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Before the Committee on Homeland Security
Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment

H.R. 6193 "Improving Public Access to Documents Act of 2008"

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Thank you Chairwoman Harman, Mr. Reichert, and members of the Subcommittee for this opportunity to comment on the "Improving Public Access to Documents Act of 2008."

I represent the National Security Archive, a non-governmental research institute at George Washington University. The Archive is one of the leading non-profit users of the Freedom of Information Act (FOIA) and the mandatory declassification review process, and relies on releases of government records to document important U.S. foreign relations, national security, and intelligence policy matters in our many publications.

In 2006 the Archive issued a report entitled: "Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive but Unclassified Information," which was the first government-wide comparison of the ways that federal agencies mark and protect unclassified, but sensitive, materials.[1] That report identified 28 different and uncoordinated control marking policies with no system to monitor or report on the use of control markings, no challenge or appeal mechanism to remove such markings, no "sunset" for the duration of most markings, few limits on who is authorized to put a control marking on material, and few limits on improper labeling of materials. The Archive's Director Tom Blanton testified before the Subcommittee on Emerging Threats of the House of Representatives Committee on Government Reform that the report concluded that neither the Congress nor the public could conclude whether the sensitive but unclassified policies were working to safeguard security or being abused for administrative convenience or cover-up. Indeed one of the government witnesses at that hearing acknowledged that there was no way to count or estimate the frequency of use of control markings.

I thank the Subcommittee for its efforts to improve interagency information sharing and to simultaneously protect the public's access to government information. History teaches us that government secrecy is a natural bureaucratic tendency, although it is often intensified during times of perceived danger. As the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission") found, prior to the September 11, 2001, attacks on our nation, the government's intelligence and law enforcement communities too often controlled information to the detriment of effective security. In reaction to those attacks, agencies developed new forms of secrecy out of concern that sensitive information could reach the wrong hands, thus perpetuating the same problem that left the United States vulnerable to attack. It is against that background that Congress directed the President in the Intelligence Reform and Terrorism Prevention Act of

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[1] National Security Archive, "Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive but Unclassified Information," (March 14, 2006), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm.

2004 to create an Information Sharing Environment that facilitates the sharing of terrorism information. While there are reflexive actions such as a short-term reduction in information disclosure that can be expected in the wake of a tragedy like the 9/11 attacks, the multi-year and multi-stakeholder process of developing the ISE had the benefit of resources and broad stakeholder input to reach a better balancing of all the relevant public interests.

The President's long-awaited Memorandum for the Heads of Executive Departments and Agencies on the Sharing of Controlled Unclassified Information (May 9, 2008) (the "Presidential Memorandum") and the CUI Framework, which is the name being given to the policies and procedures that govern handling of what will now be called Controlled Unclassified Information (CUI), are responsive to some of the concerns that open government advocates have expressed about the proliferation of varied categories of sensitive but unclassified information.

Thus, over time, the Framework should reduce the over 100 different record control labels used throughout the federal government down to three primary labels with limits on the unnecessary expansion of that number of labels. The procedures for handling materials marked with the new labels set forth under the CUI Framework will be uniform across agencies. If properly implemented, the CUI Framework should undoubtedly improve the ability of agencies to share information with other agencies, as well as state, local, and tribal officials, and other parties. Further, the Framework should make it easier for members of the public to understand the significance of CUI labels so that the labeling of records may not appear as arbitrary and inappropriate as it has in the past.

On the other hand, many of the most critical concerns of the open government community are not specifically addressed in the CUI Framework. I would like to address two broad concerns and discuss how the "Improving Public Access to Documents Act of 2008" (H.R. 6193) would have an impact on these concerns. I also hope that many of these issues will be addressed in the implementing regulations of the Executive Agent of the CUI Framework, the National Archives and Records Administration (NARA), as this bill would apply only to the Department of Homeland Security.

The problem of unnecessary control labeling of materials

The CUI Framework focuses on standardization of CUI practices without sufficient attention to the need to reduce unnecessary protection of information. For example, in its statement of purpose, the Presidential Memorandum makes no mention of reducing the use of CUI-type labeling.

True information sharing is best accomplished by the elimination of unnecessary secrecy and information controls. We know well from the security classification realm that too much information is made secret when there are no incentives to reduce secrecy. In the classified area, authorities typically protect classifiable information (and sometimes information that does not even merit classification) without any consideration of the costs to national security or to the public interest incurred by the classification. Indeed, numerous high level government officials from then-Secretary of Defense Donald Rumsfeld,[2] to then-Chair of the House Permanent Select

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[2] Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12 ("I have long believed that too much material is classified across the federal government as a general rule. . . .")

Committee on Intelligence Porter Goss,[3] to the Deputy Secretary of Defense for Counterintelligence and Security,[4] have recognized that a tremendous amount of information is improperly and unnecessarily classified. The cost of such over-classification also has been acknowledged within government. Overclassification interferes with information sharing, breeds contempt for the security classification system, is undemocratic, and unnecessarily expends taxpayer funds.

CUI certainly is vulnerable to the same unnecessary secrecy. Currently, all records within an agency may receive an FOUO (for official use only) or OUO (official use only) label simply because the record is an official government record. The CUI Framework sketched out in the Presidential Memorandum does not confront this problem directly. It provides only the barest explanation of what can substantively be called CUI: information that is "pertinent" to U.S. national interests or "important interests" of other entities and "requires protection." President's Memorandum § 3(a). Thus, CUI is an easily expandable concept.

There are, however, some touchstones in the President's Memorandum to support additional measures to reduce unnecessary control labeling. The Memorandum provides for portion marking where feasible, rather than the marking of complete documents when the material contains both CUI and non-CUI. *Id.* § 15. It also provides that information should not be labeled as CUI for an improper purpose. *Id.* § 26. The Presidential Memorandum further provides that if information is required to be made public or has already been released then it may not be labeled CUI and that non-CUI should not be subject to handling and dissemination controls. *Id.* §§ 18 and 26. The Background on the Controlled Unclassified Information Framework (May 20, 2008) provides further support, as it recognizes the goal of "control[ling] only information that should be controlled."[5]

None of those provisions, however, directly counteract the many incentives to insert a control marking on a government record. For example, there are enforcement mechanisms and penalties built in to the CUI framework, *id.* § 22(i)and 24(g), that fail to mention the possibility that they would apply to improper or unnecessary labeling. H.R. 6193 adds several additional requirements with respect to the Department of Homeland Security's CUI program that may, if

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[3] *9/11 Commission Hearing*, (Testimony of then Chair of the House Permanent Select Committee on Intelligence Porter Goss) (2003), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two ("[W]e overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them.").

[4] *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf (stating under repeated questioning from members of Congress that approximately 50 percent of classification decisions are over-classifications).

[5] Indeed, we are pleased that the Archivist of the United States, as the head of the Executive Agent NARA, has directed the office that will implement the framework "to ensure that only information which genuinely requires the protections afforded by the President's memorandum will be introduced into the CUI Framework." NARA Press Release (May 22, 2008); *see also* Memorandum of Allen Weinstein, Archivist of the United States to the Executive Department and Agencies on the Establishment of the Controlled Unclassified Information Office (May 21, 2008). We hope that NARA's implementing regulations will include this goal and will include many of the good ideas included in H.R. 6193 to help accomplish this goal across the entire federal government.

enacted into law and implemented, be far more likely than the Presidential Memorandum to reduce the labeling of records as CUI.

First, H.R. 6193 recognizes that the harmful impacts of excessive secrecy include interference with inter-agency information sharing, as well as increased costs of information security and obstacles to the release of information to the public. H.R. 6193, Findings § 2(1). Those findings provide a critical context for the CUI Framework because they encourage the Department to move away from the flawed and dangerous "secrecy equals security" paradigm. When considered in conjunction with the instruction to the Secretary of Homeland Security to implement the CUI Framework in a manner that would "maximize the disclosure to the public" of information and to consult with "organizations with expertise in civil liberties, civil rights, and government oversight," *id.* § 3 (210F(a)), the bill should encourage consideration of the costs of secrecy and of the benefits of disclosure, which are too often absent from government disclosure decisionmaking. Moreover, the requirement that DHS consult with public interest, non-governmental organizations recognizes the reality that members of the public are stakeholders who care about the effectiveness of the CUI Framework and about protecting important rights.

Second, the establishment of a system that permits employee challenges to the use of CUI markings and rewards appropriate use of the challenge procedure will put in an internal check on abuses of the CUI labeling framework at the Department. This is a necessary counterbalance to the incentives included in the Presidential Memorandum to err on the side of marking information as CUI, such as the enforcement and penalty provisions and the requirement that disclosure of CUI be reported to the originating agency. The internal check on over-controlling information could be substantially strengthened by a specific requirement that the Inspector General audits of the CUI program assess the extent that the control labels are used unnecessarily or excessively.

Third, the legislation provides for a publicly available list of materials marked as CUI that notes whether they have been withheld under the FOIA and a process for the public to challenge such CUI markings. Importantly, this requirement will discourage thoughtless use of the CUI stamp. Personnel with authority to label records as controlled will take a moment to consider whether the label is necessary if they know that their decision will be tracked and reviewable.

Fourth, the bill's requirement that the Department limit the number of people who can put a control stamp on materials will decrease the unnecessary labeling of materials. The Archive's 2006 study determined that the Department of Homeland Security permits any employee to designate sensitive unclassified information for protection. Under the bill, the Department would have to limit the individuals with authority to use control markings and ensure they are properly trained in the appropriate use of such markings.

In addition to these many useful limits on the expansion of CUI, we recommend that the bill require the Department to provide transparency regarding any new directives, regulations, or guidance promulgated pursuant to the Presidential Memorandum and provided to the Executive Agent that relate to the substantive description of what will be labeled as CUI within the Department. Public notice and comment regarding the definition of CUI at DHS will increase the likelihood that such measures would be narrowly tailored.

Impact on the Freedom of Information Act

My second major area of comment is the need to build in mechanisms to discourage agencies from treating CUI labels as *de facto* determinations of FOIA exemption. Prior to the issuance of the Presidential Memorandum, agencies were split as to whether SBU labels were relevant to FOIA determinations. Some agencies only labeled records as SBU if a FOIA exemption applied. Others claimed SBU had nothing to do with FOIA. The Memorandum says that a control label "may inform but do[es] not control" the decision whether to disclose information under the FOIA. There are several problems with this formulation.

First, the applicability of FOIA exemptions changes over time. For example, a record classified under Executive Order 12958 one day may be declassified a year later.[6] Similarly, a law enforcement investigation may end, rendering records about the investigation newly releasable. Yet, CUI control labels do not have expiration dates or take account of changing circumstances.

Second, FOIA policy changes over time, as illustrated by the different policy memoranda issued by Attorney General Reno and Attorney General Ashcroft.[7] Thus, government agencies may change their policy with respect to making discretionary releases under the FOIA and the CUI label will not incorporate any consideration of these policy changes.

Third, the identity of the requester and the reason for the request may affect the releasability of the record under FOIA. For example, in cases raising privacy issues, the identity of the requester may affect whether an agency would conclude that there is a "clearly unwarranted invasion of privacy" under Exemption 6 or an "unwarranted invasion of privacy" under Exemption 7(C) of the FOIA. 5 U.S.C. §§ 552(b) (6) and (b)(7)(C). The purpose for which the record is sought also is relevant under the privacy exemptions because it informs the evaluation of the public interest served by the requested release.

For all of these reasons, any consideration of a CUI label in the FOIA process presents a true risk that the label may weight disclosure decisions against disclosure even when the FOIA exemptions would no longer apply.

H.R. 6193 would encourage the Department to base its disclosure decisions on the presumption that its records are public absent a legitimate reason not to disclose the record. This perspective properly places the burden on the Department to justify non-disclosure, rather than on the public to justify why a record should not be withheld. The most critical parts of the bill are the provision that "controlled unclassified information markings are not a determinant of public disclosure pursuant to [the FOIA]," H.R. 6193 §3 (210F(c)(3)(D)) and the provision which provides that the Secretary make available to the public under FOIA "all controlled unclassified information and other unclassified information in its possession." *Id.* §3 (Section 210F(d)).

The existing standards in the classification system and the FOIA system for disclosure are sufficiently broad to address the need to protect sensitive information. They apply government-

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[6] *See* Exec. Order No. 12,958 (as amended by Exec. Order No. 13,292), 68 Fed. Reg. 15315 (Mar. 25, 2003).

[7] *See* New Attorney General FOIA Memorandum Issued, FOIA Post (Department of Justice, Washington, D.C.), Oct. 15, 2001, http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

wide and are not subject to the whims of a particular agency. That will not be the case with CUI, which will be substantively defined by each agency within its discretion. There is no congressional or presidential mandate to label any particular records as CUI. It is, at best, an administrative management measure by agencies to help them communicated better with each other. Further, as mentioned above, the FOIA standards recognize the expiration of sensitivities, while the CUI Framework does not. Without the two provisions barring the CUI Framework from having an impact on FOIA disclosure the bill will have only a negligible impact on preservation of the public right to know.

Indeed, I recommend the subcommittee consider going even further to ensure that FOIA disclosure is not impacted by the CUI Framework. Although the Presidential Memorandum makes clear that CUI is not intended to act as a security classification standard,[8] the systematization of the CUI Framework may elevate the status of the previously disorganized SBU system for agencies, Congress, and the courts. I recommend adding a clear statement that the CUI label does not warrant judicial deference relating to public disclosure of materials. As noted above, the substantive requirements for a CUI label will be decided by each agency pursuant to its own perspective. There is no basis for a court to defer on the question of whether a CUI record is properly withheld from the public. Courts should continue to look to the well-established standards of the Executive Order on Classification, EO 12958, as amended, and the FOIA.

Thank you for the opportunity to testify. I would be happy to respond to your questions.

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[8] Presidential Memorandum § 1 ("The memorandum's purpose … [is] not to classify or declassify new or additional information"); *id.* § 3(a) (CUI is unclassified information that "does not meet the standards for National Security Classification under Executive Order 12958, as amended").

Bio of Meredith Fuchs

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She has supervised seven government-wide audits of federal agency FOIA performance including: “40 Years of FOIA, 20 Years of Delay: Oldest Pending FOIA Requests Date Back to the 1980s” and “File Not Found: Ten Years After E-FOIA, Most Agencies are Delinquent.” She is the author of “Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy,” 58 Admin. L. Rev. 131 (2006); and “Greasing the Wheels of Justice: Independent Experts in National Security Cases,” 28 Nat’l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. (cum laude) from the New York University School of Law where she was a member of the Journal of International Law and Politics and her B.Sc. (honors) from the London School of Economics and Political Science.

The National Security Archive is a non-governmental research institute located at George Washington University. The Archive collects and publishes declassified documents obtained through the Freedom of Information Act and the Mandatory Declassification Review system. It serves as a repository of government records on a wide range of topics pertaining to the national security, foreign, intelligence, and economic policies of the United States. The Archive won the 1999 George Polk Award, one of U.S. journalism's most prestigious prizes, for--in the words of the citation--"piercing the self-serving veils of government secrecy, guiding journalists in the search for the truth and informing us all," and, in 2005, an Emmy award for outstanding new research.