

U.S. COURT OF FEDERAL CLAIMS GUIDELINES FOR CASES INVOLVING CLASSIFIED INFORMATION

The following guidelines will assist parties who believe that their cases may involve classified information.¹

1. What is classified information?

Classified information is material that the United States government has determined requires protection against unauthorized disclosure for reasons of national security. *See* Rules of the U.S. Court of Federal Claims (“RCFC”), App’x C, ¶ 7 (referring to the agency as the entity that determines whether and to what extent certain information is classified).

2. What kinds of cases involve classified information?

The court has handled contract disputes, bid protests, and patent cases that have involved classified information.

3. Are all of the court’s judges cleared to hear cases involving classified information?

Currently, many of the court’s judges have active security clearances to adjudicate cases involving classified information. When a case involving classified information is filed, the Clerk of Court will randomly assign the case to a judge. If the assigned judge does not have the appropriate security clearance, a reassignment will be ordered.

4. How do I file a case that I expect will involve classified information?

To initiate the case, plaintiff must file a public complaint along with a Notice of Intent to File Classified Information (see attachment 1) that does not itself contain classified information. A complaint that is filed on the public docket must never contain classified information, even if it is filed under seal. Once a judge has been assigned to the

¹ The following sources were consulted in the drafting of these guidelines: The Classified Information Security Guide; The Classified Information Procedures Act, 18 U.S.C. App. III. §§ 1-19; Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege; Executive Order 13526; The Department of Justice Security Program Operating Manual; and, Intelligence Directive 705.

case, the court will direct plaintiff how to file documents containing classified information in the case.

5. What are the Litigation Security Group of the Department of Justice and Classified Information Security Officers?

The Department of Justice Litigation Security Group (“LSG”) is a team of security specialists who are available to assist in litigation that involves classified information. Upon request by the court (not the parties), LSG will provide to the court contact information for several Classified Information Security Officers (“CISOs”) from whom the court will choose to appoint a primary CISO and alternate CISOs in the case. The CISOs will serve in a neutral capacity throughout the life of the case, providing advice and assistance to both the court and the parties in the handling of classified information.

6. How do I file documents containing classified information during the pendency of the case?

Classified information must never be filed electronically through CM/ECF. Instead, upon the filing of the complaint and a notice indicating that the case will involve classified information, the court will provide direction to the parties regarding how to file documents containing classified information. Typically, once the court is aware that a case will involve classified information, the court will:

- a. issue an order designating a CISO and alternate CISOs;
- b. instruct the parties to file a Notice of Filing (see attachment 2) identifying the classified material being filed but not itself including any classified information; and
- c. direct the parties to submit the filings containing classified information either to the CISO or to a cleared employee of the court for inclusion in a secured official record.

It should be noted that any filing created using material from originally classified information becomes derivatively classified. A filing that contains classified or derivatively classified information must be properly marked as classified and handled under the procedures established by the CISO.

7. How do I gain access to classified information?

In some instances, counsel may be required to obtain a security clearance before the start of the case. To secure this clearance, counsel should coordinate with the appropriate security officers of their client or the government agency.

Once the case is before the court, the designated CISO will determine whether counsel have active clearances necessary for the case and if not, the CISO will initiate the security clearance process with an appropriate FBI background investigation. The government should then consult with the agency that originated or classified the information involved in the case to make a determination that counsel is clear to have access to that information (this is known as the “need to know” status). The CISO can assist in the coordination of that inquiry as well.

Once the parties and counsel are cleared, the CISO will coordinate with them to arrange access to classified information stored at the court, and will similarly coordinate with them to arrange access to classified information stored at a secure location. Classified information must never be taken outside of the designated secure areas.

8. How will classified hearings with the court be conducted?

If classified information will be discussed or presented at a hearing or trial, the CISO will first secure the courtroom and then remain in the courtroom during the proceeding. After the hearing, the court will enter an order directing LSG to arrange for a transcript of the proceeding.

9. What is the relationship between classified information and information subject to a protective order issued by the court?

Being granted access to classified information and being granted access to information subject to a protective order are not the same thing. The court’s standard protective order governs access to proprietary and source-selection information related to a protested procurement. To gain access to protected information, counsel and experts must represent that they are not involved in competitive decision making for any company that might gain a competitive advantage from access to the information disclosed under the protective order.

By contrast, access to classified information is based on a requisite security clearance and a determination of “need to know” by the relevant classification agency, and protection of that information is governed by National Industrial Security Program laws, regulations, and guidance. Being granted access to information subject to the court’s standard protective order does not also grant one access to see classified information, and being given the clearance to access classified information does not also grant one access to information subject to the protective order.

In bid protest cases involving classified procurements, certain information may be both classified and source-selection sensitive. In such circumstances, those granted access

to that information must comply with the regulatory and statutory requirements governing access to classified information and the court's protective order provisions.

10. What if I have other questions regarding how to handle a case involving classified information?

Contact the Clerk's Office at (202) 357-6406 or LSG at (202) 514-9016. Please note that the answers to these questions serve only as guidance and can vary from case to case.

ATTACHMENT 1
United States Court of Federal Claims

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| Plaintiff(s), |) | No. _____ |
| |) | |
| v. |) | Judge _____ |
| |) | |
| |) | |
| THE UNITED STATES, |) | |
| |) | |
| Defendant. |) | |
| |) | |

NOTICE OF INTENT TO FILE CLASSIFIED INFORMATION

Notice is hereby given that the above-captioned case will include classified information. The undersigned will await the court's instruction on how to file documents containing classified information in this case.

Date: _____

Signature of Attorney of Record

(Address, Telephone, E-mail)

ATTACHMENT 2

United States Court of Federal Claims

| | | |
|--------------------|---|-------------|
| _____ |) | |
| |) | |
| |) | |
| Plaintiff(s), |) | No. _____ |
| |) | |
| v. |) | Judge _____ |
| |) | |
| |) | |
| THE UNITED STATES, |) | |
| |) | |
| Defendant. |) | |
| |) | |

NOTICE OF FILING

Notice is hereby given that _____ [NAME OF PARTY] _____ has this day filed with the court, in camera and ex parte, _____ [NAME OF DOCUMENT] _____ that is relevant to issues presented in this case. The filing has been lodged with the Classified Information Security Officer assigned to this case who will make arrangements for review by the court pursuant to appropriate security measures.

Date: _____

Signature of Attorney of Record

(Address, Telephone, E-mail)