

**Proposed Amendment:** Revise the CUI Directive as shown in the attached document.

**Justification:** Simplifies the requirement since any sharing or distribution of a Draft Recommendation or its contents outside of the Agency would require Board approval regardless of who it is. The proposed amendment would also serve to minimize potential impacts on the Board's deliberative process. The proposed amendment also would encompass all Agency employees and bind their handling of Draft Recommendations information in accordance with the restrictions specified in this Directive. This ensures that even Agency employees not directly involved in the development of a Draft Recommendation can be made aware of its existence and contents and do not inadvertently violate the Directive.

**Justification for Bullet Point K:** There should be no automatic triggering of changes to CUI markings and status of the information without an explicit vote of the Board. The decision should be specific to each circumstance.

**AFFIRMATION OF BOARD VOTING RECORD**

**SUBJECT: Amendment by Board Member Roberson to YELLOW FOLDER Doc#2017-300-066, CUI Marking**

**Doc Control#2017-300-066E**

The Board, with Board Member(s) Jessie H. Roberson, Daniel J. Santos, Joyce L. Connery *approving*, Board Member(s) Sean Sullivan, Bruce Hamilton *disapproving*, Board Member(s) none *abstaining*, and Board Member(s) none *not participating*, have voted to approve the above document on September 25, 2017.

The votes were recorded as:

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIPATING*	COMMENT	DATE
Sean Sullivan	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	09/25/17
Bruce Hamilton	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	09/22/17
Jessie H. Roberson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	09/22/17
Daniel J. Santos	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	09/25/17
Joyce L. Connery	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	09/25/17

\*Reason for Not Participating:

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Board Members.

  
Assistant Executive Secretary to the Board

Attachments:

1. Voting Summary
2. Board Member Vote Sheets

cc: Board Members  
OGC  
OGM Records Officer  
OTD

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD  
NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Sean Sullivan

**SUBJECT:** Amendment by Board Member Roberson and Board Member Santos to  
YELLOW FOLDER Doc#2017-300-066, CUI Marking

Doc Control#2017-300-066E

Approved \_\_\_\_\_ Disapproved  X  Abstain \_\_\_\_\_  
Recusal – Not Participating \_\_\_\_\_

**COMMENTS:** Below  X  Attached \_\_\_\_\_ None \_\_\_\_\_

The proposed amendment is objectionable on several levels.

The proposed Directive (“CUI Marking”) is intended to set policy on compliance with our statutory mandate to make Recommendations available to the public only after the Secretary of Energy receives the final Recommendation from the Board. Consistent with the statutory mandate of 42 U.S.C. § 2286d(b), the proposed Directive (without the amendment) establishes document marking requirements to prevent inadvertent public release.

The amendment proposes controls well beyond the statutory mandate. Specifically, the amendment bars any discussion with anyone outside the agency including other government officials charged with public safety, and provides for keeping the controls in place well after the statutory mandate has been satisfied.

The amendment is objectionable for the following reasons:

- 1. As applied to Board Members, the controls proposed by the amendment are inappropriate and unenforceable.**

A Board Member has a duty to act as that Member deems necessary in the interest of public safety. If a Member deems it appropriate to speak with another government official, that Member may do so and is bound only by the law and not any policy of the Board. No other Member or majority of Members has the right or ability to control what a minority Member may say to other government officials. To the extent that this amendment seeks to do that, it is unenforceable.

**2. As applied to Board Members, the controls proposed by the amendment should not be in a Directive.**

The Board's Directives set policy, procedures, and administrative requirements for the staff. As applied to Board Members, the Directives only set procedural or administrative requirements necessary for compliance with existing laws and regulations. Policy matters involving Board Members are reserved for the Board procedures. As stated in the preamble to those procedures, such policies are generally set by unanimous agreement among the members acting as collegial body.

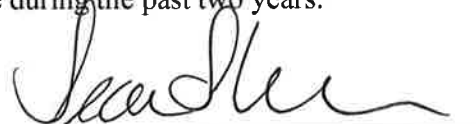
The proposed Directive (without the amendment) merely establishes markings and controls necessary to comply with the statutory mandate, requirements that appropriately apply to Board Members as well as agency staff. Any restrictions on Member behavior generated by the Board should be placed in the Board procedures. Even then, restrictions or prohibitions are voluntary and unenforceable regardless of how they may appear in the procedures.

**3. The controls proposed by the amendment provide a path to continue the pattern of anti-transparency exhibited by the Board over the past two years.**

The amendment proposes to revise the provisions regarding the sunset of controls. As proposed in the Directive (without the amendment), controls expire automatically when the statutory mandate expires, such as when a final Recommendation is transmitted to the Secretary, or the Board decides that a Recommendation under consideration is no longer needed. The amendment proposes to keep the controls in place until an affirmative decision is made by the Board in each case to remove them.

The Board has held nine closed meetings since the beginning of June, 2015. One topic, emergency preparedness and response at Pantex, resulted in a Board Recommendation. The Board released closed meeting transcripts of deliberations on that topic, but only after a second vote (the first was disapproved) held months after the Secretary received the Recommendation. Moreover, the second vote passed with only two affirmative votes, the majority of Members either abstaining or declining to participate. During the nine closed meetings a number of other topics were discussed as possible Recommendations, but in most cases the Board either dropped the subject or affirmatively decided not to issue a Recommendation. Yet, votes to release transcripts on those other topics have all been disapproved (except in the case of the most recent closed meeting for which no vote to release has been held). The proposed amendment provides a mechanism permitting the continuation of this anti-transparency practice. The Board would be required to affirmatively remove the controls from transcripts, votes, or other documents on a case-by-case basis. Under this proposal, a majority may refuse to remove those controls without providing any justification, as has been the practice during the past two years.

For all the reasons above, I disapprove.



Sean Sullivan

9/25/17

Date

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Bruce Hamilton

**SUBJECT:** Amendment by Board Member Roberson and Board Member Santos to  
YELLOW FOLDER Doc#2017-300-066, CUI Marking

**Doc Control#2017-300-066E**

Approved \_\_\_\_\_ Disapproved X Abstain \_\_\_\_\_

Recusal – Not Participating \_\_\_\_\_

**COMMENTS:** Below X Attached \_\_\_\_\_ None \_\_\_\_\_

This Amendment proposes a collection of changes which narrow and further restrict control of CUI such that it cannot be shared outside the Agency. It goes well beyond the allowance of 42 U.S.C. § 2286d. (b) which only provides for Recommendation-related information to be withheld temporarily from *the public*. The federal government, however, is not a subset of the public, and preventing release of such information outside the Agency would inappropriately prevent the sharing of pre-decisional information with the Department of Energy, other federal government entities, and, in certain cases, Congress.

This Amendment also sweeps up *potential* Recommendation information as being subject to CUI protection. Since “potential” information is not defined, it would establish a situation where just about anything the Board discusses could be withheld from the public. A broad view could find *potential* Recommendation information essentially anywhere.

This Amendment not only overly limits the staff, but it purports to restrict Board Members as well. Board Members are appointed by the President of the United States, and as such, they serve in a *political* capacity. They are obliged to speak openly on unclassified issues of policy which they believe need to be addressed. They cannot be restrained beyond that provided in law from carrying out this obligation by an Agency Directive, even when that Directive is approved by a majority of Board Members. To do so would result in the outrageous state of affairs where a majority of Board Members could choose to suppress the voice of the minority.

I therefore disapprove.

  
Bruce Hamilton

22 SEPT 2017  
Date

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**  
**NOTATIONAL VOTE RESPONSE SHEET**


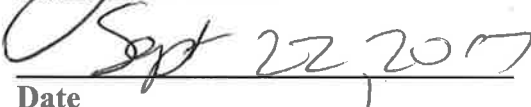
**FROM:** Jessie H. Roberson

**SUBJECT:** Amendment by Board Member Roberson and Board Member Santos to  
YELLOW FOLDER Doc#2017-300-066, CUI Marking

**Doc Control#2017-300-066E**

**Approved**  **Disapproved**  **Abstain**   
**Recusal – Not Participating**

**COMMENTS:** **Below**  **Attached**  **None**

  
\_\_\_\_\_  
**Jessie H. Roberson**  
  
\_\_\_\_\_  
**Date**

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD  
NOTATIONAL VOTE RESPONSE SHEET**

**FROM: Daniel J. Santos**

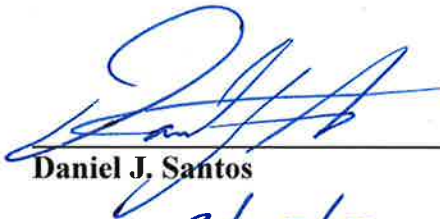
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Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Recusal – Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached \_\_\_\_\_ None

  
\_\_\_\_\_  
Daniel J. Santos  
9/25/17  
\_\_\_\_\_  
Date

**DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

**NOTATIONAL VOTE RESPONSE SHEET**

**FROM:** Joyce L. Connery

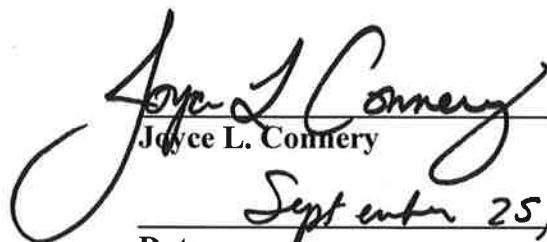
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Approved  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Recusal – Not Participating \_\_\_\_\_

**COMMENTS:** Below \_\_\_\_\_ Attached \_\_\_\_\_ None

  
\_\_\_\_\_  
Joyce L. Connery  
\_\_\_\_\_  
September 25, 2017  
Date