

Controlled Unclassified Information

and the Freedom of Information Act (FOIA)

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Frequently Asked Questions



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Information Security Oversight Office (ISOO)

The memo

- Available from the CUI Registry.
 - <https://www.archives.gov/cui/registry/policy-guidance>

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|  | <p>U.S. Department of Justice Office of Information Policy Suite 11050 1425 New York Avenue, NW Washington, DC 20408-0001</p> | <p>Information Security Oversight Office National Archives and Records Administration Room 100 700 Pennsylvania Avenue, NW Washington, DC 20408-0001</p> |  |
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July 3, 2014

Memorandum for: Senior Agency Officials for Controlled Unclassified Information (CUI)

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Subject: Revised Guidance regarding Controlled Unclassified Information and the Freedom of Information Act

Executive Order 13556 (the Order), "Controlled Unclassified Information," dated November 4, 2010, provides guidance regarding the relationship between information disclosure laws, including the Freedom of Information Act (FOIA), and Controlled Unclassified Information (CUI). The Order states: "The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches" (Order at Section 2b).

The Information Security Oversight Office (ISOO), which exercises the responsibilities of CUI Executive Agent under the Order, and the Department of Justice's Office of Information Policy (OIP) issue this joint guidance in response to agencies' inquiries and to provide clarification regarding the relationship between FOIA and CUI. This guidance supersedes the joint issuance of these offices dated November 22, 2011.

Specifically, this guidance contains additional clarification on the applicability of the statutory exemptions contained in the FOIA and prior markings or designation.

- The FOIA should not be cited as a safeguarding or dissemination control authority for CUI. The purpose of the FOIA is to open agency activities to the public.
 - The FOIA gives the public the right to request and receive federal agency records unless those records are protected from disclosure by one of the Act's exemptions.

The memo says that “FOIA should not be cited as a safeguarding or dissemination control authority for CUI.” What does that mean?

The memo says that “FOIA should not be cited as a safeguarding or dissemination control authority for CUI.” What does that mean?

- *The Freedom of Information Act is a statute that authorizes and permits the public to access the records and information from its government. It is fundamentally not an information protection statute.*
- *It is not appropriate to treat the Freedom of Information Act as a CUI control authority.*
- *FOIA exemptions are generally discretionary*
- *It is not appropriate at the creation of a document that's CUI to assert that the Freedom of Information Act is the reason behind its control*

The FOIA does have categories of information within its exemptions, certain types of information that might be exempt from disclosure in response to a specific FOIA request. But it is fundamentally to apply an exemption in response to a specific request versus controlling the information at the outset, at the creation of a document, and having that decision be determinative in any specific way.

What to do if you're a FOIA reviewer and the information that has been requested, the records that you discovered or found as part of that request in response are marked as CUI – Do all of the categories of CUI have a Statute 3 exemption?

- *No. The definition of what information qualifies to be CUI does not directly align with the Freedom of Information Act exemptions.*
- *Information might be CUI either because federal law, federal regulation, or Government-wide policy authorizes – either requires or permits – that information to be protected. But that's a very different standard from the exemptions under the Freedom of Information Act.*

Are there any unclassified information markings, like CUI or any other protection markings out there that automatically exempt information from a FOIA request?

- *No, there are not. There's no such thing as a marking being completely determinative of a FOIA request, or determinative to a FOIA reviewer as to what they should do ultimately with that FOIA request. It always comes down to – the basis is always on the substance of the information in the document.*

- **Should a FOIA reviewer completely ignore the markings on a document?**
- **No, those markings can be informative, but they are not determinative. Markings can inform whether they are CUI or otherwise, as to the content of that document, where it comes from, that an exemption even might apply – but that marking doesn't ultimately determine for the FOIA reviewer what the disposition is for that FOIA request.**

