

Current U.S. Policy on Publication of Dual Use Research of Concern

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July 11, 2016



Motivation

“...despite their extreme danger, we only became aware of [the potential of chemical and biological weapons] ... when the enemy drew our attention to them by repeatedly expressing concern that they can be produced simply.”

- Memo apparently by Al Qaeda leader Ayman Al-Zawahiri, found on the hard drive of a computer in Afghanistan (Wall Street Journal, 12/31/2001)

“... there is information that, although we cannot now capture it with lists or definitions, presents enough risk of use by terrorists that it should not be published. How and by what processes it might be identified will continue to challenge us...”

- Statement on Scientific Publication and Security, Journal Editors and Authors Group, 2/15/2003

Policies Relevant to Controls on Research Information

- First Amendment to the United States Constitution
- Security Classification Policy
- National Security Decision Directive-189
- Export Controls
- The Freedom of Information Act
- Statutory Controls on Unclassified Information
- Terms and Conditions of Federal Funding
- U.S. Government Policies for the Oversight of Dual-Use Research of Concern

First Amendment

- Greatly limits the Federal Government's ability to restrict the open communication of information it does not own or control
- The Federal Government owns or controls information generated under contract
- The Federal Government does NOT own or controls information generated under a grant
- Therefore, the government has very limited ability to restrict the communication of grant-funded or privately funded research

Security Classification

- Practically all security classifications are done pursuant to Executive Order 13526
- Information may be classified under this Executive Order only if it is “owned by, produced by or for, or is under the control of the United States Government”*

**but see next chart*

- Information regarding “scientific, technological, or economic matters relating to the national security” may be classified, but
- “Basic scientific research information not clearly related to the national security shall not be classified”

*Exceptions

Under two statutes, the Government asserts the right to classify information that it does not own or control, and that was not produced for it

- Restricted Data (Atomic Energy Act of 1954)
 - Permits the government to classify nuclear weapons-related information, including that which was privately generated.
- Patent Secrecy (Invention Secrecy Act of 1951)
 - Permits the government to impose a secrecy order upon a patent applicant when disclosure of the patent “might, in the opinion of the head of the interested Government agency, be detrimental to the national security.”

NSDD-189 (September 21, 1985)

- Establishes that “the free exchange of ideas” is a “vital component” to the strength of American science
- Specifies that “where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research... is classification”
- “No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes.”

Export Controls

- Government licenses are required to export certain listed items to certain destinations
- Export of non-public technical data associated with listed items can also be controlled
- Licensing requirements depend on the item and the destination
- Transfer of information to a foreign national within the United States is “deemed” to be an export
- Publication of fundamental research is generally exempt from controls (pursuant to NSDD-189)
- **Voluntary government security review does not change the export control status of fundamental research, so long as any advice is taken**
- **However, material redacted from publication may become subject to export controls**

Freedom of Information Act

- Requires Federal Government to release, upon request, information in its possession that is not covered by an exemption
 - Classified information is exempt from FOIA release
 - So is unclassified information subject to statutory control
 - Some 70 statutes provide for such controls
 - **None specifically pertain to DURC**

Statutory Controls on Unclassified Information

- Several statutes provide for the control of unclassified information, such as
 - Sensitive Security Information
 - Unclassified Controlled Nuclear Information
 - Protected Critical Infrastructure Information
- None of these appear to cover privately generated dual use research of concern (DURC)
 - However, it is conceivable that some of these might be able to protect DURC in the government's possession from public release under the Freedom of Information Act

Terms and Conditions of Federal Funding

- Grants and contracts conveying federal funds impose conditions on the use of those funds
- One such condition requires compliance with the “United States Government Policy for Institutional Oversight of Life Sciences DURC”
- “Reach-through” provision covers all life sciences research done at institutions receiving any federal life sciences research funding
- Another common condition states that if a Principal Investigator is concerned that research results may warrant security classification, he or she “should promptly notify the awarding agency's program official, or the person identified in the Agency Specific Requirements”
- This provision has rarely, if ever, been triggered

USG Policy for Oversight of Life Sciences DURC

- Covers USG-funded research that
 - Uses one of 15 specified agents or toxins
 - Includes one of 7 listed categories of experiment
- Requires risk assessments and, if necessary, risk mitigation plans for covered experiments that constitute DURC
- If other risk mitigation measures are inadequate, the funding agency will determine whether it is appropriate to
 - (a) **Request voluntary redaction of the research publications or communications, or**
 - (b) Classify the research in accordance with existing agency authorities
- No reference to restricted publication

USG Policy for the Institutional Oversight of Life Sciences DURC

- Same coverage as USG Policy
- Requires establishment of Institutional Review Entity to review to see if they constitute DURC, conduct risk assessments, and develop risk mitigation plan
- Specifies “the free and open conduct and communication of life sciences research is vital to a robust scientific enterprise,” but also calls for “responsible communication”
- Redaction is not explicitly mentioned as a risk mitigation option but clearly implied, given explicit linkages to the preceding U.S. Government policy
- No reference to restricted publication