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EMBASSY OF THE
UNITED STATES OF AMERICA

London

March 24, 1975

Your letter of February 3, 1975 inquires as to the protection the United States Government can afford to classified information received from Her Majesty's Government consistent with the amendments to the Freedom of Information Act which became effective February 19, 1975. The responsible agencies in Washington have examined this matter very carefully, and I am authorized to inform you that the United States Government can and will continue to protect classified information or material furnished by foreign governments and international organizations and held by the United States on the understanding that it be kept in confidence on essentially the same basis as in the past. We are well aware of your Government's concern over these amendments and will spare no effort to ensure protection of secrets your Government shares with ours.

The amended Freedom of Information Act, 5 U.S.C. Section 522(B)(1), exempts matters that are "(a) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and (b) are in fact properly classified pursuant to such executive order." The applicable executive order, E.O. 11652, which establishes the standards for classification to be applied by the courts, remains unchanged. Section 4(C) of that order commands:

"Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification.

Sir Thomas Brimelow, GCMG, OBE,
Permanent Under-Secretary of State,
Foreign and Commonwealth Office,
London.

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In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material."

Accordingly, Section 5(B)(1) of the Order provides for the exemption from the General Declassification Schedule of "Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence." Heads of Departments have additional authority to require continued protection of such material after the 30-year period for declassification stipulated in Section 5(E) of the Order in cases where such protection is essential.

As you have pointed out, the Congress has given the Judicial Branch of Government authority to examine classified documents in camera to determine whether such records shall be withheld under any of the exemptions. However, as was emphasized in the recent decision of the United States Court of Appeals in the case of Knopf v. Colby (4th Circ., February 7, 1975), the courts are not required to examine documents; they may rely on affidavits of officials of the Executive Branch to establish the propriety of classification. In any event, the courts are only authorized to examine classified material in camera. Unless and until there is a final judicial decision ordering declassification, the sealed documents would be covered by a protective order of the court, with violations subject to contempt proceedings.

In the case of classified information or material received from foreign governments on the understanding that it be kept in confidence, the question for judicial determination is one of objective fact and not the more subjective and difficult determination of whether disclosure would cause damage to the national security. Thus, my Government is confident that the courts will not order disclosure of classified information received from foreign governments in confidence and required to be protected by the express provisions of E.O. 11652. However, to ensure this result, it is important that a clear record be made when such information is received from a foreign government.

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We find that Her Majesty's Government has been consistently good in assuring the proper identification of classified documents transmitted to officials of the United States Government on the understanding that they are to be held in confidence. The Department of State and the other interested agencies will issue the necessary instructions to all personnel to ensure that all U.S. telegrams, memoranda and other documents recording classified information received in confidence from foreign governments and international organizations are marked with the appropriate indicators. You may wish to consider authorizing your Embassy in Washington to initiate discussions with appropriate U.S. officials to determine whether further or more specific arrangements are necessary.

Ronald I. Spiers
Chargé d'Affaires a.i.

30 April 1975

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