



**Homeland
Security**

May 9, 2024

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FROM: Alejandro N. Mayorkas
Secretary

A handwritten signature in blue ink, appearing to read "AN Mayorkas".

SUBJECT: **DHS Policy and Guidelines for the Use of Classified
Information in Immigration Proceedings**

This memorandum sets forth new policy and guidelines governing our Department's use of classified information in immigration proceedings. It supersedes the October 4, 2004 memorandum that then-Secretary Tom Ridge issued, entitled "*Department of Homeland Security Guidelines for the Use of Classified Information in Immigration Proceedings*" (the Ridge Memo,

a copy of which is attached). Please take appropriate steps to ensure that the policy and guidelines are followed. Questions regarding their scope and implementation should be directed to your respective counsel offices.

Introduction

Global migration, including migration to and across the Western Hemisphere, has changed dramatically in the nearly twenty years since the Ridge Memo was issued. These past two decades have seen, for example, the advent and growth of transnational smuggling organizations that wield significant influence in migration patterns, routes, and trends. Similarly, the terrorism threat landscape is more complex now than it was twenty years ago, and it continues to evolve.

We have the legal authority to use classified information in certain immigration proceedings to most effectively meet the national security and public safety challenges that we now confront. To fulfill our Department's national security and public safety missions most effectively, we must ensure our use of classified information in immigration proceedings is informed by the changes we have experienced in migration and the threat landscape over the past twenty years. Accordingly, this memorandum sets forth the new policy and guidelines governing such use.

This policy and the guidelines are issued as a matter of discretion and create no private right of action or other judicially or administratively enforceable right, interest, privilege, claim, defense, presumption, or remedy.

Legal Authority for the Use and Protection of Classified Information

The Immigration and Nationality Act (the INA) specifically provides for the use of and need to protect classified information in certain immigration proceedings, including in summary removal proceedings, when opposing admission or applications for discretionary relief (including bond), and in Alien Terrorist Removal Court proceedings.¹ Federal regulations provide additional guidance.²

Section 240(b)(4)(B) of the INA specifically authorizes the *in camera* and *ex parte* use of classified information in removal proceedings to oppose an individual's admission to the United States and to oppose discretionary relief applications under the INA.³ Similarly, in certain circumstances, federal regulations permit the use of classified information that is not disclosed to the individual.⁴

¹ See INA §§ 235(c), 240(b)(4)(B), 503(c), 504(e)(1)(C), (e)(3); 8 U.S.C. §§ 1225(c), 1229a(b)(4)(B), 1533(c), 1534(e)(1)(C), (e)(3).

² See 8 C.F.R. §§ 1240.11(a)(3), (c)(3)(iv); 1240.33(c)(4); 1240.49(a), (c)(4)(iv); 103.2(b)(16)(iii)-(iv).

³ See 8 C.F.R. §§ 1240.11(a)(3), (c)(3)(iv); 1240.33(c)(4); 1240.49(a), (c)(4)(iv); see also INA § 235(c), 8 U.S.C. § 1225(c), 8 C.F.R. §§ 103.2(b)(16)(iii)-(iv), 235.8.

⁴ See generally 8 C.F.R. § 103.2(b)(16)(iii)-(iv) (describing use of classified in immigrant benefit adjudications).

Definitions

As used in this memorandum, the terms below have the following definitions:

“Classified information” means information that has been determined, pursuant to Executive Order 13,526 (Dec. 29, 2009, as amended), or any order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security. Exec. Order No. 13,526 (Dec. 29, 2009); INA § 219(d)(1), 8 U.S.C. § 1189(d)(1) (citing to Classified Information Procedures Act (18 U.S.C. App § 1(a)).

“Consider” means that the information may inform pre-adjudicative activities, such as, but not limited to, developing a line of inquiry or determining whether the Department should seek to use the classified information.

“Immigration proceedings” includes all exclusion, deportation, or removal proceedings instituted under Title II of the INA and any adjudication of immigration benefit requests by the Department under the immigration laws (as defined in section 101(a)(17) of the INA) in which the use of classified information is authorized or permitted by law. The term “immigration proceedings” shall also include all hearings and appeals conducted under the jurisdiction of the Executive Office for Immigration Review (EOIR) involving charges of inadmissibility or applications for discretionary relief, including bond redeterminations.

“Intelligence Community” has the meaning given the term in Executive Order 12,333, Part 3.5(h) (Dec. 4, 1981, as amended).

“National security” means the national defense, foreign relations, or economic interests of the United States. INA § 219(d)(2), 8 U.S.C. § 1189(d)(2).

“Office of the General Counsel” means the immediate office of the Department’s General Counsel.

“Originator” means the Department component or other department or agency of the United States Government that produced an intelligence product or reporting based on information collected in whole or in part by that entity.

“Public safety” means the prevention of a threat of serious harm or danger to the community, typically, though not necessarily, because of criminal conduct.

“Use” means to introduce into evidence or rely upon information as a basis for an adjudicatory decision in an immigration proceeding (as defined above).

New DHS Policy Governing the Use of Classified Information in Immigration Proceedings

Our Department must pursue its mission to protect the homeland while maintaining the public's trust and protecting privacy, civil rights, and civil liberties. To effectively carry out our national security and public safety responsibilities, law enforcement objectives, and commitment to individual rights and liberties, we must consider available information and intelligence regarding an individual in immigration proceedings. This requires consideration of information and intelligence without respect to whether such information or intelligence is classified or whether, due to law enforcement or other national security interests, the information or intelligence is restricted from disclosure.

Despite a broader authorization in the INA, the Ridge Memo permitted the use of classified information in immigration proceedings "only as a last resort."⁵ That is no longer the policy of this Department. The new policy now provides that, if the Department learns of classified information indicating that an individual subject to immigration proceedings may present a threat to national security or public safety, the Department will use the classified information in the immigration proceeding in accordance with the guidance set forth in Section C below, as deemed necessary to protect our national security and public safety interests, and consistent with the legal obligation to protect intelligence sources and methods. This may require us to use the classified information *in camera* and *ex parte*, or through other legally available processes, in the immigration proceeding.

Guidelines for the Use of Classified Information in Immigration Proceedings

A. Approval to Use Classified Information in Immigration Proceedings

To use classified information in an immigration proceeding, a Department component head or their deputy, in consultation with the Office of the General Counsel and the Chief Intelligence Officer, must approve such use, unless the Secretary or the Deputy Secretary determines in any case or class of cases that exigent circumstances require the use of alternate or abbreviated procedures in place of the requirements set forth in this memorandum.

To obtain such approval, the Senior Executive supervising the requesting office, in consultation with component counsel and the Office of Intelligence & Analysis, shall request that the component head or their deputy determine in their discretion that the use of the classified information in the immigration proceeding could potentially advance the Department's national security, public safety, or other law enforcement interests.

It is the responsibility of this Department to present in an immigration proceeding the strongest case possible, including the best evidence available, to achieve Department objectives in cases involving an individual who may pose a national security or public safety threat. In exercising their discretion whether to use classified information, the component head or their deputy, in consultation with component counsel, shall consider whether the classified information could

⁵ Ridge Memo at 1, 2-3.

enhance the factfinder's appreciation of the totality of the circumstances that bear on the proceeding's outcome and whether use of the classified information could aid in the efficacy of the proceeding.

There may be statutory or regulatory requirements when using classified information that require notice or other disclosures to be provided to the noncitizen. In all situations, prior to the use of classified information, consult with your respective counsel offices.⁶

The approval requirement described in this subsection A does not apply to situations in which a Department component seeks to use information declassified or provided by an originator in unclassified form pursuant to the process described in subsection C below.

B. Scope of These Guidelines

These guidelines constitute general internal operating procedures and are applicable to all Department components and personnel.

These guidelines apply only to cases where the Department contemplates that classified information, or information declassified or provided by an originator in unclassified form (as described in subsection C below), will be used in immigration proceedings. These guidelines do not apply in situations where the Department merely considers classified information for other Departmental actions, but does not introduce the information as evidence nor does it rely upon the information in forming the basis for an adjudicatory decision in immigration proceedings. For example, these guidelines do not apply to the consideration of classified information to inform actions taken in the inspection, investigation, initial custody, or decision to initiate immigration enforcement action against an individual.

These guidelines do not apply to individuals situated outside the geographic limits of the United States as defined in INA § 101(a)(38), 8 U.S.C. § 1101(a)(38), or noncitizens interdicted at sea pursuant to Executive Orders 12,807 and 13,276. In addition, for purposes of the Department's actions under the INA, 8 U.S.C. §§ 1101 et seq., these guidelines are neither intended to apply to Alien Terrorist Removal Court (ATRC) proceedings pursuant to INA §§ 501–507, 8 U.S.C. §§ 1531–1537, nor supersede the related Attorney General's Interim Procedures to Implement Section 401 of the Antiterrorism and Effective Death Penalty Act of 1996 (July 17, 1996) and any further amendments to the Interim Procedures. Further, this policy and the guidelines apply only to the Department, not to entities outside it, and is not intended nor shall be construed to supersede existing legal requirements.

C. Originator's Authorization to Use Classified Information

The Department must obtain the authorization of the originator before classified information or any unclassified summary of classified information may be used in immigration proceedings. When requesting an originator's authorization for use of classified information, Department

⁶ See, e.g., 8 C.F.R. §§ 103.2(b)(16), 1240.33(c)(4).

components, in coordination with the Office of Intelligence and Analysis, shall seek to obtain the originator's authorization for future and/or concurrent use of the information by other Department components in immigration proceedings reasonably anticipated to have similar or overlapping requirements for use.⁷

When a Department component identifies classified information that could potentially advance the Department's national security, public safety, or other law enforcement interest in the immigration proceeding, the component shall notify the Chief Intelligence Officer and, in consultation with the Office of Intelligence and Analysis, shall engage the originator of the information to request that the originator sanitize or declassify the information⁸ and authorize its use, or authorize the use of the classified information in the immigration proceeding.

If the originator does not authorize sanitized or declassified use or authorize the use of the information at the current classification level, the component and relevant component counsel, in coordination with the Office of the General Counsel and the Office of Intelligence and Analysis, may request that the originator provide as much of the substance of the relevant information as possible in a revised form at the lowest level of classification possible.

In situations where a Department component seeks to use classified information, the component, with the Office of Intelligence and Analysis, should consult with the originator to identify additional available information that may be relevant to the credibility, accuracy, or reliability of the classified information. Department personnel shall consider whether any additional information in the Department's possession or made available by the originator impacts a decision whether or not to use the classified information.

The Chief Intelligence Officer shall support and assist component efforts to obtain authorization for the use of classified information in immigration proceedings when the originator of such information is an element of the U.S. Intelligence Community.

D. Escalation and Dispute Resolution

In the event that the Department is unable to obtain the authorization of the originator for the use of classified information or the use in unclassified form of classified information that a component head or their deputy approves pursuant to subsection A above, such disagreement shall be elevated within DHS and the originator as appropriate. If such elevation does not resolve the disagreement, the component head or their deputy and the Office of Intelligence and Analysis will make a recommendation to the Secretary or Deputy Secretary as to whether such dispute between the Department and originator should be submitted to the Director of National Intelligence, and ultimately to the National Security Council for adjudication, as needed. In the

⁷ If the information at issue is derived from activity conducted pursuant to the Foreign Intelligence Surveillance Act (FISA), the Department, through the Office of the General Counsel in consultation with the Office of Intelligence and Analysis, will seek and obtain authorization from the Attorney General, in addition to the originator, prior to the use of any such information in an immigration proceeding.

⁸ Declassification should seek to include all relevant substance in the original classified information.

event of a dispute between Department components, component heads shall elevate intra-Department disputes to the Deputy Secretary for resolution.

E. Protection of Classified Information

Appropriate classification, safekeeping, transmission, and storage of classified information will comply with the Department's classified information handling procedures as established by the Department's Office of the Chief Security Officer, and with the originator's handling requirements. When appropriate or when there are uncertainties associated with classification issues, relevant officials shall consult with the Office of the Chief Security Officer or a designated component security office.

F. Implementation

Within 30 days of the issuance of this memorandum, DHS components shall review existing component-specific internal policies, procedures, and directives implicated by this memorandum and shall, as necessary and practicable, revise, amend, issue, or re-issue them to implement and ensure conformity with this memorandum. Upon conclusion of each component's review, component heads or their deputies, in coordination with their respective legal offices, shall furnish to the Office of the Secretary a summary of any revisions, amendments, issuances, or re-issuances of component documents required to implement this memorandum.

Component heads, in coordination with their respective legal offices, shall provide to the Under Secretary for Strategy, Policy, and Plans, the General Counsel, and the Chief Intelligence Officer copies of any internal policies, procedures, or directives that are implicated by this memorandum without respect to whether they are revised, amended, issued, or re-issued to implement this memorandum.

Attachment: October 4, 2004 Memorandum from then-Secretary Tom Ridge, "*Department of Homeland Security Guidelines for the Use of Classified Information in Immigration Proceedings*"