UNITED STATES GOVERNMENT

Memorandum

U-8/AGC

TO : RSS

DATE: 8 JAN 1979

FROM : GC

SUBJECT: Sensitive Compartmented Information Denials Working Group Final Report on Appeals Procedures

1. Your memorandum of 2 January 1979 on the same Subject, to which this responds, deals with a subject which rests more appropriately in the hands of the lawyers than in the operators.

2. The threshold question should not be whether appeal procedures are desirable or even in place but rather whether the law currently requires them. If the answer is yes then that aspect of the matter is laid to rest. If the answer is no then the question of their desirability should be discussed jointly because while the impact of imposing them may be administrative in nature, the potential repercussions of not adopting them could well be legal.

3. In discussions between your office and ours, your office has taken the view that DoD provides such procedures in the case of denied collateral clearances. Accepting this as being true, GC has great difficulty drawing any meaningful distinction between collateral and compartmented clearances since the denial of either or both can have the same or similar consequences. Therefore logic would appear to dictate that if we have them for one we should have them for the other.

4. Your office advises that where a person who has been denied a compartmented clearance has yelled loud enough that the Agency has provided the complainant with some sort of explanation and opportunity for reclama. This procedure is not adequate to satisfy the legal administrative due process requirements for reasons which will appear hereinafter.

5. It is noted that in the backup documentation NSA takes the position that such procedures are already in place. Your office disagrees with NSA's position on this point. We defer to your judgment as to the accuracy of NSA's representations.

6. There are six basic elements involved in the administrative due process concept:

a. notice

b. right to present evidence

c. right to rebut adverse evidence

d. representation by counsel

e. have the decision based solely upon the evidence introduced at a hearing

f. be provided a copy of the record.

7. In order to have a meaningful appellate procedure there needs to be substantial compliance with the six points noted above. In order to satisfy a court that such procedures are in effect they should be spelled out in an appropriate DoD document signed by an appropriate official and published not only within DoD but also probably in the Federal Register. By so doing an individual is apprised of his rights and the government employees of their responsibilities.

8. Is there a need for this? CIA obviously feels that there is. DIA may soon have a court decision right on point. DMA is currently being sued by an employee who among other allegations maintains that he was denied SCI clearance and as a result the opportunity to be considered for a better paying job. Records show that DMA acted unilaterally and that the case was never sent to DIA for adjudication. Plaintiff's complaint about the manner in which he was being treated was ignored.

9. The following is obvious from the pending case. DMA adjudicated the case when it did not have the authority to do so. DIA had the responsibility to adjudicate the case but never was sent the file to consider. When the employee complained about the denial he was not afforded an opportunity to appeal either within DMA or DIA.

10. If the plaintiff should obtain a smart attorney DMA should lose this aspect of the case. (This is not to say that the judge would say that the man was entitled to a clearance but rather that the case must be processed in accordance with the rules). Since DMA has handled this case in such a cavalier fashion no one should be surprised if the judge also requires the implementation of some sort of administrative appellate process which would afford the plaintiff and others similarly situated fundamental fairness.

11. The parallel between the two types of clearances and the existence of appeal rights in the case of denial of collateral clearances if properly exploited at trial could carry a great deal of weight with the judge particularly on the point of need for appellate procedures for the denial of compartmented clearances.

12. The referenced memorandum requested specific comments with regard to the CIA proposed Annex B to DCID 1-14. Until such time as GC can determine whether the recommended language would satisfy the current case law judgment must be reserved. This much can be said about the CIA paper. The problem of language can be avoided if paragraph 5 of Annex B were rewritten to read as follows:

> "5. Requirements. Each SIO will insure the establishment of an appellate denial procedure which complies with the requirements imposed by law relating to the concepts of fundamental fairness and administrative due process."

There is no requirement that CIA go any further and this language would allow DIA to establish that procedure which would be satisfactory for DoD.

13. In summary it is this office's view that the denial of an appeals procedure should prove hard to defend in court. DoD should have an appellate procedure for compartmented denials which at least parallels that currently in effect in the case of collateral denials. Any further discussion with regard to the language in the proposed Annex B could be eliminated by substituting the recommended language spelled out above.

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