98TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPT. 98-726
Part 2

CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

SEPTEMBER 10, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. BROOKS, from the Committee on Government Operations, submitted the following

REPORT

together with

DISSENTING VIEWS

[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]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Operations, 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.

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.

37-964 O

"(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 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 demon-

stration 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.".

(c) Subsection (q) of section 552a of title 5, United States Code, is amended—

(1) by inserting "(1)" after "(q)"; and

(2) by adding at the end thereof the following:

"(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.".

SEC. 3. (a) 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, a report on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency information of historical value.

(b)(1) The Director shall, once each six months, prepare and submit an unclassified report which includes—

(A) a description of the specific measures established by the Director to improve the processing of requests under section 552 of title 5, United States Code;

(B) the current budgetary and personnel allocations for such processing;

(C) the number of such requests (i) received and processed during the preceding six months, and (ii) pending at the time of submission of such report; and

(D) an estimate of the current average response time for completing the processing of such requests.

(2) The first report required by paragraph (1) shall be submitted by a date which is six months after the date of enactment of this Act. The requirements of such paragraph shall cease to apply after the submission of the fourth such report.

(c) Each of the reports required by subsections (a) and (b) shall be submitted to the Permanent Select Committee on Intelligence and the Committee on Government Operations of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

SEC. 4. The amendments made by subsections (a) and (b) of 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.

SUMMARY AND PURPOSE

H.R. 5164 provides a limited exemption from the Freedom of Information Act (FOIA) for specifically defined operational files maintained by the Central Intelligence Agency. The bill will relieve the CIA from the requirement under the FOIA to search and review records in these operational files that, after line-by-line review, almost invariably prove to be exempt from disclosure under the FOIA. The bill will also improve the ability of the CIA to respond to FOIA requests from the public in a timely and efficient manner, without reducing the amount of meaningful information releasable to the public.

HISTORY OF THE LEGISLATION

The Permanent Select Committee on Intelligence held a hearing on earlier versions of the Central Intelligence Agency Information Act (H.R. 3460 and H.R. 4431) on February 8, 1984.[1] H.R. 5164 was introduced following the hearing and was jointly referred to the Committee on Government Operations and to the Permanent Select Committee on Intelligence.

The Permanent Select Committee on Intelligence ordered H.R. 5164 reported on April 11, 1984, with an amendment in the nature of a substitute. The bill was reported on May 1, 1984.[2]

The report of the Permanent Select Committee on Intelligence accompanying H.R. 5164 contains a detailed discussion and explanation of the purpose of the bill. That report is integral to an understanding of how H.R. 5164 should be interpreted and implemented. The entire report of the Permanent Select Committee on Intelligence is specifically incorporated by reference in this report.

A detailed history of earlier proposals affecting the obligations of the Central Intelligence Agency under the Freedom of Information Act is included in the report of the Permanent Select Committee on Intelligence.[3]

COMMITTEE ACTION AND VOTE

H.R. 5164 was introduced by Representative Romano L. Mazzoli on March 15, 1984. The Committee on Government Operations ordered the bill reported on July 31, 1984, by voice vote.

---

[1] *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency:* Hearing before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence, 98th Cong., 2d Sess. (1984).

[2] H.R. Rep. No. 98-726 Part 1, 98th Cong., 2d Sess. (1984) (Report to accompany H.R. 5164) [hereinafter cited as *"Intelligence Committee Report"*].

[3] Id. at 6-8.

HEARINGS

On May 10, 1984, the Government Information, Justice, and Agriculture Subcommittee held a hearing on H.R. 5164.[4] Witnesses at the hearing were:

—Charles A. Briggs, Executive Director, Central Intelligence Agency, accompanied by Ernest Mayerfeld, Deputy Director of Legislative Liaison; and Larry Strawderman, Information and Privacy Coordinator;

—Mark Lynch, Staff Counsel, Project on Naional Security, American Civil Liberties Union.

—Charles S. Rowe, Editor and Co-Publisher, *The Free-Lance Star,* Fredricksburg, Virginia, representing the American Newspaper Publishers Association and the American Society of Newspaper Editors;

—Angus Mackenzie, Director, Freedom of Information Project, Center for Investigative Reporting, San Francisco, California; and

—Ralph W. McGehee, Fund for Open Information and Accountability, Inc., New York, New York.

DISCUSSION

I. BACKGROUND

The Freedom of Information Act has become an important vehicle for gaining better public understanding of the operations and decisionmaking processes of all government agencies, including the Central Intelligence Agency. Because of the nature of CIA activities, however, many of that agency's records have always been exempt from disclosure because the information in those records is classified or would reveal intelligence sources or methods.

Nevertheless, the CIA has released to the public significant information as a direct or indirect result of the FOIA. Information released by the CIA under the FOIA has included:

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 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.

H.R. 5164 will exempt specifically defined CIA operational files from the search and review requirements of the FOIA. These operational files contain information documenting intelligence sources

[4] *CIA Information Act:* Hearing on H.R. 5164 before a Subcommittee of the House Committee on Government Operations, 98th Cong., 2d Sess. (1984) [hereinafter cited as *"Government Operations Hearings"*].

and methods. Because of the sensitivity of this data, little, if any, has ever been released under the FOIA.[5]

Although H.R. 5164 provides a limited exemption from the Freedom of Information Act for selected CIA records, the legislation does not make any change in the basic policy on which the FOIA is based. In fact, H.R. 5164 represents a reaffirmation by the Congress that the principles of Freedom of Information are applicable to the CIA.

H.R. 5164 leaves the Central Intelligence Agency subject to the FOIA. It confirms that the CIA maintains information about which the public may legitimately inquire. It recognizes that the FOIA plays a vital part in maintaining the public's faith in government agencies, including agencies like the CIA which must necessarily operate substantially in secret. The continued availability of information under the FOIA helps to foster public confidence that the powers of the CIA are not being misused and that the CIA is serving the national interest.

H.R. 5164 is consistent with the purposes of the FOIA because it will not interfere in any way with the processing of FOIA requests for major categories of CIA information. For example, the following types of information will be subject to FOIA search and review requirements to the same extent that they are today:

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

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

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

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

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

H.R. 5164 will not produce any meaningful change in the amount or type of information that is disclosed under the FOIA. This was confirmed by CIA Executive Director Charles A. Briggs, who testified that the bill will not result in the withholding of any information that is now made public.[6]

Mark Lynch of the ACLU reached a similar conclusion. He testified that the bill will not enable the CIA to withhold any meaningful information which the Agency is now required to release or which it would be required to release under any conceivable standard for classification.[7]

Because H.R. 5164 will not substantively change the information that the CIA is obliged to disclose in response to the FOIA re-

[5] Section 702 of the National Security Act of 1947, as amended by H.R. 5164, provides for a decennial review of exempted operational files by the Director of Central Intelligence to determine whether exemptions may be removed from any category of operational files. This section provides a new mechanism for reviewing categorical exemptions and determining whether records can be declassified or otherwise released because of historical value or other public interest. The review may actually lead to the release of some information that would not have otherwise been made available under existing FOIA or declassification procedures.

[6] *Government Operations Hearings* at 33.

[7] Id. at 47.

quests, the bill can be viewed as a procedural reform of the FOIA responsibilities of the CIA. In essence, H.R. 5164 will make it less burdensome for the CIA to deny access to files that are already exempt. Instead of reviewing records in operational files on a page-by-page, line-by-line, basis, the CIA will be able to deny most requests for records in these files in categorical fashion.

The benefits of this simplified procedure are significant. For requesters, the abbreviated administrative processing time for requests involving excluded operational files will shorten the time that it takes the CIA to respond to all other FOIA requests. Currently, there is a two to three year backlog of FOIA requests, and much of the delay is due to the workload the Directorate of Operations in searching and reviewing the kinds of materials that are inevitably exempt from disclosure anyway.[8]

The Committee takes note of the commitment made by CIA Director William Casey in an April 27, 1984, letter to Chairman Edward Boland of the Permanent Select Committee on Intelligence. Director Casey stated that upon enactment of H.R. 5164, the CIA 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.

Casey also committed the CIA to continue the current budgetary and personnel allocation for FOIA activities during the two year period following enactment.[9]

Mark Lynch of the ACLU described the current backlog as making the FOIA "all but useless except for those people who are extraordinarily patient." [10] The Committee agrees. The Committee considers the promise of a substantial reduction in the response time for FOIA requests by the CIA as a primary benefit of the bill. H.R. 5164 should restore the usefulness of the FOIA at the CIA without any meaningful limitations on the amount of information that will be released.

Improvements in the processing of FOIA requests will also produce benefits for the CIA. Experienced intelligence officers are used in the review of CIA documents for release under the FOIA. H.R. 5164 will reduce the diversion of these experienced officers away from their operational duties.

The exemption of operational files will also contribute to the overall security of CIA files. The CIA maintains self-contained, compartmented filing systems, with access to information limited to a "need-to-know" basis. The search for records responsive to FOIA requests can cut across the compartmented filing systems and can result in the compilation of records from different systems. A reduction in the need to search through operational files will increase the effectiveness of the CIA's policy of decentralization of records systems.

---

[8] Id. at 26-7 (Testimony of Charles A. Briggs, Executive Director, Central Intelligence Agency).

[9] *Intelligence Committee Report* at 12-13.

[10] *Government Operations Hearings* at 37.

The report of the Permanent Select Committee on Intelligence identifies two additional benefits from H.R. 5164. The first is a diminished risk of disclosure of sensitive information. The second is the elimination of the perception of confidential sources that the CIA cannot protect their identities from disclosure.

While this Committee does not disagree with the assessment of the Permanent Select Committee on Intelligence, this Committee is not persuaded that either of these factors is major. H.R. 5164 will lessen the risk of disclosure of sensitive information. However, the release of information under the FOIA is totally within the control of the agency processing a request. Given the careful and lengthy review of records prior to release, it appears that the CIA is already minimizing these risks. As a result, the risks of disclosure under the FOIA are probably no greater or no different than the risks of other disclosures made by intelligence agencies.

With respect to the perceptions that the CIA may be unable to protect information that would identify sources, the Permanent Select Committee on Intelligence concluded that these perceptions are not warranted because FOIA exemptions exist for information that would identify sources. This Committee concurs. There is no basis in current law for any fears that information that would identify sources must be disclosed. The CIA now has and will continue to have the ability to protect its sources.

To the extent that the fears of intelligence sources are based on misunderstandings about the current state of disclosure laws, H.R. 5164 may assist in providing reassurance that secrets can be and will be protected. If H.R. 5164 leads to any improvement in the perception of foreign sources about the ability and willingness of the CIA to protect confidential and sensitive intelligence data, this is a welcome byproduct of the legislation.

However, the unwarranted perceptions of foreign intelligence sources about the operations of the FOIA do not provide justification for changes in the law. The other reasons cited in this report and in the report of the Permanent Select Committee on Intelligence for support of H.R. 5164 are more than adequate to justify passage of the bill.

II. COMMITTEE AMENDMENTS

The Committee approved H.R. 5164 with an amendment in the nature of a substitute. The Committee substitute, which is substantially similar to the bill as reported by the Permanent Select Committee on Intelligence, includes three sets of amendments.

A. Technical Amendments—The amendments to the original text of H.R. 5164 made by the Permanent Select Committee on Intelligence and incorporated in the amendment in the nature of a substitute reported by that Committee were also included in the amendment in the nature of a substitute approved by the Government Operations Committee. These amendments are largely technical in nature and any necessary explanation will be found in the report of the Permanent Select Committee on Intelligence.

B. Oversight Amendment—Section 3 of the bill has been amended by addition of a reporting requirement in new subsection (b). The Director of the CIA is required to prepare and submit to desig-

nated congressional committees an unclassified report on FOIA processing. Reports are required every six months for the first two years following enactment of H.R. 5164. This is the period during which CIA Director Casey has agreed to continue the CIA's current budgetary and personnel allocation for FOIA activities. It is intended that these reports will be made public.

The new reporting requirement was added in order to complete the oversight provisions of H.R. 5164. As reported by the Permanent Select Committee on Intelligence, H.R. 5164 already included a very carefully written judicial review provision that will enable individuals to obtain judicial review of the CIA's compliance with the bill.

Congressional oversight of the authority contained in H.R. 5164 will be undertaken in the House of Representatives by the Permanent Select Committee on Intelligence and by the Committee on Government Operations. An outline of plans for congressional oversight is included in an exchange of correspondence between Representative Glenn English, Chairman of the Government Information, Justice, and Agriculture Subcommittee, and Representative Edward Boland, Chairman of the Permanent Select Committee on Intelligence. This correspondence is set out below:

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

Washington, DC, June 28, 1984.

Hon. EDWARD P. BOLAND,
Chairman, Permanent Select Committee on Intelligence,
Washington, DC.

DEAR MR. CHAIRMAN: The Subcommittee on Government Information, Justice and Agriculture is currently considering H.R. 5164, the "Central Intelligence Agency Information Act," which was referred jointly to your Committee and the Committee on Government Operations. The Subcommittee has completed hearings on the legislation which, with the hearing record and report produced by your Committee, provide a full legislative record. I commend your Committee for its fine work on the bill.

In order to reassure those who have doubts about H.R. 5164, I believe we must ensure careful oversight of CIA implementation of the legislation. I have been concerned, in particular, about three oversight issues which arise under H.R. 5164.

First, it will be important to ensure that the CIA observes the commitments that CIA Director Casey has made to "establish a specific program designed to substantially reduce, if not entirely eliminate, the current two-to-three year backlog" of FOIA requests at the CIA and to "maintain the current budgetary and personnel allocation for FOIA processing activities for a period of two years following enactment" of H.R. 5164. The role of your Committee in authorizing appropriations for CIA activities will be critical to ensuring that the CIA fulfills these commitments.

Second, the public must have a basis upon which to determine that the CIA is implementing in good faith the letter and the spirit of H.R. 5164. Accordingly, I believe it would be appropriate to re-

quire the CIA to issue four semiannual public reports on its implementation of, and compliance with, H.R. 5164. I intend to prepare an amendment that would add this requirement to the bill.

Third, the filing procedures and practices of the CIA must be reviewed periodically to ensure that documents are not improperly filed in operational files exempt from search and review under the Freedom of Information Act. If such misfiling were to occur, whether by accident or by design, information that the Congress does not intend to exempt from disclosure could be withheld. Although H.R. 5164 properly safeguards the extremely important right of individual FOIA requesters to seek judicial review of CIA implementation of the legislation, review of CIA filing practices in such cases by the courts will be infrequent and less than comprehensive.

Only the Congress can provide effective monitoring of CIA filing practices in a manner that will ensure public confidence that the congressional will embodied in H.R. 5164 is being carried out faithfully. Because of the sensitive nature of CIA work, and the special sensitivity of CIA operational files, the primary burden of overseeing CIA filing practices under H.R. 5164 will, of course, rest with the Members and staff of your committee.

To fulfill the oversight obligations of the Subcommittee on Government Information, Justice and Agriculture with respect to H.R. 5164, I intend to conduct personal oversight of the manner in which the CIA applies the authority granted by H.R. 5164. I believe such a personal commitment by Members of Congress to oversee implementation of H.R. 5164 will be a critical element in ensuring full CIA compliance with the intent of the Congress in enacting the legislation.

To ensure that H.R. 5164 will be implemented in the manner we intend, we must provide for thorough, vigorous oversight that will protect both public access to government information and the security of the nation's intelligence operations. Your ideas on oversight of H.R. 5164 would be of great assistance to the Subcommittee during our consideration of the legislation.

Sincerely,

GLENN ENGLISH, *Chairman.*

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC, July 9, 1984.

Hon. GLEN ENGLISH,
Chairman, Subcommittee on Government Information, Justice and Agriculture, Committee on Government Operations House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of June 28, 1984 concerning oversight of CIA implementation of H.R. 5164, the "Central Intelligence Agency Information Act" which is currently pending in your Subcommittee. I share your concern that the Congress must oversee CIA implementation of H.R. 5164.

You expressed particular interest in my views of three issues: (1) commitments made by the Director of Central Intelligence concern-

ing CIA Freedom of Information Act (FOIA) activities, (2) your proposed amendment to require four semiannual public CIA reports on implementation of H.R. 5164, and (3) congressional oversight of CIA filing procedures. My views on these issues are similar to yours.

In an exchange of letters with this Committee, reprinted in our Committee report on H.R. 5164, the Director of Central Intelligence committed the CIA to maintaining its resource commitment to FOIA processing and to reducing substantially the CIA backlog in processing of FOIA requests. Those commitments are an integral part of the legislative history of H.R. 5164 and played a central role in this committee's unanimous approval of the legislation. This Committee will ensure full CIA compliance with these commitments through close scrutiny of CIA FOIA activities and through the Committee's role in authorizing appropriations for CIA activities, including its FOIA activities. I am confident that these commitments will be realized.

Your letter indicated that you intend to offer an amendment to H.R. 5164 to require a series of four semiannual public CIA reports on CIA implementation of the bill. Such reports should be useful in overseeing CIA implementation of the legislation, and I support the concept of your amendment.

You also expressed concern that CIA misfiling of documents in operational files exempted from the FOIA could result in withholding of information that was not intended by the Congress. As you know, this Committee spent a great deal of time crafting the language of H.R. 5164 to guard against just such an eventuality. The safeguards contained in the bill, including the important judicial review provisions, should assure the Congress and the public that ducuments are not being misfiled. Moreover, the Permanent Select Committee on Intelligence will undertake continuous and thorough review of the CIA's FOIA practices and procedures, specifically including its filing practices, to provide further assurances of full CIA compliance with the letter and the sprit of H.R. 5164.

Careful congressional scrutiny of CIA implementation of H.R. 5164 will ensure that the CIA does not expand beyond congressional intent the limited FOIA relief H.R. 5164 provides to the CIA. The Permanent Select Committee on Intelligence will undertake such thorough scrutiny to ensure proper protection for public access to government information and the security of the nation's intelligence operations.

With every good wish, I am

Sincerely yours,

EDWARD P. BOLAND, *Chairman.*

The semi-annual report will allow the public to review the CIA's implementation of the authority contained in H.R. 5164. This report, together with judicial review and congressional oversight, should provide adequate assurances that H.R. 5164 will be fairly implemented by the CIA.

The report must include (a) a description of the specific measures established by the CIA Director to improve the processing of requests under the FOIA; (b) the current budgetary and personnel allocations for the processing of FOIA requests; (c) the number of

FOIA requests received and processed during the six month period covered by the report and the number of requests pending at the time the report is issued; and (d) an estimate of the current average response time for completing the processing of FOIA requests during the period covered by the report.

In preparing the estimate of the average response time, the CIA may, at its option, provide a single estimate covering all requests processed or it may categorize requests and provide separate estimates for each category. For example, the CIA may prefer to make one estimate for requests for which no responsive records were found and a separate estimate for requests that required the review of records.

An estimate of the current average response time is required rather than the actual average response time because it is expected that the response time will diminish significantly over the six month period covered by each report. If the CIA is to meet the goal of substantially reducing or entirely eliminating the current two to three year backlog, the response time at the end of each six month reporting period will have to be less than the average over the entire six month period.

The FOIA already has a requirement that each agency file an annual FOIA report.[11] If the filing of the semiannual reports required by H.R. 5164 coincides with the annual reports presently required under the FOIA, the CIA may include all of the information required under the two separate reporting provisions in a single consolidated report.

The addition of the new oversight report as subsection (b) was accompanied by a reorganization of Section 3. The existing requirement for submission of a report on the feasibility of conducting systematic review for declassification and release of CIA information of historical value was made subsection (a) of Section 3. A new subsection (c) was also added to identify the congressional committees to which the reports required by subsections (a) and (b) are to be submitted. The House Committee on Government Operations and the Senate Committee on the Judiciary were added as recipients of these reports. Except for the addition of the two Committees, all other changes in Section 3 are wholly technical.

C. Privacy Act Amendment—Section 2 of H.R. 5164 has been amended by the addition of a new subsection (c), which in turn amends subsection (q) of the Privacy Act of 1974 [12] by adding a new paragraph (2). The new paragraph provides that no agency shall rely on any exemption in the Privacy Act to withhold from an individual any record which is otherwise accessible to the individual under the provisions of the FOIA. This change in the Privacy Act clarifies the relationship between the Privacy Act and the FOIA.

H.R. 5164 provides that, notwithstanding the exemption of CIA operational files from the search and review requirements of the FOIA, United States citizens and resident aliens may continue to request information on themselves from those operational files pursuant to the FOIA and the Privacy Act. These first-party requests

[11] 5 U.S.C. § 552(d) (1982).
[12] 5 U.S.C. § 522a (1982).

will be processed in the same way that they are processed today. The requested records must be searched and reviewed, and the records must be disclosed unless the information is exempt from disclosure under one of the nine exemptions of the FOIA.

The amendment to the Privacy Act is directly supportive of the first-party exception to the operational file exemption in H.R. 5164. The Privacy Act amendment is necessary because of the overlapping access provisions of the FOIA and the Privacy Act. A recent interpretation of the two laws may make the first-party exception in H.R. 5164 unenforceable. The explanation of this issue is somewhat complex.

Both the FOIA and the Privacy Act contain procedures permitting individuals to seek access to records about themselves.[13] Both laws have exemptions [14] that differ in scope and purpose, and some information that is available under one law may be exempt under the other. Ever since the passage of the Privacy Act in 1974, the laws have been interpreted to require the disclosure of the maximum amount of information that was available under *either* law.[15]

Thus, for first-party requests, the fact that certain information fell within an exemption of the Privacy Act did not automatically mean that the same information was exempt from access under the FOIA. Similarly, the applicability of an FOIA exemption was not relevant when disclosure was requested by the subject of the record under the Privacy Act.[16]

This traditional understanding of the interrelationship between the two laws was called into question recently. Several federal circuit courts have held that the Privacy Act is a statute within the meaning of the third exemption of the FOIA [17] and that, as a consequence, information that is exempt from disclosure under the Privacy Act is also exempt from disclosure under the FOIA. This was the conclusion of the Seventh Circuit in *Terkel* v. *Kelly,*[18] and the Fifth Circuit in *Painter* v. *FBI.*[19] In both of these cases the issue of the relationship between the FOIA and the Privacy Act was raised by the courts and was not specifically briefed by the parties. A more recent case in the Seventh Circuit in which the issue was raised and briefed resulted in affirmance of the view taken by that court in *Terkel.*[20]

---

[13] 5 U.S.C. § 552(a)(3); 5 U.S.C. § 552a(d) (1982).

[14] 5 U.S.C. § 552(b); 5 U.S.C. § 552a(j) (k) (1982).

[15] [T]he Privacy Act should not be used to deny access to information about an individual which would otherwise have been *required* to be disclosed to that individual under the Freedom of Information Act.

". . . The net effect of this approach should be to assure [that] individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment." Office of Management and Budget, Implementation of the Privacy Act of 1974, Supplementary Guidance, 40 *Federal Register* 56741, 56742-3 (Dec. 4, 1974) (original emphasis), reprinted in *Oversight of the Privacy Act of 1974:* Hearings before a Subcommittee of the House Committee on Government Operations, 98th Cong., 1st Sess. 380-82 (1983).

See also the report of the Privacy Protection Study Commission, *Personal Privacy in an Information Society* 512 (1977) ("Today, an individual is supposed to be granted access to the larger of the amounts of information to which he would be entitled under the FOIA *or* the Privacy Act. . . .") (original emphasis).

[16] See 5 U.S.C. § 552a(q) (1982).

[17] 5 U.S.C. § 552(b)(3) (1982). The third exemption of the FOIA incorporates into the FOIA other statutes that authorize the withholding of information. These statutes are frequently referred to generically as "exemption three statutes" or "(b)(3) statutes".

[18] 599 F.2d 214 (7th Cir. 1979).

[19] 615 F.2d 689 (5th Cir. 1980).

[20] *Shapiro* v. *Drug Enforcement Administration,* 721 F.2d 215 (7th Cir. 1983), cert. granted, 80 L Ed 2d 180 (1984).

However, courts in other circuits have reached the opposite conclusion. The D.C. Circuit in *Greentree* v. *U.S. Customs Service*[21] found that the Privacy Act exemptions were not authority to withhold information from first-party requesters under the FOIA. The Third Circuit followed this case in *Porter* v. *Department of Justice.*[22] In both of these cases, the Privacy Act/FOIA issue was specifically argued and thoroughly briefed by the parties.

With the circuit courts evenly divided on this question,[23] the Justice Department recently amended its FOIA and Privacy Act regulations, effectively providing that the exemptions of the Privacy Act grant authority to deny requests by first parties under the FOIA as well.[24] OMB Privacy Act guidance was also changed to reflect the same new interpretation of the two laws.[25] In both instances, the agencies reversed administrative interpretations of the two laws that had stood since shortly after the passage of the Privacy Act in 1974.[26]

The Committee specifically rejects the interpretation set forth in the decisions of the Fifth and Seventh Circuits, in the new Justice Department regulations, and in the amended OMB guidelines. The understanding of the relationship between the two laws that was found to be applicable in the *Greentree* and *Porter* decisions and in the original OMB Privacy Act Guidelines is reflective of the congressional intent when the Privacy Act was passed.

Representative John Erlenborn, one of the principal authors of both the Privacy Act of 1974 and the Freedom of Information Act Amendments of 1974, has said that the two acts were passed to "enhanc[e] the rights of our citizens to know what their Government was doing, particularly as those government actions related to individuals themselves. We certainly did not give with the one hand and take away with the other days later."[27]

In proposing legislation to clarify and restore the law on this point, there is little purpose to be served in reviewing and dissecting the existing record of legislative history. This has already been done with great care in the *Greentree* case and elsewhere. While this Committee has no doubt about the true intent of the law, some have found sufficient ambiguity in both the law and its history to fuel the current disagreement. Whatever ambiguity exists will be removed by this change in the Privacy Act.

---

[21] 674 F.2d 74 (D.C. Cir. 1982).

[22] 717 F.2d 787 (3rd Cir. 1983).

[23] The Supreme Court has agreed to decide the issue. See *Department of Justice* v. *Provenzano,* 80 L Ed 2d 179; *Shapiro* v. *Drug Enforcement Administration,* 80 L Ed 2d 180 (1984).

[24] The Department of Justice changed its Freedom of Information and Privacy Act regulations to remove language that supported the practice of providing first-party requesters with the maximum amount of information that is available under either law. Compare 28 C.F.R. § 16.57 (1983) with the revised regulations at 49 *Federal Register* 12248 (Mar. 29, 1984). See especially paragraph 12 on page 12252.

[25] OMB amended its Privacy Act Supplementary Guidance to explicitly provide that the exemptions in the Privacy Act are authority under the third exemption of the FOIA to withhold information from first-party requesters. 49 *Federal Register* 12338 (Mar. 29, 1984).

[26] See notes 15 and 23.

[27] Rep. Erlenborn made this statement in connection with the introduction of H.R. 4696, a bill to clarify the relationship of the Privacy Act of 1974 to the Freedom of Information Act. The text of H.R. 4696 is identical to the Privacy Act amendment included in H.R. 5164. H.R. 4696 was introduced by Rep. Glenn English, Chairman of the Government Information, Justice, and Agriculture Subcommittee. The cosponsors were Reps. Brooks, Horton, Kindness, and Erlenborn. The introductory statements are at 130 *Congressional Record* H 310-12 (Jan. 31, 1984) (daily ed.).

It is worthwhile, however, to explain in more detail how the Privacy Act and the FOIA fit together. Some of the uncertainty comes from the language which was employed in 1974 to relate the Privacy Act to the FOIA. The confusion has been enhanced by a lack of understanding of the difference between the exemptions in the FOIA and those in the Privacy Act.

The FOIA is primarily an access and disclosure statute, and the exemptions define the categories of information that are exempt from public availability. The Privacy Act is both an access law and a records management law.[28] Portions of the Act require agencies to give public notice of the existence and nature of record systems; [29] limit disclosure of records; [30] keep an accounting of disclosures that are made; [31] collect and maintain information according to prescribed standards of relevance, necessity, accuracy, timeliness, and completeness; [32] as well as to permit individuals access to records about themselves [33] and the opportunity to seek amendment or correction of those records.[34] The Act also provides civil damages to individuals when there has been an intentional or willful violation of these requirements.[35]

The Privacy Act permits agencies to exempt some record systems from selected requirements of the Act.[36] The exemptions are thus different than the exemptions of the FOIA because the Privacy Act has different purposes. For example, some criminal law enforcement records can be exempted from the Privacy Act's access provision.[37] The Privacy Act also permits these records to be exempted from the provision permitting amendment of records. Exemptions also cover many other of the Act's requirements. The exemptions do not serve the same purpose as the exemptions of the FOIA.

Since the Privacy Act is not exclusively an access law, there is no reason why its exemptions should be read to have the same effect as the exemptions of the FOIA. The Privacy Act exemptions still have full meaning and purpose even if they are not effective when an individual seeks access to his own records using the FOIA. There are perfectly rational reasons why access to a record may be allowed under the FOIA when access to the same record is denied under the Privacy Act.

Access to records under the Privacy Act normally entails a corresponding opportunity to seek amendment of information that may be in error. There is no similar statutory amendment procedure when access is obtained under the FOIA. For some records systems, particularly those maintained by agencies with intelligence and criminal law enforcement functions, Congress allowed agencies to

---

[28] See Committee on Government Operations, *Who Cares About Privacy? Oversight of the Privacy Act of 1974 By the Office of Management and Budget and By the Congress,* H.R. Rep. No. 98-455, 98th Cong., 1st Sess. 4 (1983) ("In some respects, the Privacy Act is as much a records management law as a privacy protection law.") (footnote omitted).

[29] 5 U.S.C. § 552a (e)(4) (1982).

[30] Id. at § 552a(b).

[31] Id. at § 552a(c).

[32] Id. at § 552a (e)(1), (2) & (5).

[33] Id. at § 552a(d)(1).

[34] Id. at § 552a(d)(2).

[35] Id. at § 552a(g).

[36] Id. at § 552a(j), (k).

[37] Subsection (j)(2) permits some criminal law enforcement records to be exempted from subsection (d)(1) of the Act.

exempt records from the amendment process. This exemption was permitted because of the nature of law enforcement and intelligence records and because it is not easy or desirable to mandate a right of amendment for all of these records all of the time.

Continued access to those records under the FOIA is not inconsistent with the exemption from access under the Privacy Act. For example, access under the FOIA does not provide or imply amendment rights. Also, the exemptions in the FOIA already fully protect the government's interests in secrecy. The exemptions in the Privacy Act protect a different set of governmental interests. There is some overlap between these two sets of interests, but the smaller area of overlap cannot be read to subsume the larger area of difference.

The amendment to the Privacy Act made by H.R. 5164 is needed because of the scope of the Privacy Act exemptions for CIA records. Subsection (j)(1) of the Privacy Act[38] permits the CIA to exempt all of its records systems from many of the requirements of the Privacy Act, including the access section. The CIA has taken the necessary procedural steps to invoke Privacy Act exemptions for certain of its records systems.[39]

If the exemption of CIA records from first-party access under the Privacy Act were effective for first-party requests made under the FOIA, then no such requests could be made for CIA records that have been exempted under the Privacy Act. This would be true notwithstanding the first-party exception to the search-and-review exemption because H.R. 5164 does not provide any new procedures or new rights for access requests. First-party requests for operational files that are permitted under H.R. 5164 must continue to be made under the procedures of the Privacy Act or FOIA. If the blanket Privacy Act exemption for CIA records were recognized as grounds for denial of first-party requests under the FOIA, then first-party requesters would be unable to enforce the access rights that H.R. 5164 so carefully attempts to preserve.

In other words, the Privacy Act amendment is supportive of an access right that is already included in H.R. 5164 as reported by the Permanent Select Committee on Intelligence. The amendment does not change or broaden that access right. The CIA had already agreed that first-party requests by citizens and resident aliens should continue to be processed under the FOIA. The Committee amendment simply assures that this right of access will be enforceable.

The clarification of the relationship between the Privacy Act and the FOIA will not only affect requests made at the CIA but will have a similar effect on requests made at all other agencies subject to the Privacy Act and the FOIA. In removing any ambiguity that may surround the relationship of the Privacy Act to the FOIA, the Committee is specifically taking steps to apply a uniform interpretation to the records of all federal agencies. To do otherwise would only increase uncertainty, confusion, and litigation.

With the enactment of the Privacy Act amendment in H.R. 5164, individuals will continue to be able to make requests for records

[38] 5 U.S.C. § 552a(j)(1) (1982).
[39] 32 C.F.R. § 1901.61–.71 (1983).

about themselves using the procedures in either the Privacy Act, the FOIA, or both. Agencies will be obliged to continue to process requests under either or both laws. Agencies that had made it a practice to treat a request made under either law as if the request were made under both laws should continue to do so.

Information that is exempt under the FOIA but not under the Privacy Act will have to be disclosed when requested under the Privacy Act. Information that is exempt under the Privacy Act but not under the FOIA will have to be disclosed when requested under the FOIA.

In proposing this amendment to the Privacy Act, the Committee is not suggesting that there is anything in current law that compels an interpretation that is different than the one in the amendment. In fact, it is the view of this Committee that the court in *Greentree* correctly interpreted current law. With this amendment, it is the Committee's purpose to clarify the law in this area in order to avoid the need for any further dispute on this issue. Since the issue has been raised directly by H.R. 5164, the Committee believes that it is appropriate to enact a clarifying amendment at this time even though the amendment effectively only restates current law.

The addition of the Privacy Act amendment as subsection (c) of Section 2 of the bill required a further conforming change in Section 4. As reported by the Permanent Select Committee on Intelligence, Section 4 establishes an effective date for Section 2 of H.R. 5164. The amendment to Section 4 leaves unchanged the effective date established by the Permanent Select Committee on Intelligence with respect to subsections (a) and (b) of Section 2. As a clarification of existing law, subsection (c) of Section 2, the Privacy Act amendment, will be effective upon enactment and will apply to all pending and future requests for access made under the Privacy Act of 1974.

Section-by-Section Analysis

The report of the Permanent Select Committee on Intelligence contains a detailed section-by-section analysis of H.R. 5164. The analysis includes a lengthy discussion of that Committee's view of how the authority contained in H.R. 5164 should be implemented by the Central Intelligence Agency and how the judicial review procedures should be implemented by the courts.

The entire section-by-section analysis from the report of the Permanent Select Committee on Intelligence is hereby incorporated into this report by reference. The Government Operations Committee concurs in the views, understandings, and interpretations reflected in the section-by-section analysis contained in the report of the Permanent Select Committee on Intelligence.

This section-by-section analysis will address those provisions of H.R. 5164 that were amended by the Government Operations Committee. The amendments to the original text of H.R. 5164 made by the Permanent Select Committee on Intelligence and incorporated in the amendment in the nature of a substitute reported by that Committee have also been incorporated in the amendment in the nature of a substitute approved by the Government Operations

Committee. These amendments are largely technical in nature and will not be discussed separately in this report.

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

Section 2—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. The section also makes necessary technical additions to the table of contents of the National Security Act of 1947.

Subsection (c) amends subsection (q) of the Privacy Act of 1974, 5 U.S.C. § 552a(q) (1982), by adding a new paragraph (2). The new paragraph provides that no agency shall rely on any exemption in the Privacy Act to withhold from an individual any record which is otherwise accessible to the individual under the provisions of the FOIA. This change in the Privacy Act clarifies the relationship between the Privacy Act and the FOIA.

Section 3—Section 3 contains reporting provisions. Subsection (a) 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, on the feasibility of conducting systematic review for declassification and release of Central Intelligence Agency records of historical value.

Subsection (b) requires the Director of Central Intelligence to prepare and submit unclassified reports on FOIA processing. Reports are required every six months for the first two years following enactment of H.R. 5164.

The reports must include (a) a description of the specific measures established by the CIA Director to improve the processing of requests under the FOIA; (b) the current budgetary and personnel allocations for the processing of FOIA requests; (c) the number of FOIA requests received and processed during the six month period covered by the report and the number of requests pending at the time the report is issued; and (d) an estimate of the current average response time for completing the processing of FOIA requests.

Subsection (c) provides that the reports required by subsections (a) and (b) are to be submitted to the Permanent Select Committee on Intelligence and the Committee on Government Operations of the House of Representatives and to the Select Committee on Intelligence and the Committee on the Judiciary of the Senate.

Section 4—Section 4 makes clear that the exemptions of CIA operational files from FOIA search and review made by subsections (a) and (b) of Section 2 of H.R. 5164 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 held a hearing on the subject of H.R. 5164).

Inflationary Impact

In compliance with clause 2(*l*)(4) of House Rule XI, it is the opinion of this committee that the enactment of this bill is not expected to have any inflationary impact on prices or costs in the operation of the national economy.

OVERSIGHT FINDINGS

The committee has made no detailed findings or recommendations other than those contained elsewhere in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

No new budget authority or tax expenditures are required by this legislation.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

The cost estimate prepared by the Congressional Budget Office under Sections 308(a) and 403 of the Congressional Budget Act of 1974 is contained in the following letter:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washinton, DC, September 5, 1984.

Hon. JACK BROOKS,
Chairman, Committee on Government Operations,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5164, Central Intelligence Agency Information Act, as ordered reported on July 31, 1984 by the House Committee on Government Operations. The bill exempts certain operational files from search, review, publication, or disclosure under the Freedom of Information Act and requires the Director of Central Intelligence to make additional reports to Congress. No additional costs to the federal or state and local governments are estimated to result from enacting this legislation.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

RUDOLPH G. PENNER, *Director.*

COMMITTEE ESTIMATE OF COST

The Committee agrees with the estimate of the Congressional Budget Office. The Committee estimates that H.R. 5164 will result in some cost reduction in the processing of Freedom of Information Act requests at the Central Intelligence Agency. It is impossible to estimate the amount of savings because it is dependent in part on the number of FOIA requests received by the CIA in the future. In any event, because the CIA has agreed to make no reduction in budgetary or personnel allocations for FOIA processing during the two years following enactment, no savings will be realized until the third year.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII 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 italics, existing law in which no change is proposed is shown in roman):

NATIONAL SECURITY ACT OF 1947

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

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

SHORT TITLE

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

TABLE OF CONTENTS

* * * * * * *

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 them-

selves 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 referred 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 complaint alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complaint shall support such allegations 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 Cen-

tral Intelligence Agency, in fact, considered the criteria set forth in subsection (b) of this section in conducting the required review.

TITLE 5, UNITED STATES CODE

* * * * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

* * * * * * *

Subchapter II—Administrative Procedure

* * * * * * *

§ 552a. Records maintained on individuals

(a) DEFINITIONS.—* * *

* * * * * * *

(q)*(1)* EFFECT OF OTHER LAWS.—No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

* * * * * * *

DISSENTING VIEWS OF HON. TED WEISS

The Central Intelligence Agency Information Act (H.R. 5164) attempts to balance the right of the public to know about the activities of its government, against the legitimate need, in very limited situations, to restrict access to information maintained by the CIA. I believe that the balance has not been properly reached by this bill, so that it now reflects a serious rollback in public access rights contained in the Freedom of Information Act (5 USC 552), and, in addition, and unnecessary limitation on the power of the courts to review CIA actions.

The record of the CIA in meeting its responsibilities under the Freedom of Information Act has been appalling. It has consistently ignored the mandate of the Congress to submit, except in limited circumstances, to the scrutiny of public review, claiming a host of operational reasons to justify what the public now knows were unjustifiable cover-ups of illegal activities.

I concur with the view expressed by the Committee, and the Permanent Select Committee on Intelligence, that there is a legitimate need to protect some CIA information from public release. I believe, however, that restricting public access should be the exception, not the norm. The Congress would be better served by enacting legislation which would clarify the limited circumstances under which information could be withheld by the CIA from release under the Freedom of Information Act, without limiting court review.

This was, in fact, proposed by former federal district court Judge and Representative Richardson Preyer when in 1980, as Chair of the Government Information and Individual Rights Subcommittee, he introduced H.R. 7055 which would have exempted FOIA disclosure of information provided to the CIA in confidence by a secret intelligence source or a foreign intelligence service, but would have left in place judicial review of CIA action.

Instead, this bill grants a carte blanche exemption from FOIA for the CIA, under the guise of procedural reform.

I believe that existing laws are adequate to protect properly classified foreign intelligence information. The FOIA already contains exceptions created by 5 USC 552(b) (1) and (3) which allow the CIA to protect sensitive information. In those cases where the requester then seeks judicial review of the CIA decision to withhold the information from release, the court is empowered to conduct a de novo review, including in camera review of the documents in question. As a matter of practice, the courts generally find in favor of the agency in such cases. And in the entire history of the FOIA the involvement of the court has not resulted in an unauthorized release of the documents.

Yet H.R. 5164, as reported by the Committee, would effectively bar access to almost all operational files of the CIA, except under

three very limited situations. Had this law been part of the original FOIA legislation, it is likely that the American people would never have learned of the numerous illegal undertakings by the agency, at home and abroad, that have learned of the numerous illegal undertakings by the agency, at home and abroad, that have come to light in recent years.

If, per chance, there is any relevant information which could be released under the criteria of H.R. 5164, but that the CIA nevertheless improperly attempts to withhold from disclosure, the ability of a requester, and of the courts, to compel disclosure are so restricted by H.R. 5164 as to be rendered meaningless. For example, the bill creates an obvious CATCH-22 for most relevant requests for documents. A requester can not even use the FOIA to secure CIA documents until he/she can convince an oversight agency or committee to investigate the specific subject of the request. This is likely an impossible hurdle to meet since the requester probably needs the documents to make his case to the oversight group. Assuming the requester can get this far, his/her rights to gather information by discovery in federal court actions are severely limited, even under close court supervision to protect sensitive information. Depositions and interrogatories are eliminated, even if a court orders one, under the provisions of H.R. 5164. Production of documents is permitted, but before the court can order one, under the provisions of H.R. 5164. Production of documents is permitted, but before the court can order this, H.R. 5164 requires the requester to prove his case on the merits, without the benefit of the documents needed to do so. If a requester were in the position to make such a showing without the documents, he probably wouldn't be seeking them in the first place.

Not only are discovery rights severely limited, but normal rules of federal evidence law are altered in unprecedented ways. The bill requires that all issues of fact be based on sworn written submissions of the parties, which although appearing to be reasonable, greatly limits the value of third party input, and the value of the normal discovery process. Under subsection (f)(3), even the written information which can be submitted by the person seeking court intervention, and which can be considered by the court, is limited to only personal and 'admissible' evidence, restrictions not found anywhere else in federal procedure.

Judicial review of CIA is limited even further. In almost all cases, the ability of the courts to even review contested information is eliminated by subsection (f)(4)(A) which permits the CIA to substitute a written statement is lieu of the court's independent review of the documents. Nor may the courts even require that the CIA go back and review the documents themselves in the preparation of the written statement which is to take the place of the court's review. Then even in the event that the court were to find that the agency willfully violated the law, H.R. 5164 removes the court's power to impose sanctions on the agency or its employees for their illegal activity.

Finally, under the artful language of subsection (f)(7), if the CIA agrees *to search* the file, but not necessarily *to release* any information contained therein, at any time during the pendency of the liti-

gation, the court would be required to dismiss the court action, without any judicial discretion.

While the Congress may be willing to abdicate its responsibilities regarding the CIA, to the CIA, I am hopeful that the courts will not permit this dangerous intrusion.

If the Congress is of the mind to restrict the public's access to information, we should do it directly and specifically, without tying the hands of the courts to enforce the laws we enact.

TED WEISS.

O