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William F. Pelgrin
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MEMORANDUM

TO: Janice Pesyna, DHS

FROM: Mara Ginsberg, Counsel
New York State Office of Cyber Security & Critical Infrastructure Coordination

DATE: May 19, 2004

SUBJECT: 6 CFR Part 29- Department of Homeland Security

Comments:

The New York State Office of Cyber Security & Critical Infrastructure Coordination would like to thank the Department of Homeland Security for the opportunity to comment on the interim rule regarding the receipt, care, and storage of Critical Infrastructure Information voluntarily submitted to the Federal Government.

1) § 29.3 Effect of provisions: (a) *Mandatory submissions of information*. The CII Act of 2002 and these procedures do not apply to or affect any requirement pertaining to information that must be submitted to DHS.

- If DHS requires a submission then 29.3 makes protection inapplicable. There could be circumstances where such protection would be warranted even if the information is a mandatory submission. The question remains whether the existing exemptions of 5 U.S.C. 552(b) will be sufficient to prevent the release of such mandatory information pursuant to FOIA.

2) § 29.6 Acknowledgment of receipt, validation, and marking: (e)(2)(ii) If the CII Program Manager determines that the information is not protected and if the submitter does not notify the CII Program Manager whether to either destroy the information or maintain it without protection, then the information is to be destroyed *unless it is retained for law enforcement and/or national security reasons*.

- 5 U.S.C. 552(b) does not contain an exemption for national security except pursuant to an executive order. Accordingly, the determination to retain information that does not qualify for protection, but is necessary for national security potentially leaves this information vulnerable for release pursuant to FOIA. If information is deemed necessary for retention for

national security reasons, even if the IAIP director determined it should not receive protection pursuant to these regulations, there should be an automatic override of this determination thereby affording the information protection for national security.

3) § 29.8 Disclosure of information. (f) *Access by Congress and whistleblower protection.*
(2) *Consistent with the authority...or to any other employee designated by the Secretary of Homeland Security.*

- This provision is broad in its ability to allow distribution of information. Presumably the intent is that distribution to employees means employees of DHS. Perhaps the language could be modified for clarification to be any employee of DHS.