



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FEBRUARY 27, 1979

The Honorable John D. Dingell
Chairman, Subcommittee on
Energy and Power
Committee on Interstate and *HSE02303*
Foreign Commerce
House of Representatives



Dear Mr. Chairman:

[Request for Information Relating to Report on

Your letter of December 27, 1978, requested that we provide you with certain information relating to our recently issued classified report entitled "Nuclear Diversion in the U.S. 13 Years of Contradiction and Confusion." Specifically, you asked for information on the following four issues:

1. The Central Intelligence Agency's (CIA's) statutory authority for withholding information from GAO.
2. The Federal Bureau of Investigation's (FBI's) statutory authority for withholding information from GAO.
3. Our authority to compel the CIA and FBI to produce information essential to our review. *AGC 210*
4. The authority of the CIA and FBI to classify information that they did not generate and much of which is already on the public record. *(102)*

Moreover, your letter discussed other matters that we believe merit further comment. These are (1) additional effort on our part to gain access to all Government documents involved in the Nuclear Materials and Equipment Corporation (NUMEC) issue and (2) the reasons why the report is classified in view of our earlier assurances that the final report would be unclassified.

ANSWERS TO SPECIFIC QUESTIONS

Briefly stated, we do not agree that the CIA and FBI have authority to deny us access to their records, except with regard to unvouchered expenditures as described in the

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report

appendix to this letter. However, we have no authority to compel disclosure of CIA or FBI records when they are denied to us.

Further, the CIA's and FBI's authority to classify is an executive function implemented by Executive Order No. 12065, which is currently effective, and formerly implemented by Executive Order No. 11652, the order in effect at the time we prepared our report. Both executive orders allow appropriate classifying officials to classify information both internally generated or otherwise received. Currently, classified information publicly released may constitute a "declassification event," possibly requiring review of classification under procedures established by Executive Order No. 12065. Even where publication has not taken place, 12065 requires each agency to establish a mandatory review process to handle declassification requests.

More detailed answers to your specific questions are included as an appendix to this letter.

ADDITIONAL COMMENTS

We agree that the FBI and CIA files on the NUMEC issue are vital to a complete investigation of the matter. And, I assure you that every reasonable attempt was made to obtain access to the files held by those agencies in preparing our report. I formally wrote both the Attorney General and the Director of Central Intelligence to obtain such data. However, they refused to provide it. Indeed, in a classified letter to us dated December 28, 1977, the Director of Central Intelligence informed us that his agency could no longer provide us with any information on the NUMEC matter following a recent newspaper article on the subject.

In situations where agencies deny us access to information and records they possess, we cannot force compliance with our requests. We do not have the legal authority to subpoena records of executive branch agencies. Consequently, we do not believe additional effort on our part will be successful. We believe we did the best job possible within these constraints.

Regarding our earlier assurances that the final report would be unclassified, the determination that the report be classified as Secret/National Security Information was made by the FBI and CIA. While we can and do question agency classification determinations, we do not have classification or declassification authority with respect to matters classified pursuant to executive order. As a result, it is our

policy to generally abide by the classification judgments made by the appropriate classifiers of the information utilized in the report, in this case the FBI and CIA. While from a technical, legal standpoint it could be argued that GAO is not bound by classifications made under executive orders, as a practical matter, we recognize that executive agencies would not release classified data to us if we did not follow such classifications. Thus, we have promulgated our own regulations which bind us to follow executive orders establishing classification restrictions.

Over the years, we have worked closely with executive branch agencies in ensuring that classified data is properly protected. It is our policy that whenever we use classified data in a report, prior to disseminating the information, we obtain agency clearance from those having the responsibility for the activities under review. We believe this policy enhances our credibility in the handling and use of highly classified information. This is particularly important since we do not have the authority to bring court action against an agency for failing to provide us with documents we believe are needed during our audit efforts. There is now legislation --House bill 24--being considered by the Congress that will provide us this authority to a large extent. In the meantime, we must rely on the cooperation and good will of the agencies we are auditing.

On the other hand, we recognize that the authority of executive branch agencies to classify information can be abused. Consequently, we do not accept their classification of information blindly. We often question classification decisions when we believe undue security restrictions have been imposed. While we share your concern about the classification of the NUMEC report, we believe we exhausted all avenues available to us to issue an unclassified report. Our policy provides that, as appropriate and possible, we will prepare unclassified versions of classified reports. In this particular case, we concluded, after much deliberation, that any unclassified document we might issue would not be able to meaningfully communicate the contents of the report.

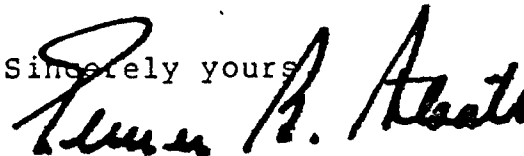
Moreover, about 6 months ago we told your staff that the final report would probably not be classified or at worst would be classified only "by line" in the most sensitive areas. At the time, we had indications from the FBI and CIA that this would be the case. Obviously, as it turned out, it was not. We believe a recap of the correspondence we received from the FBI and CIA indicates the difficulty we experienced in trying to issue an unclassified report or a report that was classified "by line."

The correspondence shows that on June 16, 1978, we received a memo from an FBI official stating that it had "no objections [with the report] relative to matters of sensitivity." The memo stated that the Attorney General had classified the FBI's investigation into the matter as "SECRET." We then checked with the Department of Justice to inquire about the possibility of issuing an unclassified report. In a letter to us dated August 21, 1978, a Justice official stated that a review of the report by the Criminal Division of the Department of Justice found "no classified information contained therein" and referred us back to the FBI. From this, we concluded that there were no classification problems with the report as far as the Department of Justice and FBI were concerned. Accordingly, we communicated this information to your staff. However, on October 25, 1978, we received a letter from the FBI stating that a determination had been made that "in order to protect intelligence sources and methods, the report must remain classified at the Secret level in its entirety."

In our early dealings with the CIA, we were told that it would work with us in trying to get an unclassified version of the report, or at a minimum a "by-line" identification of the classified material it contained. However, in a classified letter to us dated September 1, 1978, the Director of Central Intelligence stated that the report would have to be classified in order to protect intelligence sources and methods. This was reaffirmed in a later letter to us dated October 25, 1978.

I trust the above and the appended information will satisfy your concerns.

Sincerely yours



Comptroller General
of the United States

DETAILED ANSWERS TO SPECIFIC QUESTIONS REGARDING
ACCESS TO RECORDS AND DECLASSIFICATION AUTHORITY

STATUTORY AUTHORITY OF THE CIA AND FBI
TO WITHHOLD INFORMATION FROM GAO

GAO's right of access to information from executive agencies and departments is derived principally from 31 U.S.C. § 54 which provides:

"All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organizations, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records, of any such department or establishment. * * *"

This statute confers broad rights of access, in order to carry out our audit functions, limited only by other statutes exempting an agency or department from audit or from the duty to provide the requested information.

With respect to the CIA, our right of audit is statutorily limited by the Director's right to spend solely on his own certificate for objects of a confidential, extraordinary or emergency nature. 50 U.S.C. § 403j(b) (1976). Where this authority is exercised by the Director, we have acknowledged that our audit authority is restricted and that, as a result, we could be denied access to information relating to the unvouchered expenditures.

Besides the exemption in 50 U.S.C. § 403j(b), the CIA has stated that it regards section 6 of the Central Intelligence Act, 50 U.S.C. § 403g, which requires the Director to protect "intelligence sources and methods from unauthorized disclosure," as a statutory basis for denying us access to certain records, even where the Director's authority to certify expenditures has not been exercised. We do not agree that this statute allows the CIA to deny us access.

The only relevant statutory authority of the FBI of which we are aware is 28 U.S.C. § 537 (1976), which provides:

"Appropriations for the Federal Bureau of Investigation are available for expenses of unforeseen emergencies of a confidential character, when so specified in the appropriation concerned, to be spent under the direction of the Attorney General. The Attorney General shall certify the amount spent that he considers advisable not to specify, and his certification is a sufficient voucher for the amount therein expressed to have been spent."

We are aware of no other basis for the FBI to deny us access to its records.

Despite the absence of statutory authority for the FBI to withhold information, over the years we have experienced difficulty in gaining access to FBI information necessary for the preparation of our reports. This situation led to an agreement in 1976 on the extent to which the FBI would supply us information. The main provisions of that agreement, which has since then governed our relations with the FBI, were contained in a letter of May 21, 1976, from the Comptroller General to Director Kelley. Among other things, the agreement provided:

--In lieu of complete access to investigative files pertinent to specific GAO reviews, GAO will be provided:

- (a) A brief general description of documents in the file. (This can be oral or in writing, depending on the circumstances.)
- (b) Copies of report synopses and letterhead memoranda.
- (c) Copies of additional file documents on a selected basis, when information in the documents noted in (b) above is not sufficient. This step would not be performed on a large-scale basis so as to reconstruct a particular file or substantial portions thereof.

--If GAO believes it is necessary, after reviewing information provided in (a), (b), and (c) above, that it must have a more complete description of documents in the file, the case summary technique used during GAO's review of FBI domestic intelligence operations will be employed. However, due to its time-consuming nature this technique will be avoided whenever possible.

--Active investigations will not be reviewed by GAO where disclosure of any information contained in such cases may prejudice the prosecutive process.

With regard to the last point, the Attorney General, in refusing us access to NUMEC information, cited the fact that "our investigation into this matter is continuing," and offered to consider our request upon conclusion of the investigation.

GAO'S LACK OF STATUTORY AUTHORITY TO COMPEL
THE FBI AND CIA TO PRODUCE INFORMATION
ESSENTIAL TO NUMEC INVESTIGATION

There is no statute providing GAO with authority to compel production of information kept by the CIA and FBI. Such rights as we have vis-a-vis those agencies, flow from our general authority, as discussed above. None of those provisions confer explicit authority upon us to compel a Federal agency or department to produce information.

In a 1975 letter, responding to Senator Frank Church's inquiry concerning our involvement in reviewing and auditing United States intelligence activities, the Comptroller General stated:

"Also lacking, in our opinion, is any clear cut mechanism for acquiring access to information when our views and the agency's views differ as to our right to access, such as power to enforce access in court.

"We believe a strong congressional endorsement will be necessary to open the doors to intelligence data wide enough so that we can make the meaningful reviews of intelligence activities that would assist the Congress in performing its oversight function."
(B-179296, July 10, 1975, p. 7.)

H.R. 24, 96th Congress, if enacted, would expand our right of access to information relating to unvouchered expenditures and provide the Comptroller General with authority to bring action in United States District Court to compel the production of information denied him. However, H.R. 24 would not give us access to records pertaining to unvouchered expenditures by the CIA Director pursuant to 50 U.S.C. § 403j(b), supra, nor to records of financial transactions of agencies which the President decides relate to sensitive foreign intelligence or counterintelligence activities.

AUTHORITY OF THE CIA AND FBI
TO CLASSIFY INFORMATION

This question should be answered by the respective agencies. However, to the best of our knowledge, the following considerations govern. Authority to classify and declassify national security information, as previously provided in Executive Order No. 11652 and currently provided in Executive Order No. 12065, is an executive branch function, based essentially on the constitutional powers of the President to take care that the laws are faithfully executed and to be Commander in Chief of the Army and Navy.¹ The implementation of the executive's authority to classify is by executive order rather than by statute. Executive Order No. 12065, 43 Fed. Reg. 22849 became effective on December 1, 1978. Prior to that, Executive Order No. 11652, as amended, 50 U.S.C. § 401 nt (1976), was in effect. Thus, during the period of preparation and writing of the NUMEC report, Executive Order No. 11652 governed.

Information which the CIA and FBI
did not generate

Executive Orders 11652 and 12065 limit authority to originally classify information as Top Secret, Secret, or Confidential to certain designated executive branch officers, --including the Director of the CIA, the Attorney General, and their delegates--as authorized by the orders. Both executive orders confer authority on the described officials to originally classify information, the use of the word "original" referring to the origin of the act of classification rather than to the origin of the classified information. Thus, section 2 of Executive Order No. 11652 provides, in pertinent part:

"The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security * * *."

Section 1 provides

"Official information or material which requires protection against unauthorized disclosure in the

¹/U.S. Const., Art. II, §§ 1-3.

interest of the national defense or foreign relations of the United States * * * shall be classified in one of three categories * * *."

Executive Order No. 12065 similarly does not differentiate between information which is internally generated by the classifying authority and information which it might otherwise obtain. Thus, classification by the CIA or FBI would be apparently justified under the executive orders, without regard to the source of the information, if unauthorized disclosure at a minimum, "could reasonably be expected to cause identifiable damage to the national security" (Executive Order No. 12065 § 1-104) or if the information "requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States" (Executive Order No. 11652, section 1).

With respect to the NUMEC report, only part of the material which the CIA and FBI classified as Secret was generated by those agencies. Indeed, large segments of the report came from information provided by the Department of Energy (DOE) and from information otherwise obtained by us. However, since the Director of the CIA and Attorney General both possess authority to classify, the fact that those two agencies did not uncover the information themselves would not preclude classification by them. Although DOE did have authority to classify, its failure to do so did not bar the CIA or FBI from classifying, even though a large portion of the information was generated by DOE. Indeed, DOE has a policy of providing Federal agencies, including the CIA and FBI, with reports which contain sensitive information pertinent to such agencies' responsibilities for the purpose of allowing them an opportunity to classify.

Information on the public record

On December 8, 1977, the Washington Star published an article suggesting that uranium might have been diverted from NUMEC, Apollo, Pa., to Israel. Furthermore, on January 28, 1978, the Star published another article based on a Top Secret CIA report implicating NUMEC, apparently mistakenly released to the Natural Resources Defense Council, Inc., an environmental group. Some of the information in the January 28, 1978, news article was used in our report on NUMEC after its accuracy had been verified by the GAO staff.

Other than the general provisions described in sections 3 and 5 for declassification and downgrading of classified information, Executive Order No. 11652 does not make any specific provision for the declassification of classified

information that has been made public or for the classification of material which has formerly been published. On the other hand, Executive Order No. 12065 not only places a greater emphasis on declassification in general, but also contains a provision which could conceivably cover such publications. Section 3-301 of Executive Order No. 12065 provides:

"Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of time or on the occurrence of a declassification event." [Emphasis added.]

Section 6-105 defines declassification event as one which "would eliminate the need for continued classification."

Under the new executive order, arguably, the publication of the Star articles could have amounted to a declassification event, at least with respect to any information which had been classified as Secret. However, the decision about whether the need still exists for classification would still rest with the agency imposing the original classification, even under the new order.

Moreover, the order in effect when our report was classified did not prevent the FBI and CIA from classifying a document in its entirety, even though some information therein might be in the public domain. It said that "to the extent practicable," classified portions should be distinguished from unclassified portions. Executive Order No. 11652, sec. 4(a). (The present order says that this distinction within a classified document shall be made, unless a waiver is granted by the Director of the Information Security Oversight Office. Executive Order No. 12065, sec. 1-504.)

Finally, under the new order, sec. 3-5, there is to be within each agency a mandatory review process to handle requests for declassification. The procedure applies to information classified under prior orders. Agency decisions will be appealable to the Director of the Information Security Oversight Office, in the General Services Administration, under Section 5-201, 202.