

98TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 98-726
2d Session } Part 1

CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

MAY 1, 1984.—Ordered to be printed

Mr. BOLAND, from the Permanent Select Committee on Intelligence,
submitted the following

REPORT

[To accompany H.R. 5164 which on March 15, 1984, was referred jointly to the
Permanent Select Committee on Intelligence and the Committee on Government
Operations]

The Permanent Select Committee on Intelligence, to whom was referred the bill (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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purposes	4
Background	4
History of the Bill.....	6
Need for the Legislation.....	8
Delays in Responding to FOIA Requests.....	10
Lack of Useful Information Released from Certain Sensitive Operational Files.....	13
Diversion of Skilled CIA Personnel Away From Intelligence Duties.....	14
Maintenance of Sound Security Principles.....	14
Risk of Disclosure of Sensitive Information.....	15
Concern by Sources.....	16
Preservation of Existing Access to Potentially Releaseable CIA Information	17
Section-by-Section Analysis.....	19
Section 1 of H.R. 5164: Short Title.....	20
Section 2 of H.R. 5164: Amendments to National Security Act.....	20
Subsection 701(a): Exemption of Certain CIA Operational Files.....	20
Subsection 701(b): Definition of "Operational Files".....	20
Subsection 701(c): First Personal Requests, Special Activities and Investigations for Impropriety or Illegality.....	23
Subsection 701(d): Transfer of Records and Information Between Exempted Operational Files and Other Files.....	31
Subsection 701(e): Construction Against Implied Repealer or Modification	32

	Page
Subsection 701(f) : Judicial Review.....	32
Section 702: Declassification Review of Exempted Operational Files.....	36
Section 3 of H.R. 5164 : Report to Congress.....	37
Section 4 of H.R. 5164: Limited Retroactive Effect.....	38
Committee Position.....	38
Oversight Findings.....	38
Congressional Budget Act.....	39
Congressional Budget Office Estimate.....	39
Recommendation of the Committee on Government Operations.....	39
Inflation Impact Statement.....	39
Five-year Cost Projection.....	39
Executive Branch Estimates.....	39
Changes in Existing Law Made by the Bill, as Reported.....	39

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Central Intelligence Agency Information Act".

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

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

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

"SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act) which require publication or disclosure, or search or review in connection therewith.

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

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

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

except that files which are the sole repository of disseminated intelligence are not operational files.

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

"(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act) or section 552a of title 5, United States Code (Privacy Act of 1974);

"(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

"(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, 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.

"(d) (1) Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.

"(2) The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.

"(3) Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.

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

"(f) Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that—

"(1) in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined *ex parte*, in camera by the court;

"(2) the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;

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

"(4) (A) when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational file likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and

"(B) the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;

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

"(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

"(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

"DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

"SEC. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions may be removed from any category of exempted operational files or any portion thereof.

"(b) The review required by subsection (a) of this section shall include consideration of the historical value or other public interest in the subject matter

of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

"(c) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this section may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining (1) whether the Central Intelligence Agency has conducted the review required by subsection (a) of this section within ten years of enactment of this title or within ten years after the last review, and (2) whether the Central Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review."

(b) The table of contents at the beginning of such Act is 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."

Sec. 3. The Director of Central Intelligence, in consultation with the Archivist of the United States, the Librarian of Congress, and appropriate representatives of the historical discipline selected by the Archivist, shall prepare and submit by June 1, 1985, to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a report on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

Sec. 4. The amendments made by section 2 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 civil actions not commenced prior to February 7, 1984.

PURPOSES

The bill has three purposes:

(1) to relieve the Central Intelligence Agency from an unproductive Freedom of Information Act (FOIA) requirement to search and review certain CIA operational files consisting of records which, after line-by-line security review, almost invariably prove not to be releasable under the FOIA;

(2) to improve the ability of the Central Intelligence Agency to respond to Freedom of Information Act requests from the public in a timely and efficient manner, while preserving undiminished the amount of meaningful information releasable to the public under the Freedom of Information Act; and

(3) to provide additional assurance of confidentiality to sources who assist the United States by cooperating with the Central Intelligence Agency.

The bill accomplishes these purposes by excluding certain specifically defined sensitive CIA operational files from the Freedom of Information Act process.

BACKGROUND

The Freedom of Information Act (5 U.S.C. 552) currently applies to the Central Intelligence Agency (CIA) in precisely the same manner that it applies to other federal agencies. Thus, in response to a request from anyone for reasonably described records, the CIA must (1) *search* its records systems for records responsive to the FOIA requests, (2) *review* the responsive records retrieved from CIA files to

determine which portions of the records fall within FOIA disclosure exemptions, and (3) *disclose* all reasonably segregable portions of the responsive records which do not fall within one or more of the nine FOIA exemptions from disclosure, such as Exemption 1 for properly classified information or Exemption 3 for information specifically exempted from disclosure by statute, such as section 102(d) (3) of the National Security Act of 1947 which protects information relating to intelligence sources and methods.

A decade of experience has shown that certain specifically identifiable CIA operational records systems, containing the most sensitive information directly concerning intelligence sources and methods, inevitably contain few, if any, items which can be disclosed to FOIA requesters. The records contained in these operational records systems almost invariably fall within the FOIA exemptions protecting classified information and information relating to intelligence sources and methods. With respect to these sensitive operational records, FOIA requesters are often informed that the entire contents of the records are being withheld; at best the requester receives photocopies of the records with a vast expanse of blackened-out deletions leaving only a few meaningless words. Nevertheless, despite the fact that records retrieved from these operational records systems will, after line-by-line security review, be found to be exempt from FOIA disclosure, the CIA must search and review records from these systems in response to FOIA requests. As Mr. Mark Lynch, representing the American Civil Liberties Union, testified before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence on February 8, 1984:

[A] great deal of useful information is released to the public as a result of the Freedom of Information Act, but at the same time, there is a great deal of information which the CIA invariably and properly withholds under the exemptions which exist in the Act because that information is either classified or involves intelligence sources and methods. And it has also become clear to me that, as the testimony from the Agency has indicated, a great deal of time is spent processing and justifying the withholding of information which in the end is exempt and which the courts are going to accept as exempt.

The unproductive process of searching and reviewing CIA operational records systems which contain little, if any, information releasable under FOIA absorbs a substantial amount of the time of experienced CIA operational personnel and scarce tax dollars. This expenditure of time and money on fruitless search and review of sensitive operational records contributes nothing to the FOIA goal of releasing non-exempt information to the public, since it produces almost no records releasable to the public. In fact, it actively hinders achievement of that goal, because the time-consuming process of reviewing sensitive CIA operational records which prove unreleasable creates a bottleneck in the Agency's FOIA review process, causing a two-to-three year delay in CIA responses to many FOIA requests.

The "Central Intelligence Agency Information Act" (H.R. 5164) will remove certain specifically defined sensitive CIA operational files from FOIA search and review requirements, eliminating the waste of

CIA human and fiscal resources. The legislation will have the additional benefits of reducing the possibility of accidental administrative disclosure of sensitive CIA operational secrets and of providing additional assurance to CIA intelligence sources that public access to government files under America's Freedom of Information Act poses no risk to the confidentiality of their relationship with the United States Government.

With the relief afforded the CIA from undue administrative burdens by the legislation, CIA will be able to respond more quickly and more efficiently to FOIA requests in the future than it has in the past. The resources currently spent on the fruitless search for and review of records in sensitive operational files will be redirected to productive processing of FOIA requests for records in other files, which contain releasable information. Removing the operational files from the FOIA process will contribute greatly to elimination of the bottlenecks in FOIA processing at CIA, reducing delays in providing final responses to FOIA requesters.

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 early as 1977, three years after the Act was amended to provide for *de novo* judicial review of the propriety of the classification of information withheld by agencies as classified.

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, "[w]e 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

By 1979, however, CIA's position had changed. Testifying before the House Permanent Select Committee on Intelligence, Deputy Director of Central Intelligence Frank Carlucci declared that "the total 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 the FOIA for the CIA. Instead, he proposed an exemption for certain designated operational files within the Intelligence Community, with a provision allowing U.S. citizens and permanent resident aliens to continue to use the FOIA to obtain information about themselves. Mr. Carlucci described this approach as "fully consistent with the spirit and letter of national security exemptions already in the Freedom of Information Act."²

A provision similar to that proposed by Mr. Carlucci was included as subsection 421(d) of H.R. 6588, The National Intelligence Act of

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

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

1980, introduced by Representative Boland in the 96th Congress. The latter differed from the Carlucci proposal in that it would have exempted designated files of the CIA rather than designated files of all intelligence agencies. Another bill, H.R. 5129, introduced by Representative McClory and others, contained a provision that would have exempted designated files of the CIA and the National Security Agency.

During the hearings on H.R. 6588 (and on its Senate counterpart, S. 2284),³ Director of Central Intelligence Stansfield Turner expressed the Carter Administration's support for the Carlucci proposal. However, the Carter Administration subsequently supported a different proposal, put forth by the Department of Justice, which would have permitted the CIA to exempt certain types of information from disclosure by Agency certification and would have precluded judicial review. This proposal was contained in H.R. 7056 which Representative Richardson Preyer introduced, by request, in April, 1980.

Representative Preyer also introduced his own bill, H.R. 7055, which would have added to the nine existing FOIA exemptions a new exemption for information provided to the CIA in confidence by a secret intelligence source or a foreign intelligence service, and which would have retained judicial review.

A similar proposal was contained in section 202 of H.R. 6860, the Intelligence Activities Act of 1980, introduced by Representative Les Aspin in March, 1980.

The Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations conducted hearings on H.R. 5129, H.R. 7055, and H.R. 7056 in the spring of 1980.⁴

No further action was taken on any of these measures.

On June 29, 1983, Representative Mazzoli, Chairman of the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, introduced H.R. 3460. Representative Whitehurst introduced a similar bill, H.R. 4431, on November 16, 1983.

The Subcommittee on Legislation of the Permanent Select Committee on Intelligence held a public hearing on these bills on February 8, 1984. Testifying at the hearing were:

John N. McMahon, Deputy Director of Central Intelligence.

Mary C. Lawton, Counsel for Intelligence Policy, Department of Justice.

Mark H. Lynch, Council for the ACLU Project on National Security, representing the American Civil Liberties Union.

John H. Shenefield, partner, Milbank, Tweed, Hadley & McCloy, former Associate Attorney General, representing the American Bar Association.

Charles S. Rowe, Editor and Publisher, *The Free Lance Star*, Fredericksburg, Virginia, representing the American Newspaper Publishers Association.

³ *National Intelligence Act of 1980*, Hearings before the Select Committee on Intelligence, United States Senate, 96th Congress, 2d session (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 Congress, 2d session (1980).

⁴ *The Freedom of Information Act: Central Intelligence Agency Exemptions*, Hearings before a Subcommittee on the Committee on Government Operations, House of Representatives, 96th Congress, 2d Session (1980).

Samuel Gammon, Executive Director, National Coordinating Committee for the Promotion of History, representing the Organization of American Historians and the American Historical Association.

After the hearing, the Committee worked closely with the CIA and representatives of groups which use the FOIA in an attempt to resolve the major issues raised at the hearing and reached agreement on a bill. Modifications were made to previously introduced legislation in the areas of judicial review, retroactive effect, decennial review of exemptions of operational files, and other areas.

Representatives Mazzoli, Whitehurst, Boland and Robinson introduced a new bill (H.R. 5164) reflecting these modifications on March 15, 1984.

The full Committee met on April 11, 1984, to consider H.R. 5164, and, by unanimous voice vote, adopted an amendment in the nature of a substitute thereto and ordered the bill reported favorably.⁵

NEED FOR THE LEGISLATION

In considering this bill, the Committee balanced the benefits of an informed public with the national security need for an effective intelligence service. Since the 1974 FOIA amendments, the CIA has released to the public a substantial amount of information as a direct or indirect result of the Act. The following examples of material declassified and released by the CIA as a result of the FOIA illustrate the scope of this information and its importance for public understanding of the workings and decisionmaking processes of government:

Complete or partial copies of Director of Central Intelligence Directives issued from 1946 to 1976 covering a wide range of issues relating to the management, coordination, and general conduct of intelligence activities;

Substantially complete texts of significant National Intelligence Estimates, including estimates relating to the October, 1962 Cuban missile crisis;

Memoranda from the CIA General Counsel to the Director of Central Intelligence on the legality of covert action operations;

Records concerning efforts by former CIA Director William Colby 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.

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

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

⁵ Senator Goldwater, Chairman of the Senate Select Committee on Intelligence, introduced a similar bill, S. 1324, on May 18, 1983. The Senate Select Committee on Intelligence held hearings on S. 1324 on June 21 and 28, 1983, and ordered it reported, with amendments, on October 4, 1983. (See S. Rept. 98-305). The bill, as reported, passed the Senate by voice vote on November 17, 1983. This Committee notes that on pp. 24 and 25 of the Senate Intelligence Committee's hearing record (S. Hrg. 98-464) Deputy Director of Central Intelligence McMahon expressed the Administration's position that no further relief from the FOIA for the Intelligence Community will be sought.

(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 Agency's acceptance of the obligation under the FOIA to provide information to the public not exempted under the FOIA is one of the linchpins of this legislation. The Act has played a vital part in maintaining 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 nevertheless believes that current FOIA requirements create greater burdens and risks for the CIA than is necessary to achieve the essential goal of preserving full public access to significant information.

The Central Intelligence Agency exists to provide to policymakers timely, accurate and insightful information on the capabilities, intentions and activities of foreign powers, organizations, and persons; to conduct activities in support of U.S. foreign policy objectives which are carried out so that the role of the U.S. Government in the activities remains hidden; and to counter the activities of the intelligence and security services of foreign powers, and others such as international terrorist organizations, who engage in activities hostile to U.S. interests. In intelligence parlance, these matters are known as the foreign intelligence and counterintelligence functions of the Central Intelligence Agency. To carry out these functions, the CIA employs a wide variety of intelligence methods and secures information and operational assistance from a wide variety of sources.

The Committee has found that the applicability of the FOIA process to the operational files of the Central Intelligence Agency has produced a number of effects not contemplated at the time of enactment of the FOIA in 1966 or at the time of its amendment in 1974 and 1976. While the Committee has determined that continued public access through the FOIA process to CIA files consisting of records of raw or finished intelligence or policy matters does not unduly burden CIA in carrying out its mission, the Committee has concluded that public access through the FOIA to certain CIA operational files, i.e., files documenting sources and methods used in CIA operational activities, has resulted in:

Two-to-three year delays in satisfying many FOIA requests;

The release, after line-by-line security review of records from CIA operational files, of little or no meaningful information;

Diversion of skilled, CIA operational personnel from important operational duties to FOIA processing; and

Inability to observe security principles of need-to-know and compartmentation.

The Committee notes also that a risk exists of accidental or unintended disclosure of sensitive material from operational files in the FOIA process.

Finally, the CIA has testified that present and potential sources of information and operational assistance, including both individual agents and intelligence services of friendly nations, perceive that the United States cannot protect the fact of their cooperation, and the information or assistance they provide, from disclosure through the FOIA process. The Committee remains skeptical of the validity of the perception problem and does not consider it to be a major factor in its conclusion that H.R. 5164 should be adopted. In any event, it is assumed that enactment of H.R. 5164 will change whatever perceptions need changing.

Each of these issues is examined below.

DELAYS IN RESPONDING TO FOIA REQUESTS

When FOIA requests involve records maintained by the CIA Directorate of Operations, the CIA final administrative response to the requests takes years, a period far in excess of that contemplated by the promptness requirements in the Freedom of Information Act. The primary difficulty preventing the CIA from responding in a more timely fashion to FOIA requests is the bottleneck in Directorate of Operations review of documents responsive to FOIA requests.

There is a two-to-three year delay at CIA in providing final responses to FOIA requests which involve review of responsive records retrieved from Directorate of Operations files. Directorate of Operations officers must conduct a security review of these records on a time-consuming line-by-line basis. This time-consuming process affects responses to FOIA requests for information located in other CIA components because such information must often be sent to the Directorate of Operations for coordination or declassification review. The FOIA review by Directorate of Operations officers of records from sensitive operational files does not produce releasable information; it only absorbs time they could use for FOIA review of records from non-operational files which are likely to contain releasable information. The Directorate of Operations review of records from operational files which do not contain releasable information slows down CIA review and release of information from non-operational files, producing a backlog in CIA FOIA processing. The public will be better served by a system which allows the public to get directly to the releasable CIA information more quickly.

The review necessary for documents found in the Directorate of Operations is the primary cause of the overall CIA backlog in responding to FOIA requests. Because most requests are handled on a first in, first out basis, requests involving hundreds of pages of responsive documents can delay the processing of far smaller cases in the processing queue. Records packages responsive to FOIA requests back up in the queue to await line-by-line review by experienced officers of the Directorate of Operations to determine which portions of the records can be released without jeopardizing national security.

The backlog in Directorate of Operations review of records responsive to FOIA requests developed rapidly in the years succeeding the

1974 amendments to the Freedom of Information Act. The peak year for FOIA requests to the CIA was 1978, in which the CIA received 1,608 requests. That number declined to 1,010 in 1982. In 1983, however, the number began to rise; CIA received 1,266 new FOIA requests in 1983. The backlog has also increased. The year-end 1983 backlog figure of 1,711 backlogged FOIA requests reflects an increase of 351 from the same FOIA backlog figure at the end of 1982, a 25 percent increase. In considering the numbers of requests, it must be borne in mind that some requests involve the line-by-line review of many linear feet of documents, while other requests require review of a relatively small number of documents.

The Committee considered the possibility of assignment of greater human and fiscal resources to FOIA processing at CIA to deal with the processing bottlenecks and determined that dedication of such additional resources would not eliminate the Directorate of Operations backlog. Because of the extreme sensitivity of CIA operational records, relatively senior experienced intelligence officers who have current responsibility for directing intelligence operations must make the security judgments required in determining which portions of operational records can safely be released. No amount of additional administrative support can speed up the review by these senior operational personnel to reduce the Directorate of Operations backlog.

Enactment of H.R. 5164 should minimize the Directorate of Operations FOIA processing backlog by withdrawing from the FOIA process the most sensitive files of that Directorate. Although Directorate of Operations personnel still will be required to review records retrieved in response to FOIA requests from Directorate of Operations non-exempted files or from the files of other CIA components, the elimination of the Directorate of Operations' most sensitive files from the FOIA process should effect a great reduction in the Directorate of Operations backlog. This reduction in the backlog will speed up substantially final CIA administrative responses to FOIA requesters. The Committee firmly expects that CIA final responses to FOIA requesters after enactment of H.R. 5164 will be measured in months at the outside, and not in years, and that the CIA will redouble its efforts to meet the deadlines established in the Freedom of Information Act. The Committee views this substantial reduction in CIA response time as a primary benefit of this bill.

To achieve this objective, the Committee expects the CIA to establish a specific program of measures to improve processing of FOIA requests after enactment of H.R. 5164. The Committee believes that this program should provide for elimination of the existing FOIA backlog and for prompt processing of FOIA requests which do not require extensive search, review, and coordination of large numbers of records. The Committee's expectations are based on an assumption that the volume of FOIA requests received by the CIA will not increase significantly after enactment of this legislation.

With respect to the allocation of resources and personnel freed by the impact of H.R. 5164 on CIA processing of FOIA requests, the Committee expects the Agency to apply such resources and personnel appropriately to the task of eliminating the existing backlog. Furthermore, the Committee expects the Agency not to reduce its budgetary and personnel allocation for FOIA activities during the two-year

12

period following enactment of this legislation. At the end of that two-year period, the Committee will consider the appropriate level of expenditures required in the out-years to ensure prompt CIA responses to FOIA requests. Finally, the Committee expects the Agency to apply the resources freed by elimination of the backlog to augment resources for search and review of non-exempt files. The Committee will closely examine CIA compliance with these expectations in the course of considering the annual CIA budget authorizations and through oversight of CIA FOIA activities.

The Director of Central Intelligence committed the CIA to fulfilling the Committee's expectations in the following exchange of correspondence:

U.S. HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C., April 13, 1984.

HON. WILLIAM J. CASEY,
Director of Central Intelligence,
Washington, D.C.

DEAR MR. CASEY: On April 11 the Permanent Select Committee on Intelligence, by unanimous voice vote, ordered reported favorably H.R. 5164, The Central Intelligence Agency Information Act.

In anticipation of consideration of this important measure by the Committee on Government Operations and the full House of Representatives, it is an appropriate time to confirm this Committee's understanding that upon enactment of H.R. 5164 the Agency will establish a specific program designed to produce compliance with the current FOIA processing deadlines for new requests and to effect a substantial reduction, if not the entire elimination, of the current backlog of FOIA requests. Furthermore, it is expected that the Agency will not reduce its budgetary and personnel allocation for FOIA activities during the two year period following enactment.

As you know, the prospect of achieving these goals has been a major factor in securing the overwhelming congressional support, thus far evidenced, for this legislation.

It has been a pleasure working with Mr. Mayerfeld and his staff on H.R. 5164. I look forward to its prompt enactment.

With every good wish, I am

Sincerely yours,

EDWARD P. BOLAND,
Chairman.

CENTRAL INTELLIGENCE AGENCY,
Washington, D.C., April 27, 1984.

HON. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing to respond to your letter of 13 April 1984 wherein you seek to confirm the Committee's understanding of the course of action the Agency will pursue upon enactment of H.R. 5164.

Please consider this letter as confirmation of the understanding that, upon enactment of H.R. 5164, the Agency will establish a specific program designed to substantially reduce, if not entirely eliminate, the

13

current two-to-three year backlog of Freedom of Information Act (FOIA) requests. You will recall that in answering a specific question by Representative Mazzoli during the hearing, we committed ourselves to the goal of responding to new FOIA requests in a matter of weeks, or at the most months, depending on the complexity of the request. As we have previously made clear, given our compartmented system of records, we will rarely be able to give a FOIA requester a final response within the statutory 10-day time limit. However, the Agency will make continuing efforts to reduce our response time to the minimum amount necessary consistent with the needs of national security.

Additionally, this is to confirm your understanding that the Agency will maintain the current budgetary and personnel allocation for FOIA processing activities for a period of two years following enactment of this legislation.

On behalf of the entire Agency, I would like to express our appreciation for the Committee's time and effort in giving careful consideration to this legislation. I would also like to thank the Committee staff for all their assistance in this important legislative effort. I look forward to working with you to secure expeditious consideration of H.R. 5164 in the Committee on Government Operations and timely passage by the full House of Representatives.

Sincerely,

WILLIAM J. CASEY,
Director of Central Intelligence.

LACK OF USEFUL INFORMATION RELEASED FROM CERTAIN SENSITIVE
OPERATIONAL FILES

The FOIA requires that the CIA devote substantial time and money to conducting line-by-line security reviews of records in response to FOIA requests to determine which portions of records can safely be released. By enacting the FOIA in 1966 and amending it in 1974 and 1976, the Congress expressed its judgment that providing the public with an opportunity to inform itself of the workings of its government through access to government records was worth the accompanying expenditures of tax dollars and administrative effort. This premise does not apply, however, when the expenditure of tax dollars and effort does not contribute significantly to the release of information to the public.

The FOIA currently contains exemptions from disclosure for agency records which are properly classified or which would compromise intelligence sources or methods, and the CIA has never been forced in litigation, by a final judgment not subject to appeal, to disclose information which the Agency believed to be within these exemptions. The operational files which would be exempted by H.R. 5164 consist almost exclusively of these kinds of exempt information. Currently, the CIA must search for and review records from these sensitive operational files, even though the records will, after line-by-line security review, be found exempt from FOIA disclosure. With respect to the files which would be exempted by H.R. 5164, the review of records results at best in the release to FOIA requesters of pages covered with blackened-out deletions, with little or no meaningful information remaining. Requiring CIA to go through this review

process, which absorbs scarce resources without producing meaningful information for release to FOIA requesters, serves no useful purpose.

Enactment of H.R. 5164, by removing the most sensitive CIA operational files from the FOIA process, will eliminate the expenditure of time and money on the unproductive review of these records. The bill is designed carefully to ensure that it will result in exemption only of those sensitive operational files which experience under the FOIA has shown do not contain significant releasable information.

DIVERSION OF SKILLED CIA PERSONNEL AWAY FROM INTELLIGENCE DUTIES

Because of the specialized and sensitive nature of its national security work, the Central Intelligence Agency cannot rely upon a special clerical staff which does nothing but review documents for FOIA processing. Experienced intelligence officers must perform the line-by-line security review of records responsive to FOIA requests. Only intelligence officers with operational training and experience and knowledge of CIA operations, both past and present, can make the delicate judgments required in determining whether the records can be released without jeopardizing intelligence sources, methods and activities. Accordingly, the CIA must divert its experienced operations officers from their intelligence duties to review records for FOIA processing, especially records retrieved from sensitive operational files. Because skilled CIA operations officers are in limited supply, their diversion into FOIA processing has hindered the Agency's ability to carry out its intelligence functions.

H.R. 5164 will reduce the diversion of scarce, experienced operations officers away from their operational duties to review records for release under the FOIA. Because the great bulk of CIA records still will remain subject to the FOIA, even after enactment of the bill there still will be a need for skilled operations officers to set aside their operational duties to review records for release under the FOIA. However, by removing the most sensitive CIA operational files from the FOIA process, the diversion of operations officers for review of records from these files will be reduced substantially.

MAINTENANCE OF SOUND SECURITY PRINCIPLES

Central Intelligence Agency records systems are designed to serve the functional needs of particular CIA components or to support particular intelligence functions. CIA records systems are numerous, self-contained and compartmented. This decentralization of records systems contributes to the security of CIA intelligence activities by limiting the potential damage which would ensue if an individual with interests hostile to the United States were to gain access to a particular CIA records system or if a hostile foreign power were otherwise able to penetrate a CIA records system. The security principle of decentralization of records systems is important to effective security in any intelligence agency.

In addition to the principle of decentralization of records systems, the Central Intelligence Agency observes the "need-to-know" security

principle. A CIA employee is granted access only to such information as the employee needs to perform his intelligence duties. If a CIA employee lacks a demonstrable need to know the information he seeks to perform his official duties, the employee will not have access to the information. The Agency observes the "need-to-know" principle with particular care with respect to its operational files. These files directly concern and document intelligence sources and methods and are thus the repository of many sensitive CIA secrets.

Upon receiving a request for information under the Freedom of Information Act the Agency must search its file systems for records responsive to the request. The search for responsive records cuts across the compartmentation of records systems, as the CIA must search all records systems which might reasonably be expected to contain responsive records and must compile the retrieved records for review. In some cases, responding to an FOIA request may require searches of the bulk of records systems maintained by the Agency, eliminating compartmentation of information on the subject of the FOIA request.

After the Agency completes the search of its records systems and compiles the retrieved responsive records, the Agency must review the records in light of the exemptions contained in the Freedom of Information Act. In the course of this processing of records to determine for each portion of them whether it may safely be released, a number of CIA personnel have access to the information in the compiled records who would have no need to know the information to perform intelligence duties. Thus, the FOIA process is not fully consistent with the need-to-know security principle.

Enactment of H.R. 5164 would better conform FOIA processing at the CIA to the security principles of compartmentation and need-to-know with respect to the operational files of the CIA, which are the CIA files that most directly concern intelligence sources and methods. The legislation will thus add an additional measure of security for this category of sensitive CIA operational information.

RISK OF DISCLOSURE OF SENSITIVE INFORMATION

After the Central Intelligence Agency has located records responsive to an FOIA request in the various Agency records systems, the records must be reviewed and processed for release. The review process requires a determination on a page-by-page, line-by-line basis whether each reasonably segregable portion falls within one or more of the nine exemptions from disclosure contained in the Freedom of Information Act.

Errors can occur, and have occurred, in the processing of FOIA requests at the CIA. The risk of accidental disclosure of information which would, alone or in combination with other disclosed information, compromise an intelligence source or reveal other sensitive classified information always exists. Equally of concern is the potential that the CIA will disclose a piece of information in the FOIA process intentionally, believing the information to be innocuous, when in fact that piece of information provides the final clue which enables a hostile intelligence service to identify a CIA source or to deduce other important sensitive classified information. Although the existing Freedom of Information Act contains exemptions which would enable the

CIA to withhold such information, the existence of exemptions cannot cure the problem of accidental disclosure of source-revealing information or of intentional disclosure of information believed to be innocuous, which in fact could reveal sources to especially knowledgeable recipients.

H.R. 5164 will reduce substantially the potential for damage to the national security through accidental disclosure, or intentional disclosure of information not known to be damaging, in the course of FOIA processing, by removing CIA's most sensitive operational files from the FOIA process. Since operational files exempted in accordance with the bill will no longer be subject to search and review in response to FOIA requests, the risk of error in FOIA processing of records from these sensitive operational files will be reduced.

CONCERN BY SOURCES

To carry out its intelligence activities, the Central Intelligence Agency depends upon sources, including both individual agents and intelligence services of friendly nations, for information and operational assistance. To secure the cooperation of a well-placed individual who can provide information or operational assistance, the Central Intelligence Agency officer (called a "case officer") who will work with that individual must establish with him a secret relationship of great trust. If the fact of the source's cooperation with the CIA becomes known, the United States loses a source of information or operational assistance of great value in ensuring the security of the United States. The source loses his freedom, and in many parts of the world, his life.

A potential source is willing to cooperate with the CIA only if he believes the secrecy of his relationship with the CIA will be protected. If he believes that the CIA cannot provide an ironclad guarantee of secrecy and deliver on that guarantee, he will not cooperate. The critical element in establishing and maintaining the cooperation of a source is the source's perception that he can safely cooperate with the CIA because the CIA can protect the secrecy of the relationship.

The Central Intelligence Agency establishes similar relationships based on trust with the intelligence and security services of certain foreign governments which share policy interests with the United States. These services share intelligence with the CIA and assist the CIA in its conduct of intelligence activities abroad. These services will cooperate only if the United States protects the secrecy of the liaison relationship. These services will not share information with the CIA if they believe that such sharing places their sources at risk. Moreover, it is in the nature of relations among nations that they do not publicly acknowledge cooperation with other nations in the conduct of intelligence activities. Thus, even those nations whose intelligence services are widely presumed to engage in some form of cooperation with the CIA abroad would remain quite sensitive to any United States acknowledgement, whether through a record released under the FOIA or otherwise, of the existence of such a relationship.

The CIA has testified repeatedly that potential sources of great value have declined to cooperate with the CIA from fear that the CIA cannot protect the secrecy of their relationship to the CIA from disclosure. The CIA has also testified that existing sources terminated

cooperation from the same fear and that intelligence services of friendly nations have expressed concern about cooperating with the CIA due to concern that the CIA cannot keep secrets. The CIA ascribes these perceptions of sources and liaison services in part to the applicability of the Freedom of Information Act to the CIA.

The Committee believes that these perceptions, which CIA has testified that its sources hold, are not warranted, since FOIA exemptions exist for source-revealing information. It is, however, the source's perception, and not the actual state of affairs, which governs the willingness of the source to cooperate with the CIA. Enactment of H.R. 5164 should correct any misperception by some CIA sources that the CIA cannot protect the secrecy of their relationship to the CIA from FOIA disclosure. The bill withdraws CIA files which directly concern intelligence sources and methods from the FOIA process, except in certain specifically defined, limited circumstances. As a by-product of enactment of H.R. 5164, those who cooperate with the Central Intelligence Agency in the conduct of intelligence activities will have an additional measure of assurance that the CIA can maintain inviolate the confidentiality of their relationship to the CIA.

PRESERVATION OF EXISTING ACCESS TO POTENTIALLY RELEASABLE CIA INFORMATION

The Committee considered it to be of primary importance in providing CIA relief from undue FOIA processing burdens to preserve undiminished the amount of meaningful information releasable to the public under the FOIA. The bill accomplishes this goal by providing for exemption from the FOIA only of CIA's most sensitive operational files, which contain no currently releasable information other than that which is duplicated in files which will remain subject to the FOIA process. This is so because of the characteristics of CIA file systems. These characteristics must be understood in some detail to comprehend the reasons for which it can be said with assurance that withdrawing operational files from the FOIA process will not diminish the availability to the public under the FOIA of currently releasable information.

Certain CIA operational files are the repository for documents generated in the course of the conduct and management of intelligence-gathering activities. With respect to collection from human sources, these documents concern development of potential sources, assessment of their value and the likelihood of 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 administrative documents 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 the 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 under exemption (b) (1) for classified information and exemption (b) (3) for information specifically exempted from disclosure by a

statute, such as section 102(d)(3) of the National Security Act of 1947, which protects information pertaining to intelligence sources and methods.

Nevertheless, these operational files also contain other information that may currently 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 to the President, the Congress, the National Security Council, the State and Defense Departments, and other agencies. Finished intelligence is primarily the responsibility of the CIA 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 analysts write. Unlike finished intelligence, which is stored mainly in the files of the Directorate of Intelligence, raw intelligence reports are stored in files of both the Directorate of Intelligence and the Directorate of Operations. Frequently, copies of raw intelligence reports will be included in the same Directorate of Operations 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 currently triggers a search of the files of both the Directorate of Intelligence and the Directorate of Operations.

Suppose information in a raw report can be declassified and released in response to an FOIA request 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 Directorate of Operations. 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 documents: the declassified report filed in the Directorate of Intelligence, a copy of the same report filed in the Directorate of Operations, 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 exemption of operational files under H.R. 5164. 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; the Committee expects the CIA to continue this practice. This

practice is, of course, essential to the very mission of the CIA ; it would be useless to collect information and then fail to share it with analysts and policymakers. CIA dissemination practices thus ensure continued availability of raw intelligence.

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 Directorate of Operations. For example, 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 often concern significant policy questions requiring the attention of the Director or Deputy Director, which may 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 exemption of CIA operational files in the bill to ensure that enactment of the bill will preserve the availability to the public of CIA information currently releasable to the public. Of course, files not exempted by the bill remain subject to search and review, including any information in those files that was derived or disseminated from exempted operational files.

SECTION-BY-SECTION ANALYSIS

The bill consists of four sections, summarized briefly as follows:

Section 1 provides that the short title of the bill is the "Central Intelligence Agency Information Act."

Section 2 amends the National Security Act of 1947 to permit the Director of Central Intelligence to exempt certain specifically defined CIA operational files from the search, review, and disclosure requirements of the Freedom of Information Act (FOIA). The section also makes necessary technical additions to the table of contents of the National Security Act of 1947.

Section 3 requires the Director of Central Intelligence, in consultation with the Archivist of the United States, the Librarian of Congress, and historians, to report by June 1, 1985 to the intelligence committees of the Congress on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

Section 4 makes clear that exemptions of CIA operational files from FOIA search and review apply with respect to all FOIA requests, whether made before or after enactment of the bill, and to all FOIA lawsuits filed after February 7, 1984 (the day before the House Intelligence Subcommittee on Legislation FOIA hearing).

SECTION 1 OF H.R. 5164: SHORT TITLE

Section 1 of the bill provides that it may be cited as the "Central Intelligence Agency Information Act."

SECTION 2 OF H.R. 5164: AMENDMENTS TO NATIONAL SECURITY ACT

Section 2 of the bill contains the core provisions of the legislation. Section 2 enacts a new Title VII of the National Security Act of 1947, to provide for exemption of certain CIA operational files from the FOIA process. The new title consists of sections 701 and 702 of the National Security Act.

Subsection 701(a): Exemption of certain CIA operational files

Subsection 701(a) provides that the Director of Central Intelligence may exempt CIA "operational files" (defined in subsection 701(b)) from the search, review, and publication or disclosure requirements of the Freedom of Information Act. Subsection 701(a), in conjunction with the judicial review provision in subsection 701(f), ensures that the process by which the Director identifies and exempts operational files will involve a well-documented, detailed justification for the exemption of files selected for exemption. The requirement for detailed justification may be satisfied by describing the function of a group of files that fit within a well-defined category.

Although the Director of Central Intelligence will, of course, rely upon information received from his subordinates in the course of exercising his authority under subsection 701(a), the authority granted to the Director in that subsection is nondelegable. The nondelegable nature of the Director's authority does not preclude him from exempting in advance all newly created files that fit within a category of files that have been exempted.

Subsection 701(b): Definition of "operational files"

Subsection 701(b) defines the "operational files" of the Central Intelligence Agency which the Director of Central Intelligence may exempt from search and review under the Freedom of Information Act. The Central Intelligence Agency consists of four Directorates (Intelligence, Administration, Operations, and Science and Technology) composed of subordinate offices, divisions and staffs, and several relatively small offices which are independent of the Directorates and report directly to the Director of Central Intelligence, the Deputy Director of Central Intelligence, or the CIA Executive Director. The definition of "operational files" which are subject to exemption includes only certain files within the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security, which is one office within the Directorate of Administration.

Within the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security, only those files concerning intelligence sources and methods are comprehended by the definition of "operational files." These files concern the intelligence process as distinguished from the intelligence product. They include information on the identities of and contact 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. These files are distinguished from what may be called intelligence product files the function of which is to store the intelligence gathered from human and technical sources.

Within the Directorate of Operations, operational files are those "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." Thus, Directorate of Operations files will be eligible for exemption by the Director of Central Intelligence if they document the conduct of: (1) foreign intelligence operations; (2) counterintelligence operations; or (3) intelligence or security liaison arrangements or information exchanges.

Foreign intelligence operations consist both of collection of information relating to the capabilities, intentions and activities of foreign powers, organizations, or persons, including international terrorists and traffickers in narcotics, and of special activities (also called covert actions) conducted in support of United States foreign policy objectives in which the role of the U.S. Government is not apparent or acknowledged publicly. Counterintelligence operations consist of gathering information and conducting activities to protect against espionage and other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, and includes international terrorist activities. Intelligence or security liaison arrangements or information exchanges involve quiet cooperation between the United States and foreign countries on matters of mutual intelligence and security interest.

With respect to the Directorate for Science and Technology, operational files are those "which document the means by which foreign intelligence or counterintelligence is collected through scientific or technical systems." The Directorate for Science and Technology develops and operates scientific and technical systems which collect foreign intelligence and counterintelligence. These systems acquire communication intelligence, electronic intelligence, photographic intelligence and other types of intelligence susceptible for scientific and technical acquisition, and supplement human intelligence operations. These scientific and technical intelligence systems form a vital part of the National Foreign Intelligence Program. Files documenting these systems and their operation are among the most sensitive the CIA maintains.

With respect to the Office of Security, operational files are those "which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." These files are included among the operational files subject to exemption under the bill to ensure full protection for the operational files of the Directorate of Operations and the Directorate for Science and Technology. The need to extend the exemption authority to encompass these files in the Office of Security stems from the security support functions that Office performs for the Directorate of Operations and the Directorate for Science and Technology.

In most cases, when the Directorate of Operations proposes to engage an individual to provide information or operational assistance in Central Intelligence Agency operations, the Directorate of Opera-

tions must obtain approval to do so from the Office of Security. Prior to granting such approval, that Office examines and evaluates the suitability of that person from a security standpoint. Similar security approval is required when the Directorate for Science and Technology proposes to engage an individual in work on sensitive scientific and technical systems, as in the case of employees of contractors developing, producing, or operating such systems. The investigations conducted to determine the suitability of these potential sources of information or operational assistance for the Directorate of Operations and the Directorate for Science and Technology create files which directly concern intelligence sources and methods in the same manner as the operational files relating to the operations in which the potential sources will be involved. Thus, protection of the Directorate of Operations operational files and the Directorate for Science and Technology operational files requires that the Office of Security suitability investigation files supporting the operations of those Directorates also receive protection. The Committee notes that, while Office of Security suitability investigation files concerning employees of contractors involved with CIA scientific and technical systems are included within the definition of operational files in order to protect the security of those systems and avoid unproductive FOIA review of non-releasable material, Office of Security files documenting suitability investigations of CIA employees, both staff and contract, and employees of other federal agencies or the armed forces assigned or detailed to the CIA, are not within that definition and therefore cannot be exempted under subsection 701(a). The Committee also notes that the Attorney General-approved *Guidance for CIA Activities Within the United States* and *Guidance for CIA Activities Outside the United States* implementing Executive Order 12333 require that, if the CIA collects information on a U.S. person because he is a potential source, and does not contact him for operational use within three years, the CIA can no longer retain the collected information, other than a summary indicating that the CIA considered the person as a potential source, why he was considered, and why he did not become a source.

The definition of "operational files" specifically excludes files "which are the sole repository of disseminated intelligence." In very rare cases, the intelligence product of extremely sensitive sources may be disseminated by the CIA Directorate of Operations in a manner which does not allow storage of the product outside the Directorate of Operations. The Directorate of Operations intelligence dissemination is taken to selected senior officials, is read by them, and is returned to the Directorate of Operations for safekeeping. In such cases, the repository of the intelligence dissemination in the Directorate of Operations is the sole repository of the information, in contrast to the normal CIA practice in which intelligence is disseminated to, and maintained in the files of, the analytical components of the CIA, all of the files of which remain subject to search and review. To carry out the Committee's intent that the contents of disseminated intelligence remain accessible to FOIA requesters, the bill specifically provides at the end of subsection 701(b) that files which are the sole repository of these extremely sensitive intelligence disseminations are not opera-

tional files and, therefore, remain subject to FOIA search and review requirements.

The Committee notes that it will be incumbent upon the courts to interpret the term "files" in light of rapidly changing technology in the field of information storage media. Thus, for example, CIA conversion of paper files into computer files will not result in any change of the status of the files under section 701 by virtue of the nature of the information storage medium.

Subsection 701(c): First person requests, special activities, and Investigations for impropriety or illegality

Subsection 701(c) deals with three types of requests for information under the Freedom of Information Act which the Committee believes deserve special treatment because of the important interests they involve. Requests under the FOIA for information of these three types will continue to be processed in accordance with the Freedom of Information Act in the same manner as if section 701(a), which provides for exemption of operational files, were never enacted. Thus, exempted operational files will be searched along with other files for records responsive to these three types of FOIA requests.

First person requests.—Paragraph 701(c)(1) ensures that operational files will remain subject to FOIA search and review requirements in response to requests for information from a United States citizen or permanent resident alien who requests information concerning himself. Operational files will continue to be subject to search and review for these first-person requests for information whether the requests are made under the Freedom of Information Act, the Privacy Act, or both. Although the exemption authority under subsection 701(a) applies only with respect to the Freedom of Information Act, and in no way applies with respect to the Privacy Act, paragraph 701(c)(1) includes a reference specifically preserving the current state of first person requests under the Privacy Act to avoid even the remotest possibility of misconstruing the Committee's intent.

While the Privacy Act (5 U.S.C. 552a(j)(1)) authorizes the Director of Central Intelligence to promulgate rules to exempt from portions of the Act any system of records maintained by the CIA, this authority has been used only sparingly to the extent necessary to protect CIA security methods, intelligence sources and methods, and relationships with other public agencies or foreign services (see 32 C.F.R. 1901.61). The Committee relies upon CIA representations that it has no intention of expanding its use of this broad exemption authority.

The Committee thoroughly considered the possibility of providing for search and review of exempted operational files in response to FOIA requests by representatives of domestic organizations for information concerning those organizations. The Committee considered three possible approaches: (1) requiring FOIA search and review of operational files with respect to all domestic organizations, (2) requiring such search and review with respect to domestic political, religious, educational and media organizations, and (3) requiring such continued search and review with respect to domestic political, religious, educational and media organizations which are targeted or used in CIA operations. The Committee determined that none of these approaches is practicable.

The first approach, search and review of exempted operational files for requests concerning any domestic organization, would so limit the degree of relief the legislation provides to the CIA as to jeopardize achievement of the goals of eliminating the search for and line-by-line review of information which cannot be released and of speeding up CIA responses to FOIA requests. Because CIA operational records and indices contain a large number of references to domestic organizations, requiring continued FOIA search and review for information concerning such organizations would reimpose upon CIA a substantial search and review burden eliminated by subsection 701 (a). Accordingly, the Committee considered this general approach to be impracticable.

The Committee notes that the somewhat common assumption that entries in CIA records indices referring to domestic organizations portend illegalities or improprieties in intelligence activities is incorrect. CIA operational records index references to domestic organizations have legitimate purposes. For example, a large number of such references consist of domestic organizations, such as commercial corporations, which have agreements with the CIA to furnish goods or services in support of CIA operational activities. To the extent that references in operational files to domestic organizations might reflect illegality or impropriety in the conduct of intelligence activities, paragraph 701 (c) (3) of the bill providing for continued access to information concerning the specific subject matter of investigations for intelligence illegality or impropriety constitutes a fully adequate safeguard in light of existing intelligence oversight reporting and investigations mechanisms.

The second approach to continued search and review of operational files for requests concerning domestic organizations would have required continued search and review of exempted operational files only with respect to domestic political, religious, educational and media organizations. This approach is impracticable due both to definitional problems and, more importantly, to the contents of CIA operational records indices. As a threshold matter, an acceptable definition or catalog of political, religious, educational and media organizations would have to be found. It is not self-evident which organizations fall within these categories; for example, although the formulation presumably would be intended to exclude organizations such as commercial corporations, many such corporations engage in political, educational and media activities. Labor unions are another example of organizations which, because of the multifaceted activities in which they engage in addition to their economically-oriented activities, present definitional problems. Definitional problems could perhaps be surmounted by an extremely detailed definition of political, religious, educational and media domestic organizations, by a catalog of such organizations, or by leaving the terms to the courts to define. Nevertheless, the characteristics of CIA file indices make impracticable the approach of requiring search and review of exempted operational files for records concerning domestic political, religious, educational and media organizations.

Entries in CIA "impersonal subject" operational file indices, i.e., indices which index other than the names of individuals, reflect an impersonal subject and the identifying numbers of files or documents in which information concerning the indexed subject may be found.

The index reference contains nothing concerning the nature of the information contained in the files and documents about the subject. Thus, the index reference on an organization does not reflect whether the organization is (1) a domestic organization or (2) more particularly, a political, religious, educational or media organization, although in the occasional case of an extremely well known organization this may be obvious. In most cases, such information could be gleaned, if at all, only by searching for and reviewing the referenced files and documents. In effect, if the bill incorporated the approach of search and review of exempted operational files for information concerning domestic political, religious, educational and media organizations, CIA would be forced to search and review exempted operational files in response to any request on an organization in order to determine whether the bill requires search and review of such files in response to the request, for only by searching and reviewing (if at all) could CIA determine whether an organization inquired about is a domestic political, religious, educational or media organization with respect to which CIA would be required to search and review exempted operational files. This would impose upon CIA a substantial burden of search and review in conflict with the goals of the bill of reducing fruitless CIA searches and review and of speeding up CIA FOIA processing.

The Committee notes that the dearth of information in CIA impersonal file index entries occurs by design and has a valid purpose. As explained above, effective security in an intelligence agency requires decentralization of records systems and observance of the "need-to-know" principle. Observance of these principles with respect to file indices mandates that the indices indicate with respect to a subject only the location in files or documents of information relevant to the subject, and not the nature of the relevant information. This minimizes the damage to national security which would ensue if a hostile intelligence service were to gain access to a CIA file index by, for example, recruiting a CIA employee with access to such an index. Such access to index references would tell a hostile intelligence service only that CIA had some kind of interest in an indexed subject, but not the nature of CIA interest in the subject or the extent of CIA knowledge on the subject. The Committee notes that, to service efficiently FOIA requests under a statutory requirement to search and review exempted operational files for information concerning domestic political, religious, educational and media organizations, CIA file indexing practices would need to be modified to include in index entries information concerning the political, religious, educational or media activities of indexed impersonal subjects. The Committee emphasizes that it does not intend for CIA to adopt such a practice. The creation and maintenance of such indices would present a civil liberties concern far outweighing any gains from continued FOIA access to exempted operational files for information concerning domestic political, religious, educational or media organizations.

The Committee also notes that the problem of the dearth of information in CIA file indices, which would force the CIA to conduct a search and review of operational files in order to determine whether an organization inquired about is a domestic organization with respect to which search and review of operational files is required, could be

alleviated by placing the burden on an FOIA requester to provide sufficient information in an FOIA request to enable the CIA to conclude reliably that an organization inquired about is a domestic political, religious, educational or media organization. Although this might be a minor matter with respect to the relatively small number of extremely well known domestic political, religious, educational and media organizations, it would as a general matter result in producing a collection of files in the CIA on the political, religious, educational and media activities of domestic organizations. The Committee discourages the creation of such files, even if it is the result of voluntary submissions by FOIA requesters who wish to trigger a search and review of exempted operational files for information concerning a domestic political, religious, educational or media organization.

The third approach to providing for search and review of exempted operational files in response to FOIA requests concerning domestic organizations would require continued search and review for only that information concerning domestic political, religious, educational and media organizations which reflects CIA operational targeting of that organization or operational use of that organization. The American Civil Liberties Union proposed this approach for consideration in the course of testimony by its representative before this Committee's Subcommittee on Legislation. To the extent that the approach involves domestic political, religious, educational or media organizations, it is impracticable for the reasons outlined above. Moreover, just as entries on an organization in CIA impersonal records indices do not reflect whether an organization is a domestic political, religious, educational, or media organization, they also do not reflect whether the organization has been targeted or used in an operation.

This third approach suffers from the additional problem that its very design ensures that it will produce no releasable information for FOIA requesters. The specific subjects of CIA operations and operational use of individuals are generally properly classified because they reveal intelligence sources and methods. Thus, an FOIA request for records reflecting CIA operational use of an individual in an organization or of CIA collection of information on an organization is likely to engender either of two CIA responses in order to protect intelligence sources and methods: (1) the CIA can neither confirm nor deny the existence of responsive records, or (2) the CIA has responsive records which cannot be released. For example, the United States Court of Appeals for the District of Columbia Circuit held that the CIA did not have to confirm or deny whether it had conducted covert operations at any of the campuses of the University of California. In the case of either of the likely CIA responses, the FOIA request will not produce for FOIA requesters releasable records from operational files, and thus no productive purpose is served by requiring continued search and review of operational files for information on targeting or operational use of domestic organizations.

The Committee thus reached a determination not to include in H.R. 5164 a provision requiring the CIA to search and review exempted operational files for information concerning domestic organizations requested by appropriate representatives of those organizations. The Committee notes that a member of a given organization,

like any other individual, may request information on himself under the FOIA; the Privacy Act, or both, and that exempted operational files will continue to be subject to search and review in response to such requests. The Committee reemphasizes that, to the extent CIA information concerning a domestic organization relates to the specific subject matter of an investigation for any illegality or impropriety in the conduct of an intelligence activity, which can be triggered in appropriate circumstances by individuals, including representatives of organizations, it will become subject to search and review by virtue of subsection 701(c) (3) of H.R. 5164.

Special activities.—Paragraph 701(c) (2) ensures that operational files will remain subject to FOIA search and review requirements in response to requests for information concerning any special activity (also known as covert action) the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act. 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 nonexistence of records responsive to an FOIA request relating to an alleged special activity. In such circumstances, CIA does not conduct a search for responsive records. The issue in these cases is whether the fact of the existence or nonexistence of the special activity is currently properly classified.

When the fact of the existence or nonexistence of the special activity is properly classified, the CIA can only protect that fact by declining to admit or deny whether it possesses responsive documents. If the CIA were instead to establish a pattern of denying the existence of an alleged special activity inquired about when there is in fact no such activity, then a subsequent CIA response to a similar inquiry on a different alleged special activity which does not deny (and also, of course, does not confirm) the existence of such special activity would, in light of the previous pattern of denial, be the practical equivalent of confirmation of the existence of the activity. Thus, the CIA can effectively protect the properly classified fact of the existence of special activities from disclosure under the FOIA only by declining to confirm or deny the existence of such activities. The CIA does not, of course, have the option under the Freedom of Information Act to falsely deny that it has records responsive to an FOIA request for records relating to an alleged special activity when it does, in fact, have such records.

The CIA response declining to confirm or deny the existence of records responsive to an FOIA request for records concerning a special activity is required by Section 3.4(f) (1) of Executive Order 12356. Nothing in H.R. 5164 is intended in any way to limit the ability of the CIA to utilize this so-called "Glomar" response, so named as a result of Freedom of Information Act requests to the CIA concerning the Glomar Explorer ship.

In certain circumstances, the existence of a CIA special activity may cease to be exempt from disclosure under the Freedom of Information Act. In such a case, files containing information concerning an acknowledged special activity will, by virtue of paragraph 701(c) (2), continue to be subject to search and review.

In any case in which the fact of the existence of a particular special activity is not properly classified, exempted operational files containing information concerning that activity will become accessible to an FOIA request for information concerning that activity. The Committee emphasizes that nothing in paragraph 701(c)(2) in any way changes the statutory and case law concerning whether the existence of a special activity is exempt from disclosure under the FOIA.

The term "special activity" as used in paragraph 701(c)(2) means any activity of the United States Government, other than an activity 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.

Investigations.—Paragraph 701(c)(3) ensures that operational files will remain subject to FOIA search and review requirements for information concerning the specific subject matter of an investigation for any impropriety or illegality in the conduct of an intelligence activity. Thus, such information will remain fully subject to FOIA search, review, and disclosure requirements in the same manner as if subsection 701(a) were never enacted.

When CIA conducts an internal investigation of allegations of impropriety or illegality in the conduct of an intelligence activity, whether through the Office of the Director, the Inspector General, or the General Counsel, all CIA files, including exempted operational files, will remain subject to FOIA search and review requirements in response to requests for information concerning the specific subject matter of the investigation. Similarly, when the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the President's Intelligence Oversight Board or the Department of Justice carries out an investigation for impropriety or illegality in the conduct of an intelligence activity, all CIA files, including exempted operational files, will remain subject to FOIA search and review for information concerning the specific subject matter of the investigation.

Allegations of impropriety or illegality in the conduct of an intelligence activity may originate either inside or outside the Central Intelligence Agency. Allegations raised by CIA personnel are directed to the Office of the Inspector General or to the Office of General Counsel. CIA regulations (HR 7-1a(6), rev. Nov. 21, 1979) require that Agency employees report any "past, current, or proposed CIA activities that might be construed to be illegal, improper, questionable, or not authorized by applicable law, Presidential directive, Executive order, or regulation, or . . . instructions received in any way [which] appear to be illegal, improper, or questionable." CIA regulations (HR 7-1a(7), rev. Nov. 21, 1979) also specifically require employees to report possible violations of federal criminal law to the General Counsel. In addition to these reporting mechanisms, the Office of the Inspector General periodically inspects individual Agency components. These inspections involve multi-disciplinary teams which thoroughly examine every aspect of a CIA component's activities.

The Inspector General's staff investigates the substance of employee allegations of abuse or impropriety. When the allegation raises any question of illegality, the Inspector General's staff either fully coordi-

nates its investigation with the Office of General Counsel or refers the matter to the Office of General Counsel for reporting to the Attorney General in accordance with Executive Order 12333. Allegations which arise internally at the CIA are never dismissed without some recorded inquiry. Hence, they are never determined not to warrant a documented investigation.

When allegations received by the CIA from outside the Agency result in investigations of intelligence activities for illegality or impropriety, exempted operational files will remain subject to search and review for information concerning the specific subject matters of those investigations. Allegations made by persons outside the Agency almost exclusively arrive in the form of a letter received by the Agency Mail Room, although on occasion, complaints are received by telephone, sometimes anonymously. If a letter contains allegations of abuse, impropriety, or illegality, but appear frivolous (e.g., "CIA is manipulating my brain waves," or an actual 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 the 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 CIA's records reflect that the Agency 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 instead forwarded to the Inspector General or General Counsel, as appropriate. In cases of repeated 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 exempted under section 701 (a). The Committee has been assured that these practices will remain in effect at CIA.

Entities outside the Central Intelligence Agency also have responsibilities with respect to impropriety or illegality in the conduct of intelligence activities. Under Section 501 of the National Security Act of 1947, the Director of Central Intelligence must report to the intelligence committees of the House and Senate any illegal intelligence activity, and such a report might trigger a congressional inquiry. In addition, the intelligence committees of Congress may initiate and conduct investigations with respect to impropriety or illegality in the conduct of an intelligence activity pursuant to the constitutional prerogatives of the Congress, their oversight responsibilities under the Rules of the House and the Senate, and their statutory right under Section 501 to all information concerning intelligence activities. The Committee notes that the House Select Committee on Intelligence of the 94th Congress (the "Pike Committee") and the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee") were intelligence committees of the Congress within the meaning of paragraph 701 (c) (3).

All CIA files, including exempted operational files, will remain subject to FOIA search and review for information concerning the specific subject matter of investigations by the intelligence committees of Congress. The Committee emphasizes that nothing in paragraph 701 (c) (3) is intended to affect the definition of agency records

subject to request under the FOIA, as distinguished from congressional documents not subject to request under the FOIA, or to waive in any way the prerogatives of the House of Representatives and the Senate to maintain control over, and confidentiality of, documents generated in the course of congressional activities.

The President's Intelligence Oversight Board also exercises responsibilities with respect to unlawful intelligence activities. Executive Order 12334 requires the Board to inform the President of intelligence activities that any member of the Board believes violate the Constitution or other applicable law and to forward to the Attorney General reports received concerning intelligence activities that the Board believes may be unlawful. The Order requires Inspectors General and General Counsel of Intelligence Community agencies to report to the Board concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive Order or Presidential directive. The President has, by section 2(e) of Executive Order 12334, authorized and directed the Intelligence Oversight Board to carry out such investigations as the Board deems necessary to carry out its functions. All files of the Central Intelligence Agency, including exempted operational files, will remain subject to FOIA search and review for information concerning the specific subject matter of such investigations for impropriety or illegality in the conduct of intelligence activities.

The Department of Justice, by virtue of its law enforcement and intelligence oversight functions, also has responsibilities with respect to unlawful or improper intelligence activities. Section 535 of title 28, United States Code, and section 1.7 of Executive Order 12333 require, among other things, the reporting of possible crimes by federal employees. As a result of these provisions, Intelligence Community agencies must report possible violations of law by their employees in the conduct of intelligence activities. Such reports may trigger a Department of Justice investigation into illegalities in the conduct of intelligence activities. Independent of any reporting requirements, in appropriate circumstances, the Department of Justice may initiate investigations of intelligence activities to carry out the Department's law enforcement and intelligence oversight functions. All files of the Central Intelligence Agency, including exempted operational files, will remain subject to FOIA search and review for information concerning the specific subject matter of such investigations for impropriety or illegality in the conduct of intelligence activities.

Paragraph 701(c)(3) provides that exempted operational files shall continue to be subject to FOIA search and review for information concerning "*the specific subject matter of an investigation*" by intelligence oversight entities of impropriety or illegality in the conduct of an intelligence activity. The scope of information with respect to which the exempted operational files will remain subject to FOIA search or review will be coextensive with the specific subject matter of the investigation. Information concerning the specific matter of the investigation will remain subject to search and review regardless of whether those conducting the investigation reviewed records containing that information in the course of the investigation. The key requirement is that information concern the specific subject matter of the investiga-

tion, not that the information surfaced in the course of the investigation.

The specificity requirement in the phrase "specific subject matter of the investigation" tailors the scope of information remaining subject to the FOIA process to the scope of the specific subject matter of the investigation. This tailoring was intended to avoid the possibility of an unreasonably expansive interpretation of paragraph 701(c)(3) to include as subject to search and review information wholly unrelated to any question of illegality or impropriety. The purpose of this tailoring can best be illustrated by example.

Suppose a CIA case officer abroad, acting at the direction of his CIA superior, conducts an unlawful electronic surveillance of a United States citizen while trying to collect foreign intelligence on a foreign scientific installation abroad. The CIA reports the unlawful surveillance to the various intelligence oversight entities. The Intelligence Oversight Board chooses to conduct an investigation. If an FOIA request subsequently sought all agency records containing information concerning the specific subject matter of the Board's investigation, the Agency would be required to search its files, including exempted operational files, for records containing information concerning the unlawful surveillance, not for all records concerning any operations targeted at the foreign scientific installation, because, in this case, the unlawful surveillance constitutes the specific subject matter of the investigation.

The phrase "*in the conduct of an intelligence activity*" used in paragraph 701(c)(3) makes clear that the continued obligation to search and review exempted operational files for information concerning an investigation for impropriety or illegality extends only with respect to an impropriety or illegality which has a nexus to an intelligence activity. Thus, for example, an FOIA request for information concerning the specific subject matter of a Department of Justice investigation of a CIA employee for stealing typewriters from the CIA for resale for personal profit would not require the Agency to search exempted operational files for responsive records, because the illegality bears no relationship to an intelligence activity.

Subsection 701(d): Transfer of records and information between exempted operational files and other files

Central Intelligence Agency records systems, like those of other agencies, are dynamic. Records are added to files and deleted from files, in accordance with the Federal Records Act (chapters 31 and 33 of title 44) and other applicable law, on a regular basis, and information flows between files. Legislation which exempts some files, but not others, must therefore specify the consequences to the status of the files of transfers of records and information between files.

Paragraphs 701(d)(1) and (2) state the consequences of the flow of records and information *from* an exempted operational file *to* a file which is not exempted. By virtue of paragraph 701(d)(1), the status of a file which is not exempted does not change by the addition to it of information from an exempted operational file; the receiving non-exempted file remains subject to search and review. By virtue of paragraph 701(d)(2), the status of the exempted operational file from which information is transferred to a file which is not exempt does not

change; the sending exempted file remains exempted from search and review. Therefore, under paragraphs 701(d)(1) and (2), the flow of records and information from a file which is exempted to a file which is not exempted has no effect on the exempted/nonexempted status of the two files.

Paragraph 701(d)(3) concerns the CIA practice of using marker references, referred to as "dummy copies," in the dissemination of particularly sensitive records from operational files. In this process, the sensitive record is taken from the operational file to the intended temporary recipient, who reads it and returns it to the operational file for exclusive storage. A marker reference (usually a single piece of paper containing a brief description of the subject of the record and indicating where the record is stored) is placed in the file of the temporary recipient. If not for security constraints, a copy of the record would have been retained in the recipient's files, but because the record is so sensitive, only the marker reference from which one could locate the record is maintained in the recipient's file. Paragraph 701(d)(3) is designed to ensure that marker references are treated as if they were in fact the records they represent, in the sense that the record would have been subject to search and review if it were located in the non-exempted file where the marker reference is located. As a result of this provision, when CIA is searching a non-exempted file for records responsive to an FOIA request and locates a marker reference which substitutes for a record in an exempted operational file which may be responsive, the CIA must retrieve the record from the exempted operational file and process it in response to the FOIA request.

The marker reference practice is of particular importance given its use in some circumstances in the Executive Registry of the CIA, which serves the Director of Central Intelligence, the Deputy Director of Central Intelligence and the CIA Executive Director. Under H.R. 5164 all records contained in the Executive Registry, and all records referenced in the Executive Registry by marker references, will remain subject to FOIA search and review requirements.

Subsection 701(e) : Construction against implied repealer or modification

Subsection 701(e) provides that subsection 701(a), which grants authority to exempt operational files (as defined in the bill) from the FOIA process, can be superseded only by a subsequent statute which specifically cites and repeals or modifies it. Although no Congress and President can enact a statute which a subsequent Congress and President cannot repeal or modify by another statute, subsection 701(e) makes clear that, absent a clear, express statutory statement, repeal or modification of subsection 701(a) shall not be inferred from a subsequent statute:

Subsection 701(f) : Judicial review

Subsection 701(f) provides for a *de novo* substantive standard of judicial review of CIA compliance with section 701 within a precisely defined procedural framework, ensuring both protection for sensitive CIA information and effective judicial review. The Committee concludes with respect to CIA action under H.R. 5164, as did the Congress in enacting the FOIA in 1966 and amending it in 1974 with respect to all executive agencies, that *de novo* judicial review is essential to en-

sure effective CIA implementation of the Freedom of Information Act and to maintain public confidence in the implementation of the Act. Subsection 701(f) ensures effective judicial review by providing that allegations that CIA has improperly withheld records because of failure to comply with section 701 shall be reviewed in accordance with subparagraph 552(a)(4)(B) of title 5, which is the judicial review provisions of the FOIA providing for *de novo* review, subject to seven procedural exceptions set forth in subsection 701(f). Thus, by virtue of subsection 701(f), CIA action to implement section 701 will be subject to judicial review in the same manner as CIA action to judicial review currently, except to the extent that paragraphs 701(f)(1) through (7) provide specific procedural rules. Matters not addressed by paragraphs 701(f)(1) through (7) will continue to be decided in accordance with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience. Nothing in H.R. 5164 in any way affects the law of evidence.

Paragraph 701(f)(1) provides that classified information filed with, or produced for, the courts by the Central Intelligence Agency shall be examined *ex parte, in camera* by the court. The requirement that only the judge, and not the complainant, the complainant's counsel, or court personnel, may see the classified information is generally consistent with current practice under the FOIA. However, because issues arising under H.R. 5164 will be considered in the context of CIA's most sensitive operational files, the Committee believed it appropriate to provide expressly in statute that classified information involved in judicial review of CIA action under H.R. 5164 is for the judge's eyes only. Of course, in some FOIA cases CIA submissions may not be classified.

Paragraph 701(f)(2) provides that the courts shall, to the fullest extent practicable, determine issues of fact based on the sworn written submissions of the parties, when dealing with issues arising from CIA implementation of section 701. This provision also is generally consistent with current practice under the Freedom of Information Act in handling national security-related issues. However, because issues arising under section 701 will be considered in the context of CIA's most sensitive operational files, the Committee believed it important to make this rule explicit in statute.

While the Committee believes that a review of the sworn written submissions of the parties will generally be sufficient to enable a court to determine whether the CIA has improperly withheld records, cases will arise in which a court will find it impracticable to decide such issues based on sworn written submissions. Paragraph 701(f)(2) does not place obstacles in the path of the court in obtaining information it needs to decide these issues. Thus, when necessary to decision, the court may go beyond sworn written submission to require the Agency to produce additional information, such as live testimony, or the court may examine the contents of operational files. As an example, if the propriety of the exemption of an operational file is properly drawn into question under paragraph 701(f)(4), and the court concludes after considering the various sworn written submissions of the parties that it is necessary to decision that the court examine the contents of the operational file, the court may do so. In such a case, the scope of

the court's examination would be coextensive with what is necessary to the decision of the issue; it would not necessarily be limited to examination of the records requested by the FOIA requester, although it may be if the court concludes that examination of those records is all that is necessary to decision.

Paragraph 701(f)(3) provides that when alleging that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission based upon personal knowledge or otherwise admissible evidence. The "personal knowledge or otherwise admissible evidence" basis for the sworn written submission is similar to that required for submissions under Rule 56(e) of the Federal Rules of Civil Procedure. A complainant making an allegation of improper placement of a record argues that if the records requested were properly filed where they should be filed, they would be outside exempted operational files and would therefore be subject to the search, review and disclosure requirements of the FOIA. Determining the truth of such an allegation for purposes of defending in litigation may in practice require the CIA to search exempted operational files to see if responsive records are located there and to determine whether they are properly or improperly filed there. Since one of the basic purposes of H.R. 5164 is to remove from the CIA precisely this burden of searching exempted operational files, the Committee believed that the CIA should not be forced by a mere allegation of improper filing into a position of having to search exempted operational files to defend a lawsuit. Accordingly, a complainant alleging that requested records were improperly withheld because of improper placement of records solely in exempted operational files must support such an allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence. When such an allegation of improper placement of records is supported by such a submission based upon personal knowledge or otherwise admissible evidence, the CIA must answer and defend against the allegation. In responding to the complainant's submission, the CIA may, of course, challenge its factual basis.

Paragraph 701(f)(4) provides for determination of an allegation by a complainant that CIA improperly withheld requested records because of improper exemption of operational files. Under subparagraph 701(f)(4)(A), when such an allegation is made the CIA must meet its burden to sustain its action by demonstrating to the court's satisfaction by sworn written submission that the exempted operational files likely to contain responsive records currently perform the functions set forth in subsection 701(b), which defines "operational files" by function. Subparagraph 701(f)(4)(B) makes clear that if the complainant thereafter files a sworn written submission genuinely disputing the CIA's submission concerning the functions of the files, the court may in its discretion order the CIA to review the contents of operational files in connection with determination of the issue of improper exemption of the operational files. Of course, if the CIA fails to sustain its burden to demonstrate the propriety of the exemptions of the files in issue due to the insufficiency of its sworn written submissions and any other submitted information, the court will, under paragraph 701(f)(6), order the CIA to search such files for respon-

sive records, and the reference in subparagraph 701(f)(4)(B) to a complainant's submission would be inapplicable. By virtue of subsection 701(f)(4), the CIA will not be forced into the position of searching and reviewing the contents of operational files to defend the lawsuit by a mere allegation of improper exemption of the files, which would be inconsistent with one of the basic purposes of the bill, which is to relieve the CIA of an undue burden of searching and reviewing operational files. The Committee notes that subparagraph 701(f)(4)(B) does not diminish the court's authority to review the contents of operational files likely to contain responsive records, if the written submissions are inadequate and such a review is necessary to decide the issue presented, as described above in the explanation of paragraph 701(f)(2).

Paragraph 701(f)(5) restricts discovery by the parties in connection with proceedings to determining allegations of improper placement of records solely in operational files or of improper exemption of operational files. The provision prohibits discovery, except for requests for admission, related to these two issues. The Committee believed it important to prohibit discovery by a complainant with respect to these issues because they involve the most sensitive of CIA operational files and because of the potential damage which could ensue from CIA errors in responding to discovery requests concerning these files. Since the Committee believed it necessary to prohibit discovery by a complainant from the CIA, the Committee imposed a reciprocal prohibition on discovery by the CIA from a complainant as a matter of fundamental fairness. The provision permits requests for admission, unlike other discovery devices such as depositions or interrogatories, because use of requests for admission presents little risk of compromise of secrets. The specific provision concerning the issue of discovery in the context of the issues of improper placement of records and improper exemption of files is not intended to carry a negative implication that discovery on other issues is to be either especially encouraged or discouraged in any manner by this subsection. The question of discovery with respect to other issues shall continue to be governed by the practices developed by the courts under the judicial review provision of the Freedom of Information Act (5 U.S.C. 552(a)(4)(B)). The Committee emphasizes that paragraph 701(f)(5) addresses discovery by the parties in accordance with the Federal Rules of Civil Procedure; this provision does not address access by the court to information. Furthermore, the provision does not prevent the complainant from proposing to the court matters on which the complainant believes the court should itself seek information from the CIA to decide issues in the lawsuit.

Paragraph 701(b)(6) provides the exclusive remedy for CIA failure to comply with section 701. If the court finds that the CIA has improperly withheld requested records because of failure to comply with any provision of section 701, the court shall order the CIA to search and review the appropriated exempted operational file or files for the requested records and to release the records, or portions thereof, which do not fall within any of the FOIA exemptions contained in subsection 552(b) of title 5, United States Code. Such an order is the exclusive remedy for CIA failure to comply with section 701. This provision, of course, does not affect the court's authority under the

Freedom of Information Act to assess reasonable attorney fees, to punish for contempt, or to handle other, similar ancillary matters.

Paragraph 701(b)(7) provides that, if the CIA agrees at any time after the filing of a complaint alleging CIA failure to comply with section 701 to search the appropriate exempted operational files for the requested records and process the records under the FOIA, the court shall dismiss claims based upon failure to comply with section 701. Thus, by agreeing to process an FOIA request for records without regard to the exemption of operational files, the CIA can obtain dismissal of claims challenging its compliance with section 701.

Section 702: Decennial Review of Exempted Operational Files

Section 702 provides for a periodic review of the exemptions of operational files to determine whether the exemptions may be removed with respect to such files or significant portions thereof.

Subsection 702(a) requires the Director of Central Intelligence to review the exemptions of operational files in force under subsection 701(a) at least once every ten years to determine whether such exemptions may be removed from exempted files or any portion thereof. The phrase "or any portion thereof" provides for potential removal of exemptions from an individual collection of records which forms a portion of an exempted operational file. The phrase contemplates, for example, potential removal of an exemption with respect to a collection of records concerning a specific intelligence operation, even though the collection is contained in a larger exempted operational file which continues to merit exemption. The phrase does not require the review and potential removal of exemption with respect to individual records contained in exempted operational files. Those files, or portions thereof, with respect to which exemptions are removed, become subject once again to the search, review, and disclosure requirements of the FOIA.

Subsection 702(b) requires that, in conducting the review of exemptions mandated by subsection 702(a), the Director of Central Intelligence shall consider the historical value or other public interest in the subject matter of the particular files or portions thereof and the potential for declassifying a significant part of the information contained therein. In applying the historical value criterion, the Director of Central Intelligence should consult with, and take into account, the recommendations of the historical staff of the Departments of State and Defense, the Archivist of the United States, and appropriate historians from the private sector. In applying the public interest criterion, the Director of Central Intelligence should consider the contribution materials would make to an understanding of intelligence, foreign policy, and international developments and should consider interest in specific topics expressed by the journalistic and academic professions. In applying the potential-for-declassification criterion, the Director of Central Intelligence should consider factors such as the sensitivity of operations, the possibility of damaging foreign relations or jeopardizing intelligence sources and methods, and the passage of time.

Subsection 702(c) provides for limited judicial review of CIA compliance with section 702. Since this review does not arise under the judicial review section of the FOIA, subsection 702(c) provides a sep-

arate grant of subject matter jurisdiction to the U.S. district courts and provides an independent venue provision. A complainant may obtain judicial review upon allegation that the CIA has improperly withheld records because of failure to comply with section 702. However, unlike allegations in a complaint of improper withholding for failure to comply with section 701, which will be reviewed under the judicial review provision of the FOIA (5 U.S.C. 552) and the procedures provided in section 701(f), the allegation of improper withholding of records for noncompliance with section 702 will be reviewed in accordance with the more limited judicial review provision contained in subsection 702(c). The court's review of CIA compliance with section 702 is limited to determining whether the review of exemptions of operational files required by subsection 702(a) has been conducted within the time period prescribed by that section and whether the criteria set forth in subsection 702(b) were in fact considered in the review of exemptions.

Should the court find that the review required by subsection 702(a) has not been conducted or that the criteria set forth in subsection 702(b) were not considered in the review, the court may, as appropriate, order the CIA: (1) to search and review the appropriate exempted operational file or files for the requested records and to release the records, or portions thereof, which do not fall within any of the FOIA exemptions; (2) to conduct the review required by subsection 702(a); or (3) to consider the criteria set forth in subsection 702(b) when conducting the review of appropriate exempted operational files for the requested records. These are the exclusive remedies for failure to comply with section 702.

SECTION 3 OF H.R. 5164: REPORT TO CONGRESS

Section 3 of the bill requires the Director of Central Intelligence to report by June 1, 1985 to the intelligence committees of the Congress on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value. In preparing this report, the Director shall consult with the Archivist of the United States, the Librarian of Congress, and appropriate historians selected by the Archivist of the United States.

The Committee expects the Director's report to explore the full range of ideas which can contribute to the objective of making available CIA information of historical value on the diplomatic, military, and intelligence activities of the United States without risking damage to the security or foreign policy of the Nation. The Committee considers the Foreign Relations of the United States series published by the Department of State to be an excellent example of a project which contributes to this objective. Because of the especially sensitive nature of the work of the CIA, this type of large-scale chronological disclosure of CIA information of historical value may not be possible. However, the Committee expects the report of the Director of Central Intelligence to explore this possibility on some appropriate scale, along with exploring other ideas which can contribute to the objective set forth above.

Section 3 is intended to require the Director of Central Intelligence to study the feasibility of a declassification program which would sup-

plement the voluntary declassification review program agreed to in an exchange of letters of October 3 and 4, 1983, between Director of Central Intelligence William J. Casey and Senator Dave Durenberger. Those letters refer to "selective" review of materials that the CIA believes "would be of greatest historical interest and most likely to result in declassification of useful information." The type of systematic review Section 3 requires the Director to consider would take into account similar criteria, but would envisage a greater volume of declassification.

SECTION 4 OF H.R. 5164: LIMITED RETROACTIVE EFFECT

Section 4 of the bill provides that CIA operational file exemptions from FOIA requirements under new subsection 701(a) of the National Security Act of 1947 apply with respect to all FOIA requests, whether made before or after enactment of H.R. 5164, which had not proceeded to the stage of litigation by February 7, 1984. Thus, the exemptions apply retroactively to all FOIA requests which are pending before the Central Intelligence Agency, whether in initial processing or in administrative appeal, on the date of enactment of H.R. 5164. The CIA could, however, as a matter of administrative discretion, decide to complete the processing of any such requests which had been substantially completed. The exemptions will also apply retroactively with respect to all civil actions to enforce access to records under the Freedom of Information Act which were not commenced prior to February 7, 1984. The latter date was the day preceding the hearings on the subject of H.R. 5164 before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, at which it was first suggested that a date certain be set by which FOIA lawsuits must be filed to ensure that enactment of legislation modifying the application of the FOIA to the CIA will not affect an FOIA request which has proceeded to litigation. The day preceding the hearing was selected to avoid creating an incentive for a race to the courthouse by FOIA complainants in anticipation of the enactment of legislation modifying the application of the FOIA to the CIA.

COMMITTEE POSITION

On April 11, 1984, a quorum being present, the Permanent Select Committee on Intelligence approved H.R. 5164 with an amendment in the nature of a substitute and, by unanimous voice vote, ordered that it be reported favorably.

OVERSIGHT FINDINGS

With respect to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee notes that it has conducted an extensive investigation, including public hearings, on the application of the Freedom of Information Act to the Central Intelligence Agency. The Committee's findings in this area have resulted in its recommendation that new legislation (H.R. 5164) be enacted. The Committee's reasoning for its recommendation is set out in the body of this report.

CONGRESSIONAL BUDGET ACT

Pursuant to clause 2(1) (3) (B) of rule XI of the Rules of the House of Representatives, the Committee notes that this legislation does not provide for new budget authority or tax expenditures.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(1) (3) (C) of rule XI of the Rules of the House of Representatives, the Committee notes that it has not received an estimate from the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

RECOMMENDATION OF THE COMMITTEE ON GOVERNMENT OPERATIONS

Pursuant to clause 2(1) (3) (D) of rule XI of the Rules of the House of Representatives, the Committee notes that it has not received a report from the Committee on Government Operations.

INFLATION IMPACT STATEMENT

Pursuant to clause 2(1) (4) of rule XI of the Rules of the House of Representatives, the Committee finds that enactment of H.R. 5164 will have no inflationary impact on prices or costs in the operation of the National economy.

FIVE-YEAR COST PROJECTION

Pursuant to clause 7(a) (1) of rule XIII of the Rules of the House of Representatives, the Committee has determined that no measurable additional costs will be incurred by the government in the administration of H.R. 5164.

EXECUTIVE BRANCH ESTIMATES

The Committee has received no cost estimates from the executive branch and is therefore unable to compare the government's cost estimates with its own estimates pursuant to clause 7(a) (2) of rule XIII of the Rules of the House of Representatives.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

NATIONAL SECURITY ACT OF 1947

TABLE OF CONTENTS

* * * * *
Sec. 2. Declaration of policy.

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

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

SEC. 701. (a) Operational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of title 5, United States Code (Freedom of Information Act) which requires publication or disclosure, or search or review in connection therewith.

(b) For the purposes of this title, the term "operational files" means—

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

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

except that files which are the sole repository of disseminated intelligence are not operational files.

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

(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 of title 5, United States Code (Freedom of Information Act) or section 552a of title 5, United States Code (Privacy Act of 1974);

(2) any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code (Freedom of Information Act); or

(3) the specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General and 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.

(d) (1) *Files that are not exempted under subsection (a) of this section which contain information derived or disseminated from exempted operational files shall be subject to search and review.*

(2) *The inclusion of information from exempted operational files in files that are not exempted under subsection (a) of this section shall not affect the exemption under subsection (a) of this section of the originating operational files from search, review, publication, or disclosure.*

(3) *Records from exempted operational files which have been disseminated to and referenced in files that are not exempted under subsection (a) of this section and which have been returned to exempted operational files for sole retention shall be subject to search and review.*

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

(f) *Whenever any person who has requested agency records under section 552 of title 5, United States Code (Freedom of Information Act) alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code, except that—*

(1) *in any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign relations is filed with, or produced for, the court by the Central Intelligence Agency, such information shall be examined ex parte, in camera by the court;*

(2) *the court shall, to the fullest extent practicable, determine issues of fact based on sworn written submissions of the parties;*

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

(4) (A) *when a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the Central Intelligence Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section; and*

(B) *the court may not order the Central Intelligence Agency to review the content of any exempted operational file or files in order to make the demonstration required under subparagraph (A) of this paragraph, unless the complainant disputes the Central Intelligence Agency's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence;*

(5) *in proceedings under paragraphs (3) and (4) of this subsection the parties shall not obtain discovery pursuant to rules 26*

through 36 of the Federal Rules of Civil Procedure, except that requests for admission may be made pursuant to rules 26 and 36;

(6) if the court finds under this subsection that the Central Intelligence Agency has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Central Intelligence Agency to search and review the appropriate exempted operational file or files for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5, United States Code (Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section; and

(7) if at any time following the filing of a complaint pursuant to this subsection the Central Intelligence Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES

SEC. 702. (a) Not less than once every ten years, the Director of Central Intelligence shall review the exemptions in force under subsection (a) of section 701 of this Act to determine whether such exemptions may be removed from any category of exempted operational files or any portion thereof.

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

(c) A complainant who alleges that the Central Intelligence Agency has improperly withheld records because of failure to comply with this section may seek judicial review in the district court of the United States of the district in which any of the parties reside, or in the District of Columbia. In such a proceeding, the court's review shall be limited to determining (1) whether the Central Intelligence Agency has conducted the review required by subsection (a) of this section within ten years of enactment of this title or within ten years after the last review, and (2) whether the Central Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review.

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