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BARRIERS TO THE FLOW OF TECHNICAL INFORMATION

Limitation Statements - Legal Basis

7 May 1969

By Colonel Currie S. Downie

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Presentation to
National Security Industrial Association
Technical Information Advisory Committee
7 May 1969
Los Angeles, California

by

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National Security Industrial Association
Technical Information Advisory Committee
Meeting in Los Angeles, 7 May 1969

Colonel Currie S. Downie, USAF

INTRODUCTION

It is with considerable pleasure^{we} that I received an invitation to be with you here today and discuss limitation statements. Your theme "Barriers to the Flow of Technical and Scientific Information" is a subject that I have been interested in for some time. Although limitation statements are my primary topic, I will not restrict the presentation to this specific barrier but will discuss problems related to dissemination of government scientific and technical information in general, since I feel that the interests of the NSIA Technical Information Advisory Committee cover the entire spectrum of withholding and dissemination activities.

The previous speaker, Mrs. S. O. Jones of McDonnell Douglas Company, has done a magnificent job of pointing out many of the barriers to dissemination that are encountered all too often, I am afraid, by industrial and other requestors of information produced or sponsored by the Federal Government. She indicated that it takes an average of 2 1/2 months to obtain a document marked with Distribution Statement #5. I cannot dispute her statement; two months ago I ordered three such documents and have received only one of them to date. Sometimes the agencies do not reply to letters requesting authorization to obtain these documents in a timely manner.

Mrs. Jones mentioned not being able to obtain a translation of a 1956 foreign journal article. In all probability this is a copyrighted article and since the copyright law, in the United States at least, runs for 28 years with a possibility of renewal for another 28 years, it is conceivable that this particular translation might not become available for public distribution through government channels until the year 2012.

The problems encountered by industry in trying to reply to a short notice RFP (Request for Proposal) were illustrated quite graphically. By the time industry requests and receives a bibliographic search from the Defense Documentation Center (DDC), and then requests and receives the relevant technical reports, the deadline for submitting the proposal has often passed.

Regarding the technical report on counterinsurgency that was unobtainable because it was marked PROPRIETARY, I suspect (and this is purely speculation) that the report contained some details on gadgetry or a hardware item that some company felt was proprietary information -- information the company developed itself which might be commercially valuable in the future.

The behavioral science report mentioned by Mrs. Jones as having been produced by a company on its own, may have been listed as a limited distribution (L) document because the company marked it proprietary or copyrighted. Again, this is purely speculation on my part; I would have to see each of these documents to be able to

determine precisely why their distribution is limited. I wish to thank Mrs. Jones for pointing out in detail some of the more frustrating problems encountered by the librarians or information specialists in trying to obtain for their users copies of reports which are unobtainable, often for some rather obscure, not easily discernible, reason.

In the ordinary conduct of its business, the Federal Government must maintain a delicate balance between the right to know and the need-to-know. If the government is to be truly of, by, and for the people, the people must know in detail the activities of the government. And nothing so diminishes democracy as secrecy. At the same time, the welfare of the Nation may require that some documents not be made available. As long as there is turmoil in the world and peace is threatened, there must be military secrets; also delicate foreign policy negotiations cannot be conducted in public.

In the light of recent happenings throughout the world - for example in Eastern Europe and the Far East - the U. S. should not wish to allow its military strength to weaken. (Throughout history there have been many examples of what happens to countries not strong enough to defend themselves.) Making essential defense information available indiscriminately to anyone could cripple our military strength, since military capability nowadays depends so much on technology and technical information.

Your people in industry all know what proprietary information is, and how essential each company considers the protection of such information. I suggest that classified security information, and/or information with distribution limitations, can be considered proprietary information belonging to the government. Instead of the profit motive, as in industry, defense capabilities and national security are the motive. The government must provide for the common defense, and safeguarding security information is essential for this task. We all understand industry's handling of information it considers proprietary. It is a fact of life, recognized and accepted as being necessary. Similarly, we should recognize the Federal Government's responsibilities in the area of defense, as well as many other areas, and the necessity to protect both classified defense information, and information with distribution limitations imposed for other reasons.

It is essential to break down certain associations between classified defense information on the one hand, information whose dissemination is restricted for other reasons, and current thinking in contemporary society. Many people feel that classification of defense information is probably necessary even though they may not be particularly enthusiastic about it. Alternatively, on an off-hand spur-of-the-moment basis, they are aware of few legitimate reasons for limiting the flow of information for reasons other than national security;

they see everything as black or white -- either classified defense information or releasable.

In the words of the AAAS report⁽¹⁾ on Secrecy and Dissemination in Science and Technology (Dr. Margaret Mead, Chairman): ". . . it is popularly assumed that anything one is asked to regard as 'private' is, ipso facto, disgraceful, and that secrecy is necessary primarily to protect the individual from the exposure of some aspect of his life which is disreputable." Likewise, in contemporary thinking about the U. S. Government, I am afraid that many people feel there is something disgraceful, something abhorrent, about reports of research and development findings which are not classified defense information, and yet cannot be released to the public.

TASK GROUP ON DISSEMINATION OF INFORMATION

COSATI (the Committee on Scientific and Technical Information) under the Federal Council for Science and Technology, during 1967 organized a Task Group on Dissemination of Information. The Task Group, of which I am Chairman, was organized to review the Federal Government's information dissemination services and its withholding policies and practices. It was chartered to study and make recommendations on those aspects of dissemination of scientific and technical information where improvements can be accomplished and where uniform policies or guidelines might be valuable for all departments and agencies of the U. S. Government.⁽²⁾

What steps can be taken to improve and facilitate the dissemination of data and information resulting from government R&D programs? In order to obtain more information on these problems, the Task Group has submitted letters to the editors of several technical magazines and scientific journals asking for comments, statements of problems and suggestions. You people attending this meeting are invited to make comments on problems encountered and suggestions for their solution. Please address your letters to me at the Office of Aerospace Research, 1400 Wilson Boulevard, Arlington, Virginia 22209.

LEGAL BASIS FOR DISSEMINATING AND WITHHOLDING INFORMATION

The basic and most recent law governing the distribution or withholding of information is the Public Information Section of the Administrative Procedure Act (5 US Code 522) which became effective 4 July 1967. This is more commonly known as "The Freedom of Information Law," and provides that disclosure of information be the general rule, not the exception; that all individuals have equal right of access; that the burden be on the government to justify the withholding of a document, not on the person to justify his right to it. This Act seeks to facilitate and expedite the release and dissemination of government information, but also provides for certain exemptions to disclosure.

Among the 9 exemptions to public disclosure of information, as provided in 5 USC 522, there are at least 3 that may apply to scientific

and technical information, matters that are:

- o Specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy (Exemption #1).
- o Specifically exempted from disclosure by statute (Exemption #3).
- o Trade secrets and commercial or financial information obtained from a person and privileged or confidential (Exemption #4).

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act⁽³⁾ establishes the principles to be used in making determinations to release or withhold information.

Information Required to be Kept Secret

Executive Order 10501, which became effective in December 1953, recognizes that citizens of the United States have the right to be informed of the activities of their government, but also recognizes it is essential that certain official information affecting the National Defense be protected against unauthorized disclosure. The interests of National Defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action, including espionage as well as military action. Official information is regarded as that information which requires protection in the interest of National Defense.

I do not wish to go into Exemption #1 in any more detail, since this will be the subject of a separate discussion at this meeting.

Information Exempt by Statute (Exemption #3)

The House of Representatives noted that there are "nearly 100 statutes or parts of statutes which restrict public access to specific government records."⁽⁴⁾

A survey conducted by the Administrative Conferences of the United States in 1962 concluded that there were somewhat less than

100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. Some of these, of course, deal with classified defense information, many do not.

Today I would like to mention briefly a few of the more important laws, directives, etc. which limit or control the dissemination of information in the Federal Government, for national security and for other reasons as well.

The Atomic Energy Act of 1954 provides for various categories of restricted information -- Restricted Data and Formerly Restricted Data.

There are several acts which provide for controlling the export of certain types of information out of the country. The Export Control Act of 1949 provides for export control of unclassified technical data (technical data being defined as any professional, scientific or technical information including designs, models, photographs, documents, etc., of any kind that can be adopted or used in production, manufacture, or reconstruction, etc. of articles or material). This Act prohibits the export of unclassified technical data from the U. S. or its possessions to any nation or combination of nations threatening the national security of the U. S., if it is determined that it would significantly contribute to the military or the economic potential of such a nation or nations. The hang-up here is "who can make a reasonable decision about economic potential?"

The Mutual Defense Assistance Control Act of 1951 provides that countries receiving military, economic or financial assistance from the U. S. will agree to embargo shipment of certain material to nations threatening the security of the U. S., specifically communist-controlled countries. The Act does not require marking of documents for export control. However, if they are so marked under the Export Control Act then it does provide for international control of these documents.

These two Acts, the Export Control Act and the Mutual Defense Act, are administered by the Department of Commerce, and the vehicle for administering them is the Export Schedule.

The Mutual Security Act of 1954, in furtherance of world peace and the security and foreign policy of the U. S., provides for control of the export and import of arms, ammunition and implements of war, including related technical data, other than by a U. S. Government Agency. "Tech Data" is defined generally as in the Export Control Act, only here it includes both classified and unclassified information. It does exclude from control (except to communist country destinations) information approved for public release by an authorized DoD agency.

This Act is administered by the Department of State, and the vehicle for administration is the International Traffic in Arms Regulation, commonly called ITAR.

DoD Distribution Statements

DoD Directive 5200.20 dated 29 March 1965 provides for five distribution statements (other than security) on technical documents and states that:

Information or data in a technical document is occasionally of such a nature that it requires a degree of distribution control to protect proprietary, privileged, ethical, or certain administrative types of government and contractor information or data by confining its distribution within a given category of recipients.

DoD distribution statements are as follows:

1. Unlimited Distribution
2. No Foreign
3. U. S. Government Only
4. DoD Only
5. Distribution Controlled by Sponsoring DoD Office

The Acts previously mentioned -- Export Control, Mutual Defense Assistance, and Mutual Security Act -- are the reason for the use of limitation statement #2 on DoD technical reports, probably the most troublesome one to administer. Distribution Statement #2 reads: "This document is subject to special export controls and each transmittal to foreign governments or foreign nations may be made only with prior approval of (controlling DoD office)."

Distribution Statement #3 documents usually are either copyrighted articles (such as translations of copyrighted foreign articles) or are

in the proprietary or limited rights category and must be protected by limiting distribution to U. S. Government personnel. Both of these categories are provided for under Exemption #3 - Information exempt by statute.

STATISTICS ON GOVERNMENT SCIENTIFIC AND TECHNICAL REPORTS

The Hearings of the Randolph Committee in September and October 1967 included a statement of the number of DoD reports received by the Defense Documentation Center which were made available to the public in fiscal year 1967.⁽⁵⁾ Of the 46,640 reports received, 19,217 (40%) were made available for sale to the public, while 8,924 (20%) were excluded as classified defense information under Executive Order 10501. The remaining 21,498 (40%) had various types of restrictions which precluded dissemination to the general public.

Recently a count was made of the various categories of markings on documents listed in the DDC TAB Index and the Clearinghouse USGRDR Index for a two-week period in December 1968. The results are listed in Figure 1.

<u>Reports Listed in TAB* and USGRDR* Indexes</u> <u>for Period of Two Weeks</u> Vol. 68, No. 24, 25 Dec 1968			
Statement No.	Unclassified	Confidential	Secret
1	762	-	-
2	62	16	31
3	127	21	10
4	73	27	33
5	<u>34</u>	<u>9</u>	<u>29</u>
Total	1,058	73	103
1,234			
*TAB = Technical Abstract Bulletin (available to authorized users of the Defense Documentation Center) *USGRDR = U. S. Government Research and Development Reports (available from the Clearinghouse for Federal S&T Information)			

Figure 1.

The TAB lists only the DoD classified and/or limited distribution documents. The USGRDR Index lists documents received from all government agencies.

Over 60% of the total reports were unclassified/unlimited, that is, available to any requestor the world over. About 14% were classified defense information, 5% were unclassified but marked NO FOREIGN, 3% unclassified but marked with Statement #5, which only the originator can release. Other than the 60% unclassified/unlimited, the biggest single category was unclassified/U. S. Government only. This will give you some idea of the numbers involved in each category.

In Figure 2, the top ten AIR FORCE contributors of technical reports to DDC are listed, with the number of limited and/or classified documents, the number of unlimited/unclassified documents, and the totals given. As expected, the basic research laboratories in OAR (the Office of Aerospace Research) produce for the most part unclassified/unlimited documents, whereas the applications and development laboratories are dealing largely in classified and/or limited distribution areas.

Top Ten AIR FORCE Contributors of Technical Reports
to Defense Documentation Center

Jan - Dec 1968

	<u>Limited and/ or Classified</u>	<u>Unlimited and Unclassified</u>	<u>Total</u>
Air Force Office of Scientific Research (OAR)*	40	2178	2218
Foreign Technology Division (AFSC)*	233	1169	1402
Air Force Cambridge Research Laboratories (OAR)	62	600	662
Air Force Materials Lab (AFSC)	411	105	516
Space and Missile Systems Organization (AFSC)	330	170	500
Electronic Systems Div (AFSC)	146	293	439
Rome Air Development Center (AFSC)	332	71	403
Air Force Avionics Lab (AFSC)	345	14	359
Aerospace Research Labs (OAR)	19	290	309
Arnold Engineering Development Center (AFSC)	231	58	289

Source: 1968 DDC TAB Index (for Limited and/or Classified)
1968 USGRDR Index (for Unlimited and Unclassified)

*OAR = Office of Aerospace Research
*AFSC = Air Force Systems Command

Figure 2.

Of the Air Force contribution given in Figure 2, approximately 30% were classified and/or limited, and 70% were unclassified/unlimited.

SUMMARY

The new "Freedom of Information Act" and the more important reasons for limitations on the flow of information have been discussed. The legal basis for these limitations can be found in the nearly 100

statutory provisions which prohibit, exempt, or otherwise protect certain types of information from disclosure. The Export Control Acts of the Department of Commerce and the Mutual Security Act of the Department of State are among the most difficult to administer.

Some of the basic reasons and requirements for DoD distribution statements were reviewed. Finally, statistics are presented to show approximately what proportion of the federal reports fall in the various categories of limitations, and the contributions of the Air Force laboratories to the federal technical report literature.

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2. Downie, C. S., Legal and Policy Impediments to Federal Technical Information Transfer, to be published in the Proceedings of the American Society for Information Science Annual Meeting, October 1969.
3. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, U. S. Department of Justice, June 1967.
4. Ibid., p 31.
5. Technology Transfer, Hearings before the Subcommittee on Science and Technology of the Select Committee on Small Business, U. S. Senate, 90th Congress, 1st Session (Randolph Committee), Hearings held Sept 20, 26, 27, 28 and Oct 12, 1967, p 163, GPO.

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14	KEY WORDS	LINK A		LINK B		LINK C	
		ROLE	WT	ROLE	WT	ROLE	WT
	Information Technical Information Technical Information Barriers Limitation Statements Distribution Statements Restrictions Withholding of Information Freedom of Information Act Exemptions COSATI Task Group on Dissemination of Information Dissemination of Information Copyright Proprietary Legal basis Secret Export Control Acts Mutual Security Act						

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