OGC 79-08375
14 September 1979

OGC Has Reviewed

MEMORANDUM FOR: Chief, Information Services Staff/DDA

STATINTL FROM : [redacted]
Office of General Counsel

SUBJECT : Personal Liability of Declassification Reviewers

REFERENCE : Request for Ruling, dated 31 May 1978, same subject

1. Your request presented four questions regarding the potential civil liability of Agency employees who negligently, but not maliciously, declassified and released documents which should have remained properly classified, or although unclassified, should not have been disseminated to members of the general public. Generally speaking, your employees have little cause for apprehension, insofar as potential civil liability is concerned, although a civil suit is a theoretical possibility. A more complete answer to your four questions is given below.

2. In response to that portion of your request which involved civil actions brought by members of the general public who were adversely affected by the improper declassification or release of information, it is my opinion that:

--- A declassifier who improperly declassifies a document, but who does not disseminate it to a member of the general public, may not be subject to civil liability although the declassifier may be subject to administrative sanctions at the Agency level.

--- An Agency employee who improperly releases information in contravention of the Freedom of Information Act or the Privacy Act is, in all likelihood, not subject to civil suit on the basis that either of those federal statutes establishes an implied cause of action which may be brought by a member of the general public adversely affected by such improper release.

--- An Agency employee who improperly releases information in contravention of the Freedom of Information Act or the Privacy Act theoretically may be susceptible to a state civil suit based upon the common law of libel or invasion of privacy. However, it should be noted that substantial defenses are available which should prevent an actual award of damages against the employee. In effect, it is theoretically possible such a suit could be brought, although it is likely to fail on the merits.

3. If such a civil suit was brought in state court against an employee of this Agency on the ground of negligent conduct occurring within the scope of his or her employment, counsel would be provided by the Department of Justice. Although the government's provision of legal counsel is subject to certain limitations, these limitations are not applicable here, and it is my opinion such counsel would be made available by the Department of Justice.

4. Your request also sought a definition of the term "immediate jeopardy" for the purposes of declassification review. Attorneys from this Office are currently developing a workable definition of the term "immediate jeopardy", in conjunction with representatives from the National Archives and employees from the Classification Review Division of this Agency. The definition of the term which results from this collaboration will be used on a government-wide basis during the systematic review for declassification of intelligence information provided by foreign governments. It is my recommendation this definition, once established, also be considered for use during the systematic or mandatory review of Agency materials.

5. Also attached is a comprehensive legal memorandum I drafted on the subject of the potential personal liability of declassification reviewers. While this memorandum may be too "legalistic" for your purposes, it does set forth the background and rationales which underlie my opinions and conclusions.

6. I would be happy to discuss these issues with you or with your employees, either formally or informally. If you have any questions regarding this memorandum or the attached longer memorandum, please do not hesitate to call on me.

STATINTL

Attachment

cc: DC/ISS/DDA
STATINTL C/FOI&PLD/OGC

13 September 1979

MEMORANDUM FOR: Chief, General Law Division

STATINTL FROM : [redacted]

SUBJECT : Personal Liability of Classification Reviewers

REFERENCE : 31 May 1978 Request for Ruling, same subject

1. The above-referenced request presented four questions concerning the potential civil liability of an Agency employee who negligently declassified and released a document to the detriment of a member of the general public. These four questions may be restated as follows:

--- May an Agency employee be held personally liable for the negligent declassification of classified information in a suit for damages brought by a member of the general public?

--- May an Agency employee be held personally liable for the negligent declassification of a document when that document is subsequently released by the National Archives and Records Service?

--- Will the federal government provide legal representation for an Agency employee who is sued in a civil proceeding for the negligent declassification and release of information by a member of the general public?

--- How should the term "immediate jeopardy" be defined for the purposes of continuing the classification of a document? (The term "immediate jeopardy" is used in DDA Declassification Review Guideline, paragraph 9, p. 2.)

2. At the present time, members of the CIA's Classification Review Group, Information Systems Analysis Staff ("ISAS") exercise declassification and downgrading authority for Agency information. ISAS reviews classified information for declassification purposes in two distinct contexts. First, ISAS systematically reviews classified information constituting permanently valuable records of the United States Government. This classified information is reviewed when it becomes twenty years old. This review process is referred to as "Systematic Review." Information of potential historical significance which is declassified through the systematic review process may then be placed in the custody of the National Archives and Records Service ("NARS"), a division of the General Services Administration. The second declassification review process is known as "Mandatory Review." Classified information is subject to mandatory review for declassification and release upon request by another government agency or upon request by an individual member of the general public for such information. The CIA component of record for all requests involving the mandatory review, declassification and release of information pursuant to Executive Order 12065,

the Freedom of Information Act or the Privacy Act is the Information and Privacy Staff ("IPS").

3. Research has been conducted in response to the four questions recited in paragraph one. This research failed to identify any reported case which imposed civil liability upon an employee of the federal government for the negligent declassification and release of information. Neither the Privacy Act nor the Freedom of Information Act expressly establish a civil cause of action which may be brought against a federal employee for violation of the rights and privileges granted to members of the general public by those statutes. Under the Freedom of Information Act, only suits for injunctive relief may be brought against the United States--that is, suits to require a federal agency to disclose or not to disclose particular information. 5 U.S.C. §552(a)(4)(A) (1970). The negligent release of information is not actionable under the Freedom of Information Act, at least as far as the imposition of personal liability upon a federal employee is concerned.1/ Similarly, no right of action against a federal employee is expressly established by the Privacy Act.

1/ Agency employees are, however, subject to administrative sanctions for the negligent disclosure of information which is required to be protected by statute or Executive Order. Executive Order 12065 indicates that the negligent compromise of classified information can expose a federal employee to disciplinary sanctions at the Agency level.

Sections 552(g) and (h) of the Privacy Act indicate that damages may be assessed against the United States for intentional and willful violations of the provisions of the Act. The Privacy Act also indicates that a federal employee who discloses protected information regarding an individual with the knowledge such disclosure is prohibited is subject to criminal penalties. The penalty for an unauthorized and willful disclosure is a fine of not more than five thousand dollars.

4. Executive Order 12065, the Privacy Act and the Freedom of Information Act indicate collectively that an employee who negligently declassifies and releases information may be subject to administrative sanctions and may have jeopardized his or her employment with the federal government. However, these authorities do not expressly make available a personal cause of action to members of the general public who may have been adversely affected by such negligence. However, due to the absence of applicable case law on this subject, this Office is not prepared to state that no possibility exists that an action could be brought successfully against an individual employee by a member of the general public who was damaged by the employee's failure to abide by the mandate of these statutes. I can note only that no right of private action is expressly created by either statute and that my research has failed to reveal any reported decision which recognized an implied right of

private action for violations of the Privacy Act or for violations of the Freedom of Information Act.

5. The fact neither the Privacy Act nor the Freedom of Information Act establish an explicit civil cause of action which may be brought against a federal employee who negligently declassifies and releases properly classified information, does not necessarily indicate that federal employees are not amendable to suit for negligence in a state court. A possibility exists that a civil cause of action could be brought under the general law of negligence. Such an action would be brought in accordance with state common law. The action would not be based upon the fact the Agency employee failed to conform his or her conduct to the requirements of the Privacy Act or the Freedom of Information Act; instead, the action would be based upon the law of negligence of the state where the act or omission complained of occurred. In order to be successful, an action for the negligent disclosure of information would have to exist under state law. Such an action probably would allege the negligent declassification and release of information constituted either libel or an invasion of the privacy of the individual about whom the information pertained.[2/] Although relatively substantial defenses could

2/ Under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq. (1970) ("FTCA"), liability may be imposed upon the United States for the actions of its officers and employees which occur within the scope of their employment and which constitute an invasion of the plaintiff's privacy. However,

be raised against such actions, the possibility of an employee's personal civil liability cannot be dismissed. The remainder of this memorandum will describe those aspects of the law of negligence which might apply to the negligent declassification and release of properly classified information. As the following discussion indicates, the law of negligence admits no hard and fast answers. However, it is my opinion that the probability of a civil suit for damages brought by a member of the general public against a federal employee for the negligent declassification and release of information is low. Further, it is my opinion that if such an action was brought, its chances of success---that is, the actual award of damages against the employee---are also low.

It should be noted that a judgment against the United States under the FTCA constitutes a complete bar to any action against the employee whose act or omission gave rise to the claim. 28 U.S.C. §§1346(b), 2676 (1970). The usual effect of this provision of the FTCA is to provide practical protection to a federal employee, since a judgment against the United States serves as a complete bar to any action against the employee. However, no legal impediment exists to the filing of a suit against the federal employee instead of the government in the first instance. In such a case, the FTCA does not prevent a recovery against the employee. The FTCA only provides a statutory bar if the plaintiff first obtains a judgment against the United States and then files suit against the federal employee. It is unlikely a plaintiff would first sue the federal employee without also naming the United States as a defendant for the simple reason that the federal employee may be judgment proof---that is, lack the resources with which to satisfy any judgment. This protection, which arises from the FTCA, is not available in the case of libel. Under the FTCA, the federal government is not amenable to suit on the ground of libel. Accordingly, the only possible defendant in a libel action is the federal employee.

5. The first two questions raised in the request for ruling require a prefatory comment. An employee may be potentially liable for negligent conduct which results in the improper declassification of a document if three general tests are satisfied. These three factors constitute the broad analytical framework within which the law considers and resolves questions concerning individual liability for negligent conduct. This body of law is known as tort law. In general, before any individual can be liable in tort for civil damages due to his or her negligent conduct, these three elements must be present: the existence of a duty, a breach of that duty, and an injury which results as the legal consequence of the breach of that duty. With reference to decisions made by declassifiers during systematic review, these three elements can be stated as follows:

--- Does the declassifier owe a duty of care to a member of the general public?

--- Has the declassifier breached this duty of care by improperly declassifying a document?; and

--- Is the breach of this duty the legal cause of damages to the individual to whom the duty was owed?

6. Although no case law or other persuasive legal precedent could be found to this effect, it is arguable an employee whose duties include the review and declassification of documents, but not their release, owes no legally enforceable duty to members of the public at large. This argument is supported by the nature of the classification process. Information is classified in order to protect the interests of the government. Normally, this governmental interest is described under the rubric of "national security." For example, Paragraph 1-3 of Executive Order 12065, "National Security Information," (July 3, 1978), specifies six categories of information that may be eligible for classification. These categories include:

--- military plans;

--- foreign government information;

--- intelligence activities, sources and methods;

--- foreign relations;

--- scientific, technological or economic matters relating to the national security; and

--- programs for the safeguarding of nuclear facilities and materials.

A final category cited in the Executive Order includes other categories of information "... which are related to national security...."

7. As a recitation of the categories of information susceptible to classification makes clear, the classification program is designed to protect governmental interests and not individual interests. Moreover, information which falls within one of the categories enumerated above may not be classified unless its unauthorized disclosure "... could be expected to cause at least identifiable damage to the national security." Executive Order 12065, paragraph 1-302 (emphasis added). Accordingly, it is arguable a declassifier is under a duty, not to any particular individual, but to the federal government to ensure that no document is improperly declassified. Executive Order 12065 suggests this is the case since paragraph 3-3 of that Order clearly indicates only the interests of the government are to be considered in a determination of whether any particular information merits continued classification. According to the Executive Order, any information which continues to satisfy the classification requirements should not, in the usual case, be declassified. In effect, the test for declassification is the information's relation to "national security" interests and not the information's relation to the interests of any identifiable individual.

8. Under the "no duty" approach described above, the negligent declassification of a document, without more, could not serve as a basis for a civil action against the declassifier. This result would obtain for the simple reason the declassifier owed no duty of care to individual members of the general public. Since the declassifier owed only a duty to the government not to declassify improperly a particular document, the breach of this duty could not serve as the basis of a civil action brought against the classifier by a member of the general public. However, this same negligent conduct could serve as the basis for administrative action taken against the declassifier by the government.3/

9. The major shortcoming of the "no duty" theory described above, is that no court has considered this argument. Accordingly, although the possibility of a "no duty" defense should be identified, it should also be noted that no assurances whatsoever can be given regarding its ultimate validity.

3/ Paragraph 5-503 of Executive Order 12065 indicates sanctions may be imposed upon employees who "... compromise properly classified information through negligence." Arguably, this provision also encompasses the improper declassification of information which should have remained classified.

10. If it is assumed a declassifier owes a duty recognized by law to conform to a certain standard of conduct in order to protect members of the general public from unreasonable risks of harm due to the negligent declassification of classified materials, then a failure to conform to this standard could serve as a potential basis for the imposition of civil liability. The failure to conform to a standard established by law for the protection of others is usually referred to in tort law as negligence. Although the concept of negligence is amorphous, it has been generally defined as conduct "... which falls below the standard established by law for the protection of others against unreasonably great risk of harm." Restatement of Torts, §282.

11. It should always be kept in mind that negligence refers to conduct and not to the consequences of that conduct. Because of this concept, a classifier's conduct would be judged in light of the possibilities apparent to him at the time the decision to declassify a document was made. A declassifier's conduct would not be evaluated in light of the subsequent damage caused by his improper declassification. Another characteristic of the concept of negligence that should be noted is that before liability may be imposed, the challenged conduct must be shown to have exposed another to an unreasonable risk of harm. It is not sufficient to show merely that another has been injured as a direct result of a decision made by a declassifier to declassify a document.

It must also appear that the declassifier's conduct was unreasonable in light of some recognizable risk. Liability will not be imposed for declassification decisions which are merely questionable or otherwise subject to dispute. Liability can only be imposed for negligent conduct. Negligent conduct, in this context, would involve a decision made by a declassifier which exposed a member of the general public to an unreasonable risk of harm. It is not sufficient to show that every decision made by a declassifier carries some recognizable but remote possibility of harm to another. Nor is it sufficient to show that differences of judgment might exist between declassifiers with regard to the classification or declassification of a particular document. Individuals may have differences of judgment and, yet, from a legal point of view, both judgments may be reasonable.

12. Whether a declassifier's conduct is unreasonable in a legal sense, so as to constitute negligence, is difficult to predict in the abstract. However, a general legal standard for determining whether an individual's conduct is unreasonable involves the application of what is called the "reasonable man" standard. This standard is based upon the conduct of a fictitious person---a "reasonable man"---who represents a model of the proper human attributes with only those human shortcomings and weaknesses which the community at large finds tolerable. This "reasonable man" is not an ordinary individual who may occasionally do unreasonable things.

The "reasonable man" is a personification of a prudent and careful individual whose conduct is always up to standard---that is, an ideal of reasonable behavior. In the context of an employee charged with the responsibility of declassifying documents or continuing their classification, the "reasonable man" standard would require an employee to be reasonable, prudent, and careful in his or her duties, and faithful to the applicable rules and regulations which govern his or her conduct. In a novel context such as this, it is impossible to predict with certainty whether a decision of a declassifier, if challenged, would pass muster under the "reasonable man" standard. However, it should be remembered that the "reasonable man" standard is, in reality, a form of legal shorthand for conduct which a jury finds to be reasonable in light of all the circumstances.

13. If it assumed that declassifiers owe a legal duty to members of the general public and if it is further assumed that a declassifier negligently---that is, fails to conform to the "reasonable man" standard---declassifies a document, no liability can result unless the declassifier's negligence was the legal cause of an injury. The act of improperly declassifying a document, without more, cannot serve as a

basis for civil liability. Since documents, once declassified, do not automatically fall into the public domain, the act of negligent declassification cannot serve as a basis for civil liability.

14. As stated above, the negligent declassification of a document, standing alone, cannot serve as a basis for the imposition of civil liability upon an Agency employee--an injury or other legally cognizable detriment must also be shown to have resulted from this same act of negligence. Accordingly, employees whose duties include only the systematic "review for declassification" of classified information, within the meaning of paragraph 3-4 of Executive Order 12065, are not susceptible to tort liability for negligently declassifying a document.

15. Before a negligently declassified document can be the legal cause of an injury, it must be released by the federal government. However, both the Freedom of Information Act and the Privacy Act impose restrictions upon the release of unclassified information which govern the conduct of the ISAS and the IPS. Under the Freedom of Information Act, 5 U.S.C. §552(b)(6), federal agencies are not to provide

records "... the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Moreover, the Privacy Act provides that no record which is contained in a "system of records" shall be disclosed to another person "... without the prior written consent of the individual to whom the record pertains...." Accordingly, even if a classified document was negligently declassified, these two statutes would usually come into play prior to the government's release of any information regarding an identifiable individual.

16. If a negligently declassified document was released in contravention of either statute---that is, its release constituted an unwarranted intrusion into the personal privacy of an individual under the Freedom of Information Act or if its release violated the consent requirement of the Privacy Act, then it is doubtful that the negligent declassification of that document was the legal cause of an injury to a member of the general public. It is more likely the legal cause of such injury would be found to be the improper releaseof the document subsequent to its negligent declassification. In such a case, any potential liability would be most likely to fall upon the government employee who violated either the mandate of the Privacy Act or the Freedom of Information Act, or both, by improperly disclosing the

information.[4/] This result is known in the law of tort as the doctrine of "superseding causes." This doctrine indicates that an act of a third person may prevent a person who was initially negligent from being liable for harm to another, provided that the third person's subsequent negligence was a "substantial factor" in causing the injury. Restatement of Torts §440. With regard to those employees engaged in the systematic review and declassification of Agency documents, the doctrine of "superseding causes" may provide a substantial defense against civil liabiity. An employee who negligently declassifies a document but does not release it can contend that his or her negligence---the act of negligent declassification---failed to cause any identifiable injury, and can further contend that any legally cognizable injury stemmed from the improper or negligent release of the document by another employee or agency. In effect, a release of information in violation of the Privacy Act or in violation of the Freedom of Information Act could be viewed as the legal cause of the injury. In this context, the initial negligence of the declassifier would not provide a basis for civil liability; instead, the employee who was subsequently negligent would be exposed to liability.

4/ As stated in paragraphs 3-5 of this memorandum, no implied right of private action has been found to date in either the Privacy Act or in the Freedom of Information Act. Accordingly, the negligent disclosure of confidential or classified information which occurred after the negligent declassification of the same information would be evaluated in light of state tort law. If such disclosure constituted tortious conduct, then the act of disclosure and not the act of declassification is likely to be viewed as the legal cause of any injury to a member of the general public, thereby relieving from liability the employee who negligently declassified the document but did not release it.

17. As this discussion indicates, the likelihood is slight that any civil liability could be imposed upon a declassifier for negligent declassification. It is also apparent that liability is most likely to be imposed, if at all, upon those employees who ultimately release documents or otherwise disclose information contained therein. The improper release of a document or information could support a recovery in tort under one of two possible theories. These theories are libel and invasion of privacy. Under either tort theory a significant factor could prove to be the manner in which the disputed document was released and to whom the disputed document was released.

18. If an Agency document is negligently declassified, but is properly transferred to the National Archives of the United States, and subsequently released by the National Archives and Records Service, it is likely no personal liability could be imposed upon the CIA employee who negligently declassified the document. The employees of the National ARchives and Records Service are subject to the provisions of the Privacy Act and the Freedom of Information Act. Subpart 105-61.5302-18 of Title 41 of the Code of Federal Regulations imposes restrictions upon the release of unclassified materials by NARS employees. With regard to records that have been transferred to the National Archives and Records Service in accordance with

44 U.S.C. §§2103, 3103 (1970),[5] these regulations indicate that public access shall be restricted to records containing information that has not been previously made known to the public. These restrictions are designed to protect the privacy interests of members of the general public. As stated in the Code of Federal Regulations, the NARS is not to disclose records which:

> ... contain information about a living individual which reveal details of a highly personal nature which the individual could reasonably assert a claim to withhold from the public to avoid a clearly unwarranted invasion of privacy....

41 CFR §105-61.5302-18. Information contained in a document that was negligently declassified by a CIA employee and then

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5/ Section 2103 of Title 44 United States Code, indicates that the Administrator of the General Services Administration may accept, for deposit with the National Archives, the records of a federal agency which have "... sufficient historical or other value to warrant their continued preservation by the United States Government." Section 3103 of Title 44 governs records held in a federal records center operated by the General Services Administration. Section 2104 of the same Title indicates the Administrator of General Services "... shall be responsible for the custody, use and withdrawal of records transferred to him." Similarly, the Archivist of the United States is subject to all the statutory limitations with respect to the "... examination and use of records" transferred to him that were applicable to the head of the agency from which the records originated.

transferred to the National Archives should not be disclosed except in accordance with the Freedom of Information Act, the Privacy Act and applicable NARS regulations.6/ The effect of these statutes and NARS regulations is that, in all likelihood, potential liability is shifted from the CIA employee who negligently declassified the document to the NARS employee who negligently released it. Under this theory, the legal cause of any damages is not the negligent declassification of the document but its improper release by the National Archives and Records Service.

19. As this discussion indicates, the only Agency employees who are potential defendants in a civil action based upon the ground of libel or the ground of invasion of privacy, are IPS employees who negligently release an Agency document concerning a third person to a member of the general public. Insofar as the tort of libel is concerned, it is my opinion that a successful claim would be difficult to establish.

6/ 41 CFR 105-61.103-1 governs requests for access to unclassified archives under the Freedom of Information Act. Since NARS is responsible for the implementation of the Freedom of Information Act with regard to any records deposited in the National Archives or deposited in a federal records center, it is under a statutory obligation not to disclose any information about an individual which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, under the doctrine of "superseding causes" it is arguable that employees of the NARS and not employees of the CIA would be potentially liable for the release of information which invaded the privacy of a member of the general public, even though it originated in a classified document prior to its transfer to the National Archives and Records Service.

20. The tort of libel requires the publication to a third person, of information about the plaintiff which tends to injure his reputation or otherwise excite adverse, derogatory or unpleasant feelings about him. The release of derogatory information about a third person, to a requestor, by a member of the IPS could constitute libel provided that the defamatory statement was untrue. It is significant to note that truth is a complete defense to libel. Accordingly, even if an Agency employee negligently released information about another person to a third party, if that information was true, no cause of action for libel would lie.[7/]

21. The second basis of potential tort liability for the negligent disclosure of information about a member of the general public involves an individual's right of privacy. This area of tort law establishes a cause-of action in publicity---that is, the publicity given to private information of an objectionable kind about the plaintiff. This cause of action---public disclosure of private facts---can arise even though the information disclosed is true and, thus, no action would lie for libel. However, in the usual case, it is unlikely that an action could be brought successfully against a member of the IPS staff on the ground of invasion of privacy. It is generally established that the disclosure of private facts must be a public one accompanied by publicity. The disclosure of private information to a single individual or to a few individuals is not actionable. As stated by one authoritative legal commentator:

7/ It is significant to note that truth is not a defense to a suit which alleges an invasion of privacy.

> Some limits of this branch of the right of privacy appear to be fairly well marked out. The disclosure of the private facts must be a public one; there must be, in other words, publicity. It is an invasion of [the plaintiff's] ... rights to publish a newspaper that the plaintiff does not pay his debts, or to post a notice to that effect in a window on the public street, or to cry it aloud ... but not to communicate the fact to the plaintiff's employer, or to any other individual, or even to a small group.

Prosser, The Law of Torts, §112, p. 835.[8/]

The requirement of publicity---that is, the widespread dissemination of private facts---appears to be absent in the activities of the IPS staff. Since the tort of invasion of privacy, at least in this context, usually requires a wide distribution of private facts about an individual, even a negligent disclosure of private facts to a single individual who requested such information does not appear to be actionable.

8/ Of course, the disclosure of untrue, derogatory information to a single individual could be libelous although not an invasion of the plaintiff's right to privacy.

22. As this discussion indicates, members of the IPS and the ISAS staff appear to be theoretically susceptible to suits for common law torts in a few discrete instances.[9/] Assuming the negligent disclosure of information about a member of the general public it does not appear to be likely that an action alleging an invasion of privacy could be brought as long as the improper disclosure was made only to one person or to a few persons. A potential action on the ground of libel is available only if the information disclosed is both derogatory and untrue. However, even if the elements of a cause of action in tort are present, a substantial defense is available to an Agency employee.

23. The Supreme Court has indicated that federal employees may enjoy an absolute immunity from liability for common law torts which result from their discretionary action. In Barr v. Matteo, 360 U.S. 564, 573-574 (1959), the Supreme Court held that a high level federal official was absolutely immune from suit for defamation due to statements made by that official in a press release. In a more recent decision, the Supreme Court affirmed Barr v. Matteo and concluded that federal officials and employees may enjoy

9/ These instances include the following: (1) the written disclosure of derogatory and untrue statements about an individual to a third person; and (2) the public disclosure of private facts about an individual to more than a few persons. A negligent disclosure of information may also be actionable on other, common law tort grounds, depending upon the tort law of the state where the act or omission complained of occurred.

an absolute immunity from suit for common law torts provided that (1) the conduct complained of occurred while these officials or employees were acting within the "... outer perimeter of (the officer's or employee's) line of duty ..." and that (2) the action complained of was "... an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively." Butz v. Economou, ___U.S.___, 57 L.Ed 895, 904 (June 29, 1978), quoting, Barr v. Matteo supra at 575. The absolute immunity granted federal employees making discretionary decisions within the scope of their duties extends to lower level federal employees. Davis, Administrative Law, §26.02 p. 486.

24. In its discussion of the immunity accorded federal officials in Butz v. Economou, the Supreme Court indicated that this immunity accrues even if the federal official or employee mistakenly made a decision which they were authorized to make. For example, Court cited a number of prior decisions involving common law tort actions that had been brought against high-level federal employees for the proposition that a good-faith, error of judgment does not automatically deprive a federal employee or official of his or her absolute immunity from suit for common law torts. For example, in the case of Kendall v. Stokes, 44 U.S. 87 (1845), the Court noted the Postmaster General could not be held liable for errors of judgment: "... a public officer, acting to the best of his

judgment ... is not liable in an action for an error or judgment...." Butz v. Economou supra at 906. More significantly, the Supreme Court also affirmed its 1959 decision in Barr v. Matteo which extended absolute immunity to a federal official who acted maliciously and not merely negligently within the scope of his duties:

> ... Barr also appears ... to have extended absolute immunity to an officer who was authorized to issue press releases, who was assumed to know that the press release he issued was false and who therefore was deliberately misusing his authority. [We accept] this extension of immunity with respect to state tort claims...."

Butz v. Economou supra at 908. Accordingly, it is possible that IPS employees would be absolutely immune from suits predicated upon common law tort claims as long as they were acting within the outer limits of their duties and exercising discretionary judgments with regard to the review for declassification of classified documents.

25. This conclusion is supported by the decisions of the U.S. Circuit Courts of Appeal that have considered common law tort claims brought against federal employees since the Supreme Court's landmark decision in Butz v. Economou.

In every reported decision to date, the Federal Circuit Courts of Appeal have uniformly concluded that federal officials and employees enjoy an absolute immunity from common law tort suits brought pursuant to state law, provided that the act or omission complained of occurred during the course of their duties.[10/] It is my opinion, in light of these recent decisions, that such an immunity may also be available to IPS employees who negligently declassify and release information pursuant to Freedom of Information Act or Privacy Act requests, at least in situations in which the following factors are present:

10/ Marshall v. Whirlpool Corp., 593 F.2d 715, 734 n.49 (6th Cir. 1979) (arbitrary action of federal inspector; inspector immune from common law tort suit); Commodity Futures Trading Commission v. Hunt, 591 F.2d 1211, 1224-24 (7th Cir. 1979) (federal employees publish plaintiff's market position in soybeans; alleged misconduct was within scope of employees' duties; employees enjoy immunity from suit); Birnbaum v. U.S., 588 F.2d 319, 332 (2d Cir. 1978) (CIA employees may be absolutely immune from state tort claims due to mail opening operation); Tigue v. Swain, 585 F.2d 909, 913 (8th Cir. 1978) (libel and false imprisonment claims brought against army colonel; absolute immunity exists for common law torts); Granger v. Marek, 583 F.2d 781, 784 (6th Cir. 1978) (IRS investigators allegedly interefered with plaintiff's business prospects; agents immune since alleged misconduct occurred within the scope of their duties); Evans v. Wright, 582 F.2d 20, 21 (5th Cir. 1978) (HEW investigators sued for interference with plaintiff's contractual relations; investigators absolutely immune from suit for torts occurring within the outer perimeter of their official duties).

--- the employee was acting in good faith; that is, without an malicious intent to injure a member of the public through the improper release of information.

--- the employee personally believed that the release of the information was proper under the applicable statutory and Agency standards;

--- the declassification and release of information was within the scope of the employee's duties and authority.

--- at least some facially reasonable basis existed to justify the information's release at the time the employee decided to disclose the information.

However, even if an absolute immunity is available, any employee is still susceptible to suit; that is, no impediment exists to prevent a plaintiff from naming the employee as a defendant in a suit filed in state court or in a suit that has been filed in state court and removed to a federal district court. However, the availability of an absolute immunity may result in the prompt rejection of such a suit by the court. For example, if an Agency employee was named as a defendant in such a suit, the action could be dismissed, by the court, upon the government's

motion for summary judgment, without the necessity of a trial if it appeared conclusively that the alleged negligence occurred within the outer limits of the employee's duties.

26. If an action should be brought in state court against an Agency employee on the ground the employee negligently disclosed information about a member of the general public, that employee may be represented by attorneys provided by the U.S. Department of Justice. The conditions under which legal counsel will be provided are set forth in 28 CFR §50.15. In the context of this memorandum, such counsel is available upon request by the employee provided that:

--- the act or omission which forms the basis of the suit occurred while the employee was acting within the scope of his employment.

--- the Agency for which the employee works recommends that representation be provided by the Department of Justice.

--- the Department of Justice, upon review of the circumstances in which the suit arose, concludes that the employee was, at the time of the allegedly tortious conduct, within the scope of his or her employment and further concludes that government representation is in the interests of the United States.

Accordingly, it is quite likely that legal counsel will be provided by the Department of Justice in the case of tort actions brought against an Agency employee for the negligent declassification and disclosure of information about a member of the general public.

27. With regard to the final question posed in the Request for Ruling---that is, provide a definition of the term "immediate jeopardy,"---no comment is necessary at this time. An attempt to provide a government-wide definition of this term is currently underway. Attorneys from the Office of the General Counsel of this Agency are working with representatives of the National Archives and Records Service and members of this Agency's Classification and Review Division to develop a workable definition of the term "immediate jeopardy" for use in guidelines for the systematic review of classified intelligence information provided by foreign governments. It is recommended that the definition of the term "immediate jeopardy" that results from this collaboration be used by employees of this Agency.

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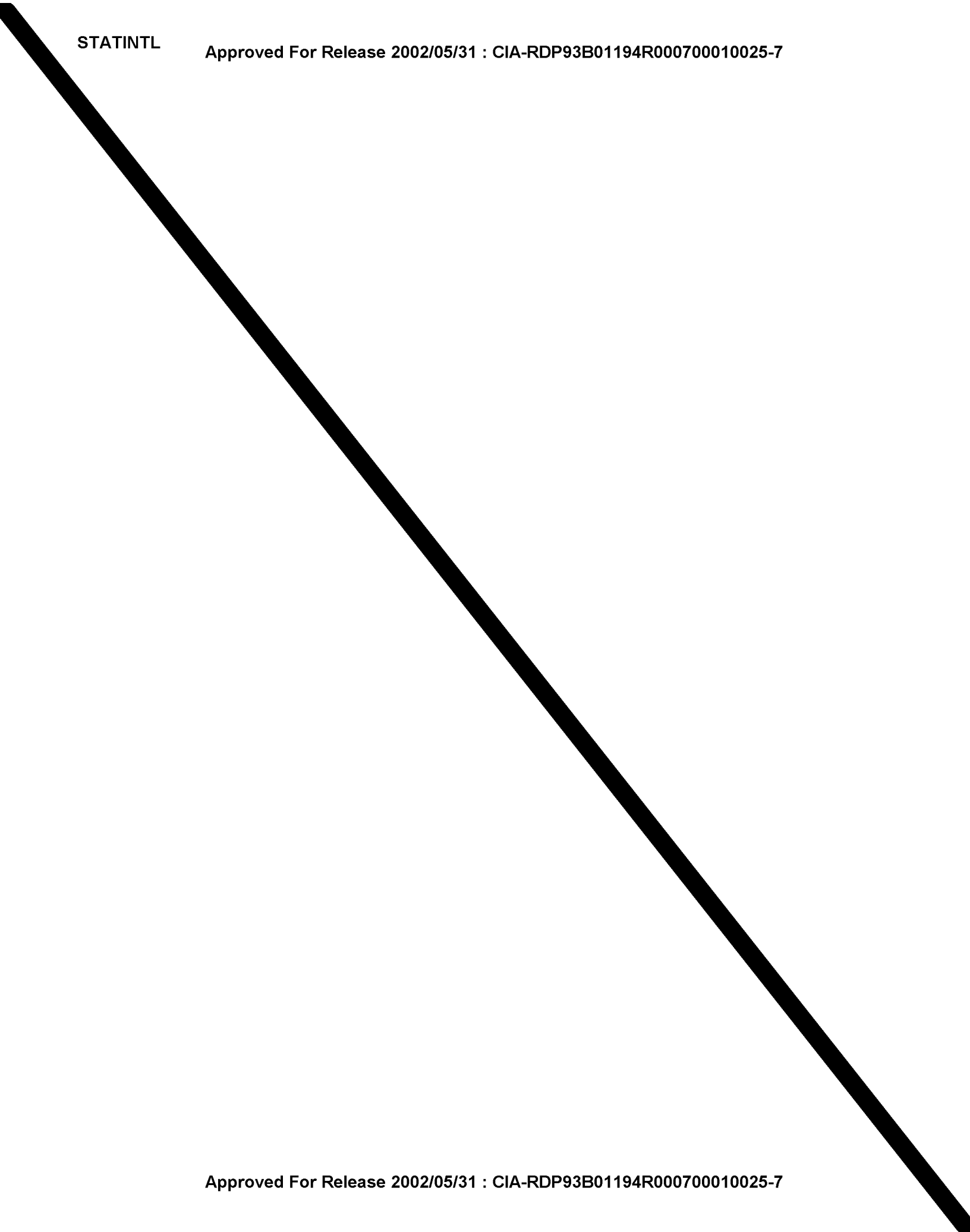

Approved For Release 2002/05/31 : CIA-RDP93B01194R000700010025-7