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Annie Searle & Associates LLC

Research Note

Diplomacy and the Law

By Annie Searle

Applicable Sectors: Banking and finance, information technology, communications, energy, public health, emergency services.

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We are in the midst of an information war of sorts, fueled by the close relationship between WikiLeaks and the media, at a time in our history where there has been no real adjustment of law or policy to deal with the digital world we live in except for controls now in place around nonpublic personal information via the *Gramm-Leach-Bliley Act (GLBA)*; or the *Health Insurance Portability and Accountability Act* (*HIPAA*) controls that are designed to protect patients' personal information.

Against the First Amendment right to free speech, which since the Federalist papers includes the right to publish anonymously, we are looking at a system of data classification that may need to be updated, when sensitive information of various types is restricted by law or regulation. Most every government, including our own, uses a system involving secrecy that requires different levels of clearance for access. Information security policies in many

private corporations and organizations also provide a scheme by which sensitive information is classified, often for purposes having to do with intellectual property, mergers, acquisitions, trade secrets, legal issues and/or quarterly financial disclosures. Like the government, the private sector prosecutes those against which a case can be made for what here is generally considered a form of internal fraud.

In this country, national security classifications range from the highest level ("Top Secret") down four more levels to the lowest ("Unclassified"). An organization like WikiLeaks is a metaphorical "drop box" for those who have security clearances sufficient to have access to sensitive data, and who feel that there is a reason to make the information public. It is very clear that law and regulation is designed to protect sensitive documents, but it is not so clear -- especially in the escalated rhetoric of the present "Cablegate" situation – who is at fault, and who should be prosecuted. As Evgeny Morozov points out in his New York Times article titled "Why It's Hard to Duplicate,"[1] Cablegate is a watershed event. Diplomatic cables, like explosive videos or photographs, do not appear do need much explanation – even as to why they were highly classified. Yet without investigative reporting and some context in which to better understand the meaning and impact, the only thing that changes is the advice that authors of diplomatic cables will receive on how to write their reports. And if the National Security Administration has its way, there will be an attempt to revert to stove piped information that is highly controlled and thought to be secure. Perhaps Cablegate will be the tipping point for a review of our current data classification scheme as well as the laws and regulations that surround sensitive documents. At the same time, greater care must be taken by organizations like WikiLeaks to ensure that the information they release does not inadvertently end up compromising the identities of actual people, such as Saudi princes or even dissidents who shared their views with the State Department.

1 Evgeny Morozov, "Why It's Hard to Duplicate," part of "What Has WikiLeaks Started," New York Times editorial, December 10, 2010.

In the meantime, in a twist upon the old saying, it's best to remember never to say (or write) something you wouldn't be embarrassed to read in tomorrow's newspaper.