

CASES INVOLVING CLASSIFIED INFORMATION

The following guidance is intended to assist parties that believe their case 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.

2. **May the Court of Federal Claims hear cases involving classified information?**

Yes, the Court may hear cases involving classified information and has done so in the past. In such cases, the Court typically enlists the assistance of the Litigation Security Group, Security and Emergency Planning Staff, Justice Management Division, United States Department of Justice (202) 514-9016.

3. **What is the Litigation Security Group of the Department of Justice?**

The Litigation Security Group of the Department of Justice is a team of security specialists available to be detailed to the Court to serve as Classified Information Security Officers (CISOs) to assist in the handling and protection of classified information. These CISOs serve in a neutral capacity providing advice and assistance to the Court and the parties in the handling of classified information.

4. **How do I gain access to classified information?**

Security procedures are complicated and may vary from agency to agency. However, access to classified information is authorized only by the United States Government, not the Court (although the Court may adjudicate the consequences of the Government's inability to produce information deemed relevant for the case).² If counsel require a clearance before the start of a case, counsel can coordinate with the appropriate security officers of their client or the agency. For the case before the Court, the Litigation Security Group can determine whether counsel have active clearances, and the level of the clearances, in order to know whether counsel are eligible to have access to

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. §§ 1-16; 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.

² The federal district courts review the merits of government classification decisions.

classified information. If counsel do not have current clearances necessary for the case, the Litigation Security Group can initiate the appropriate background investigation with the FBI to determine whether counsel may be cleared for access to classified information. The Government will need to consult with the agency that originated or classified the information involved in the case to make a determination that counsel may have access to that information (this is known as the “need to know” status). The Litigation Security Group can assist in the coordination of that inquiry as well.

5. What kinds of cases involve classified information?

To date, the Court has handled contract disputes, bid protests and patent cases that have involved classified information.

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

As with any case, a case is commenced by filing a complaint with the Court under Rule 3. That complaint may not contain classified information. To the extent a party believes it is necessary to include classified information in a document to be filed with the court, the Department of Justice Litigation Security Group will receive classified filings. The party will then be expected to file on the public docket a document providing a “Notice of Filing with the Classified Information Security Officer.”

7. How may I review classified information and prepare filings?

If you have an appropriate clearance and have been granted access to classified information, you may review information under the same constraints that generally govern access to classified information independent of litigation. Briefly, this means that with the appropriate clearance for access, classified information may be reviewed and stored only in approved facilities and it may be contained only on computers or media specially approved for that purpose. Counsel should follow all appropriate procedures for the storing of classified information. Depending upon the nature of the case, a party may have access through the client’s secure facility that obtains a facility clearance (FCL). A FCL includes the execution of a Department of Defense Security Agreement (DD Form 441). Under the terms of the agreement, the Government agrees to issue the FCL and inform the contractor as to the security classification of information to which the contractor will have access. The contractor, in turn, agrees to abide by the security requirements set forth in the National Industrial Security Program Operating Manual, commonly referred to as the NISPOM. In situations where a facility with a FCL is not available, a party may be provided access to appropriate facilities at the Department of Justice by the Litigation Security Group.

8. How do I file documents containing classified information with the Court?

You may not file classified information directly with the Court. Instead, you should work with the Litigation Security Group as described below.

A filing that contains classified information must be properly marked as classified and handled under the procedures that govern the handling of classified information generally. Classified information may be transported only by a person who has been granted approval to carry such information as identified by an approved courier card. The Litigation Security Group will ordinarily assist in this function. The Litigation Security Group will receive classified information on behalf of the Court and work with the assigned Judge to facilitate the Court's handling and use of the information.

This guidance does not address the question of what is the deemed date of filing – the filing of the complaint with LSG or the filing of the complaint with the Court – for statute of limitations purposes.

9. How will classified hearings with the Court be conducted?

The Court, with the assistance of the Litigation Security Group, will make arrangements to conduct appropriate hearings, conferences and arguments. Arguing parties will not need to participate in the coordination of this unless there are special circumstances.

10. 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 relating to the protested procurement. In order to gain access, counsel and experts must represent 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 upon 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 look at 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 look at classified information does not also grant one the right to look at information subject to the protective order. In protests involving classified procurements, it is sometimes the case that certain information is both classified and source selection sensitive. In such circumstances those granted access to that information must comply with both the regulatory and statutory requirements governing access to classified information and the Court's protective order provisions.

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

Contact the Litigation Security Group, Security and Emergency Planning Staff, Justice Management Division, United States Department of Justice, (202) 514-9016.

Please note that the answers to these questions serve as only guidelines and can vary from case to case. It is strongly encouraged that cleared counsel confers with LSG before submitting National Security Information.