

REDUCING INFORMATION CONTROL DESIGNATIONS ACT

JULY 30, 2008.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WAXMAN, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 6576]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 6576) to require the Archivist of the United States to promulgate regulations regarding the use of information control designations, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 6576, the Reducing Information Control Designations Act, was introduced by Reps. Henry A. Waxman and Tom Davis on July

23, 2008. The purpose of H.R. 6576 is to standardize and limit the use of information control designations.

H.R. 6576 requires the Archivist to promulgate regulations regarding the use of information control designations, requires federal agencies to implement those regulations in a manner that reduces and minimizes the use of information control designations, and requires the inspector general of each federal agency to randomly audit unclassified information with information control designations.

BACKGROUND AND NEED FOR LEGISLATION

In the final report on the attacks of September 11, 2001, the 9/11 Commission observed that the government keeps too many secrets. To address this problem, the Commission recommended that “[t]he culture of agencies feeling they own the information they gathered at taxpayer expense must be replaced by a culture in which the agencies instead feel they have a duty . . . to repay the taxpayers’ investment by making that information available.”¹

In addition, investigations by this Committee have found that there has been a proliferation of pseudo-classification designations such as “sensitive but unclassified” or “for official use only.” These often vague and undefined markings can be used to prevent or delay information sharing with interested stakeholders or the public release of that information.²

New categories of information control designations are continuously being created by agencies yet these designations lack a statutory basis, and there is no federal entity monitoring their use. The Controlled Unclassified Information Office at the National Archives and Records Administration (NARA) reports that currently there are 107 known unique markings, or information control designations, applied across the federal government.

In May 2008, the White House issued a Memorandum on “Designation and Sharing of Controlled Unclassified Information (CUI),” establishing new rules governing the designation and sharing of CUI. However, that memorandum requires these consistent procedures only for “terrorism-related information” used in the Information Sharing Environment (ISE), a framework established in the Intelligence Reform and Terrorism Prevention Act of 2004.

H.R. 6576, the Reducing Information Control Designations Act, is written broader in order to address all types of information uses across all of the government. H.R. 6576 has the goal of reducing the total number of designations used on federal government information. H.R. 6576 attempts to resolve the growing problem of multiple information control designations by authorizing the Archivist to establish regulations to minimize and reduce the use of information control designations.

¹National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (July 22, 2004).

²Letter from Rep. Henry A. Waxman, Ranking Minority Member, to Rep. Christopher Shays, Chairman of the Subcommittee on National Security, Emerging Threats, and International Relations (Mar. 1, 2005).

LEGISLATIVE HISTORY

The Committee held two hearings in the 109th Congress on the issue of information control designations. See Subcommittee on National Security, Emerging Threats, and International Relations hearings: Drowning in a Sea of Faux Secrets: Policies on Handling of Classified and Sensitive Information (Mar. 14, 2006) and Emerging Threats: Overclassification and Pseudo-classification (Mar. 2, 2005).

In addition, during the 109th Congress, the full Committee reported H.R. 5112, the Executive Branch Reform Act, to the House, H. Rept. 109–445. H.R. 5112 was ordered reported by a vote of 32–0. H.R. 5112 included provisions of H.R. 6576, including those requiring the Archivist to issue regulations to standardize and limit the use of information control designations. In the 110th Congress, on February 14, 2007, H.R. 984, legislation similar to H.R. 5112, was favorably ordered reported by the full Committee on a vote of 29–0.

H.R. 6576, the Reducing Information Control Designations Act, was introduced by Reps. Henry A. Waxman and Tom Davis on July 23, 2008, and referred to the Committee on Oversight and Government Reform.

On July 23, 2008, the Committee on Oversight and Government Reform held a business meeting to consider H.R. 6576, and ordered the bill to be favorably reported by a voice vote.

SECTION-BY-SECTION

Section 1. Short title

This section provides that the short title of the bill is the “Reducing Information Control Designations Act.”

Section 2. Purpose

This section provides that the purpose of the Act is to increase the sharing of information within the government and the availability of information to the public by standardizing and limiting the use of information control designations.

Section 3. Regulations relating to information control designations within the Federal Government

Subsection (a) requires that each federal agency reduce and minimize its use of information control designations on information that is not classified.

Subsection (b) requires the Archivist to promulgate regulations regarding the use of information control designations to address: standards for the use of the information control designations in a way that maximizes public access to information; the duration of the designations and a process for their removal; procedures for identifying and tracking designated information; provisions to minimize the use of information control designations and protect against their misuse; and methods to ensure that compliance protects national security and privacy rights.

This subsection also requires that the regulations issued by the Archivist require federal agencies to establish a process for individuals to challenge the use of information control designations and to receive incentives for successful challenges, to establish penalties

for individuals who repeatedly fail to abide by these policies, and to establish procedures for the public to be able to challenge the use of information control designations.

These regulations should be established in a manner that maximizes public access to information and with the presumption that information should not be given these designations. This subsection requires the Archivist, in developing the regulations, to consult with relevant stakeholders.

Subsection (c) requires that the head of each federal agency implement these new regulations in a way that encourages the appropriate sharing of information, limits the number of individuals with the authority to place these designations on information, and restricts the placement of designations to the portion of a document that requires control.

Section 4. Enforcement of information control designation regulations within the Federal Government

Subsection (a) requires the inspector general of each federal agency, in consultation with the Archivist, to randomly audit unclassified information with information control designations in order to determine whether agencies are properly implementing the regulations, to describe any problems with implementation, and to recommend improvements in awareness and training to address those problems. The inspector generals must report to the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs, the Archivist, and the public on the findings of these audits.

Under subsection (b), the Archivist must require that when marking information with a control designation, an individual provide unique identifying information including the individual's name or personal identifier and the individual's agency, office, and position. The purpose of this requirement is for the agency to be able to identify and address problems or misuse and assess the impact on information sharing of any problems or misuse.

Subsection (c) requires the Archivist to require federal agencies to train, as needed, those who apply information control designations. That training shall include the standards for using information control designations, the proper use of information control designations, and the consequences of repeated improper use of these designations and of failing to comply with the policies and procedures established under this section. This subsection clarifies that this training is to be conducted in conjunction with other training programs required by the agency to reduce the burden of this new requirement.

Subsection (d) requires the Archivist to establish a program to detail personnel from federal agencies to NARA, on a nonreimbursable basis, in order to assist NARA with its oversight responsibilities and to provide the detailed employees with more extensive training on the use of information control designations. This subsection provides that the detailee program will continue through the year 2012.

Section 5. Releasing information pursuant to the Freedom of Information Act

This section explains that information control designations should have no relationship to determinations of public disclosure pursuant to the Freedom of Information Act (FOIA).

Subsection (a) requires the head of each federal agency to ensure that information control designations are not a determinant of public disclosure pursuant to FOIA. This means that the agency must conduct an independent review of information to determine whether it is releasable pursuant to FOIA and should not consider the existence of an information control designation in that independent review. If the agency determines in response to a FOIA request that the information is releasable, the agency is required under this subsection to make that information publicly available.

Subsection (b) clarifies that nothing in this Act is intended to limit or discourage agency officials from voluntarily releasing any unclassified information that is not exempt under FOIA.

Section 6. Definitions

The term “information control designations” is defined in this section as information dissemination controls that are not defined by federal statute or by an executive order relating to the classification of national security information, that are used to manage, direct, or route information, or control the accessibility of information, regardless of its form or format. The term includes, but is not limited to, the designations of “controlled unclassified information,” “sensitive but unclassified,” and “for official use only.”

The term “information” is defined in this section as any communicable knowledge or documentary material, regardless of its physical form or characteristics, which is owned by, is produced by or for, or is under control of the federal government.

The term “federal agency” is defined in this section as (1) any executive agency, which means an executive department, a government corporation, and an independent establishment; (2) any military department, which means the Department of the Army, the Department of the Navy, or the Department of the Air Force; and (3) any other entity within the executive branch that comes into the possession of classified information.

Section 7. Deadline for regulations and implementation

This section provides that the regulations required by the bill must be promulgated in final form with implementation to begin no later than 18 months after the date of enactment.

EXPLANATION OF AMENDMENTS

No amendments were offered to this legislation.

COMMITTEE CONSIDERATION

On Wednesday, July 23, 2008, the Committee met in open session and favorably ordered H.R. 6576 to be reported to the House by a voice vote.

ROLLCALL VOTES

No rollcall votes were held.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of P.L. 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations. H.R. 6576 relates to the use of information controls by the executive branch and therefore does not apply to the legislative branch.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the need to standardize and limit the use of information control designations.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including reducing and minimizing the use of information control designations.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 6576. Article I, Section 8, Clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 6576 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 6576. However, clause 3(d)(3)(B) of that rule provides that this re-

quirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 6576 from the Director of the Congressional Budget Office:

JULY 29, 2008.

Hon. HENRY A. WAXMAN,
Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 6576, the Reducing Information Control Designations Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 6576—Reducing Information Control Designations Act

Summary: H.R. 6576 would amend federal law concerning the security classification of government documents. The legislation would require the National Archives and Records Administration (NARA), in consultation with the Director of National Intelligence and other affected federal agencies, to develop regulations that minimize and reduce the government's use of information-control designations on information that is not classified. The bill also would require training for employees and contractors on using classifications and random audits by inspectors general on the proper use of information-control designations.

CBO estimates that implementing H.R. 6576 would have a discretionary cost of \$15 million in 2009 and \$45 million over the 2009–2013 period to implement the new regulations, provide training, and conduct audits that would be required under the bill. Although the legislation could affect agencies not funded through annual appropriations (such as the Tennessee Valley Authority or the U.S. Postal Service), CBO estimates that any net increase in spending by those agencies would not be significant. As a result, enacting the bill would have no significant impact on direct spending or revenues.

H.R. 6576 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 6576 is shown in the following table. The costs

of this legislation fall within most budget functions that contain salaries and expenses.

	By fiscal year, in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	15	15	5	5	5	45
Estimated Outlays	15	15	5	5	5	45

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2009 and that spending would follow historical patterns for similar programs.

Under current law, agencies are required to develop policies for handling terrorism-related and homeland security information. However, the Government Accountability Office (GAO) has reported that there are no governmentwide policies and procedures for agencies to use to classify sensitive, but unclassified information.

Based on the information provided by GAO, NARA, and selected federal agencies and inspectors general about the current use of information-control designations, CBO estimates that implementing H.R. 6576 would cost \$15 million in 2009 and \$45 million over the 2009–2013 period, assuming appropriation of the necessary amounts. Initial costs would total about \$20 million and would be incurred over the first two years. Ongoing costs would total about \$25 million over the 2009–2013 period, mostly for subsequent training and random audits by inspectors general.

Intergovernmental and private-sector impact: H.R. 6576 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Elizabeth Cove; Impact on the Private-Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

No changes to existing law are made by H.R. 6576, as reported.

