



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

June 12, 2001

The Honorable Edward J. Markey
House of Representatives

Subject: DOD Officials Acted in Accordance With Executive Order for Addressing Security Classification Concerns

Dear Mr. Markey:

This letter responds to your request that we investigate whether the Department of Defense (DOD) misused the security classification process to stifle public discussion of possible problems with the National Missile Defense system. Your concern was the result of events that started with a May 11, 2000, letter that Dr. Theodore Postol, Professor of Science, Technology, and National Security Policy, Massachusetts Institute of Technology, wrote to John Podesta, the then White House Chief of Staff. That letter alleged scientific fraud by contractors involved in developing the National Missile Defense system for DOD's Ballistic Missile Defense Organization (BMDO) and included Dr. Postol's analysis of public data on the National Missile Defense system and extracts from documents he used to reach his conclusion. When Dr. Postol learned unofficially that BMDO was classifying his May 11 letter, he wrote a second letter to Mr. Podesta, dated May 19, 2000, in which he complained that the classification was an attempt to restrict his public exposure of scientific fraud. A third letter from Dr. Postol to Mr. Podesta dated June 21, 2000, described how three Defense Security Service investigators made an unscheduled visit to his office in what he characterized as an attempt to intimidate him and violate his First Amendment rights. Dr. Postol said they told him that DOD was concerned that some of the information contained in the May 11 letter was classified.

We conducted our investigation between July and September 2000 in accordance with investigative standards established by the President's Council on Integrity and Efficiency. We reviewed pertinent documentation and interviewed Dr. Postol and representatives of BMDO and Department of Justice. We also interviewed representatives of DOD's Office of the Inspector General; Defense Criminal Investigative Service; Office of Command, Control, Communications, and Intelligence; and Defense Security Service. We briefed your office on the results of our investigation. In addition, we are currently conducting a separate review of the allegations concerning scientific fraud.

In brief, DOD's actions included performing a security classification review and determining that portions of the documentation enclosed with Dr. Postol's

May 11, 2000, letter to Mr. Podesta contained derivatively classified information.¹ DOD's actions were performed in accordance with Executive Order 12958. Similarly, BMDO's subsequent request that the Defense Security Service contact Dr. Postol to discuss concerns that his letter contained classified information was made in accordance with DOD's regulations. We learned that the source of the documents enclosed with Dr. Postol's May 11 letter was a former employee of a DOD contractor involved in the development of the National Missile Defense system. The former contractor employee, who had the required security clearances and was prosecuting a Qui Tam complaint² at the time, obtained poorly redacted documents from the Defense Criminal Investigative Service that were not properly handled. The discovery by BMDO officials that the documents enclosed with Dr. Postol's letter were similar to classified DOD documents prompted the security classification review and the Defense Security Service visit to Dr. Postol.

Redacted Documents Provided to Dr. Postol

In 1996, Dr. Nira Schwartz, a former employee of a DOD contractor involved with developing the National Missile Defense system, filed a Qui Tam complaint against her former employer. The Department of Justice and Defense Criminal Investigative Service investigated the allegations raised in Dr. Schwartz's complaint, and Dr. Schwartz cooperated. In response to a request from the Defense Criminal Investigative Service, BMDO contracted with a consultant group to review certain concerns raised by Dr. Schwartz. The contractor provided a classified draft report of its findings to BMDO in September 1998, and BMDO provided a copy of the draft report to the Defense Criminal Investigative Service case agent. That agent provided redacted versions of the draft report and other classified documents to Dr. Schwartz. Dr. Schwartz had a security clearance and reviewed the classified documents, but she wanted to be able to use the documents at home. The agent, who has since retired, told us that he attempted to redact all classified information from the documents before he provided them to Dr. Schwartz. DOD officials informed us that classified national security information that is inadvertently released into the public domain does not automatically become declassified.

In January 1999, the contractor issued a classified final report. The Defense Criminal Investigative Service case agent told us that he reviewed his copy of the report, copied those pages that differed from the draft report, and attempted to redact classified information from them. He then faxed the redacted pages directly to Dr. Schwartz. DOD's Office of Inspector General officials told us that the agent did not follow the prescribed classification guidelines for sanitizing classified documents, which require that the cognizant classification authority review redacted documents. In this instance, BMDO should have been, but was not, provided the documents for review.

¹ Derivative classification entails incorporating, paraphrasing, restating, or generating in new form information that is already classified and marking the newly developed material consistent with the classification markings that apply to source information.

² A Qui Tam complaint is an action brought by a party under a statute that establishes a penalty for the commission of a certain act and provides that the penalty shall be recoverable in a civil action; part of the penalty recovered goes to the person who brought the action and the remainder goes to the government.

In March 2000, Dr. Schwartz's allegations were the topic of an article in the *New York Times*.³ Having read the article, Dr. Postol invited Dr. Schwartz to a workshop at the Massachusetts Institute of Technology in April 2000. Dr. Schwartz made a presentation concerning her allegations about the National Missile Defense system to workshop participants and provided Dr. Postol documents in support of her claims. According to Dr. Postol, these documents included the contractor's redacted draft report and the redacted pages from the final report that Dr. Schwartz had received from the Defense Criminal Investigative Service case agent.

The Derivative Classification Was Conducted in Accordance With Executive Order

Dr. Postol provided a copy of his May 11, 2000, letter, which included a copy of the redacted report he received from Dr. Schwartz, to DOD's Director for Operational Test and Evaluation and to a U.S. Army engineer, an acquaintance of Dr. Postol. Dr. Postol informed us that the Army engineer told him he had provided a copy of the letter and redacted report to the Deputy Director of Systems Integration for BMDO. On May 12, the Director for Operational Test and Evaluation provided Dr. Postol's May 11 letter to the Director of BMDO, who asked his staff to prepare a response. The staff told us that this was BMDO's normal process. The staff also told us that when they initially reviewed the letter, they noted similarities between the documents enclosed with the letter and certain classified DOD documents. The staff, therefore, referred the matter to BMDO's Office of Security, Counterintelligence, and Information Assurance. The staff also said that they believed Dr. Schwartz could have been the source of the redacted documents enclosed with Dr. Postol's letter when they read the May 19, 2000, *Los Angeles Times* article that reported an April 2000 meeting between Dr. Schwartz and Dr. Postol.

BMDO's Office of Security, Counterintelligence, and Information Assurance conducted a security classification review of the May 11 letter, which, in accordance with Executive Order 12958, *Classified National Security Information*, resulted in a derivative classification. The result was provided to BMDO senior leadership. BMDO officials told us that the letter and its enclosures represented a poor attempt to redact classified information from the contractor's report.

Defense Security Service Notified Dr. Postol of BMDO's Concerns

Officials of BMDO's Office of Security, Counterintelligence, and Information Assurance concluded that DOD had no existing contractual relationship with Dr. Postol and that they, therefore, had no jurisdiction to discuss with Dr. Postol their concerns that the May 11 letter contained classified information. However, Dr. Postol had current security clearances under the National Industrial Security Program, which is administered by the Defense Security Service.⁴ Therefore, on May 22, 2000, BMDO's Office of Security, Counterintelligence, and Information Assurance requested that the Defense Security Service initiate an Administrative Inquiry into the source of the documents that Dr. Postol enclosed with his May 11 letter to

³ On March 29, 1999, the Department of Justice filed its declination notice with the court, indicating that it would not intervene in Dr. Schwartz's Qui Tam complaint.

⁴ DOD Regulation 5220.22-R, para. 1-101c.

Mr. Podesta.⁵ This request was put in writing on May 23, 2000. The Defense Security Service agreed to contact Dr. Postol and on May 23 directed its Boston Field Office to do so. The Chief of the Boston Field Office telephoned Dr. Postol on May 26 and left a message asking that he return the call. Later that day, BMDO and Defense Security Service headquarters agreed to delay further attempts to contact Dr. Postol so that BMDO could conduct an additional review of the documents enclosed with the May 11 letter. The Boston Field Office was told not to have any contact with Dr. Postol until the additional review was completed.

On June 16, 2000, after BMDO completed the additional review, the Defense Security Service and BMDO agreed that an Administrative Inquiry was not necessary based on the information available. In addition, they agreed that the Defense Security Service would meet with Dr. Postol, in accordance with a DOD regulation,⁶ and provide him with written notice of BMDO's concerns. At that time, the Boston Field Office was directed to contact Dr. Postol.

Between June 16 and 20, 2000, the Boston Field Office left messages for Dr. Postol, and Dr. Postol returned the calls, also leaving messages. On the morning of June 21, Dr. Postol again called the Boston Field Office and left a message that detailed his schedule for the next few days. Later in the day on June 21, three representatives of the Defense Security Service, including the Chief of the Boston Field Office, visited Dr. Postol at the Massachusetts Institute of Technology. The visit was unscheduled and lasted approximately 30 minutes.

Dr. Postol told us that during the meeting, the Defense Security Service representatives attempted to have him read a classified letter that they said would put him on notice that the documents enclosed with the May 11 letter contained classified information. Dr. Postol said he refused to read the document because he believed that doing so would prevent him from publicly criticizing the National Missile Defense system. Dr. Postol told us that in mid-May 2000, he was unofficially informed by an acquaintance that DOD was classifying certain documents used in his May 11 letter to Mr. Podesta. At that time, he reviewed the documents and determined that there may have been an inadvertent release of classified information.

The Defense Security Service officials told us that they were unaware of the message Dr. Postol left the morning of June 21 until after they had met with him later that day. Dr. Postol told us that he was not happy with the way the Defense Security Service representatives conducted themselves during the meeting.⁷ He said that based on the representatives' conduct and the unofficial information he received regarding the alleged classification of the documents he enclosed with his May 11 letter, he wrote the June 21 letter to Mr. Podesta. The Defense Security Service officials who met with Dr. Postol on June 21 told us that they believe they conducted themselves properly during the visit.

⁵ DOD Regulations 5200.1-R, para. 10-101f and 5220.22-R, para. 5-107.

⁶ DOD Regulation 5200.1-R, para. 10-105.

⁷ One of these representatives, the Chief of the Defense Security Service's Boston Field Office, was involved in a previous investigation that involved Dr. Postol. Dr. Postol informed us that he had a particular dislike for this individual's conduct during the previous investigation, which increased his concerns about the June 21 meeting.

Agency Comments

DOD provided comments on a draft of this letter, in which it concurred with the letter and its findings. DOD provided technical corrections, and where appropriate, we have made those corrections.

As arranged with your office, unless you announce its contents earlier, we plan no further distribution of this letter until 30 days after the date of the letter. At that time, we will make copies of the letter available to interested congressional committees and agency officials. We will also make copies available to others on request. The letter will also be available at www.gao.gov. If you have any questions about this investigation, please call me at (202) 512-7455 or Assistant Director John Ryan at (202) 512-6722. Senior Analyst Shelia James and Senior Attorney Peter Iannicelli made key contributions to this letter.

Sincerely yours,



Robert H. Hast
Managing Director
Office of Special Investigations

(600875)