October 07, 1983

COMMITTEE DRAFT REPORT ON S. 1324 -- CONTENTS

As amended 10/23/83

287

Note: Bracketed material [ ] refers to possible amendments

INTELLIGENCE INFORMATION ACT OF 1983

MR. GOLDWATER, for the Select Committee on Intelligence, submitted the following

REPORT

[To accompany S. 1324]

The Select Committee on Intelligence, having considered (S. 1324), a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, reports favorably with amendments and recommends that the bill as amended do pass.

PURPOSE

The purpose of S. 1324, as reported, is to relieve the Central Intelligence Agency (CIA) from undue burdens of searching and reviewing certain operational files for information in response to Freedom of Information Act requests and thereby enable the Agency to respond to other requests under the Act in a more timely and efficient manner.

AMENDMENTS

That this Act may be cited a the "Intelligence Information Act of 1983".

FINDINGS AND PURPOSES

Sec. 2(a) The Congress finds that --

(1) the Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decisionmaking processes of their Government, including the Central Intelligence Agency;

(2) the full application of the Freedom of Information Act to the Central Intelligence Agency is, however, imposing unique and serious burdens on this agency;

(3) the processing of a Freedom of Information Act request by the Central Intelligence Agency normally requires the search of numerous systems of records for information responsive to the request;

(4) the review of responsive information located in operational files which concerns sources and methods utilized in intelligence operations can only be accomplished by senior intelligence officers having the necessary operational training and expertise;

(5) the Central Intelligence Agency must fully process all requests for information, even when the requester seeks information which clearly cannnot be released for reasons of national security;

(6) release of information out of operational files risks the compromise of intelligence sources and methods;

(7) eight years of experience under the amended Freedom of Information Act has demonstrated that this time-consuming and burdensome search and review of operational files has resulted in the proper withholding of information contained in such files. The Central Intelligence Agency should, therefore, no longer be required to expend valuable manpower and other resources in the search and review of information in these files;

(8) the full application of the Freedom of Information Act to the Central Intelligence Agency is perceived by those who cooperate with the United States Government as constituting a means by which their cooperation and the information they provide may be disclosed;

(9) information concerning the means by which intelligence is gathered generally is not necessary

for public debate on the defense and foreign policies of the United States, but information gathered by the Central Intelligence Agency should remain accessible to requesters, subject to existing exemptions under law;

(10) the organization of Central Intelligence Agency records allow the exclusion of operational files from the search and review requirements of the Freedom of Information Act while leaving files containing information gathered through intelligence operations accessible to requesters, subject to existing exemptions under law; and

(11) the full application of the Freedom of Information Act to the Central Intelligence Agency results in inordinate delays and the inability of these agencies to respond to requests for information in a timely fashion.

(b) The purposes of this Act are --

(1) to protect the ability of the public to request information from the Central Intelligence Agency under the Freedom of Information Act to the extent that such requests do not require the search and review of operational files;

(2) to protect the right of individual United States citizens and permanent resident aliens to request information on themselves contained in all categories of files of the Central Intelligence Agency; and

(3) to provide relief to the Central Intelligence Agency from the burdens of searching and reviewing operational files, so as to improve protection for intelligence sources and methods and enable this agency to respond to the public's requests for information in a more timely and efficient manner.

Sec. 3(a) The National Security Act of 1947 is amended by adding at the end thereof the following new title:

TITLE VII -- RELEASE OF REQUESTED INFORMATION TO THE PUBLIC BY THE CENTRAL INTELLIGENCE AGENCY.

"Designation of Files by the Director of Central Intelligence as Exempt from Search, Review, Publication, or Disclosure

"Sec. 701(a) In furtherance of the responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure as set forth in section

102(d)(3) of this Act (50 U.S.C. 403(d)(3)) and section 6 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403g), operational files located in the Directorate of Operations, Directorate for Science and Technology, and Office of Security of the Central Intelligence Agency shall be exempted from the provisions of the Freedom of Information Act which require publication or disclosure, or search or review in connection therewith, if such files have been specifically designated by the Director of Central Intelligence to be --

"(1) files of the Directorate of Operations which document foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services; or

"(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems;

"(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

Provided, however, That nondesignated files which may contain information derived or disseminated from designated operational files shall be subject to search and review. The inclusion of information from operational files in nondesignated files shall not affect the designation of the originating operational files as exempt from search, review, publication, or disclosure: Provided further, That the designation of any operational files shall not prevent the search and review of such files for information concerning any special activity the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act or for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, violation of law, Executive Order, or Presidential directive in the conduct of an intelligence activity.

"(b) The provisions of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of this section and which specifically cites and repeals or modifies its provisions.

"(c) Notwithstanding subsection (a) of this section, proper requests by United States citizens, or by aliens lawfully admitted for permanent residence in the United States, for information concerning themselves, made pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) or the Freedom of Information Act (5 U.S.C. 552), shall be processed in accordance with those Acts.

"(d) The Director of Central Intelligence shall promulgate regulations to implement this section as follows:

"(1) Such regulations shall require the appropriate Deputy Directors or Office Head to:

(A) specifically identify categories of files under their control which they recommend for designation;

(B) explain the basis for their recommendations; and

(C) set forth procedures consistent with the statutory criteria in subsection (a) which would govern the inclusion of documents in designated files. Recommended designations, portions of which may be classified, shall become effective upon written approval of the Director of Central Intelligence.

"(2) Such regulations shall further provide procedures and criteria for the review of each designation not less than once every ten years to determine whether such designation may be removed from any category of files or any portion thereof. Such criteria shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portion thereof and the potential for declassifying a significant part of the information contained therein.

"(e)(1) On the complaint under section 552 (a)(4)(B) of title 5 that the Agency has improperly withheld records because of improper designation of files or improper placement of records solely in designated files, the court's review shall be limited to a determination whether the Agency

regulations implementing subsection (a) conform to the statutory criteria set forth in that subsection for designating files unless the complaint is supported by an affidavit, based on personal knowledge or otherwise admissable evidence, which makes a prima facie showing, that (A) a specific file containing the records requested was improperly designated; or (B) the records requested were improperly placed solely in designated files. If the court finds a prima facie showing has been made under this subsection, it shall order the Agency to file a sworn response, which may be filed in camera and ex parte, and the court shall make its determination based upon these submissions and submissions by the plaintiff. If the court finds under this subsection that the Agency's regulations implementing subsection (a) of this section do not conform to the statutory criteria set forth in that subsection for designating files, or finds that the Agency has improperly designated a file or improperly placed records solely in designated files, the Court shall order the Agency to search the particular designated file for the requested records in accordance with

the provisions of the Freedom of Information Act and to review such records under the exemptions pursuant to section 552(b) of title 5. If at any time during such proceedings the CIA agrees to search designated files for the requested records, the court shall dismiss the cause of action based on this subsection.

"(e)(2) On complaint under section 552(a)(4)(B) of title 5 that the Agency has improperly withheld records because of failure to comply with the regulations adopted pursuant to subsection (d)(2), the Court's review shall be limited to determining whether the Agency considered the criteria set forth in such regulations."

(b) The table of contents at the beginning of such Act is amended by adding at the end there of the following:

"TITLE VII--RELEASE OF REQUESTED INFORMATION TO THE PUBLIC BY THE CENTRAL INTELLIGENCE AGENCY

"Sec. 701. Designation of files by the Director of Central Intelligence as exempt from search, review, publication, or disclosure".

Sec. 4. The amendments made by section 3 shall be effective upon enactment of this Act and shall apply with respect to any requests for records, whether or not such request was made prior to such enactment, and shall apply to all cases and proceedings pending before a court of the United States on the date of such enactment.

COMMITTEE ACTION

On October 4, 1983, the Select Committee on Intelligence, a quorum being present, approved the bill with an amendment and ordered it favorably reported by a unanimous vote.

The purpose of the amendment adopted by the Select Committee has been to clarify the legislative intent and to provide greater assurance that the bill will be implemented in accordance with the legislative intent. The third purpose of the Act as stated in section 2(b)(3) is revised to express the intent to improve protection for intelligence sources and methods.

Other changes are made in a new section 701 to be added by the bill to the National Security Act of 1947. First, criteria for designation of operational files by the Director of Central Intelligence are specified more precisely for each affected CIA component -- the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security. Second, additional language in the second proviso to section 701(a) preserves access for search and review of information in designated operational files that was reviewed and relied upon in official investigations for impropriety or illegality in the conduct of an intelligence activity. Third, a new subsection (d) is added to require the promulgation of regulations by the Director of Central Intelligence to implement section 701. These regulations have two separate

purposes. The regulations under subsection (d)(1) require the appropriate Deputy Directors or Office Head to identify categories of files recommended for designation, explain the basis for their recommendation, and set forth criteria governing the inclusion of documents in designated files. The regulations under subsection (d)(2) provide procedures and criteria for the review of designations at least once every ten years to determine whether the designation may be removed from a category of files or portion thereof. Such criteria are to include consideration of the historical value or other public interest in the subject matter of the particular file or category of files and the potential for declassifying a significant part of the information contained therein.

The final change in section 701 is the addition of a new subsection (e) establishing procedures for judicial review. The procedures under subsection (e)(1) apply to cases of alleged improper withholding of records because of improper designation of files or improper placement of records solely in designated files. The procedures under subsection (e)(2) apply to cases of alleged improper withholding of records because of failure to comply with the regulations adopted under subsection (d)(2) for periodic review of file designations.

A more detailed explanation of each of these changes in the proposed section 701 is contained in the section-by-section analysis of this report.

HISTORY OF THE BILL

Concern over the burdens imposed on intelligence agencies under the Freedom of Information Act (FOIA) is not new. Congress considered the FOIA's impact on the Central Intelligence Agency as [redacted] as 1977, three years after the Act was amended to provide for de novo review of the withholding of classified information.

In September, 1977, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee heard CIA officials testify about the effects of the 1974 amendments on the Agency. Acting CIA Director John F. Blake, who was chairman of the CIA's Information Review Committee, stated that the 1974 amendments had "constituted a somewhat traumatic experience" and had "required a considerable adjustment in attitude and practice." He added, "We have been able to make the necessary adjustments. I am pleased to report that, in fact, I think the Agency is better off for it."[1]

96th Congress

By 1979, however, CIA's position changed. Testifying before the House Intelligence Committee, Deputy Director of Central Intelligence Frank Carlucci declared that "the total

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1 Freedom of Information Act, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. (1977), p. 69.

application of public disclosure statutes like FOIA to the CIA is seriously damaging our ability to do our job." Mr. Carlucci did not seek total exemption from FOIA for the CIA. Instead, he proposed an exemption for certain designated operational files, with a provision allowing U.S. citizens and resident aliens to continue to use FOIA to obtain information about themselves. Carlucci described this approach as "fully consistent with the spirit and letter of national security exemptions already in the Freedom of Information act."[2]

This CIA proposal was included as Section 3 of S. 2216, introduced in the 96th Congress by several Members, including Senators Moynihan, Wallop, Jackson, and Chafee of the Select Committee on Intelligence. A similar provision was included as Section 421(d) of S. 2284, the National Intelligence Act of 1980, introduced in the 96th Congress by Senators Huddleston, Mathias, Bayh, and Goldwater. The bills differed in that S. 2216 would have exempted designated files of all U.S. intelligence agencies, while S. 2284 would have exempted designated files of the CIA only.

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2 Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities, Hearing before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Cong., 1st Sess. (1979), pp. 3, 7, 162.

During hearings on S. 2284, Director of Central Intelligence Stansfield Turner stated the Carter Administration's support of the wider scope of S. 2216. However, the Carter Administration subsequently supported a different proposal by the Department of Justice which would have permitted the CIA to exempt by Agency certification certain types of information from disclosure with no judicial review. This proposal, H.R. 7056, was introduced by Rep. Richardson Preyer.

Numerous witnesses testified for and against these various proposals during Senate and House Intelligence Committee hearings on the National Intelligence Act of 1980.[3] However, no action was taken on any of these measures in the 96th Congress.

97th Congress

In 1981 Senators Chafee and Goldwater introduced S. 1273, a bill identical to the CIA's original proposal previously considered as Section 3 of S. 2216. It would have allowed the Director of Central Intelligence to designate as exempt from search and review, publication or disclosure, those files maintained by any U.S. intelligence agency which fell within certain operational categories. Admiral Bobby R. Inman, then

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3/ National Intelligence Act of 1980, Hearings before the Select Committee on Intelligence, United States Senate, 96th Cong., 2d Sess. (1980).; H.R. 6588, The National Intelligence Act of 1980, Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 96th Cong., 2d. Sess. (1980).

Deputy Director of the CIA testified at an open hearing, July 21, 1981 before the Senate Intelligence Committee. His testimony stressed the unique problems the FOIA places on intelligence agencies which operate under compartmented records systems and restricted access to records based on a "need to know" principle. In addition, CIA expressed concern that reviewing documents responsive to an FOIA request frequently requires the time and expertise of trained intelligence officers who would otherwise be focusing on current intelligence requirements. Other arguments for relief were CIA's large amount of FOIA litigation, the risk of court-ordered disclosure of classified information, the possibility of human error in release decisions and processing, and foreign governments' perception that the United States Government cannot maintain the confidentiality of the information entrusted to it. In his written statement, Admiral Inman expressed the view that while partial relief via the file designation process was a "promising approach" which "would have a major positive impact," only a total exclusion of CIA's records from the requirements of the FOIA could resolve all the problems caused by the Act.

Other witnesses included General Faurer, Director of the National Security Agency, General Larkin, Director of the Defense Intelligence Agency, and representatives of the news media, civil liberties groups, and historians.

Representatives of groups opposed to the legislation testified that valuable information had been released through the FOIA process, and the public interest in receiving

such information outweighed any burdens in complying with the Act. The witnesses emphasized that current FOIA exemptions (b)(1), protecting classified information, and (b)(3), protecting information specifically covered by other statutes, e.g., intelligence sources and methods, were adequate to meet CIA's needs.[4] However,

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[4] Until two U.S. District of Columbia Court of Appeals decisions in a related FOIA matter, Sims v. CIA, 642 F. 2d 562 (D.C. Cir. 1980) and Sims v. CIA, Nos 82-1945, 82-1961 (D.C. Cir. June 10, 1983), (Sims I and Sims II), the reliance on the Director of Central Intelligence's ability to protect sources and methods under the (b)(3) exemption was well-founded. However, the Sims decisions threaten the Director's statutory duty under 50 U.S.C. § 403(d)(3) to protect sources and methods and, in doing so, impair the CIA and other intelligence agencies ability to gather needed intelligence.

Rather than accepting the plain language and legislative history of 50 U.S.C. § 403(d)(3), the Sims courts judicially created a two-prong test to determine whether an individual's identity is protected as an intelligence source: first, a court must look at the kind of information an individual provided the Agency and second, a court must determine if that kind of information could "reasonably [be] expect[ed] to be obtain[ed] without guaranteeing the confidentiality" to the individual provider. The Sims courts said that even a specific agreement between the agency and a source is not necessarily sufficient to maintain confidentiality.

This test imposes a district court's judgment of these issues possibly years after the event. It totally disregards some of the basic rules of intelligence gathering such as tasking a new source to provide information already acquired in order to test the new source's reliability and access. What if a high level source provides information about a foreign country and this same information coincidentally is also leaked by someone else to a newspaper?

Sims I and II make the passage of this legislation all the more necessary.

the witnesses did not rule out the possibility of a more carefully and narrowly framed ~~measure~~ alternative to relieve some of the burdens on the CIA. For example, Mark Lynch of the American Civil Liberties Union suggested adopting "a random sample procedure" to alleviate document-by-document review in response to requests on extremely sensitive subjects. Without amending FOIA itself, the courts could use such a procedure when "no information or very little information" on a subject could actually be released. Recognizing the CIA's special personnel and resource problems, Mr. Lynch urged "a careful and constructive approach ... to examining the administrative procedure to see if it cannot be streamlined" before turning to a legislative solution.[44]

On November 24, 1981, Admiral Inman testified in closed session before the Select Committee regarding the Freedom of Information Act's impact on the CIA's ability to collect intelligence and to maintain its relationships with friendly intelligence services. The purpose of this hearing was to examine specific examples of damage that could not be discussed in open session. Admiral Inman stated that the "real damage" was not the personnel and resource burden or releases due to administrative error. Instead, he

[45] Intelligence Reform Act of 1981, Hearing Before the Select Committee on Intelligence, United States Senate, 97th Cong., 1st Session. (1981), see esp. pp. 16-17, 44-48, 67.

emphasized the damage in terms of "lost collection opportunity" where both individuals and foreign governments have been reluctant to provide information to CIA. He cited particular cases of CIA responses where, even though no documents were released, sensitive information appeared to be disclosed. This occurred because the CIA in certain cases could not classify the fact that it possessed documents on a particular subject. The Agency's mere acknowledgement of possessing documents on a subject was characterized by the press as confirmation of controversial alleged CIA activity. Such inferences were almost always erroneous, but individuals' and governments' confidence in the CIA's ability to maintain secrecy was undermined.

At the closed hearing, Admiral Inman repeated his testimony favoring a "total exemption" as the only way to "restore confidence of the foreign intelligence sources and other[s] who would collaborate with us ... that they are not running a risk ... in providing information to us ...." He added that, if a total exemption were impossible, "certainly one that at least limits the scope of the cases ... would be a substantial improvement over the situation in which we find ourselves."

No further legislative action occurred in connection with S. 1273 in the 97th Congress.

98th Congress

Senator Goldwater, Chairman of the Select Committee, introduced S. 1324, the Intelligence Information Act of

1983 on May 18, 1983. Hearings were held on June 21 and 28, 1983. At the June 21 hearing, Senator Strom Thurmond, Chairman of the Judiciary Committee and co-sponsor of S. 1324, testified in support of the legislation. He was followed by CIA Deputy Director John M. McMahon and other senior CIA officials including Deputy General Counsel Ernest Mayerfeld, Deputy Director for Operations John Stein, Deputy Director for Science and Technology Evan Hineman, Director of Security William Kotapish, and the Chief of the Information and Privacy Division, Larry Strawderman. Mr. McMahon urged enactment of S. 1324 as a carefully balanced effort to benefit both CIA's intelligence mission and the public's access to government information. He stated that the bill "will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the [FOIA] process." At the same time, he emphasized that the "public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act."

At the hearing on June 28, 1983, S. 1324 was endorsed by Major General Richard Larkin, President of the Association of Former Intelligence Officers, and two members of the ~~ABA~~ American Bar Association's Standing Committee on Law and National Security, University of Virginia Law Professor John

Tab #1

p. 23

During Deputy Director McMahon's testimony, members of the Select Committee asked whether the bill might be a prelude to later requests for broader exemption from the FOIA for the intelligence community. Deputy Director McMahon replied that the CIA recognized "it cannot have total exemption and must seek something that protects our sources, yet at the same time lives with the spirit and the intent of Freedom of Information." The Chairman also described his communication with the President in which the President had indicated his support for this approach. The CIA subsequently advised the Committee that the Administration "has no intention to seek additional FOIA relief for the Agency."

Norton Moore, and former Associate Attorney General John Shenefield.[65] Mary Lawton, Counsel for Intelligence Policy in the Department of Justice, expressed "wholehearted support" for S. 1324 and indicated that the Department considered it appropriate to consider the CIA exemption "as separate and distinct from efforts to secure Government-wide amendments to the Freedom of Information Act itself."

Mark Lynch of the ACLU stressed three key principles that would prevent any meaningful loss of information currently available: (1) "all gathered intelligence" would continue to be subject to search and review; (2) U.S. citizens and permanent resident aliens could still use FOIA to request information concerning themselves; and (3) covert action operations (or "special activities") would continue to be accessible if their existence can be disclosed under the FOIA; (insert)

Other witnesses were Charles S. Rowe, editor and co-publisher of the Fredericksburg, Virginia, Free-Lance Star, testifying on behalf of the American Newspaper Publishers Association,

[65] At the time of the hearing, the ABA had not taken a a stand on a proposed FOIA Resolution. Subsequent to the hearing, on August 3, 1983, the ABA adopted a Resolution calling for "significant relief from the FOIA for the intelligence agencies," limiting judicial review in FOIA to "determining whether there is non-frivolous certification ... that the material has been properly classified," and a specific exemption for sources and methods. The ABA resolution also encouraged intelligence agencies to "experiment with modifications in current administrative practices for handling FOIA requests.

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Insert, p. ~~13~~ 24

and (4) information relevant to investigations of illegal or improper intelligence activities would be subject to search and review, even if the information were located in operational files.

Level Three

Insert 24+

ADDITIONAL REPORT LANGUAGE FOR PP. 24-25

Mr. Lynch went on to state, however, that the ACLU could not support the bill without certain amendments. Essential, ~~amendments~~ in his view, were amendments concerning ~~those to deal with~~ FOIA requests for ~~material on~~ information about operations that had been the subject of "abuse" investigations and ~~to maintain~~ judicial review of whether a file has been properly characterized as an operational file.

The press was represented by Charles S. Rowe, editor and co-publisher of the Fredericksburg, Virginia, Free-Lance Star, testifying on behalf of the American Newspaper Publishers Association, and Steven Dornfeld of Knight-Ridder Newspapers, National President of the Society of Professional Journalists. These witnesses seconded the concerns raised by the ACLU and emphasized the importance of obtaining specific commitments from the CIA regarding improved servicing of FOIA requests.

Dr. Anna Nelson, Professor of History at George Washington University, testified on behalf of the National Coordinating Committee for the Promotion of History. 26 Dr. Nelson called for a narrower definition of "operational files," a time limit on the duration of an operational file's designated status, and clarification of the bill's intent regarding policy memoranda and intelligence disseminated outside of designated files.

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EFFECT #2

Insert 24 B

After the public hearings, members of the Committee, formulated four principal modifications to the bill. In consultation with the CIA and some of the other witnesses, ~~In response to~~ Because of concern about the need to specify more clearly the standards for designation of operational files, bill language was revised to establish criteria for designation of files in each of the three affected CIA components. Access to information relevant to investigations of alleged illegal or improper intelligence activities was assured by adding a new proviso to the bill. In addition, a new section ~~was drafted to~~ provided for review of file designations at least every ten years in order to permit removal of file designations based on the historical value or other public interest in the materials. Finally, provision was made for judicial review in cases of alleged improper file designation or improper placement of documents solely in designated files. The Chairman incorporated all these revisions in an amendment in the nature of a substitute, which was adopted by the Select Committee on October 4, 1983. The amended bill was approved unanimously thereafter.

and Steven Dornfeld, National President of the Society of Professional Journalists. In addition, Dr. Anna Nelson, Professor of History at George Washington University, testified on behalf of the National Coordinating Committee for the Promotion of History. ~~Some of the witnesses suggested the need for amendments, specifically on the issue of judicial review.~~ a different tack

GENERAL STATEMENT

I. Introduction and Overview

The Committee considered and unanimously approved this bill as amended because it will relieve the CIA of a serious serious burden imposed by the Freedom of Information Act without diminishing the amount of meaningful information released to the public. After examining CIA's file systems and the type of documents released under FOIA, the Committee found that exempting certain sensitive operational files from search and review would not result in any significant loss of information to the public. This is because the CIA information releasable under the FOIA is [redacted] available outside these certain sensitive operational files. Insert 2

NATURE OF THE PROBLEM

The Committee first studied both the burden the FOIA places on the CIA and the delays that confront individuals seeking information from the CIA. Presently, the Agency is mandated under the Act and case law interpretation to search and review all sensitive operational records and, if the matter goes to Court, to justify the basis for exempting "each and every

INSERT #2, p. ~~14~~ 25

The Committee also determined that enactment of this bill would improve the timeliness and efficiency of CIA responses to requests for information under the FOIA.

segregable item." This procedure requires almost every sentence, certainly every paragraph, have a written explanation of the claimed exemption.

The Committee examined in depth how the search and review process works at CIA. The essential features of that process were described by CIA officials in the public hearings. The Committee received additional briefings, most at CIA Headquarters where presence at the physical location illuminated the oral explanations of the file system.

CIA records are maintained in numerous self-contained file systems with access to these systems limited to individuals having a legitimate need for access. Therefore, a search for documents responsive to an FOIA request can involve many separate file systems. This is especially true for documents stored in operational files which contain details of source relationships and ~~sophisticated~~ sensitive intelligence-gathering techniques. Broad FOIA requests penetrate this compartmentation, as the mere act of searching for responsive data ~~cris-crosses~~ may require examining the entire filing system. Once responsive documents are compiled, they must be reviewed by experienced intelligence officers, often an officer assigned to current substantive intelligence duties. Only an individual with the necessary training in intelligence and ~~possessing~~ knowledge of present and past operations can make the final, critical judgment about which information can

be released without jeopardizing the national security ~~classified information~~ or intelligence sources and methods. Typically, the result of this lengthy process is the release of no material or fragmented phrases or sentences. Nevertheless, painstaking attention to detail is required because of the possibility of de novo judicial review. If the withholding of information is challenged in court, detailed justifications are required for "each and every segregable item." This means that almost every sentence must be scrutinized and justified. Affidavits explaining the withholding of sensitive operational information must be prepared by intelligence officers having the knowledge and expertise to attest to the probable consequences of public release. The ultimate risk is that ~~in the effort to satisfy the de novo review standards imposed by the courts,~~ sensitive information can be released mistakenly and jeopardize an intelligence relationship or technique. CIA makes every effort to minimize that risk, at the price of lengthy delays. It is this process that is responsible for the two-three year backlog facing requestors seeking CIA information.

Insert pp 38-40

BENEFITS OF S. 1324

By eliminating search and review of these designated files, and where there are in court challenges, ~~also~~ eliminating ~~justification~~ the need to justify withholding of each segregable item, S. 1324 will enable the CIA to reduce substantially this backlog.

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This bill is also crucial from a national security perspective because it will provide better protection for intelligence sources and methods. Intelligence sources can be assured that under S. 1324 records identifying them and describing their secret activities will not be subject to search and review under the FOIA. Deputy Director of Central Intelligence John N. McMahon testified that the bill "will do away with the perception that a number of our sources have that they are threatened because of the present FOIA." He explained that the CIA's sources "will know that their identities are not likely to be exposed as a result of a clerical error and they will know that the same information will be handled in a secure and compartmented manner and not be looked at by people who have no need to know the information." Deputy Director for Operations John Stein agreed with this assessment and stressed the need to preserve "one of the cardinal rules of the intelligence business, namely the compartmentation of its information."

In considering this bill, the Committee balanced the benefits of an informed public with the national security needs for an effective intelligence service. Since the 1974 FOIA amendments, a substantial amount of information has been released to

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6 See f.n. 4, discussing the need for this legislation in viewing of recent D.C. Court of Appeals decisions jeopardizing the Director of Central Intelligence's statutory duty to protect sources and methods.

the public by the CIA as a direct or indirect result of the Act. Several examples illustrate the scope of this information and its importance for public understanding of the workings and decision-making processes of Government. Portions of or complete copies of the Director of Central Intelligence Directives issued from 1946 to 1976 have been released. These policy documents cover a wide range of issues relating to the management, coordination, and general conduct of intelligence activities. Substantially complete texts of significant National Intelligence Estimates have been declassified and released, including estimates relating to the October, 1962 Cuban missile crisis. Memoranda from the General Counsel to the Director on the legality of covert action operations have been made public. CIA documents on Director William Colby's efforts to forestall publication of news stories on the Glomar Explorer have been provided under FOIA , as have internal CIA studies of particular intelligence operations such as the Berlin Tunnel in the 1950s.

CIA officials have recognized that, within the spirit of what Congress intended FOIA to do for the American people, the Agency does possess information which the public may legitimately inquire about. Deputy Director McMahon's testimony reaffirmed categories which would remain subject to search and review:

(1) all intelligence disseminations, including raw intelligence reports direct from the field;

(2) all matters of policy formulated at Agency executive levels, even operational policy;

(3) information concerning those covert actions the existence of which is no longer classified;

(4) information concerning U.S. citizens and permanent resident aliens requested by such individuals about themselves; and

(5) information concerning any Agency intelligence activity that was improper or illegal or that was the subject of an investigation for alleged illegality or impropriety.

The acceptance by the Agency of the obligation to provide information to the public under FOIA is one of the linchpins of this legislation. The Act has played a vital part in rebuilding the American people's faith in their government, and particularly in agencies like the CIA that must necessarily operate in secrecy. In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.

The Committee believes that current FOIA requirements create greater burdens and risks for the CIA than is necessary to ensure full public access to significant information. But of equal importance to the Committee was that relieving CIA from the

permit releasable ... to be duplicated in designated and non-designated for

search and review burden does not deny public access to releasable information. This is so because of the characteristics of CIA file systems. For example, certain CIA operational files are the repository for documents generated in the course of the conduct and management of intelligence-gathering activities. Where there is collection from human sources, such documents concern development of potential sources, assessment of their value and likelihood of their their cooperation, arrangements to approach and contact the individual, and a wide variety of decisions and problems that may be involved in working with the source, such as determining compensation, testing bona fides, and resettlement after completion of service.

Other ~~These~~ administrative documents ~~also~~ discuss maintenance of cover, development and use of clandestine communications methods, selection of personnel for hazardous assignments, evaluation of success and failure, and assessment of vulnerabilities of individuals and techniques. Virtually all of this information is highly sensitive and properly classified; most is strictly compartmented. It is the type of information that has always been withheld from FOIA release by ~~either~~ exemption (b)(1) for classified information and ~~or~~ exemption (b)(3) for information pertaining to intelligence sources and methods.

Nevertheless, these operational files also contain other information that may in some cases be releasable under FOIA. One typical example is "raw" intelligence reports. Intelligence

information can be divided roughly into two categories: "finished" intelligence and "raw" intelligence. Finished intelligence is written by professional intelligence analysts to be read by policymakers. It ranges from National Intelligence Estimates coordinated among several agencies to research papers, studies, and regular publications all designed to convey assessments of intelligence ~~available~~ to the President, the NSC, the State and Defense Departments, and other agencies. Finished intelligence is primarily the responsibility of the Directorate of Intelligence, which stores all CIA finished reports in its files.

Raw intelligence is the information provided by a CIA source and written to protect the source's identity in order to permit dissemination to analysts and policymakers. Raw intelligence and information from other agencies form the basis for the finished intelligence reports written by analysts.

~~In exceptional cases, raw intelligence reports may also go directly to policymakers.~~ Unlike finished intelligence which is stored mainly in the files of the Director of Intelligence, raw intelligence reports are stored in both the files of ~~Director, Area of~~ Intelligence and Operations ~~files~~ Directorate of Directorate of the.

Frequently, copies of raw intelligence reports will be included in the same file as operational materials on the handling of the source; and information contained in the raw report may also be mentioned in documents that directly concern the handling of the source. Therefore, an FOIA request for information on a subject contained in raw intelligence reports triggers a search of the files of both Directorates.

Suppose information in a raw report can be declassified and released without jeopardizing the source. Under current FOIA requirements, CIA must search both the files on intelligence reports in the Directorate of Intelligence and the files on the handling of the source in the Operations Directorate. In addition, the CIA must review not only the intelligence report, but also any documents concerning the handling of the source that may include the same information. The result could be release of three substantially similar docments -- the declassified report filed in the Directorate of Intelligence, a copy of the same report filed in the Operations Directorate, and a third operational document heavily edited to delete any sensitive information that might endanger the source while still releasing the information duplicating the declassified intelligence report.

This example illustrates how raw intelligence could still be located and reviewed for declassification with less risk to the source and less delay in processing the request notwithstanding the exemptions in S. 1324. In this case the crucial feature of the CIA filing system is the practice of disseminating copies of raw intelligence reports for storage in the files of the Directorate of Intelligence.* Under current FOIA requirements, a requestor of intelligence reports readily accessible through the Directorate of Intelligence normally must wait until the longer search and review of Operations Directorate files is completed. ~~Even if the~~

Footnote, p. ~~22~~ 33

See the sectional analysis of section 701(a) for a discussion of exceptional cases where intelligence reports from very sensitive sources are returned for storage solely in Operations Directorate files.

~~review of Operations Directorate files is completed~~. Even if the request is limited to Directorate of Intelligence files, it must wait its turn behind previous requests that involve search and review of Operations Directorate files. Exempting the duplicative operational files from search and review would expedite the process with no loss of access to the desired information.

The same is true for information on policy issues, including operational policy matters, considered at CIA executive levels by the Director and Deputy Director of Central Intelligence, the Executive Director, the Comptroller, the General Counsel, the Deputy Director for Administration, and other senior CIA officials outside the Operations Directorate. For example, Deputy Director McMahon testified that documents handcarried to the Director or Deputy Director and returned to operational files for safekeeping are referenced in the CIA's Executive Registry, which logs all documents that go into or out of the Office of the Director and Deputy Director. All documents referenced in the Executive Registry will be subject to search and review. These documents could concern significant policy questions requiring the attention of the Director or Deputy Director. Such matters range from general policy directives to specific decisions approving particular operational activities.

The fact that raw intelligence reports and policy documents are accessible through index and retrieval systems located in the Directorate of Intelligence and the Office of the Director and Deputy Director has made it possible to refine the standards for designation of CIA operational files in the bill.

INSERT, p. ~~24~~ 34A

Specific statutory language guarantees that all nondesignated files remain subject to search and review, including any information in those files that was derived or disseminated from designated operational files.

Moreover, in recognition of the ~~wide~~ public interest in CIA "special activities" (or covert action operations), the bill contains a proviso that preserves existing law for access to information about any special activity the existence of which is not exempt from disclosure under the FOIA. The bill also takes account of the comparable public interest in investigations of allegedly illegal or improper intelligence activities. As amended, the bill ensures access for search and review to information in designated operational files that was ~~directly relevant~~ reviewed and relied upon ~~to the~~ during an investigation. Finally, as the CIA originally proposed in 1979, United States citizens and permanent resident aliens will continue to have the same ability to obtain information about themselves from operational files.

Assured access to the files of important CIA components such as the Directorate of Intelligence and the Office of the Director, and the provisions for access to particular types of information, effectively safeguard continued public access to releasable CIA information.

The 1979-82 CIA proposals would have established general standards for designation of files of any CIA component as operational files exempt from search and review. By contrast, S. 1324 limits such designation to certain specified categories files of only three CIA components -- the Operations Directorate, the Directorate for Science and Technology, and the Office of Security. This ensures by statute that the files of the Directorate of Intelligence analytic elements of the Director of Science & Technology and the Office of Director and Deputy Director, as well as other significant CIA components such as the Directorate for Administration and the Offices of Executive Director, Comptroller, General Counsel, and Inspector General, and staff elements of the Office of Security will remain subject to search and review. ~~Assured access to the files of these other components, effectively safeguards continued public access to releasable CIA information.~~ } insert

II. Findings and Purposes

The Committee has considered various proposals to modify the effects of the Freedom of Information Act on the CIA since 1980. The issues were discussed extensively at hearings on S. 2284, the National Intelligence Act of 1980, and on S. 1273 during 1981. The hearings on S. 1324, detailed questions answered for the record by CIA, and additional information provided in staff briefings and interviews with CIA officials have provided the Committee a full picture of the value of the information released under FOIA from CIA files, the impact of current FOIA requirements on the CIA, and the probable consequences of various proposals. On the basis of this record, the

Committee makes the following findings and recommends them to the Senate as Section 2(a) of S. 1324:

(1) The Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decision-making processes of their Government, including the Central Intelligence Agency;

(2) the full application of the Freedom of Information Act to the Central Intelligence Agency is, however, imposing unique and serious burdens on this agency;

(3) the processing of a Freedom of Information Act request by the Central Intelligence Agency normally requires the search of numerous systems of records for information responsive to the request;

(4) the review of responsive information in operational files which concerns sources and methods utilized in intelligence operations can only be accomplished by senior intelligence officers having the necessary operational training and experience;

(5) the Central Intelligence Agency must fully process all requests for information, even where the requestor seeks information which clearly cannot be released for reasons of national security;

(6) release of information out of operational files risks the compromise of intelligence sources and methods;

(7) since eight years of experience under the amended Freedom of Information Act has demonstrated that this time-consuming and burdensome search and review of operational files has resulted in the proper withholding of information contained in such files, the Central Intelligence Agency should no longer be required to expend valuable personnel and other resources in the search and review of information in these files;

(8) the full application of the Freedom of Information Act to the Central Intelligence Agency is perceived by individuals who cooperate with the United States Government as a means by which their cooperation and the information they provide may be disclosed;

(9) information concerning the means by which intelligence is gathered generally is not necessary for public debate on the defense and foreign policies of the United States, but information gathered by the Central Intelligence Agency should remain accessible to requesters, subject to existing exemptions under law;

(10) the organization of Central Intelligence Agency records allows the exclusion of operational files from the search and review requirements of the Freedom of Information Act while leaving files containing information gathered through intelligence operations accessible to requestors, subject to existing exemptions under law; and

(11) the full application of the Freedom of Information Act to the Central Intelligence Agency results in inordinate delays and the inability of the Agency to respond to requests for information in a timely fashion.

Therefore, the Committee reports S. 1324 to the Senate with a recommendation for favorable action thereon to achieve the following purposes set forth in Section 2(b) of the bill:

(1) to protect the ability of the public to request information from the Central Intelligence Agency under the Freedom of Information Act to the extent that such requests do not require the search and review of operational files;

(2) to protect the right of individual United States citizens and permanent resident aliens to request information on themselves contained in all categories of files of the Central Intelligence Agency; and

(3) to provide relief to the Central Intelligence Agency from the burdens of searching and reviewing operational files, so as to improve protection for intelligence sources and methods and enable this agency to respond to requests for information in a more timely and effective manner.

III. Actions to Improve CIA Responsiveness

Insert

The CIA advised the Committee there is a two-three year delay responding to FOIA requests where responsive documents are located in Operations Directorate files and review of documents is required. Moreover, responses to requests for information

located in other CIA components are affected by this delay. For example, documents originating in the Operations Directorate but located in another Directorate's files are referred to the Operations Directorate for classification review. Also, documents originating outside the Operations Directorate are usually sent to the operations Directorate for "coordination/review." Thus, the review necessary for documents found in the Operations Directorate is ~~the~~ primary cause of the overall CIA backlog in responding to FOIA requests. Because most requests ~~are~~ must be handled on a first in, first out basis, those involving hundreds of pages of responsive documents can delay the processing of far smaller cases in the queue.

The Operations Directorate backlog developed rapidly in the 1970s and has remained stable since. The number of FOIA requests has declined gradually from a peak of 1,608 in 1978 to 1,010 in 1982. Because many of these requests continue to be broad and, thus, time-consuming, it has not been possible for CIA to reduce the backlog even with a large number of experienced employees. Of 26 full-time positions assigned to FOIA processing in the Operations Directorate, ~~assigns~~ 22 are professionals with significant ~~substantive~~ operational CIA experience, ~~to FOIA/Privacy Act/Executive Order processing~~. The Operations Directorate effort consists of 71 work-years (equivalent to 71 full-time positions) out of a total CIA effort of 128 work-years

on FOIA/PA/EO duties during 1982.[6] Assignment of more personnel cannot significantly reduce the backlog in the Operations Directorate, because many declassification review decisions can be made only by officials having current responsibility for supervising intelligence operations.

The CIA projects a significant reduction in the Operations Directorate backlog within one year after enactment of the bill; it cannot predict how long it will take to eliminate the present backlog entirely. Cases that involve coordinating large numbers of documents (both within CIA and with other agencies) will continue to require considerable time to complete. The Agency expects to meet the 10-day standard of the FOIA rarely because the decentralized nature of CIA's file systems and necessary compartmentation of the intelligence process will continue to affect the timeliness of CIA efforts.

On July 5, 1982, there was a backlog of 1,546 FOIA requests, 1,104 Privacy Act requests, and 267 Executive Order mandatory review requests. CIA predicts that approximately 400 of these would be eliminated if the bill were enacted, and an additional 50 would be reduced in scope. On the other hand, CIA believes

[6] This figure includes full-time and part-time positions. The effort in other CIA components is as follows: Directorate of Administration (which houses the Information and Privacy Division having overall responsibility for all FOIA requests) 33 work-years, Office of the Director 18 work-years, Directorate of Intelligence 4 work-years, and Directorate for Science and Technology 2 work-years. CIA estimates that the services of some 100 professionals with a variety of intelligence disciplines are pulled away from regular duties to focus on FOIA matters.

that action on this bill could stimulate increased numbers and different kinds of FOIA requests in the expectation of more timely responses. Deputy Director McMahon said he suspects "that a number of well-meaning requestors when they know it is going to take two to three years to get an answer are discourged." The prospects of a reduced backlog could encourage an influx of requests and, thus, adversely affect working-off the backlog.

The Committee asked the CIA whether relief from search and review of operational files would permit shifting additional personnel to other FOIA processing duties. CIA's reply indicated that this might be done to the extent necessary to respond to the anticipated increase in FOIA requests. Currently, the search and review process in areas that do not involve Operations Directorate files "can generally be completed in several weeks, or at most in several months." According to the CIA, when the bill finally eliminates the backlog, the average response time is expected to be "several months or less."

In stating the purposes of this bill, the Committee expressly noted its intent "to enable this agency to respond to the public's requests for information in a more timely and efficient manner." With the enactment of S. 1324 the Committee expects that FOIA requesters will receive responses to their requests in a far more timely manner.

To achieve this objective, the Committee has requested the CIA to provide a specific program of administrative

measures the Agency will take to improve processing of FOIA requests following enactment of this legislation. The Committee believes that the essential elements of this program should include a detailed plan for eliminating the present backlog of FOIA requests and a description of the bill's impact on the Agency's ongoing efforts to process promptly those requests that do not require extensive search, review, and coordination and to expedite other requests under criteria established by the Justice Department.

With respect to the allocation of resources and personnel freed by the bill's impact on search and review requirements, the Committee requests the Agency to appropriately apply such resources and personnel to the task of eliminating the present backlog. To accomplish this, the Committee expects the Agency not to reduce its budgetary and personnel allocation for FOIA during the period of two years immediately following enactment of this legislation. The Committee will examine the question of budgetary and personnel allocation thereafter during consideration of the annual CIA budget authorization. Moreover, the Commmittee intends and the CIA agrees that resources freed by elimination of the backlog will be reallocated to augment resources for search and review of nondesignated files.

For its part, the Committee will regularly and closely scrutinize the CIA's implementation of each aspect of this program to insure that concrete results are achieved toward stated objectives. The Committee expects its oversight

performance will be facilitated by periodic progress reports and meetings in which Commmittee members will be apprised of the status of the agency's FOIA processing operations. To this end, the CIA will also provide the Committee with the annual statistical FOIA report it ~~presently~~ currently provides to the Senate. Finally, the Committee ~~intends to take such other actions as may be necessary to~~ will insure that all FOIA requests are responded to in a timely and courteous manner, ~~and treated with the courtesy required by the spirit, as well as the letter, of the FOIA.~~

NEXT-OF-KIN RESPONSIVENESS

This legislation does not give next-of-kin a right to request information about a deceased person. However, the Committee expects the CIA to treat generously bereaved families of CIA officers and agents who have died under suspicious circumstances. CIA assured the Committee it will search without restriction for documents where there is a request by next-of-kin for information on employees or agents who have died in service to their country. In addition, the CIA has advised the Committee that requests by next-of-kin for information about MIA's will be searched without restriction.

IV. Historians

The original version of this bill did not provide for the eventual removal of designation from files or portions of files that no longer warranted the special protection afforded by this Act. Professor Anna Nelson of George Washington University, speaking on behalf of the major associations of historians, noted

that permanent designation could result in important material never being made available to the public, even after the passage of time had eroded its sensitivity. General Richard Larkin, President of the Association of Former Intelligence Officers, responded to a question from the Chairman of the Committee by affirming that historical research and writing on the role of intelligence in American history was of "tremendous value in our educational system as well as in our political system."

The CIA assured the Committee that "the designation process will be a dynamic one, in which recommendations for removal of files from designated status will be made to the DCI whenever such a lifting of the designation is appropriate either because of the passage of time or for some other reason." Thus, the Deputy Director for Operations decided that the files of the OSS would not be designated. The CIA opposed any specific time limit on designations because such a limit would inevitably be arbitrary and would expose sensitive files to needless FOIA search and review.

After further consideration, the Committee adopted, with CIA's support, an amendment specifying that file designation must be reviewed at least once every ten years and setting forth basic criteria to be applied in this de-designation review.

The Committee, recognizing the necessity to protect sensitive information, expects that the Agency will de-designate operational files to the maximum extent possible consistent with the criteria.

V. Judicial Review

In the course of hearings on S. 1324, there was extensive discussion of whether the bill would or should provide for judicial review of the DCI's decision to designate a particular file as exempt from ~~judicial~~ search and review. In testimony before the Committee, CIA testified that "the designation by the DCI would not be judicially reviewable," because the bill gave the DCI authority to designate files at his sole discretion. CIA also expressed grave concern that judicial review could defeat the entire purpose of the bill if it required the court to inspect each and every ~~document in a designated file~~ designated file to determine if ~~the file~~ a document had been ~~improperly~~ placed in an improperly designated file or whether a ~~document~~ file had been ~~improperly placed in a~~ designated. ~~file.~~ CIA feared that this process could result in the court becoming mired in an item-by-item review of large ~~amounts~~ numbers of documents.

Other witnesses suggested the need for judicial review and disagreed with the CIA's interpretation of the bill. For example, Mark Lynch of the ACLU said there was "not really anything in the bill to indicate non-reviewability" and urged that the legislative history reject the CIA's interpretation. Summarizing the arguments in favor of judicial review, Mr. Lynch stated that "judicial review is absolutely essential, because I think that the public simply would not have confidence that the Agency had not succumbed to the temptation to go overboard in the designation of files as operational if there were no judicial review."

Mary Lawton, Counsel for Intelligence Policy in the Justice Department, testified that it would be "left to the court's own judgment as to whether there was an intent or not of Congress to preclude judicial review of the designation." As she understood the bill, it was "absolutely silent" and would neither invite nor bar judicial review of file designations. However, she also predicted that "courts would be very reluctant under...standing judicial precedent to engage in judicial review of the categorization of files of an agency by the head of the agency." She also predicted that the Justice Department would urge the courts to give "the greatest deference to the Executive branch." She also noted that "a legal argument could be made based on existing case law." Similarly, former Associate Attorney General John Shenefield said he thought "a fair interpretation of the language would allow one to conclude that judicial review is not as a practical matter available in the typical case."

After reviewing these arguments as to the meaning of the bill and advantages and disadvantages of judicial review, the Committee ~~finds that the bill should be~~ amended the bill to provide for judicial review in certain circumstances. The Committee does not intend that this amendment will require CIA to expose through litigation, via discovery or other means, the make up and contents of sensitive file systems of the Agency to plaintiffs. The Committee expects the procedure for judicial review in this bill will be entirely consistent with the objective of reducing the FOIA burden on the Agency. At the same time, the Committee believes this judicial

review procedure is necessary to guard against any improper designation of CIA files or improper inclusion of documents solely within particular designated files. The Committee is confident that the CIA will implement this bill in accordance with the statutory requirements. Therefore, the Committee does not anticipate that judicial review will be needed routinely.

SECTION BY SECTION ANALYSIS

SECTION 701. -- DESIGNATION OF FILES BY THE DIRECTOR OF CENTRAL INTELLIGENCE

Section 3 of the bill amends the National Security Act of 1947 by adding a new Title VII designating certain CIA files exempt from search and review under the Freedom of Information Act.

Section 701 authorizes the Director of Central Intelligence to designate certain operational files within the Directorate of Operations (DO), Directorate of Science & Technology (DS&T), and the Office of Security (OS) of the Central Intelligence Agency which store certain delineated categories of information. Such designation exempts these files from the FOIA provisions requiring publication or disclosure, or search and review related to publication or disclosure. The section also provides for exceptions to these exemptions to ensure that currently releasable CIA information remains accessible under the FOIA.

Section 701(a) -- Standards for Designation

Section 701(a) allows the Director of Central Intelligence, in furtherance of his statutory responsibilities to protect intelligence sources and methods, to designate certain operational files located in the DO, DS&T, and OS of the Central Intelligence Agency as exempt from the provisions of the Freedom of Information Act which require search, review, publication, or disclosure.

The term "operational files" describes files that store information about particular intelligence sources and methods. These kinds of files concern the intelligence process -- including information on the identities of and contacts with human intelligence sources, the various methods used to collect intelligence from human and technical sources, and day-to-day administration and management of sensitive human and technical intelligence activities. ~~They~~ These files should be distinguished from what may be called "intelligence product files" whose function is to store intelligence gathered from human and technical sources. It is the intent of the bill that for affected CIA components having both types of files -- that is, the Directorate of Operations and the Directorate for Science and Technology -- the term "operational files" does not apply to files whose function is to store gathered intelligence not stored in files of other CIA components that remain subject to search and review.

As introduced, the bill listed four separate categories of files that could be designated in any of the three affected CIA components.

After the Commmittee reviewed the functions of each component and CIA's plans for file designation, the bill was revised to specify the particular category (or categories) of files that may be designated in each component. The CIA emphasized and the Committee agrees that the basis for file designation should be the function of the file, i.e., the purpose for which the file has been established, rather than the specified contents of the file. Therefore, the language of the bill has been modified to refer to files which "document" certain operational activities of the CIA. The intent is that designated files will be those which serve as the repository for storage of documents generated in the course of conducting intelligence operations. The categories have been framed to concentrate on those CIA files that contain the most highly sensitive information that directly concerns intelligence sources and methods. Finally, the term "counterterrorism" has been deleted from the bill as introduced, because it is subsumed by the terms "foreign intelligence" and "counterintelligence" in Executive Order 12333 which governs the conduct of U.S. intelligence activities. Special activities or covert action is considered included in the term "files of the Directorate of Operations which document foreign intelligence or counterintelligence operations...."

Experience has shown that very little, if any, information of any meaningful benefit to the public has ever been released

from these operational files.* By exempting these categories of files from search and review requirements, endless hours will no longer be spent by experienced intelligence officers in a line-by-line review process that invariably results in little or no actual release of information. Exemption of these categories of files from search and review will also substantially limit the risk of human error resulting in the mistaken release of classified information, ~~which has on occasion been an unfortunate and damaging reality. Exemption of these categories of files will also~~ and assure those who cooperate with our country at great personal risk that the United States is able to maintain the confidentiality of such relationships and to safeguard the information entrusted to it.

The FOIA already exempts information concerning intelligence sources and methods from publication or disclosure. If properly classified, such information is exempt under section (b)(1) of the Act. Even if the information concerning sources and methods is unclassified, there is a separate exemption under section (b)(3) for such information so the DCI can fulfill his statutory duty under the Nat'l Security Act to protect

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* During 1982, the CIA released to the public, in whole or in part, material in twenty-eight percent of the FOIA cases processed. Although exact figures on the three affected CIA components are not readily available, the CIA estimates that no more than five percent or less of the material released came from those components. This small amount of material was itself fragmentary and seldom meaningful or significant.

The further effect of the provisions in section 701(a) are discussed separately below.

intelligence sources and methods. Nevertheless, in some circumstances the FOIA requirement to search and review a file or set of files can pose a risk to intelligence sources and methods. This is especially so with regard to "operational files" located in the Directorate of Operations, Directorate for Science and Technology, and Office of Security.

It is, however, extremely important to understand that exempting certain files from search, review, publication or disclosure does not constitute a total exclusion of CIA files from the processes of the FOIA. The effect of ~~subsection~~ section 701(a) will be that files located in any records system outside of these designated categories will remain subject to the search, review, publication, and disclosure requirements, as well as the exemptions, of the Act. In addition, under ~~subsection~~ section 701(c), all files will continue to be subject to the present provisions governing the handling of requests from citizens and resident aliens for information pursuant to the Privacy Act of 1974. about themselves

The ~~first~~ second category of files designated are those in the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems. The Committee examined the DS&T files systems and is satisfied it is possible to identify and designate only those files concerned with scientific and technical systems collections efforts. The Committee is also satisfied that over the past several years information contained

Shift to page 54 (before Tuesday 3 is discussed)

in the file systems which would be designated within the DS&T has been withheld from release under the FOIA pursuant to exemptions (b)(1) and (b)(3) of the Act. Therefore, there will be no withholding of information from the DS&T which would have otherwise been released under the current Act. Insert

The ~~second~~ first category of files listed in Section 701(a) allows designation of files in the Directorate of Operations which document foreign intelligence or counterintelligence operations ~~and~~ or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services. Special activities or covert action is included in this concept.

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~~This category is intended to exempt from search and review all files of the Directorate of Operations with one exception~~. The Committee reviewed the file systems of the DO and found that by far the majority of the file systems in this Directorate deal with the sources and methods used in our collection efforts. Again, the Committee is satisfied that information contained in these files systems has been protected from release to the public under exemptions (b)(1) and (b)(3) of the FOIA. However, there ~~is one exception of~~ are a few files systems within the DO which would not be designated under the terms of this bill because they do not ~~contain~~ document operations ~~information~~ but rather serve as the sole repository

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The Office of Security files that concern other personnel, physical, document, or communications security activities cannot be designated as operational files. For example, files on activities within the United States to protect the physical security of agency facilities will be ineligible for designation.

no such files exist

ties in with EO provisions requiring surveillance of Americans when physical security

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The files of the DS&T which store intelligence product and the results of intelligence analysis, such as scientific and technical intelligence assessments, will not be designated. Those files do not meet the standards for designation either as "operational files" or as files that document scientific and technical collection methods. To the extent the DS&T files on administrative, management, and policy matters involve both collection methods and analysis functions, such files will also be ineligible for designation.

For example,

for ~~the most highly~~ sensitive intelligence reports. Because of the sensitivity of the sources, a small number of intelligence reports prepared by the Operations Directorate are disseminated by memoranda and returned for storage solely in DO files. ~~Since these narrow categories of files within the Operations Director-ate do not deal with the sources and methods involved in intelligence collection operations these files cannot be designated by the Director of Central Intelligence.~~

To the extent that administrative, management, and policy documents are generated by and used within the Operations Directorate, but ~~and~~ are not disseminated outside the Directorate, the files that store those documents are intended to be designated because such materials directly concern sources and methods and contain little if any information releasable under the FOIA. However, any administrative, management, or policy documents disseminated outside the Directorate will remain subject to search and review because they will be contained in non designated files of the DO. This includes analyses of the prospects for and results of operations, as well as reports on their outcomes and instructions for their conduct. Similarly, Operations Directorate files on personalities and impersonal subjects are generally used by the Directorate as an integral part of the conduct of operations. Insofar as the information in ~~those~~ files is ever used by national policymakers or at Agency executive levels,

it will be duplicated in or accessible through the files of other Agency components.

Category three under subsection 701(a) exempts from search and review those files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources of the DO and the DS&T. After a review of the files systems contained in the Office of Security by staff, the Committee has satisfied itself that it is possible to identify those file systems within the Office of Security which deal with such investigations for the purpose of designation by the Director of Central Intelligence. The information contained in these files systems has been protected from release under exemptions (b)(1) and (b)(3) and therefore there is no loss of information to the public.

Proviso Regarding Disseminated Information

Section 701(a) contains two provisos. The first makes it clear that nondesignated files remain subject to search and review even if they include information derived or disseminated from designated operational files. The search and review of these nondesignated files include the information derived or disseminated from designated files. On the other hand, the fact that information from designated operational files has been included in the non-designated files shall not affect the designation of the originating operational files.

It is Committee's intent that documents entered into a non-designated file system, but returned for storage solely in designated files, will be considered part of the non-designated file system. Thus, if a request is made for information in non-designated files, and the records contained in those files indicate that a responsive document was entered into the non-designated files, that document will be retrieved from designated files. This search is not intended to affect the designation of the originating operational files.

Two examples illustrate the intent of the Committee. First, Deputy Director McMahon testified that documents handcarried to the Director or Deputy Director and returned to operational files for safekeeping are referenced in the CIA's Executive Registry, which logs all documents that go into or out of the Office of the Director and Deputy Director. All documents referenced in the Executive Registry will be subject to search and review. These documents deal with policy questions that receive the attention of the Director or the Deputy Director, ranging from general policy directives to approval of specific operational activities. For instance, unclassified CIA regulations prohibit the operational use of U.S. news media personnel by the CIA, unless an exception is authorized by the Director. The record of any authorization will remain subject to search and review through

the files of the Office of the Director, even if the authorizing document is returned for storage in files of the Operations Directorate.

The second example concerns sensitive intelligence reports that are disseminated to the Directorate of Intelligence and returned for storage solely in the files of the Operations Directorate. The files of the Operations Directorate that serve as the repository for these reports will not be designated as operational files. Moreover, if a sensitive intelligence report is entered into the Directorate of Intelligence file system and returned for storage solely in a designated operational file, that report will be considered part of the non-designated Directorate of Intelligence files and will be retrievable as if it continued to be stored in the non-designated files.

The first proviso is especially important for historians. Documents contained in non-designated files cannot be exempted from the search and review process because they discuss operational subject-matter or otherwise include information derived or disseminated from designated operational files. Historians are especially interested in operational policy documents disseminated to the President and the National Security Council. According to the CIA, all such documents are sent via the Office of the Director and thus will be accessible through the

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Appeals from initial CIA decisions in Executive Order 12356 mandatory review cases are processed by the CIA's Information and Privacy Division and considered by an Information Review Committee. The files of that division and committee will not be eligible for designation. Thus, the documents in question will be subject to review under the FOIA if they are subsequently requested pursuant to the FOIA rather than the Executive Order.

Executive Registry. It is the intent of the Committee that this procedure should not be modified. ~~Another consequence of the first proviso concerns~~ It should be noted that requests made by historians and others pursuant to Executive Order ~~12036~~ 12356 on national security information will not be affected by this legislation. This order includes a mandatory search and declassification review upon receipt of a request that describes "the documents or material containing the information with sufficient specificity to enable the Agency to locate it with a reasonable amount of effort." Section 3.4(a)(2). The CIA will continue to respond to such requests for information in designated operational files, and the Committee intends that CIA should do so in the same manner as it presently does.

Proviso regarding Special Activities

The second proviso in section 701(a) is an extremely important provision in the legislation. It is intended to make clear that designated operational files will be subject to search and review in response to an FOIA request when they contain information concerning a special activity the fact of whose existence or nonexistence ~~has become declassified~~ is not exempt from disclosure under the FOIA.

Current case law concerning FOIA requests for information about special activities holds that in certain circumstances, the CIA response can neither confirm nor deny the existence or non-existence of records responsive to an FOIA request relating to alleged special activity. The issue in these cases is whether the fact of the existence or non-existence of the special activity is currently and properly

properly classified. When classified, the CIA can only protect that classified fact by declining to even admit it possesses responsive documents. Hence, under present case law, once it is upheld that the existence or nonexistence of a special activity is properly classified, there is no requirement to search any files, including operational, for responsive documents. Furthermore, this is a response required to be made in specified circumstances under Section 3.4(f)(1) of Executive Order 12356. Nothing in this legislation is intended in any way to limit this ability of the CIA to utilize the "Glomar" response, so named as a result of Freedom of Information Act requests to the CIA concerning the Glomar Exploration ship.

However, courts have held that where an authorized Executive Branch official has acknowledged the existence or nonexistence of a specific special activity the existence of that special activity is no longer a classified fact exempt from disclosure under the provisions of the FOIA. In such a case, files containing information concerning an acknowledged special activity become accessible to an FOIA request, subject to search and review, and release using the current exemptions in the FOIA. This access to files containing information on an acknowledged special activity will continue under this proviso.

Under this proviso, a request triggering search and review for information on a special activity must establish that the existence of a specific covert action operation, such as the Bay of Pigs invasion or the CIA's role in replacement of the

Guatemala regime in the 1950s, is not exempt from disclosure under the FOIA. A request is not sufficient to require search and review of designated files if it refers to a broad category or type of covert action operations. For example, a request predicated on declassification of the existence of CIA covert efforts to counter Soviet influence in Western Europe during the 1950s would not be sufficiently specific. [~~Nor would~~ any other ~~request for~~ information concerning a broad category or type of ~~special~~ activities in a described area or time-frame] However, requesting information about a particular individual or organization officially acknowledged to have provided operational assistance in the conduct of special activities would be sufficiently specific, as would a request for information about an officially disclosed effort to influence foreign public opinion by promoting a specific viewpoint in support of U.S. foreign policy aims. These examples illustrate - specificity requirement and not the 'Glomarization' ~~standard~~. unclear what this means

It is not possible in unclassified legislative history to spell out all the relevant examples which would fully illustrate the meaning of the specificity requirement. Nevertheless, persons seeking to use this proviso as a means of securing access to information in designated files should understand that the purpose is to provide for search and review only ~~after~~ if the existence of a particular special activity ~~has been~~ may be disclosed under the FOIA. It is not intended to be an invitation to test the continued classification of broad categories or types of

special activities in order to gain access to designated files.

The determination of whether or not the fact of the existence or non-existence of a particular special activity is currently and properly classified will be treated in the same manner as any other classification determination by the CIA. The initial determination is made by Operational Directorate officers assigned to the Directorate's Information Management Staff in consultation with the concerned area division in the Directorate. They will consider, among other things, whether the fact of the existence of a special activity has been officially acknowledged by an authorized representative of the U.S. Government. Of course, the existence of an officially acknowledged special activity is ipso facto not classified. In any case where the fact of the existence of a particular special activity has is not properly ~~been~~ declassified, files containing information concerning that activity will become accessible to a FOIA request for information concerning that activity.

The term "special activity" as used in this proviso means any activity of the United States Government, other than activities intended solely for obtaining necessary intelligence, which is planned and executed so that the role of the United States is not apparent or acknowledged publicly, and functions in support of any such activity, but not including diplomatic activities. Over the years a variety of ~~definitions~~ terms have been used to regulate or authorize "special activities" or covert action operations. ~~To some extent it becomes a "you know it when you~~

Strike Accent

~~see it" standard, not conforming to any legalistic formula for the purposes of this proviso~~. The intent is that whatever was the prevailing CIA practice when the particular covert action operations were conducted should determine the meaning of the term "special activity" under this proviso.

strike Study

Proviso Regarding Improprieties

Under this bill as introduced, files within the OGC and the Office of Inspector General, which are the components within the CIA charged with investigating allegations of improper or illegal intelligence activities, could not be designated exempt from search and review. This intended to insure that material dealing with improper or illegal intelligence activities would continue to be accessible to search and review. Concern was expressed, however, that material relied upon in the course of an investigation of an illegal or improper intelligence activity would be located in a designated file rather than the files of the IG or the OGC and therefore this material would be exempt from search and review. Therefore, the Committee amended the second proviso to assure any such material will continue to be subject to search and review.

The Select Committee examined Agency practices for maintaining records of such investigations and found that when an investigation is conducted by the Inspector General's office, the General Counsel's office, or the Director's office, a great deal of the reviewed relevant information is copied and retained in the investigating office files, which are not

designated under the bill. When the amount of information reviewed is too voluminous to be reproduced, the report of the investigating office will frequently reference various files or portions of files which were reviewed and relied upon by the investigators. It is intended that all materials relevant to the subject matter of the investigation which were reviewed and relied upon by those who conducted the investigation will be subject to search and review, even if stored solely in designated files.

This provision applies to information reviewed and relied upon in investigations by the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of the CIA General Counsel, the Office of the CIA Inspector General, or the Office of the Director of Central Intelligence. In the case of the Office of the DCI, the Committee intends to include the Office of the Deputy DCI and the Executive Director. Reference to the Intelligence Oversight Board should include any future Presidentially authorized oversight body or Presidential Commission. Moreover, pursuant to Executive Order 12334 and predecessor orders, the Intelligence Oversight Board has been directed by the President to forward to the Attorney General reports received by the IOB concerning intelligence activities that the Board believes may be unlawful. The Committee intends that investigations conducted for the IOB by the Attorney General should be included within the scope of this provision.

Internal CIA investigations will be conducted by Agency components whose files cannot be designated under this bill. These components are the General Counsel's office, the Inspector General's office and the Director's office. The Select Committee has reviewed CIA procedures for initiating and conducting such investigations. Allegations of abuse or impropriety can originate either inside or outside of the Agency.

Allegations raised by Agency employees are directed either to the Office of the Inspector General or to the Office of General Counsel. CIA regulations require that Agency employees report any "past, current, or proposed CIA activities that might be construed to be illegal, improper, or questionable, or not authorized by applicable law, Executive Order, regulations, or ... any instructions received in any way [which] appear to be illegal, improper, or questionable." CIA regulations also specifically require employees to report possible violations of federal criminal law to the General Counsel. In addition, the Office of the Inspector General periodically inspects individual Agency components. These IG inspections include multi-disciplinary teams which thoroughly examine every aspect of a component's activities. The General Counsel also periodically requires his staff to advise him of any items that could require reporting by the General Counsel to the Intelligence Oversight Board under Executive Order 12333.

The Inspector General's staff substantively investigates all employee allegations of abuse or impropriety. When the allegation raises any question of illegality, the IG Staff either fully coordinates its investigation with the Office of General Counsel or refers the matter to the Office of General Counsel for reporting to the Attorney General under Executive Order 12333. Allegations which arise internally are never dismissed without some recorded inquiry. Hence, they are never determined to be "frivolous" in the same sense of not warranting a documented investigation.

Allegations made by persons outside the Agency almost exclusively arrive in the form of a letter received by the Agency Mail Room. (On occasion, complaints are received by telephone, sometimes anonymously.) If the letter contains allegations of abuse, impropriety, or illegality, but appear frivolous (e.g., "CIA is manipulating my brain waves," or an actual and recent example, "CIA is making me fat"), there may not be an investigation or response. If the letter does not appear frivolous, it is forwarded to the Office of Inspector General or the Office of General Counsel, as appropriate, for action. The apparently frivolous letters are individually reviewed by a supervisory CIA official. An allegation will be deemed frivolous and closed without any investigation only where the writer has sent previous letters and the allegation is preposterous on its face. If Agency records reflect the

CIA has had contact with the individual making the allegation and the individual is not a prior correspondent of known frivolity, the allegation is never determined to be frivolous, but is forwarded to the Inspector General or General Counsel, as appropriate. In cases of repeated and frivolous correspondence, the letter may be destroyed and no record made of it. In all other cases, a record is made and retained in files that will not be designated under this bill.

The scope of investigations is determined by the Inspector General, General Counsel, or other investigating body. Consequently, the scope of information concerning the subject of an investigation accessible for search and review under the bill is contingent on the scope of the initial inquiry. If the records of an investigating body indicate that only a representative sample of documents in a specific file was examined but that particular entire file was considered directly relevant to the subject of the investigation, such file shall be accessible for search and review.

There may be rare instances in which a file was not reviewed in connection with the investigation because it was withheld or overlooked through inadvertence. To the extent that such file contains information relating to the subject of the investigation but not reviewed and relied upon by the investigating body, it can become accessible if the investigation is reopened or if the file is examined in a new

investigation. For example, if it is established that a file was deliberately withheld, that matter would itself become a subject of investigation, and the records of that investigation would become accessible under the bill. Additionally, the Committee intends that where there is a prima facie showing that a document was withheld or overlooked through inadvertance, the provisions for judicial review of improper placement of records under subsection 701(e) apply. Certainly the Committee expects and the CIA agrees that if it discovers on its own that a document was inadvertantly overlooked or deliberately withheld, it will review such document under the provisions of FOIA. However, the proviso is not intended to open up all designated files or even an entire file because portions contain information relevant to an activity that was the subject of an investigation. The C's intent is rather that only those directly relevant files or portions of files should be reviewed.

SECTION 701(b)

Section 701(b) is intended to ensure that no provision of law enacted after the date of enactment of the Intelligence Information Act of 1983 repeals or modifies section 701 unless such subsequently enacted provision does so by specific citation and repeal or modification.

SECTION 701(c) -- FIRST PERSON REQUESTS

Section 701(c) is intended to ensure that, this legislation shall not effect the processing of proper requests by United States citizens or permanent resident aliens for information concerning themselves made either under FOIA or the Privacy Act of 1974 (5. U.S.C. 552(a)). According to the CIA, as of July 5, 1983, there were 1,104 pending requests for information under the Privacy Act. In calendar year 1982, the CIA received 1,016 Privacy Act requests.

While subsection (j)(1) of the Privacy Act authorizes the CIA Director to promulgate rules to exempt from portions of the Act "any system of records," this authority has only been narrowly used to the extent necessary to protect its security methods, intelligence sources and methods, and relationships with other public agencies or foreign services. (See, 32 C.F.R. 1901.61). The Committee understands that the CIA has no intention of expanding its use of this broad exemption authority.

This provision does not permit organizations to require search and review of designated files for information about themselves or their members. This accords with the principles embodied in the Privacy Act, which applies only to information concerning individuals. The Committee has determined that CIA should not be required to search operational files for information concerning a requesting U.S. organization. Such search could run the gamut of operational files because U.S. organizations are frequently referred to incidentally in Agency operational documents. Reference to a U.S. organization in an operational document does not necessarily indicate that the organization was targeted by or involved in a CIA operation. Because of the volume of incidentally acquired information, granting domestic organizations the same access as individuals would resurface the problems this bill is designed to alleviate -- risks to sources and methods by breaking down compartmentation of operational files and commitment of operations officers to non-productive FOIA review.

Since individual officers and members of domestic organizations have the right to request information from designated files about themselves, and that information sometimes refers to the organization, the Committee believes the bill strikes the proper balance in this area.

SUBSECTION 701(d)(1)

Subsection 701(d)(1) mandates that the Agency shall promulgate regulations implementing section 701. These regulations will require that the appropriate Deputy Directors or Office Heads identify categories of files for designation, explain the basis for their recommendation, and set forth procedures governing the inclusion of documents within designated files. The recommended designations, which will include the explanation for the designation and the procedures for including documents in the designated files, will be forwarded to the DCI for approval. The Committee does not intend that the implementing regulations require the appropriate Deputy Directors or Office Heads to identify or list each file to be designated. Instead, the Committee intends that the implementing regulations will require that the appropriate Deputy Directors or Office Heads provide a description specific enough so that the purpose for which the categories of files were created could be identified. Because the description of certain specific categories of CIA files must by necessity be classified, the subsection specifically provides that portions of the recommended designation may be classified.

INSERT, p. ~~59~~ 70--

The procedures for including documents in designated files are especially important to ensure proper implementation of the provisions of the bill and the DCI's designations. If a document is prepared in a CIA component that does not have designated files, that document must not be stored solely in designated files where it would be exempt from search and review under the FOIA. In CIA components having designated files but also having functions that do not require file designation -- as is the case with DO sensitive source intelligence report files, DS&T analysis files, and most Office of Security functions -- documents produced in the performance of those nonoperational functions must remain subject to search and review.

As is current practice in other areas, the ~~Select~~ Committee ~~on Intelligence~~ expects to be informed of proposed designations prior to their effective date. This arrangement should apply to new designations, expansions of previous designations, and reorganizations or file system modifications that affect existing designations. The proposed designations will become effective after reporting to the Intelligence Committees and written approval of the DCI.

see separate page

SUBSECTION 701(d)(2)

Subsection 701(d)(2) requires a determination of "whether such designation may be removed from any category of files or any portion thereof." The phrase "or any portion thereof" is in no way intended to require the review and removal from designation of individual documents contained within designated files. It is intended, however, to provide for the de-designation of an individual file, or files, which belong to a larger category of designated files. For example, the file on a specific intelligence operation might be removed from designation even though contained in a larger designated category of project files which continue to merit designation. The Committee does not intend for the continuing sensitivity of particular files within a designated category to serve as a basis for retaining the designation of those files within the designated category that meet the criteria for removal from designation.

The first criterion to be applied in determining whether designation may be removed is "the historical value or other public interest in the subject matter of the particular category of files or portion thereof." The Committee intends this criterion to be applied solely by the CIA, but that the CIA should consult with and take into account the recommendations of persons who could provide an independent evaluation of what topics meet this criterion. Such persons could include the

and outside historians

CIA Historian, historians in the Departments of State and Defense, the Archivist of the United States. "Public interest" in materials would include interest expressed by journalists and authors and the contribution that such materials could make to an understanding of intelligence, foreign policy, and international developments.

The second criterion to be applied in determining whether designation of a file may be removed is "the potential for declassifying a significant part of the information contained therein." Its application will require the consideration of factors such as the sensitivity of the operation, the likelihood of damaging foreign relations or revealing sources or methods, and the passage of time. Some materials could lose their sensitivity even before the passage of ten years and the Committee intends that CIA regulations provide for the possibility of de-designation review before the minimum scheduled 10-year review. It is much more likely, however, that files on an operation would remain designated for at least twenty-to-thirty years. The Committee expects ~~most~~ many files ~~to~~ be removed from designation by the time they are forty years old, but recognizes the CIA's need for flexibility in handling especially sensitive materials.

SUBSECTION 701(e)(1)

Subsection 701(e)(1) provides for judicial review where a complaint alleges that the Agency has improperly withheld records because of improper designation of files or improper placement of records solely in designated files. Under this subsection, the court would have jurisdiction to review the Agency's regulations implementing subsection 701(a) of this Act to determine if those regulations conform to the statutory criteria set forth in that subsection for designating files. Except in the situation described below, the courts should review only the regulations requiring the appropriate Deputy Directors or Office Heads to designate categories of files, and not the actual recommended designations, the explanation for those designations or the procedures for the inclusion of documents in designated files. In reviewing these regulations, the Committee expects the court will uphold the validity of those regulations if there is a rational basis to conclude that the implementing regulations conform with the statutory criteria for designating files.

The Committee recognizes there may be situations in which a plaintiff can make a showing that a particular file was improperly designated or a document improperly placed solely in designated files. The judicial review provision provides for such review only if the complaint is supported by an

affidavit, based on personal knowledge or otherwise admissible evidence, which makes a prima facie showing, that (i) a specific file containing the records requested was improperly designated, or (ii) the records requested were improperly placed solely in designated files. The reason for requiring that a complaint be accompanied by an affidavit based on "personal knowledge or otherwise admissible evidence, which makes a prima facie showing" is to insure that the courts conduct review only when such prima facie evidence exists that CIA files or documents have been improperly exempted from search and review. Should a complaintant present such evidence, the court would have jurisdiction to determine whether the Agency has improperly designated a file or improperly placed records solely in a designated file.

In conducting such review in an action in which the complaintant has made a prima facie showing, the Court shall order the Agency to submit a sworn response. Such response shall consist of an affidavit setting forth the justification for designating the file containing the records requested or for filing such records solely in designated files and shall have attached to it the explanation required in subparagraph (d)(1)(B) of this section which serve as the basis for the designation or the procedures required in subparagraph (d)(1)(c) of this section which govern the inclusion of documents in the designated files. The Committee believes that review of these materials as well as the submissions of the plaintiff will in almost all

cases be sufficient to enable the court to determine whether the Agency has improperly designated a file or improperly placed records solely in designated files. However, the court, after reviewing the Agency's affidavit, may require additional affidavits. The bill does not deprive the court of its authority to order the Agency to attach to its additional affidavits, as part of its sworn response, the requested Agency records in extraordinary circumstances where essential to determine whether such records were improperly placed solely in designated files. Because the Committee anticipates that the Agency submissions may contain classified information, the Committee expects the court to permit such submissions to be made on an in camera, ex parte basis, when necessary to protect classified information. the Committee does not anticipate the court's review to include examining the file in question or conducting any other form of discovery.

Should the court find, after examining the Agency's affidavits and regulations, that there is no rational basis to conclude that the regulations implementing subsection 701(a) of this Act conform to the statutory criteria set forth in that subsection for designating files, or that the Agency has improperly designated a file or improperly placed records solely in designated files, the court shall order the Agency to search the particular designated file for the records which are the subject of the FOIA request and to review such records under the provisions of the FOIA. It is the intent of this

Committee that this be the sole remedy for either non-conformance of the regulations with the statute, for improper placement of records solely in designated files, or improper designation of a file. If the court finds that the Agency has improperly designated a file or improperly placed records solely in designated files, the court shall order the Agency to search the particular designated file for the records which are the subject of the FOIA request.

SUBSECTION 701(e)(2)

Subsection 701(e)(2) provides that judicial review of CIA application of its regulations pursuant to subsection 701(d)(2) "shall be limited to determining whether the Agency considered the criteria set forth in such regulations." A court could thus ascertain whether proper procedures had been followed, but would not be allowed to second-guess the CIA's substantive judgment regarding whether a particular file or portion thereof met the de-designation criteria outlined above.

The Administration supports S. 1324, as reported by the Senate Select Committee on Intelligence with amdendments. This position was reported to the Chairman in the following letter signed by Director of Central Intelligence, William J. Casey:

COST ESTIMATE OF CONGRESSIONAL BUDGET OFFICE

TABLE OF CONTENTS

Section 3(b) of S. 1324 sets forth an amendment to the table of contents at the beginning of the National Security Act of 1947 so as to reflect new section 701 of the new title VII.

EFFECTIVE DATE

Section 4 of the "Intelligence Information Act of 1983" sets forth the effective date of the proposed amendment to the National Security Act so that it will apply retroactively to all requests for records that are, on the effective date of the amendment, pending before the Central Intelligence Agency. This would include those requests on administrative appeal and any pending initial requests that had not been finally processed. The agency could, however, as a matter of administrative discretion, decide to complete the processing of any such requests which had been substantially completed. The amendment would also apply to any case or proceeding, including appeals, pending before any court of the United States on the effective date of the amendment. This would result in the dismissal by the courts of all such legal proceedings, or portions thereof, for want of jurisdiction, where the documents in question are located in designated operational files and not subject to search and review under the terms of section 701. Without retroactive applicability, it would take years for the relief envisioned by the amendment.

CHANGES IN EXISTING LAW MADE BY THE BILL

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in the existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

(61 Stat. 497) Chapter 343

AN ACT To promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947."

TABLE OF CONTENTS

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TITLE VII-RELEASE OF REQUESTED INFORMATION TO THE PUBLIC BY THE CENTRAL INTELLIGENCE AGENCY

Designation of Files by the Director of Central Intelligence as Exempt from Search, Review, Publication, or Disclosure

Sec. 701. (a) In furtherance of the responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure as set forth in section 102(d)(3) of this Act (50 U.S.C. 403(d)(3)) and section 6 of the Central Intelligence Agency Act of 1949 (59 U.S.C. 403g), operational files located in the Directorate of Operations, Directorate for Science and Technology, and Office of Security of the Central Intelligence Agency shall be exempted from the provisions of the Freedom of Information Act which require publication or disclosure, or search or review in connection therewith, if such files have been specifically designated by the Director of Central Intelligence to be--

(1) files of the Directorate of Operations which document foreign intelligence or counter-intelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services; or

(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems;

(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources:

Provided, however, That nondesignated files which may contain information derived or disseminated from designated operational files shall be subject to search and review. The inclusion of information from operational files in nondesignated files shall not affect the

designation of the originating operational files as exempt from search, review, publication, or disclosure: *Provided, further,* That the designation of any operational files shall not prevent the search and review of such files for information concerning any special activity the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act or for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive in the conduct of an intelligence activity.

(b) The provisions of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of this section and which specifically cites and repeals or modifies its provisions.

(c) Notwithstanding subsection (a) of this section proper requests by United States citizens, or by aliens lawfuly admitted for permanent residence in the United States, for information concerning themselves, made pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) or the Freedom of Information Act (5 U.S.C. 552), shall be processed in accordance with those Acts.

(d) The Director of Central Intelligence shall promulgate regulations to implement this section as follows:

(1) Such regulations shall require the appropriate Deputy Directors or Office Head to:

(A) specifically identify categories of files under their control which they recommend for designation;

(B) explain the basis for their recommendations; and

(C) set forth procedures consistent with the statutory criteria in subsection (a) which would govern the inclusion of documents in designated files. Recommended designations, portions of which may be classfied, shall become effective upon written approval of the Director of Central Intelligence.

(2) Such regulations shall further provide procedures and criteria for the review of each designation not less than once every ten years to determine whether such designation may be removed from any category of files or any portion thereof. Such criteria shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portion thereof and the potential for declassifying a significant part of the information contained therein.

(e)(1) On the complaint under section 552(a)(4)(B) of title 5 that the Agency has improperly withheld records because of improper designation of files or improper placement of records solely in designated files, the court's review shall be limited to a determination whether thee Agency regulations implementing subsection (a) conform to the statutory criteria set forth in that subsection for designating files

unless the complaint is supported by an affidavit, based on personal knowledge or otherwise admissable evidence, which makes a prima facie showing, that (A) a specific file containing the records requested was improperly designated; or (B) the records requested were improperly placed solely in designated files. If the courts find a prima facie showing has been made under this subsection, it shall order the Agency to file a sworn response, which may be filed in camera and ex parte, and the court shall make its determination based upon these submissions and submissions by the plaintiff. If the court finds under this subsection that the Agency's regulations implementing subsection (a) of this section do not conform to the statutory criteria set forth in that subsection for designating files, or finds that the Agency has improperly designated a file or improperly placed records solely in designated files, the Court shall order the

Agency to search the particular designated file for the requested records in accordance with the provisions of the Freedom of Information Act and to review such records under the exemptions pursuant to section 552(b) of title 5. If at any time during such proceedings the CIA agrees to search designated files for the requested records, the Court shall dismiss the cause of action based on this subsection.

(e)(2) On complaint under section 552(a)(4)(B) of title 5 that the Agency has improperly withheld records because of failure to comply with the regulations adopted pursuant to subsection (d)(2), the Court's review shall be limited to determining whether the Agency considered the criteria set forth in such regulations.