

CIA INFORMATION ACT

HEARING
BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 5164

TO AMEND THE NATIONAL SECURITY ACT OF 1947 TO REGULATE
PUBLIC DISCLOSURE OF INFORMATION HELD BY THE CENTRAL IN-
TELLIGENCE AGENCY, AND FOR OTHER PURPOSES

MAY 10, 1984

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CIA INFORMATION ACT

THURSDAY, MAY 10, 1984

HOUSE OF REPRESENTATIVES,
GOVERNMENT INFORMATION, JUSTICE,
AND AGRICULTURE SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2203, Rayburn House Office Building, Hon. Glenn English (chairman of the subcommittee) presiding.

Present: Representatives Glenn English, Gerald D. Kleczka, Thomas N. Kindness, and Tom Lewis.

Also present: Robert Gellman, counsel; Euphon Metzger, clerk; and John J. Parisi, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN ENGLISH

Mr. ENGLISH. The hearing will come to order.

The subject of today's hearing is H.R. 5164, the Central Intelligence Agency Information Act. H.R. 5164 was introduced by Congressman Mazzoli, chairman of the Legislation Subcommittee of the House Committee on Intelligence. The bill was jointly referred to the Intelligence Committee and the Government Operations Committee.

Last month, H.R. 5164 was ordered reported by the Intelligence Committee, and a report filed on May 1. A similar bill, S. 1324, was passed by the Senate last year.

[The bill, H.R. 5164, follows:]

98TH CONGRESS
2D SESSION

H. R. 5164

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 1984

Mr. MAZZOLI (for himself, Mr. BOLAND, Mr. ROBINSON, and Mr. WHITEHURST) introduced the following bill; which was referred jointly to the Permanent Select Committee on Intelligence and the Committee on Government Operations

A BILL

To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Central Intelligence
4 Agency Information Act".

5 SEC. 2. (a) The National Security Act of 1947 is
6 amended by adding at the end thereof the following new title:

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1 "TITLE VII—PROTECTION OF OPERATIONAL
2 FILES OF THE CENTRAL INTELLIGENCE
3 AGENCY

4 "EXEMPTION OF CERTAIN OPERATIONAL FILES FROM
5 SEARCH, REVIEW, PUBLICATION, OR DISCLOSURE

6 "SEC. 701. (a) Operational files of the Central Intelli-
7 gence Agency may be exempted by the Director of Central
8 Intelligence from the provisions of the Freedom of Informa-
9 tion Act (5 U.S.C. 552) which require publication or disclo-
10 sure, or search or review in connection therewith.

11 "(b) For the purposes of this title the term 'operational
12 files' means—

13 "(1) files of the Directorate of Operations which
14 document the conduct of foreign intelligence or coun-
15 terintelligence operations or intelligence or security lia-
16 sion arrangements or information exchanges with for-
17 eign governments or their intelligence or security serv-
18 ices;

19 "(2) files of the Directorate for Science and Tech-
20 nology which document the means by which foreign in-
21 telligence or counterintelligence is collected through
22 scientific and technical systems; or

23 "(3) files of the Office of Security which document
24 investigations conducted to determine the suitability of

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1 potential foreign intelligence or counterintelligence
2 sources;
3 except that files which are the sole repository of disseminated
4 intelligence are not operational files.

5 “(c) Notwithstanding subsection (a) of this section,
6 exempted operational files shall continue to be subject to
7 search and review for information concerning—

8 “(1) United States citizens or aliens lawfully ad-
9 mitted for permanent residence who have requested in-
10 formation on themselves pursuant to the provisions of
11 the Freedom of Information Act (5 U.S.C. 552) or the
12 Privacy Act of 1974 (5 U.S.C. 552a);

13 “(2) any special activity the existence of which is
14 not exempt from disclosure under the provisions of the
15 Freedom of Information Act (5 U.S.C. 552); or

16 “(3) the specific subject matter of an investigation
17 by the intelligence committees of the Congress, the In-
18 telligence Oversight Board, the Department of Justice,
19 the Office of General Counsel of the Central Intelli-
20 gence Agency, the Office of Inspector General of the
21 Central Intelligence Agency, or the Office of the Di-
22 rector of Central Intelligence for any impropriety, or
23 violation of law, Executive order, or Presidential direc-
24 tive, in the conduct of an intelligence activity.

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1 “(d)(1) Nonoperational files which contain information
2 derived or disseminated from exempted operational files shall
3 be subject to search and review.

4 “(2) The inclusion of information from exempted oper-
5 ational files in nonoperational files shall not affect the exemp-
6 tion under subsection (a) of this section of the originating
7 operational files from search, review, publication, or disclo-
8 sure.

9 “(3) Records from exempted operational files which
10 have been disseminated to and referenced in nonoperational
11 files and which have been returned to exempted operational
12 files for sole retention shall be subject to search and review.

13 “(e) The provisions of subsection (a) of this section shall
14 not be superseded except by a provision of law which is en-
15 acted after the date of enactment of subsection (a), and which
16 specifically cites and repeals or modifies its provisions.

17 “(f) Whenever any person who has requested agency
18 records under the Freedom of Information Act (5 U.S.C.
19 552) alleges that the Central Intelligence Agency has im-
20 properly withheld records because of failure to comply with
21 any provision of this section, judicial review shall be available
22 under the terms set forth in subparagraph 552(a)(4)(B) of title
23 5, United States Code, except that—

24 “(1) information specifically authorized under cri-
25 teria established by an Executive order to be kept

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1 secret in the interest of national defense or foreign re-
2 lations which is filed with, or produced for, the court
3 by the Agency shall be examined ex parte, in camera
4 by the court;

5 “(2) the court shall, to the fullest extent practica-
6 ble, determine issues of fact based on sworn submis-
7 sions of the parties;

8 “(3) when a complaint alleges that requested
9 records were improperly withheld because of improper
10 placement solely in exempted operational files, the
11 complainant shall support such allegation with a sworn
12 written submission, based upon personal knowledge or
13 otherwise admissible evidence;

14 “(4)(A) when a complainant alleges that requested
15 records were improperly withheld because of improper
16 exemption of operational files, the Agency shall meet
17 its burden under subparagraph 552(a)(4)(B) of title 5,
18 United States Code, by demonstrating to the court by
19 affidavit that exempted files likely to contain respon-
20 sive records currently perform the functions set forth in
21 subsection (b) of this section; and

22 “(B) in making its determination under subpara-
23 graph (A) of this paragraph, the court may not order
24 the Agency to review the content of any operational
25 file or files unless the complainant disputes the Agen-

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1 cy's showing with a sworn written submission based on
2 personal knowledge or otherwise admissible evidence;

3 "(5) in proceedings under paragraphs (3) and (4)
4 of this subsection the parties shall not obtain discovery
5 pursuant to rules 26 through 35 of the Federal Rules
6 of Civil Procedure, except that requests for admission
7 may be made pursuant to rules 26 and 36;

8 "(6) if the court finds under this subsection that
9 the Agency has improperly withheld requested records
10 because of failure to comply with any provision of this
11 section, the court shall order the Agency to search and
12 review the appropriate exempted operational file or
13 files for the requested records and make such records,
14 or portions thereof, available in accordance with the
15 provisions of the Freedom of Information Act (5
16 U.S.C. 552), and such order shall be the exclusive
17 remedy for failure to comply with this section; and

18 "(7) if at any time following the filing of a com-
19 plaint pursuant to this subsection the Agency agrees to
20 search the appropriate exempted operational file or
21 files for the requested records, the court shall dismiss
22 the claim based upon such complaint.

23 "DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

24 "SEC. 702. (a) Not less than once every ten years, the
25 Director of Central Intelligence shall review the exemptions

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1 in force under subsection (a) of section 701 of this Act to
2 determine whether such exemptions may be removed from
3 any category of exempted files or any portion thereof.

4 “(b) The review required by subsection (a) of this section
5 shall include consideration of the historical value or other
6 public interest in the subject matter of the particular category
7 of files or portions thereof and the potential for declassifying
8 a significant part of the information contained therein.

9 “(c) A complainant who alleges that the Agency has
10 improperly withheld records because of failure to comply with
11 this section may seek judicial review in the district court of
12 the United States of the district in which any of the parties
13 reside, or in the District of Columbia. In such a proceeding,
14 the court’s review shall be limited to determining (1) whether
15 the Agency has conducted the review required by subsection
16 (a) of this section within ten years of enactment of this Act or
17 within ten years after the last review, and (2) whether the
18 Agency, in fact, considered the criteria set forth in subsection
19 (b) of this section in conducting the required review.”

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

“TITLE VII—PROTECTION OF OPERATIONAL FILES OF THE
CENTRAL INTELLIGENCE AGENCY

“Sec. 701. Exemption of certain operational files from search, review, publication,
or disclosure.

“Sec. 702. Decennial review of exempted operational files.”

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1 SEC. 3. The Director of Central Intelligence, in consul-
2 tation with the Archivist of the United States, the Librarian
3 of Congress, and appropriate representatives of the historical
4 discipline selected by the Archivist, shall prepare and submit
5 by June 1, 1985, to the Permanent Committee on Intelli-
6 gence of the House of Representatives and the Select Com-
7 mittee on Intelligence of the Senate a report on the feasibility
8 of conducting systematic review for declassification and re-
9 lease of Central Intelligence Agency information of historical
10 value.

11 SEC. 4. The amendments made by section 2 shall be
12 effective upon enactment of this Act and shall apply with
13 respect to any requests for records, whether or not such re-
14 quest was made prior to such enactment, and shall apply to
15 all civil actions not commenced prior to February 7, 1984.

Mr. ENGLISH. This legislation exempts selected CIA files from search and review under the Freedom of Information Act. The theory behind the bill is that these files contain information that is exempt from disclosure under the FOIA.

By exempting files from unproductive search and review, the backlog of FOIA requests at the CIA will be reduced, FOIA requests will be processed more rapidly, and the security of CIA information will be protected. At the same time, no information now available to a requester will be removed from public availability. These are worthy goals, and our purpose here today is to find out if the bill lives up to these goals.

I would like to make clear at the outset that the need for secrecy in the conduct of intelligence operations is not at issue today. No one disputes that secrecy has its place in intelligence activities. The Freedom of Information Act has always recognized that the Government has a legitimate need for secrecy to protect our national security interests.

At the same time, however, intelligence agencies do possess information about which the public can legitimately inquire and which is relevant to public debate. The House Intelligence Committee report on H.R. 5164 lists examples of this type of information. These include:

Directives on the management, coordination, and general conduct of intelligence activities;

National intelligence estimates, including estimates relating to the 1962 Cuban missile crisis;

Memoranda from the CIA General Counsel on the legality of covert action operations;

Records concerning CIA efforts to forestall publication of news stories on the Glomar Explorer; and

Internal CIA studies of particular intelligence operations, such as the Berlin tunnel operation in the 1950's.

It is our responsibility in this committee and in the Congress to balance the national security needs for an effective intelligence service and the benefits of an informed public. Finding the appropriate balance between these two important values is our ultimate goal here today.

Mr. Kindness.

Mr. KINDNESS. Thank you, Mr. Chairman.

I welcome all of our witnesses today. A little over 4 years ago, this subcommittee held a couple of days of hearings on legislation similar in concept to H.R. 5164. At that time, I said that "The subject of CIA compliance with the Freedom of Information Act has been one of continuing congressional interest in recent years." That statement is just as true today as it was then. Congress has had an ongoing interest in the application of the Freedom of Information Act to the work of the CIA and should continue that.

The experience of the Agency and of those who have sought to obtain information from the Agency under the Freedom of Information Act has been a great teacher. Four years ago I don't believe that any of us, either we in the Congress or the CIA or the ACLU and others who request information, knew quite how to adjust the CIA's obligations under the act.

Just given the status of H.R. 5164, it would appear that we are closer to a balanced solution than ever before. But as the committee with principal jurisdiction over the Freedom of Information Act, we have an obligation to look not only at this particular bill but also any related Freedom of Information Act and Privacy Act issues which arise as a consequence of the provisions of this legislation.

I welcome the opportunity to hear our witnesses today, and I would yield back, Mr. Chairman.

Mr. ENGLISH. Thank you very much, Mr. Kindness.

This morning I want to welcome a new member of the subcommittee; one who just joined us. In fact, he just joined the Congress, and we are delighted to have him. Gerald Kleczka, who is from Wisconsin, was named by the committee yesterday to this subcommittee. Mr. Kleczka, we want to welcome you, and do you have any comments you want to make this morning?

Mr. KLECZKA. No thank you, Mr. Chairman. I want only to say that it is a pleasure for me to not only serve on the Government Operations Committee but also this subcommittee, and I look forward to working with not only yourself, Chairman English, but also our ranking minority member, Mr. Kindness.

Mr. ENGLISH. Thank you very much. Well, we appreciate it, and, again, a very hearty welcome.

Also this morning we want to welcome Mr. Charles A. Briggs, who is the Executive Director of the Central Intelligence Agency, and Mr. Briggs, if you would introduce the folks that accompanied you here this morning.

**STATEMENT OF CHARLES A. BRIGGS, EXECUTIVE DIRECTOR,
CENTRAL INTELLIGENCE AGENCY, ACCOMPANIED BY ERNEST
MAYERFELD, DEPUTY DIRECTOR OF LEGISLATIVE LIAISON;
LARRY STRAWDERMAN, INFORMATION AND PRIVACY COORDI-
NATOR; AND BERNARD MAKOWKA, OFFICE OF GENERAL COUNSEL**

Mr. BRIGGS. On my left, Mr. Chairman, is Mr. Ernest Mayerfeld, who is Deputy Director of our Legislative Liaison Office. On my right, Mr. Larry Strawderman, who has a bureaucratic title that I can't even remember. He is the head of Information and Privacy Division.

Mr. ENGLISH. Very good. We welcome you gentlemen here, and we would be happy to hear your testimony, Mr. Briggs.

Mr. BRIGGS. All right, sir.

Mr. Chairman, and members of the subcommittee, it is a pleasure to appear before you this morning to discuss H.R. 5164, the Central Intelligence Agency Information Act. We last appeared before you to discuss our concerns with the Freedom of Information Act in February of 1980.

Since that time, the Central Intelligence Agency (CIA) has persisted in its efforts to achieve needed relief from the unique problems posed to it by the FOIA. We believe that H.R. 5164 will provide the CIA with substantial relief from these problems without reducing the amount of meaningful information which can be released to the public.

As you know, Mr. Chairman, Deputy Director McMahon has presented our problems with the FOIA in great detail to both the Senate and House Intelligence oversight committees during the course of the 98th Congress. With your permission, Mr. Chairman, I would like to submit for the record Deputy Director McMahon's explanation of these problems as contained in the statement he gave before the House Permanent Select Committee on Intelligence last February.

Mr. ENGLISH. Without objection, that will be made part of the record.

[The information follows:]

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EXCERPT OF STATEMENT OF
JOHN N. McMAHON
DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

UNDER PRESENT LAW ANY FOIA REQUESTER CAN CAUSE A SEARCH AND REVIEW TO BE MADE IN ALL CIA FILES, INCLUDING OPERATIONAL FILES, AND THE AGENCY MUST DEFEND A DENIAL OF SENSITIVE INFORMATION TO ANYONE WHO ASKS FOR IT LINE BY LINE, SOMETIMES WORD BY WORD. WE, OF COURSE, ATTEMPT TO ASSURE OUR SOURCES, WHO LIVE IN FEAR OF THIS PROCESS, THAT THE EXEMPTIONS AVAILABLE UNDER THE FOIA ARE SUFFICIENT TO PROTECT THEIR IDENTITIES, BUT THAT ASSURANCE IS TOO OFTEN SEEN AS HOLLOW. THEY ASK, WITH JUSTIFICATION IN MY VIEW, THAT IN EXCHANGE FOR THE RISKS WHICH THEY UNDERTAKE ON OUR BEHALF, WE PROVIDE THEM WITH AN ABSOLUTE ASSURANCE OF CONFIDENTIALITY. SO LONG AS WE ARE COMPELLED BY LAW TO TREAT OUR OPERATIONAL FILES AS POTENTIALLY PUBLIC DOCUMENTS, WE ARE UNABLE TO PROVIDE THE IRON-CLAD GUARANTEE WHICH IS THE BACKBONE OF AN EFFECTIVE INTELLIGENCE SERVICE. IN ADDITION, THE REVIEW OF OPERATIONAL FILES WITHDRAWS UNIQUELY CAPABLE PERSONNEL FROM INTELLIGENCE OPERATIONS, AND COMPELS US TO VIOLATE OUR WORKING PRINCIPLES OF GOOD SECURITY. LET ME EXPLAIN THESE POINTS IN MORE DETAIL.

FOR SECURITY REASONS, AGENCY INFORMATION IS COMPARTMENTED INTO NUMEROUS SELF-CONTAINED FILE SYSTEMS WHICH ARE DESIGNED IN ORDER TO SERVE THE OPERATIONAL NEEDS OF A PARTICULAR COMPONENT OR TO ACCOMPLISH A PARTICULAR FUNCTION. AGENCY PERSONNEL ARE GIVEN ACCESS TO SPECIFIC FILES ONLY ON A "NEED TO KNOW" BASIS. OPERATIONAL FILES ARE MORE STRINGENTLY COMPARTMENTED BECAUSE THEY DIRECTLY REVEAL INTELLIGENCE SOURCES AND METHODS. YET A

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TYPICAL REQUEST UNDER THE FOIA WILL SEEK INFORMATION ON A GENERALLY DESCRIBED SUBJECT WHEREVER IT MAY BE FOUND IN THE AGENCY AND WILL TRIGGER A SEARCH WHICH TRANSGRESSES ALL PRINCIPLES OF COMPARTMENTATION. A RELATIVELY SIMPLE FOIA REQUEST MAY REQUIRE AS MANY AS 21 AGENCY RECORDS SYSTEMS TO BE SEARCHED, A DIFFICULT REQUEST CAN INVOLVE OVER 100.

IN MANY INSTANCES THE RESULTS OF THESE SEARCHES ARE PRODIGIOUS. THOUSANDS OF PAGES OF RECORDS ARE AMASSED FOR REVIEW. ALTHOUGH, IN THE CASE OF RECORDS GLEANED FROM OPERATIONAL FILES, VIRTUALLY NONE OF THIS INFORMATION IS RELEASED TO THE REQUESTER, SECURITY RISKS, WHICH ARE INHERENT IN THE REVIEW PROCESS, REMAIN PRESENT. THE DOCUMENTS ARE SCRUTINIZED LINE BY LINE, WORD BY WORD, BY HIGHLY SKILLED OPERATIONAL PERSONNEL WHO HAVE THE NECESSARY TRAINING AND EXPERIENCE TO IDENTIFY SOURCE-REVEALING AND OTHER SENSITIVE INFORMATION. THESE REVIEWING OFFICERS MUST PROCEED UPON THE ASSUMPTION THAT ALL INFORMATION RELEASED WILL FALL INTO THE HANDS OF HOSTILE POWERS, AND THAT EACH BIT OF INFORMATION WILL BE RETAINED AND PIECED TOGETHER BY OUR ADVERSARIES IN A PAINSTAKING EFFORT TO EXPOSE SECRETS WHICH THE AGENCY IS DEDICATED TO PROTECT. AT THE SAME TIME, HOWEVER, THE REVIEWING OFFICER MUST BE PREPARED TO DEFEND EACH DETERMINATION THAT AN ITEM OF INFORMATION IS CLASSIFIED OR OTHERWISE PROTECTED UNDER THE FOIA. FURTHERMORE, THE OFFICER MUST BEAR IN MIND THAT UNDER THE FOIA EACH "REASONABLY SEGREGABLE" ITEM OF UNPROTECTED

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INFORMATION MUST BE RELEASED. SENTENCES ARE CARVED INTO THEIR INTELLIGIBLE ELEMENTS, AND EACH ELEMENT IS SEPARATELY STUDIED. WHEN THIS PROCESS IS COMPLETED FOR OPERATIONAL RECORDS, THE RESULT IS USUALLY A COMPOSITE OF BLACK MARKINGS, INTERSPREAD WITH A FEW DISCONNECTED PHRASES WHICH HAVE BEEN APPROVED FOR RELEASE.

AFTER THE RESPONSIVE RECORDS HAVE BEEN PROPERLY REVIEWED, THE PUBLIC DERIVES LITTLE OR NOTHING BY WAY OF MEANINGFUL INFORMATION FROM THE FRAGMENTARY ITEMS OR OCCASIONAL ISOLATED PARAGRAPH WHICH IS ULTIMATELY RELEASED FROM OPERATIONAL FILES. YET WE NEVER CEASE TO WORRY ABOUT THESE FRAGMENTS. WE CAN NEVER BE COMPLETELY CERTAIN WHAT OTHER PIECES OF THE JIGSAW PUZZLE OUR ADVERSARIES ALREADY HAVE, OR WHAT ELSE THEY NEED TO COMPLETE THE PICTURE. PERHAPS WE MISSED THE SOURCE-REVEALING SIGNIFICANCE OF SOME ITEM. PERHAPS WE MISPLACED ONE OF THE BLACK MARKINGS. THE REVIEWING OFFICER IS CONFRONTED WITH A DIZZYING TASK OF DEFENDING EACH DELETION WITHOUT RELEASING ANY CLUE TO THE IDENTITY OF OUR SOURCES. HE HAS NO MARGIN FOR ERROR. THOSE WHO HAVE TRUSTED US MAY LOSE THEIR REPUTATION, THEIR LIVELIHOOD, OR THEIR LIVES; THE WELL-BEING OF THEIR FAMILIES IS AT STAKE IF ONE APPARENTLY INNOCUOUS ITEM FALLS INTO HOSTILE HANDS AND TURNS OUT TO BE A CRUCIAL LEAD. AS LONG AS THE PROCESS OF FOIA SEARCH AND REVIEW OF CIA OPERATIONAL FILES CONTINUES, THIS POSSIBILITY OF ERROR CANNOT BE ERADICATED. THE HARM DONE TO THE AGENCY'S MISSION BY SUCH

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ERRORS IS, OF COURSE, UNKNOWN AND UNCALCULABLE. THE POTENTIAL HARM IS, IN OUR JUDGMENT, EXTREME.

ASIDE FROM THIS FACTOR OF HUMAN ERROR, WE RECOGNIZE THAT UNDER THE CURRENT FREEDOM OF INFORMATION ACT, SUBJECT TO JUDICIAL REVIEW, NATIONAL SECURITY EXEMPTIONS DO EXIST TO PROTECT THE MOST VITAL INTELLIGENCE INFORMATION. THE KEY POINT, HOWEVER, IS THAT THOSE SOURCES UPON WHOM WE DEPEND FOR THAT INFORMATION HAVE AN ENTIRELY DIFFERENT PERCEPTION.

I WILL EXPLAIN HOW THAT PERCEPTION HAS BECOME, FOR US, A REALITY WHICH HURTS THE WORK OF THE AGENCY ON A DAILY BASIS. THE GATHERING OF INFORMATION FROM HUMAN SOURCES REMAINS A CENTRAL PART OF CIA'S MISSION. IN PERFORMANCE OF THIS MISSION, AGENCY OFFICERS MUST, IN ESSENCE, ESTABLISH A SECRET CONTRACTUAL RELATIONSHIP WITH PEOPLE IN KEY POSITIONS WITH ACCESS TO INFORMATION THAT MIGHT OTHERWISE BE INACCESSIBLE TO THE UNITED STATES GOVERNMENT.

THIS IS NOT AN EASY TASK, NOR IS IT QUICKLY ACCOMPLISHED. THE PRINCIPAL INGREDIENT IN THESE RELATIONSHIPS IS TRUST. TO BUILD SUCH A RELATIONSHIP, WHICH IN MANY CASES ENTAILS AN INDIVIDUAL PUTTING HIS LIFE AND THE SAFETY OF HIS FAMILY IN JEOPARDY TO FURNISH INFORMATION TO THE U.S. GOVERNMENT, IS A DELICATE AND TIME-CONSUMING TASK. OFTEN, IT TAKES YEARS TO CONVINCE AN INDIVIDUAL THAT WE CAN PROTECT HIM. EVEN THEN, THE SLIGHTEST PROBLEM, PARTICULARLY A BREACH OR PERCEIVED BREACH OF TRUST, CAN PERMANENTLY DISRUPT THE RELATIONSHIP. A PUBLIC

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EXPOSURE OF ONE COMPROMISED AGENT WILL OBVIOUSLY DISCOURAGE OTHERS.

ONE MUST RECOGNIZE ALSO THAT MOST OF THOSE WHO PROVIDE US WITH OUR MOST VALUABLE AND, THEREFORE, MOST SENSITIVE INFORMATION LIVE IN TOTALITARIAN COUNTRIES. IN SUCH PLACES INDIVIDUALS SUSPECTED OF ANYTHING LESS THAN TOTAL ALLEGIANCE TO THE RULING PARTY OR CLIQUE CAN LOSE THEIR LIVES. IN SOCIETIES SUCH AS THESE, THE CONCEPTS BEHIND THE FREEDOM OF INFORMATION ACT ARE TOTALLY ALIEN, FRIGHTENING, AND INDEED CONTRARY TO ALL THAT THEY KNOW. IT IS VIRTUALLY IMPOSSIBLE FOR MOST OF OUR AGENTS AND SOURCES IN SUCH SOCIETIES TO UNDERSTAND THE LAW ITSELF, MUCH LESS WHY THE CIA OPERATIONAL FILES, IN WHICH THEIR IDENTITIES ARE REVEALED, SHOULD BE SUBJECT TO THE ACT. IT IS DIFFICULT, THEREFORE, TO CONVINCE ONE WHO IS SECRETLY COOPERATING WITH US THAT SOME DAY HE WILL NOT AWAKEN TO FIND IN A U.S. NEWSPAPER OR MAGAZINE AN ARTICLE THAT IDENTIFIES HIM AS A CIA SPY.

ALSO, IMAGINE THE SHACKLES BEING PLACED ON THE CIA OFFICER TRYING TO CONVINCE THE FOREIGN SOURCE TO COOPERATE WITH THE UNITED STATES. THE SOURCE, WHO MAY BE LEANING TOWARDS COOPERATION, WILL DEMAND THAT HE BE PROTECTED. HE WANTS ABSOLUTE ASSURANCE THAT NOTHING WILL BE GIVEN OUT WHICH COULD CONCEIVABLY LEAD HIS OWN INCREASINGLY SOPHISTICATED COUNTER-INTELLIGENCE SERVICE TO APPEAR AT HIS DOORSTEP. OF COURSE, ACCESS TO OPERATIONAL FILES UNDER FOIA IS NOT THE ONLY

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CAUSE OF THIS FEAR. LEAKS, THE DELIBERATE EXPOSURE OF OUR PEOPLE BY AGEE AND HIS COHORTS PRIOR TO YOUR PASSAGE OF THE IDENTITIES LEGISLATION, AND ESPIONAGE ACTIVITIES BY FOREIGN POWERS ALL CONTRIBUTE, BUT THE PERCEIVED HARM DONE BY THE FOIA IS PARTICULARLY HARD FOR OUR CASE OFFICERS TO EXPLAIN BECAUSE IT IS SEEN AS A DELIBERATE ACT OF THE UNITED STATES GOVERNMENT.

ALTHOUGH WE TRY TO GIVE ASSURANCES TO THESE PEOPLE, WE HAVE ON RECORD NUMEROUS CASES WHERE OUR ASSURANCES HAVE NOT SUFFICED. FOREIGN AGENTS, SOME VERY IMPORTANT, HAVE EITHER REFUSED TO ACCEPT OR HAVE TERMINATED A RELATIONSHIP ON THE GROUNDS THAT, IN THEIR MINDS -- AND IT IS UNIMPORTANT WHETHER THEY ARE RIGHT OR NOT -- BUT, IN THEIR MINDS THE CIA IS NO LONGER ABLE TO ABSOLUTELY GUARANTEE THAT THEY CAN BE PROTECTED. HOW MANY CASES OF REFUSAL TO COOPERATE WHERE NO REASONS ARE GIVEN ARE BASED ON SUCH CONSIDERATIONS, I CANNOT SAY. I SUBMIT, HOWEVER, THAT KNOWING OF NUMEROUS SUCH CASES, THERE ARE MANY MORE INSTANCES WHERE SOURCES WHO HAVE DISCONTINUED RELATIONSHIPS OR REDUCED THEIR INFORMATION FLOW HAVE DONE SO BECAUSE OF THEIR FEAR OF DISCLOSURE. NO ONE CAN QUANTIFY HOW MUCH INFORMATION VITAL TO THE NATIONAL SECURITY OF THE UNITED STATES HAS BEEN OR WILL BE LOST AS A RESULT.

THE FOIA ALSO HAS HAD A NEGATIVE EFFECT ON OUR RELATIONSHIPS WITH FOREIGN INTELLIGENCE SERVICES. OUR STATIONS OVERSEAS CONTINUE TO REPORT CONSTERNATION OVER WHAT IS SEEN AS A POTENTIAL LEGAL REQUIREMENT TO DISCLOSE INFORMATION ENTRUSTED

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TO US. AGAIN, THE UNANSWERABLE QUESTION IS HOW MANY OTHER SERVICES ARE NOW MORE CAREFUL AS TO WHAT INFORMATION THEY PASS TO THE UNITED STATES.

THIS LEGISLATION WILL GO A LONG WAY TOWARD RELIEVING THE PROBLEMS THAT I HAVE OUTLINED. THE EXCLUSION FROM THE FOIA PROCESS OF OPERATIONAL FILES 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 PROCESS. THEY 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 THAT INFORMATION. IN HIS DECISION IN A LAWSUIT BROUGHT BY PHILLIP AGEE AGAINST THE CIA, FBI, NSA, DEPARTMENT OF STATE, AND DEPARTMENT OF JUSTICE, JUDGE GERHARD GESELL OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA SUMMARIZED THE PROBLEM THIS WAY: "IT IS AMAZING THAT A RATIONAL SOCIETY TOLERATES THE EXPENSE, THE WASTE OF RESOURCES, THE POTENTIAL INJURY TO ITS OWN SECURITY WHICH THIS PROCESS NECESSARILY ENTAILS."

AT THE SAME TIME, AS I HAVE EXPLAINED BEFORE, BY REMOVING THESE SENSITIVE OPERATIONAL FILES FROM THE FOIA PROCESS, THE PUBLIC IS DEPRIVED OF NO MEANINGFUL INFORMATION WHATSOEVER.

THE PALTRY RESULTS FROM FOIA REVIEW OF OPERATIONAL FILES ARE INEVITABLE. THESE RECORDS DISCUSS AND DESCRIBE THE NUTS

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AND BOLTS OF SENSITIVE INTELLIGENCE OPERATIONS. CONSEQUENTLY, THEY ARE PROPERLY CLASSIFIED AND ARE NOT RELEASABLE UNDER THE FOIA. THE REVIEWING OFFICERS WHO PRODUCE THESE MASTERPIECES OF BLACK MARKINGS ARE DOING THEIR JOB AND DOING IT PROPERLY. THE SIMPLE FACT IS THAT INFORMATION IN OPERATIONAL RECORDS IS BY AND LARGE EXEMPT FROM RELEASE UNDER THE FOIA, AND THE FEW BITS AND PIECES WHICH ARE RELEASABLE HAVE LITTLE OR NO INFORMATIONAL VALUE.

WHEN I SPEAK OF REVIEWING OFFICERS ABSORBED IN THIS PROCESS, IT IS IMPORTANT TO STRESS THAT THESE INDIVIDUALS ARE NOT AND CANNOT BE SIMPLY CLERICAL STAFF OR EVEN "FOIA PROFESSIONALS." IN ORDER TO DO THEIR JOB, THEY MUST BE CAPABLE OF MAKING DIFFICULT AND VITALLY IMPORTANT OPERATIONAL JUDGMENTS, AND, CONSEQUENTLY, MOST OF THEM MUST COME FROM THE HEART OF THE AGENCY'S INTELLIGENCE CADRE. MOREOVER, BEFORE ANY ITEM OF INFORMATION IS RELEASED UNDER THE FOIA, THE RELEASE MUST BE CHECKED WITH A DESK OFFICER WITH CURRENT KNOWLEDGE OF THE OPERATIONAL ACTIVITY INVOLVED. HENCE, WE MUST NOT ONLY CALL INTELLIGENCE OFFICERS ON A FULL-TIME BASIS AWAY FROM THEIR PRIMARY DUTIES, WE MUST ALSO CONTINUALLY DIVERT THE ATTENTION OF THE OFFICERS OF OUR OPERATING COMPONENTS. THAT IS SO BECAUSE WE HAVE A PRACTICE IN THE OPERATIONS DIRECTORATE WHICH REQUIRES THAT EVERY PIECE OF PAPER WHICH IS RELEASED, EVEN INCLUDING THOSE COVERED WITH BLACK MARKS MUST BE REVIEWED BY AN OFFICER FROM THE PARTICULAR DESK THAT WROTE THE DOCUMENTS OR

RECEIVED IT FROM THE FIELD, AND WE CANNOT ALTER THIS PRACTICE BECAUSE THE RISK OF COMPROMISE IS SO GREAT. YOU CAN IMAGINE THE DISRUPTION, FOR EXAMPLE, ON THE SOVIET DESK WHEN THE PEOPLE THERE MUST TAKE TIME OFF FROM THE WORK THEY ARE SUPPOSED TO DO TO REVIEW A DOCUMENT PREPARED FOR RELEASE UNDER THE FOIA. AND IT IS OBVIOUS, OF COURSE, THAT WHEN A CIA OPERATION MAKES THE FRONT PAGES OF THE NEWSPAPERS, THE FOIA REQUESTS ON THAT SUBJECT ESCALATE. THIS LOSS OF MANPOWER CANNOT BE CURED BY AN AUGMENTATION OF FUNDING. WE CANNOT HIRE INDIVIDUALS TO REPLACE THOSE LOST, WE MUST TRAIN THEM. AFTER THE REQUISITE YEARS OF TRAINING, THEY ARE A SCARCE RESOURCE NEEDED IN THE PERFORMANCE OF THE AGENCY'S OPERATIONAL MISSION.

Mr. BRIGGS. Thank you, sir.

I will then summarize these problems and briefly discuss H.R. 5164.

As an intelligence agency, our records systems must be responsive to both the functions of the CIA as well as to the security needs of the Agency. Therefore, rather than having one overall filing system with one central index, the CIA has numerous self-contained file systems. Compartmentation fulfills a vital security need and also allows each file system to reflect the needs of an individual agency component. Our operational files are even more stringently compartmented because they reveal intelligence sources and methods.

Another relevant security principle we operate under is that agency personnel have access to specific files only on a "need to know" basis. When an FOIA request is received by the CIA, these principles of compartmentation and limited access are broken down. An FOIA request on a generally described subject matter must be distributed to several different agency components so that a search can be made of any file system which might contain responsive records.

In many instances the results of these searches are prodigious. Thousands of pages of records are amassed for review each year. Thus, records otherwise residing in compartmented file systems are pulled together and numerous agency personnel are given access to information which they otherwise have no need to know.

Once responsive records are located, they must be carefully reviewed line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source-revealing and other sensitive information which could be used by our adversaries. The reviewing officer is fully aware of the requirement of the FOIA that each "reasonably segregable" item of unprotected information must be released and that he or she must be prepared to defend each determination to withhold an

item of information because it is classified or otherwise exempted from release under the FOIA.

This review process is particularly burdensome when it involves our operational records. An FOIA requester who makes a request for information to the CIA which involves records in our Directorate of Operations can now anticipate waiting 2 to 3 years to receive a response. The backlog which stems from the time-consuming process of reviewing operational records cannot be solved for the CIA by simply hiring more reviewers. These individuals are not and cannot be simply clerical staff or even "FOIA professionals."

In order to do their job, they must be capable of making difficult and vitally important operational judgments, and, consequently, most of them must come from the heat of the Agency's intelligence cadre. Moreover, before any item of information is released under the FOIA, the release must be checked with a desk officer with current knowledge of the operational activity involved.

Hence, we must not only call intelligence officers on a full-time basis away from their primary duties, but we must also continually divert the attention of the officers of our operating components. I am sure that you can understand the necessity for this practice since the risk of compromise is so great. Unfortunately, even with this practice we know that mistakes can be made and, therefore, the element of human error in the review and release of operational records is always present and always a concern.

After waiting 2 to 3 years, what does the FOIA requester receive when operational records are involved? The paper released is usually a composite of blacked-out words, interspersed between disconnected phrases which have been approved for release. Thus, after operational records have been properly reviewed pursuant to the existing exemptions in the FOIA, the public derives little or no meaningful information from the fragmentary items or the occasional isolated paragraph which is ultimately released from operational files.

The fact that these exemptions are provided in the FOIA is generally lost on our human sources and friendly foreign intelligence services. In their view, the very process of searching operational files and reviewing the information contained in them poses a serious threat to the ability of the United States to protect either their identity or the information they entrust to us.

In our view, Mr. Chairman, H.R. 5164 will substantially alleviate the problems that I have just outlined. Only operational files as defined by this bill would be removed from the FOIA search and review process. As I have just explained, the operational information contained in these files takes the longest to review and results in the release of little, if any, meaningful information to the public.

The public, therefore, retains its access under the law to other Agency records. This includes all intelligence which is disseminated to our Nation's policymakers, as well as all matters of policy formulated at agency executive levels.

In addition, under H.R. 5164, the CIA would continue to search all its files, as it does today, in response to three types of requests: These being requests by U.S. citizens or permanent resident aliens for information concerning themselves, requests for information concerning a covert action the existence of which is no longer clas-

sified, and requests for information concerning the specific subject matter of an investigation for any impropriety or illegality in the conduct of an intelligence activity.

There are two other important provisions in H.R. 5164 which I would like to touch upon. First, there is the requirement that no less than once every 10 years the Director of Central Intelligence shall review all the exemptions in force to determine whether any can be removed. This could allow operational files to become accessible to FOIA search and review when the sensitivity of the information they contain has diminished as a result of the passage of time or for other reasons.

And, second, H.R. 5164 sets forth the right of requesters to seek judicial review of an Agency decision to withhold information based on the provisions of this act.

As you know, Mr. Chairman, legislation very similar to this was passed unanimously by the Senate last November. H.R. 5164 comes to you after having been unanimously reported out of the House Permanent Select Committee on Intelligence. I believe the strong bipartisan support being shown for this legislation stems from the recognition that this is a carefully crafted piece of legislation which will benefit the public as well as the CIA. The public will benefit because FOIA requesters will be able to receive responses to their requests on a more timely basis without the loss of any meaningful information.

We will be pleased to answer any specific questions you or the other members may have.

[The prepared statement of Mr. Briggs follows:]

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STATEMENT OF
CHARLES A. BRIGGS
EXECUTIVE DIRECTOR
CENTRAL INTELLIGENCE AGENCY

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, IT IS A PLEASURE TO APPEAR BEFORE YOU THIS MORNING TO DISCUSS H.R. 5164, THE "CENTRAL INTELLIGENCE AGENCY INFORMATION ACT". WE LAST APPEARED BEFORE YOU TO DISCUSS OUR CONCERNS WITH THE FREEDOM OF INFORMATION ACT (FOIA) IN FEBRUARY 1980. SINCE THAT TIME, THE CENTRAL INTELLIGENCE AGENCY (CIA) HAS PERSISTED IN ITS EFFORTS TO ACHIEVE NEEDED RELIEF FROM THE UNIQUE PROBLEMS POSED TO IT BY THE FOIA. WE BELIEVE THAT H.R. 5164 WILL PROVIDE THE CIA WITH SUBSTANTIAL RELIEF FROM THESE PROBLEMS WITHOUT REDUCING THE AMOUNT OF MEANINGFUL INFORMATION WHICH CAN BE RELEASED TO THE PUBLIC.

AS YOU KNOW, MR. CHAIRMAN, DEPUTY DIRECTOR McMAHON HAS PRESENTED OUR PROBLEMS WITH THE FOIA IN GREAT DETAIL TO BOTH THE SENATE AND HOUSE INTELLIGENCE OVERSIGHT COMMITTEES DURING THE COURSE OF THE 98TH CONGRESS. WITH YOUR PERMISSION, MR. CHAIRMAN, I WOULD LIKE TO SUBMIT FOR THE RECORD DEPUTY DIRECTOR McMAHON'S EXPLANATION OF THESE PROBLEMS AS CONTAINED IN THE STATEMENT HE GAVE BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE LAST FEBRUARY. I WILL THEN SUMMARIZE THESE PROBLEMS AND BRIEFLY DISCUSS H.R. 5164.

AS AN INTELLIGENCE AGENCY, OUR RECORDS SYSTEMS MUST BE RESPONSIVE TO BOTH THE FUNCTIONS OF THE CIA AS WELL AS TO THE SECURITY NEEDS OF THE AGENCY. THEREFORE, RATHER THAN HAVING ONE OVERALL FILING SYSTEM WITH ONE CENTRAL INDEX, THE CIA HAS

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NUMEROUS SELF-CONTAINED FILE SYSTEMS. COMPARTMENTATION FULFILLS A VITAL SECURITY NEED AND ALSO ALLOWS EACH FILE SYSTEM TO REFLECT THE NEEDS OF AN INDIVIDUAL AGENCY COMPONENT. OUR OPERATIONAL FILES ARE EVEN MORE STRINGENTLY COMPARTMENTED BECAUSE THEY DIRECTLY REVEAL INTELLIGENCE SOURCES AND METHODS. ANOTHER RELEVANT SECURITY PRINCIPLE WE OPERATE UNDER IS THAT AGENCY PERSONNEL HAVE ACCESS TO SPECIFIC FILES ONLY ON A "NEED TO KNOW" BASIS. WHEN AN FOIA REQUEST IS RECEIVED BY THE CIA THESE PRINCIPLES OF COMPARTMENTATION AND LIMITED ACCESS ARE BROKEN DOWN. AN FOIA REQUEST ON A GENERALLY DESCRIBED SUBJECT MATTER MUST BE DISTRIBUTED TO SEVERAL DIFFERENT AGENCY COMPONENTS SO THAT A SEARCH CAN BE MADE OF ANY FILE SYSTEM WHICH MIGHT CONTAIN RESPONSIVE RECORDS. IN MANY INSTANCES THE RESULTS OF THESE SEARCHES ARE PRODIGIOUS. THOUSANDS OF PAGES OF RECORDS ARE AMASSED FOR REVIEW EACH YEAR. THUS, RECORDS OTHERWISE RESIDING IN COMPARTMENTED FILE SYSTEMS ARE PULLED TOGETHER AND NUMBERS OF AGENCY PERSONNEL ARE GIVEN ACCESS TO INFORMATION WHICH THEY OTHERWISE HAVE NO NEED TO KNOW.

ONCE RESPONSIVE RECORDS ARE LOCATED, THEY MUST BE CAREFULLY REVIEWED LINE BY LINE, WORD BY WORD, BY HIGHLY SKILLED OPERATIONAL PERSONNEL WHO HAVE THE NECESSARY TRAINING AND EXPERIENCE TO IDENTIFY SOURCE-REVEALING AND OTHER SENSITIVE INFORMATION WHICH COULD BE USED BY OUR ADVERSARIES. THE REVIEWING OFFICER IS FULLY AWARE OF THE REQUIREMENT OF THE FOIA THAT EACH "REASONABLY SEGREGABLE" ITEM OF UNPROTECTED

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INFORMATION MUST BE RELEASED AND THAT HE OR SHE MUST BE PREPARED TO DEFEND EACH DETERMINATION TO WITHHOLD AN ITEM OF INFORMATION BECAUSE IT IS CLASSIFIED OR OTHERWISE EXEMPTED FROM RELEASE UNDER THE FOIA.

THIS REVIEW PROCESS IS PARTICULARLY BURDENSOME WHEN IT INVOLVES OUR OPERATIONAL RECORDS. AN FOIA REQUESTER WHO MAKES A REQUEST FOR INFORMATION TO THE CIA WHICH INVOLVES RECORDS IN OUR DIRECTORATE OF OPERATIONS CAN NOW ANTICIPATE WAITING TWO TO THREE YEARS TO RECEIVE A RESPONSE. THE BACKLOG WHICH STEMS FROM THE TIME-CONSUMING PROCESS OF REVIEWING OPERATIONAL RECORDS CANNOT BE SOLVED FOR THE CIA BY SIMPLY HIRING MORE REVIEWERS. THESE INDIVIDUALS ARE NOT AND CANNOT BE SIMPLY CLERICAL STAFF OR EVEN "FOIA PROFESSIONALS". IN ORDER TO DO THEIR JOB, THEY MUST BE CAPABLE OF MAKING DIFFICULT AND VITALLY IMPORTANT OPERATIONAL JUDGMENTS, AND, CONSEQUENTLY, MOST OF THEM MUST COME FROM THE HEART OF THE AGENCY'S INTELLIGENCE CADRE. MOREOVER, BEFORE ANY ITEM OF INFORMATION IS RELEASED UNDER THE FOIA, THE RELEASE MUST BE CHECKED WITH A DESK OFFICER WITH CURRENT KNOWLEDGE OF THE OPERATIONAL ACTIVITY INVOLVED. HENCE, WE MUST NOT ONLY CALL INTELLIGENCE OFFICERS ON A FULL-TIME BASIS AWAY FROM THEIR PRIMARY DUTIES, BUT WE MUST ALSO CONTINUALLY DIVERT THE ATTENTION OF THE OFFICERS OF OUR OPERATING COMPONENTS. I AM SURE THAT YOU CAN UNDERSTAND THE NECESSITY FOR THIS PRACTICE SINCE THE RISK OF COMPROMISE IS SO GREAT. UNFORTUNATELY, EVEN WITH THIS PRACTICE WE KNOW THAT

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MISTAKES CAN BE MADE AND, THEREFORE, THE ELEMENT OF HUMAN ERROR IN THE REVIEW AND RELEASE OF OPERATIONAL RECORDS IS ALWAYS PRESENT AND ALWAYS A CONCERN.

AFTER WAITING TWO TO THREE YEARS, WHAT DOES THE FOIA REQUESTER RECEIVE WHEN OPERATIONAL RECORDS ARE INVOLVED? THE PAPER RELEASED IS USUALLY A COMPOSITE OF BLACKED OUT WORDS, INTERSPERSED BETWEEN DISCONNECTED PHRASES WHICH HAVE BEEN APPROVED FOR RELEASE. THUS, AFTER OPERATIONAL RECORDS HAVE BEEN PROPERLY REVIEWED PURSUANT TO THE EXISTING EXEMPTIONS IN THE FOIA, THE PUBLIC DERIVES LITTLE OR NO MEANINGFUL INFORMATION FROM THE FRAGMENTARY ITEMS OR THE OCCASIONAL ISOLATED PARAGRAPH WHICH IS ULTIMATELY RELEASED FROM OPERATIONAL FILES.

THE FACT THAT THESE EXEMPTIONS ARE PROVIDED IN THE FOIA IS GENERALLY LOST ON OUR HUMAN SOURCES AND FRIENDLY FOREIGN INTELLIGENCE SERVICES. IN THEIR VIEW, THE VERY PROCESS OF SEARCHING OPERATIONAL FILES AND REVIEWING THE INFORMATION CONTAINED IN THEM POSES A SERIOUS THREAT TO THE ABILITY OF THE UNITED STATES TO PROTECT EITHER THEIR IDENTITY OR THE INFORMATION THEY ENTRUST TO US.

IN OUR VIEW, MR. CHAIRMAN, H.R. 5164 WILL SUBSTANTIALLY ALLEVIATE THE PROBLEMS I HAVE JUST OUTLINED. ONLY OPERATIONAL FILES AS DEFINED BY THIS BILL WOULD BE REMOVED FROM THE FOIA SEARCH AND REVIEW PROCESS. AS I HAVE JUST EXPLAINED, THE OPERATIONAL INFORMATION CONTAINED IN THESE FILES TAKES THE

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LONGEST TO REVIEW AND RESULTS IN THE RELEASE OF LITTLE, IF ANY, MEANINGFUL INFORMATION TO THE PUBLIC. THE PUBLIC, THEREFORE, RETAINS ITS ACCESS UNDER THE LAW TO OTHER AGENCY RECORDS. THIS INCLUDES ALL INTELLIGENCE WHICH IS DISSEMINATED TO OUR NATION'S POLICY-MAKERS, AS WELL AS ALL MATTERS OF POLICY FORMULATED AT AGENCY EXECUTIVE LEVELS. IN ADDITION, UNDER H.R. 5164, THE CIA WOULD CONTINUE TO SEARCH ALL ITS FILES, AS IT DOES TODAY, IN RESPONSE TO THREE TYPES OF REQUESTS, THESE BEING REQUESTS BY UNITED STATES CITIZENS OR PERMANENT RESIDENT ALIENS FOR INFORMATION CONCERNING THEMSELVES, REQUESTS FOR INFORMATION CONCERNING A COVERT ACTION THE EXISTENCE OF WHICH IS NO LONGER CLASSIFIED, AND REQUESTS FOR INFORMATION CONCERNING THE SPECIFIC SUBJECT MATTER OF AN INVESTIGATION FOR ANY IMPROPRIETY OR ILLEGALITY IN THE CONDUCT OF AN INTELLIGENCE ACTIVITY.

THERE ARE TWO OTHER IMPORTANT PROVISIONS IN H.R. 5164 WHICH I WOULD LIKE TO TOUCH UPON. FIRST, THERE IS THE REQUIREMENT THAT NO LESS THAN ONCE EVERY 10 YEARS THE DIRECTOR OF CENTRAL INTELLIGENCE SHALL REVIEW ALL THE EXEMPTIONS IN FORCE TO DETERMINE WHETHER ANY CAN BE REMOVED. THIS COULD ALLOW OPERATIONAL FILES TO BECOME ACCESSIBLE TO FOIA SEARCH AND REVIEW WHEN THE SENSITIVITY OF THE INFORMATION THEY CONTAIN HAS DIMINISHED AS A RESULT OF THE PASSAGE OF TIME OR FOR OTHER REASONS. AND SECONDLY, H.R. 5164 SETS FORTH THE RIGHT OF REQUESTERS TO SEEK JUDICIAL REVIEW OF AN AGENCY DECISION TO WITHHOLD INFORMATION BASED ON THE PROVISIONS OF THIS ACT.

AS YOU KNOW, MR. CHAIRMAN, LEGISLATION VERY SIMILAR TO THIS WAS PASSED UNANIMOUSLY BY THE SENATE LAST NOVEMBER. H.R. 5164 COMES TO YOU AFTER HAVING BEEN UNANIMOUSLY REPORTED OUT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE. I BELIEVE THE STRONG BIPARTISAN SUPPORT BEING SHOWN FOR THIS LEGISLATION STEMS FROM THE RECOGNITION THAT THIS IS A CAREFULLY CRAFTED PIECE OF LEGISLATION WHICH WILL BENEFIT THE PUBLIC AS WELL AS THE CIA. THE PUBLIC WILL BENEFIT BECAUSE FOIA REQUESTERS WILL BE ABLE TO RECEIVE RESPONSES TO THEIR REQUESTS ON A MORE TIMELY BASIS WITHOUT THE LOSS OF ANY MEANINGFUL INFORMATION.

THIS CONCLUDES MY TESTIMONY, MR. CHAIRMAN. I HAVE WITH ME THE DEPUTY DIRECTOR OF THE OFFICE OF LEGISLATIVE LIAISON, ERNEST MAYERFELD, AND LARRY STRAWDERMAN, CHIEF OF THE INFORMATION AND PRIVACY DIVISION. WE WILL BE PLEASED TO ANSWER ANY SPECIFIC QUESTIONS YOU OR THE OTHER MEMBERS MAY HAVE.

Mr. ENGLISH. Thank you very much, Mr. Briggs.

Mr. Briggs, in 1982, the CIA established a routine use for all of its Privacy Act systems of record permitting disclosure when "necessary or appropriate" to enable CIA to carry out its responsibilities. As I am sure you know, I objected to the routine use at the time. The main reason was that it is so broad that it fails to meet the Privacy Act requirement that agencies describe how records are used. The CIA could, I felt, easily comply with the Privacy Act by publishing a more descriptive notice.

If other agencies adopted this same approach, then the notice provisions of the Privacy Act would be a joke. What would be so difficult about including a more detailed description of how records are disclosed?

Mr. BRIGGS. Well, the fundamental problem, Mr. Chairman, I think is that the additional revelation could well involve the revelation of classified information. We take very seriously the Privacy Act. My own association with it goes back some 10 years when it and the FOIA both closed something of a traumatic experience for us with our preceding history of secrecy across the board.

And one of the things that we attempted unequivocally to demonstrate was that our decisions were not arbitrary or capricious. Our General Counsel, I believe, has concluded that the definition, as we have attempted to utilize it, is within the context of the law. I do have Mr. Makowka here from our General Counsel's Office, and if you wish, I would be happy to have him elaborate a little more.

Mr. ENGLISH. We would like for him to.

Mr. MAKOWKA. Mr. Chairman, I am Bernard Makowka.

Mr. ENGLISH. Would you care to pull a chair up to the table and the microphone, and would you identify yourself with your title so that we will have it for the record.

Mr. MAKOWKA. Mr. Chairman, I am Bernard Makowka, from the Office of General Counsel at CIA.

The simple answer to your question is, as a lawyer, I would like to believe that where there is a will, there is a way. However, we have tried and we have tried and we have tried, but we have faced a couple of problems that we have described to you before. I will summarize them again.

The first stems the very nature of the CIA's business, which is to acquire information and disseminate it for a large number and a wide variety of uses and recipients, both within the executive branch and the Congress. To the extent that our responsibilities involve information about Americans, we are very closely regulated, after the events of the last few years, not only by statute and Executive order, but also by procedures approved by the Attorney General of the United States.

In order to ensure not only that all of the purpose for which the CIA is authorized to disseminate information are covered but also to ensure that all the limitations are taken into account, an extremely comprehensive and elaborate statement would be required.

Second, some of those procedures by the very nature of our business, must be classified, and there is no way, to the extent that they are classified, that they can be revealed in a public document. Nevertheless, we attempted to do our best to prepare an unclassified statement and went through various drafts.

By the way, we did not amend our eventual routine use statement on our own initiative. We did it at the request of the Department of Justice, and the purpose and intent of this particular routine use statement was to bring our entire list of statements more in line with the Privacy Act. This was the reason why we attempted the job in the first place.

We looked through numerous variations and eventually concluded that the best and most efficient way to be comprehensive was to cross reference all of the various statutes, Executive orders, procedures applicable to the Agency and bring them into the routine use statement. Although it appears on its face to be very general I believe it incorporates by reference all of the specific reasons for which we may disseminate information about Americans.

At that time we had looked at the systems of record of other agencies, and we found a number of agencies in the Government that had comparable types of statements. So we did not feel that our statement was out of line with what many other agencies were promulgating in their statements.

When you wrote our Director a letter, I believe it was last year, indicating your concerns, we were very much surprised because we thought we had been moving closer to what is required under the Privacy Act. Your letter caught us completely by surprise, and the Director and we took your comments very seriously.

Since we received your letter, we have gone beyond our office experts to OMB for assistance. We invited their Privacy Act experts out to our Agency. We showed them all the rules and regulations

and invited them to help us come up with something better if that were possible. Many hours were spent on that particular endeavor. They have concluded informally after considerable effort that our statement was the most efficient and best way to undertake this matter.

Now, I think I speak for the CIA in saying that we would consider any help that we could get from your committee and consider any other possible way of better dealing with your concerns in this area and get back to you on the subject.

Mr. ENGLISH. We appreciate that. I think I know where you went astray. It was when you involved OMB. I think that is where you got in trouble. We have had some hearings, and, quite frankly, we have had some real criticisms about the way they are overseeing the Privacy Act. So that may be where you got some bad information.

But we would be delighted to work with you. First of all, I should explain, I am not an attorney. But second, we have a great deal of faith in you and we think that perhaps you could tighten that up just a little bit. I want to ask you if you would go back and take another look at it.

I appreciate your offer to work with our staff, both majority and minority counsel. Perhaps we could see if we could make a little more progress there. And if you would be willing to, I would like to see if we could get some discussions started and make some progress perhaps by the first of June. So if your office would be willing to work with our folks, I would appreciate your cooperation in that effort.

Mr. MAKOWKA. Absolutely. We will look into it, and we will be happy to get back with you by that time.

Mr. ENGLISH. And, again, I am sorry that you got led astray. I understand how that happens. Thanks again.

Mr. Kindness?

Mr. KINDNESS. Thank you, Mr. Chairman.

Mr. Briggs, we had some information to the effect that you have some 24 people working full time on Freedom of Information Act, Privacy Act, and Executive Order 12356 requests. Is that approximately correct information?

Mr. BRIGGS. That is Mr. Strawderman's group, and with your permission, I will have him answer the question.

Mr. STRAWDERMAN. Actually, we do have 24 people centrally located to deal with requests from the public, and their role is to receive them, analyze them and pass them on to the various components in the Agency for their search and review of responsive records. Those documents then come back to our central office, and we then deal with the public and other agencies in responding to those requests.

There are more than 24 people working full time on the process, but the central office only has 24 people. That is correct.

Mr. KINDNESS. Are these people trained to deal with those acts and Executive orders in particular?

Mr. STRAWDERMAN. Yes, sir, they are. They come from a wide variety of backgrounds in the Agency, the majority of them are at the senior officer level.

We also have a cadre of clerical people, of course, to do the logging in and many of the other clerical duties associated with the request. We give them training when they come into the office to acquaint them with the Privacy Act, the Freedom of Information Act, as well as Executive Order 12356, since we have to deal with all three of those stipulations in receiving requests from the public.

So we try to train them as well as we can, both internally and by participation in governmentwide training programs around town here.

Mr. KINDNESS. But these 24 people are all people who are drawn from other senior roles in the Agency?

Mr. STRAWDERMAN. Well, not necessarily in our shop. Some of them are what we refer to as case officers who deal with the public day to day, who write the letters, who deal with how we are going to ask a request and where we are going to ask it. That cadre of 8 or 10 people have the wider experience throughout the Agency.

The real crux of the experience comes with the director of operations when they receive the request and begin the search and review process. That is the expertise that has to deal with the DO problem, such as how were the documents originated and which can be released and which cannot.

So we are kind of the hub of a wheel, and we go out to the spokes, to the components, and they have the real expertise in searching for their records and reviewing their records for determining release. We then amalgamate the documents in a package for the public.

Mr. KINDNESS. What I was trying to get at, I think, is that there are 8 or 10 people who have to be drawn from other tasks at a senior level in the Agency to perform the work involved in the contact with the public.

Mr. STRAWDERMAN. I believe, to clarify that a little, that doesn't occur in my office, that occurs in the component where the director of operations, for example, deals with the day-to-day review of documents, and they are going to have to call on the expertise of a desk officer who is actively running operations to rule on records that they find responsive.

So it is beyond my office that this calling on expertise in the operations area or in the science and technology area or in the Directorate of Intelligence occurs.

Mr. KINDNESS. I guess maybe we have to go back over it one more time then.

Mr. BRIGGS. Mr. Kindness, in a previous incarnation after spending 15 years in the overt side of the house, I went over to the covert side for about 4 years, and I headed up the senior staff as what was then a GS-16 level, an office director level. I was the reviewing officer for the clandestine service. I was the final point at which a decision was made as to whether a document could or could not be released, had the form in which it had been sanitized.

Those releases then went from the Operations Directorate, were combined with similar review documents from the Scientific and Technical Directorate and the other components of the Agency and came to what was then the equivalent of Mr. Strawderman's office where the final packaging was done for release to the Government.

The difficult job of deciding on sources and methods protection was done at several different layers at several different levels of seniority in the Operations Directorate. What is today Larry's office had to try to insure that the right hand knew what the left hand was doing.

If a document that reflected, for example, the travel of an individual from the Operations Directorate showed up in our Administration Directorate and we had sanitized out something in the Operational Component, we had to make sure that we didn't forget to sanitize it in the Administrative Directorate. So it is a packaging, but it is also a consistency check that they are doing in Larry's office.

Generally, the level of his people is probably middle level, I would say.

Mr. STRAWDERMAN. I would say midrange senior officers.

Mr. BRIGGS. But the level of seniority could go all the way up, as I say, to GS-18 in the Operations Directorate.

There was a step beyond that if there was an appeal. We had an Information Review Board which consisted of several deputy directors, whose level was another one or two notches above even the GS-18 level.

Mr. ENGLISH. Mr. Briggs, Mr. Kleczka will be back very briefly, and he will ask his questions at that point. We will try to keep this moving as much as we can. We may have several votes today, and we certainly don't want to delay any more than we have to. We will try to stagger it as much as we can, but we will have brief intermissions.

[Recess taken.]

Mr. KLECZKA [presiding]. Will H.R. 5164 result in the withholding of any information that is now made public?

Mr. BRIGGS. No, sir, it will not.

Mr. KLECZKA. H.R. 5164 seems to have been carefully based on the way in which the CIA organizes its files. How stable has the CIA structure been over the years?

Mr. BRIGGS. To the best of my knowledge, and I served in all four directorates and knew something of the files, the file structure has not changed since the beginning of the organization.

Mr. KLECZKA. Is the file organization at the CIA unique among other intelligence agencies?

Mr. BRIGGS. I am not as informed on what the others have as compared with ours. It is my impression that we are unique in requiring a degree of compartmentation based on need to know. Mr. Mayerfeld has been deeply engaged in this process for many years. Maybe he could say something a little more explicit.

Mr. MAYERFELD. Mr. Chairman, we did try in the process of seeking relief from the unique burdens of the intelligence agencies, all of them, from the FOIA, in that process we had extensive conversations with the other agencies in the community, such as the DIA, the Intelligence Division of the FBI, the INR Office in the Department of State, and so forth, to see whether the unique burden that is ours, which is the accessibility to our operational files, exists in these other agencies as well.

We found, after extensive discussion, examination of their system, that their problems were different and although they cer-

tainly do have problems with the FOIA, it was not fixable in the way that we do it here. They did not have—their file systems were not organized in such a way that the records which document the conduct of intelligence activities, the collection and so forth, are segregable from those that contain the intelligence product.

The Agency is unique in that regard. In fact, we are the only intelligence agency organized along these lines. We have an Intelligence Directorate whose function it is to produce and analyze intelligence and, for example, the Operations Directorate and the Scientific and Technical Directorate, they are in the collection business; so, therefore, their files reflect their functions, and they are easily so separated.

The other agencies in the community are not so organized.

Mr. KLECZKA. The CIA has made some commitments about the handling of FOIA requests after the enactment of H.R. 5164. I want to go over them. Director Casey has agreed to establish a specific program designed to substantially reduce, if not eliminate, the current FOIA backlog.

Director Casey has also agreed that the CIA will not reduce its budgetary and personnel allocation for FOIA activity during the 2-year period following enactment. Is this correct, Mr. Briggs?

Mr. BRIGGS. Yes, sir, Mr. Chairman. I can assure the subcommittee that we are committed not to reduce our budget for the personal allocation over a period of 2 years following the enactment of the legislation.

Mr. STRAWDERMAN. I might add the major focus will be the removal of several hundred cases from the processing queue that we have today and allowing for more significant turnaround time in FOIA cases. We will monitor and analyze that process after enactment to see how effective we can be in that regard.

Mr. KLECZKA. I want this subcommittee and the public at large to be able to monitor these commitments. For the 2-year period referred to by Director Casey, will you agree to file with this subcommittee semiannual status reports on the processing of requests, the assignment of personnel, and the size of the backlog?

Mr. STRAWDERMAN. Yes, we will be able to do that.

Mr. BRIGGS. Yes, sir.

Mr. KLECZKA. I would also like you to agree that the semiannual report will be unclassified so that anyone who wants to see it will be able to do so.

Mr. BRIGGS. Yes, sir, we will do that.

Mr. KLECZKA. Since the bill is so heavily based on the current CIA filing system, I would like you to agree to report in advance any major structural changes at the CIA that would affect the agreements embodied in H.R. 5164.

Mr. BRIGGS. Mr. Chairman, we can agree to that.

Mr. KLECZKA. Let us clarify how the provisions will work regarding actual investigations into improprieties or violations of the law. For example, suppose that a citizen makes a nonfrivolous allegation that the CIA is or has engaged in some improper activity. An appropriate authority collects or reviews records regarding the allegations.

Am I correct that those records will remain subject to search and review under the FOIA?

Mr. BRIGGS. Yes, sir, Mr. Chairman, you are correct. They will.

Mr. KLECZKA. Are there any exceptions? In other words, can the authority and H.R. 5164 be used to deny access to records of improper CIA activities that are accessible now under FOIA?

Mr. BRIGGS. No, sir.

Mr. KLECZKA. Do you object to the mandatory review for procedure under Executive order for security classification?

Mr. BRIGGS. Could you repeat that please?

Mr. KLECZKA. Does the CIA object to the mandatory review for declassification procedure in the Executive order or on security classification?

Mr. BRIGGS. No, Mr. Chairman, we do not.

Mr. KLECZKA. Did you ask the President to delete the mandatory review procedure from the order issued in 1982?

Mr. MAYERFELD. We did not, Mr. Chairman, no.

Mr. KLECZKA. In 1977, acting CIA Director John Blake said that the 1974 FOIA amendments constituted a somewhat traumatic experience and had required a considerable adjustment in the attitude and practice. He concluded, I believe, that the Agency is better off for it.

That statement has been quoted quite a bit. I wonder if you would care to comment on Mr. Blake's remarks?

Mr. BRIGGS. I know Jack very well. He was a close friend and an old colleague. I probably would have disagreed with him at the time. I think what he must have meant is that prior to that time it was a part of the culture that everything was secret and when I first came in the Agency the names of those who were on the overt side of the house were secret.

The fact that we had domestic offices located in the United States was top secret. So there was a general mentality that resulted in secrecy as a concept being applied across the board and the experience that we had, traumatic as he said it was did, in fact cause us to look more closely at that which required continued classification.

And as I said, we spent a good bit of time, Ernie and I particularly, in those days in insuring that we were not acting arbitrarily and capriciously. The environment on the outside certainly had changed. I think that is probably what he meant.

Mr. KLECZKA. Thank you.

Mr. Kindness, do you have any questions of the witnesses?

Mr. KINDNESS. I just have, I believe, one other question.

I am trying to get a measurement, as the earlier line of questioning indicated, of the sort of work hours, work years of senior personnel that are involved. I believe we had information to the effect that approximately 121 work years were devoted to the handling of requests including review time by case officers.

And I believe that was for a fiscal year—the last past fiscal year.

Mr. STRAWDERMAN. That was calendar year 1983.

Mr. KINDNESS. Now, if I understand correctly that is the work years estimated for all of the personnel involved in the handling of those requests included in your group and in the operational group?

Mr. STRAWDERMAN. That is correct and it involves more than 121 people. It could be as many as 200 contributing hours per week on individual cases.

Mr. KINDNESS. Right. Are there some situations of which you are aware in the Agency in which a very substantial portion of the time that a senior person is involved in these requests that attracts as much as 20 to 25 percent of that person's time from their normal duties?

Mr. BRIGGS. Let me start on that anyway although my information is a little outdated because it was back earlier when the bill was first amended, but I spent more than 50 percent of my time as a GS-16 in this process. For example, in the review of the Oswald files, there was something like 52 manila folders constituting his entire personnel file.

And I had to read every single line of every document in those files. It is particularly true, of course, when a case goes into litigation and I have to sign an affidavit and at one point I think my name was on 65 different affidavits at the same time.

I have to make sure that every single statement is accurate and the exemptions claimed are valid. So I literally did spend more than 50 percent of my time as a GS-16 doing this when I was involved in it.

Mr. KINDNESS. Are there currently situations somewhat similar to that?

Mr. STRAWDERMAN. I would think there are. It is hard for me to measure that from my central staff, but I know from the Director of Operations they do involve case officer time presently to review documents they find in their searches. So presumably with passage of H.R. 5164, if you don't review the files, you don't have documents to review, there will be some savings, but I don't know the extent or degree.

We can get back to you with a more formal answer on that if you would like.

Mr. BRIGGS. I don't think there is a GS-18 involved today, but I do think there is a supergrade officer involved or at least a GS-15 level.

Mr. KINDNESS. It would help to have something of a measurement. I don't want to create an unnecessary project, but getting sort of a measurement of what we are dealing with would be somewhat helpful.

Mr. STRAWDERMAN. We would be happy to do that.

Mr. MAYERFELD. May I comment on that? We certainly will supply more accurate statistics, but if I may take a minute to describe the process particularly in the operations directorate which is the one that suffers the greatest burden under the current arrangement, it is required that before any piece of paper, before any document is released out of the Operations Directorate, the person who has the substantive responsibility in that particular area must review it to make absolutely certain and that nothing slips out by inadvertence, so to speak.

So to take a hypothetical example, the subject matter of the request concerns—well, let's say the Soviet Union. The particular person who has the responsibility for operations in the U.S.S.R. area must actually eyeball the document which usually at that

point contains more black marks than it contains words before it is permitted to be sent out.

So, this is the kind of burden that we were talking about on the substantive people. I cannot personally at this moment quantify that, but we would be happy to supply that for the record.

Mr. KINDNESS. I don't seek to make a large task of something that would be used for purposes of argumentation in support of the bill, but that is basically what it amounts to.

Mr. Chairman, if I may ask one more question here. Has Executive Order 12356 made any substantive difference in classification and declassification decisions made by the Agency that is in comparison with the previous Executive order?

Mr. STRAWDERMAN. We found no discernable change in using the Executive Order 12356 and the prior Executive order. In both cases in reviewing documents, you have to weigh whether you should keep the information classified or whether it should go into the public domain. So that same balancing test is, in effect, in today's world, as it was previously as far as we can tell.

Mr. KINDNESS. Thank you. I yield back to Mr. Chairman.

Mr. KLECZKA. Are there any further questions?

Hearing none, the committee would like to reserve the right to submit additional questions in writing to you, Mr. Briggs. If there are no further questions, we would like to thank you all for appearing this morning.

Mr. BRIGGS. Thank you very much.

Mr. ENGLISH. The subcommittee would like to now call Mr. Mark Lynch, representing the American Civil Liberties Union. Mr. Lynch, we will be happy to receive your testimony now. If you would care to summarize your testimony, without objection your written testimony, in full, will be made a part of the record.

**STATEMENT OF MARK H. LYNCH, AMERICAN CIVIL LIBERTIES
UNION, WASHINGTON, DC**

Mr. LYNCH. Thank you, Mr. Chairman. That's a good procedure. The ACLU appreciates the chairman giving us the opportunity to appear this morning to testify on this bill. To get to the bottom line, after long and careful consideration and the application of a considerable amount of skepticism, we have come to the conclusion that this bill, as it has been reported by the House Intelligence Committee, would result in a net gain for public access to information at the Central Intelligence Agency, and therefore we urge its prompt enactment without further amendment.

The reasons for coming to this conclusion are that the bill will not result in the withholding of any information which is now currently available and it will reduce the 2- to 3-year backlog in processing requests that has made the act all but useless except for those people who are extraordinarily patient.

This backlog is intolerable. It negates the usefulness of the act, and steps to eliminate it seem to be of paramount importance if the act is to have any effectiveness with respect to the CIA.

Now, why have we come to the conclusion that this bill would not result in the withholding of any information which is now available? Let me say, first of all, that we qualify this as meaning-

ful information. As the CIA representatives indicated earlier this morning, documents from operational files sometimes are released with a vast percentage of the document deleted and nothing but random words or phrases released.

Those documents are not meaningful in our judgment. So when we say no meaningful information will be lost, we do understand that these documents with random words may not be available any longer, but that doesn't mean that anyone is going to be losing any meaningful information.

There are occasions on which meaningful information has been released from operational files to the Central Intelligence Agency, and this bill is carefully crafted to insure that that kind of information will continue to be available in the future.

The three circumstances are: First of all, requests by U.S. citizens or permanent resident aliens for information about themselves; second, information about covert operations where the existence of the operation is not itself properly classified; and third, and most important, information concerning the specific subject matter of an investigation into an impropriety and illegality in the conduct of an intelligence activity.

Now, some people, and in particular, Mr. Mackenzie, who is going to be testifying later this morning, have pointed out examples of information from operational files that in their view will be lost under this bill, if passed.

However, I have gone through Mr. Mackenzie's testimony carefully and with respect to every single example of which I have personal knowledge—and that is probably a third to a half of the examples he cites in his testimony—I have concluded that the kind of information he has cited is the kind of information that is covered by these three exceptions.

That is, it is information that was the subject matter of a specific investigation into impropriety or illegality or information that involved a covert action, the existence of which was no longer properly classified.

One example, in particular, that I might give the committee in that regard is a request that, in fact, was handled by my colleague, Susan Schaffer, for information about the CIA's technical assistance in the March 1982 election in El Salvador.

That request was made on August 23, 1982, and it was based on a July 30, 1982, letter to the editor in the New York Times from Director of Central Intelligence, William Casey, in which Mr. Casey said, and I quote: "We provided election authorities with invisible ink which existed and will be detected only under ultraviolet light. This was to insure an honest vote to protect against the retaliation with which the guerrillas had threatened anyone who voted."

Our request was for technical assistance in that election. The Agency released a document cited in Mr. Mackenzie's testimony concerning the use of invisible ink. This document was released because the Director had confirmed that the Agency had provided this invisible ink, and under the provision of the bill providing for the continued release of information concerning covert operations, the existence of which is no longer classified, this document would still be searchable and still be releasable if this bill went into effect.

I would like to assure the committee and the public at large that the Center for National Security Studies, which is an ACLU project and which I have represented in a number of litigations, is one of the largest institutional users of the Freedom of Information Act at the CIA and has a very great interest in the application of the FOIA to the CIA.

We have gone over the Center's file cabinets full of documents obtained under the Freedom of Information Act and we are confident that we are not going to lose anything that we have gotten in the past. We wouldn't support this bill if we thought we were going to lose information. We have the view that this bill has been carefully crafted to maintain the level of access which is currently available, but at the same time to reduce this intolerable backlog so that information which is releasable can get out in a timely fashion.

One of the other important provisions I should dwell on is the one dealing with the specific subject matter of an investigation into illegality or impropriety. Mr. Mackenzie makes the point that many of the documents he cites in his testimony would not be available, because they were not reviewed by the people doing the investigations.

That is precisely the point of the difference between the House bill, which is before this committee, and the Senate bill. The Senate bill only did cover information which had been the subject of an investigation if, in fact, the documents had been reviewed or relied upon by the people doing the investigating.

We objected to that limitation in testimony before the House Intelligence Committee, and the committee took the approach that the entire specific subject matter would be subject to search and review, even if it hadn't actually been examined by an investigator. Consequently all documents dealing with Operation Chaos, which was a specific subject matter of inquiry, all documents dealing with Operation Resistance, which was specific subject matter of inquiry, all documents dealing with Operation Merrimac, which was a specific subject matter of inquiry—all of those documents, irrespective of whether they were ever actually reviewed by anybody on the Church committee, will continue to be subject to research and review under this bill.

I think these examples illustrate why we have come to the conclusion we have come to, and why we think this is a bill that is worth supporting. That, I think, summarizes our position.

I would be happy to answer any further questions the committee has.

Mr. ENGLISH. Thank you.

[The prepared statement of Mr. Lynch and attachments follow:]

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STATEMENT OF MARK H. LYNCH
ON BEHALF OF
THE AMERICAN CIVIL LIBERTIES UNION

ON H.R. 5164

BEFORE THE
SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE, AND AGRICULTURE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
MAY 10, 1984

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on H.R. 5164. The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the Freedom of Information Act as one of the most important pieces of legislation ever enacted by Congress because the Act positively implements the principle, protected by the First Amendment, that this nation is committed to informed, robust debate on matters of public importance. Accordingly, the ACLU is extremely wary of all proposals to amend the FOIA. This is especially true with respect to the CIA, for the FOIA has been a significant part of a larger process over the past ten years of bringing that Agency under public and congressional scrutiny. While maintaining this skepticism, we have concluded after long and careful consideration of H.R. 5164 that this bill will be a gain for public access to CIA information and we therefore support the bill.

Anyone who has made an FOIA request to the CIA knows that the wait for a substantive response is intolerable -- two to three years. There is good reason to believe that this delay is primarily due to the amount of time that it takes to review

records in the Agency's operational files. We also know from nearly ten years of litigation with the CIA that, with very few exceptions, documents from operational files, as that term is narrowly defined in the bill, are exempt under the provisions of the FOIA and that the courts do not order the release of such information. (In some instances, the CIA has released documents from operational files with everything deleted but random words that have no meaning, and therefore we do not regard these releases as meaningful.)

These factors suggest that if operational files are exempt from routine search and review, with exceptions to cover substantive material which is now released, the delay in responding to requests will be reduced and no meaningful information which is currently released will be lost. Accordingly, we took the position that if both these conditions were met -- improved service and no loss of currently available information -- we would support legislation to exempt CIA operational files from routine search and review. We believe that H.R. 5164 meets these tests and should be enacted.

Operational files are defined in the bill as: (1) files in the Directorate of Operations "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services;" (2) files in the Directorate for Science and Technology "which document the means by which foreign intelligence or counter-

intelligence is collected through scientific and technical systems;" and (3) files in the Office of Security "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." The Report of the House Intelligence Committee makes clear that the files in these three components covered by these definitions "concern the intelligence process as distinguished from the intelligence product."

Files within these three components which do not meet the statutory definitions will not be eligible for exemption from search and review. Furthermore, records in all other parts of the CIA, including information which originated in the operational components, will continue to be subject to search and review. For example, all documents which go to the Director of Central Intelligence, even if they concern the most intimate details of an operation, will be subject to search and review. Furthermore, all intelligence collected through human and technical means will continue to be covered by the FOIA because the operational components forward such information to the analytic components of the Agency. What will be exempt from search and review is information about how intelligence is collected -- for example, how a source was spotted and recruited, how much he is paid, and the details of his meetings with his case officer. Such information is invariably exempt from disclosure under the FOIA and will continue to be exempt under any conceivable standard for classification.

In some instances, collected intelligence is so sensitive that it is disseminated to analysts and policy-makers on an "eyes only" basis and then returned to the operational component for storage. To cover these situations and to guard against the possibility of an expansion of this practice to circumvent the intent of this legislation, the bill also includes a proviso that files maintained within operational components as the sole repository of disseminated intelligence cannot be exempt from search and review.

The bill provides for three circumstances in which operational files will be subject to search and review. First, information about covert operations in operational files will be subject to search and review if the fact of the existence of the operation is not exempt from disclosure under the FOIA. This provision codifies well-established case law that in some instances the existence of such operations can be properly classified. However, if the existence of a covert operation is not properly classified, the Agency will be required to review all its records concerning the operation.

Second, any information in operational files which concerns the subject matter of an investigation for impropriety or illegality in the conduct of an intelligence activity will be subject to search and review. Such investigations may be conducted by the Agency's Inspector General or General Counsel, by the congressional oversight committees, or by the President's Intelligence Oversight Committee. It is important to note from the legislative history of the bill that the CIA undertakes investigations whenever it

receives an allegation of illegality or impropriety from any member of the public, except where the individual has repeatedly made frivolous allegations. The House Intelligence Committee Report makes clear that "frivolous allegations" are those such as "the CIA is manipulating by brain waves."

Whenever such an investigation is conducted, all information concerning the subject matter will be subject to search and review even if the investigators did not review the particular documents. This is an important improvement over the Senate bill which reaches only information that was reviewed or relied on in the course of an investigation.

This provision on the subject matter of investigations is very important for two reasons. First, for historical purposes, it insures that all information concerning the abuses that were addressed by the Church and Pike Committees will continue to be accessible. Second, if future abuses come to light, the public -- acting either on its own or through the congressional oversight committees -- can trigger investigations which will make relevant information in operational files subject to search and review. Thus, the bill insures that operational files cannot be used to hide information on improper and illegal activities of the CIA.

Third, the bill requires that operational files must be searched in response to requests by United States citizens and permanent resident aliens for information about themselves. This provision recognizes the importance of the right of individuals to be able to seek information about themselves in all CIA

files and also preserves the degree of access currently afforded by the Privacy Act.

In hearings before the House Intelligence Committee, we urged the Committee to consider whether the concept of first-person requests should be broadened to include United States political, religious, academic, and media organizations. The Committee staff investigated this issue carefully and found that it is very difficult to identify the nature of organizations from the CIA's indices without actually reviewing the files. Consequently, the Committee concluded that including organizations within the scope of first-person requests would require extensive file searches and thus jeopardize the goal of eliminating the delay in processing FOIA requests.

We are willing to live with this judgment because of the proviso in the bill that requires the CIA to search operational files for the subject matter of an investigation. Under this proviso, an organization that suspects it is being improperly used or targeted by the CIA can request an investigation, and the information concerning that investigation will be subject to search under the FOIA. Consequently, we believe that the interests of organizations involved in First Amendment activity are adequately protected by this bill.

The bill also contains a provision to insure that information in operational files will not necessarily be exempt from search and review forever. Every ten years the CIA is required to review its operational files to determine whether files, or

portions of files, of historic value or other public interest can be removed from exempt status and made subject to search and review. As an example of this process, the CIA has already assured the Senate Intelligence Committee that the files of the OSS, which are currently maintained by the Operations Directorate, will not be exempt from search and review. Another provision of the bill also requires the Agency, in consultation with the Archivist, the Librarian of Congress, and historians selected by the Archivist, to submit a report to Congress by June 1, 1985, on the feasibility of reinstating systematic declassification reviews of historically significant information. Although this provision is not directly connected to the FOIA, it responds to the complaints of historians over the Reagan Administration's elimination of systematic declassification reviews.

In the area of judicial review, the House bill is a marked improvement over the Senate bill. In hearings last June before the Senate Intelligence Committee, the CIA took the position that there should be no judicial review of whether a particular file meets the definition of operational or whether particular documents are improperly placed solely in operational files. The Committee, at our urging, rejected this position and insisted on judicial review. However, the Senate bill and the accompanying report left some confusion over whether the standard of review was de novo, as under the FOIA, or a more generous arbitrary and capricious standard. H.R. 5164 resolves this confusion by making it crystal clear that review is de novo. The bill

also codifies certain litigation procedures concerning the parties' submissions, discovery, and in camera proceedings that do not depart from the practices which the courts currently apply in FOIA cases involving classified information.

The House bill also contains an improvement over the Senate bill with respect to the issue of retroactivity. The provisions of both bills will cover all requests pending at the administrative stage on the date of enactment. This provision makes sense because if the bill had only prospective effect, it would take another two to three years to eliminate the backlog and thus defeat one of our principal interests in this legislation. However, the House bill, unlike the Senate bill, does not apply retroactively to any lawsuit which was pending on February 7, 1984. This date was selected because it was the day before the hearings before the House Intelligence Committee where members of the Committee expressed opposition to the retroactivity provision of the Senate bill. To avoid a rush to the courthouse, the Committee chose that date rather than the date of enactment as the cut-off point.

For the foregoing reasons we believe that this bill will not enable the CIA to withhold any meaningful information which the Agency is now required to release or which it would be required to release under any conceivable standard for classification. Furthermore, the Director of Central Intelligence has provided the House Intelligence Committee with a written assurance that he will establish a specific program of measures to speed up the processing of FOIA requests. The Director has also agreed