



Information Security Oversight Office

National Archives and Records Administration

700 Pennsylvania Avenue, NW

Washington, DC 20408-0001

LSOO Off. file



JAN 9 - 2007

192-44-17F

The Honorable Alberto R. Gonzales
Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

Pursuant to §6.2(b), Executive Order 12958, as amended, "Classified National Security Information" (the Order), I request that you render an interpretation as to whether the Office of the Vice President of the United States (OVP) is an agency as defined in §6.1(b) of the Order and thus responsible to fulfill the responsibilities of an agency as set forth in the Order to include submitting reports to the Director of the Information Security Oversight Office (ISOO) relating to its security classification program.

Background

One of my responsibilities under the Order is to consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under the Order. In that regard, several months ago I received a letter (Tab A) suggesting that the OVP is willfully violating a provision of the Order and of "Classified National Security Information Directive No. 1" (32 CFR Part 2001) (the Directive), which implements the Order. The specific concern is with respect to the failure of the OVP to "report annually to the Director of ISOO statistics related to its security classification program" in accordance with §2001.80 of the Directive.

Per the attached news article ("Cheney Keeps Classification Activity Secret" by Mark Silva, *Chicago Tribune*, May 27, 2006) (Tab B) the OVP spokesperson indicated that "This has been reviewed and it's been determined that the reporting requirement does not apply to [the Office of the Vice President], which has both legislative and executive functions."

In response to this complaint, I corresponded with the OVP (Tabs C & D) and indicated that I took this explanation to mean that the OVP does not believe it is included in the definition of "agency" as set forth in the Order, since it does not consider itself an "entity within the executive branch that comes into the possession of classified information" (emphasis added) in that it has both legislative and executive functions. Replies to these queries have not been received.

Analysis

Consistency in application: An interpretation that the OVP is not subject to the reporting provisions of the Order is fairly recent, in that up until 2002, the OVP did submit annual reports to this office.

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Plain text reading: There are several explicit references in the Order to the constitutional position of Vice President that confer specific authorities and exemptions upon the individual encumbering that position.¹ There is but a single explicit reference to the government entity (the OVP) which serves the Vice President.² This sole explicit reference for the purpose of exempting the OVP from a provision of the Order supports an interpretation that the rest of the Order does apply, to include the Order's definition of an "agency;" otherwise there would be no need for an exemption.

Policy Implications: If the OVP is not considered an entity within the executive branch, I am concerned that this could impede access to classified information by OVP staff, in that such access would be considered a disclosure outside the executive branch. While I recognize that OVP staff may, at times, be supporting the Vice President's performance of legislative duties, I believe that most, if not all, disclosures of classified information to OVP staff by other agencies and entities within the executive branch are regarded by those agencies as disclosures within the executive branch in that they occur in support of the Vice President's performance of executive duties.

Conclusion

I believe that OVP staff, when they are supporting the Vice President in the performance of executive duties, are an entity within the executive branch that comes into possession of classified information and are thus, for purposes of the Order, an agency. As such, it is entirely appropriate that security classification activity by OVP staff in supporting the Vice President's performance of executive duties be reportable to this office in accordance §5.2(b)(4) and 5.4(d)(8) of the Order as well as §2001.80 and 2001.81 of the Directive. I also believe it is appropriate to affirm that all provisions of the Order apply to the staff of the OVP when they are acting in support of the Vice President's performance of executive duties. Absent such affirmation, I would recommend that the Order be revised to clarify the extent to which it pertains to the staff of the OVP.

Sincerely,

(signed) J. William Leonard

J. WILLIAM LEONARD
Director

Enclosures

¹ See § 1.3(a)(1), 1.3(c)(2), 1.3(c)(3), 3.3(b)(7), 3.5(b)(1), 4.4(a)(2), 4.4(a)(3), 6.1(cc). Some of these provisions state that they apply to the Vice President "in the performance of executive duties."

² See § 3.5(b)(2) which exempts "in the performance of executive duties, the incumbent Vice President's Staff" from the mandatory declassification review provisions of the Order

cc: Mr. David S. Addington
Assistant to the President and
Chief of Staff to the Vice President

Mr. Steven Bradbury
Acting Assistant Attorney General
Office of Legal Counsel



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* Nobel Laureate

May 30, 2006
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William Leonard, Director
Information Security Oversight Office
National Archives and Records Administration
700 Pennsylvania Avenue, NW, Room 500
Washington, DC 20408

Dear Mr. Leonard:

Pursuant to executive order 12958, as amended, section 5.2(b)(6), I am writing to present a concern regarding implementation of the President's executive order on national security classification and to request that ISOO take appropriate action.

I believe that the Office of the Vice President is willfully violating a provision of the executive order and of the implementing ISOO directive.

Specifically, the Office of the Vice President (OVP) is refusing to comply with the ISOO requirement to "report annually to the Director of ISOO statistics related to its security classification program." (ISOO Directive 1 at section 2001.80).

As you know, the President's executive order states that this and other ISOO Directive requirements are "binding" upon any "entity within the executive branch that comes into the possession of classified information." (EO 12958, as amended, at section 5.1, section 6.1b).

Yet despite this requirement, the OVP has failed to report on its classification and declassification activity for three years in a row.

Moreover, this appears to be a deliberate act on the part of the OVP, not simply a negligent one.

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Strangely, the OVP contends that it is not obligated to comply with this provision of the executive order. Thus, OVP spokeswoman Lea Ann McBride told the Chicago Tribune last week:

"This has been thoroughly reviewed and it's been determined that the reporting requirement does not apply to [the office of the vice president], which has both legislative and executive functions." ("Cheney Keeps Classification Activity Secret" by Mark Silva, Chicago Tribune, May 27, attached).

But this OVP claim is a non sequitur.

Nothing in the executive order excuses the OVP from reporting on classification activity in the performance of its executive duties merely because it also has separate legislative functions. It is hard to see how such an argument could be proposed by a reasonable person in good faith.

Since the OVP has publicly staked out a position that openly defies the plain language of the executive order, I believe ISOO now has a responsibility to clarify the matter. Otherwise, every agency will feel free to re-interpret the order in idiosyncratic and self-serving ways.

I respectfully urge that you undertake one of the two following courses of action:

1. Exercise the authority of the ISOO Director under Section 5.5 (including 5.5b on sanctions) to compel the OVP to comply with the reporting requirements of the executive order;
2. Ask the Attorney General to render an opinion on the applicability to the OVP of the annual reporting requirement, pursuant to Section 6.2b of the executive order.

I recognize that the OVP's classification activity is quantitatively small, by comparison with other executive branch elements, and that it could easily be overlooked without much detriment to the aggregate statistical reporting by ISOO.

But by casting its non-compliance as a matter of principle, the OVP has mounted a challenge to the integrity of classification oversight and to the authority of the executive order. In my opinion, it is a challenge that should not go unanswered.

Thank you for your consideration.

Respectfully yours,

Steven Aftergood
Director, Project on Government Secrecy
Federation of American Scientists

<http://www.chicagotribune.com/news/nationworld/chi-0605270039may27,1,1588921.story>

Cheney keeps classification activity secret

By Mark Silva
Washington Bureau

Advertisement

May 27, 2006

WASHINGTON -- Federal agencies made somewhat fewer decisions to classify top secret and confidential information last year than the year before--and declassified slightly more documents--according to a new government report Friday.

Yet Vice President Dick Cheney again refused to report his office's activities in either the classification or declassification of documents during 2005, as he has refused to disclose since 2003.

Despite an executive order signed by President Bush in 2003 requiring all agencies or "any other entity within the executive branch that comes into the possession of classified information" to report on its activities, the vice president's office maintains that it has no legal obligation to report on its classification decisions.

Cheney's office told the Tribune in an April report on the administration's propensity for secrecy that it is under no obligation to report this information. The vice president says his office is not an agency, and that the vice president is unique in having both an executive role and legislative role--he is president of the Senate.

But monitors of government secrecy say the vice president is flouting his own president's authority in this matter.

"It undermines oversight of the classification system and reveals a disdain for presidential authority," said Steven Aftergood, director of the Project on Government Secrecy at the Federation of American Scientists. "It's part of a larger picture of disrespect that this vice president has shown for the norms of oversight and accountability."

A spokeswoman for Cheney, asked for a response, reiterated the vice president's stance on the issue.

"This has been thoroughly reviewed and it's been determined that the reporting requirement does not apply to [the office of the vice president], which has both legislative and executive functions," spokeswoman Lea Anne McBride said Friday.

Since the beginning of Bush's presidency, agencies and other entities each year had reported increasing

numbers of decisions to classify information as top secret, secret or confidential. These numbers rose from 8.65 million classification decisions reported in 2001 to a record 15.65 million in 2004.

Last year, agencies made 14.2 million decisions, a 9 percent decrease from 2004 and slightly less than what had been reported in 2003, according to a new report of the National Archives Information Security Oversight Office.

Agencies also declassified 29.5 million pages of documents in 2005, the report shows. This marked a 4 percent increase from the 28 million pages of documents declassified the year before.

This represents a turnaround from the annual scaling back of documents declassified during Bush's presidency, with 100 million pages declassified in 2001 and 44 million declassified in 2002.

The National Archives office that monitors these decisions calls last year's increases in declassification and decreases in classification "a positive step."

"It's incrementally good news," Aftergood said. "The numbers are down from record-high levels to second record-high levels . . . It's hard to get excited about that, but it's better than increases."

With some 80 agencies and other entities taking part in the National Archives' annual accounting of activity, the report notes that only the Office of the Vice President, the president's Homeland Security Council and the president's Foreign Intelligence Advisory Board failed to report on its activities.

In the past, the Archives report notes, the vice president's activities "historically have not reported quantitatively significant" numbers. But Aftergood suggests there is no way of knowing what the vice president has done since 2002 because he isn't reporting.

"The reality is that until 2002, they did report," he said. "Somebody made a decision that they don't want to do what they used to do. . . . They have to explain why they stopped doing it, and they haven't done that."

mdsilva@tribune.com

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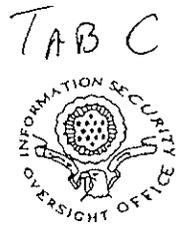


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National Archives and Records Administration

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JUN - 8 2006

Mr. David S. Addington
Assistant to the President and
Chief of Staff to the Vice President
The White House
Washington, DC 20500

Dear Mr. Addington:

One of my responsibilities under Executive Order 12958, "Classified National Security Information" (the Order), is to consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under the Order. In that regard, I recently received a written complaint suggesting that the Office of the Vice President (OVP) is "willfully violating" a provision of the Order and of "Classified National Security Information Directive No. 1" (32 CFR Part 2001) (the Directive), which implements the Order. The specific concern is with respect to the failure of the OVP to "report annually to the Director of the Information Security Oversight Office statistics related to its security classification program" in accordance with section 2001.80 of the Directive.

Per the attached news article ("Cheney Keeps Classification Activity Secret" by Mark Silva, *Chicago Tribune*, May 27, 2006) the OVP spokesperson indicated that "This has been reviewed and it's been determined that the reporting requirement does not apply to [the Office of the Vice President], which has both legislative and executive functions." I take this explanation to mean that OVP does not believe it is included in the definition of "agency" as set forth in the Order, since it does not consider itself an **"entity within the executive branch** that comes into the possession of classified information." (Emphasis added.)

An interpretation such as the above relative to the Order is fairly recent, since up until 2002 the OVP did submit annual reports to this office. Furthermore, if the OVP is not to be considered an entity within the executive branch, I am concerned that this could possibly impede access to classified information by OVP staff, since such access would be considered a disclosure outside the executive branch. While I recognize that OVP staff personnel may, at times, be supporting the Vice President's performance of legislative duties, I believe it is fair to state that most, if not all, disclosures of classified information to OVP staff by other agencies and entities within the executive branch have been regarded by those agencies as disclosures within the executive branch, since they occur in support of the Vice President's performance of executive duties. As such, I believe it is entirely appropriate that security classification activity by OVP staff in supporting the Vice President's performance of executive duties be reportable to this office in accordance with relevant sections of the Order and the Directive.

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Absent a common understanding as to how the Order applies to the OVP, I would suggest referral of this matter to the Attorney General in accordance with section 6.2(b) of the Order.

Sincerely,

(s) J. William Leonard

J. William Leonard
Director

Enclosure

cc: Official file - ISOO
Reading file - ISOO
JWLeonard:dle - Filed in May 2006 Reading file
Named: OVP - Addison Letter - Leonard

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Information Security Oversight Office

National Archives and Records Administration

700 Pennsylvania Avenue, NW

Washington, DC 20408-0001



August 23, 2006

Mr. David S. Addington
Assistant to the President and
Chief of Staff to the Vice President
The White House
Washington, DC 20500

Dear Mr. Addington:

Enclosed is the annual reminder with respect to submission of agency security classification management data (Standard Form 311) to this office. The applicability of this reporting requirement to the Office of the Vice President (OVP) was the subject of a June 8, 2006, letter between us (copy enclosed). To date, we have not received a reply to this correspondence.

Absent a common understanding as to how Executive Order 12958, "Classified National Security Information" applies to the OVP, I would suggest referral of this matter to the Office of Legal Counsel at the Department of Justice in accordance with the order's section 6.2(b). Regardless, I would appreciate hearing your views at your earliest convenience.

Sincerely,

Signed/ J. William Leonard

J. WILLIAM LEONARD
Director

Enclosures

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