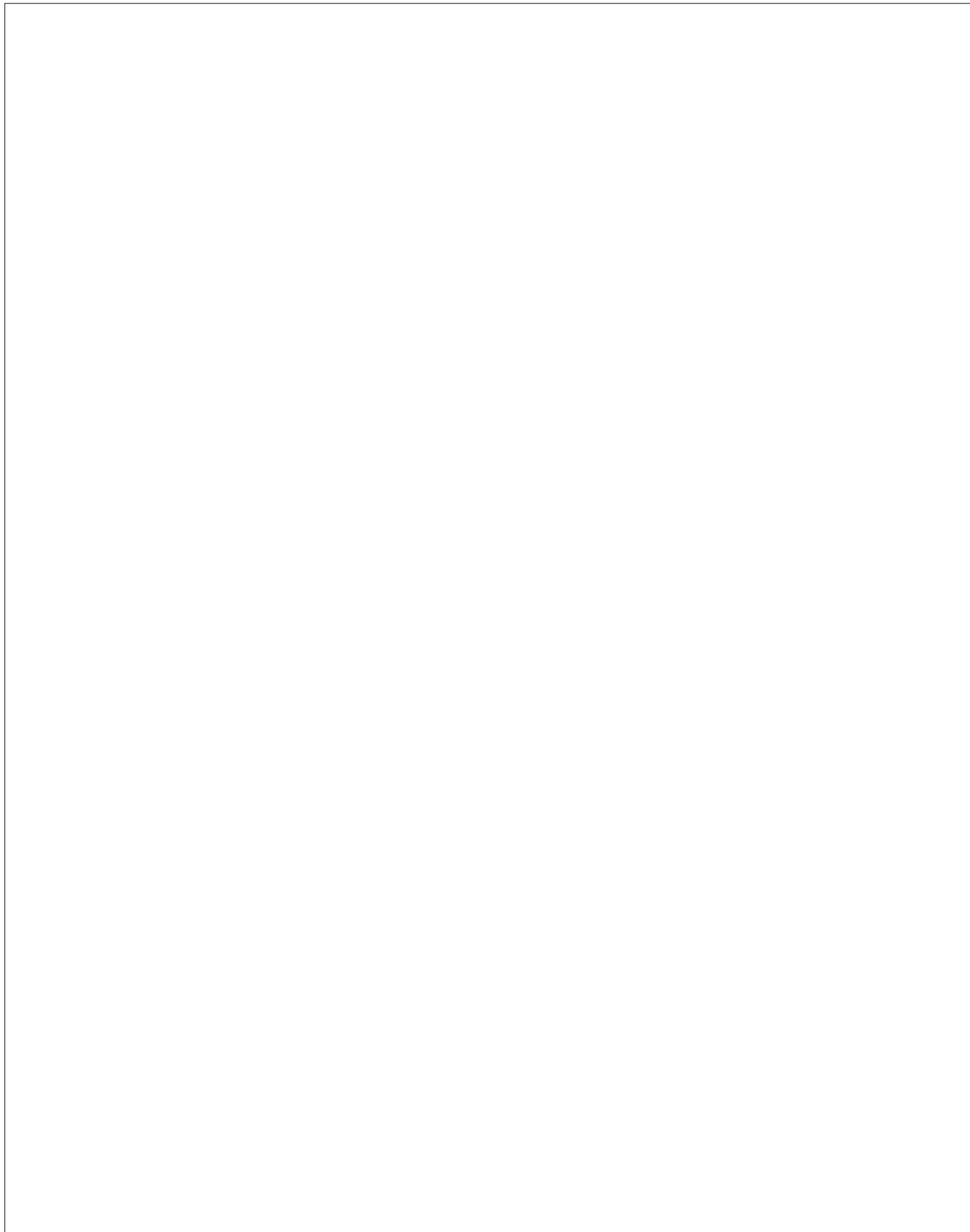


(b)(3)



APPROVED FOR RELEASE
DATE: 18-Aug-2010

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)
)
)
 Plaintiff,)
)
 v.) Civil Action No.: 08-0708 (JR)
)
 CENTRAL INTELLIGENCE AGENCY,)
)
)
 Defendant.)
 _____)

**DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY
MOTION FOR SUMMARY JUDGMENT**

Defendant, the Central Intelligence Agency ("CIA"), through its undersigned attorneys, hereby respectfully moves the Court, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss the complaint herein on the basis that the Court lacks jurisdiction and Plaintiff has failed to state a claim on which relief can be granted. Alternatively, Defendant moves, pursuant to Fed. R. Civ. P. 56, for summary judgment on the grounds that no genuine issue of material fact exists and that therefore, Defendant CIA is entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to the accompanying Memorandum of Points and Authorities in Support, Statement of Material Facts To Which There Is No Genuine Issue, and Declaration of Delores M. Nelson attached hereto. A proposed Order is attached.

Respectfully submitted,

/s/

JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

/s/

RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

/s/

JUDITH A. KIDWELL
Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
Room E4905
Washington, D.C. 20530
(202) 514-7250

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)
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 Plaintiff,)
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 v.) Civil Action No.: 08-0708 (JR)
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 CENTRAL INTELLIGENCE AGENCY,)
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 Defendant.)
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**STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE**

Pursuant to LCvR 7(h), Defendant, Central Intelligence Agency (“CIA”), hereby submits the following statement, which is supported by the Declaration of Delores M. Nelson, Chief of the Public Information Programs Division, Information Review and Release Group, Information Management Services, Office of the Chief Information Officer (“Nelson Decl.”).

1. By letter dated October 18, 2007, Plaintiff submitted a FOIA request to the CIA for the following records:

copies of all internal Central Intelligence Agency (“CIA”), documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA’s Inspector General (“IG”), John Helgerson, and of the IG’s Office as a whole.

Nelson Decl. ¶ 15, Exhibit A.

2. By letter dated November 5, 2007, the CIA acknowledged Plaintiff’s request and assigned it reference number F-2008-00103. Nelson Decl. ¶ 16, Exhibit B. Additionally, the CIA granted Plaintiff’s request for a fee waiver, but denied Plaintiff’s request for expedited processing. *Id.*

3. By letter dated March 3, 2008, the CIA informed Plaintiff's counsel that Plaintiff's request was still being processed, and that the CIA was unable to give Plaintiff a definite date for completion as had been discussed with Plaintiff's counsel by telephone on February 21, 2008. Nelson Decl. ¶ 17, Exhibit C.

4. On April 21, 2008, Plaintiff filed the complaint herein. *See* Docket No. 1.

5. In early July 2008, in accordance with its procedures, the CIA concluded its processing of Plaintiff's request. Nelson Decl. ¶ 19. The CIA conducted diligent searches of relevant systems of records that were reasonably calculated to discover any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General. *Id.*

6. The CIA's search for records responsive to Plaintiff's request included the Director of Central Intelligence Agency ("DCIA") area, which includes the records systems of the DCIA Action Center, the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel, and the Office of Public Affairs. Nelson Decl. ¶ 19. These CIA components used a variety of search terms reasonably calculated to locate information responsive to Plaintiff's FOIA request, including the following terms: "internal review of operations," "CIA's Inspector General," "John L. Helgerson," "OIG," "Office of Inspector General," "OIG internal review," and "Deitz review." *Id.*

7. The CIA's reasonable and diligent searches failed to locate any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General and thus, failed to locate any records responsive to Plaintiff's FOIA request. Nelson Decl. ¶ 19.

8. By letter dated July 11, 2008, the CIA informed Plaintiff's counsel that the CIA was unable to locate any records responsive to Plaintiff's FOIA request. Nelson Decl. ¶ 19, Exhibit D.

Respectfully submitted,

/s/
JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

/s/
JUDITH A. KIDWELL
Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)
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 Plaintiff,)
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 v.) Civil Action No.: 08-0708 (JR)
)
 CENTRAL INTELLIGENCE AGENCY,)
)
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 Defendant.)
 _____)

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Defendant, Central Intelligence Agency (“CIA”), through undersigned counsel, respectfully submits this memorandum of points and authorities in support of its motion to dismiss or alternatively, motion for summary judgment.

I. INTRODUCTION

Plaintiff brought this action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging Defendant’s failure to timely process and respond to its FOIA request for “copies of all internal CIA documents pertaining to the discussions concerning the decision to initiate an internal review of the operations of Mr. Helgeson, and of the OIG as a whole.” Complaint (“Compl.”) ¶¶ 15-19. The declaration of Delores M. Nelson demonstrates that the CIA conducted a diligent search of its records systems reasonably calculated to discover records responsive to Plaintiff’s FOIA request. However, the CIA found no records responsive to Plaintiff’s request.

II. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff filed this action on April 21, 2008, seeking access to records pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole. Compl. ¶¶ 15-19. By letter dated October 18, 2007, Plaintiff had submitted a FOIA request to the CIA for copies of all internal CIA documents pertaining to discussions about this decision. Nelson Decl. ¶ 15, Exhibit A.

By letter dated November 5, 2007, the CIA acknowledged Plaintiff's request and assigned it reference number F-2008-00103. Nelson Decl. ¶ 16, Exhibit B. Additionally, the CIA granted Plaintiff's request for a fee waiver, but denied Plaintiff's request for expedited processing. *Id.* By letter dated March 3, 2008, the CIA informed Plaintiff's counsel that Plaintiff's request was still being processed, but that the CIA was unable to give Plaintiff a definite date for completion as had been discussed with Plaintiff's counsel by telephone on February 21, 2008. Nelson Decl. ¶ 17, Exhibit C.

In response to Plaintiff's FOIA request, the CIA conducted diligent searches of relevant systems of records that were reasonably calculated to discover any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General. Nelson Decl. ¶ 19. The CIA's search for records responsive to Plaintiff's request included a number of records systems and the use of a variety of search terms reasonably calculated to locate information responsive to Plaintiff's FOIA request. *Id.*

In early July 2008, in accordance with its procedures, the CIA concluded its processing of Plaintiff's request. Nelson Decl. ¶ 19. The CIA's searches failed to locate any records

responsive to Plaintiff's FOIA request. Nelson Decl. ¶ 19. By letter dated July 11, 2008, the CIA informed Plaintiff's counsel that the CIA had been unable to locate any records responsive to Plaintiff's FOIA request. Nelson Decl. ¶ 19, Exhibit D.

III. LEGAL STANDARDS OF REVIEW

A. Motion to Dismiss Under Rule 12(b)(1)

A motion under 12(b)(1) "presents a threshold challenge to the court's jurisdiction." *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987). "In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court must accept the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor." *Thompson v. Capitol Police Bd.*, 120 F. Supp. 2d 78, 81 (D.D.C. 2000) (citations omitted). "The court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations." *Rann v. Chao, Dep't. of Labor*, 154 F. Supp. 2d 61, 64 (D.D.C. 2001) (citations omitted), *affirmed*, 346 F.3d 192 (D.C. Cir. 2003), *cert. denied*, 543 U.S. 809 (2004). In addition, "[o]n a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuasion to establish subject-matter jurisdiction by a preponderance of the evidence." *Thompson*, 120 F. Supp. 2d at 81.

A court may resolve a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) in two ways. First, the court may determine the motion based solely on the complaint. *Herbert v. National Academy of Science*, 974 F.2d 192, 197 (D.C. Cir. 1992). Alternatively, to determine the existence of jurisdiction, a court may look beyond the allegations of the complaint, consider affidavits and other extrinsic information, and ultimately weigh the conflicting evidence. *Id.*

B. Motion to Dismiss Under Rule 12(b)(6)

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court will dismiss a claim if a plaintiff's complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1974 (2007) (clarifying the standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Aktieselskabet v. Fame Jeans, Inc.*, --F.3d--, 2008 WL 1932768 (D.C. Cir. Apr. 29, 2008); *In re Sealed Case*, 494 F.3d 139, 145 (D.C. Cir. 2007) (citing *Twombly*). Hence, the focus is on the language in the complaint, and whether that language sets forth sufficient factual allegations to support a plaintiff's claims for relief.

The Court must construe the factual allegations in the complaint in light most favorable to Plaintiff and must grant Plaintiff the benefit of all inferences that can be derived from the facts as they are alleged in the complaint. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citing *Kowal v. MCI Commc 'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). However, the Court need not accept any inferences or conclusory allegations that are unsupported by the facts pleaded in the complaint. *Kowal*, 16 F.3d at 1276. Moreover, the Court need not "accept legal conclusions cast in the form of factual allegations." *Id.*

C. Motion for Summary Judgment Under Rule 56

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To

determine which facts are material, the Court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *Id.*, at 255. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of his position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, at 249-250. The non-movant cannot manufacture genuine issues of material fact with "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Radio Corp.*, 475 U.S. 574, 586 (1986).

D. Summary Judgment In FOIA Cases

For purposes of summary judgment, an agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the Courts. *Hayden v. National Security Agency Cent. Sec. Serv.*, 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

Summary judgment may be granted to an agency in a FOIA case solely on the basis of

agency affidavits or declarations if the “affidavits [or declarations] are ‘relatively detailed, non-conclusory, and not impugned by evidence . . . of bad faith on the part of the agency.’” *McGhee v. Central Intelligence Agency*, 697 F.2d 1095, 1102 (D.C. Cir. 1983). See also *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981); *Hayden v. National Security Agency Cent. Sec. Serv.*, 608 F.2d at 1387.

ARGUMENT

IV. THE CIA CONDUCTED REASONABLE AND DILIGENT SEARCHES

A. Legal Standard

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). This “reasonableness” standard focuses on the method of the search, not its results, so that a search is not unreasonable simply because it fails to produce relevant material. *Id.* at 777 n.4. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. Simply stated, the adequacy of the search is “dependent upon the circumstances of the case.” *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The search standards under FOIA do not place upon the agency a requirement that it prove that all responsive documents have been located. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). It has been held that “ ‘the search need only be reasonable; it does not have to be exhaustive.’ ” *Miller v. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing *National Cable Television Association v. FCC*, 479 F.2d 183, 186 (D.C.

Cir. 1973). Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. *Nation Magazine*, 71 F.3d at 892 n.7.

The burden rests with the agency to establish that it has “made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby*, 920 F.2d at 68; see *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). “An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith.” *Miller*, 779 F.2d at 1383. Though the “affidavits submitted by an agency are ‘accorded a presumption of good faith,’” *Carney v. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (quoting *SafeCard Servs.*, 926 F.2d at 1200), the burden rests with the agency to demonstrate the adequacy of its search. Once the agency has met this burden through a showing of convincing evidence, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller*, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. See *Carney*, 19 F.3d at 813; *SafeCard*, 926 F.2d at 1200. The fundamental question is not “whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate.” *Steinberg v. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

B. The CIA's Records Systems and Processing of FOIA Requests

Because the CIA is an intelligence agency, it must take measures to protect against the unauthorized release of classified information. Nelson Decl. ¶ 7. Thus, the CIA limits employee access to information in its records systems by employing a "need-to-know" policy. Nelson Decl. ¶ 8. The CIA implements this policy by decentralizing and compartmentalizing its records systems. Nelson Decl. ¶ 8. Obviously, the disadvantage of CIA's "need-to-know" policy is that the records search and retrieval processes are inefficient and time-consuming, because numerous records systems must be searched when processing a FOIA request. Nelson Decl. ¶ 9.

The Information Management Services ("IMS"), is the initial reception point for all FOIA requests received by the CIA. Nelson Decl. ¶ 10. Experienced IMS information management professionals analyze each request and determine which CIA components might reasonably be expected to possess records responsive to a particular request. *Id.* The IMS then transmits a copy of the FOIA request to each relevant component. *Id.* In the event of a broad FOIA request, it is common for the IMS to transmit the request to a number of its components. *Id.* Because of the decentralization and compartmentalization of the CIA's records systems, each component devises its own search strategy, which includes identifying which records systems to search and what search tools, indices, and terms to employ. *Id.*

Officers must then review any documents located during a search to determine whether they are responsive to the FOIA request. Nelson Decl. ¶ 11. After officers identify and remove any non-responsive documents, Information Review Officers review any remaining documents to determine whether there is classified information in the documents and which, if any, FOIA exemptions may apply. Nelson Decl. ¶ 12. This process is laborious and time-consuming. *Id.*

In the course of reviewing documents for exempt information and segregability, a component frequently identifies information that it must refer to another CIA component. *Id.* At the very least, a component must often coordinate with another CIA component to complete its review of documents. Nelson Decl. ¶ 13. After all the components complete their respective reviews of documents, in order to comply with the law and CIA regulations, IMS professionals incorporate all of their recommendations regarding any exemptions, segregation, redactions, and release, resolving any conflicting recommendations. Nelson Decl. ¶ 14.

C. Details of the CIA's Search for Records Responsive To Plaintiff's Request

In responding to Plaintiff's FOIA request, the CIA conducted diligent searches of relevant systems of records that were reasonably calculated to discover any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General. Nelson Decl. ¶ 19. The CIA's search for records responsive to Plaintiff's request included the Director of Central Intelligence Agency ("DCIA") area, which includes the records systems of the DCIA Action Center, the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel, and the Office of Public Affairs. Nelson Decl. ¶ 19. These CIA components used a variety of search terms reasonably calculated to locate information responsive to Plaintiff's FOIA request, including the following terms: "internal review of operations," "CIA's Inspector General," "John L. Helgerson," "OIG," "Office of Inspector General," "OIG internal review," and "Deitz review." *Id.* However, these diligent searches for records failed to locate any records responsive to Plaintiff's FOIA request. Nelson Decl. ¶ 19. In a letter dated July 11, 2008, the CIA advised Plaintiff that no records responsive to its FOIA request had been located. *Id.* According, Plaintiff's claims herein should be dismissed.

V. CONCLUSION

The CIA conducted a reasonable search and found no records responsive to Plaintiff's FOIA request. Accordingly, the Court should grant Defendant's motion to dismiss or alternatively, motion for summary judgment.

Respectfully submitted,

/s/
JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

/s/
RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

/s/
JUDITH A. KIDWELL
Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
Room E4905
Washington, D.C. 20530
(202) 514-7250

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Civil Action No.: 08-0708 (JR)

ORDER

UPON CONSIDERATION of Defendant's Motion to Dismiss or Alternatively, Motion for Summary Judgment and attachment and exhibits thereto, Defendant's Memorandum of Points and Authorities in Support thereof, and Defendant's Statement of Material Facts To Which There Is No Genuine Issue, any Opposition thereto, any Reply, and the entire record herein, it is this _____ day of _____, 2008, hereby

ORDERED that Defendant's Motion To Dismiss is granted.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)
)
 Plaintiff,)
)
 v.) Case No. 1:08-cv-00708 (JR)
)
 CENTRAL INTELLIGENCE AGENCY,)
)
 Defendant.)
 _____)

DECLARATION OF DELORES M. NELSON
INFORMATION AND PRIVACY COORDINATOR
CENTRAL INTELLIGENCE AGENCY

I, DELORES M. NELSON, hereby declare and say:

1. I am the Chief of the Public Information Programs Division, Information Review and Release Group (IRRG), Information Management Services (IMS), Office of the Chief Information Officer (CIO), Central Intelligence Agency (CIA). I have served with the CIA for approximately twenty-nine years and, in addition to my current position, have held other supervisory positions with the CIA. Since 21 April 2008, I also serve as the CIA Information and Privacy Coordinator (Coordinator).

2. I make this declaration in support of the CIA's motion to dismiss, or in the alternative, CIA's motion for summary judgment.

3. In my capacities as Chief of PIPD and Coordinator, I am responsible for managing the Freedom of Information Act (FOIA), Privacy Act, and Executive Order 12958¹ Mandatory Declassification Review programs in the CIA. These responsibilities include directing searches of CIA records systems pursuant to public requests for records under these programs, and coordinating the reviews of any records retrieved in such searches.

4. As part of my official duties, I ensure that the Agency administratively processes FOIA and Privacy Act requests, including the search, retrieval, analysis, review, redaction, and release of documents, in accordance with the law and as efficiently as possible with the personnel and resources available.

5. Through the exercise of my official duties, I am familiar with this civil action. I make the following statements based upon my personal knowledge and the information made available to me in my official capacity.

¹ Executive Order 12958 was amended by Executive Order 13292. See Exec. Order No. 13292, 68 Fed. Reg. 15,315 (Mar. 28, 2003). All citations to Executive Order 12958 are to the Order as amended by Executive Order 13292. See Exec. Order No. 12958, 3 C.F.R. 333 (1996), reprinted as amended in 50 U.S.C.A. § 435 note at 193 (West Supp. 2008).

6. This declaration describes the CIA's records systems, its procedures for responding to FOIA requests, and actions the CIA took in responding to Plaintiff's FOIA request.

I. CIA RECORDS SYSTEMS

7. As an intelligence agency, the CIA must take measures to protect against the unauthorized release of classified information. One way to minimize such damage is strictly to limit the amount of information to which any particular employee has access. This practice ensures that should there be a spy within the CIA, that individual will have limited access to information, and thus limits the damage that could result should that information be mishandled.

8. The CIA limits employee access to information by employing a "need-to-know" policy, which provides that an employee has access only to that information required to perform the employee's duties. The CIA implements this policy through decentralizing and compartmentalizing its records systems. In other words, all of the CIA's information is not stored in the same records system, but rather in numerous separate systems across the CIA.

9. While the counterintelligence advantage of this practice is obvious, one disadvantage is equally obvious: the inherent inefficiencies created in the records search and retrieval processes. These inefficiencies affect not only the

day-to-day activities of CIA employees trying to perform their mission, but also the process of responding to FOIA requests. Because it is often the case that numerous records systems must be searched when processing a given FOIA request, it can take a considerable amount of time to locate information potentially responsive to a FOIA request.

II. PROCESSING OF FOIA REQUESTS

10. IMS is the initial reception point for all FOIA requests. Experienced IMS information management professionals analyze each request and determine which CIA components might reasonably be expected to possess records responsive to a particular request. IMS then transmits a copy of the request to each relevant component. When a request is broad, it is quite common for IMS to transmit the request to many components. Because the CIA's records systems are decentralized and compartmented, each component must then devise its own search strategy, which includes identifying which of its records systems to search as well as what search tools, indices, and terms to employ. The information management professionals in each component conducting FOIA searches are the same professionals searching records to support the component's daily mission.

11. Officers must review any documents located during a search to determine whether they are responsive to the FOIA

request. Because of the nature of a particular records system-- or the search tools, indices, or terms employed-- a search may locate many documents that are not responsive to the request.

12. After officers identify and remove the non-responsive documents, the Information Review Officers must then review the remaining documents to determine which, if any, FOIA exemptions apply, and whether they can reasonably segregate non-exempt information from exempt information. In evaluating responsive documents, officers must segregate exempt information to avoid the inadvertent disclosure of classified information, information concerning intelligence sources and methods, or other information protected by FOIA exemptions. This process is laborious and time-consuming.

13. In the course of reviewing documents for exempt information and segregability, a component frequently identifies information that it must coordinate with or refer to another CIA component or another agency because the other component or agency originated the information or otherwise has an equity in it.² This coordination and referral process itself can be quite time-consuming because other components and agencies have their own mission and FOIA priorities.

14. When all of the components and agencies complete their respective reviews, IMS professionals incorporate all of their

² See Exec. Order No. 12958 § 3.6(b).

recommendations regarding exemptions, segregation, redaction, and release, resolve conflicting recommendations, and ensure that release or withholding determinations comply with the law and published CIA regulations. A review is then conducted from a corporate perspective on behalf of the entire CIA and additional exempt information that reflects overall CIA equities may be identified. A final record copy of each document is then produced and a response is provided to the requestor.

III. PLAINTIFF'S FOIA REQUEST

15. By letter dated 18 October 2007, plaintiff submitted a FOIA request to the CIA for the following records:

"copies of all internal Central Intelligence Agency ("CIA") documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole."

A true and correct copy of Plaintiff's 18 October 2007 letter is attached as Exhibit A hereto.

16. By letter dated 5 November 2007, the CIA acknowledged plaintiff's request and assigned it reference number F-2008-00103. In addition, the CIA also granted plaintiff's request for a fee waiver but denied plaintiff's request for expedited processing. A true and correct copy of the CIA's 5 November 2007 letter is attached as Exhibit B hereto.

17. By letter dated 3 March 2008, the CIA informed plaintiff's counsel that plaintiff's request was still being

processed, and that CIA was unable to give a definite date for completion of the request, as had been discussed via telephone with plaintiff's counsel on 21 February 2008.³ A true and correct copy of CIA's 3 March 2008 letter is attached as Exhibit C hereto.

18. On 21 April 2008, plaintiff filed a Complaint asking the Court to order disclosure of the requested records and attorney's fees.

19. In early July 2008, the CIA concluded its processing of plaintiff's request. The CIA processed plaintiff's request in accordance with the procedures described above. The CIA conducted diligent searches of relevant systems of records that were reasonably calculated to discover any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General. The CIA search included the Director of Central Intelligence Agency ("DCIA") area, which includes the records systems of the DCIA Action Center ("DAC") and the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel ("OGC"), and the Office of Public Affairs ("OPA"). These offices used a variety of search terms reasonably calculated to locate information responsive to plaintiff's FOIA request, including, for example: "internal review of operations," "CIA's Inspector General,"

³ Exhibit C states the phone call was 21 February 2007 (prior to plaintiff's request), but the call actually took place 21 February 2008.

"John L. Helgerson," "OIG," "Office of Inspector General," "OIG internal review," and "Deitz review." These diligent searches failed to locate any records concerning the decision to initiate an internal review of the operations of the CIA's Inspector General, and thus no records that were responsive to plaintiff's request have been located. By letter dated 11 July 2008, the CIA informed plaintiff's counsel that CIA was unable to locate any records responsive to plaintiff's request. A true and correct copy of CIA's 11 July 2008 letter is attached as Exhibit D hereto.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of July, 2008.



Delores M. Nelson
Information and Privacy Coordinator
Central Intelligence Agency

EXHIBIT A

F-2008-00103

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: JaMadPro@aol.com
<http://www.jamesmadisonproject.org>

18 October 2007

Scott A. Koch
Central Intelligence Agency
Information and Privacy Coordinator
Washington, D.C. 20505

Re: FOIA Request - Internal Investigation of IG's Office

Dear Mr. Koch:

This is a request on behalf of The James Madison Project under the Freedom of Information Act, 5 U.S.C. § 552, et seq., for copies of all internal Central Intelligence Agency ("CIA") documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgeson, and of the IG's Office as a whole. Enclosed please find copies of news articles from *The New York Times*, *Los Angeles Times*, and *USA Today* referring to confirmation by the CIA that Director General Michael Hayden has ordered the internal review.

We are hereby requesting a waiver of all fees. The James Madison Project is a non-profit organization under the laws of the District of Columbia and has the ability to disseminate information on a wide scale. Stories concerning our activities have received prominent mention in many publications including, but not limited to, *The Washington Post*, *The Washington Times*, *St. Petersburg Tribune*, *San Diego Union Tribune*, *European Stars & Stripes*, *Christian Science Monitor*, *U.S. News and World Report*, *Mother Jones* and *Salon Magazine*. Our website, where much of the information received through our FOIA requests is or will be posted for all to review, can be accessed at

"Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

James Madison, 1782

OCT 19 10 03 AM '07

The James Madison Project

<http://www.jamesmadisonproject.org>. Prior requests submitted by our organization have all received fee waivers.

We are also asking for expedited processing. The 1996 amendments to the Freedom of Information Act permit expedited processing when a "compelling need" exists. See 5 U.S.C. § 552 (a)(6)(E)(v). Specifically, "compelling need" means "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* at § 552 (a)(6)(E)(v)(II). The CIA has adopted internal regulations governing expedited processing and has determined that a "compelling need" is deemed to exist where the "request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." See 32 C.F.R. § 1900.34(c)(2).

There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Over the course of the Global War on Terror ("GWOT"), numerous documents from a host of executive branch agencies have been released, detailing the legal and policy considerations that have formed the basis for discussions on a wide-range of national security policies. One example was the DOJ's disclosure of memoranda that originated in its Office of Legal Counsel and which formed a critical component of U.S. policies concerning detention of terrorist suspects. Given the highly-publicized nature of this particular controversy and its relation to the activities of the CIA's internal "watchdog," an office which has recently produced reports highlighting critical failures by the CIA in its prosecution of the GWOT, detailing the span of arguments considered prior to the authorization of this internal review will clearly contribute to the public's understanding of government operations or activities.

With respect to expedited processing, as explained above, JMP has been and continues to be primarily engaged in disseminating information on a wide scale and clearly falls within the scope of the statute. A "compelling need" exists due to the critically important political and legal questions that are clearly implicated by the decision to authorize the internal review of the IG's Office. Not only does the review have the potential to serve, either in mere appearance or in actual reality, as evidence of the politicization of a statutorily-designated non-political division within the CIA, but it also raises the possibility of constituting unlawful interference in the activities of the IG and obstruction of the IG's statutory obligations.

"Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

James Madison, 1822

The James Madison Project

The CIA is required by law to respond to this request within 20 working days. However, the CIA is required to issue a determination on the request for expedited processing "within 10 days after the date of the request." 5 U.S.C. § 552 (a)(6)(E)(ii)(I). Therefore, the CIA's response is due on or before October 28, 2007. Failure to timely comply may result in the filing of a civil action against your agency in the United States District Court for the District of Columbia. Please note that the denial of expedited processing should not interfere with the normal processing of these requests.

If you deny all or part of this request, please cite the specific exemptions you believe justifies your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please "black out" rather than "white out" or "cut out".

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at either (202) 498-0011 or my law office at (202) 454-2809.

Finally, please have all return correspondence addressed specifically to my attention to ensure proper delivery.

Sincerely,


Mark S. Zaid
Executive Director

"Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

James Madison, 1822

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry - New York Times

http://www.nytimes.com/2007/10/11/washington/11intel.html?_r=1&p...

The New York Times

October 11, 2007

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry

By MARK MAZZETTI and SCOTT SHANE

WASHINGTON, Oct. 11 — The director of the Central Intelligence Agency, Gen. Michael V. Hayden, has ordered an unusual internal inquiry into the work of the agency's inspector general, whose aggressive investigations of the C.I.A.'s detention and interrogation programs and other matters have created resentment among agency operatives.

A small team working for General Hayden is looking into the conduct of the agency's watchdog office, which is led by Inspector General John L. Helgerson. Current and former government officials said the review had caused anxiety and anger in Mr. Helgerson's office and aroused concern on Capitol Hill that it posed a conflict of interest.

The review is particularly focused on complaints that Mr. Helgerson's office has not acted as a fair and impartial judge of agency operations but instead has begun a crusade against those who have participated in controversial detention programs.

Any move by the agency's director to examine the work of the inspector general would be unusual, if not unprecedented, and would threaten to undermine the independence of the office, some current and former officials say.

Frederick P. Hitz, who served as C.I.A. inspector general from 1990 to 1998, said he had no first-hand information about current conflicts inside the agency. But Mr. Hitz said any move by the agency's director to examine the work of the inspector general would "not be proper."

"I think it's a terrible idea," said Mr. Hitz, who now teaches at the University of Virginia. "Under the statute, the inspector general has the right to investigate the director. How can you do that and have the director turn around and investigate the I.G.?"

A C.I.A. spokesman strongly defended the inquiry on Thursday, saying General Hayden supported the work of the inspector general's office and had "accepted the vast majority of its findings."

"His only goal is to help this office, like any office at the agency, do its vital work even better," said Paul Gimigliano, the spokesman.

Current and former intelligence officials said the inquiry had involved formal interviews with at least some of the inspector general's staff and was perceived by some agency employees as an "investigation," a label Mr. Gimigliano rejected.

Several current and former officials interviewed for this article spoke on condition of anonymity because of the sensitivity of the inquiry.

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry - New York Times

http://www.nytimes.com/2007/10/11/washington/12intel.html?_r=1&p...

The officials said the inquiry was being overseen by Robert L. Deitz, a trusted aide to the C.I.A. director and a lawyer who served as general counsel at the National Security Agency when General Hayden ran it. Michael Morrell, the agency's associate deputy director, is another member of the group, officials said.

Reached by phone Thursday, both Mr. Helgeson and Mr. Dietz declined to comment.

In his role as the agency's inspector general since 2002, Mr. Helgeson has investigated some of the most controversial programs the C.I.A. has begun since the Sept. 11 attacks, including its secret program to detain and interrogate high value terrorist suspects.

Under federal procedures, agency heads who are unhappy with the conduct of their inspectors general have at least two places to file complaints. One is the Integrity Committee of the President's Council on Integrity and Efficiency, which oversees all the inspectors general. The aggrieved agency head can also go directly to the White House.

If serious accusations against an inspector general are sustained by evidence, the president can dismiss him.

Both those routes avoid the awkward situation officials describe at the C.I.A. and preserve the independence of the inspector general.

But one intelligence official who supports General Hayden's decision to begin an internal inquiry said that going outside the agency would "blow things way out of proportion."

A report by Mr. Helgeson's office completed in the spring of 2004 warned that some C.I.A.-approved interrogation procedures appeared to constitute cruel, inhuman and degrading treatment, as defined by the international Convention Against Torture.

Some of the inspector general's work on detention issues was conducted by Mary O. McCarthy, who was fired from the agency last year after being accused of leaking classified information. Officials said Mr. Helgeson's office was nearing completion on a number of inquiries into C.I.A. detention, interrogation, and "renditions" — the practice of seizing suspects and delivering them to the authorities in other nations.

The inspector general's office also rankled agency officials when it completed a withering report about the C.I.A.'s missteps before the Sept. 11 attack — a report that recommended "accountability boards" to consider disciplinary action against a handful of senior officials.

When the report was made public in August, General Hayden took the rare step of pointing up criticisms of the report by the former intelligence director, George J. Tenet and his senior aides, saying many officials "took strong exception to its focus, methodology and conclusions."

Some agency officers believe the aggressive investigations by Mr. Helgeson amount to unfair second guessing of intelligence officers who are often risking their lives in the field.

"These are good people who thought they were doing the right thing," said one former agency official. "And now they are getting beat up pretty bad and they have to go out and hire a lawyer."

Agency officials have also criticized the length of the inspector general's investigations, some lasting more

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry - New York Times

http://www.nytimes.com/2007/10/11/washington/12intel.html?_r=1&p...

than five years, which have derailed careers and generated steep legal bills for officers under scrutiny.

The former agency official called General Hayden's review of the inspector general "a smart move."

Since taking over at the C.I.A. in 2006, General Hayden has taken several steps to soothe anger within the agency's clandestine service, which has been buffeted in recent years by a string of prolonged investigations.

He has brought back two veteran agency operatives, Steven R. Kappes and Michael J. Sulick, both of whom angrily left during the tenure of Porter J. Goss, the C.I.A. director, to assume top posts at the spy agency. He also supported the president's nomination of John A. Rizzo, a career agency lawyer and someone well-respected by covert operatives, to become the C.I.A.'s general counsel.

Mr. Rizzo withdrew his nomination to the post last month in the midst of intense opposition from Senate Democrats.

"Director Hayden has done a lot of things to convince the operators that he's looking out for them, and putting the I.G. back in its place is part of this," said John Radsan, who worked as a C.I.A. lawyer from 2002 to 2004 and is now a professor at William Mitchell College of Law.

Mr. Hitz and other former C.I.A. officials said tensions between the inspector general and the rest of the agency were natural. Conflicts most often arise when the inspector general reviews the actions of the agency's directorate of operations, now known as the National Clandestine Service, which recruits agents and hunts terrorists overseas.

"The perception is like in a police department between street cops and internal affairs," said A. B. Krongard, the agency's executive director from 2001 to 2004.

Resentment of the inspector general's work has also at times extended to the agency's general counsel's office, whose legal judgment is sometimes second-guessed by after-the-fact investigations. "In some of our reports, we were quite critical of the advice given by the general counsel," Mr. Hitz said.

The C.I.A., created in 1947, had an in-house inspector general selected by the director starting in 1952 who investigated failed operations like the Bay of Pigs invasion against Cuba in 1961.

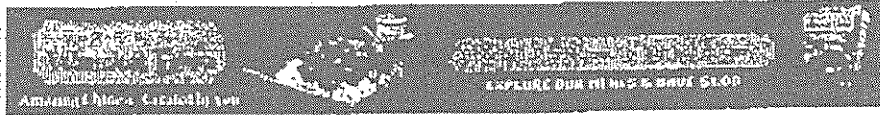
But that position was viewed as lacking clout and independence, and in 1989, partly in response to the Iran-contra affair, Congress created an independent inspector general at the agency, appointed by the president and reporting to both the director and to Congress.

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Lawmakers back CIA inspector general - USATODAY.com

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Lawmakers back CIA inspector general

WASHINGTON (AP) — Congress will "aggressively preserve" the independence of the CIA's internal investigator, the chairman of the House Intelligence Committee said Friday in response to reports that the CIA has launched a critical review of its inspector general's work.

"The initiation of this investigation, if accurately reported, is troubling," Rep. Silvestre Reyes, D-Texas, said in a statement.

The intelligence agency confirmed that CIA Director Gen. Michael Hayden has ordered an internal review into the operations of the agency's inspector general, John Helgerson. In a series of reports on the agency's conduct before and after the Sept. 11 attacks, Helgerson has criticized senior figures at the spy agency, including former Director George Tenet and officers involved in the CIA's detention of terrorist suspects.

Reyes is slated to meet with CIA leadership next week to discuss the matter. The House Intelligence Committee had been unaware of the investigation until it was reported Friday in The New York Times and the Los Angeles Times, said committee spokeswoman Kira Maas.

The investigation is causing concern on Capitol Hill that the CIA is trying to muzzle one of its sharpest critics and the only officially independent voice inside the secretive agency, members of the House and Senate intelligence committees said Friday.

In a statement Thursday night, a CIA spokesman said Hayden rejects that characterization of the probe and firmly believes in the inspector general's office and its work.

"Director Hayden ... has, since taking the helm at CIA, accepted the vast majority of its findings. His only goal is to help this office, like any office at the agency, do its vital work even better," CIA spokesman Paul Gimigliano said.

The review is being led by Robert Dietz, senior counsel to Hayden and the general counsel at the National Security Agency when Hayden was NSA director.

"That's why he asked a seasoned observer like Bob Dietz to take a look at the Office of Inspector General and, if need be, suggest specific improvements for consideration by the unit itself," Gimigliano said.

"He — like everyone else involved — comes to this task with just one preconception: an absolute belief in the value of an independent, rigorous Office of Inspector General," Gimigliano said.

Gimigliano would not specify what kind of improvements might be needed or considered in the IG office. He said that Helgerson was aware of the review and that congressional aides have been briefed.

Helgerson has been highly critical of the CIA. In a report in August, for example, he concluded that Tenet and other senior leaders never developed a comprehensive plan to stop al-Qaeda and missed crucial opportunities to thwart two hijackers in the run-up to the Sept. 11 attacks. Under congressional orders, the agency recently declassified portions of the embarrassing findings.

Helgerson has also been highly critical, in classified reports, of the agency's treatment of detainees.

The newspaper reports said the review was focusing on complaints that Helgerson's office has not been impartial and has assumed guilt on the part of agency operatives, particularly those who participated in the agency's detention programs.

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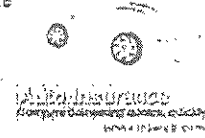
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Los Angeles Times: CIA investigates conduct of its inspector general

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From the Los Angeles Times

CIA Investigates conduct of its inspector general

The internal inquiry is prompted by senior agency officials who say they were criticized unfairly in the watchdog's reports on secret overseas prisons.
By Greg Miller
Los Angeles Times Staff Writer

October 12, 2007

WASHINGTON — CIA Director Michael V. Hayden has mounted a highly unusual challenge to the agency's chief watchdog, ordering an internal investigation of an inspector general who has issued a series of scathing reports sharply critical of top CIA officials, according to government officials familiar with the matter.

The move has prompted concerns that Hayden is seeking to rein in an inspector general who has used the office to bring harsh scrutiny of CIA figures including former Director George J. Tenet and undercover operatives running secret overseas prison sites.

The inquiry is focused on the conduct of CIA Inspector General John L. Helgeson and his office. Officials said it was aimed in particular at evaluating whether his office was fair and impartial in its scrutiny of the agency's terrorist detention and interrogation programs. But officials said the probe also spanned other subjects and had expanded since it was launched several months ago.

U.S. intelligence officials who are concerned about the inquiry said it was unprecedented and could threaten the independence of the inspector general position. The probe "could at least lead to appearances he's trying to interfere with the IG, or intimidate the IG or get the IG to back off," said a U.S. official familiar with the probe.

Frederick P. Hitz, who served as the CIA's inspector general from 1990 to 1998, said the move would be perceived as an effort by Hayden "to call off the dogs."

"What it would lead to is an undercutting of the inspector general's authority and his ability to investigate allegations of wrongdoing," Hitz said. "The rank and file will become aware of it, and it will undercut the inspector general's ability to get the truth from them."

But other officials described the probe as a chance to turn the tables on an inspector general who has been accused by some of his targets of treating career officers unfairly and letting personal biases undermine his objectivity.

"There is across-the-board distrust with the IG function and disrespect for Helgeson, who many believe has a personal agenda on issues," said a former high-ranking CIA official who, like others interviewed, spoke on condition of anonymity because of the classified nature of the inspector general's work.

Helgeson, the former official said, "always went in with a presumption of guilt."

Helgeson oversees a large staff of investigators whose activities include detailed examinations of highly classified programs and routine audits of mundane agency functions. He has served as inspector general at the CIA since 2002.

The CIA probe comes at a time when the powers of inspectors general in agencies throughout the federal government are under renewed debate. This month, the Bush administration threatened to veto a House bill that would strengthen the independence of inspectors general by giving them seven-year terms and permit the White House to fire them only for cause.

Hayden, an Air Force general who became CIA director last year, has not been involved in any public clashes with Helgeson. But Hayden has been a staunch defender of the Bush administration's counter-terrorism programs and has publicly lamented what he describes as a tendency by outside observers and critics to second-guess the activities of the nation's intelligence agencies.

In response to questions about the unusual arrangement, CIA spokesman George Little said Hayden "firmly believes that the work of the office of inspector general is critical to the entire agency, and, since taking the helm at CIA, he has accepted the vast majority of its findings." However, Hayden's goal is to "help the office do even better," Little said.

The CIA's review is being led by Robert Deitz, an attorney with long-standing ties to Hayden who was brought in to serve as a senior counselor to the director. Deitz, who served as general counsel at the National Security Agency when Hayden was director there in the 1990s, has assembled a small team of investigators to conduct the probe.

Little, the CIA spokesman, said Deitz came to the post with "an absolute belief in the value of an independent, rigorous Office of Inspector General."

The inquiry has been driven in large part by senior operations officers who have complained to Hayden that they were unfairly criticized by Helgeson in classified reviews of the CIA's secret prisons programs.

Los Angeles Times: CIA investigates conduct of its inspector general

<http://www.latimes.com/news/nationworld/nation/la-na-cia12oct12078...>

The probe is set up to examine "how these people were treated, how the investigations were conducted," said an official familiar with it.

The official declined to discuss the conclusions of the internal investigations, which are classified, but said that "the people who are upset didn't think they were glowing reviews."

Among the issues being explored are whether agency officers were given adequate opportunity to defend their actions, and whether the inspector general's conclusions accurately represented their roles.

Officials declined to name the CIA officers behind the complaint. One former official said, "We're talking about undercover people at mid- to senior-grade ranks."

The CIA created a network of secret overseas prisons shortly after the Sept. 11 attacks, and it has faced severe international criticism for employing harsh interrogation tactics as well as a program known as "extraordinary rendition," in which prisoners have been transferred to countries known to use torture.

To date, officials said, the inquiry has largely involved gathering information and statements from CIA officers who came under scrutiny in Helgeson's review.

But officials expressed concern that the probe would also involve reviewing the inspector general's files. Such a step could have a dramatic chilling effect, officials said, making agency employees reluctant to cooperate with future investigations for fear that their involvement and the information they provide would be exposed.

The focus on the prison program represents an expansion of a probe that officials said began several months ago into the relationship between Helgeson's office and that of the CIA general counsel.

Officials said Hayden was concerned about friction between the two offices and tapped Deitz to explore the matter. The nature of the friction was unclear but involved complaints that Helgeson had overstepped his role by offering legal opinions on agency programs.

One former high-ranking CIA official said Helgeson has not shied away from taking positions in heated internal policy debates. The former official recalled attending staff meetings in which Helgeson expressed opposition to agency involvement in handling detainees as part of the war on terrorism.

A career CIA officer who holds degrees in political science, Helgeson had previously served as chief of the agency's analytic branch as well as head of the National Intelligence Council, which produces authoritative reports on key national security issues.

Helgeson has become an unusually high-profile occupant of the position largely because his tenure has coincided with a series of historic intelligence blunders.

An examination of failures leading up to the Sept. 11 attacks was sharply critical of Tenet and other senior CIA officials, saying they "did not discharge their duties in a satisfactory manner," and calling for the creation of special in-house panels to determine whether they should be reprimanded.

The CIA had sought to keep that report secret. But Hayden reluctantly released its key findings in August after Congress passed legislation requiring the CIA to declassify the document's executive summary.

The conclusions were denounced by many targets of the probe, including Tenet, who issued a statement saying, "The IG is flat wrong."

The tone of the report also angered officials who were not singled out for criticism. Robert Richer, who was the assistant deputy director for operations at the CIA before retiring in 2005, said that shortly before he left the agency, he sent a memo to then-Director Porter J. Goss requesting that the inspector general be reviewed for his impartiality.

"The basis of it was the 9-11 report," Richer said in an interview, referring to Helgeson's examination of Sept. 11-related failures. Goss did not act on that request, and it is unclear whether it played any role in Hayden's decision to initiate a review of Helgeson's conduct.

Because of its role, the inspector general's office is viewed with distrust and suspicion by other parts of the agency, particularly case officers who operate overseas and "feel they're being investigated by people who don't fully understand their business," said one former CIA official.

Helgeson's office has also been accused of leaks to the press. Goss in 2006 fired CIA officer Mary O. McCarthy, who worked in the inspector general's office, after she was accused of inappropriate contacts with journalists, including a Washington Post reporter who wrote articles about the CIA's secret overseas prisons.

The relationship between the CIA director and the inspector general is complicated. The law creating the position specifies that the watchdog "shall report directly to and be under the general supervision of the director."

The law also makes clear that the CIA director can ignore recommendations from an inspector general and even prohibit the office from initiating investigations.

But Hiltz, the former CIA inspector general, and others said that the position has traditionally operated with a great deal of autonomy, and that there are other mechanisms for holding an inspector general accountable. In particular, a 1992 executive order established what is known as the

Los Angeles Times: CIA investigates conduct of its Inspector general

<http://www.latimes.com/news/nationworld/nation/la-na-cia12oct12,0,78...>

President's Council on Integrity and Efficiency and gave it authority to evaluate the work of inspectors general in agencies across the government.

"I don't think it's appropriate for the IG to be in an offline way investigated by his superior," Hitz said. "If the director has a problem with the way the IG is performing his job, he can go to the Congress, to the president's intelligence oversight board, or he can go to the president himself."

greg.miller@latimes.com

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PARTNERS:


EXHIBIT B

Central Intelligence Agency



Washington, D.C. 20505

Mr. Mark S. Zaid
Executive Director
The James Madison Project
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Reference: F-2008-00103

Dear Mr. Zaid:

On 19 October 2007 the Office of the Information and Privacy Coordinator received your 18 October 2007 Freedom of Information Act (FOIA) request for "copies of all internal Central Intelligence Agency ('CIA') documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ('IG'), John Helgerson, and of the IG's Office as a whole." We have assigned your request the reference number above. Please use this number when corresponding with us so that we can identify it easily.

We accept your request and will process it according to the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431, as amended. Unless you object, we will limit our search to CIA-originated records existing through the date of this acceptance letter.

As a matter of administrative discretion, we will waive the fees associated with processing your FOIA request in this instance. Therefore, your request for a fee waiver is granted.

You have requested expedited processing. We handle all requests in the order we receive them: that is, "first-in, first-out." We make exceptions to this rule only when a requester establishes a compelling need under the standards in our regulations. A "compelling need" exists: 1) when the matter involves an imminent threat to the life or physical safety of an individual, or 2) when a person primarily engaged in disseminating information makes the request and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity. Your request does not demonstrate a "compelling need" under these criteria and, therefore, we deny your request for expedited processing.

The large number of FOIA requests CIA receives has created unavoidable delays making it unlikely that we can respond within the 20 working days the FOIA requires. You have the right to consider our honest appraisal as a denial of your request and you may appeal to the Agency Release Panel. A more practical approach would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. We will proceed on that basis unless you object.

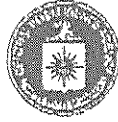
Sincerely,

A handwritten signature in black ink, appearing to read "Scott Koch", with a long horizontal flourish extending to the right.

Scott Koch
Information and Privacy Coordinator

EXHIBIT C

Central Intelligence Agency



Washington, D.C. 20505

MAR 09 2008

Mr. Mark S. Zaid
Executive Director
The James Madison Project
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036

Reference: F-2008-00103

Dear Mr. Zaid:

This concerns your 18 October 2007 Freedom of Information Act (FOIA) request for "copies of all internal Central Intelligence Agency ('CIA') documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ('IG'), John Helgerson, and of the IG's Office as a whole."

In a telephone conversation with one of my staff members on 21 February 2007, Mr. Brad Moss of your office, requested the status of this request.

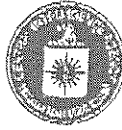
Your request is still being processed. We can appreciate your concern with not having received a final response to your request. Please be assured that it is the overwhelming number of requests and their complexity that causes delays in our responses. At the present, our workload comprises thousands of FOIA, Privacy Act, and Executive Order requests, and it is our policy to handle each on a first-in, first-out basis that is the most equitable to all requesters. Again, we regret that we are unable to give you a definite date for completion and ask for your continued cooperation.

Sincerely,

A handwritten signature in black ink that reads "Scott Koch".

Scott Koch
Information and Privacy Coordinator

EXHIBIT D



Washington, D.C. 20505

JUL 11 2008

Mr. Mark S. Zaid
Executive Director
The James Madison Project
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036

Reference: F-2008-00103

Dear Mr. Zaid:

This is a final response to your 18 October 2007 Freedom of Information Act (FOIA) request and subsequent litigation for "copies of all internal Central Intelligence Agency ('CIA') documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ('IG'), John Helgeson, and of the IG's Office as a whole."

We processed your request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431, as amended. Our processing included a search for records as described in our 5 November 2007 acceptance letter existing through the date of that letter.

We did not locate any records responsive to your request.

The CIA regulations governing administrative appeals are set forth at 32 C.F.R. sect. 1900.42. Those regulations state that no appeal shall be accepted if the information in question is the subject of pending litigation in the federal courts. Therefore, as a result of James Madison Project v. CIA, Case No. 1:08-cv-00708, currently pending in the U.S. District Court for the District of Columbia, and this letter, the Agency has completed the administrative processing of your FOIA request.

Sincerely,

A handwritten signature in cursive script that reads "Delores M. Nelson".

Delores M. Nelson
Information and Privacy Coordinator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY

Defendant.

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Civil Action No. 08-0708 (JR)

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OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Plaintiff James Madison Project (“JMP”)¹ commenced this litigation pursuant to the Freedom of Information Act (“FOIA”) to obtain copies of internal Central Intelligence Agency (“CIA”) documents pertaining to an internal review of the CIA’s Inspector General, John Helgerson (“Helgerson”), and of the Office of the Inspector General (“OIG”).

The CIA has repeatedly delayed the processing of this request since October 2007, and only provided its first (and final) substantive response after JMP filed suit in April 2008. That response asserted that no documents were located. The record reflects, however, that the CIA’s searches for responsive records were inadequate. As a result, this Court should deny the CIA’s request for summary judgment and either require a more detailed affidavit on the adequacy of the search or allow JMP to conduct limited discovery to identify the proper scope of its response.

¹ JMP (<http://www.jamesmadisonproject.org>) is a Washington, D.C.-based non-profit organization that was created in 1998 for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security, and government wrongdoing. Much of the work undertaken by JMP involves litigation under FOIA.

PROCEDURAL BACKGROUND

The factual and procedural background concerning JMP's FOIA request at issue in this litigation is set out in detail in the CIA's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (filed July 14, 2008) ("CIA's Memo"), the CIA's Declaration of Delores M. Nelson (dated July 14, 2008) ("Nelson Declaration"), and JMP's Rule 56(f) Declaration of Bradley P. Moss, Esq. ("Moss Decl."), all of which are incorporated herein by reference.²

ARGUMENT

The CIA has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Waterhouse v. Dist. of Columbia, 298 F.3d 989, 991 (D.C. Cir. 2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The nonmoving party's opposition, however, must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp., 477 U.S. at 324.

² The factual statements made in the CIA's Memo and the Nelson Declaration are incorporated only in relation to pages 2 through 3 and paragraphs 15 through 19, respectively, and only to the extent that they do not constitute legal characterizations and conclusions.

In a FOIA case, the Court exercises *de novo* review and summary judgment is only available to a defendant agency that has fully discharged its obligations under FOIA. See Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1350 (D.C. Cir. 1983).

I. THE CIA FAILED TO CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS AND GENUINE ISSUES OF MATERIAL FACT REMAIN PRECLUDING SUMMARY JUDGMENT AT THIS TIME

A. The CIA Is Unable At This Time To Demonstrate It Conducted An Adequate Search For Responsive Records

There is no dispute regarding the overarching case law pertaining to the adequacy of an agency's search for purposes of summary judgment. The burden rests upon the defendant agency to "show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Id. at 1351. See also Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1988) ("reasonableness" standard is applied to determine the adequacy of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure). Put more succinctly, the CIA "must show that it has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)(citations omitted).

It is also undisputed that a court may rely upon agency affidavits in adjudicating the adequacy of the search, Founding Church of Scientology v. Nat'l Sec. Agency, 610 F.2d 824, 836 (D.C. Cir. 1979), so long as those affidavits are detailed, nonconclusory and submitted in good faith. Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978); Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982)(*per curiam*)(highlighting that affidavits must

shed sufficient light on “scope and method of the search conducted by the agency”). “Even if these conditions are met the requestor may nonetheless produce countervailing evidence, and if the sufficiency of the agency’s identification or retrieval procedure is genuinely in issue, summary judgment is not in order.” Founding Church of Scientology, 610 F.2d at 836. See also id. at 837 (“To accept its claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory.”). But see Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004)(“Likewise, the agency’s failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.”)(citations omitted).

Therefore, the central issue here is whether the specific circumstances of the case at bar reveal “positive indications of overlooked materials,” Founding Church of Scientology, 610 F.2d at 837, which would have been found if the CIA had conducted a “diligent search for those documents in places in which they *might be expected to be found*.” Miller v. U.S. Dep’t of State, 779 F.2d 1378, 1385 (8th Cir. 1985)(emphasis added), cited with approval in Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Relying upon the Nelson Declaration, the CIA asserts that since it: a) searched for responsive records in at least one (1) records system in which the identified scope of regulations would arguably be maintained; and b) utilized at least seven (7) different

search terms in conducting the search, there does not remain any substantial doubt as to the reasonableness of the CIA's search and therefore no genuine issue of material fact exists. CIA's Memo at 9.

The CIA's assertion to the contrary, the Nelson Declaration does not demonstrate conclusively that the CIA conducted a diligent search. As will be demonstrated *infra*, the bare-bones, boilerplate description detailed in the Nelson Declaration fails to provide this Court with any semblance of a comprehensive assessment of the adequacy of the CIA's search, as it lacks the specificity required by the law of this Circuit. JMP can also demonstrate that at issue here is not a "purely speculative" claim about the existence of responsive documents, *see Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981), as JMP can identify countervailing evidence by way of at least one applicable federal statute and CIA official public statements, to say nothing of pure common sense.

At some appropriate time the CIA may in fact be entitled as a matter of law to summary judgment regarding the adequacy of its search, but based upon the current record—consisting of the Nelson Declaration—it is not yet that time.

B. The CIA's Nelson Declaration Is Insufficient For Purposes Of Summary Judgment, As It Fails To Provide This Court With Sufficient Factual Context Within Which To Evaluate The Adequacy Of The CIA's Search

1. The Nelson Declaration's Description Of The Search Terms And Location Parameters Used In The CIA's Search Is Insufficiently Detailed And Leaves Open Several Evidentiary Gaps

Agency affidavits must "explain in reasonable detail the scope and method of the search conducted by the agency [sufficient] to demonstrate compliance with the obligations imposed by the FOIA." *Morley v. CIA*, 508 F.3d 1108, 1121 (D.C. Cir. 2007), *quoting Perry*, 684 F.2d at 127. An affidavit that lacks the detail "necessary to

afford a FOIA requestor an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment” will be deemed insufficient. See Morley, 508 F.3d at 1122 (rejecting as insufficient a CIA affidavit that failed to identify search terms, explain how the search was conducted in each component, or give an indication of what each component’s search specifically yielded). Where the agency’s responses raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory, summary judgment in the government’s favor would usually be inappropriate. Perry, 684 F.2d at 127.

The Nelson Declaration’s description of the search conducted for responsive records consists largely of boilerplate language mostly devoid of any specific context.³ It first

³ The courts have previously addressed agency reliance upon boilerplate affidavits—albeit in the context of Exemption One invocations on the grounds of national security—and have permitted their use only to the extent that the agency’s explanation was “sufficiently tailored” to its determination. See Coldiron v. Dep’t of Justice, 310 F. Supp. 2d 44, 53 (D.D.C. 2004)(cautioning that “the court is not to be a wet blanket” and its review should not be vacuous, but ultimately conceding that the D.C. Circuit has permitted agency use of boilerplate affidavits in circumstances where the agency explanations were sufficiently tailored to the specific redactions). See also Schrecker v. Dep’t of Justice, 254 F.3d 162, 166 (D.C. Cir. 2001)(relating to documents identifying confidential sources, disclosure “should be expected to reveal the identity of a confidential human source or reveal the identify of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States by harming the FBI’s ability to continuously recruit sources for current and future use”); Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)(regarding the names of CIA attorneys, disclosure would “tend to reveal details of [intelligence] activities and that representatives of hostile, foreign intelligence services working in this country who, by a variety of techniques, can undertake courses of action to ascertain what other contacts, what other locations, and then arrive at determinations whether [the CIA’s attorneys are] doing any other function for the Central Intelligence Agency”)(internal quotations omitted); Coldiron, 310 F. Supp. 2d at 52-54 (upholding the sufficiency of the FBI’s affidavits only after concluding that the FBI indicated that disclosure of particular passages would make available the

generically describes the organization of the CIA record systems. Nelson Decl. at ¶¶ 7-9. It subsequently details the procedures by which the CIA conducts a search for records. *Id.* at ¶ 10. It is these procedures that are of considerable importance in assessing the adequacy of the CIA's search, as the Nelson Declaration explains that each individual CIA component devises its own search strategy for processing a FOIA request. Each individual strategy includes the identification of particular records systems that will be searched, as well as the particular search tools, indices, and terms that will be utilized in conducting the search. *Id.*

The Nelson Declaration, however, does not even attempt to provide this Court with an explanation of the particular strategies of the individual components tasked with conducting the search, including which particular search terms—if different—were used by each separate component. Instead, it condenses its entire explanation into two mere sentences that rely heavily upon conclusory adjectives and ambiguous language. *See id.* at ¶ 19 (“The CIA search *included* the Director of Central Intelligence Agency (“DCIA”) area, *which includes* the records systems of the DCIA Action Center (“DAC”) and the independent offices of the Office of Inspector General (“OIG”), the Office of General Counsel (“OGC”), and the Office of Public Affairs (“OPA”). These offices used a *variety* of search terms . . . , *including, for example*: ‘internal review of operations,’ ‘CIA’s Inspector General,’ ‘John L. Helgerson,’ ‘OIG,’ ‘Office of Inspector General,’ ‘OIG internal review,’ and ‘Deitz review.’”)(emphasis added).

This explanation leaves open several evidentiary gaps, including, for example:

very criteria used by the FBI to decide what actions warranted an investigation and that disclosure would reveal the cooperation of foreign governments).

1) whether the CIA search included components other than the DCIA area; 2) whether the search within the DCIA area actually involved the record systems of the DAC, OIG, OGC and OPA; 3) whether other record systems within the DCIA area were searched; 4) which of the “example” search terms were used in which particular records systems; 5) what other search terms were used in conducting the search; and 6) whether and to what degree the CIA revised its initial search in light of information discovered during initial phases of the search, including information from relevant but non-responsive documents.⁴ Moss Decl. at ¶ 16, attached as Exhibit “I”. Such evidentiary gaps undermine this Court’s ability to assess the adequacy of the CIA’s search and render the Nelson Declaration insufficiently detailed for purposes of summary judgment.⁵

⁴ “Consequently, the court [should evaluate] the reasonableness of an agency’s search based on what the agency knew at its conclusion rather than what the agency speculated at its inception.” Campbell, 164 F.3d at 28.

⁵ Interestingly enough, the CIA affidavit deemed insufficient by the D.C. Circuit in Morley appears virtually indistinguishable from the Nelson Declaration.

The [Dorn] Declaration incorporates a general explanation of how the agency responds to all FOIA requests, and after describing how a single FOIA request must be divvied up between multiple component units within the CIA, Dorn states that “each component must then devise its own search strategy, which includes identifying which of its records systems to search as well as what search tools, indices, and terms to employ.” But the two brief paragraphs in the Declaration explaining the search itself provide no information about the search strategies of the components charged with responding to Morley’s FOIA request. Dorn merely identifies the three directorates that were responsible for finding responsive documents *without “identify[ing] the terms searched or explain[ing] how the search was conducted” in each component.* . . . The remainder of the Declaration describes only basic CIA policy regarding FOIA responses and a description of the CIA’s correspondence with Morley.

Morley, 508 F.3d at 1122 (citations omitted)(emphasis added). Similarly, the Nelson Declaration fails to identify which particular search terms were used in relation to the different particular components.

2. *The Nelson Declaration Fails To Explain In Any Context The Reasonableness Of Its Imposition Of An "End-Date"*

The D.C. Circuit has previously addressed the issue of temporal limits, such as a "time-of-request cut-off" policy, in the context of the adequacy of an agency's FOIA search and has maintained that that the legal standard for a temporal limit is whether the "limitation is consistent with the agency's duty to take *reasonable* steps to ferret out requested documents." See McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983)(emphasis in original). See also Public Citizen Inc. v. Dep't of State, 276 F.3d 634, 643 (D.C. Cir. 2002)(reaffirming the D.C. Circuit's rejection of the CIA's contention that the language of the FOIA and authoritative case law establishes that the use of a time-of-request cut-off is always reasonable). The burden of demonstrating that the imposition of a temporal limit upon a FOIA search comports with the agency's obligation to conduct a reasonably thorough investigation rests with the agency, not the requestor. McGehee, 697 F.2d at 1101. Therefore, in the context of a motion for summary judgment, the agency is required to demonstrate that there is no genuine issue of material fact with respect to the reasonableness of the temporal limit. Id. at 1102.

The Nelson Declaration, for its part, fails to satisfy this burden. The CIA, by virtue of its own statements, appears to have imposed a temporal limit on the search in the form of an "end-date" cut-off point, namely November 5, 2007. See CIA's Memo, Exhibit "B" ("Ex. B"). See also CIA's Memo, Exhibit "D" ("Ex. D")("Our processing included a search of records as described in our 5 November 2007 acceptance letter *existing through the date of that letter.*")(emphasis added). The Nelson Declaration, however, does not address this issue in any way, shape, or form, even if simply to reiterate that an "end-date" for responsive records was imposed. See Nelson Decl. at ¶ 19. It does not verify if

the temporal limit was actually imposed or explain how, given the CIA's administrative delays, the limit was reasonable. The CIA's failure to even address, let alone explain, the reasonableness of the imposition of the original "end-date" constitutes further evidence of the insufficiency of the Nelson Declaration.

Even if the Nelson Declaration had addressed the issue, it is JMP's position that permitting the use of the original "end-date" would be unreasonable in light of the CIA's eight-month administrative delay in processing the search. During those eight months, during which the CIA apparently took no action on JMP's request, the "internal inquiry" was concluded and changes to the operations of the OIG and the structure of the CIA's oversight of the OIG were implemented. *See, e.g.*, Exhibit "2" ("CIA Tells of Changes for its Internal Inquiries"); Exhibit "3" ("CIA Sets Changes to IG's Oversight, Adds Ombudsman"); Exhibit "4" (detailing the changes implemented subsequent to this review). Arguably, untold numbers of responsive records were created during those eight months. Moss Decl. at ¶ 17. Despite that fact, *after* JMP finally was forced to initiate the present litigation in order to compel the CIA to comply with its obligations under FOIA, the CIA concluded its search in "early July 2008" and chose to rely upon the original "end-date" of November 5, 2007. Nelson Decl. at ¶ 19; Ex. D. By that point, the original "end-date" was no longer reasonable and arguably should have been modified to comport with the changed circumstances. This type of behavior was rejected as unreasonable by the D.C. Circuit in McGehee⁶ and is equally unreasonable here.

⁶ The D.C. Circuit highlighted that the CIA's imposition of an "end-date" for its search to the first 35 days after the Jonestown Tragedy, despite the agency's two-and-a-half year delay in responding to McGehee's request, was not reasonable and remanded that portion of the case with instructions to the CIA to "do better than it has thus far." McGehee, 697 F.2d at 1103-04.

3. *The Nelson Declaration's Inclusion Of Irrelevant FOIA Procedures Constitutes Supplemental Evidence That It Is Insufficiently Detailed*

For reasons known only to the CIA, the Nelson Declaration includes generic, boilerplate descriptions of CIA FOIA procedures pertaining to the review of responsive records for purposes of determining the applicability of FOIA exemptions, making redactions to withhold exempted information, and segregating exempt information. Nelson Decl. at ¶¶ 11-14. Given that the CIA's search failed to identify any responsive records, none of those three procedures were ever employed with respect to JMP's request.

The Nelson Declaration's inclusion of this information should raise concerns as to the CIA's good faith in its submission of an affidavit that is required to be "sufficiently detailed" and tailored specifically to this particular FOIA litigation in order to provide this Court with sufficient factual context in which to assess the adequacy of the CIA's search. Moss Decl. at ¶ 15. In effect, the Nelson Declaration's description of the CIA's search consists solely of: a) generic explanations regarding CIA's FOIA procedures (some irrelevant) and records systems; b) a recitation of JMP's FOIA request correspondence with CIA; c) two vague and insufficient sentences explaining the records system searched and search terms used; and d) one self-serving sentence asserting that the CIA's search was "diligent" and "reasonably calculated to discover" responsive records.⁷ See Nelson Decl. at ¶¶ 7-19. This description does not and cannot meet the CIA's burden of providing an affidavit that is "detailed" and "nonconclusory."

⁷ The CIA's unsubstantiated assertion that its search was diligent and adequate is of little consequence or importance in assessing whether, for purposes of summary judgment, the CIA has met its burden of demonstrating that there is no genuine issue of material fact regarding the adequacy of its search. Indeed, the D.C. Circuit has held that "[r]eliance on

The Nelson Declaration's vague description of the search terms and location parameters utilized in conducting the search, as well as its failure to explain the reasonableness underlying its imposition of the original "end-date" and its inclusion of irrelevant FOIA procedures, renders it insufficiently detailed and deprives this Court of an adequate context in which to assess the adequacy of the CIA's search. Therefore, the CIA's Motion for Summary Judgment ("CIA's Motion") should be denied pending, at a minimum, submission by the CIA of a more sufficiently detailed affidavit, if not additional searches and agency review.

C. JMP Can Identify Countervailing Evidence In Light Of The Applicability Of The Central Intelligence Agency Act of 1949 And CIA Official Public Statements That Raise A Genuine Issue Of Material Fact Regarding The Adequacy Of The CIA's Search

While it is true that the inability of an agency to find a particular document does not *generally* render a search inadequate, in certain circumstances a court may place significant weight on the fact that a records search failed to turn up a particular document. See Nation Magazine, Washington Bureau v. U.S. Customs Serv., 71 F.3d 885, 892, n.7 (D.C. Cir. 1995). See also Krikorian v. Dep't of State, 984 F.2d 461, 468 (D.C. Cir. 1993)(documents not found by agency factored into court's evaluation of adequacy of search). At a minimum, JMP can direct this Court's attention to at least one federal statute that would have imposed an obligation upon the CIA to create records responsive to JMP's request. The Central Intelligence Agency Act of 1949 ("the CIA Act") mandates that the OIG prepare and submit to the CIA Director a classified semiannual report ("the IG report") summarizing the OIG's activities during the immediately-

affidavits to demonstrate agency compliance with the mandate of the FOIA does not, however, require courts to accept glib government assertions of complete disclosure or retrieval." Perry, 684 F.2d at 126.

preceding six-month period. 50 U.S.C. § 403q(d)(1). The CIA Director subsequently is obligated to transmit that report to the House Permanent Select Committee on Intelligence (“HPSCI”) and the Senate Select Committee on Intelligence (“SSCI”) with any comments he may deem appropriate. *Id.* See Exhibit “5” (“Semiannual Report to the Director, Central Intelligence Agency: July – December 2005”).

In its original FOIA request, JMP provided the CIA with copies of news articles from October 2007 detailing the CIA’s official verification that Director Hayden had authorized an “internal inquiry” into the activities of the OIG as a whole, and Helgeson in particular. CIA’s Memo, Exhibit “A.” See also Exhibit “6” (“CIA Chief Defends Review on Agency’s Inspector General”). As indicated in a routine briefing between Helgeson and SSCI staff members in October 2007, the “internal inquiry” began in April 2007 and was being conducted by Director Hayden’s senior counselor Robert L. Dietz. See Exhibit “7” (“Lawmakers Criticize CIA Director’s Review Order”). In a pair of news articles dated February 2, 2008, at which point JMP’s request was still being processed administratively, Director Hayden verified that the “internal inquiry” had been concluded and that Helgeson had agreed to “tighter controls” over the OIG’s investigative procedures, as well as the appointment of an ombudsman and a “quality control officer” to oversee the activities of the OIG. See Exhibit “2;” Exhibit “3.” See also Exhibit “4” (detailing the job responsibilities of the “quality control officer” and the ombudsman).⁸

⁸ It should not be ignored that the CIA is, in effect, arguing that an allegedly-reasonably adequate search of its records did not find one responsive record pertaining to a ten month internal investigation which implicated not only the OIG but also included, at a minimum: a) OPA, for the comments made by Helgeson in the SSCI briefing and the press contacts by Director Hayden and CIA spokesman Paul Gimigliano; b) Office of Legislative Counsel, for the IG reports that Director Hayden was required to provide to the HPSCI and SSCI; and c) the Office of the Director, for the coordination of the

Given that the “internal inquiry” lasted approximately ten months and spanned three different reporting intervals, the OIG was obligated by the CIA Act to create at least three semiannual reports summarizing its activities that would have included references to the “internal inquiry,” including: 1) efforts to cooperate with the inquiry; 2) discussions within OIG and with other CIA officials regarding possible changes to the OIG’s investigative procedures and the appointment of an ombudsman and a “quality control officer;” and 3) discussions regarding the implementation of the agreed-upon changes. Director Hayden would have subsequently been required to transmit those reports to the HPSCI and SSCI. The CIA’s failure to locate these records is assuredly a relevant factor for this Court to consider in evaluating the reasonableness of the CIA’s search.⁹

In light of the insufficiency of the Nelson Declaration and JMP’s identification of countervailing evidence in the form of at least one statutory provision that required the CIA to produce responsive records, the CIA has failed to meet its burden of demonstrating that there are no genuine issues of material fact pertaining to the adequacy of its search. Therefore, the CIA’s Motion should be denied pending, at a minimum,

“internal inquiry” with Director Hayden’s senior counselor, Robert L. Dietz. On its own, this failure would not necessarily be sufficient to raise a genuine issue of material fact, but when combined with the insufficient explanations in the Nelson Declaration of the CIA’s search and the CIA’s failure to identify the three IG reports whose creation was statutorily-mandated, the fact that the CIA could not identify a single responsive record pertaining to this investigation is highly suspect.

⁹ The fact that JMP’s original FOIA request does not specifically seek records pertaining to the ultimate conclusions of the “internal inquiry” does not render unresponsive the reports created in compliance with the CIA Act. The D.C. Circuit has previously held that agencies have a duty to construe FOIA requests *liberally* to ensure responsive records are not overlooked. See *Valencia-Lucena*, 180 F.3d at 326. A reasonable, liberal construction of JMP’s request for “documents pertaining to discussions concerning the decision to initiate an internal review” of the OIG would include records that reference the internal review itself.

submission by the CIA of a more sufficiently detailed affidavit, if not the completion of additional searches and agency review.

II. ALTERNATIVELY, JMP IS ENTITLED TO CONDUCT LIMITED DISCOVERY TO ASCERTAIN THE ADEQUACY OF THE CIA'S SEARCH

Discovery is a permissible and useful tool in the proper judicial administration of the FOIA with regard to agency searches that are inadequate. "If a party opposing [a motion for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken"¹⁰ Fed. R. Civ. P. 56(f). Since in most FOIA cases the government possesses all of the relevant evidence, it is permissible to use discovery to uncover facts to determine the adequacy of the government's search or the exempt status of requested documents. See Weisberg v. Webster, 749 F.2d 864, 868 (D.C. Cir. 1984).¹¹ Given the insufficiency of the Nelson Declaration and the subsequent inability by the CIA to demonstrate that it conducted an adequate and reasonable search, discovery is necessary and permitted. See,

¹⁰ While some recent unpublished opinions have interpreted this to mean that "a FOIA plaintiff generally 'must establish how the specific discovery requested would create a genuine issue of material fact.'" Morley v. CIA, 2006 WL 280645, *1 (D.D.C. Feb. 6, 2006), quoting Center for Nat'l Security Stud. v. Dep't of Justice, 2002 U.S. Dist. LEXIS 2983, *4 (D.D.C. Feb. 21, 2002), this interpretation is an oversimplification of the original ruling that "[c]onclusory allegations unsupported by factual data will not create a triable issue of fact." Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978), cited by Exxon Corp. v. Federal Trade Com., 663 F.2d 120, 127 (D.C. Cir. 1980), cited by Carpenter v. Fannie Mae, 174 F.3d 231, 237 (D.C. Cir. 1999). Under this original interpretation, this Court should find the factual data and logical inferences presented by JMP sufficient to pass the Marks test.

¹¹ While the court was addressing the particular right of the government to utilize discovery, it affirmed that right by stating that the government, "like any other litigant," should be able to utilize the rules of discovery. Weisberg, 749 F.2d at 868.

e.g., Weisberg, 705 F.2d at 1348 (permitting discovery to resolve material factual dispute regarding adequacy of search).

Discovery does not need to be overly burdensome or excessive in scope. At a minimum, a limited number of interrogatories and depositions will be necessary to identify the full scope of responsive documents that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Discovery would address several previously-identified gaps in the CIA's description of its search for records, including, for example: 1) which particular search terms were utilized with respect to different particular components or offices; 2) to what extent, if any, the CIA revised its search in light of identification of relevant yet non-responsive documents; and 3) whether the original "end-date" was imposed as a limitation on the search. Moss Decl. at ¶ 18.

CONCLUSION

For the foregoing reasons, the CIA's Motion for Summary Judgment should be denied, pending the submission by CIA's counsel of a more sufficiently detailed affidavit, or, alternatively, JMP should be permitted to undertake limited discovery.

Date: August 11, 2008

Respectfully submitted,

/s/

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Of Counsel

James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “1”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE JAMES MADISON PROJECT

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY

Defendant.

Civil Action No. 08-0708 (JR)

* * * * *

**RULE 56(f) DECLARATION OF
DEPUTY EXECUTIVE DIRECTOR BRADLEY P. MOSS, ESQ.**

I, BRADLEY P. MOSS, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the plaintiff's Opposition to Defendant's Motion for Summary Judgment (filed August 11, 2008).

2. I am the Deputy Executive Director of the plaintiff James Madison Project ("JMP") and have served in that position since 2007. JMP is a Washington, D.C.-based non-profit organization created for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under disclosure acts such as the Freedom of Information Act ("FOIA"). The principles underlying the objectives of the JMP are derived from the 1997 findings of the Commission on Protecting and Reducing Government Secrecy. Our website, which contains further information and examples of JMP's activities, can be viewed at <http://www.JamesMadisonProject.org>.

3. I am also an attorney of record in this litigation for JMP. I am admitted to practice law in the State of Illinois and the District of Columbia, as well as the D.C. Circuit and the United States District Courts for the District of Columbia, Maryland, and Northern District of Illinois.

Procedural Background

4. By letter dated October 18, 2007, I submitted on behalf of JMP's Executive Director, Mark S. Zaid, a FOIA request to the Central Intelligence Agency ("CIA") which sought copies of all internal CIA documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole. I enclosed with the request copies of newspaper articles from the *New York Times*, *Los Angeles Times*, and *USA Today* that confirmed that the CIA's Director General Michael Hayden ("Director Hayden") had ordered an internal review. The letter also stated that JMP was seeking expedited processing of the request as well as a fee waiver

5. By letter dated November 5, 2007, the CIA acknowledged receipt of the request and assigned it Request No. F-2008-00103. The letter noted that the CIA was granting JMP the fee waiver for the request, but that it was denying expedited processing. The letter also stated that, unless JMP objected, the CIA would limit its search to CIA-originated records existing as of the date of the letter.

6. JMP did not object to the temporal limit being imposed upon the parameters of the CIA's search at that point in time, or the limitation to CIA-originated records.

7. On February 21, 2008, having not received any further response from the CIA since the acceptance letter, I contacted the CIA's FOIA Requester Service Center ("FOIA

Center”) seeking a status update. I was informed by a FOIA Center staff member that the request was still being processed and that no additional information could be provided. I was also told that, due to the routine backlog, delays should be expected but that the FOIA Center was attempting to work through the backlog as quickly as possible.

8. By letter dated March 3, 2008, the CIA memorialized the substance of the conversation I had had with the FOIA Center, namely, that the request was still being processed and that there was a significant backlog causing the delay in the CIA’s response.

9. No further responses were ever received from the CIA. Therefore, after more than five months of administrative delay, and with no identifiable timeframe in which the CIA was planning to fulfill its legal obligations under the FOIA, JMP filed suit in this Court on April 21, 2008.

10. By e-mail dated June 4, 2008, Judith Kidwell (“Ms. Kidwell”), the Department of Justice attorney representing the CIA, sought my consent for her motion for enlargement of time. On that same day, I talked with Ms. Kidwell via telephone and indicated my consent to her motion for enlargement of time. This constituted the only attempt ever made by Ms. Kidwell to discuss the present case with me prior to the filing of dispositive motions.

11. By letter dated July 11, 2008, the CIA informed JMP that it had conducted a search for records responsive to JMP’s request and that the search had not identified any responsive records. The letter stated that the search had been conducted for responsive records that existed as of November 5, 2007, the date of the original acceptance letter by the CIA.

12. On July 14, 2008, the CIA filed its Motion for Summary Judgment, claiming that it had conducted an adequate search for responsive records and that there was no genuine issue of material fact with regard to the adequacy of the search.

Substantive Response On Adequacy Of The Search

13. The CIA relies on the Declaration of Delores M. Nelson, Chief, Public Information Programs Division, Information Review and Release Group, Information Management Services, Office of the Chief Information Officer (dated July 14, 2008) (“Nelson Declaration”)(cited as “Nelson Decl.”) to support its determination that the search conducted was adequate.

14. For approximately eighteen (18) months, as both a private attorney and as the Deputy Executive Director of JMP, I have participated in the litigation of several FOIA lawsuits. See, e.g., SAE Productions, Inc. v. Federal Bureau of Investigation, Civil Action No. 07-0866 (D.D.C.)(JR); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-01154 (D.D.C.)(RMU); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-01382 (D.D.C.)(RMU); The James Madison Project v. Central Intelligence Agency, Civil Action No. 07-02306 (D.D.C.)(RBW). In each of those cases, the agency’s FOIA declaration has tended to be filled with pages upon pages of generalized boilerplate descriptions of the process by which the agency coordinates FOIA requests and how generic classification determinations are rendered. Ms. Nelson’s declaration is no different.

15. Indeed, Ms. Nelson chose to include three entire paragraphs containing generic, boilerplate information pertaining to FOIA exemption and segregability determinations. Nelson Decl. at ¶¶ 12-14. Given that the CIA’s search did not identify any responsive

records, the CIA did not even have to conduct any FOIA exemption or segregability determinations. Ms. Nelson's inclusion of the irrelevant information should raise concerns as to the CIA's good faith in its submission of an affidavit that is required to be "sufficiently detailed" and to provide this Court with sufficient factual context in which to assess the adequacy of the CIA's search. The rest of Ms. Nelson's declaration does little to assuage those concerns.

16. Specifically, the CIA fails to sufficiently describe the scope of search terms and location parameters utilized in conducting its search. The entirety of its explanation consists of two mere sentences that rely heavily upon conclusory adjectives and ambiguous language. *See* Nelson Decl. at ¶ 19 ("The CIA search *included* the Director of Central Intelligence Agency ("DCIA") area, *which includes* the records systems of the DCIA Action Center ("DAC") and the independent offices of the Office of Inspector General ("OIG"), the Office of General Counsel ("OGC"), and the Office of Public Affairs ("OPA"). These offices used a variety of search terms . . . , *including, for example:* 'internal review of operations,' 'CIA's Inspector General,' 'John L. Helgerson,' 'OIG,' 'Office of Inspector General,' 'OIG internal review,' and 'Deitz review.'") (emphasis added). This explanation leaves open several evidentiary gaps, including, for example: 1) whether the CIA search included components other than the DCIA area; 2) whether the search within the DCIA area actually involved the record systems of the DAC, OIG, OGC and OPA; 3) whether other record systems within the DCIA area were searched; 4) which of the "example" search terms were used in which particular records systems; 5) what other search terms were used in conducting the search; and 6) whether and to what degree the CIA revised its initial search in light of information discovered

during initial phases of the search, including information from relevant but non-responsive documents.

17. Furthermore, the Nelson declaration does not address, let alone explain, how the imposition of the original “end-date”, November 5, 2007, was still reasonable at the time that the CIA’s search was conducted. The internal review authorized by Director Hayden reached its conclusion in February 2008, resulting in the creation of an ombudsman and a “quality control officer” to oversee the Office of the Inspector General (“OIG”), as well as the imposition of modified controls on the OIG’s investigative procedures. See Exhibit “2;” Exhibit “3.” In addition, the OIG was required by the Central Intelligence Agency Act of 1949 (“CIA Act”) to create three reports during the course of the “internal inquiry” detailing the activities of the OIG; those reports would, by necessity, have included information concerning the “internal inquiry” and the changes that were implemented as a result. At least one of those reports was submitted by Director Hayden to Congress’s two intelligence committees.¹ Arguably all of this information would have fallen within the scope of JMP’s request.

18. Because material facts, such as described above, still remain at issue regarding the adequacy of the CIA’s search, the CIA’s Motion for Summary Judgment should be denied pending, at a minimum, the submission of a more sufficiently detailed CIA affidavit. Alternatively, JMP should be permitted to undertake limited discovery in order to address the disputes surrounding the adequacy of CIA’s search. Discovery need not be overly burdensome or excessive in scope. A limited number of interrogatories and

¹ Due to the unclear language in the CIA Act regarding the timing of the CIA Director’s submission of these reports to Congress, it is impossible to tell exactly how many reports Director Hayden should have submitted to Congress by this time.

depositions will be necessary to identify the full scope of responsive regulations that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information. Discovery would address several previously-identified gaps in the CIA's description of its search for records, including, for example: (1) which particular search terms were utilized with respect to different particular components or offices; (2) to what extent, if any, the CIA revised its search in light of identification of relevant yet non-responsive documents; and (3) whether the original "end-date" was imposed as a limitation on the search.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: August 11, 2008

/s/

Bradley P. Moss

James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “2”

February 2, 2008

C.I.A. Tells of Changes for Its Internal Inquiries

By MARK MAZZETTI

WASHINGTON — After an internal inquiry that put his office under unusual scrutiny, the inspector general of the Central Intelligence Agency has agreed to a series of changes in the way the office conducts its investigations of the agency's practices, the C.I.A. director confirmed on Thursday in a message to agency employees.

Among the changes announced by the director, Gen. Michael V. Hayden, were new procedures to allow agency officers to lodge complaints against the inspector general's office, which is an independent auditor over the agency's internal affairs.

General Hayden said the changes were intended to "heighten the efficiency, assure the quality and increase the transparency of the investigative process."

The internal inquiry, unusual in its focus on investigators who usually ask the hard questions rather than answering them, had created anxiety among some inside the office of the inspector general, John L. Helgerson, and drew criticism from lawmakers who said the review was inappropriate and could have a chilling effect on inquiries into questionable conduct by the agency.

Started in April, the review was led by Robert L. Deitz, a close aide to General Hayden.

It was begun after complaints from C.I.A. officers that Mr. Helgerson's office had not been an impartial judge of agency operations and had begun crusading against controversial agency programs.

Some complained that inspector general investigations were unnecessarily long and resulted in huge legal bills for agency employees whose work was under review.

As an example, they cite an investigation into the shooting down of a missionary plane in 2001 by Peruvian troops advised by C.I.A. officers. The investigation has lasted nearly seven years and remains incomplete.

In his message to agency employees, General Hayden said the inspector general's office would now have an ombudsman to hear complaints from C.I.A. officers and to ensure the fairness of internal agency investigations.

He also said that the inspector general's office was installing new equipment to allow investigators to record interviews and create a more permanent record of investigations. In addition, a new position of quality control officer is being established inside the office to attest, as General Hayden put it, "that reports include all exculpatory and relevant mitigating information."

A C.I.A. spokesman said Mr. Helgerson supported the steps General Hayden outlined.

Senator [Ron Wyden](#) of Oregon, a Democratic member of the Intelligence Committee, did not challenge any of the conclusions laid out by General Hayden but said the inquiry “should never have happened and can’t be allowed to happen again.”

“I’m all for the inspector general taking steps that help C.I.A. employees understand his processes, but that can be done without an approach that can threaten the inspector general’s independence,” Mr. Wyden said.

Congress created the position of C.I.A. inspector general in 1989, in part to prevent a repeat of the sort of agency misdeeds revealed during the Iran-contra affair. The position is appointed by the president and reports both to Congress and the C.I.A. director.

The inspector general has investigated some of the C.I.A.’s most secret operations since the Sept. 11 attacks, including the program of detaining and interrogating top Qaeda suspects in secret overseas prisons.

A report by Mr. Helgerson’s office completed in April 2004 concluded that some C.I.A.-approved interrogation methods appeared to constitute cruel, inhuman and degrading treatment, as defined by the international Convention Against Torture.

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James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “3”

washingtonpost.com

CIA Sets Changes To IG's Oversight, Adds Ombudsman

By Joby Warrick
Washington Post Staff Writer
Saturday, February 2, 2008; A03

The CIA's inspector general has agreed to tighter controls over its investigative procedures, agency officials revealed yesterday, in what appeared to be an attempt to soften resentments among agency officials over the watchdog's aggressive probes into the legality and effectiveness of the CIA's counterterrorism efforts and detention programs.

The revisions, which include the appointment of a special ombudsman to oversee the IG's work, were disclosed by CIA Director Michael V. Hayden in an e-mail sent to employees, announcing the end of an unusual inquiry into the performance of Inspector General John L. Helgerson, a 36-year CIA veteran and the man chiefly responsible for the spy agency's internal oversight.

The inquiry, begun last year, had raised concern among lawmakers who worried that the CIA was seeking to undermine the independence of Helgerson and his staff of auditors and inspectors. Helgerson angered top officials at the agency after leading aggressive investigations into the CIA's performance before the Sept. 11, 2001, terrorist attacks, as well as its use of secret prisons and harsh interrogation methods against suspected terrorists.

Hayden, in the note to employees, praised Helgerson and his staff as being "committed to performing investigations . . . of the highest quality, integrity and timeliness," but said the inspector general had agreed on the need for changes.

"John has chosen to take a number of steps to heighten the efficiency, assure the quality and increase the transparency of the investigation process," Hayden said in the e-mail.

The changes include measures intended to speed up investigations and require the watchdog to keep CIA employees and managers informed about both the process and results of investigations. In addition to appointing an ombudsman, Helgerson also agreed to name a "quality control officer" who would make sure that reports "include all exculpatory and relevant mitigating information," Hayden said.

The agency did not make Helgerson available for comment, but CIA spokesman Paul Gimigliano said the inspector general had "concurred with the director's statement and was comfortable with the steps agreed upon."

Helgerson, who joined the CIA in 1971, wrote a report that harshly criticized the agency for failing to anticipate al-Qaeda's attacks on the World Trade Center and the Pentagon on Sept. 11, 2001. That report, parts of which were released last fall under a congressional order, recommended that some CIA officials be held accountable for failing to do more to prevent the attacks. But the agency's then-management decided against sanctions.

Helgerson also drafted a classified report critical of the CIA's interrogation of top al-Qaeda suspects. The report said the use of waterboarding and other aggressive interrogation methods by CIA officers violated the Geneva Conventions' ban on torture.

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James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “4”

POGO Project On Government Oversight[home](#) [about us](#) [investigations](#) [press room](#) [get involved](#) [donate](#)

Updating the Record

Our friend smitheus on Daily Kos [blogged earlier this week](#) about the changes being voted upon in the Senate to the Foreign Intelligence Surveillance Act, or FISA, the law that is supposed to govern electronic surveillance in national security cases, that was ignored when the NSA began its secret warrantless wiretapping of Americans believed to have ties to al-Qaeda. The blog made the point that relying on four inspectors general to report to Congress in the future on such programs may be futile, since the IGs in question frequently lack the independence or resources necessary to accomplish such a mission.

Although smitheus was generous in his crediting of POGO, and our ongoing project examining the IG law and how it works (or doesn't), he quoted a passage from our [report from February this year](#) that we can now actually update and clarify. We had noted with alarm that CIA Director Michael Hayden had launched a "management review" of CIA Inspector General John Helgerson. We had termed this "perhaps the most astonishing known infringement of an IG's independence," and lamented the unprecedented interference with the IG's mandate. We noted that published reports "have stated that the IG has changed procedures and will install an 'ombudsman' in his office. It appears that this solution has been imposed on the IG against his will, and may have seriously damaged his independence."

Since that was written and published, we've continued talking to people in the IG community and on the Hill, and can now report that not only did IG Helgerson not have any solution imposed upon him against his will, but in fact he turned down at least two recommendations that had been proposed by the management review team.

First, the review team had recommended the creation of a new position that would serve as both quality control officer and ombudsman. Helgerson decided on his own to create two new positions: a quality control officer to look over investigative reports before they reached Helgerson and his top deputies; and an ombudsman to handle complaints about fairness and treatment. But in both cases, Helgerson chose the officers now assigned to those posts, and they report directly to him, not to agency management.

Helgerson has told Hill staff that Hayden had promised him all along that he would only implement the recommendations that Helgerson thought made sense. In fact, POGO has been told, there were two recommendations to which the IG flatly said "no way": 1)

the idea that the Director should play a role in the appointment of staff in the IG's office. Helgerson said it was clear to him that such interference would violate the statute [NOTE: the CIA IG was actually created by a separate law from most IGs, but the CIA statute very closely tracks the IG law]; and 2) the idea that the IG's legal counsel should report to the agency's general counsel. Here again, Helgerson replied that the CIA IG's shop had always had its own counsel who reports directly to the IG.

We're told that Helgerson further informed the Director that pending legislation to change the IG law would have to be reviewed, and if it passes, it may be necessary for Helgerson to recommend that the separate CIA IG statute be similarly amended. Helgerson has been assured by Hill staffers that anything they do will serve only to strengthen, not weaken, the IGs' powers.

We are particularly happy to set this record straight because there are some out there in the anti-IG community who have seized upon the CIA episode to send "attaboys" to Director Hayden. We are glad to say that praise seems to have been misinformed and misdirected.

-- Beverley Lumpkin

July 10, 2008 in [Watching the Watchdogs](#) | [Permalink](#)

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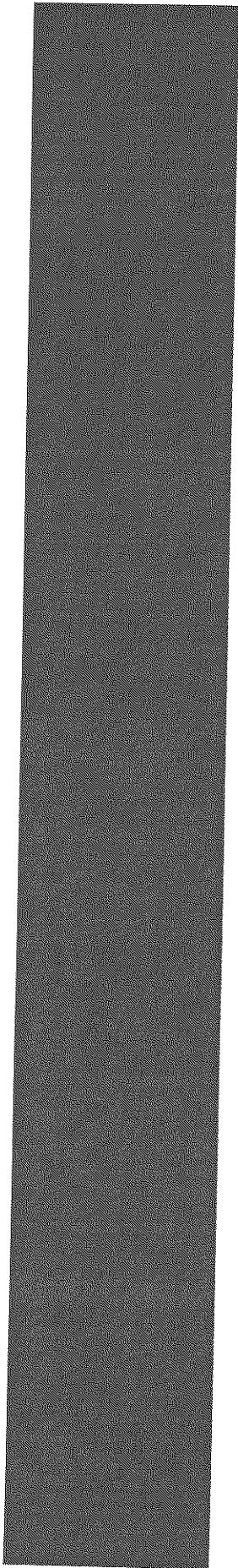
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James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “5”

APPROVED FOR RELEASE
DATE: FEB 2007

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*Central Intelligence Agency
Inspector General*



SEMIANNUAL REPORT
TO THE DIRECTOR, CENTRAL INTELLIGENCE AGENCY

JULY - DECEMBER 2005

*John L. Helgerson
Inspector General*

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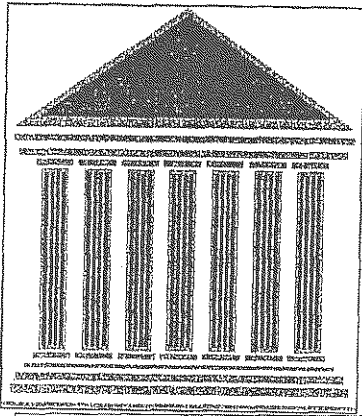
(U) ANNEX SECTION

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(U) A Message From the Inspector General



[redacted] The work of the Office of Inspector General (OIG) during this reporting period continued to concentrate on Agency activities in Iraq and the war on terrorism. Ongoing Iraq investigations focus on the circumstances surrounding the movement, confinement, and in some cases, alleged mistreatment of detainees.

[redacted] OIG also is investigating a number of incidents concerning the extraterritorial transfers of individuals and alleged abuse during detentions outside Iraq. As a result of an investigation of a case in Afghanistan, a former Agency contractor has been indicted on four felony charges of assault of a detainee, who died. The trial, which has been rescheduled for early 2006, will represent the first US prosecution of a civilian for abuses committed in Afghanistan. OIG continues to work closely with the Departments of Justice and Defense, as appropriate, and has briefed the intelligence oversight committees regularly on developments in these inquiries.

[redacted] OIG is working with relevant Agency components to ensure implementation of recommendations stemming from several counterterrorism-related inquiries. In May 2004, OIG completed a special review of management practices associated with a [redacted] covert action program [redacted] Ten significant recommendations concerning review, revalidation, or

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modification of the program resulted. Action has been completed on most of the recommendations, and Agency managers continue to work to complete action on the two outstanding recommendations. [redacted]

[redacted] A second recommendation has been satisfied with issuance of updated guidelines on medical care for detainees. One other recommendation remains outstanding. As a result of a separate investigation into the circumstances surrounding [redacted]

[redacted] Two recommendations have been closed.

(U/[redacted]) As a result of investigations, an employee reimbursed the government \$8,800 for embezzlement of funds after the Department of Justice declined prosecution. Another employee reimbursed \$4,500 for receipt of duplicate funds for training. In a third case involving civil service annuity fraud investigated in conjunction with the Inspector General of the Office of Personnel Management, the government recovered \$107,958. In a fourth case, the government recovered \$45,045 for unauthorized cell phone use. In two other cases, a contractor reimbursed the government \$11,217 for hours mischarged by an employee and an independent contractor made reimbursement of \$10,724 for mischarged hours. The Investigations Staff is conducting a variety of other investigations, including possession of child pornography, unauthorized shipments of firearms, misappropriation of funds, fraud, and false statements and claims.

(U/[redacted]) Personnel recruitment for the Investigations Staff remains a priority, owing to Staff turnover and the continually expanding workload. Three experienced Agency officers have been hired as investigators, and employment offers have been extended to six other individuals with Federal law enforcement experience.

(U/[redacted]) As reported in the previous Semiannual Report, in late June the OIG completed a special review of accountability issues identified in the findings and recommendations of the Congressional Joint Inquiry

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Report on 9/11. While that review found that Agency officers worked hard against the al-Qa'ida target, it concluded that, with respect to certain matters, the Agency and its officers did not discharge their responsibilities in a satisfactory manner. It recommended that the Director, CIA establish an Accountability Board to review the performance of some individuals in regard to these failures. In September, the IG briefed the report's findings to the Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence, and the House Minority Leader.

(U/[REDACTED]) *In October, the Director, CIA announced that he would not convene an Accountability Board as the IG had recommended. The Director expressed appreciation for OIG's work, crediting in particular, its assessment of pre-9/11 systemic problems within the Agency. Agency Information Review Officers are currently reviewing the report in response to several Freedom of Information Act requests.*

[REDACTED] *During this reporting cycle, the Inspection Staff completed inspections of three components and four issues. The Staff issued reports on Europe Division in the National Clandestine Service; the Office of Asian Pacific, Latin American, and African Analysis in the Directorate of Intelligence (DI); and CIA University. It also completed inspections on Research and Development in the Agency, Leadership Analysis in the DI, and the DI's Senior Analytic Service, as well as a "Review of CIA's Pre-9/11 Reporting on the Relationship Between Saddam's Regime and al-Qa'ida," which Congress had requested. In the latter case, the review found that relevant CIA reporting in the decade before 9/11 was limited to 66 reports and generally involved isolated occurrences that do not establish patterns suggesting an organized or centrally managed relationship.*

(U/[REDACTED]) *The Inspection Staff continued its outreach program to inspection and evaluation staffs in other agencies. Inspectors from the Defense Intelligence Agency and the Department of Defense completed the Staff's New Inspector Training Course in August. In addition, the Inspection Staff has met several times with the Office of the Director of National Intelligence IG to discuss inspection practices and procedures.*

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[redacted] The Audit Staff completed the first audit that is a part of an initiative started during the last reporting period to provide more oversight on the effectiveness of project management throughout the Agency. The audit evaluated Facilities Support's project management practices at the [redacted]

(U) The Staff completed its second annual audit of the CIA's financial statements (for fiscal year 2005). The Staff is currently performing audits of four covert action programs. In the information technology area, the Staff completed an audit of the Agency's management of laptop computers, and is performing a review of information security at field stations.

[redacted]
John L. Heigerson
17 January 2006

~~SECRET~~ [redacted]

~~SECRET~~ [REDACTED]

(U) STATUTORY REQUIREMENTS

(U) This report is submitted pursuant to section 17 of the CIA Act of 1949, as amended, which requires the Inspector General to provide to the Director, CIA, not later than 31 January and 31 July of each year, a semiannual report summarizing the activities of the OIG for the immediately preceding six-month periods, ending 31 December and 30 June, respectively.

(U) All audit activities of the OIG are carried out in accordance with generally accepted government auditing standards. All OIG inspection and investigation activities conform to standards promulgated by the President's Council on Integrity and Efficiency.

(U) The OIG has had full and direct access to all Agency information relevant to the performance of its duties.

(U) Subpoena Authority

(U/ [REDACTED]) During this reporting period, the IG did not issue any subpoenas.

(U) Legislative Proposals

(U) OIG has no proposals for legislative changes.

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(U) AUDITS

(U) AUDIT STAFF OVERVIEW

(U) [REDACTED] The Audit Staff conducts performance and financial statement audits of Agency programs and activities, and participates with other agencies in joint reviews of Intelligence Community (IC) programs and activities. During this period, the Audit Staff completed 11 audits of Agency facilities management, financial management, information technology, field stations, and other CIA activities.

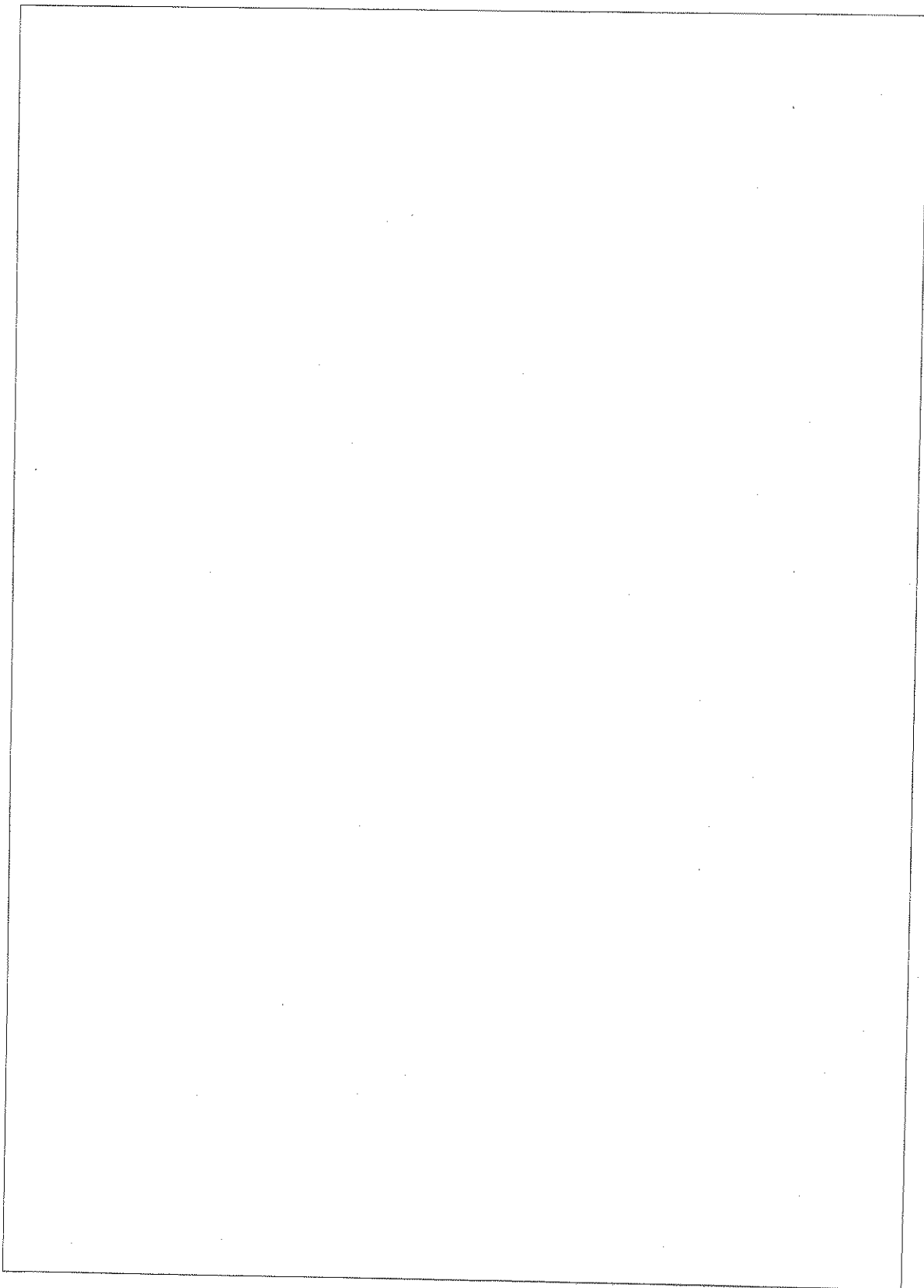
[REDACTED] The Audit Staff completed the first audit that is a part of an initiative started during the last reporting period to provide more oversight of the effectiveness of project management throughout the Agency. The audit evaluated Facilities Support's project management practices at [REDACTED]. While Facilities Support's management requested the audit, the Staff is proactively performing and planning additional audits that focus on project management.

(U) The Staff completed work on the statutory audit of the CIA's financial statements for fiscal year (FY) 2005. The Staff completed the second audit of this annual requirement on schedule in November 2005. The report contains 18 recommendations, and it encompasses the status of management's progress on recommendations from the FY 2004 audit.

(U) The Audit Staff also continues to pursue its program, as requested by Congress, to audit each covert action program (or an aspect of each program) at least every third year. The Staff is currently performing audits of four covert action programs. In the information technology area, the Staff completed an audit of the Agency's management of laptop computers and is performing a review of information security at field stations.

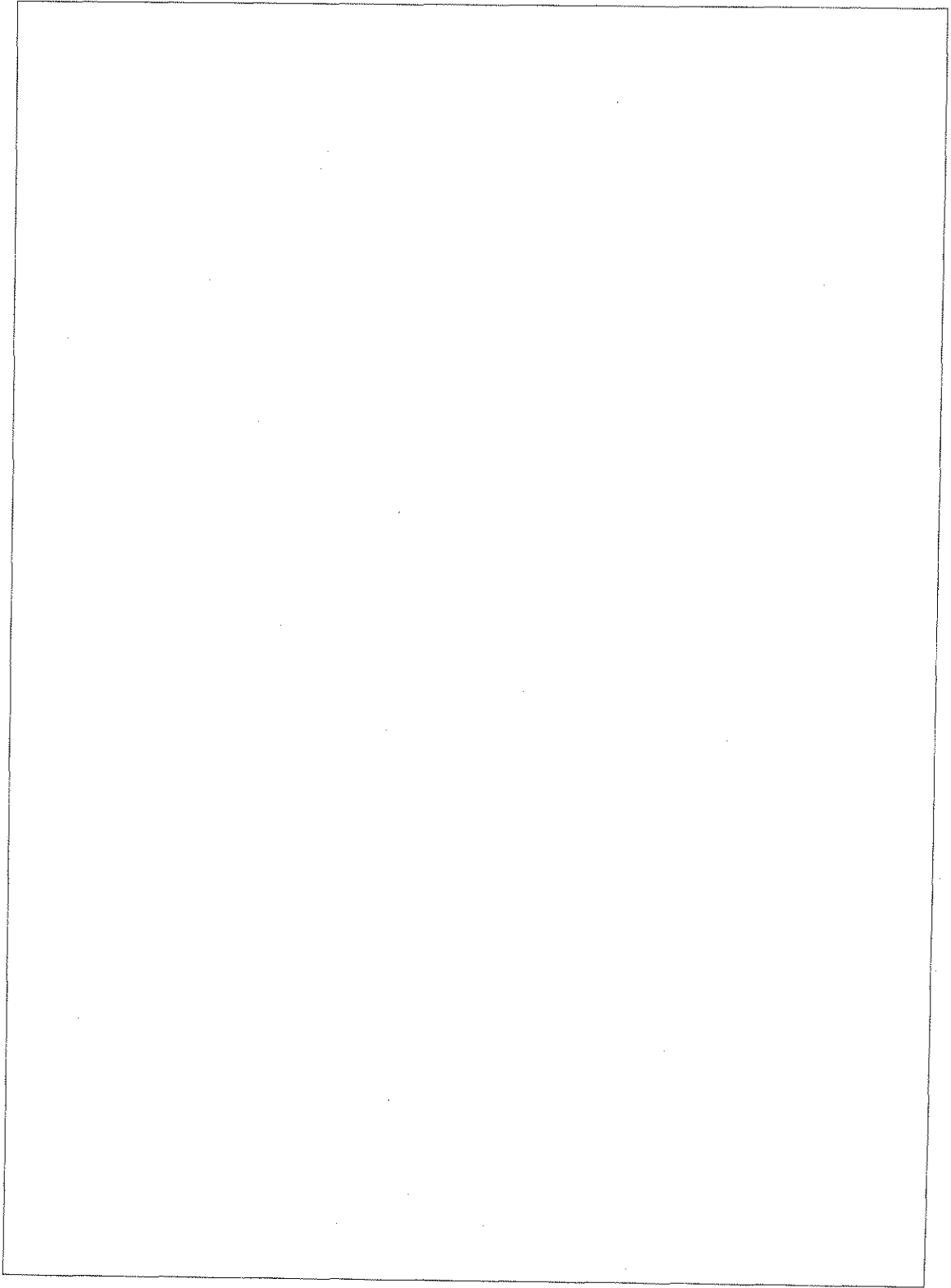
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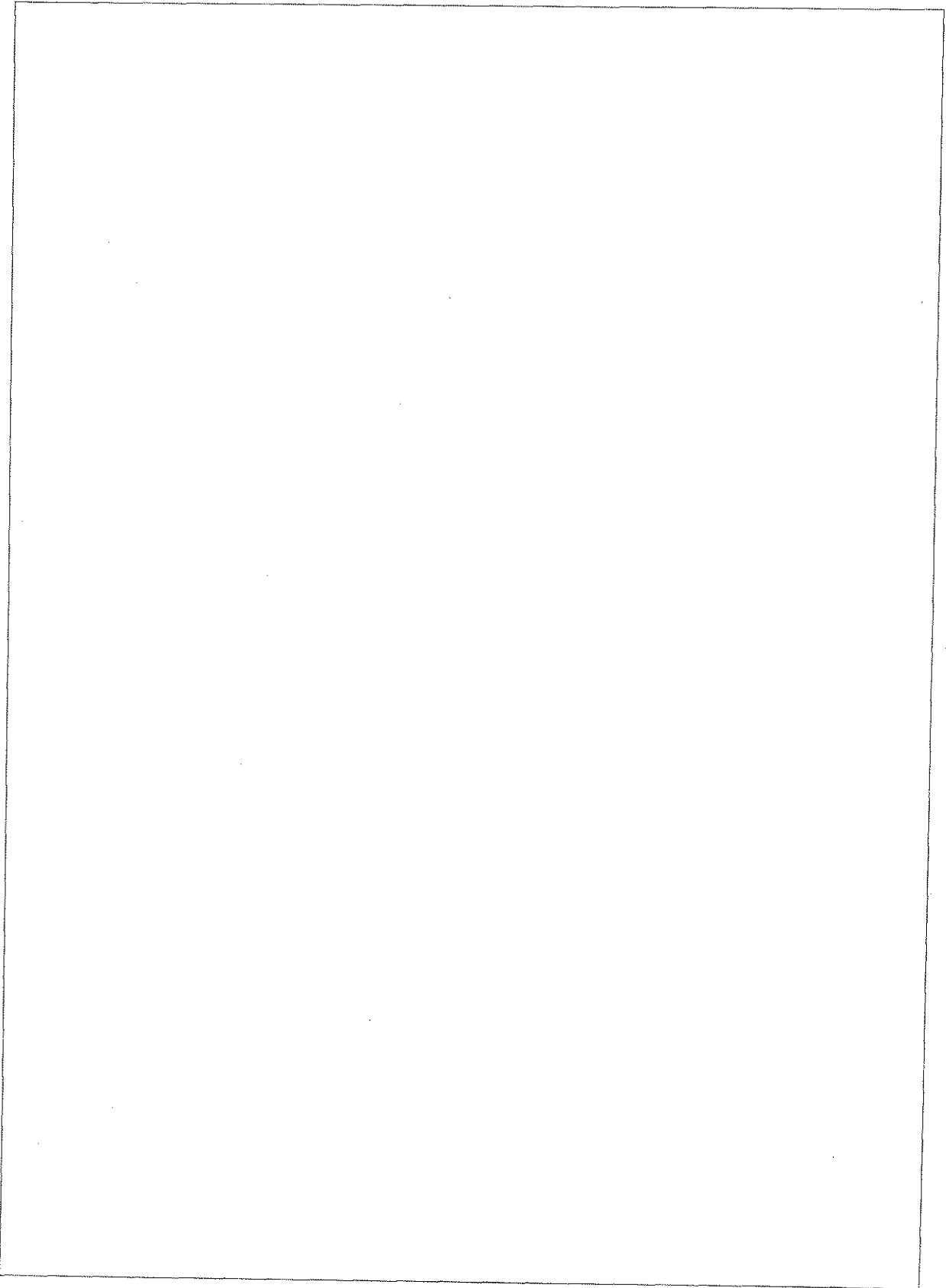


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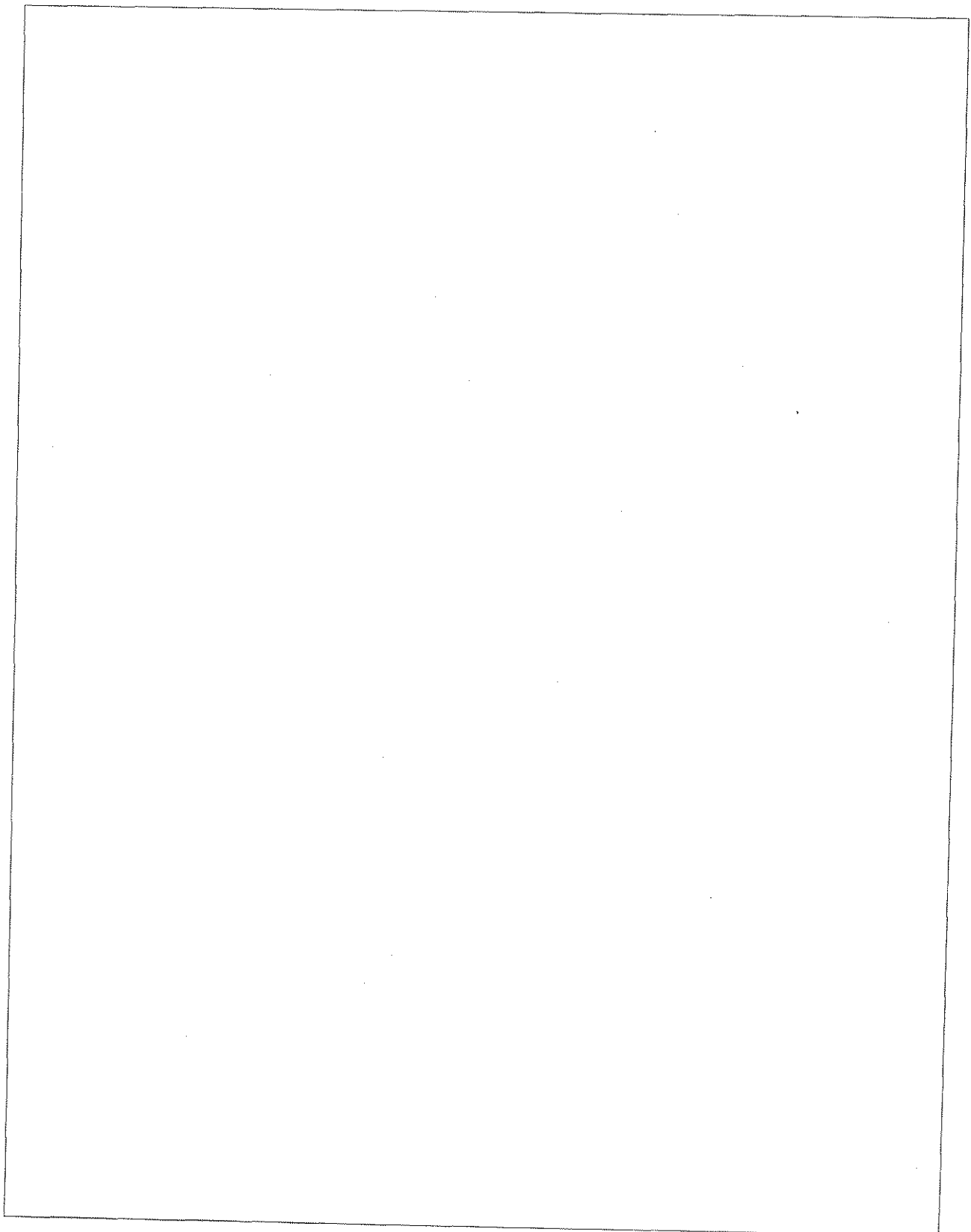
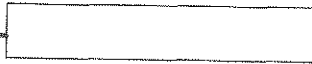


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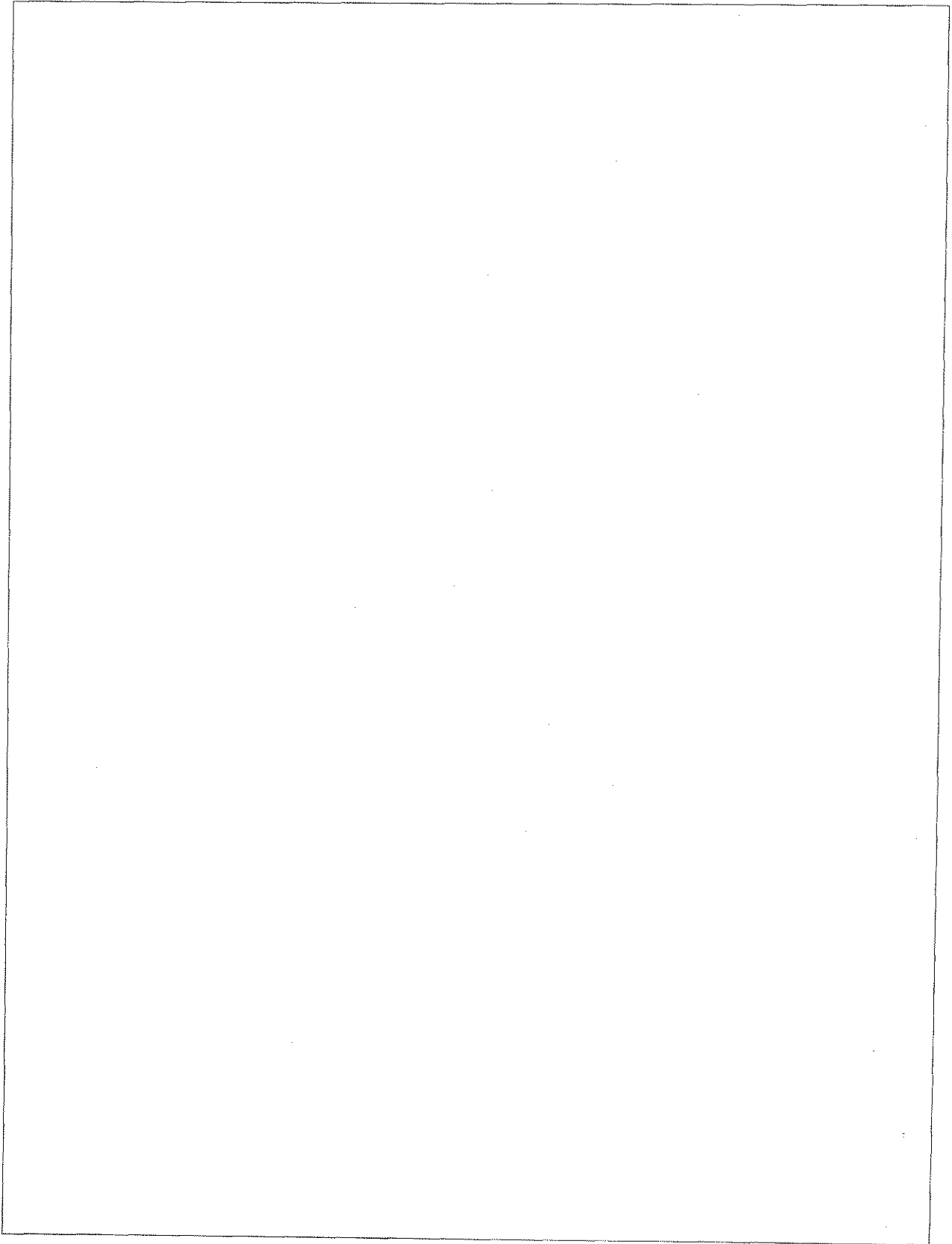
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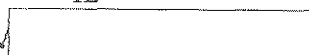
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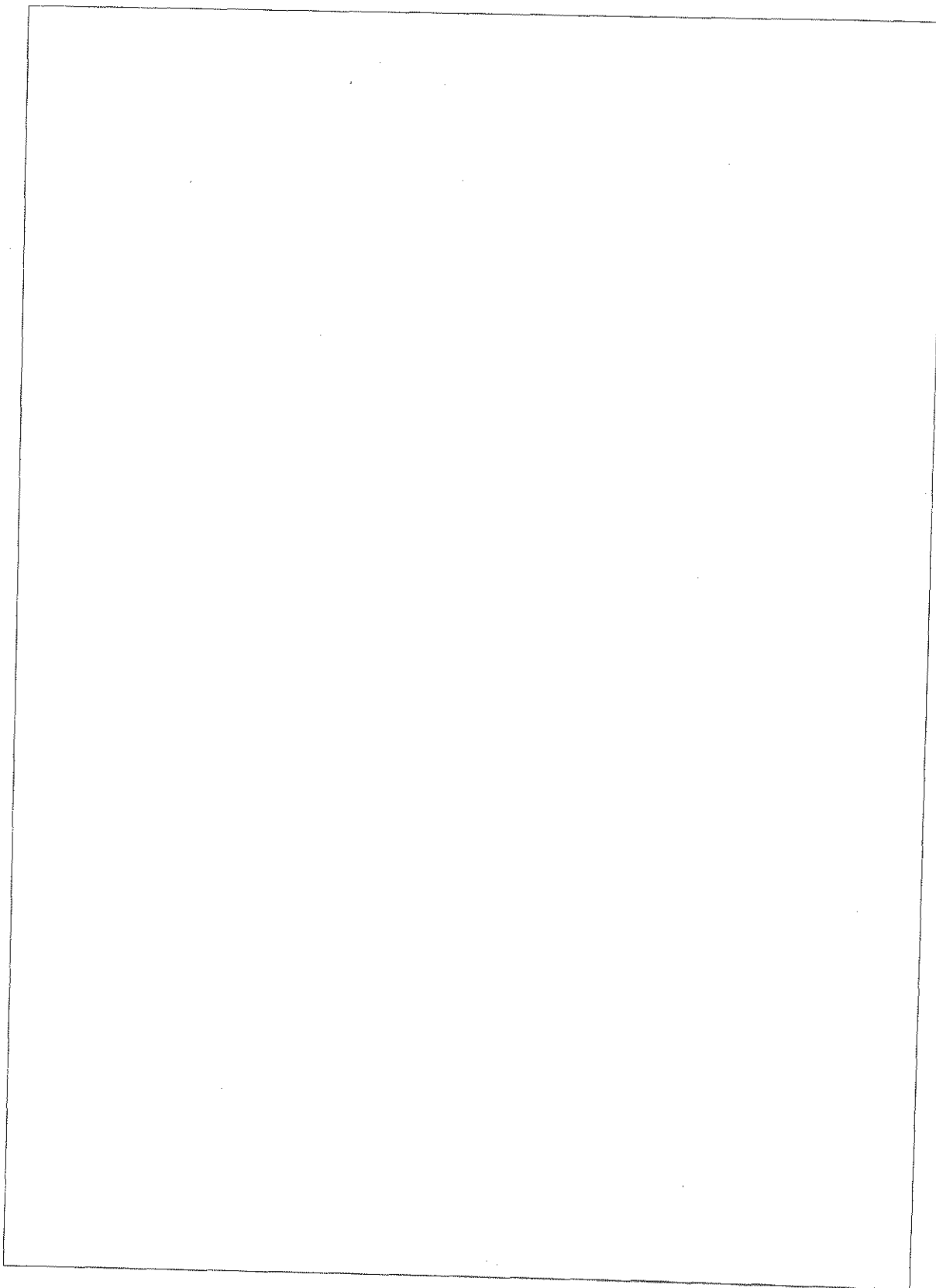
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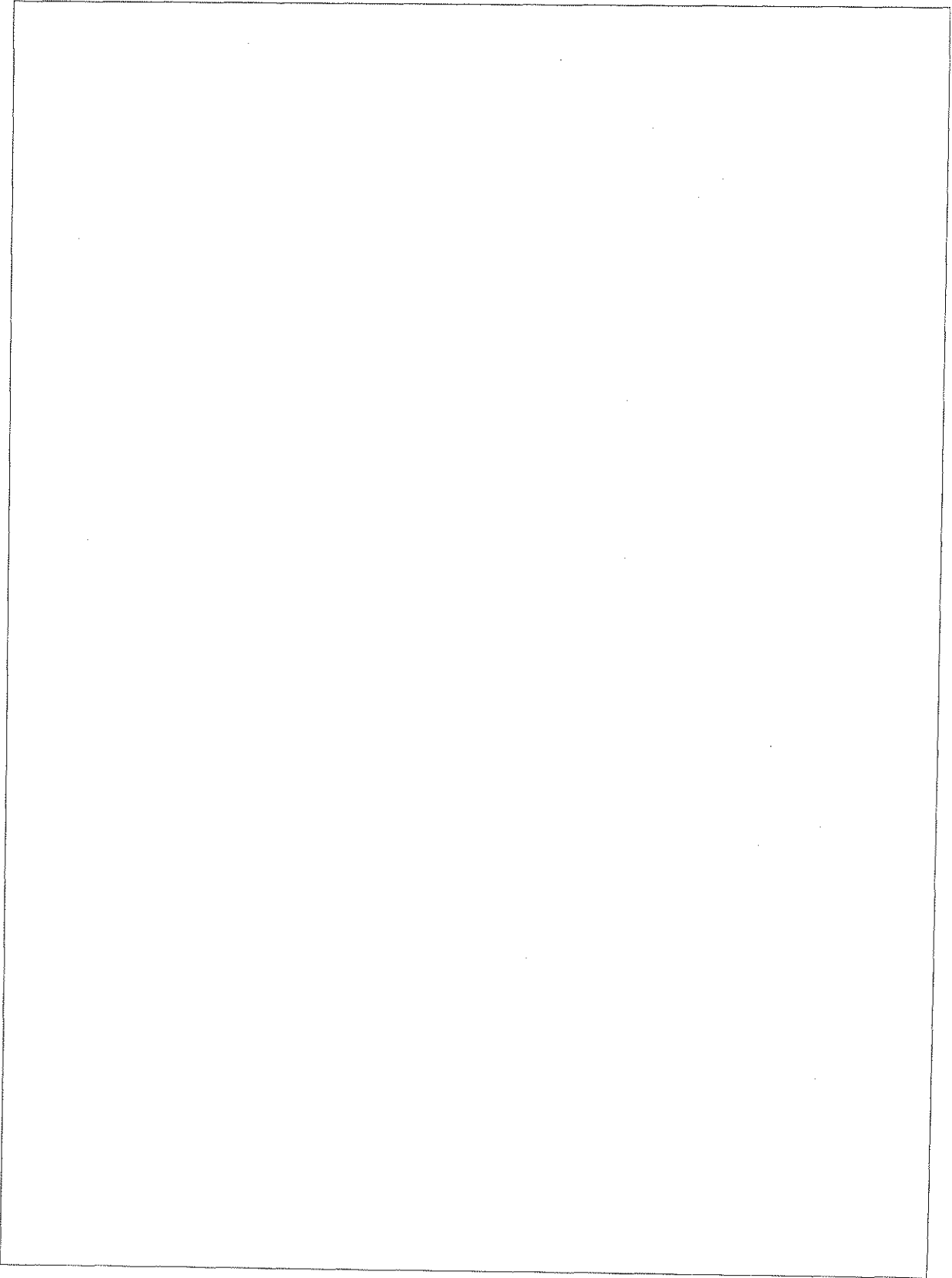


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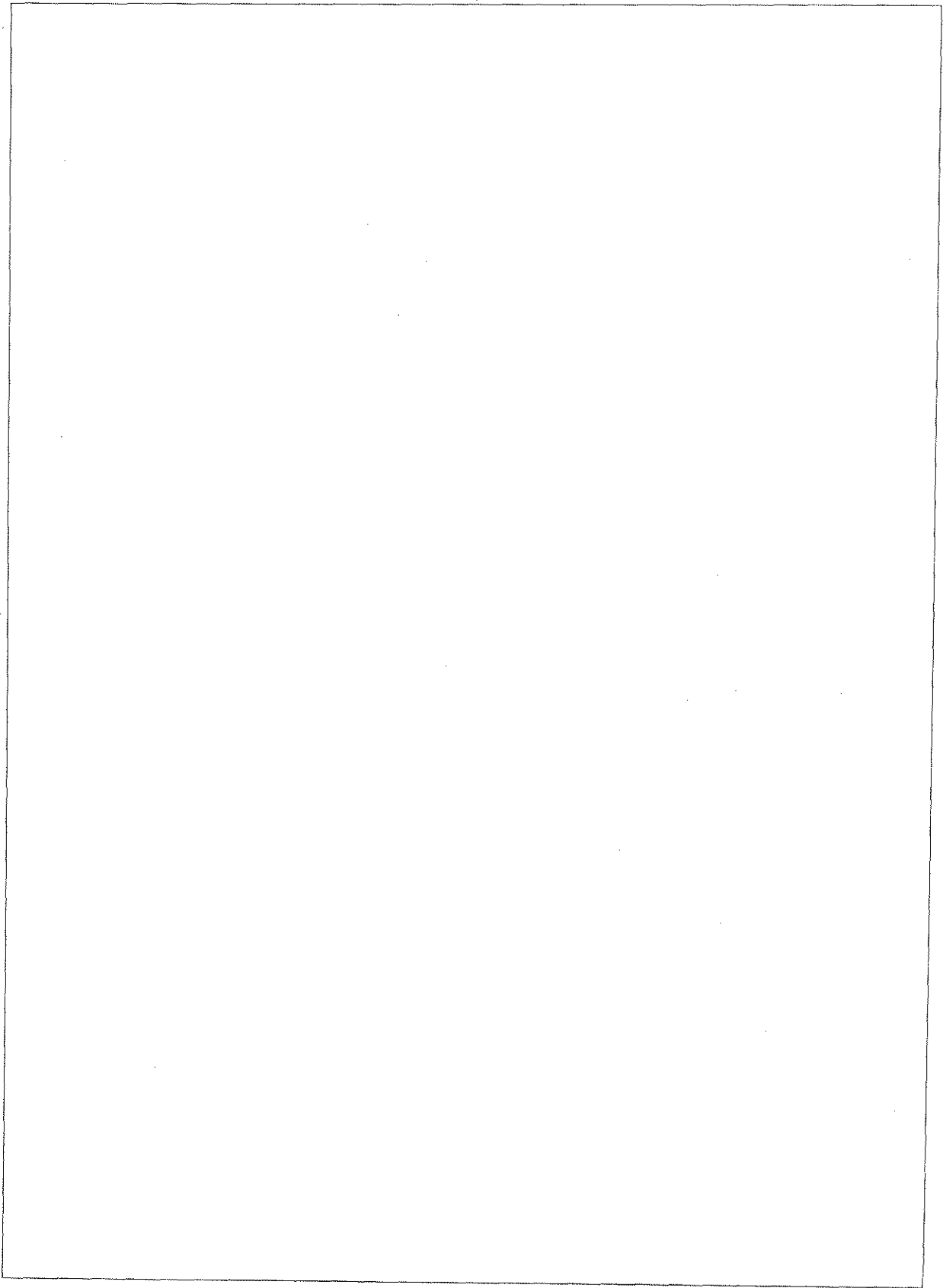
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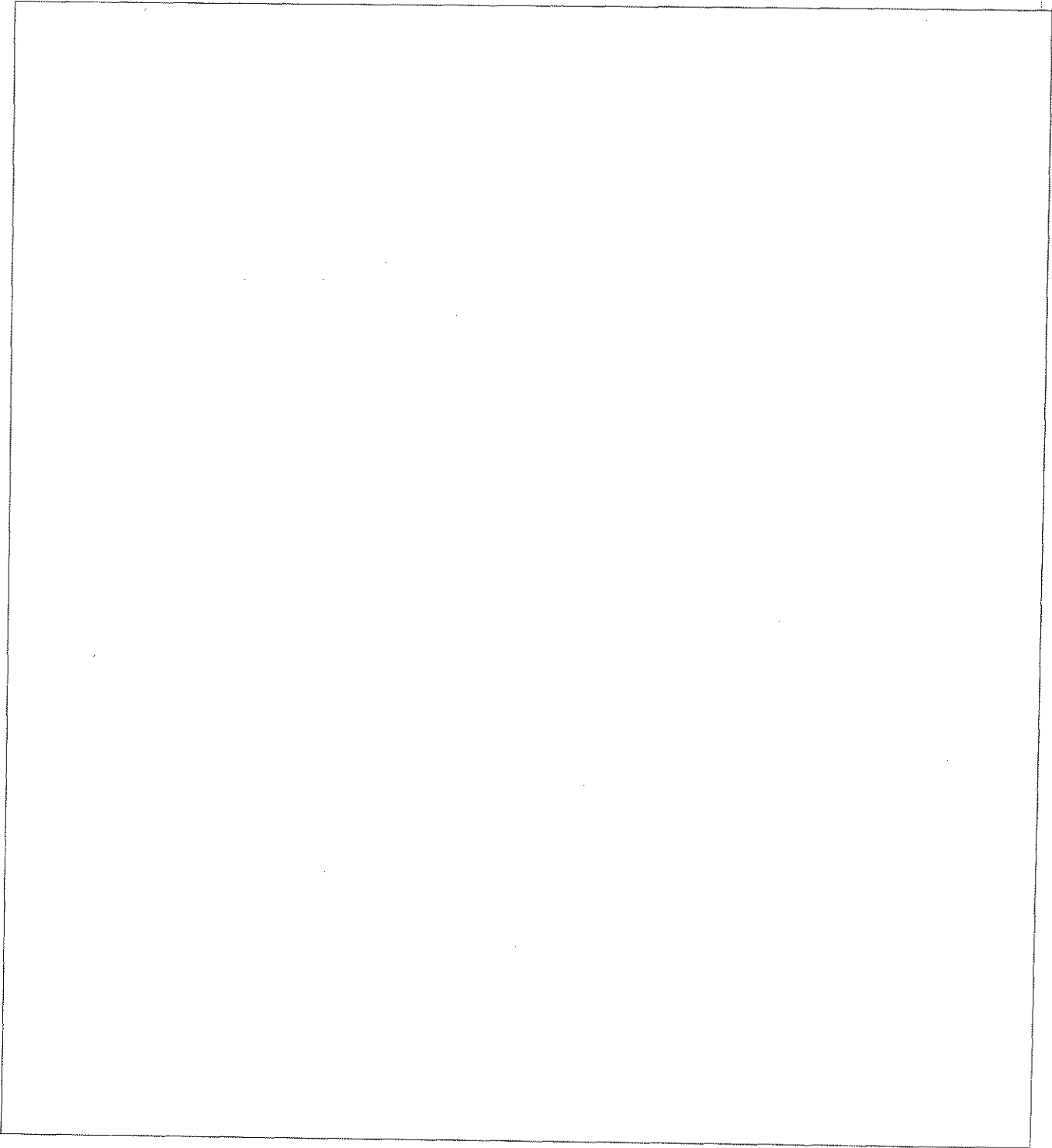


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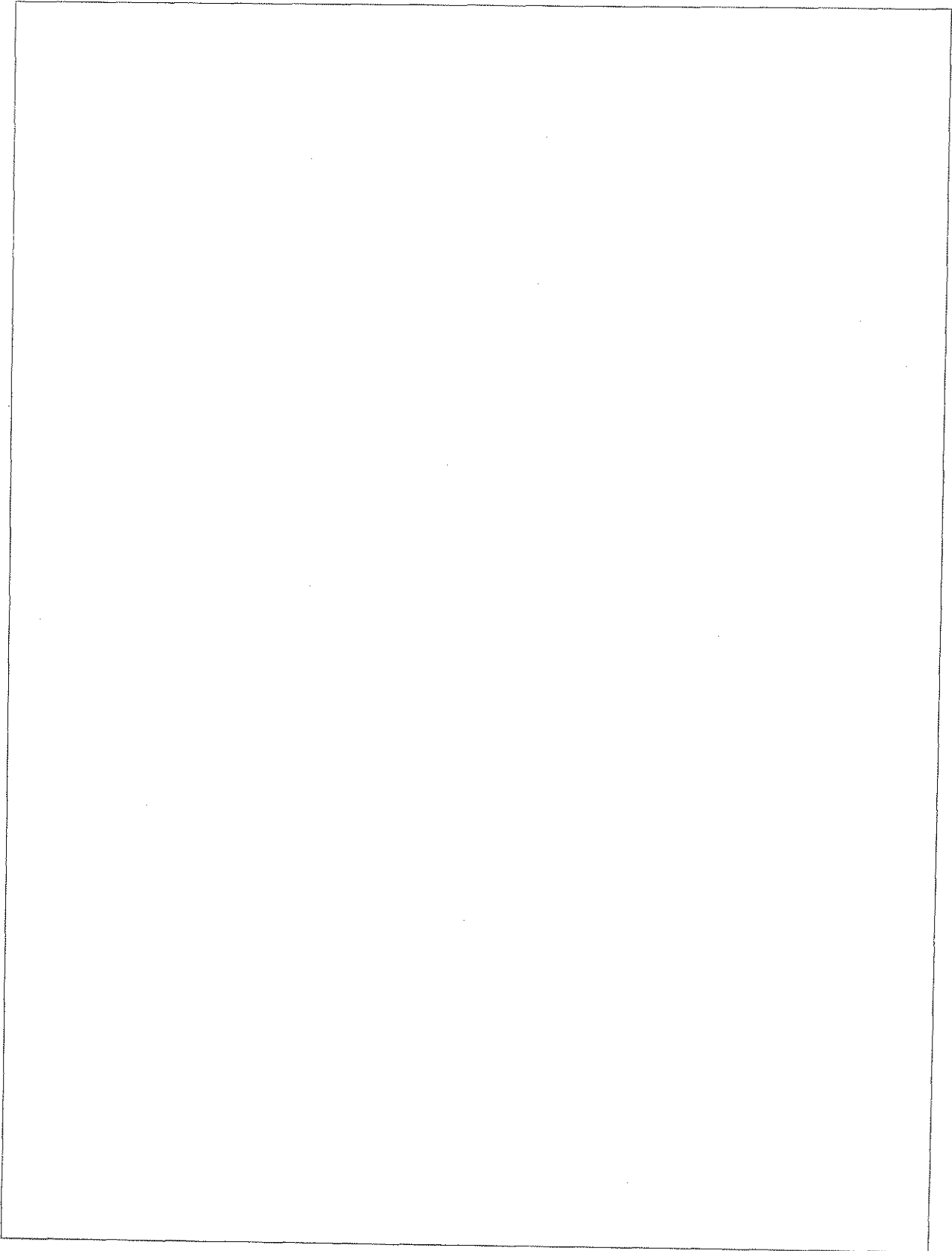
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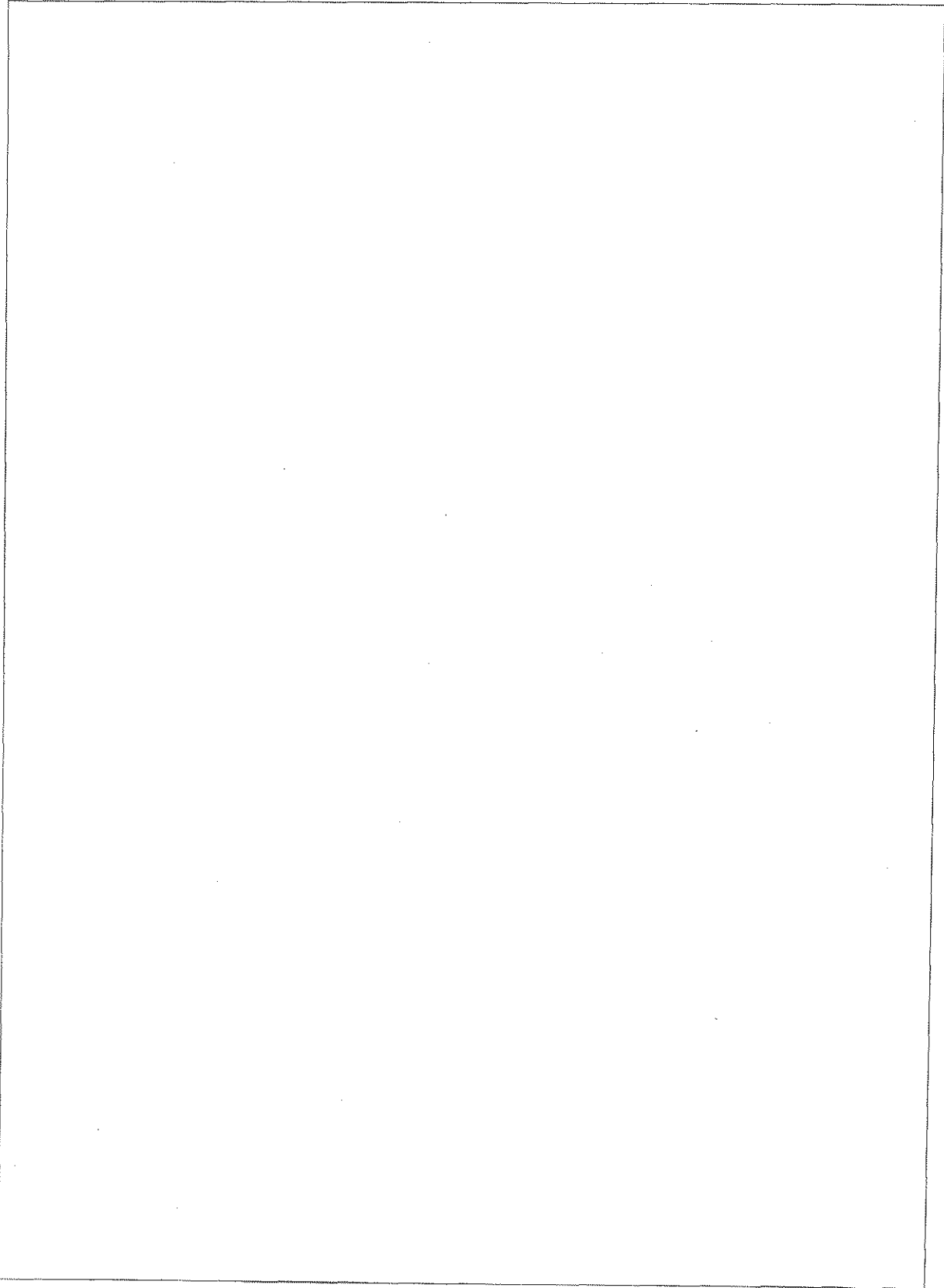
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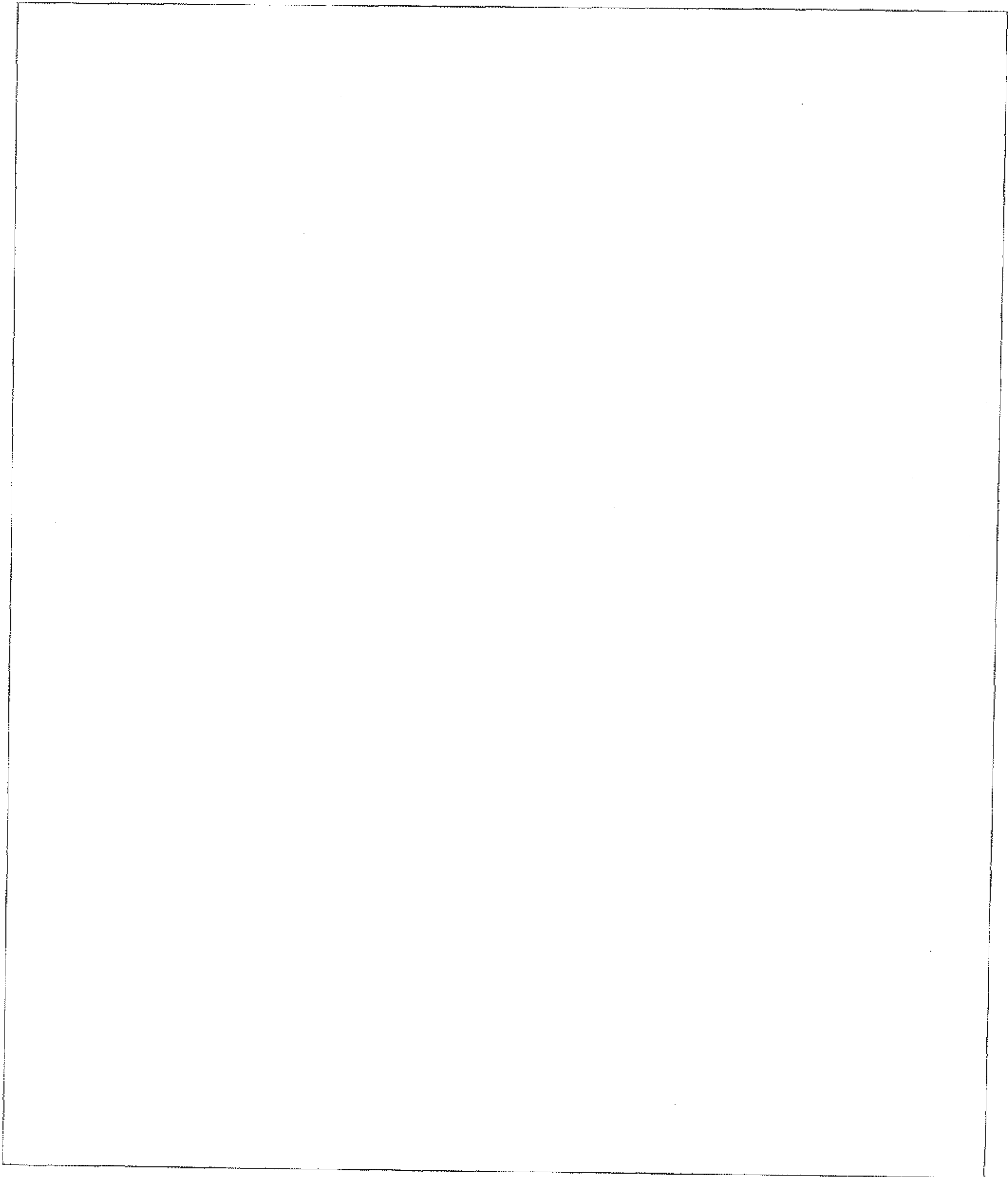
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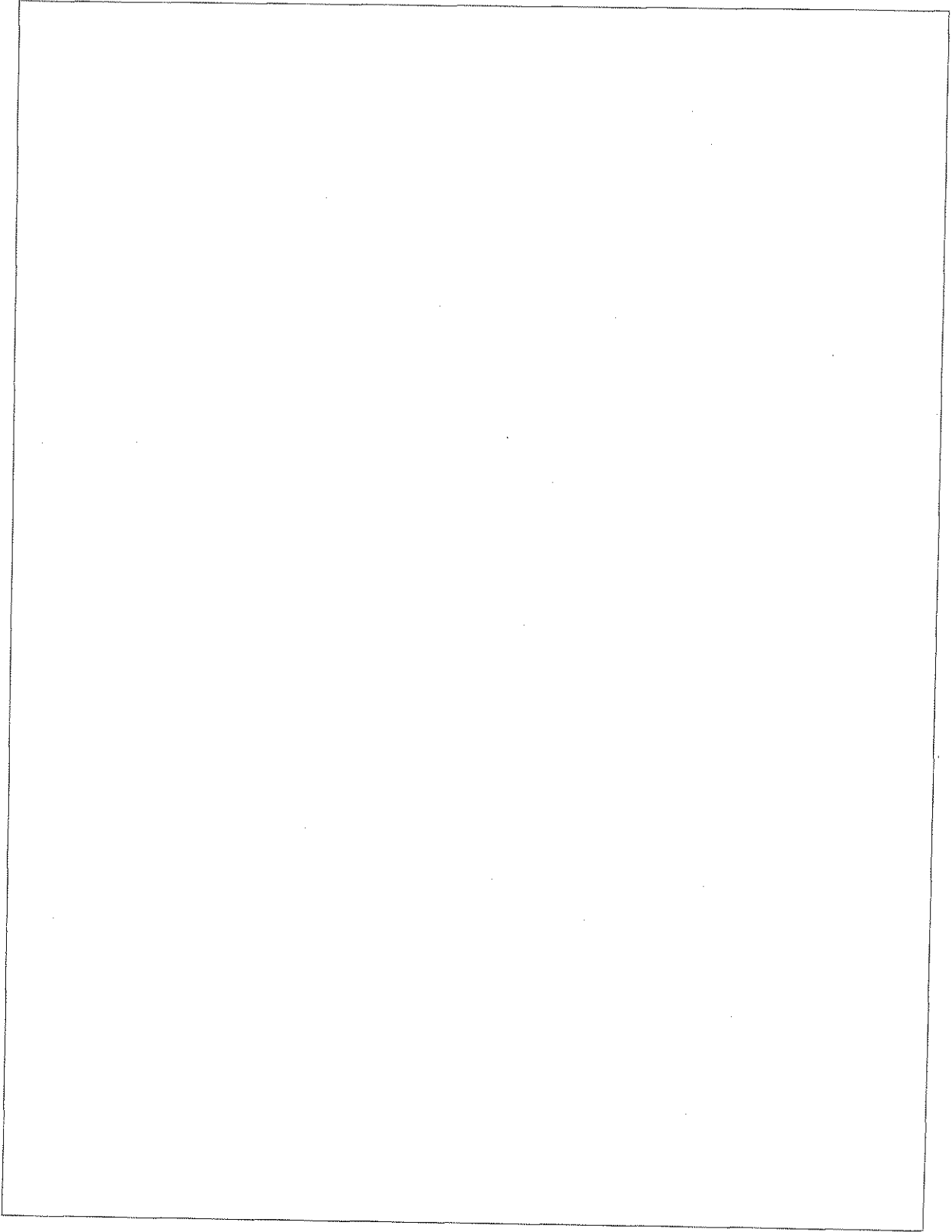
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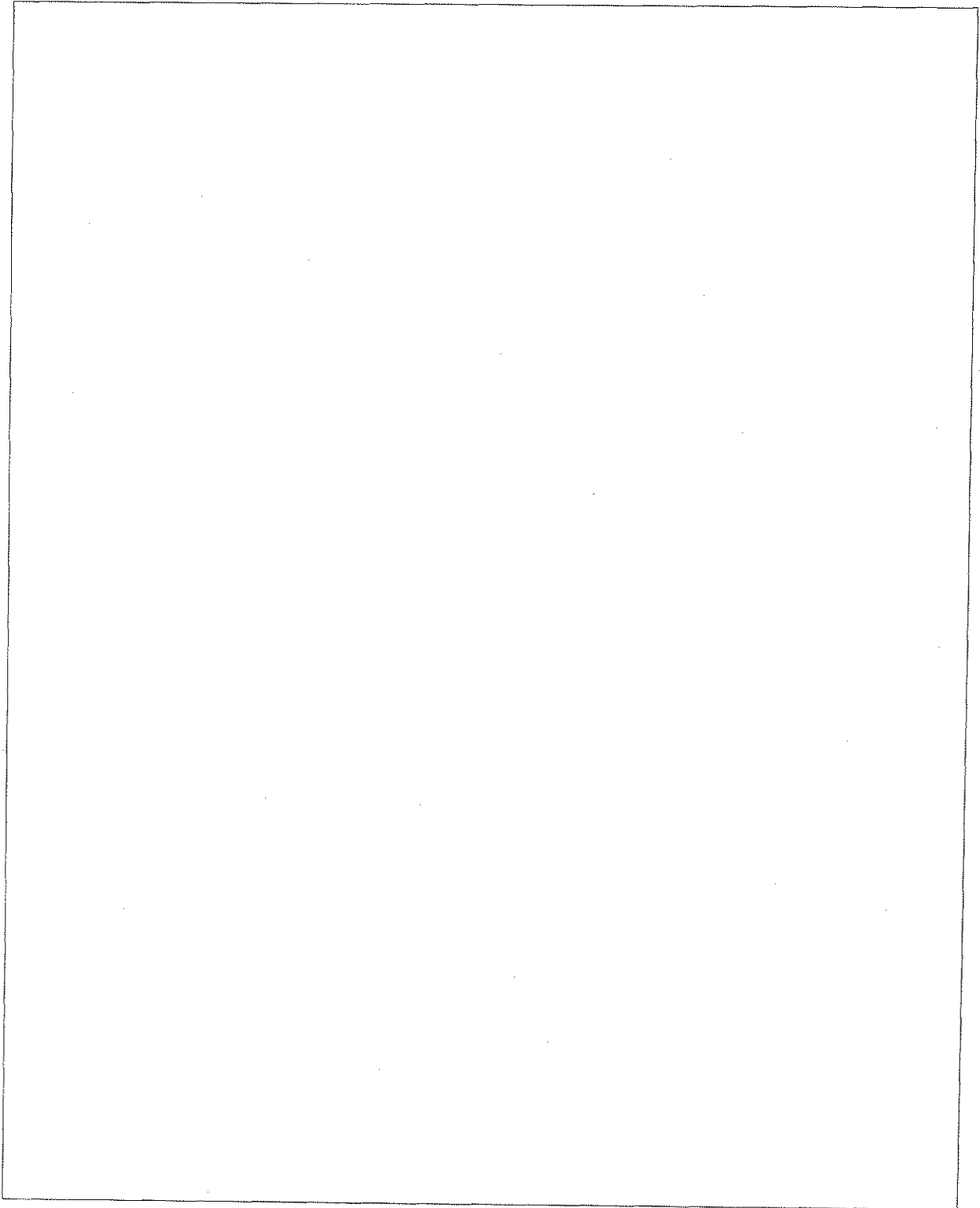
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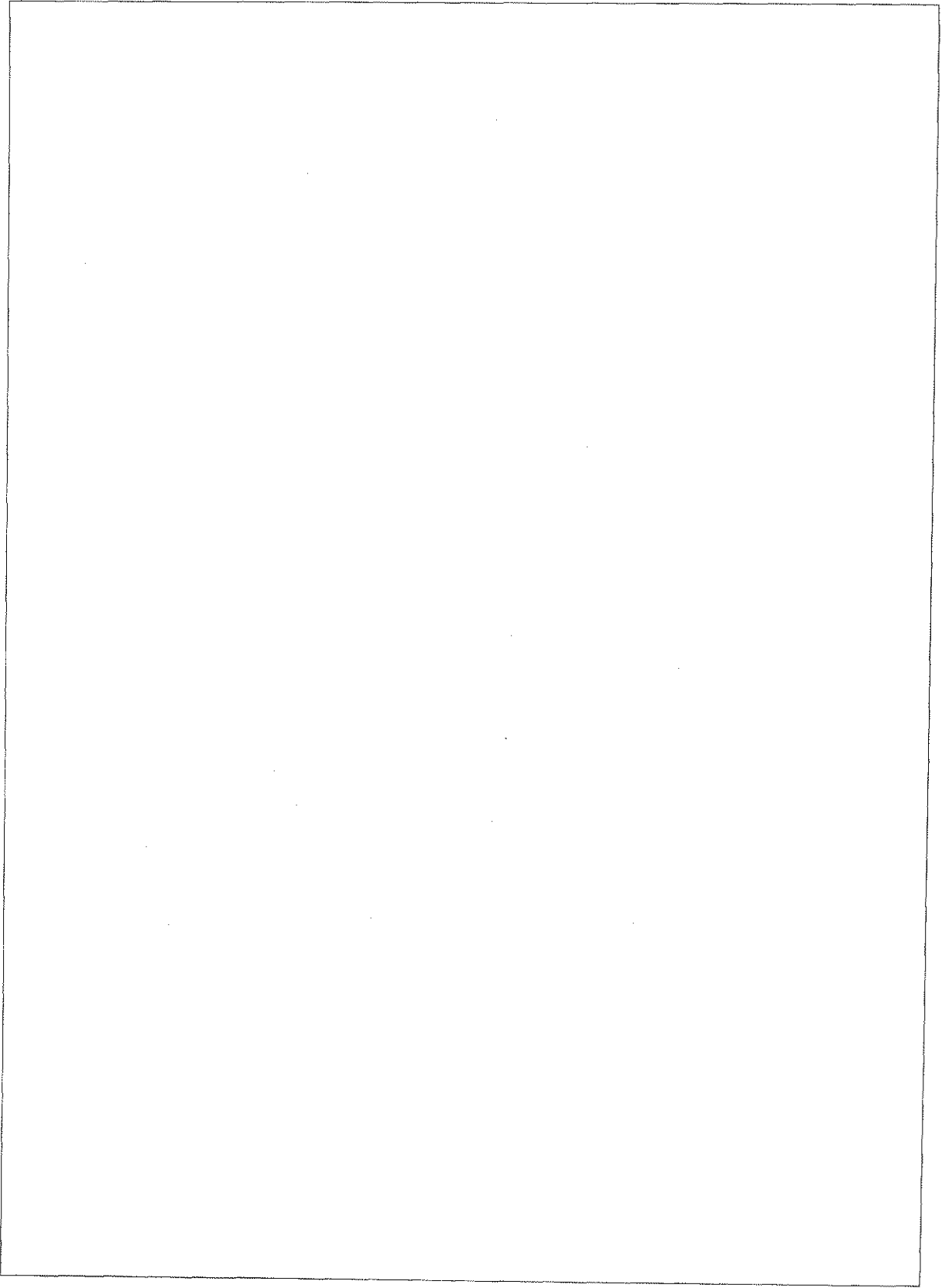
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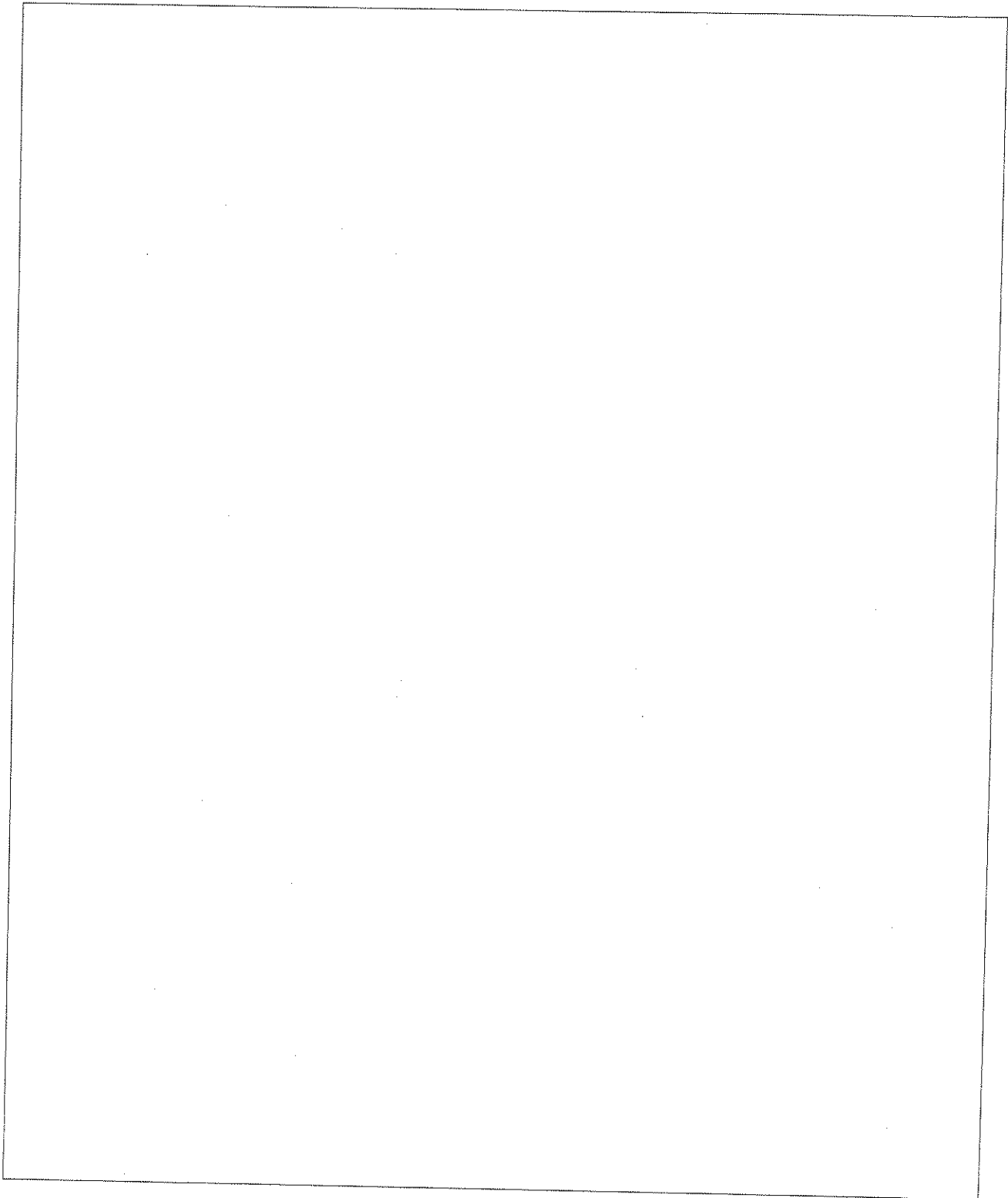
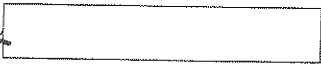


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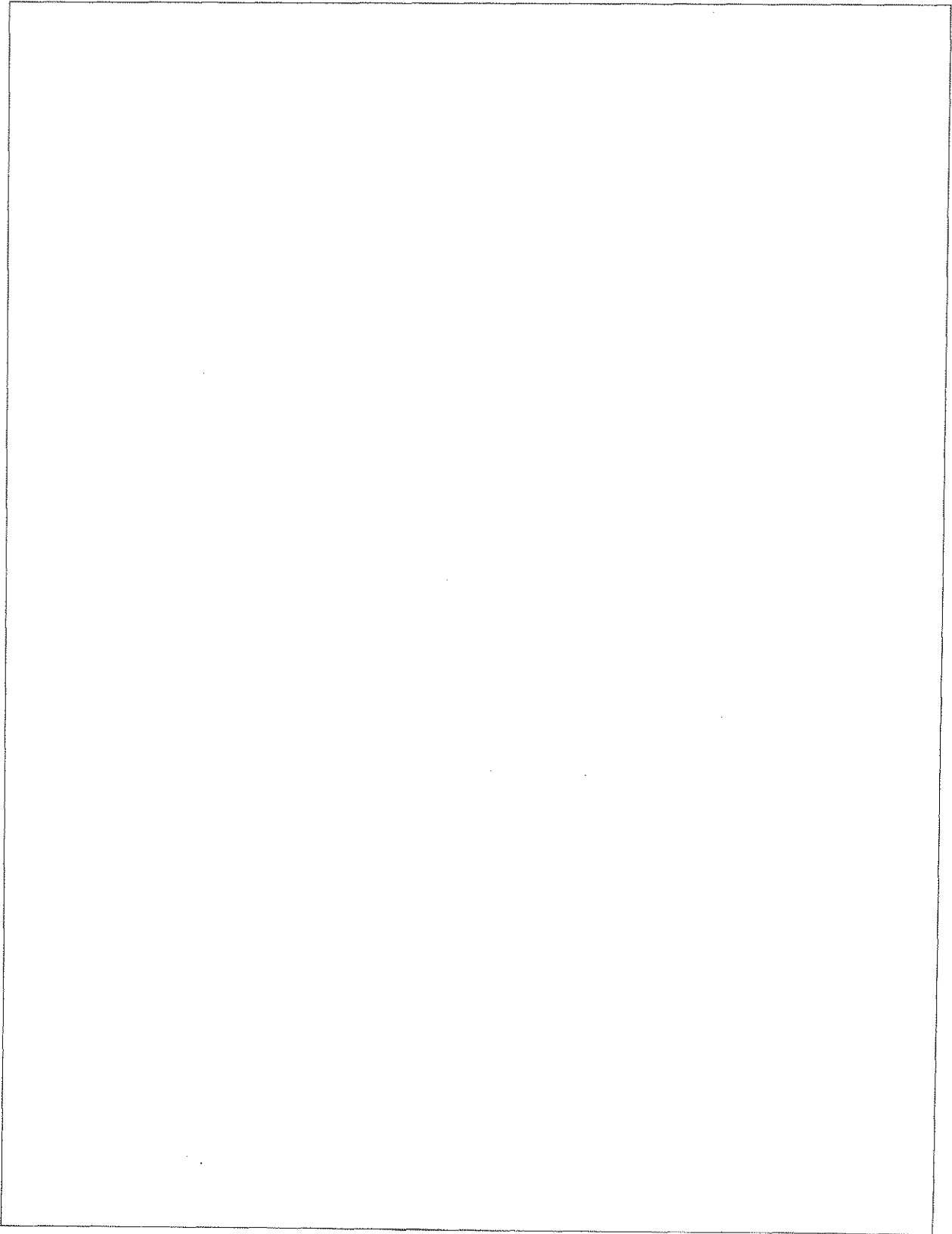
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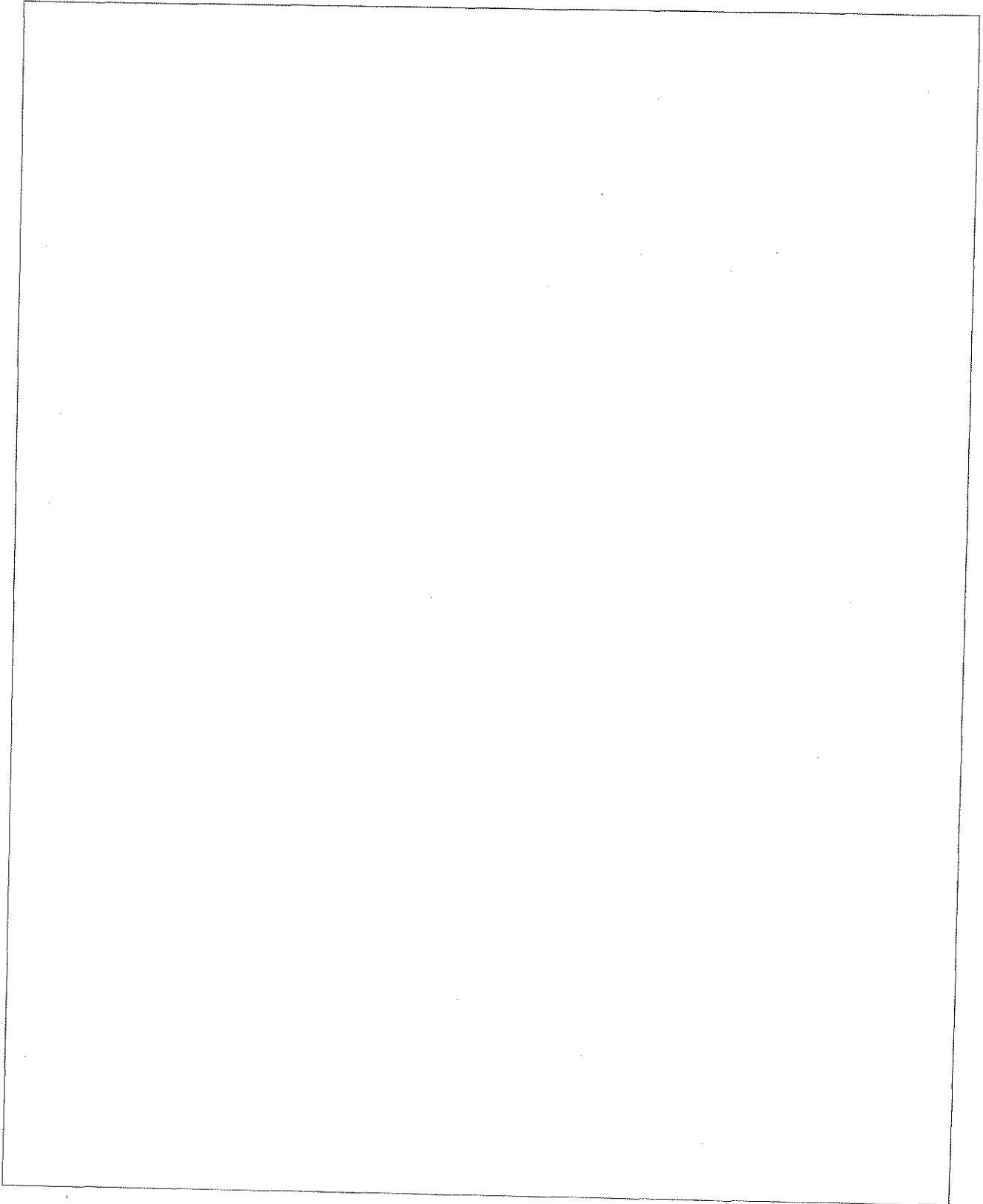
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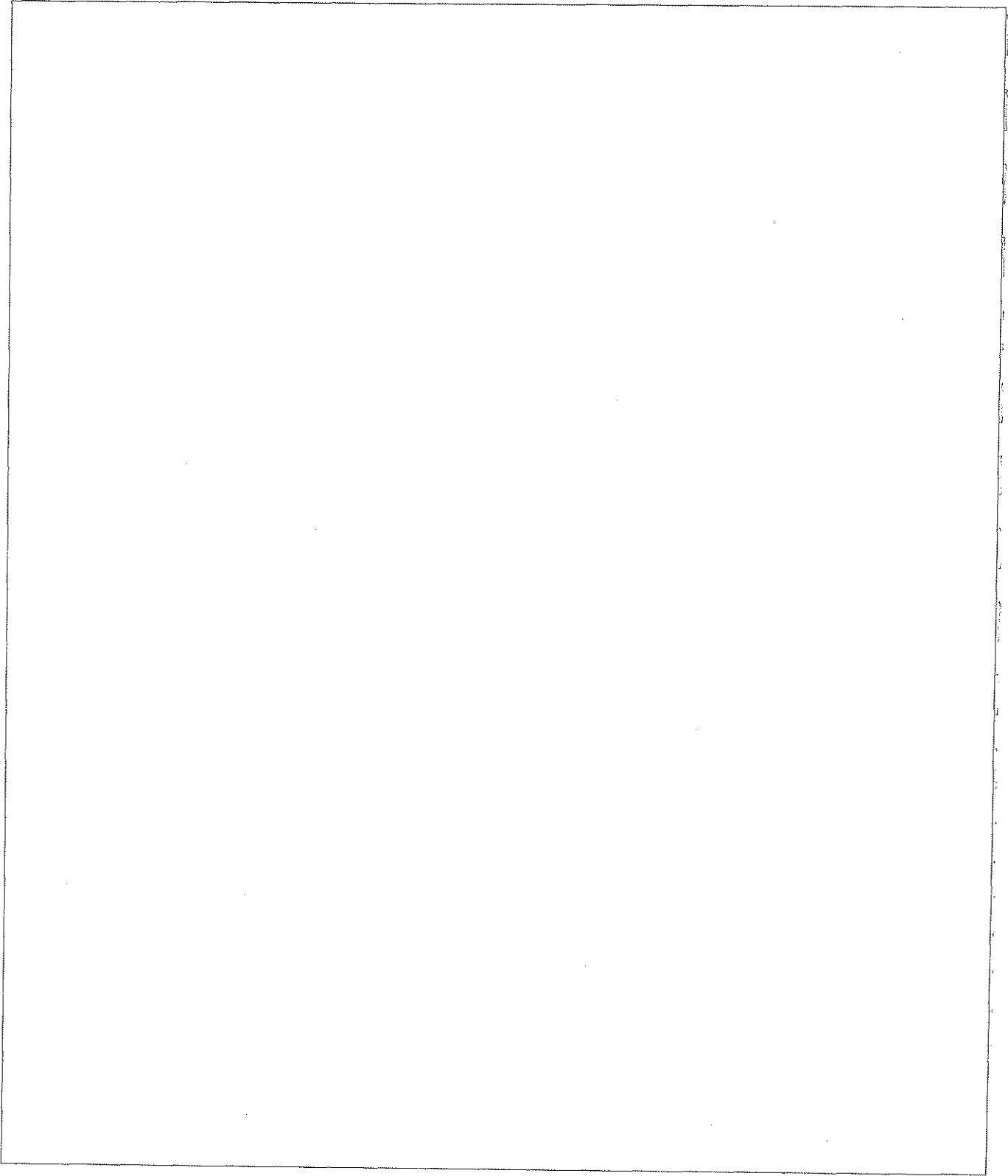
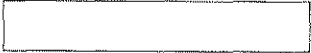
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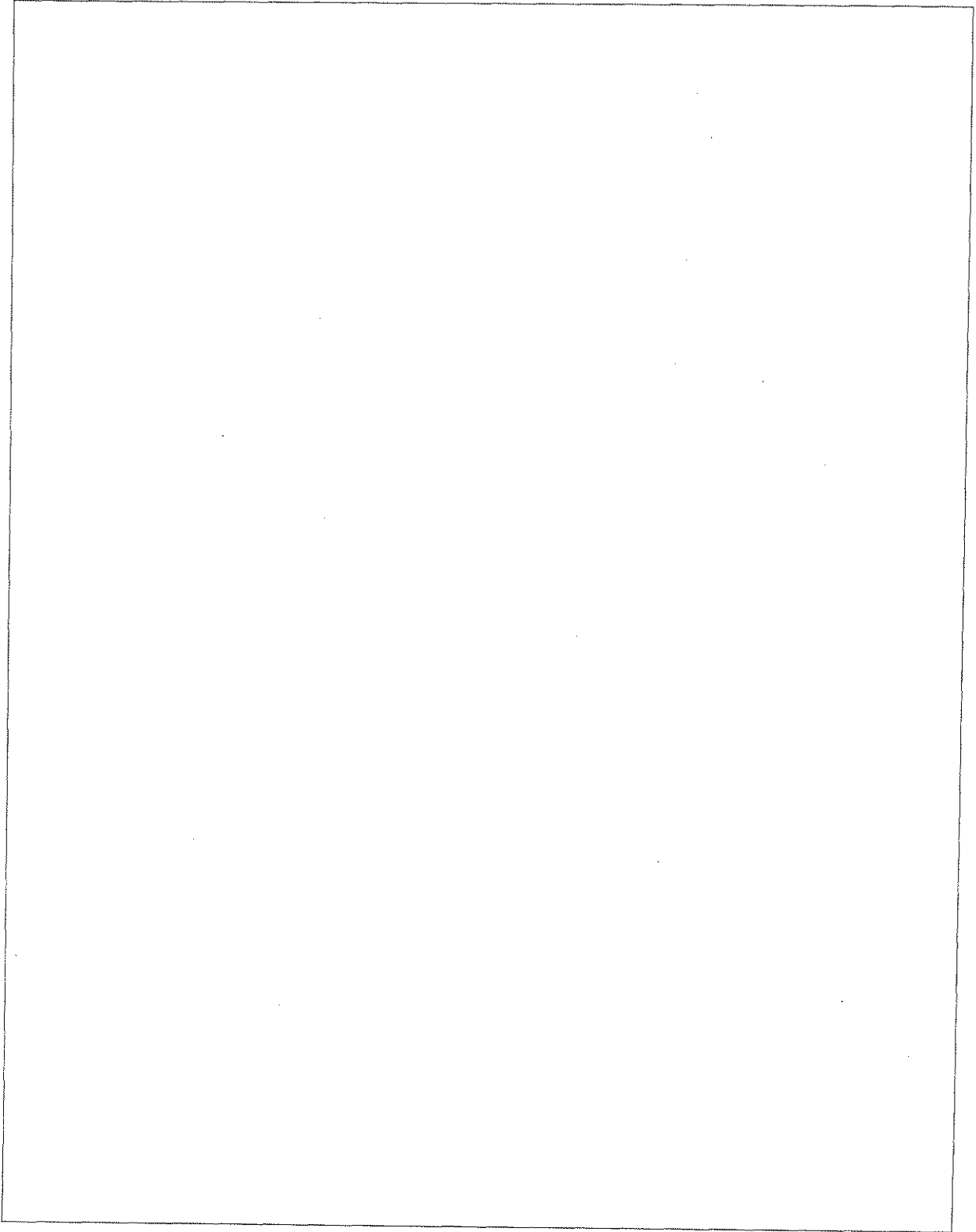
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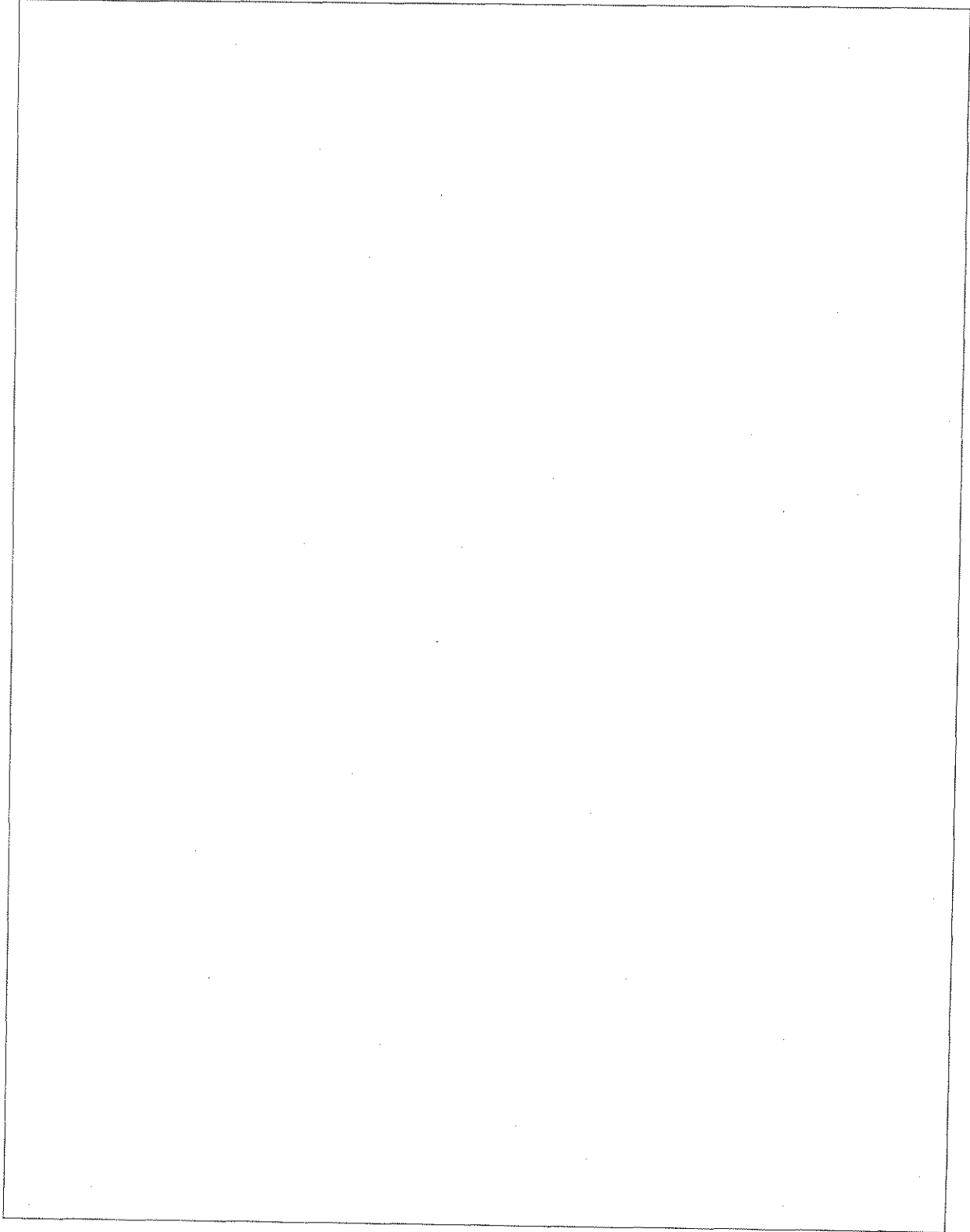
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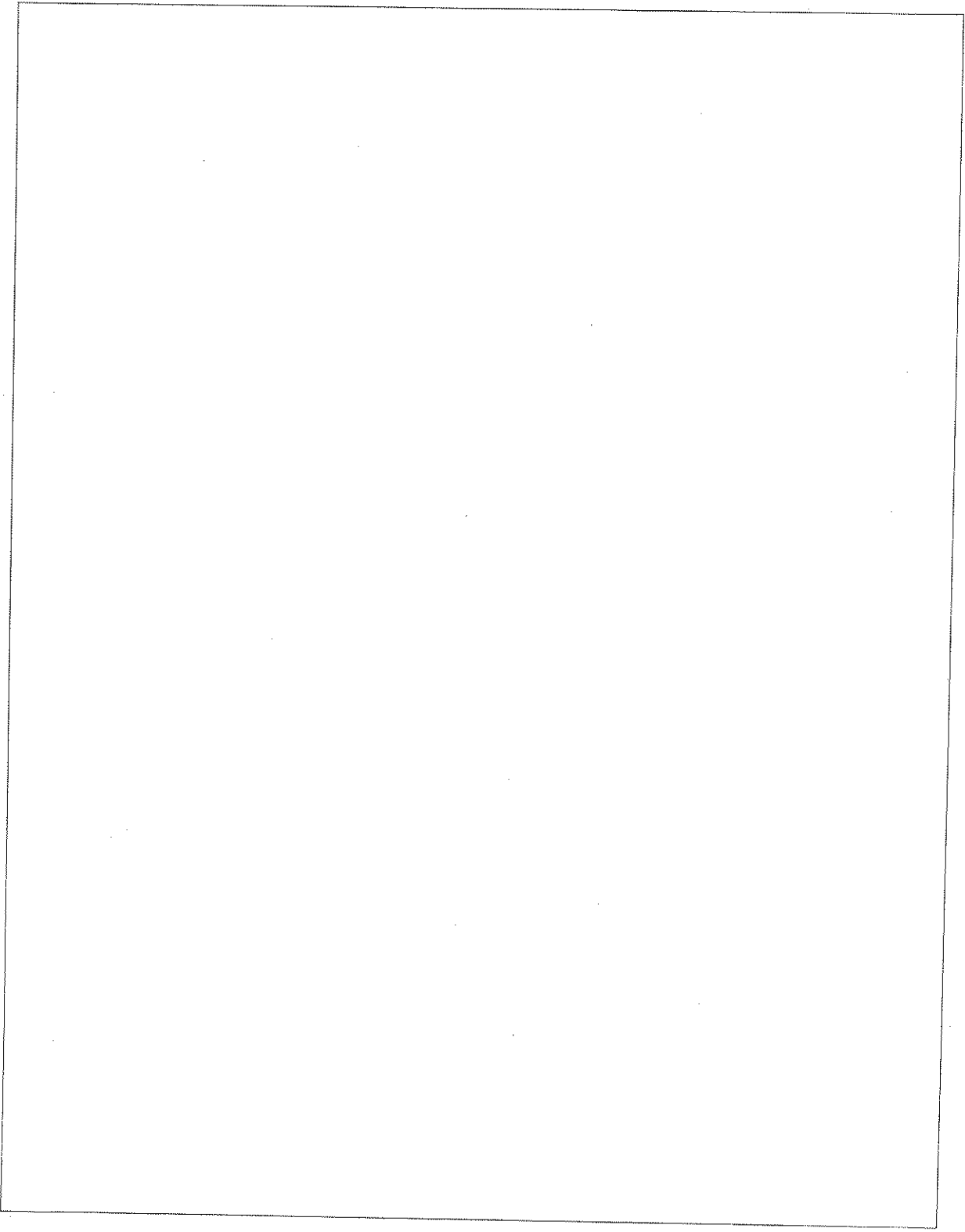


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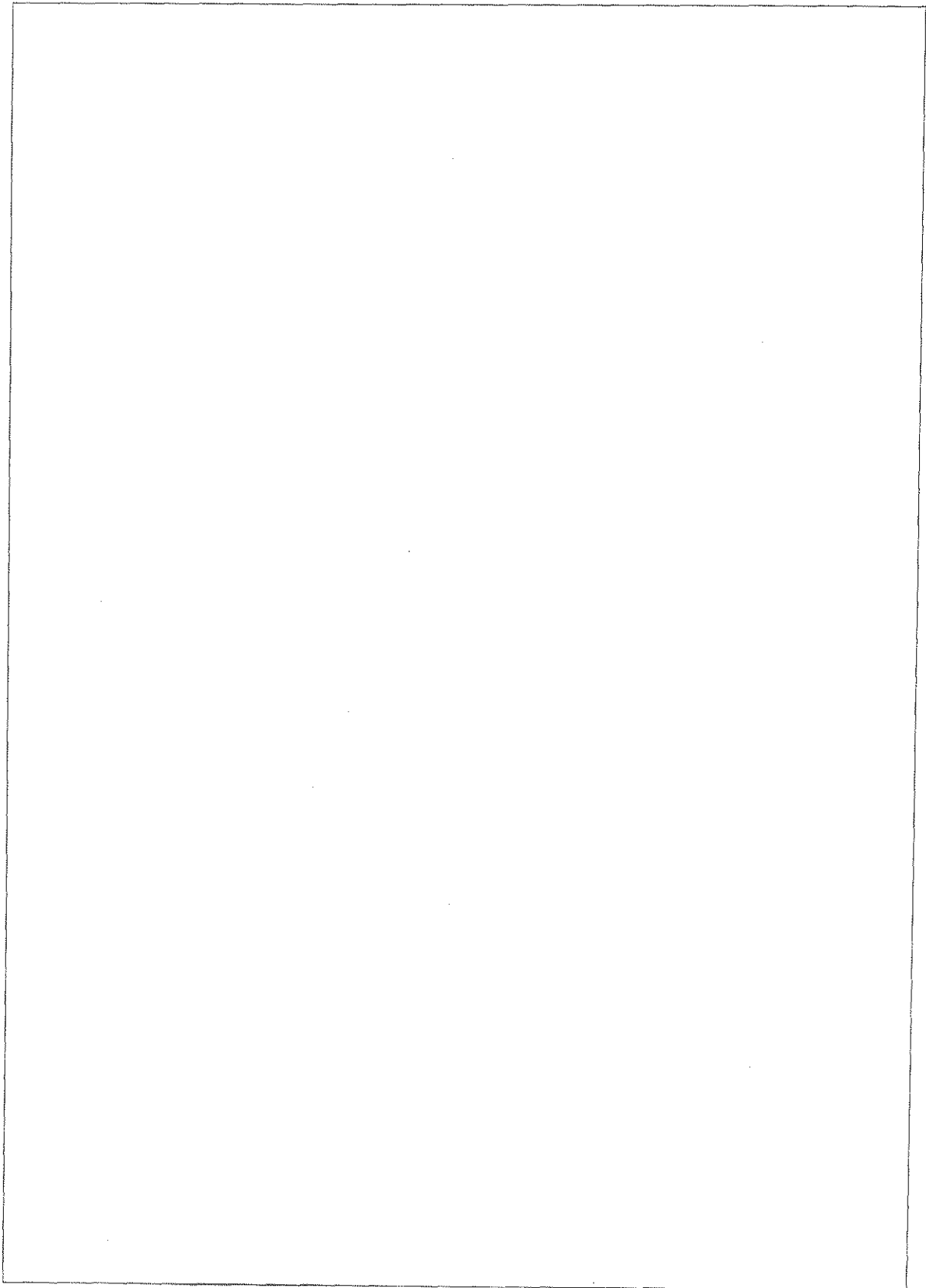
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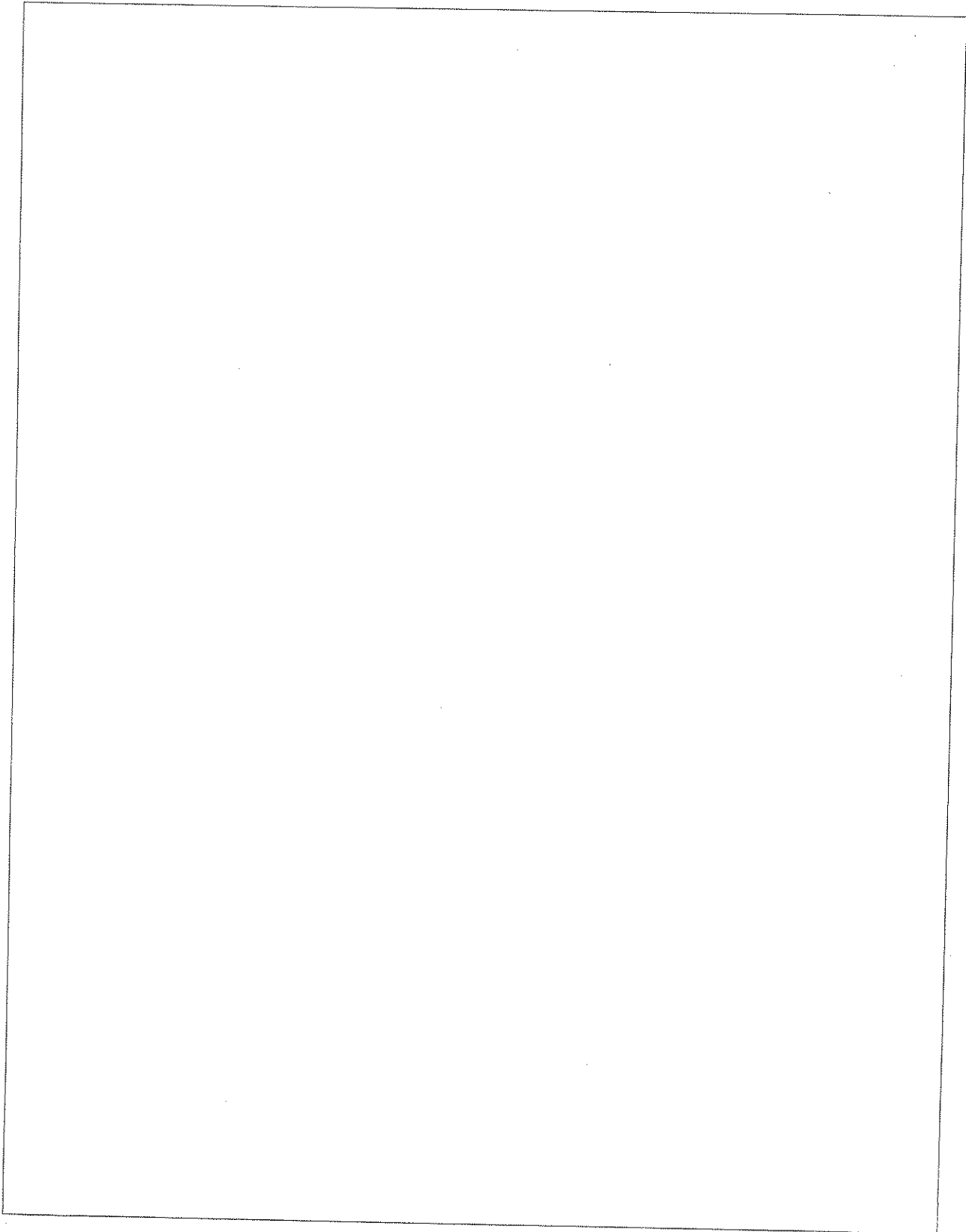


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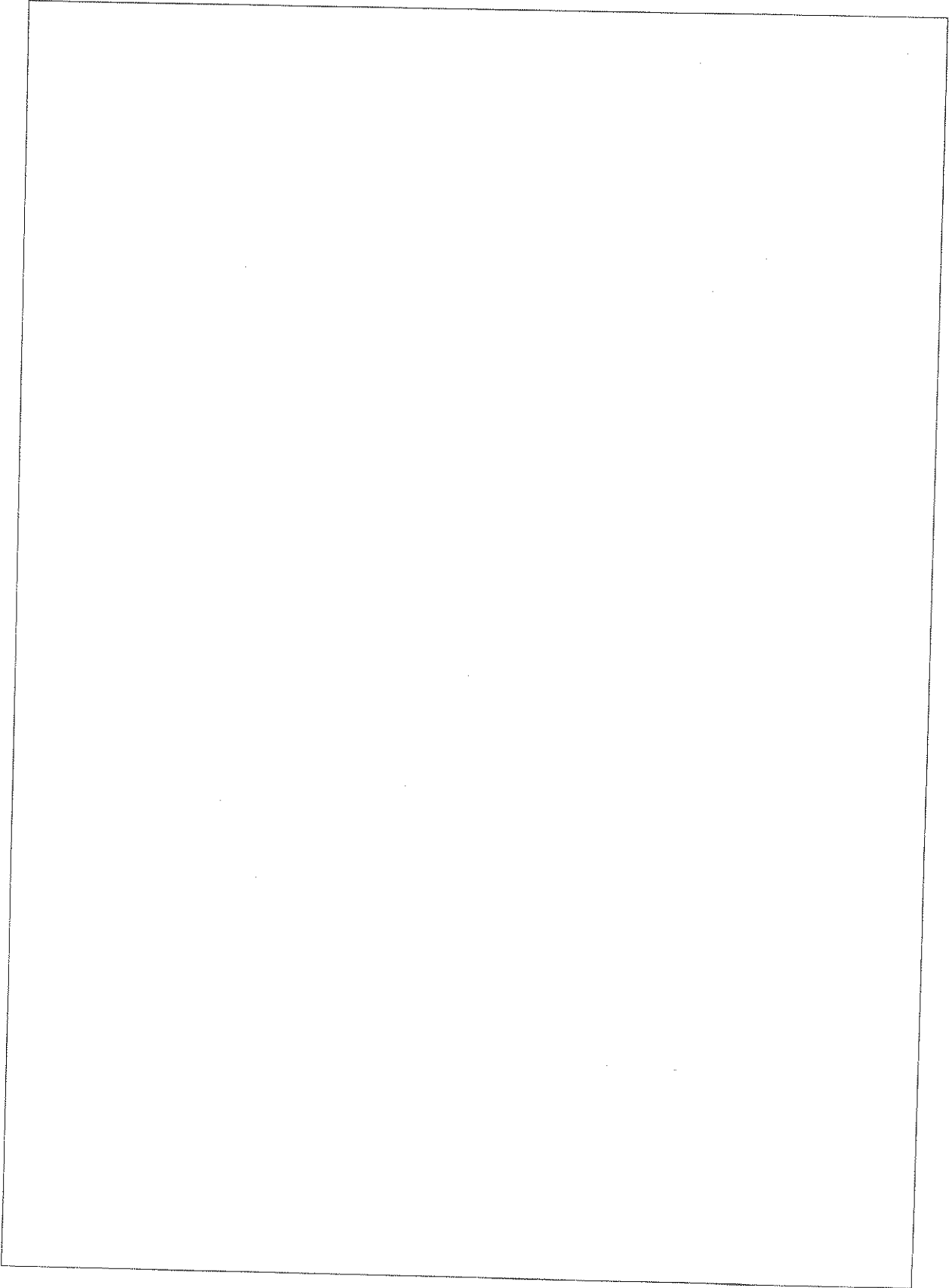
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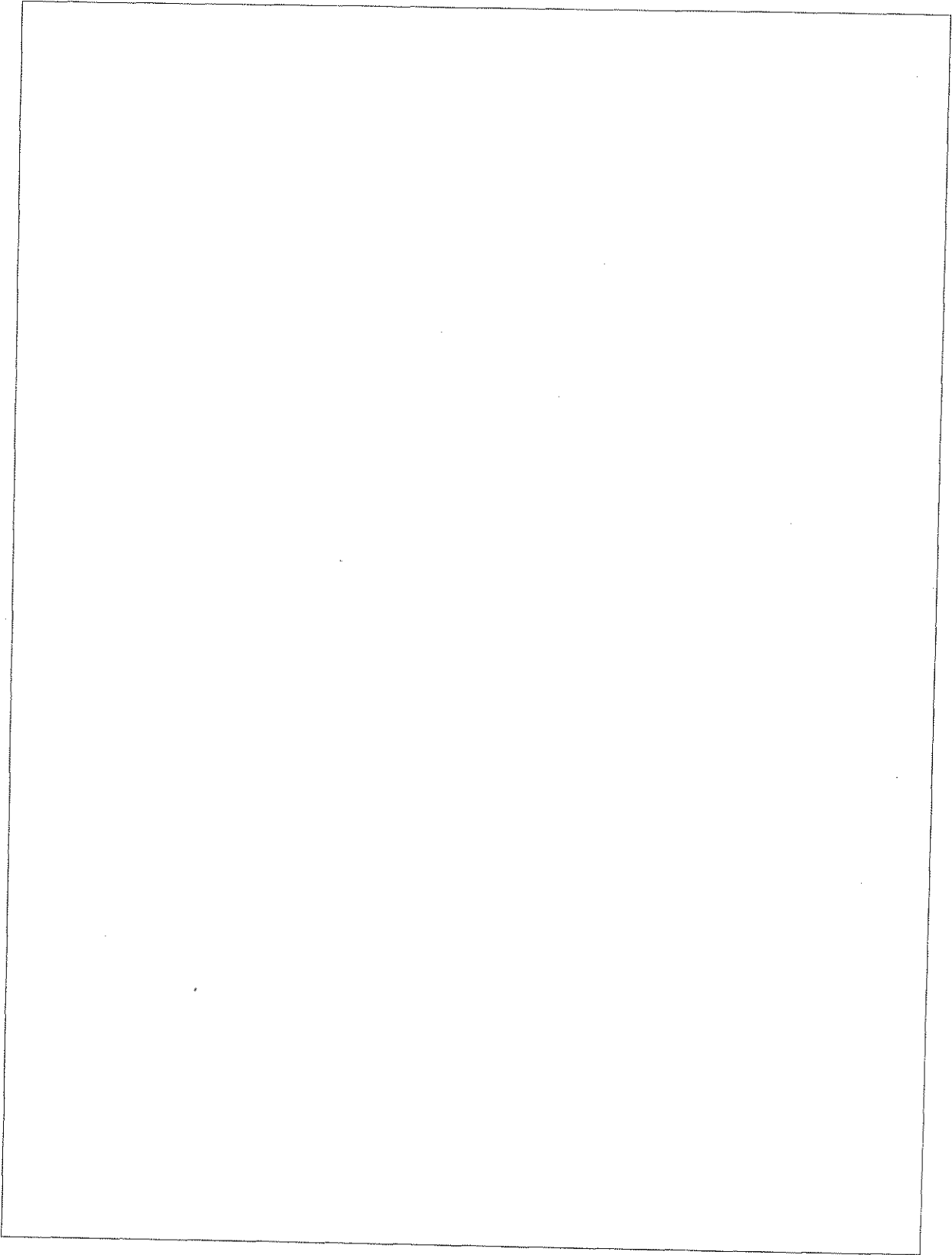
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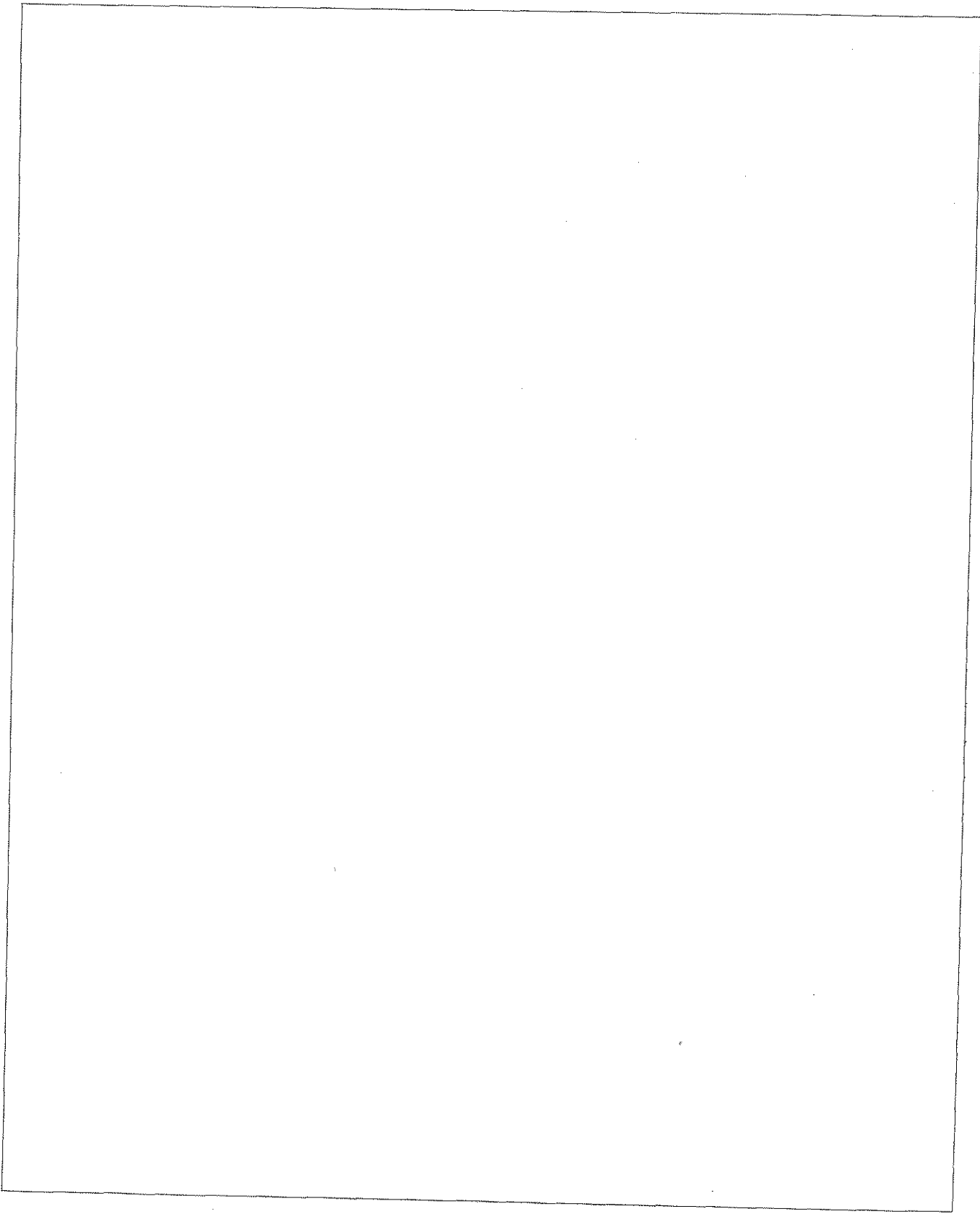
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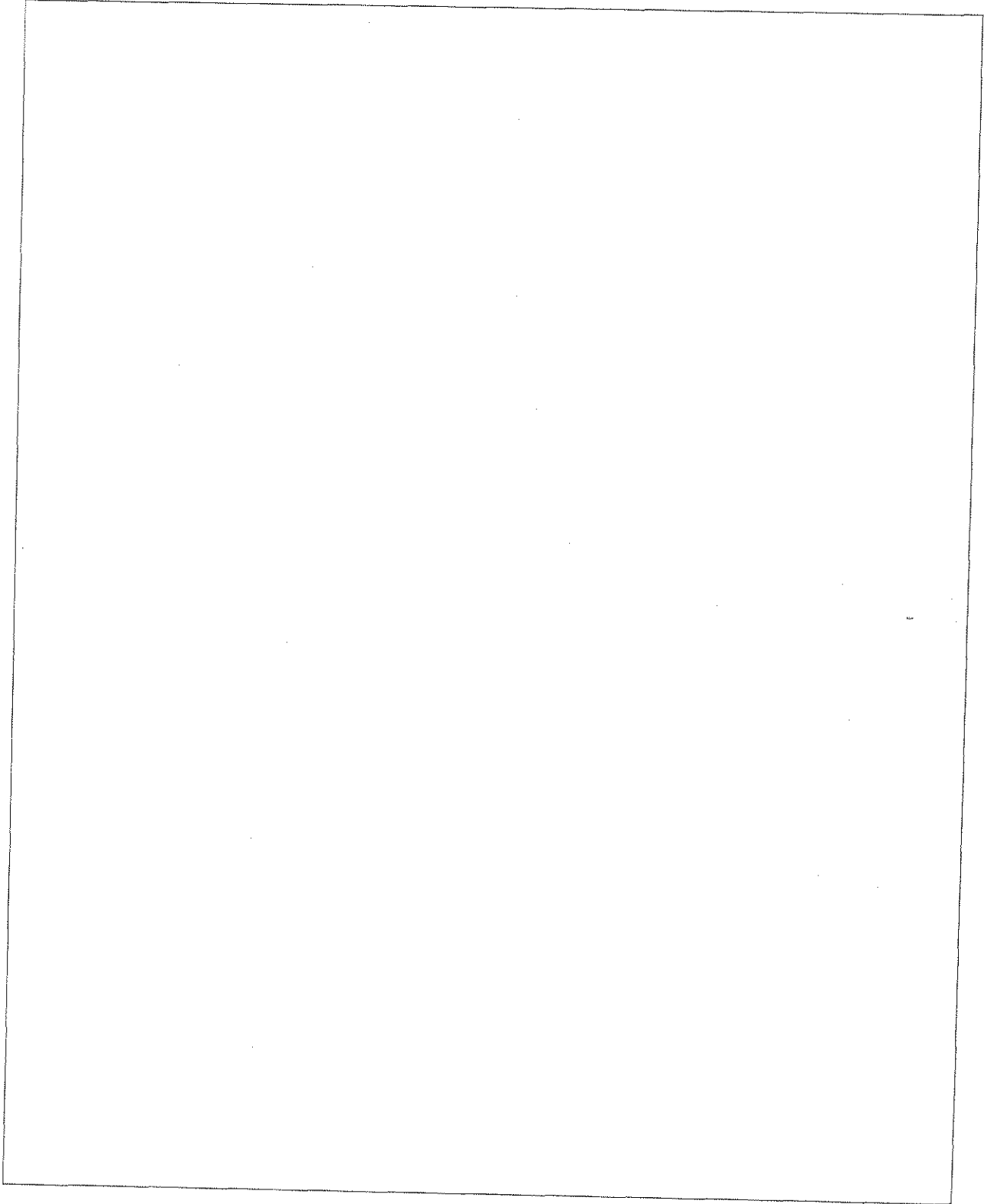
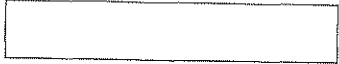
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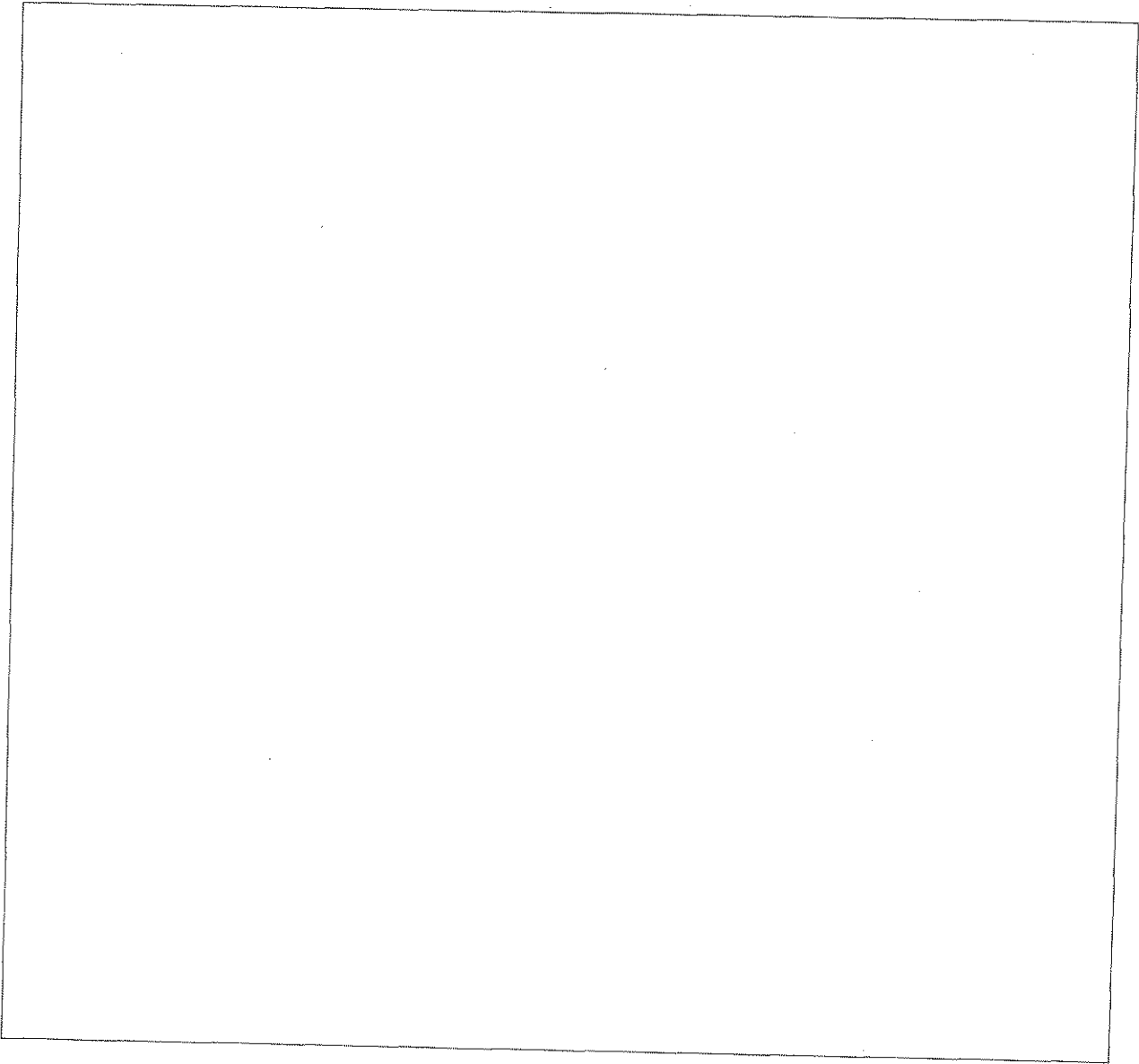
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(U) INSPECTIONS

(U) INSPECTION STAFF OVERVIEW

(U/ [REDACTED]) The Inspection (INS) Staff is responsible for conducting inspections of Agency programs and operations to evaluate their efficiency and effectiveness and their compliance with law, Executive orders, and regulations.

(U/ [REDACTED]) During the current reporting period, the Staff completed inspections of the Office of Asian Pacific, Latin American, and African Analysis (APLAA) in the Directorate of Intelligence (DI); CIA University (CIAU); Europe (EUR) Division in the Directorate of Operations (DO);⁴ Research and Development (R&D) in the CIA; Leadership Analysis in the DI (a follow-up to the Staff's inspection of that issue in 2001); the DI's Senior Analytic Service; and a *Review of CIA's Pre-9/11 Reporting on the Relationship Between Saddam's Regime and al-Qa'ida*, which was mandated by Congress. In addition, the Staff continued its inspection on Agency Performance on North Korea and began inspections of the CounterTerrorism Center (CTC) in the National Clandestine Service (NCS), the DI's Office of Near East and South Asian Analysis, Information Management Services in the Directorate of Support (DS), and Agency Performance on Russia.

(U/ [REDACTED]) The Inspection Staff continues to conduct a two-week course for new inspectors and a seminar for team leaders before the start of each inspection cycle. The Staff also provides instructional seminars for OIG inspectors and research assistants during the course of each cycle, instituted in response to the increasing sophistication of the Staff's methodology.

⁴ (U) While the titles of CIA's directorates and directorate heads recently changed, this section of the report uses the titles in effect at the time that the inspections took place.

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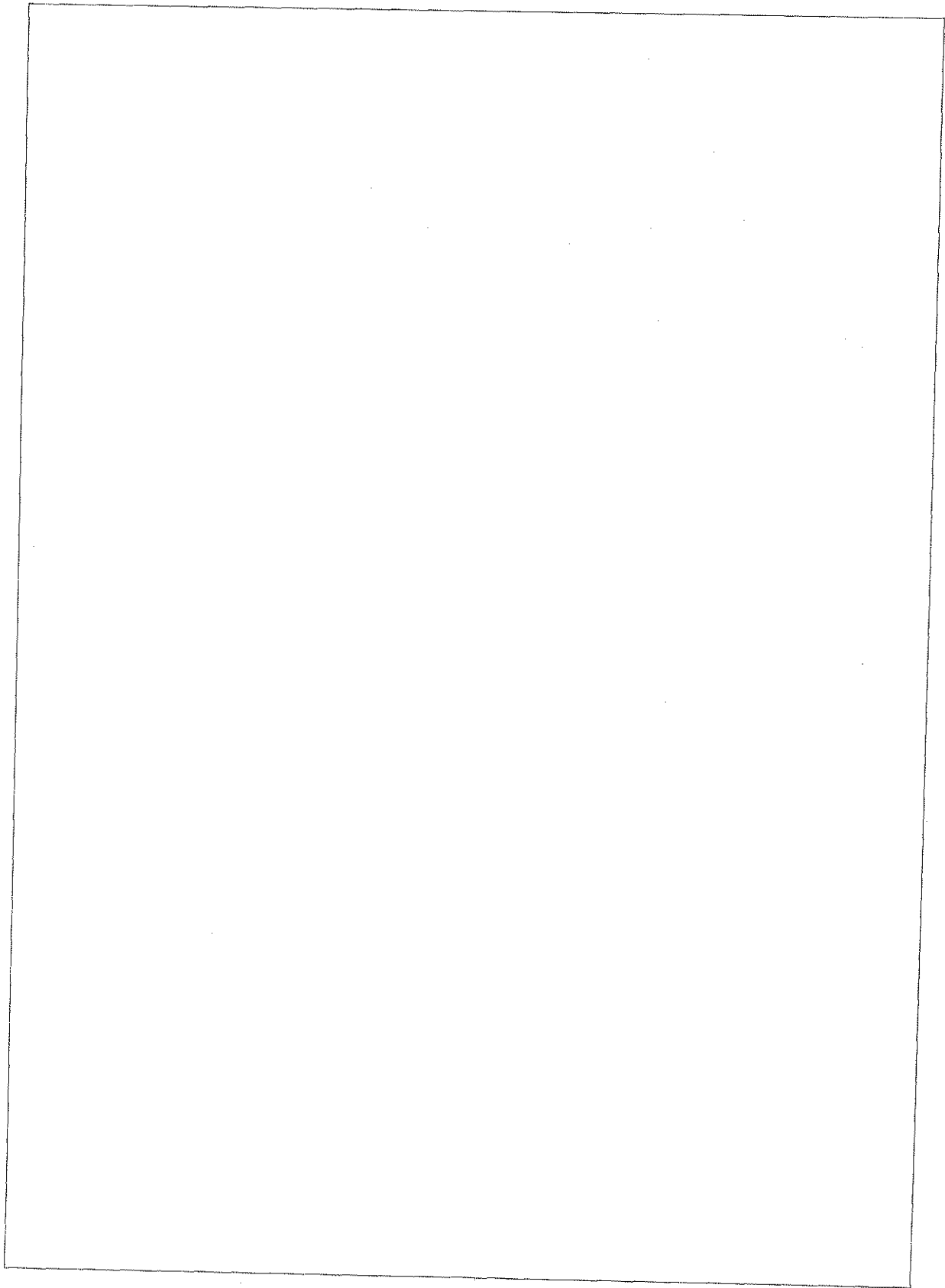
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(U) [redacted] In addition, the Inspection Staff continues to utilize an independent contractor to track, monitor, and pursue compliance with recommendations. The Staff has closed five inspections—Global Support; [redacted] the Office of Transnational Issues in the DI; Director of Central Intelligence (DCI) Center for Weapons Intelligence, Nonproliferation, and Arms Control (WINPAC); and Latin America (LA) Division in the DO — that were open as of 1 July 2005. INS closed the Global Support inspection because the period covered by five semiannual reports has elapsed and several recommendations—none of which are significant—remain unsatisfied.



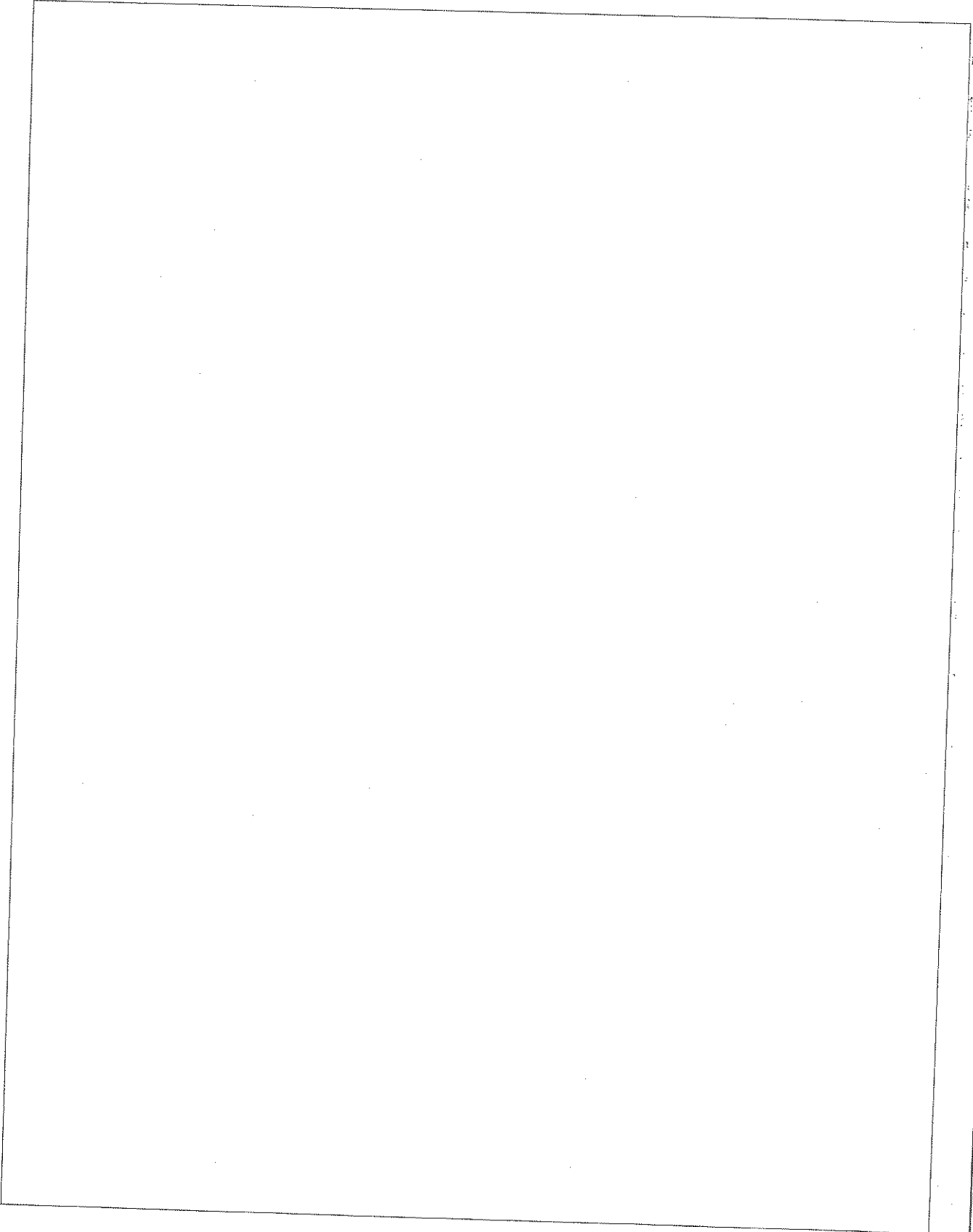
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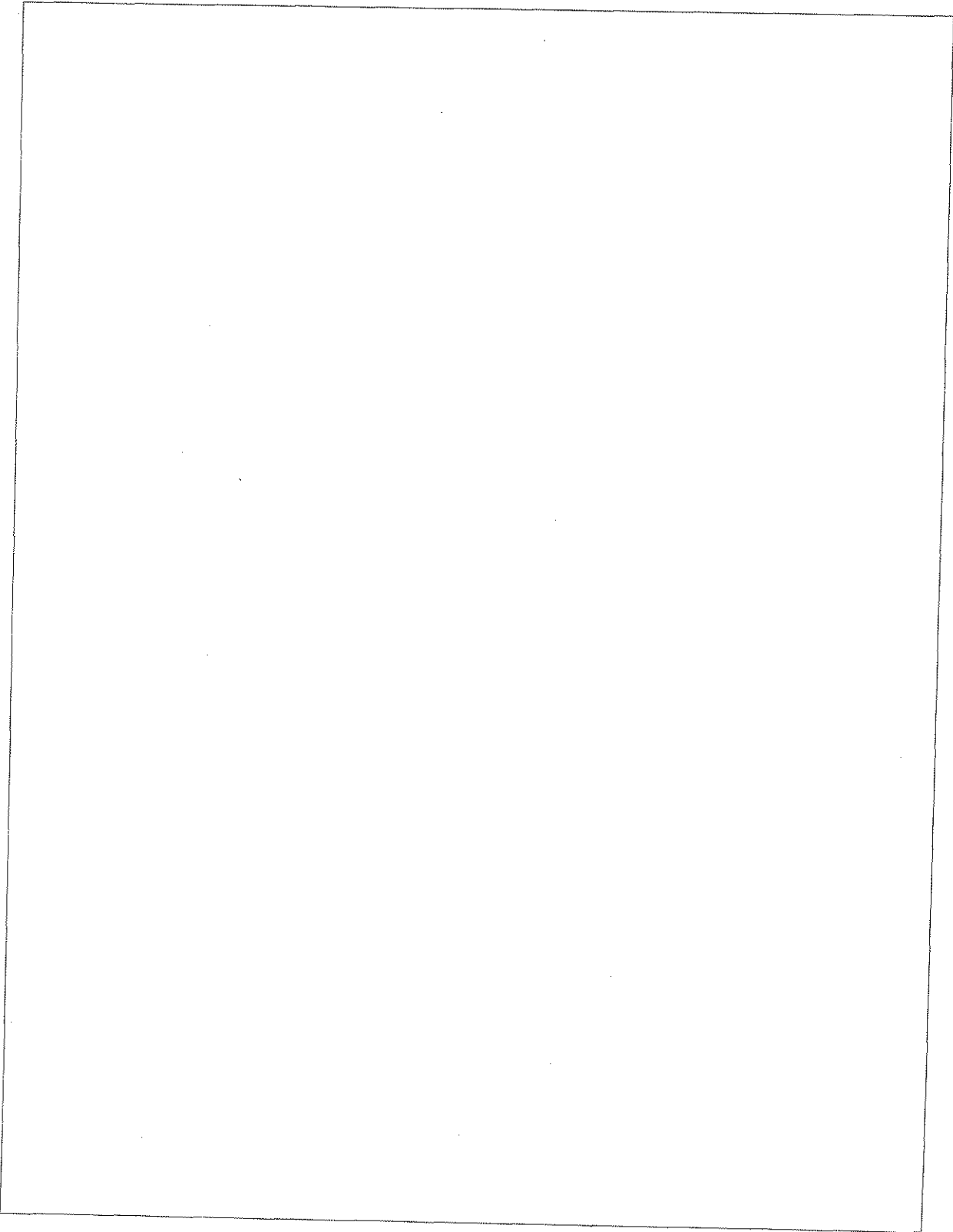


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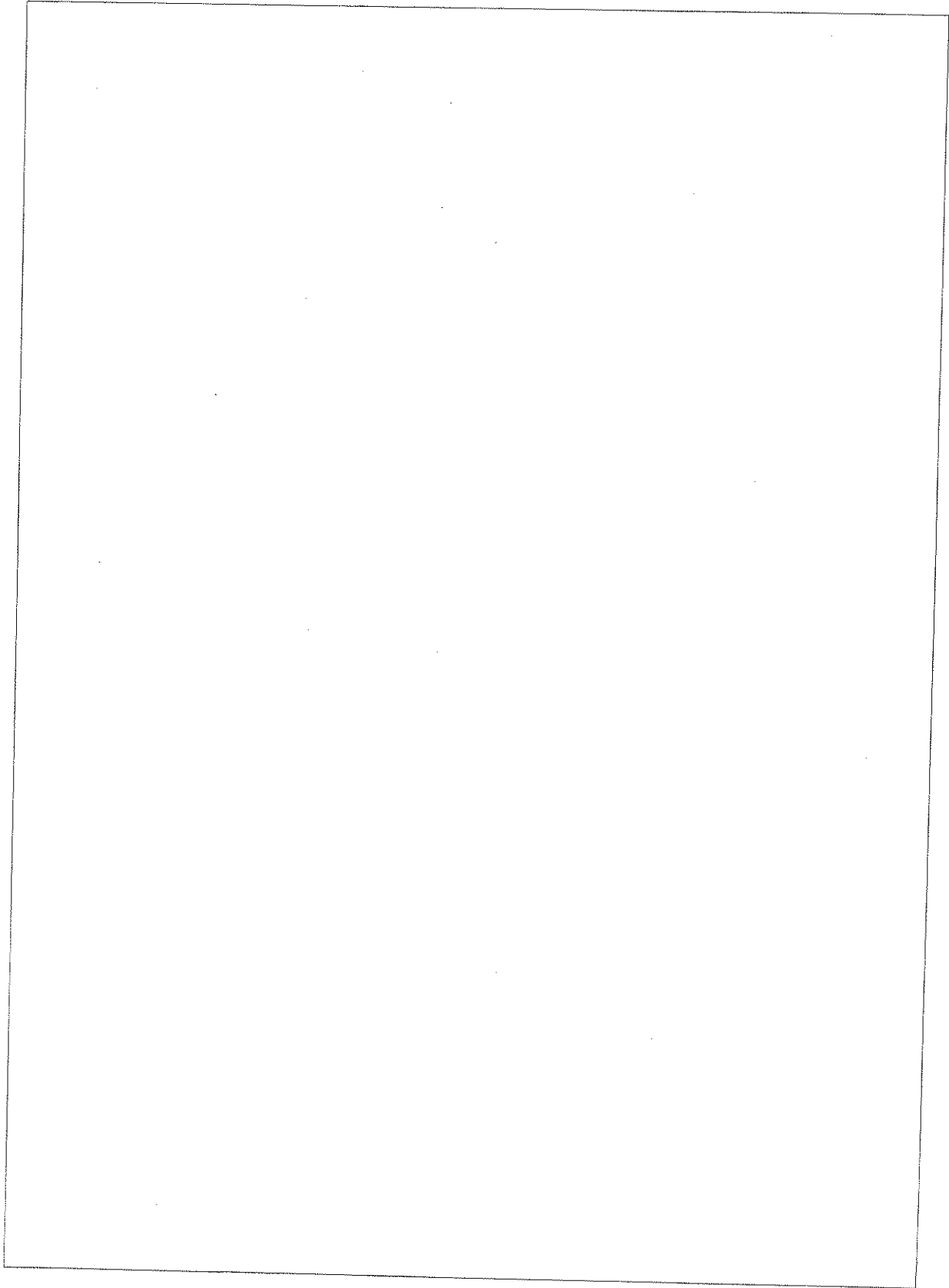
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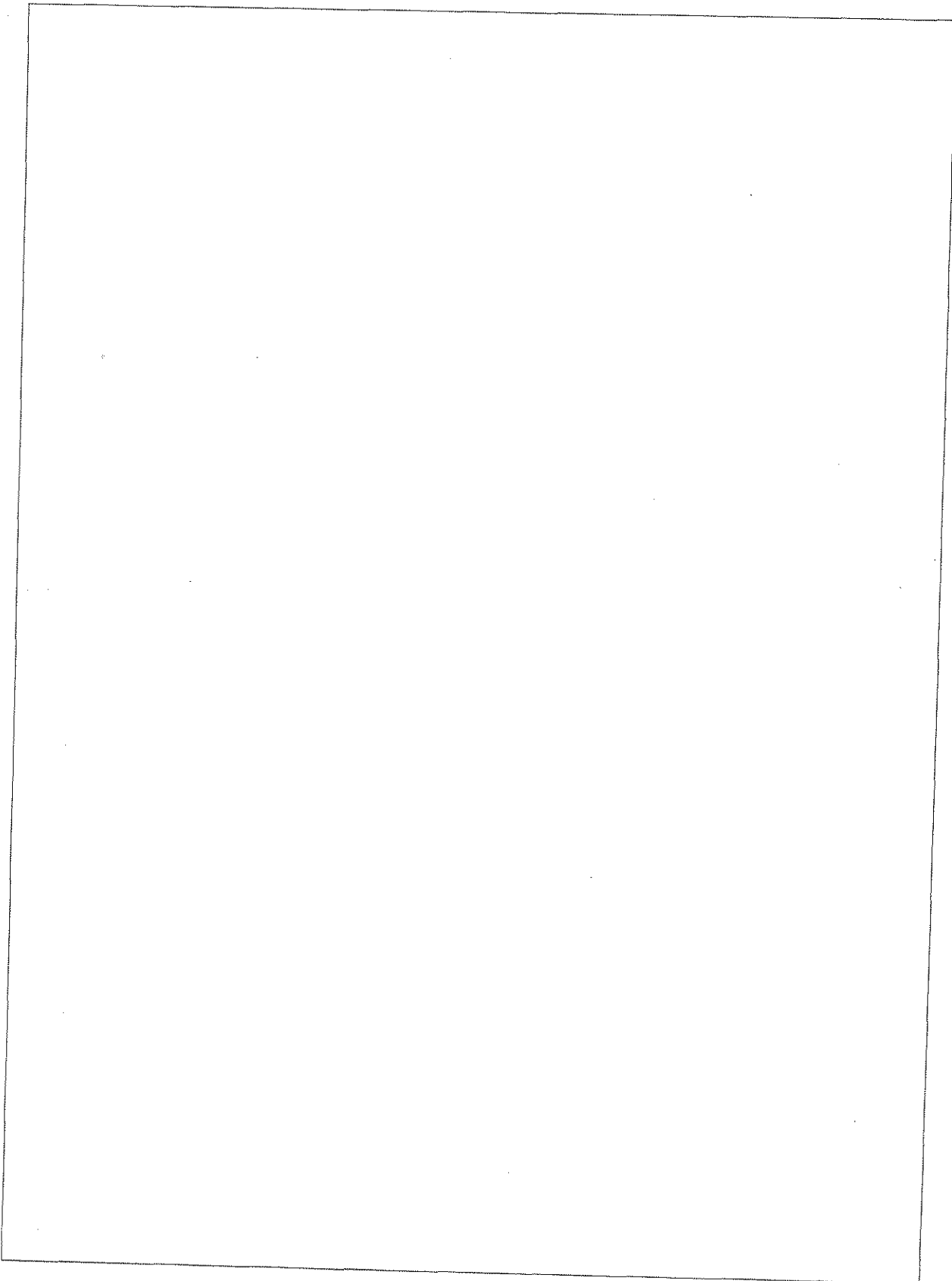
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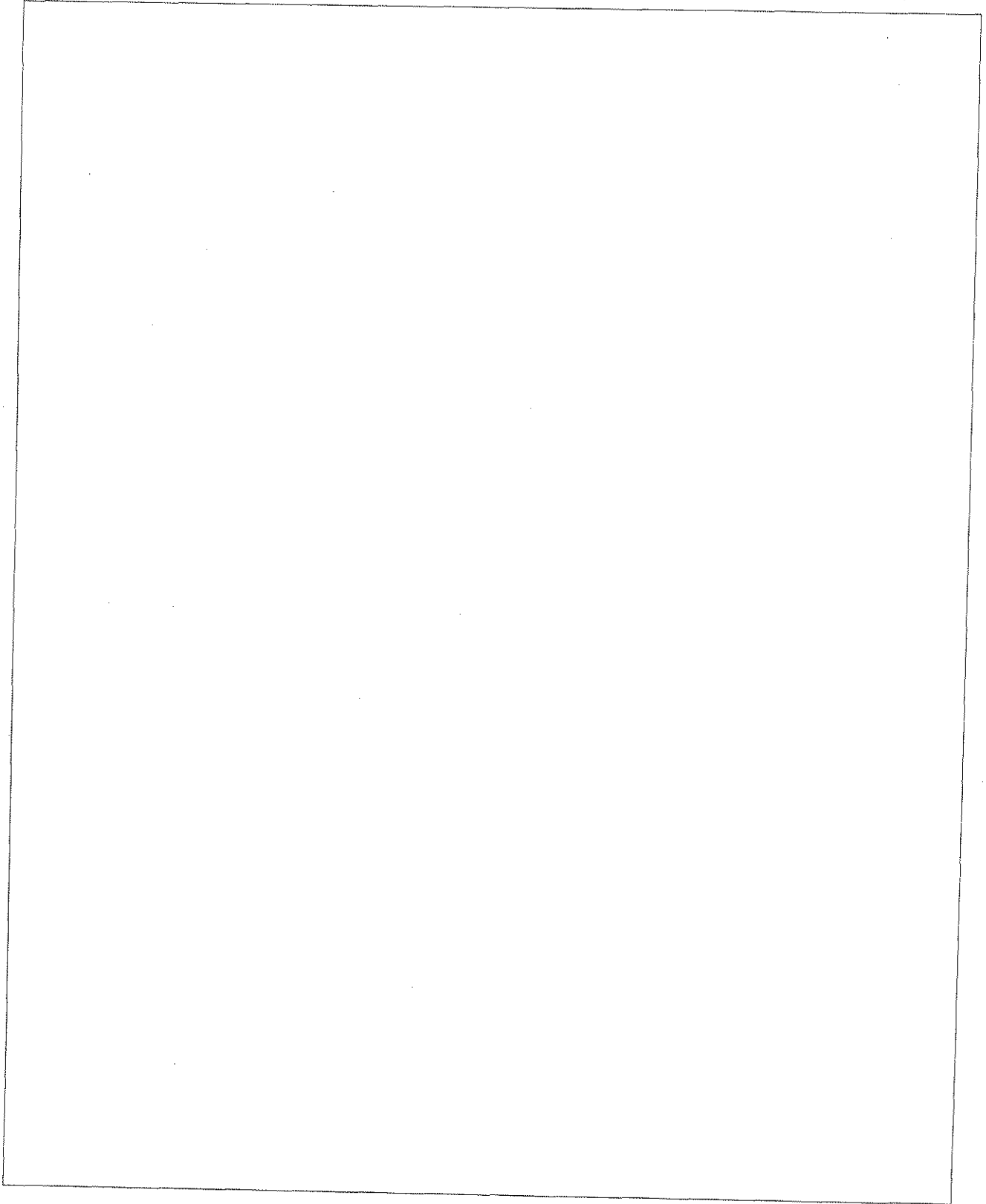
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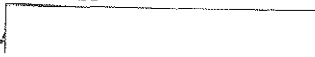
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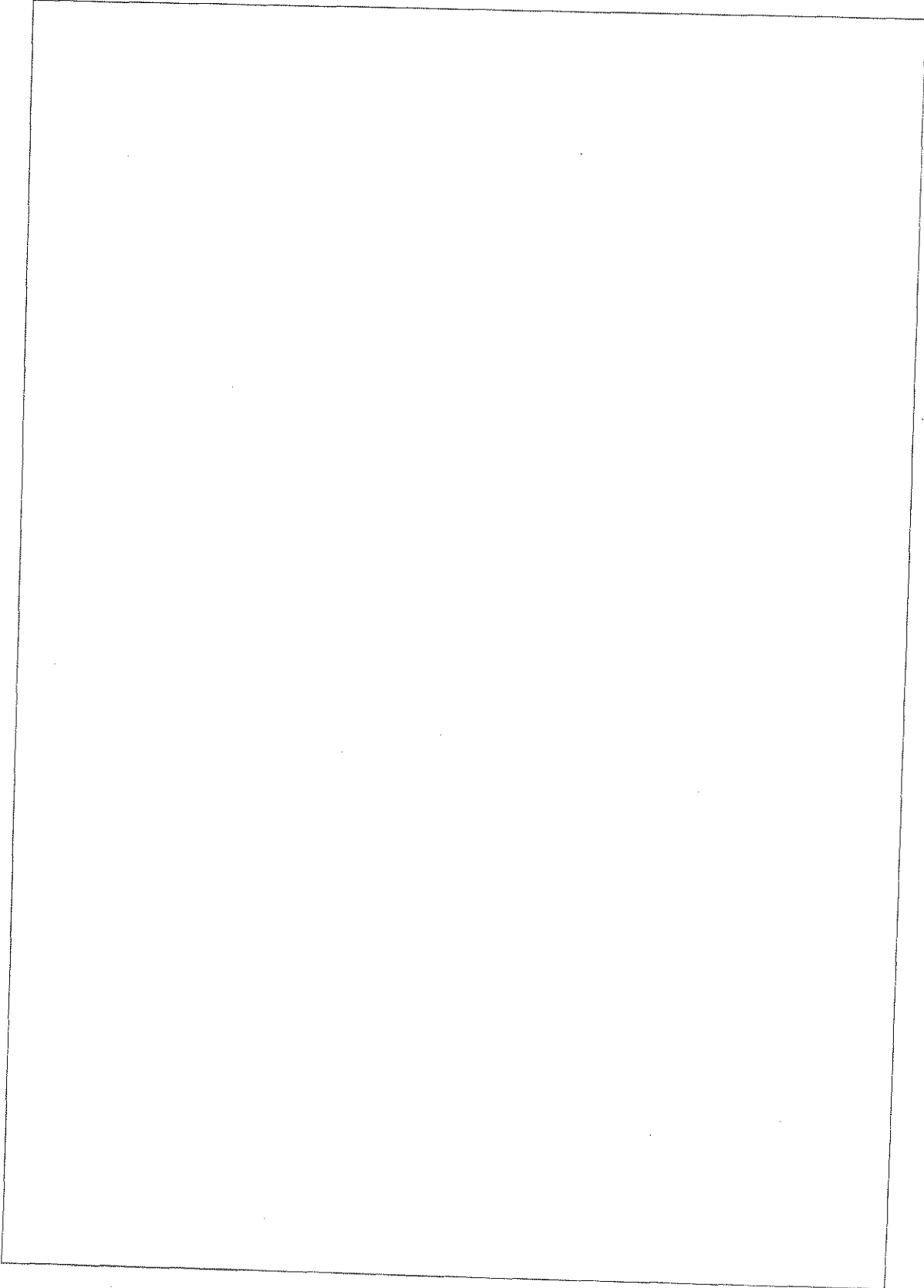
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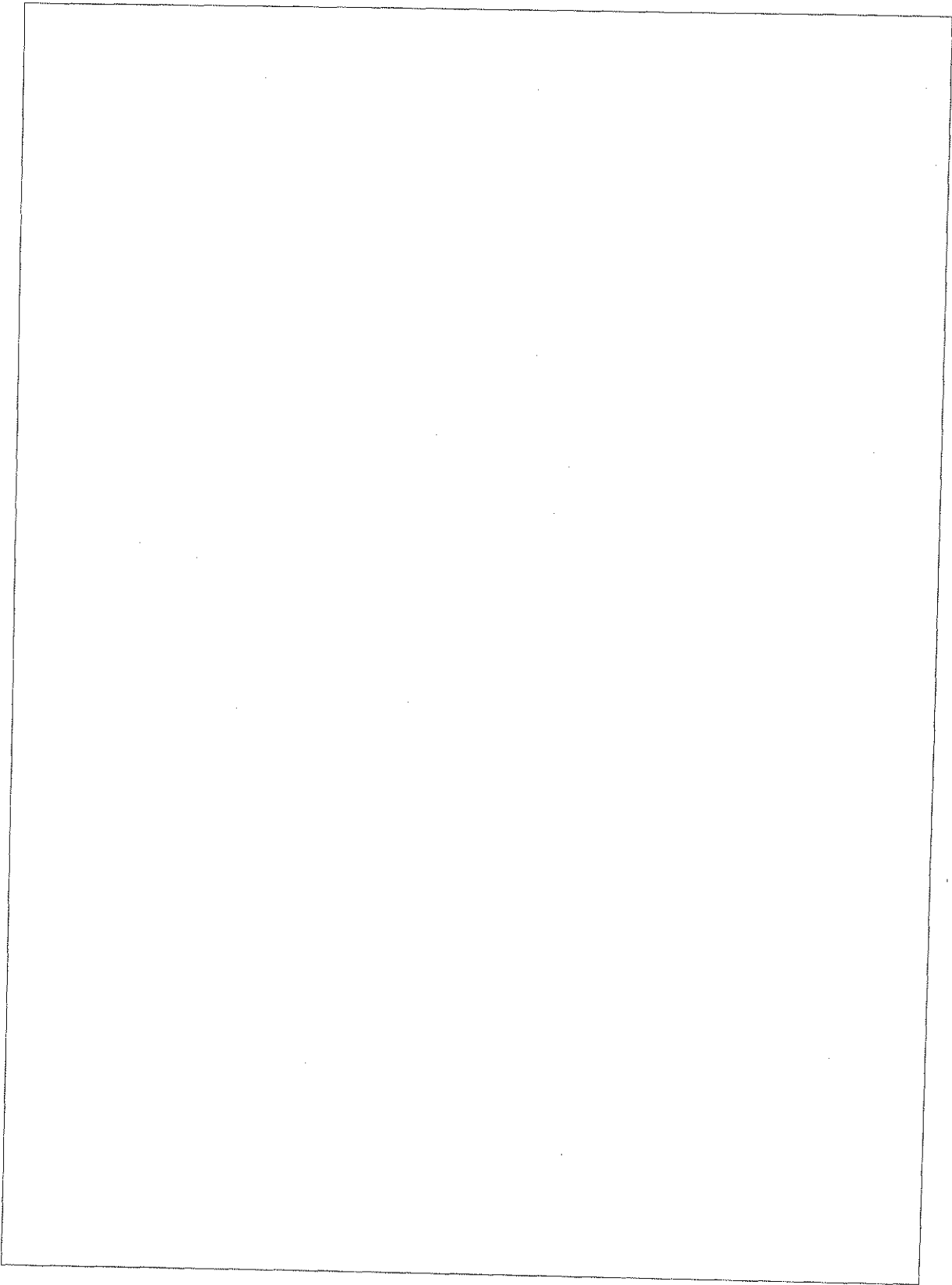
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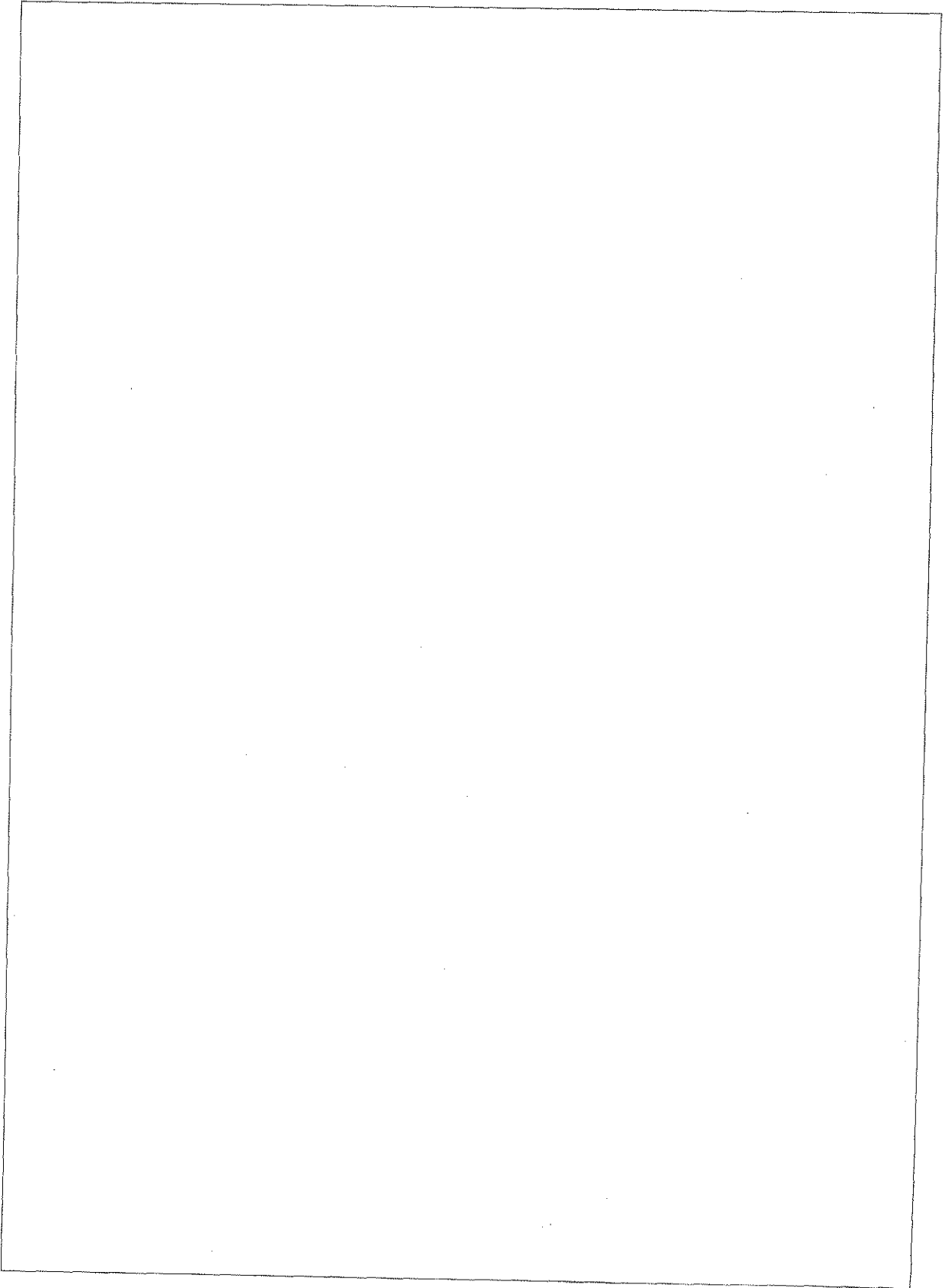
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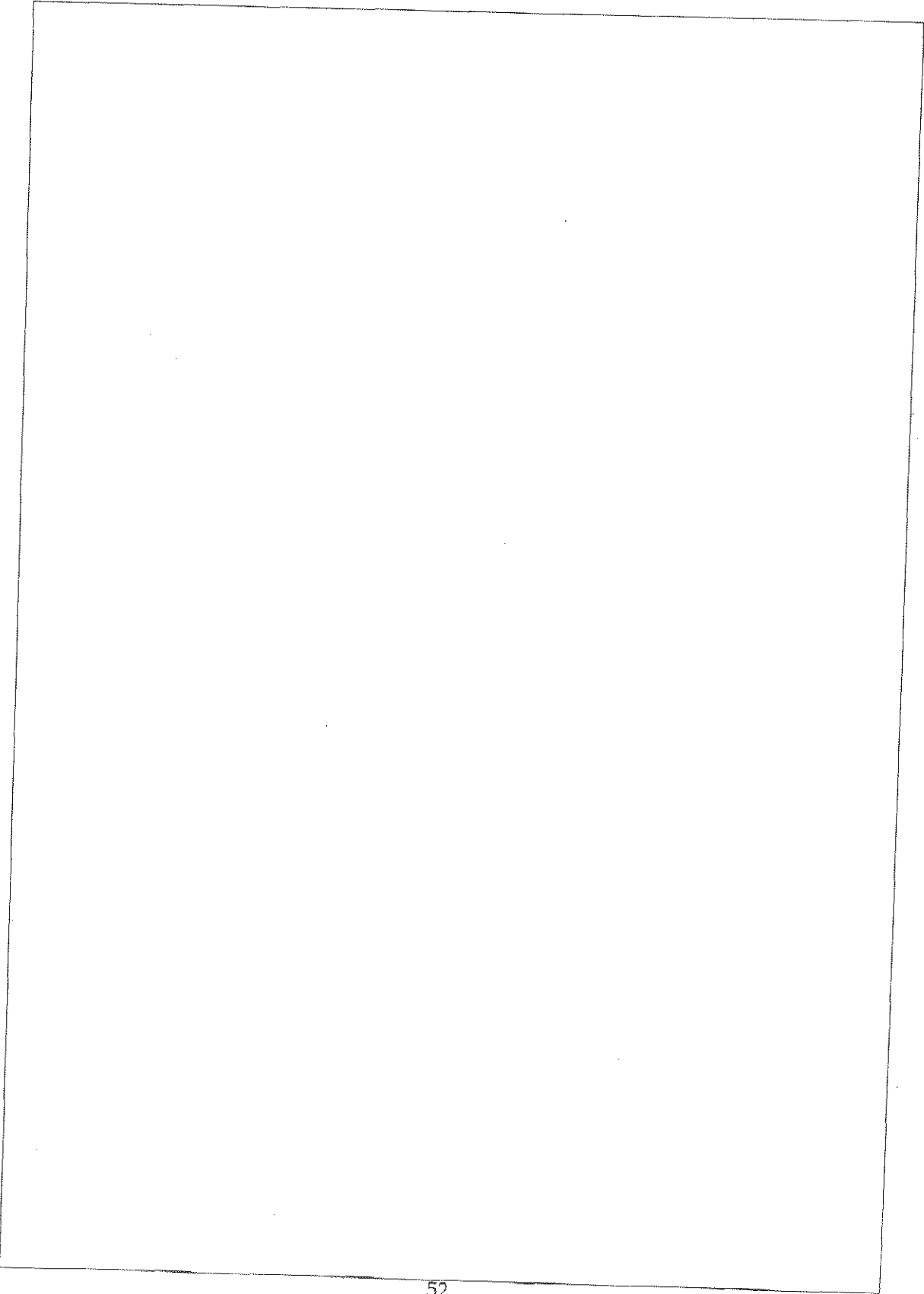
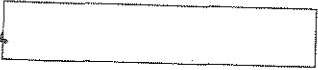
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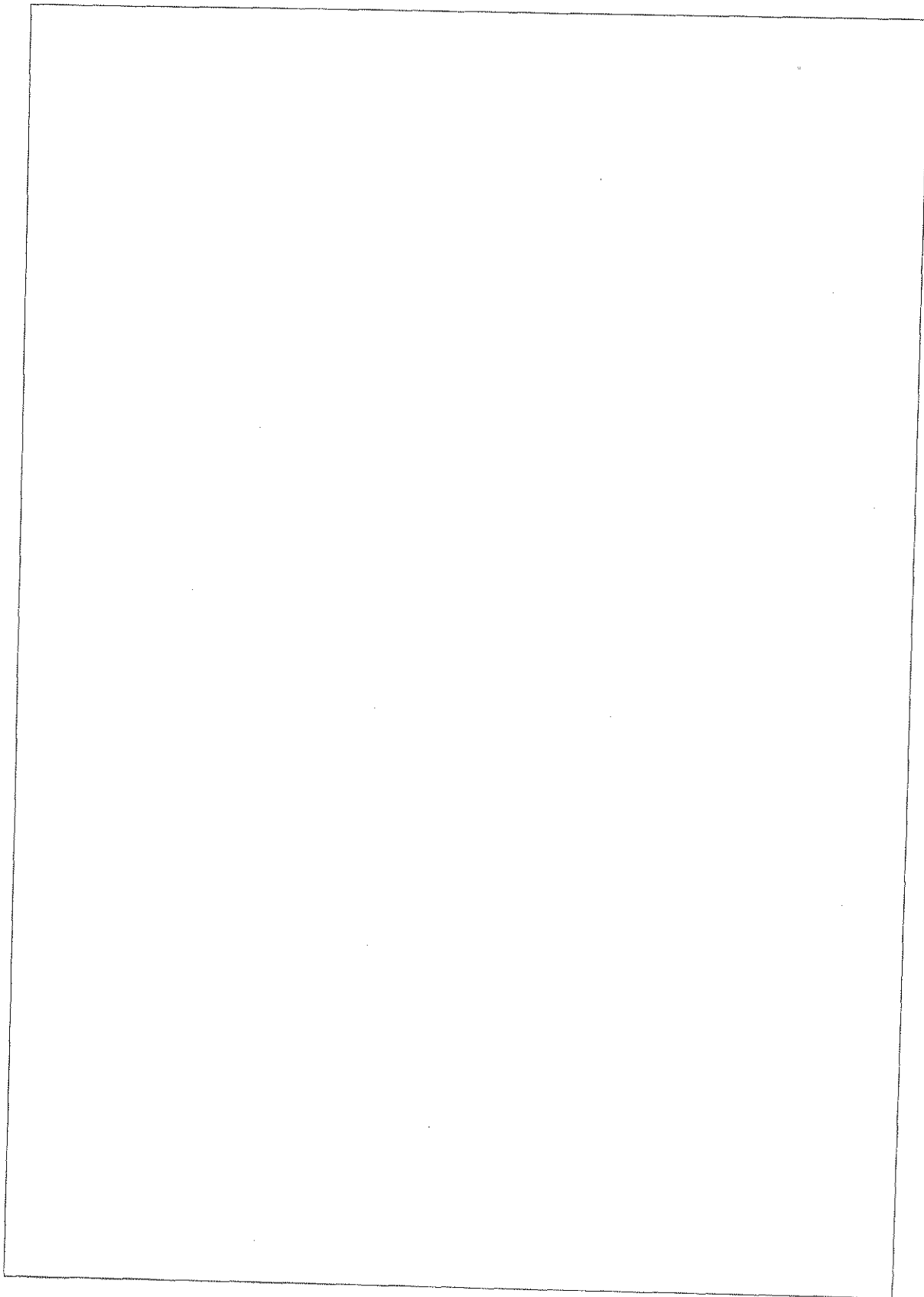
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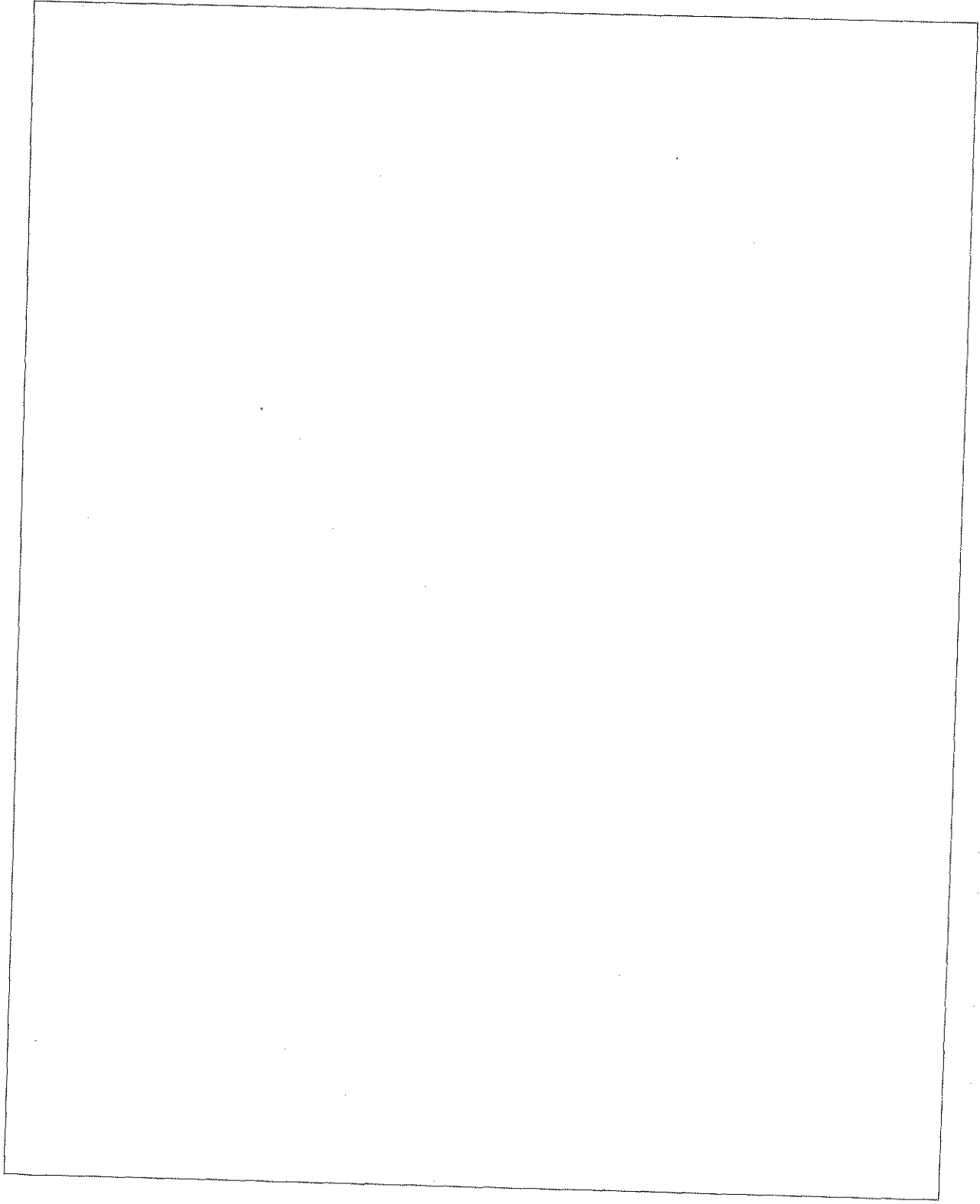
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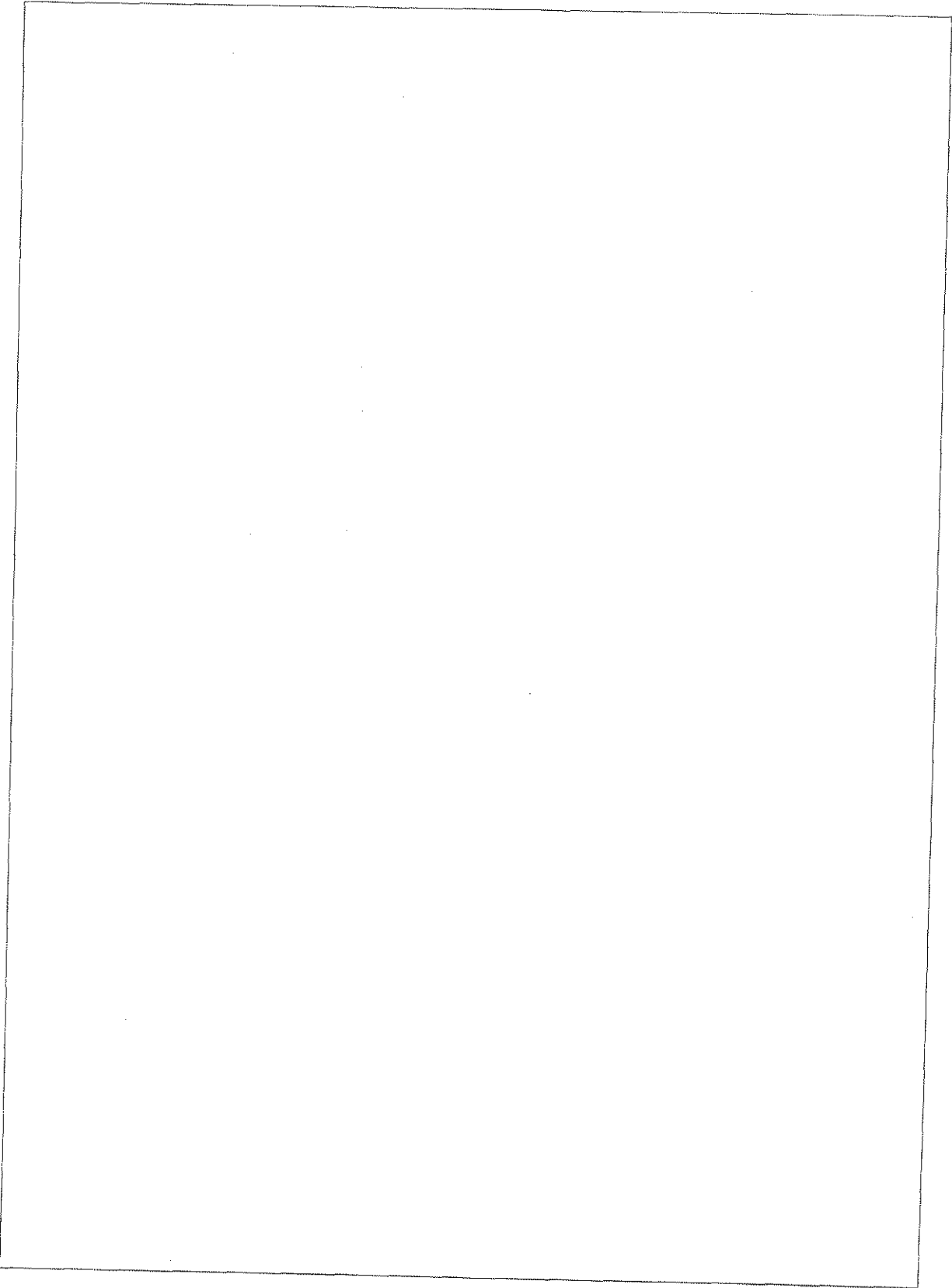


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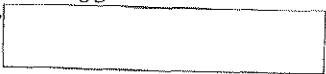


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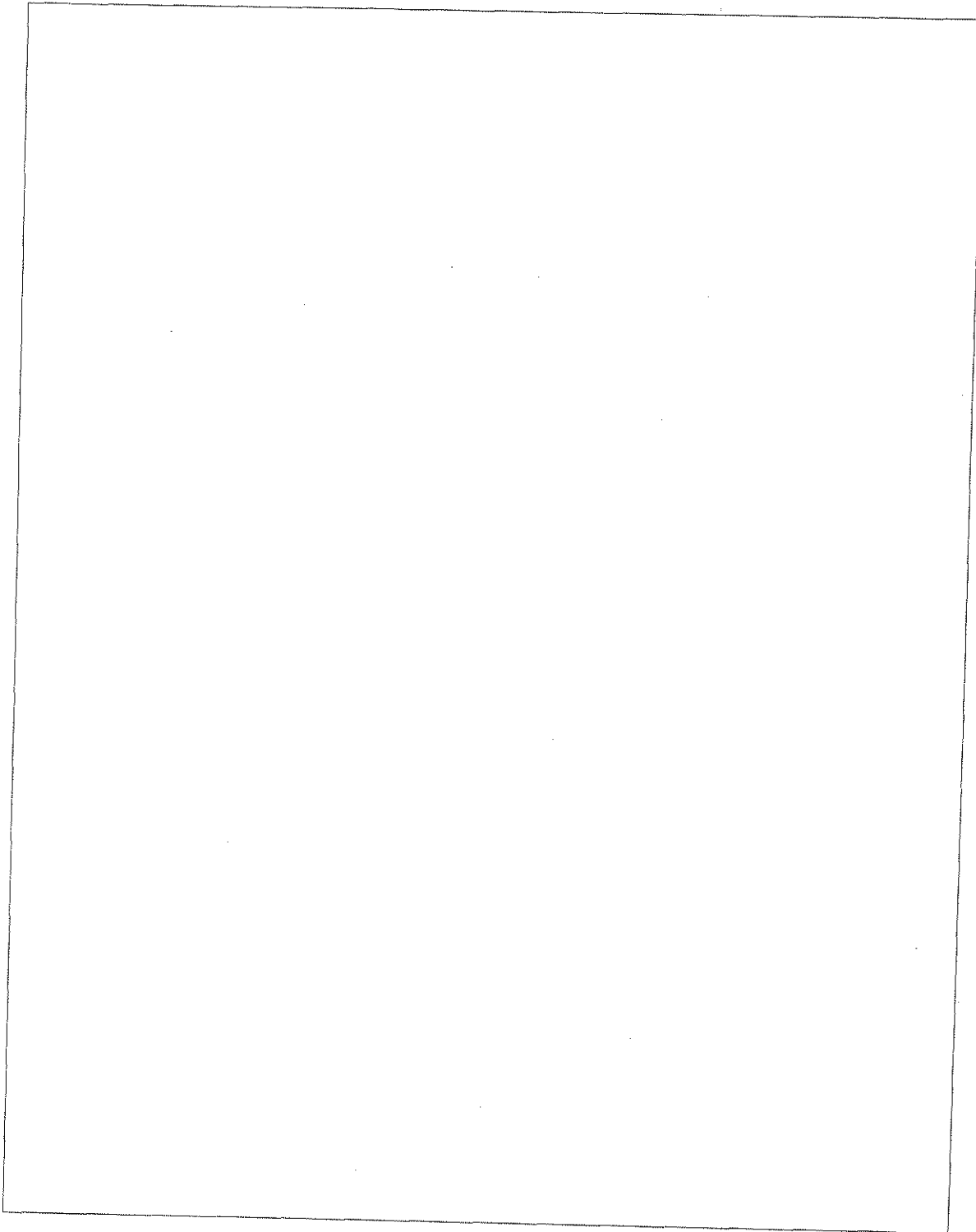
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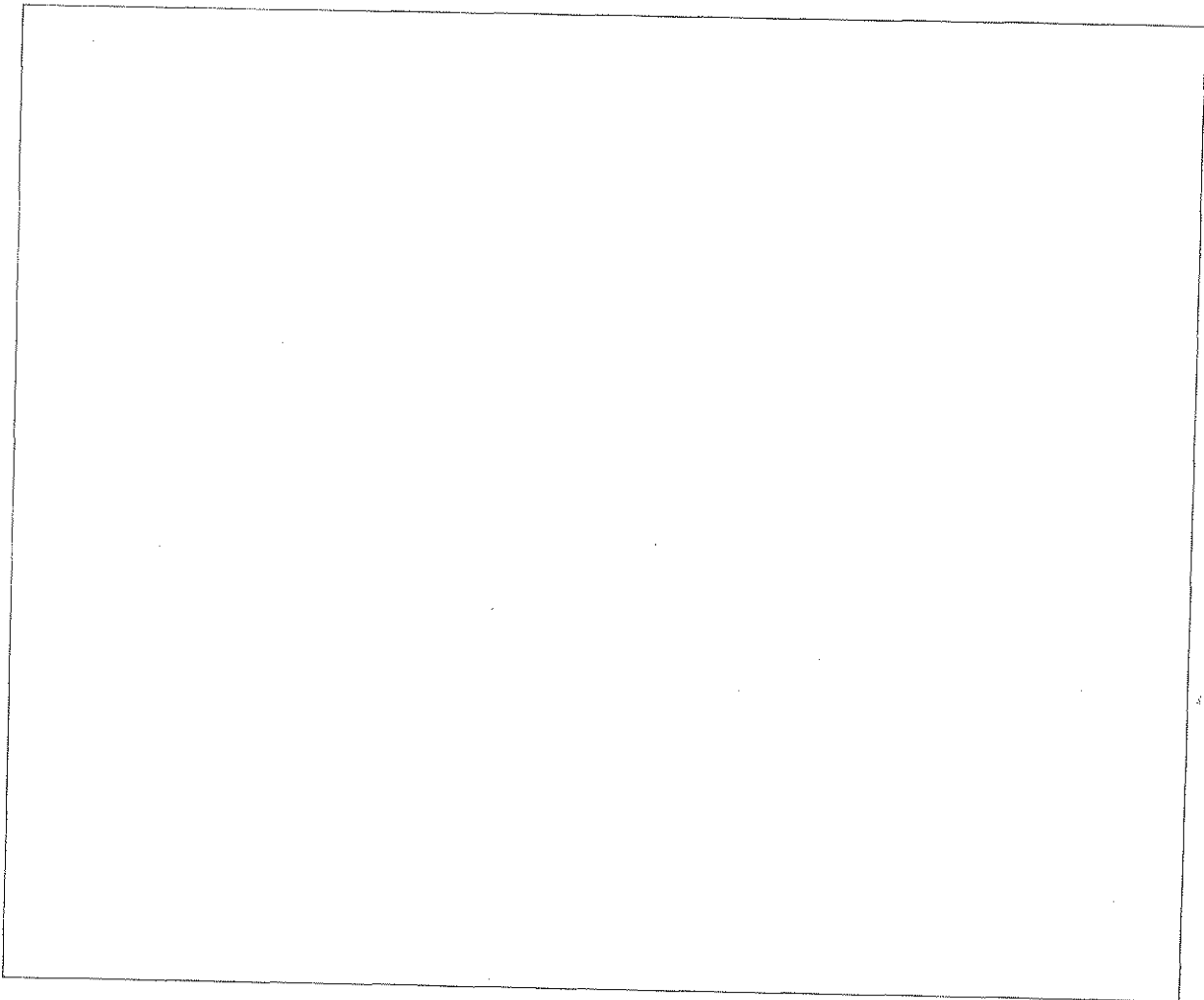
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(U) INVESTIGATIONS

(U) INVESTIGATIONS STAFF OVERVIEW

(U/ [REDACTED]) The Investigations Staff investigates possible violations of statutes, regulations, policies, and procedures, as well as allegations of waste, fraud, mismanagement, abuse of authority, and substantial dangers to public health and safety related to Agency programs and operations. The Staff oversees the Agency's grievance system and conducts proactive initiatives aimed at detecting and preventing fraud, waste, and abuse.

[REDACTED] A majority of the Staff's personnel continue to be devoted to resource-intensive investigations concerning detention and interrogation activities in Iraq, Afghanistan, and elsewhere. These investigations focus on the circumstances surrounding the detention, movement, confinement, and alleged abuse of detainees. Two investigations completed in this period concerned the

[REDACTED] Other ongoing investigations are being conducted in conjunction with the Departments of Defense and Justice, as appropriate. The trial of a former Agency contractor indicted on four felony counts of assault of a detainee, who died, has been rescheduled for early 2006. This matter is the first US prosecution of a civilian for abuses committed in Afghanistan. The Inspector General regularly informed the Congressional oversight committees of progress in these investigations.

(U/ [REDACTED]) The Staff conducted a range of other investigations, including allegations of fraud by employees and contractors, possession of child pornography, misuse of a government intelligence collection system, unauthorized shipments of firearms, misappropriation of funds, and false statements and claims. Judicial proceedings are under way in several cases. The

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Staff, additionally, tracks the progress by Agency components in fulfilling outstanding recommendations from completed investigations.

(U/ [REDACTED]) As a result of Staff investigations, one employee reimbursed the government \$8,800 for embezzlement of funds after the Department of Justice (DoJ) declined prosecution. Another employee reimbursed \$4,500 for receipt of duplicate funds for academic training. In a third case involving civil service annuity fraud investigated in conjunction with the Office of Personnel Management (OPM) OIG, the government recovered \$107,958. In a fourth case, the government recovered \$45,045 for unauthorized cell phone calls. In two other cases, a contractor reimbursed the government \$11,217 for hours mischarged by an employee and an independent contractor made reimbursement of \$10,724 for mischarged hours.

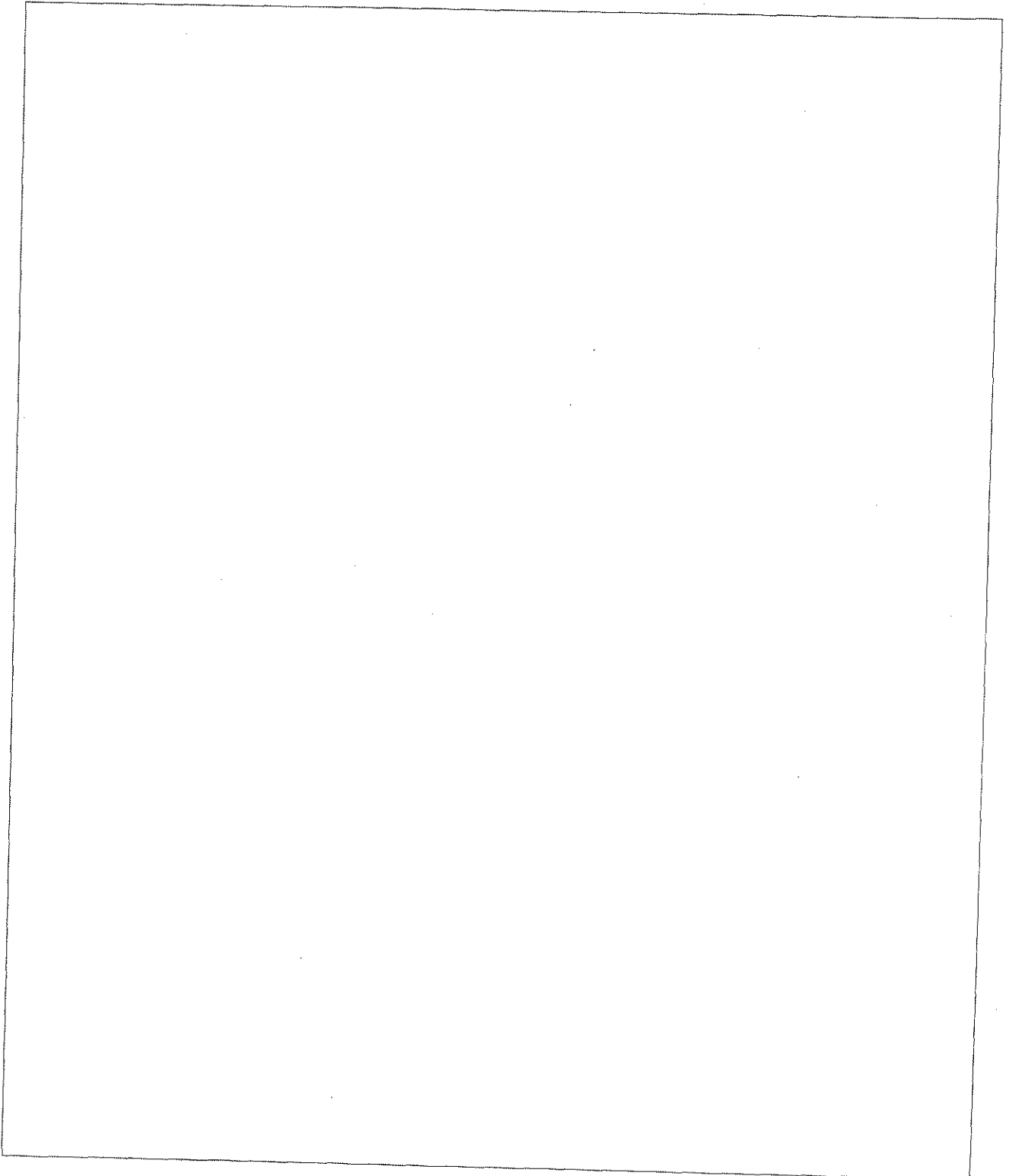
(U/ [REDACTED]) As the Staff's workload continues to expand, it has hired three experienced Agency officers as investigators and has issued conditional offers of employment to six other individuals with Federal law enforcement experience. Staff recruitment remains a priority. Advancing the information technology arena remains an equally critical priority for the Staff, as it seeks to identify and deploy software to manage its workflow and organize and search the voluminous records received in investigations. Outreach efforts—in the form of regularly scheduled lectures at CIA and Intelligence Community courses and liaison with other Federal Assistant Inspectors General for Investigation—continued to reap positive benefits.

(U/ [REDACTED]) The Staff continues to oversee the Agency-wide grievance system, which seeks to resolve grievances at the lowest possible level in the organization. In addition to sponsoring a yearly grievance counselor workshop for component and directorate grievance officers, the Staff hosts quarterly meetings of grievance officers to share issues of common interest, and it conducts mandatory training for all new grievance officers. This training,

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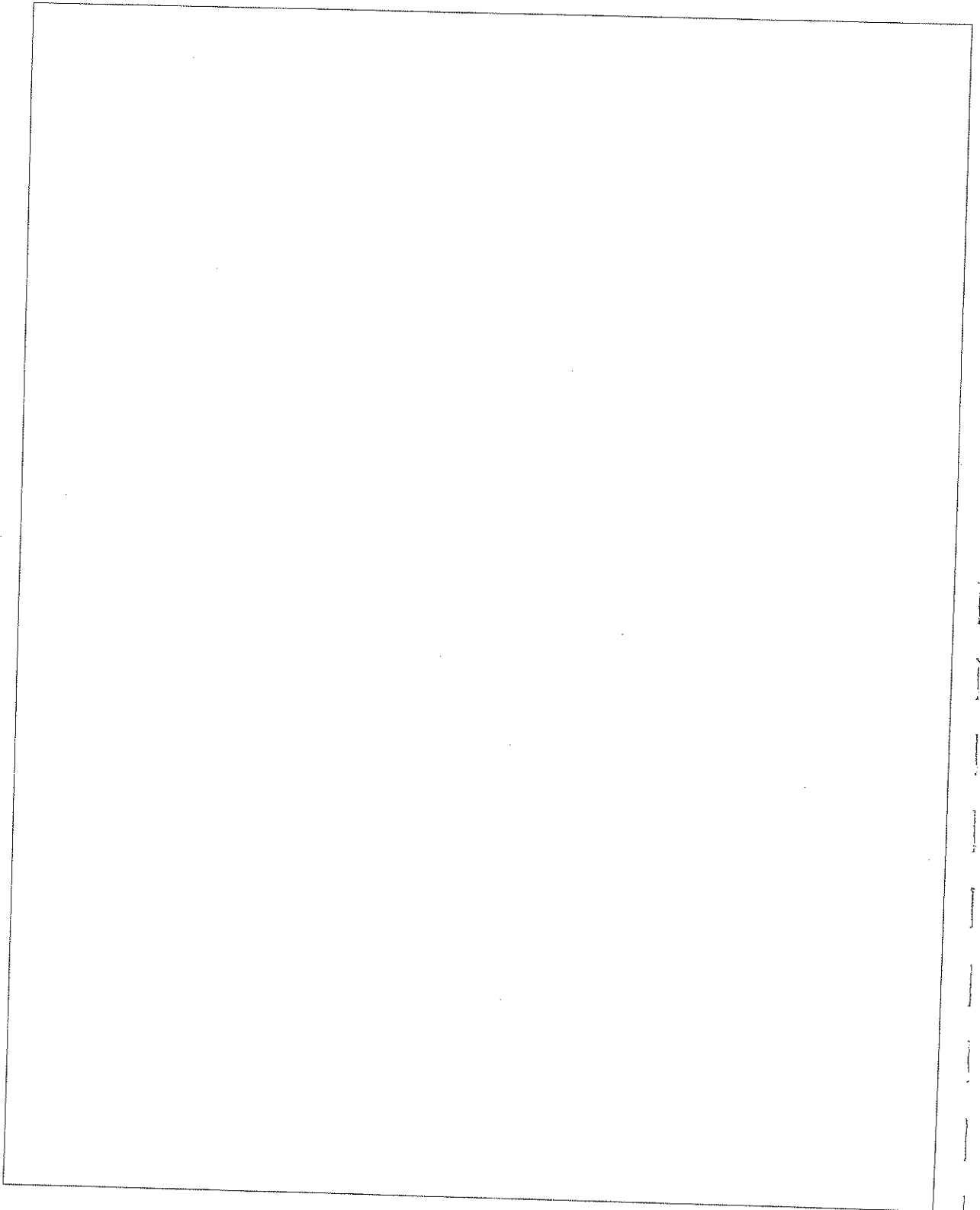
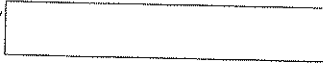
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together with the emphasis on resolution at the lowest possible level,
continues to contribute to effective and timely grievance resolution.



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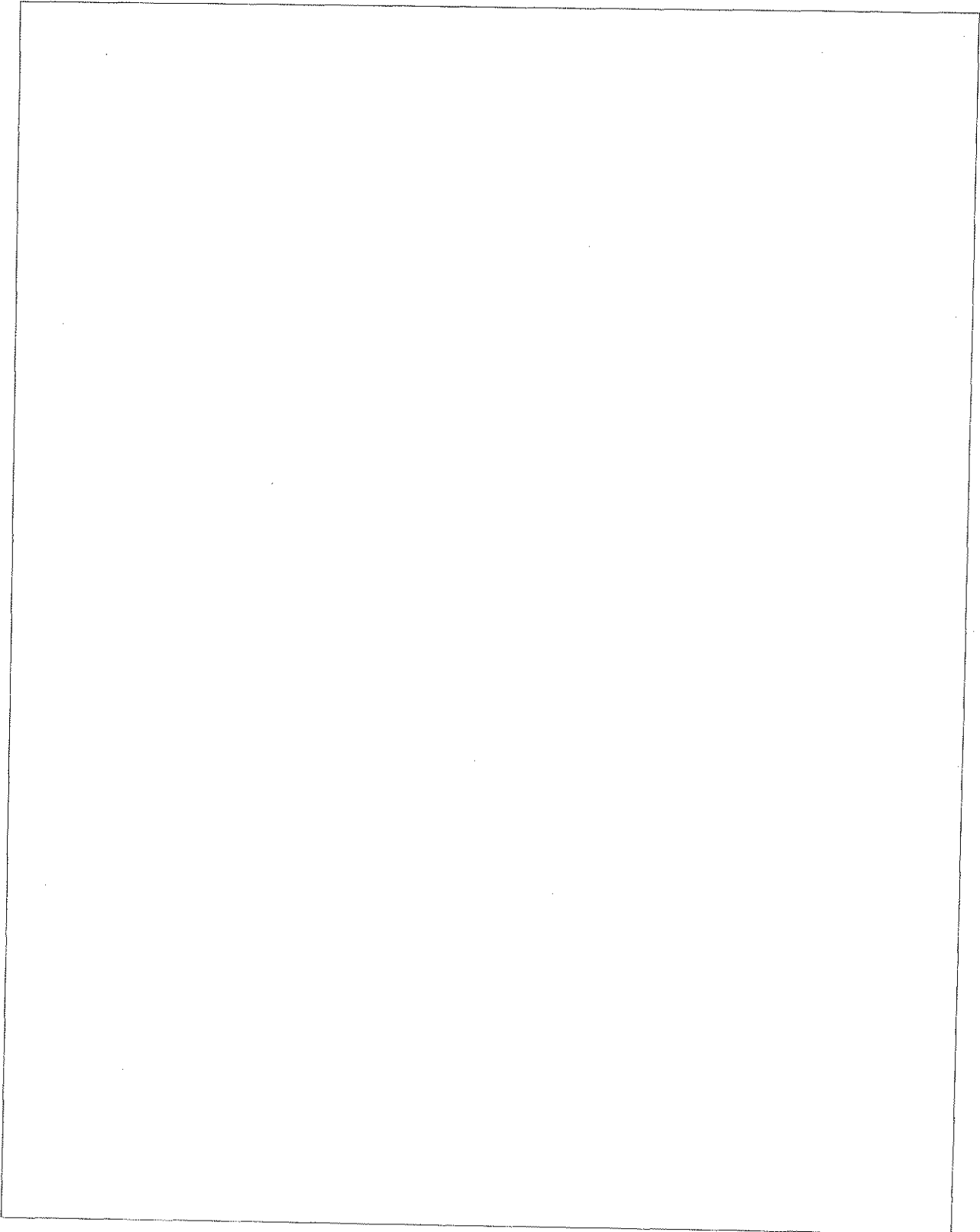
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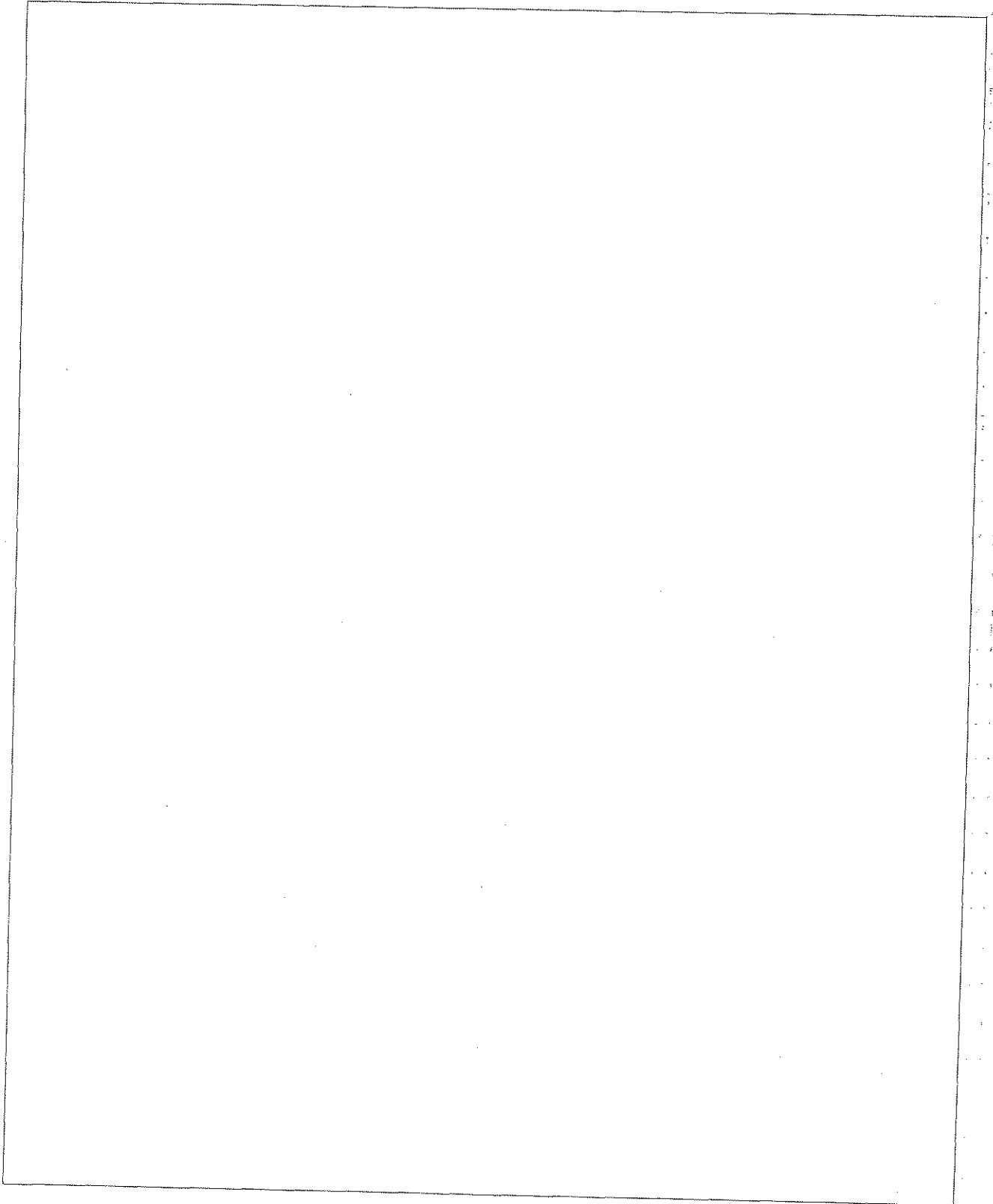


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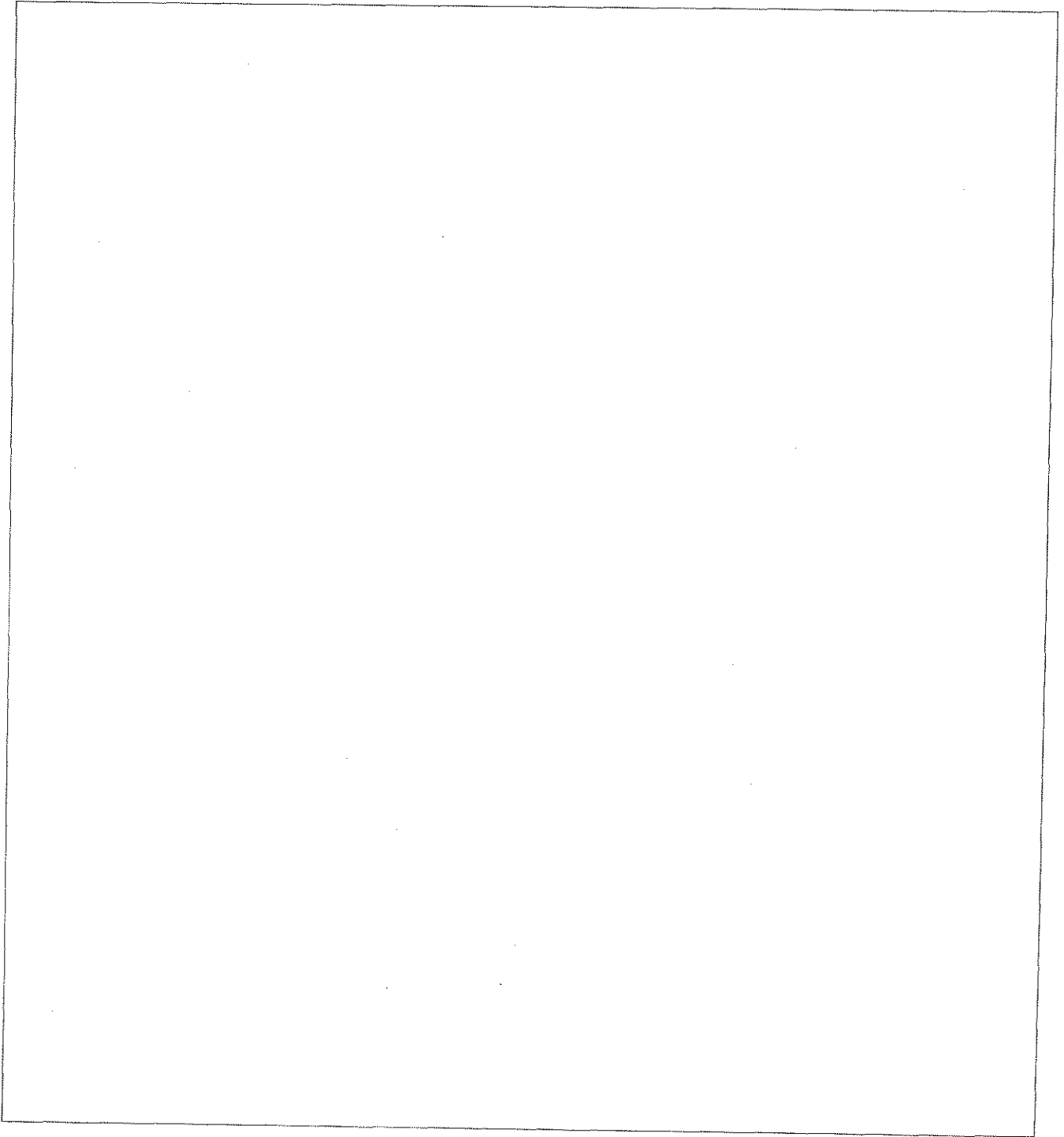
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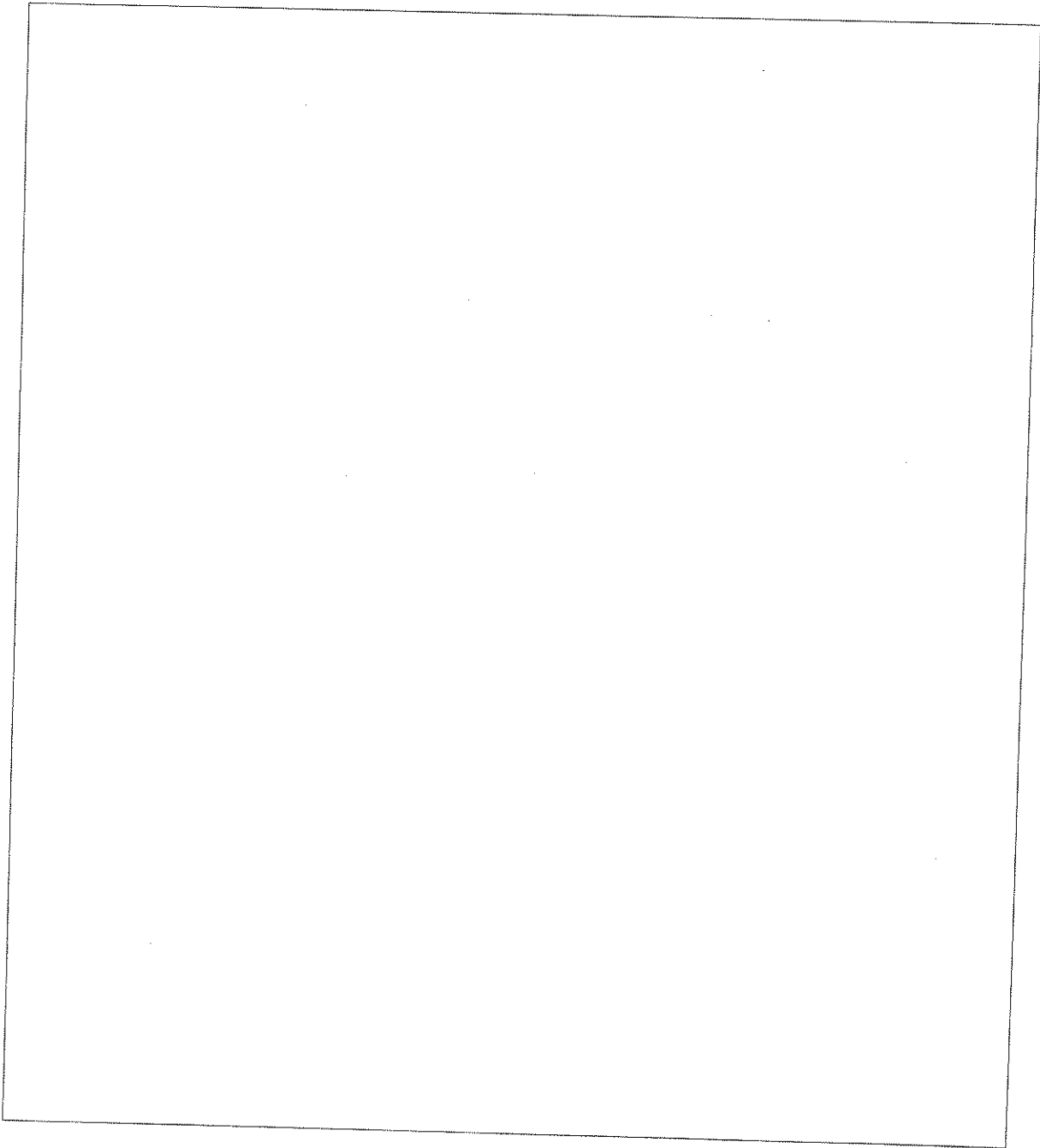
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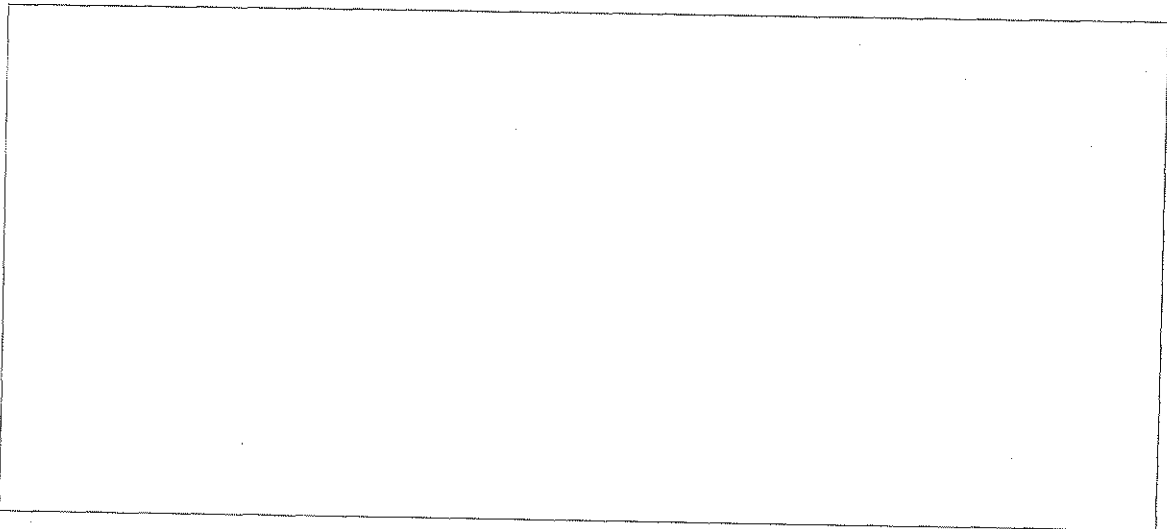
(U) SPECIAL REVIEWS

(U/ [redacted]) Special reviews are undertaken by ad hoc teams under the leadership of a senior OIG officer to address issues of special concern identified by the Congress, senior CIA leaders, or the Inspector General.



~~SECRET~~ [redacted]

~~SECRET~~



~~SECRET~~



~~SECRET~~ [REDACTED]

(U) STATISTICAL OVERVIEW

(U) Audit Staff

(U/ [REDACTED]) During the period 1 July to 31 December 2005, the Audit Staff issued 11 reports and made 48 recommendations to improve accounting and financial management, facilities management, and general management.

(U) The Audit Staff had 18 audits and reviews ongoing at the end of the reporting period.

(U) Inspection Staff

(U) During the last six months of 2005, the Inspection Staff completed seven inspections. At the end of the reporting period, the Staff also had five ongoing inspections. In addition, the Staff closed five inspections.

(U) Investigations Staff

(U/ [REDACTED]) The Investigations Staff completed work on 139 matters of various types during this reporting period. Of this number, 21 cases were of sufficient significance to be the subject of a final report—7 Reports of Investigation and 14 Disposition Memoranda.

(U/ [REDACTED]) During this period, the IG formally referred 10 matters to DoJ based upon a reasonable belief that violations of Federal criminal law may have been committed.

(U/ [REDACTED]) Recoveries on behalf of the US Government during this reporting period, as a result of the Investigations Staff's efforts, totaled \$188,343.

~~SECRET~~ [REDACTED]

~~SECRET~~ / [REDACTED]

(U) As of 31 December 2005, 153 matters were in various stages of review by the Investigations Staff.

(U) Special Reviews

(U) During the period, the office closed two special reviews.

~~SECRET~~ / [REDACTED]

~~SECRET~~ [REDACTED]

(U) COMPLETED AUDITS
1 July - 31 December 2005

(U) Financial Management

(U) Central Intelligence Agency Fiscal Year 2005 Financial Statements

(U) Information Technology

(U) CIA Management of Laptop Computers

(U) Procurement

[REDACTED] Facilities Support Project Management Practices at the
[REDACTED]

(U) Field Activities

[REDACTED]

~~SECRET~~ [REDACTED]

~~SECRET~~ [REDACTED]

(U) COMPLETED INSPECTIONS

1 July – 31 December 2005

- (U) Office of Asian Pacific, Latin American, and African Analysis
- (U) CIA University
- (U) Europe Division
- (U) Research and Development in the CIA
- (U) Leadership Analysis Follow-Up
- (U) The DI's Senior Analytic Service
- (U) Review of CIA's Pre-9/11 Reporting on the Relationship
Between Saddam's Regime and al-Qa'ida

(U) CURRENT INSPECTIONS

31 December 2005

- (U) Agency Performance on North Korea
- (U) CounterTerrorism Center
- (U) Office of Near East and South Asian Analysis
- (U) Information Management Services
- (U) Agency Performance on Russia

~~SECRET~~ [REDACTED]

~~SECRET~~

(U) COMPLETED INVESTIGATIONS

1 July - 31 December 2005

(U) Conversion of Government Funds

[Redacted]

(U) Alleged Contract Improprieties

[Redacted]

(U) Potential False Claims - False Statements

[Redacted]

[Redacted]

(U) Fraudulent Reimbursement for Academic Training

[Redacted]

(U) Possible Conflict of Interest

[Redacted]

(U) Alleged Fraud Concerning Separate Maintenance Allowance

[Redacted]

(U) Alleged Conflict of Interest - Contract Improprieties

[Redacted]

(U) Allegations of Time and Attendance (T&A) Abuse

[Redacted]

[Redacted]

* (U) These investigations resulted in a Disposition Memorandum rather than a Report of Investigation.

~~SECRET~~

~~SECRET/~~ [REDACTED]

(U) Board Appeal - FERS Special

[REDACTED]

(U) Agency Internet Personal Use for Adult Pornography

[REDACTED]

(U) Counterfeit Goods

[REDACTED]

(U// [REDACTED] Embezzlement of Government Funds and False Statements

[REDACTED]

(U) Alleged Contract Improprieties

[REDACTED]

[REDACTED] Alleged Abuse of Iraqi Prisoners

[REDACTED]

(U) Alleged Medical Leave Bank Abuse

[REDACTED]

(U) Potential False Claims and False Statements

[REDACTED]

(U) Theft of Government Funds

[REDACTED]

(U// [REDACTED] Misuse of a Government Intelligence Collection System

[REDACTED]

(U// [REDACTED] T&A Abuse by [REDACTED] Contractor

[REDACTED]

~~SECRET/~~ [REDACTED]

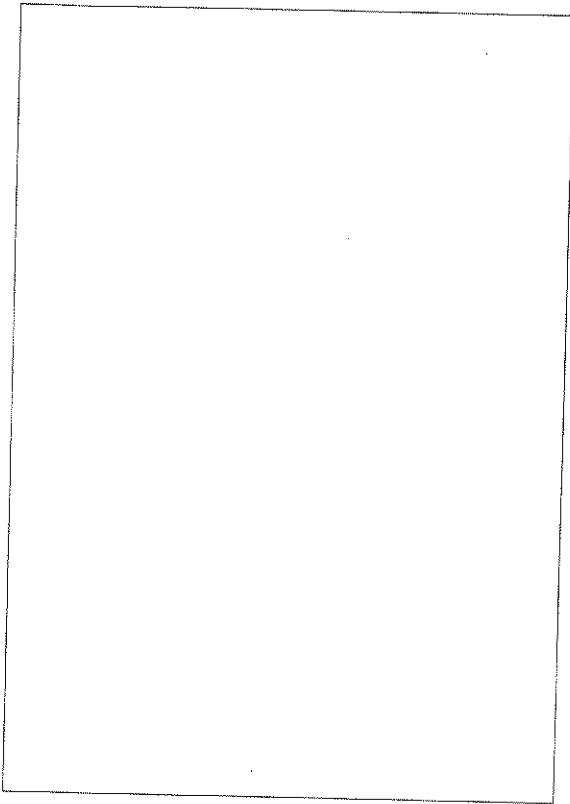
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(U) CURRENT INVESTIGATIONS
As of 31 December 2005

Category	Number of cases
Grievances	
Assignment	2
Promotion	1
Other – Grievance	5
Board Appeals	2
General Investigations	
Criminal and Prohibited Acts	
Conflicts of Interest	8
Embezzlement	4
False Claims – Other	10
False Claims/Statements/Vouchers	8
False Claims - Time & Attendance	13
False Claims – Visa/Passports	1
Firearms	3
Megaprojects	5
Misconduct – Employee	6
Misconduct – Management	6
Obstruction of Justice	2
Procurement Fraud	16
Theft/Misuse of Government Property	4
Waste	2
Other - Administrative/Criminal	38
Unsubstantiated Allegations	17
Total Ongoing Cases	153

~~SECRET~~ [Redacted]

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James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “6”

October 23, 2007

C.I.A. Chief Defends Review on Agency's Inspector General

By [MARK MAZZETTI](#)

WASHINGTON, Oct. 22 — The director of the [Central Intelligence Agency](#) on Monday vigorously defended the agency's examination of its own inspector general, calling it a "management review" intended to improve investigations by that independent internal watchdog.

The director, Gen. [Michael V. Hayden](#), said he had ordered the review after hearing reports about the conduct of Inspector General John L. Helgerson that "raised questions in my mind" about how Mr. Helgerson's office was carrying out its investigations of C.I.A. programs.

The comments by the director, in an appearance on the [PBS](#) television program "[Charlie Rose](#)," were his first public remarks on the subject since news reports this month disclosed the existence of the internal review.

General Hayden did not specify what in particular concerned him about the investigations by Mr. Helgerson's office. He said a small group led by Robert L. Deitz, a close aide to the director, had been working on the review since April and would deliver a report within "the next week or so."

"This was designed to be low key," he said.

The review has drawn criticism from Democrats and Republicans alike on Capitol Hill, who have suggested that it could have a chilling effect on Mr. Helgerson's independence.

Mr. Helgerson's office has investigated some of the most controversial programs undertaken by the agency since the Sept. 11 attacks, including its efforts to detain and interrogate leading terrorism suspects and its program of "extraordinary rendition": the practice of capturing suspects and delivering them to authorities in other nations.

The inspector general's investigations have bred resentment among some at the agency, who say the inquiries amount to second-guessing of C.I.A. operatives in dangerous field assignments.

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James Madison Project v. CIA, Civil Action No. 08-0708 (D.D.C.)(JR)

EXHIBIT “7”

washingtonpost.com

Lawmakers Criticize CIA Director's Review Order

Congress Wants to Protect Investigator's Independence

By Walter Pincus
Washington Post Staff Writer
Saturday, October 13, 2007; A03

A decision by the CIA director, Gen. Michael V. Hayden, to order a special review of efforts by CIA Inspector General John L. Helgerson to probe the agency's past interrogations and imprisonment of terrorism suspects evoked concern yesterday among congressional staff members and lawmakers.

The review is the latest reflection of disagreement within the CIA about the legality and appropriateness of the agency's treatment of suspects since 2001, including its decision to hold nearly 100 in secret prisons, to subject more than a dozen to extraordinarily harsh interrogation techniques, and to fly others to countries where torture is frequently practiced.

The agency's leadership, including its lawyers, has been sparring with the inspector general's office for several years about those practices, and since 2004 has been questioned by Helgerson about allegations that CIA officers engaged in criminal activities in Iraq.

A secret report completed by Helgerson in 2004 concluded that some CIA interrogation practices might violate international law, a conclusion that jarred the agency officials who had relied on Justice Department assurances that such practices were legal.

Rep. Silvestre Reyes (D-Tex.), chairman of the House Permanent Select Committee on Intelligence, said in a statement yesterday that the review of the agency's inspector general that Hayden ordered is "troubling" because of its possible impact on the official's independence, "which Congress established and will very aggressively preserve."

Sen. Christopher S. Bond (R-Mo.), vice chairman of the Senate intelligence committee, warned in a statement that Congress depends heavily on the inspector general's help to oversee the CIA's activities. He promised to "be watching carefully to make sure that nothing is done to restrain or diminish that important office."

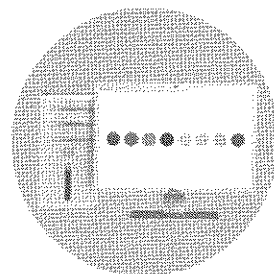
Helgerson informed staff members of the Senate committee last week, during a routine briefing on his investigations, that he is the subject of a review ordered by Hayden. The Los Angeles Times and the New York Times disclosed the existence of the review in yesterday's editions.

The review is being conducted by Hayden's senior counselor, Robert L. Deitz, and has raised concerns among Helgerson's staff, said officials familiar with it. "Some people complained, and they were loud enough that we wanted to see if there was a problem," a Senate staff member said, requesting anonymity because he was not authorized to discuss the subject. "There is no judgment. We just asked him [Helgerson] about it."

Deitz is to meet with the staffs of both House and Senate committees on Tuesday, a senior intelligence officer said. In December, Deitz told an American Bar Association conference that "we need to give more credit to

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people in these positions of authority, heads of NSA, CIA, DIA. These are not a bunch of corrupt politicians who are making decisions to cover their careers. These are well-intentioned people who are deeply concerned about keeping America safe."

Deitz's review of Helgerson began in April when Hayden started getting reports that Helgerson's staff was carrying on its investigations with "a prosecutorial mentality and the director could not ignore them," a senior intelligence official said.

Summing up the views of the agency's clandestine operators, the senior intelligence official said, "They find the CIA general counsel says a technique is okay, the IG months or years later says no." That situation, he added, "leads first to job anxiety, then to a drop in morale and, finally, to risk aversion."

Another intelligence official said there had been other complaints about the work of the IG's office, including the length of time that investigations went on and claims of bias in the IG's approach to fact-finding.

CIA spokesman Paul Gimigliano said that Hayden "firmly believes that the work of the Office of Inspector General is critical to the entire agency" and since taking over CIA "has accepted the vast majority of its findings." He described Dietz, who served as National Security Agency general counsel when Hayden headed that agency, as "a seasoned observer" from outside the agency who can "if need be, suggest specific improvements for consideration by the [IG] unit itself."

The senior intelligence official described it as an "effort in-house to determine whether the complaints [Hayden] was receiving had merit," the senior intelligence official said. "Nothing that rises to the level of asking some outside group to put this IG under a microscope." It was to be, he added, "a careful, discreet inquiry."

Suzanne Spaulding, a former CIA associate general counsel and former senior staff member on the Senate and House intelligence panels, said the review had created "an appearance of attempted intimidation" of the inspector general.

But Jeffrey H. Smith, CIA general counsel during the Clinton administration, cautioned yesterday that "inspector general second-guessing on legal authority, using their own lawyers, may result in risk aversion by officers in the future." He added that an IG "is engaged in looking backwards with 100 percent clarity and does not have the pressures on them and risks the operators face."

Smith noted that the CIA inspector general not only finds facts but also suggests "what disciplinary actions should be taken. That converts him into a prosecuting attorney."

Staff researcher Julie Tate contributed to this report.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 08-0708 (JR)
	*	
CENTRAL INTELLIGENCE AGENCY	*	
	*	
Defendant.	*	
	*	

* * * * *

RESPONSE TO DEFENDANT’S LOCAL RULE 7(h) STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 7.1 (h), the plaintiff respectfully responds to the defendant’s Statement of Material Facts as to Which There is No Genuine Issue with the following statement, which is supported by the Rule 56(f) Declaration of Bradley P. Moss, Esq., Deputy Executive Director, James Madison Project (“Moss Decl.”).

1. Plaintiff does not dispute this statement.
2. Plaintiff does not dispute the factual recitations of these statements.
3. Plaintiff does not dispute the factual recitations of these statements.
4. Plaintiff does not dispute this statement.
5. Plaintiff does not dispute the factual recitations of these statements in that processing was concluded after searches were undertaken, but does dispute any legal characterizations or conclusions that such searches were diligent, adequate, or reasonable enough to locate any responsive records. Moss Decl. at ¶¶ 11,18.
6. Plaintiff does not dispute the factual recitations of these statements in that particular components and databases were identified particular components and databases

as those which would be searched for responsive records, but does dispute any legal or factual characterizations or conclusions that those components and databases were most likely to have responsive records or were the only components or databases that could contain responsive records. Plaintiff also does not dispute the factual recitations of these statements in that the CIA utilized specific search terms to conduct the search, but does dispute any legal or factual characterizations or conclusions that the particular search terms rendered the search adequate or reasonable enough to locate any responsive records, or that additional search terms should not have reasonably been utilized. Moss Decl. at ¶¶ 16-17.

7. Plaintiff does not dispute the factual recitations of this statement in that the searches conducted failed to locate any responsive records, but does dispute any legal characterizations or conclusions that such searches were diligent, adequate, or reasonable enough to locate responsive records. Moss Decl. at ¶ 18.

8. Plaintiff does not dispute the factual contents of the CIA's letter dated July 11, 2008.

Date: August 11, 2008

Respectfully submitted,

/s/

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Kel@JamesMadisonProject.org

Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 08-0708 (JR)
	*	
CENTRAL INTELLIGENCE AGENCY	*	
	*	
Defendant.	*	
	*	
* * * * *	*	* * * * *

ORDER

Upon consideration of plaintiff's Opposition to Defendant's Motion for Summary Judgment, and it appearing that the relief prayed is just and appropriate, it is this _____ day of _____ 2008,

ORDERED, that defendant's Motion is denied; and

FURTHER ORDERED, that the request be remanded to the Central Intelligence Agency for a more detailed declaration on the adequacy of the search as set forth in the accompanying Memorandum Opinion; or, alternatively

FURTHER ORDERED, that the plaintiff is permitted to undertake limited discovery as set forth in the accompanying Memorandum Opinion.

Date: August 11, 2008

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 08-0708 (JR)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

**MEMORANDUM OF POINTS AND AUTHORITIES
IN REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT¹**

Plaintiff states that it “commenced this litigation pursuant to the Freedom of Information Act to obtain copies of internal Central Intelligence Agency (“CIA”) documents pertaining to an internal review of the CIA’s Inspector General, John Helgerson (“Helgerson”) and of the Office of the Inspector General (“OIG”).” Plaintiff’s Opposition (“Plff. Opp.”) at 1. However, Plaintiff’s FOIA request was not that broad.

Plaintiff’s FOIA request was limited in that it requested “copies of all internal Central Intelligence Agency (“CIA”) documents *pertaining to discussions concerning the decision to initiate an internal review* of the operations of the CIA’s Inspector general (“IG”), John Helgerson, and of the IG’s Office as a whole.” (emphasis added.) See Second Declaration of Delores M. Nelson (“2d Nelson Decl.”), Defendant’s Attachment A, ¶ 2. To now suggest that its FOIA request was much broader and argue that Defendant’s search was inadequate, is without merit.

¹ Defendant filed a motion to dismiss or alternatively, for summary judgment. Plaintiff has failed to address Defendant’s motion to dismiss.

I. DEFENDANT CONDUCTED A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO PLAINTIFF'S NARROW FOIA REQUEST

A. The CIA's End-Date Was Reasonable

Plaintiff cites *McGehee v. CIA*, 697 F.2d 1096, 1101 (D.C. Cir. 1983), in arguing that the CIA's imposition of an "end-date" of November 5, 2007, was unreasonable. Plaintiff's reliance on this case is misplaced. The Court in the *McGhee* case found that imposition of an end-date to the first 35 days, in light of the agency's two and one-half year delayed response was unreasonable. In this case, there is only approximately eight months between the time of the request and CIA's response. More importantly, in light of the fact that the Plaintiff's FOIA request was limited to requesting documents *pertaining to discussions concerning the decision to initiate an internal review*, the CIA reasonably "searched for records that would have pre-dated the announcement of the review of the IG's office." See 2d Nelson Decl. ¶ 2. The CIA determined that November 5, 2007, would be a reasonable cut-off date in terms of providing a temporal limit to the search for responsive records. See 2d Nelson Decl. ¶ 4. That date was reasonable, because it post-dates the decision to conduct the internal review. *Id.* Thus, there is absolutely nothing to support Plaintiff's speculative argument that "untold numbers of responsive records were created during those eight months." Plff. Opp. at 10.

B. Defendant's Search Was Adequate In Light of Plaintiff's Narrow Request

Plaintiff argues that Defendant's search was inadequate because it did not turn up records of a ten-month investigation or records that would have been mandated by a federal statute, i.e., "a classified semiannual report." Plf. Opp. at 12-13, FN8. These arguments are unavailing.

"[I]t is the requester's responsibility to frame requests with sufficient particularity to

ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested.” *Assassination Archives and Research Center, Inc.*, 720 F.Supp. 217, 219 (D.D.C. 1989) (citing *Yeager v. DEA*, 678 F.2d 315 (D.C. Cir. 1982). “The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.” *Id.* An agency’s duty is only to conduct a search reasonably calculated to uncover all relevant documents. *See Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). The agency is not required to speculate about potential leads. *Id.* Furthermore, the agency is not required to exercise “clairvoyant capabilities” to determine the nature of a plaintiff’s request. *See Hudgins v. IRS*, 620 F.Supp. 19, 21 (D.D.C. 1985) (citing *Weisberg v. Department of Justice*, 705 F.2d 1344 (D.C. Cir. 1983)).

“Because Plaintiff’s request was so narrow, the CIA did not search for records that would have been produced during the review of the IG, or the office as a whole.” 2d Nelson Decl. ¶ 2. Plaintiff cannot now broaden that request in the midst of litigation. It is illogical to think that a classified semiannual report would be responsive to a FOIA request asking for documents pertaining to discussions concerning a decision to initiate an action. Moreover, the agency was not obligated to search for records concerning any ten month internal investigation when Plaintiff only requested records pertaining to the discussions about the initiation of such an investigation.²

II. THE AGENCY’S DECLARATIONS ARE NOT CONCLUSORY

The agency’s declarations in this case contain sufficient specificity to allow the Court to determine the reasonableness of its decisions about where to search. The agency’s initial declaration (“Nelson Decl.”), which was submitted with its motion to dismiss or alternatively

² In fact, it is Defendant’s understanding that Plaintiff has now filed a new FOIA request.

motion for summary judgment, lists the various components that were searched and specific terms that were used in the searches.³ See Declaration of Delores M. Nelson, ¶ 19. The agency provided additional information in this regard in its second declaration. See 2d Nelson Decl. ¶ 3. Contrary to Plaintiff's assertions, both of these declarations are quite specific and clearly demonstrate that the agency conducted a search reasonably calculated to locate information responsive to Plaintiff's narrow FOIA request.

Conclusion

For the foregoing reasons and those provided in Defendant's motion to dismiss or alternatively, motion for summary judgment, this case should be dismissed or alternatively, Defendant CIA should be granted judgment as a matter of law.

Respectfully submitted,

/s/

JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

/s/

RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

/s/

JUDITH A. KIDWELL
Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
Room E4905
Washington, D.C. 20530
(202) 514-7250

³ These terms included "internal review of operations," "CIA's Inspector General," "John L. Helgerson," "OIG," "Office of Inspector General," "OIG internal review," and "Deitz review."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)
)
 Plaintiff,)
)
 v.) Case No. 1:08-cv-00708 (JR)
)
 CENTRAL INTELLIGENCE AGENCY,)
)
 Defendant.)
 _____)

SECOND DECLARATION OF DELORES M. NELSON
INFORMATION AND PRIVACY COORDINATOR
CENTRAL INTELLIGENCE AGENCY

I, DELORES M. NELSON, hereby declare and say:

1. I am the Chief of the Public Information Programs Division (PIPD), Information Review and Release Group (IRRG), Information Management Services (IMS), Office of the Chief Information Officer (CIO), Central Intelligence Agency (CIA). I hereby incorporate by reference my prior declaration in this case, dated 14 July 2008. I make this second declaration in support of the CIA's Reply to Plaintiff's Opposition to the CIA's Motion for Summary Judgment.

2. The purpose of this second declaration is to provide additional information about the CIA's search for records in response to Plaintiff's Freedom of Information Act (FOIA)

request. By letter dated 18 October 2007, Plaintiff submitted a FOIA request to the CIA for the following records:

"copies of all internal Central Intelligence Agency ("CIA") documents pertaining to discussions *concerning the decision to initiate an internal review* of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole." (Emphasis added).

A true and correct copy of Plaintiff's 18 October 2007 letter is attached as Exhibit A hereto. Based on the extremely narrow focus of this request--information "concerning the decision to initiate an internal review" of the IG and the IG's Office as a whole--the CIA searched for records that would have pre-dated the announcement of the review of the IG's office. Because Plaintiff's request was so narrow, the CIA did not search for records that would have been produced during the review of the IG, or the office as a whole.

3. The CIA's search for records included all components where records concerning "the decision to initiate" a review of the IG and the IG's office as a whole might reasonably be located. CIA IMS professionals determined that the Director of Central Intelligence Agency (DCIA) area was the only part of the CIA reasonably likely to have records responsive to Plaintiff's request because the Director of the CIA decided to initiate the review and the Office of the DCIA carried out the review of the IG. Because the other directorates of the CIA--the National Clandestine Service (NCS), the Directorate of Support (DS), the

Directorate of Intelligence (DI), and the Directorate of Science and Technology (DS&T)--were not involved in the decision to initiate the internal review, CIA IMS professionals determined that these directorates would not be reasonably likely to have records responsive to Plaintiff's request. The DCIA Area, which includes the DCIA Action Center (DAC) and the independent offices of the Office of Inspector General (OIG), the Office of General Counsel (OGC), and the Office of Public Affairs (OPA), were all tasked to search for records in response to Plaintiff's request.

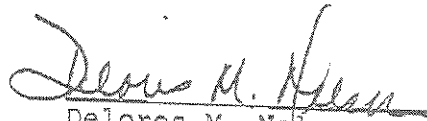
4. The CIA searched for records in existence as of the date of the acceptance letter sent to Plaintiff. A true and exact copy of the CIA's 5 November 2007 letter is attached as Exhibit B hereto. The DCIA area was tasked with searching for documents in response to Plaintiff's FOIA request on 9 November 2007. Thus, because searches were undertaken in response to Plaintiff's request so soon after the date of the acceptance letter, the CIA determined that this would be a reasonable cut-off date in terms of providing a temporal limit to the search for responsive records. Furthermore, because Plaintiff's request sought records that concerned the decision to initiate an internal review of the IG and the IG's office as a whole, this cut-off date was more than reasonable, because it post-dates the decision to conduct the internal review.

5. Finally, Plaintiff asserts that it can identify, based on the CIA Act of 1949, 50 U.S.C. § 403, records that the CIA was obligated to create that would be responsive to Plaintiff's request.¹ While the IG's Office is obligated to meet certain reporting requirements under the CIA Act, the CIA did not search for any IG reporting relating to the internal review of the IG's Office simply because these documents would not be responsive to Plaintiff's request. Any documentation relating to the IG Office's compliance with the internal review would not be responsive to a request for records relating to the decision to initiate the internal review of the IG and the IG's office as a whole.

* * * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of August, 2008.



Delores M. Nelson
Information and Privacy Coordinator
Central Intelligence Agency

¹ See Plaintiff's Opposition at pp. 12-15.

EXHIBIT A

F-2008-00103

The James Madison Project
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

(202) 498-0011
(202) 330-5610 fax

E-Mail: JaMadPro@aol.com
<http://www.jamesmadisonproject.org>

18 October 2007

Scott A. Koch
Central Intelligence Agency
Information and Privacy Coordinator
Washington, D.C. 20505

Re: FOIA Request - Internal Investigation of IG's Office

Dear Mr. Koch:

This is a request on behalf of The James Madison Project under the Freedom of Information Act, 5 U.S.C. § 552, et seq., for copies of all internal Central Intelligence Agency ("CIA") documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's Office as a whole. Enclosed please find copies of news articles from *The New York Times*, *Los Angeles Times*, and *USA Today* referring to confirmation by the CIA that Director General Michael Hayden has ordered the internal review.

We are hereby requesting a waiver of all fees. The James Madison Project is a non-profit organization under the laws of the District of Columbia and has the ability to disseminate information on a wide scale. Stories concerning our activities have received prominent mention in many publications including, but not limited to, *The Washington Post*, *The Washington Times*, *St. Petersburg Tribune*, *San Diego Union Tribune*, *European Stars & Stripes*, *Christian Science Monitor*, *U.S. News and World Report*, *Mother Jones* and *Salon Magazine*. Our website, where much of the information received through our FOIA requests is or will be posted for all to review, can be accessed at

"Knowledge will forever govern ignorance, and a people who mean to be free must arm themselves with the power knowledge gives."

James Madison, 1822

77 OCT 19 10:03

The James Madison Project

<http://www.jamesmadisonproject.org>. Prior requests submitted by our organization have all received fee waivers.

We are also asking for expedited processing. The 1996 amendments to the Freedom of Information Act permit expedited processing when a "compelling need" exists. See 5 U.S.C. § 552 (a)(6)(E)(v). Specifically, "compelling need" means "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* at § 552 (a)(6)(E)(v)(II). The CIA has adopted internal regulations governing expedited processing and has determined that a "compelling need" is deemed to exist where the "request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." See 32 C.F.R. § 1900.34(c)(2).

There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Over the course of the Global War on Terror ("GWOT"), numerous documents from a host of executive branch agencies have been released, detailing the legal and policy considerations that have formed the basis for discussions on a wide-range of national security policies. One example was the DOJ's disclosure of memoranda that originated in its Office of Legal Counsel and which formed a critical component of U.S. policies concerning detention of terrorist suspects. Given the highly-publicized nature of this particular controversy and its relation to the activities of the CIA's internal "watchdog," an office which has recently produced reports highlighting critical failures by the CIA in its prosecution of the GWOT, detailing the span of arguments considered prior to the authorization of this internal review will clearly contribute to the public's understanding of government operations or activities.

With respect to expedited processing, as explained above, JMP has been and continues to be primarily engaged in disseminating information on a wide scale and clearly falls within the scope of the statute. A "compelling need" exists due to the critically important political and legal questions that are clearly implicated by the decision to authorize the internal review of the IG's Office. Not only does the review have the potential to serve, either in mere appearance or in actual reality, as evidence of the politicization of a statutorily-designated non-political division within the CIA, but it also raises the possibility of constituting unlawful interference in the activities of the IG and obstruction of the IG's statutory obligations.

"Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

James Madison, 1822

The James Madison Project

The CIA is required by law to respond to this request within 20 working days. However, the CIA is required to issue a determination on the request for expedited processing "within 10 days after the date of the request." 5 U.S.C. § 552 (a)(6)(E)(ii)(I). Therefore, the CIA's response is due on or before October 28, 2007. Failure to timely comply may result in the filing of a civil action against your agency in the United States District Court for the District of Columbia. Please note that the denial of expedited processing should not interfere with the normal processing of these requests.

If you deny all or part of this request, please cite the specific exemptions you believe justifies your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please "black out" rather than "white out" or "cut out".

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at either (202) 498-0011 or my law office at (202) 454-2809.

Finally, please have all return correspondence addressed specifically to my attention to ensure proper delivery.

Sincerely,


Mark S. Zaid
Executive Director

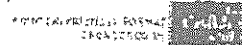
"Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives."

James Madison, 1822

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry - New York Times

http://www.nytimes.com/2007/10/11/washington/12intel.html?_r=1&p...

The New York Times



October 11, 2007

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry

By MARK MAZZETTI and SCOTT SHANE

WASHINGTON, Oct. 11 — The director of the Central Intelligence Agency, Gen. Michael V. Hayden, has ordered an unusual internal inquiry into the work of the agency's inspector general, whose aggressive investigations of the C.I.A.'s detention and interrogation programs and other matters have created resentment among agency operatives.

A small team working for General Hayden is looking into the conduct of the agency's watchdog office, which is led by Inspector General John L. Helgerson. Current and former government officials said the review had caused anxiety and anger in Mr. Helgerson's office and aroused concern on Capitol Hill that it posed a conflict of interest.

The review is particularly focused on complaints that Mr. Helgerson's office has not acted as a fair and impartial judge of agency operations but instead has begun a crusade against those who have participated in controversial detention programs.

Any move by the agency's director to examine the work of the inspector general would be unusual, if not unprecedented, and would threaten to undermine the independence of the office, some current and former officials say.

Frederick P. Hitz, who served as C.I.A. inspector general from 1990 to 1998, said he had no first-hand information about current conflicts inside the agency. But Mr. Hitz said any move by the agency's director to examine the work of the inspector general would "not be proper."

"I think it's a terrible idea," said Mr. Hitz, who now teaches at the University of Virginia. "Under the statute, the inspector general has the right to investigate the director. How can you do that and have the director turn around and investigate the I.G.?"

A C.I.A. spokesman strongly defended the inquiry on Thursday, saying General Hayden supported the work of the inspector general's office and had "accepted the vast majority of its findings."

"His only goal is to help this office, like any office at the agency, do its vital work even better," said Paul Gimigliano, the spokesman.

Current and former intelligence officials said the inquiry had involved formal interviews with at least some of the inspector general's staff and was perceived by some agency employees as an "investigation," a label Mr. Gimigliano rejected.

Several current and former officials interviewed for this article spoke on condition of anonymity because of the sensitivity of the inquiry.

Watchdog of C.I.A. Is Subject of C.I.A. Inquiry - New York Times

http://www.nytimes.com/2007/10/11/washington/12/intel.html?_r=1&p...

The officials said the inquiry was being overseen by Robert L. Deitz, a trusted aide to the C.I.A. director and a lawyer who served as general counsel at the National Security Agency when General Hayden ran it. Michael Morrell, the agency's associate deputy director, is another member of the group, officials said.

Reached by phone Thursday, both Mr. Helgeson and Mr. Dietz declined to comment.

In his role as the agency's inspector general since 2002, Mr. Helgeson has investigated some of the most controversial programs the C.I.A. has begun since the Sept. 11 attacks, including its secret program to detain and interrogate high value terrorist suspects.

Under federal procedures, agency heads who are unhappy with the conduct of their inspectors general have at least two places to file complaints. One is the Integrity Committee of the President's Council on Integrity and Efficiency, which oversees all the inspectors general. The aggrieved agency head can also go directly to the White House.

If serious accusations against an inspector general are sustained by evidence, the president can dismiss him.

Both those routes avoid the awkward situation officials describe at the C.I.A. and preserve the independence of the inspector general.

But one intelligence official who supports General Hayden's decision to begin an internal inquiry said that going outside the agency would "blow things way out of proportion."

A report by Mr. Helgeson's office completed in the spring of 2004 warned that some C.I.A.-approved interrogation procedures appeared to constitute cruel, inhuman and degrading treatment, as defined by the international Convention Against Torture.

Some of the inspector general's work on detention issues was conducted by Mary O. McCarthy, who was fired from the agency last year after being accused of leaking classified information. Officials said Mr. Helgeson's office was nearing completion on a number of inquiries into C.I.A. detention, interrogation, and "renditions" — the practice of seizing suspects and delivering them to the authorities in other nations.

The inspector general's office also rankled agency officials when it completed a withering report about the C.I.A.'s missteps before the Sept. 11 attack — a report that recommended "accountability boards" to consider disciplinary action against a handful of senior officials.

When the report was made public in August, General Hayden took the rare step of pointing up criticisms of the report by the former intelligence director, George J. Tenet and his senior aides, saying many officials "took strong exception to its focus, methodology and conclusions."

Some agency officers believe the aggressive investigations by Mr. Helgeson amount to unfair second guessing of intelligence officers who are often risking their lives in the field.

"These are good people who thought they were doing the right thing," said one former agency official. "And now they are getting beat up pretty bad and they have to go out and hire a lawyer."

Agency officials have also criticized the length of the inspector general's investigations, some lasting more

EXHIBIT B

Central Intelligence Agency



Washington, D.C. 20505

Mr. Mark S. Zaid
Executive Director
The James Madison Project
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Reference: F-2008-00103

Dear Mr. Zaid:

On 19 October 2007 the Office of the Information and Privacy Coordinator received your 18 October 2007 Freedom of Information Act (FOIA) request for "copies of all internal Central Intelligence Agency ('CIA') documents pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ('IG'), John Helgerson, and of the IG's Office as a whole." We have assigned your request the reference number above. Please use this number when corresponding with us so that we can identify it easily.

We accept your request and will process it according to the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431, as amended. Unless you object, we will limit our search to CIA-originated records existing through the date of this acceptance letter.

As a matter of administrative discretion, we will waive the fees associated with processing your FOIA request in this instance. Therefore, your request for a fee waiver is granted.

You have requested expedited processing. We handle all requests in the order we receive them; that is, "first-in, first-out." We make exceptions to this rule only when a requester establishes a compelling need under the standards in our regulations. A "compelling need" exists: 1) when the matter involves an imminent threat to the life or physical safety of an individual, or 2) when a person primarily engaged in disseminating information makes the request and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity. Your request does not demonstrate a "compelling need" under these criteria and, therefore, we deny your request for expedited processing.

The large number of FOIA requests CLA receives has created unavoidable delays making it unlikely that we can respond within the 20 working days the FOIA requires. You have the right to consider our honest appraisal as a denial of your request and you may appeal to the Agency Release Panel. A more practical approach would permit us to continue processing your request and respond to you as soon as we can. You will retain your appeal rights and, once you receive the results of our search, can appeal at that time if you wish. We will proceed on that basis unless you object.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Koch", with a long horizontal flourish extending to the right.

Scott Koch
Information and Privacy Coordinator

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT *
1250 Connecticut Avenue, NW *
Suite 200 *
Washington, D.C. 20036 *

Plaintiff *

v. *

CENTRAL INTELLIGENCE AGENCY *
Washington, D.C. 20505, *

and *

DEPARTMENT OF JUSTICE *
950 Pennsylvania Avenue, NW *
Washington, D.C. 20530, *

and *

FEDERAL BUREAU OF *
INVESTIGATION *
935 Pennsylvania Avenue, NW *
Washington, D.C. 20535 *

Defendants. *

Civil Action No. 08-0708 (JR)

* * * * *

FIRST AMENDED COMPLAINT

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq., as amended, for the disclosure of agency records improperly withheld from plaintiff James Madison Project by defendants Central Intelligence Agency, Department of Justice, and Federal Bureau of Investigation.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the defendants pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff James Madison Project (“JMP”) is a non-profit organization under the laws of the District of Columbia and has the ability to disseminate information on a wide scale. Stories concerning our activities have received prominent mention in many publications including, but not limited to, the *Washington Post*, *Washington Times*, *St. Petersburg Tribune*, *San Diego Union Tribune*, *European Stars & Stripes*, *Christian Science Monitor*, *U.S. News and World Report*, *Mother Jones* and *Salon Magazine*.

4. Defendants Central Intelligence Agency (“CIA”), Department of Justice (“DOJ”), and Federal Bureau of Investigation (“FBI”) are agencies within the meaning of 5 U.S.C. § 552 (e), and are in possession and/or control of the records requested by JMP which are the subject of this action.

BACKGROUND

5. John L. Helgerson (“Mr. Helgerson”) has served as the Inspector General of the CIA since April 26, 2002. Since his appointment, Mr. Helgerson has led numerous internal investigations into controversial programs that began in the aftermath and as a result of the September 11, 2001, terrorist attacks, including such high-profile programs as the CIA’s detention and interrogation of terrorist suspects. Mr. Helgerson also conducted an investigation into the CIA’s actions prior to the September 11, 2001, terrorist attacks, resulting in a report which recommended “accountability boards” to consider disciplinary action against a handful of senior officials.

6. Upon information and belief, the prolonged and aggressive nature of these investigations has caused bitter resentment on the part of certain CIA operatives and officials towards the Office of the Inspector General (“OIG”) in general and Mr. Helgerson in particular.

7. On October 12, 2007, the CIA confirmed that Director General Michael V. Hayden (“Director Hayden”) had authorized an internal investigation into the operations of the CIA’s OIG, specifically focusing on the conduct of Mr. Helgerson, which began in April 2007. The basis of the review was to address complaints that the OIG’s investigations have not consisted of a fair and impartial review but rather as a “crusade” against CIA officials involved in controversial programs. CIA spokesman Paul Gimigliano refused to characterize the internal review—which was overseen by Robert L. Deitz, Senior Counselor to Director Hayden, and Michael J. Morell, Associate Deputy Director—as an “investigation” and insisted that Director Hayden’s only objective was to assist the OIG in doing “its vital work even better.”

8. On January 31, 2008, Director Hayden announced the completion of the investigation, including details of changes that would be made to the OIG as a result of the investigation, including measures requiring the IG to: a) keep CIA employees and managers informed about both the process and results of investigations; b) appoint an ombudsman; and c) appoint a “quality control officer” who would make sure OIG reports “include all exculpatory and relevant mitigating information.”

9. Upon information and belief, the CIA’s stated basis for and characterization of the internal investigation is both misleading and inaccurate. Upon further information and belief, the commencement of such an investigation posed a conflict of interest and threatens to undermine the independence of the OIG.

10. Frederick P. Hitz, who served as the CIA’s Inspector General from 1990 to 1998 and currently teaches at the University of Virginia, stated on October 12, 2007, that any investigation by Director Hayden into the OIG’s work would “not be proper.”

11. Pursuant to the Inspector General Act of 1978, only the President of the United States may remove the Inspector General of a Cabinet-level or major agency. In the event of such action, both houses of Congress must be notified of the rationale justifying the removal.

12. Upon information and belief, Director Hayden lacks the authority to initiate an internal investigation designed to address complaint(s) against both the OIG as a whole and Mr. Helgerson in particular.

13. Pursuant to Executive Order 12993, allegations of misconduct by an Inspector General and/or senior staff members of most federal agencies' OIGs are referred to the Integrity Committee of the President's Council on Integrity and Efficiency ("PCIE"). Pursuant to Section 2(c) of Executive Order 12993, the Integrity Committee shall determine if there is a substantial likelihood that the allegation "discloses a violation of any law, rule or regulation, or gross mismanagement, gross waste of funds or abuse of authority." To the extent that an investigation is necessary, the Public Integrity Section of the Department of Justice or the Federal Bureau of Investigation will conduct the investigation on behalf of the Integrity Committee.

14. Pursuant to Executive Order 12993, records of the Integrity Committee of the PCIE are maintained by the FBI.

15. Upon information and belief, to date, Director Hayden has not referred any complaint(s) against Mr. Helgerson and/or his staff to the Integrity Committee of the PCIE.

COUNT ONE

16. JMP repeats and realleges the allegations contained in paragraphs 5 through 15 above, inclusive.

17. By letter dated October 18, 2007, JMP submitted to the CIA a FOIA request which sought copies of all internal CIA documents pertaining to discussions concerning the decision to initiate an internal review of the operations of Mr. Helgerson, and of the OIG as a whole. Copies of news articles from the *Los Angeles Times*, *New York Times*, and *USA Today* that detailed the CIA's confirmation that an internal review had been authorized were included. The request sought a waiver of all fees, noting that JMP is a non-profit organization with the ability to disseminate information on a wide scale, the

information would contribute to the public's understanding of government operations or activities and is in the public interest, and that JMP had been granted a fee waiver on all prior requests.

18. By letter dated November 5, 2007, the CIA acknowledged receipt of JMP's request and assigned it Request No. F-2008-00103. The CIA also granted JMP's request for a waiver of fees.

19. By letter dated July 11, 2008, the CIA, pursuant to judicial order, informed JMP that no records were found responsive to this request. The letter noted that, since the request is the subject of pending litigation, no administrative appeals would be permitted.

20. JMP has a legal right under the FOIA to obtain the information it seeks, and there is no legal basis for the denial by the CIA of said right.

COUNT TWO

21. JMP repeats and realleges the allegations contained in paragraphs 5 through 15 above, inclusive.

F-08-1698
22. By letter dated August 11, 2008, JMP submitted to the CIA a FOIA request which sought copies of all internal CIA documents pertaining to: a) discussions concerning the decision to initiate an internal review of the operations of Mr. Helgeson, and of the OIG as a whole, dated after November 5, 2007; b) the activities of the internal review itself; c) proposals for and the implementation of changes in the operations and procedures of the OIG; and d) any semiannual IG reports to the Director that reference any of the above. Copies of news articles from the *New York Times* and *Washington Post* that detailed the CIA's confirmation that an internal review had been authorized were included. The request sought a waiver of all fees, noting that JMP is a non-profit organization with the ability to disseminate information on a wide scale, the information would contribute to the public's understanding of government operations or activities and is in the public interest, and that JMP had been granted a fee waiver on most prior requests.

23. By letter dated August 28, 2008, the CIA acknowledged receipt of JMP's request and assigned it Request No. F-2008-01698. The CIA also granted JMP's request for a waiver of fees.

24. By letter dated August 27, 2008, JMP amended its request to expand the time frame to include the period January 1, 2006 – November 5, 2007.

25. By letter dated September 18, 2008, the CIA acknowledged receipt of JMP's amendment and stated that its search for records will be from January 1, 2006 – August 28, 2008.

26. As twenty working days have elapsed without a substantive determination by the CIA, JMP has constructively exhausted all required administrative remedies.

27. JMP has a legal right under the FOIA to obtain the information it seeks, and there is no legal basis for the denial by the CIA of said right.

COUNT THREE

28. JMP repeats and realleges the allegations contained in paragraphs 5 through 15 above, inclusive.

29. By letter dated May 26, 2008, JMP submitted to the DOJ Criminal Division a FOIA request which sought copies of all DOJ documents pertaining to: a) investigations referred to the Criminal Division's Public Integrity Section by the Integrity Committee of the PCIE into the operations of the CIA IG, John Helgerson, and of the IG's Office as a whole; and b) discussions, records, correspondence, memoranda, or opinions of the Public Integrity Section regarding CIA Director Hayden's decision to initiate an internal investigation of the IG's Office. Copies of news articles from the *New York Times* and *Los Angeles Times* that detailed the CIA's confirmation that an internal review had been authorized were included. The request sought a waiver of all fees, noting that JMP is a non-profit organization with the ability to disseminate information on a wide scale, the information would contribute to the public's understanding of government operations or

activities and is in the public interest, and that JMP had been granted a fee waiver on most prior requests.

30. By letter dated June 5, 2008, the DOJ acknowledged receipt of JMP's request and assigned it Request No. CRM-200800363.

31. By telephone on July 21, 2008, JMP's Director of FOIA Operations, Kel McClanahan, contacted the DOJ Criminal Division's FOIA Requester Service Center for a status update on the request. The DOJ stated that the request was still being processed and indicated that it could not provide a concrete date upon which the process would be completed because no response had yet been received from the Public Integrity Section.

32. By telephone on August 13, 2008, Mr. McClanahan contacted the DOJ Criminal Division's FOIA Requester Service Center again for a status update on the request. The DOJ stated that the request was still being processed and indicated that it still could not provide a concrete date upon which the process would be completed, but that an overdue notice was being sent to the Public Integrity Section.

33. By telephone on August 20, 2008, Mr. McClanahan contacted the DOJ Criminal Division's FOIA Requester Service Center again for a status update on the request. The DOJ stated that the request was still being processed and indicated that it still could not provide a concrete date upon which the process would be completed, but that the Public Integrity Section had until September 3, 2008, to respond.

34. By telephone on August 21, 2008, a representative of the DOJ Criminal Division's FOIA Requester Service Center contacted Mr. McClanahan. The representative stated that the FOIA Requester Service Center is not required to answer questions about the status of requests, that these updates were merely a courtesy, and that the Public Integrity Section "will get to it when it gets to it."

35. As twenty working days have elapsed without a substantive determination by the DOJ, JMP has constructively exhausted all required administrative remedies.

36. JMP has a legal right under the FOIA to obtain the information it seeks, and there is no legal basis for the denial by the DOJ of said right.

COUNT FOUR

37. JMP repeats and realleges the allegations contained in paragraphs 5 through 15 above, inclusive.

38. By letter dated May 26, 2008, JMP submitted to the FBI a FOIA request which sought copies of all PCIE documents pertaining to a) investigations authorized by the Integrity Committee of the PCIE into the operations of the CIA IG, John Helgerson, and of the IG's Office as a whole; and b) discussions, records, correspondence, memoranda, or opinions of the Integrity Committee regarding CIA Director Hayden's decision to initiate an internal investigation of the IG's Office. Copies of news articles from the *New York Times* and *Los Angeles Times* that detailed the CIA's confirmation that an internal review had been authorized were included. The request sought a waiver of all fees, noting that JMP is a non-profit organization with the ability to disseminate information on a wide scale, the information would contribute to the public's understanding of government operations or activities and is in the public interest, and that JMP had been granted a fee waiver on most prior requests.

39. By letter dated July 1, 2008, the FBI acknowledged receipt of JMP's request and assigned it Request No. 1116243-000. In this letter, the FBI informed JMP that no records were found responsive to this request.

40. By letter dated September 11, 2008, JMP submitted an appeal of the FBI's determination to the DOJ Office of Information and Privacy. In this letter, JMP stipulated that there were no formal investigations launched by the PCIE Integrity Committee of Mr. Helgerson or his office and accordingly limited the scope of the appeal to the request's second line item.

41. By letter dated September 19, 2008, the DOJ acknowledged receipt of JMP's appeal and assigned it Appeal No. 08-2741.

42. As twenty working days have elapsed without a substantive determination by the DOJ Office of Information and Privacy, JMP has constructively exhausted all required administrative remedies.

43. JMP has a legal right under the FOIA to obtain the information it seeks, and there is no legal basis for the denial by the FBI of said right.

WHEREFORE, plaintiff James Madison Project prays that this Court:

(1) Order the defendants to disclose the requested records in their entireties and make copies promptly available to it;

(2) Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552 (a)(4)(E) and/or 28 U.S.C. § 2412 (d);

(3) Expedite this action in every way pursuant to 28 U.S.C. § 1657 (a); and

(4) Grant such other relief as the Court may deem just and proper.

Date: November 14, 2008

Respectfully submitted,

/s/

Bradley P. Moss, Esq.
DC Bar #975905
Mark S. Zaid, Esq.
DC Bar #440532
Mark S. Zaid, P.C.
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036
(202) 454-2809
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Attorneys for Plaintiff

Kelly B. McClanahan, Esq.
NYS Bar #4563748
Mark S. Zaid, P.C.
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036

Of Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 08-0708 (JR)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendant, the Central Intelligence Agency, by and through undersigned counsel, hereby moves to dismiss Plaintiff's First Amended Complaint pursuant to Fed. R. Civ. P. 1, 15(d) and 21. In support of this motion, the Court is respectfully referred to the accompanying Memorandum of Points and Authorities in Support. A proposed Order is attached.

Respectfully submitted,

 /s/
JEFFREY A. TAYLOR, D.C. BAR # 498610
United States Attorney

 /s/
RUDOLPH CONTRERAS, D.C. BAR # 434122
Assistant United States Attorney

 /s/
JUDITH A. KIDWELL
Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
Room E4905
Washington, D.C. 20530
(202) 514-7250

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 08-0708 (JR)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF CENTRAL INTELLIGENCE AGENCY'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT

I. INTRODUCTION

On April 22, 2008, Plaintiff filed its complaint against Defendant Central Intelligence Agency ("CIA"), pursuant to the Freedom of Information Act ("FOIA"). Defendant moved for summary judgment on July 14, 2008, and Plaintiff filed its opposition on August 11, 2008. Briefing concluded on August 26, 2008, upon the filing of Defendant's Reply.

Now, more than two and one-half months later, after fully briefing the FOIA claim set forth in Plaintiff's original complaint, Plaintiff has filed an amended complaint, without leave of Court, seeking to add claims, based on recently made FOIA requests, and to add additional parties to this suit. For the reasons discussed below, Plaintiff's first amended complaint should be dismissed.

ARGUMENT

II. PLAINTIFF FAILED TO SEEK LEAVE OF COURT
TO SUPPLEMENT ITS PLEADING UNDER FED. R. CIV. P. 15(d)

Fed. R. Civ. P. 15(d) authorizes the Court, “upon reasonable notice and upon such terms as are just” to permit a party to serve a supplemental pleading setting forth events which have happened since the date of the original complaint. Such supplements require leave of Court and the Court has broad discretion in determining whether to allow supplemental pleadings in the interests of judicial economy and convenience. *United States v. Hicks*, 283 F.3d 380, 385 (D.C. Cir. 2002); *Wright v. Herman*, 230 F.R.D. 1, 4 (D.D.C. 2005); *Miller v. Air Line Pilots Ass’n Int’l*, 2000 WL 362042, at * 1 (D.D.C. Mar. 30, 2000); *accord Banks v. York*, 448 F.Supp.2d 213, 214 (D.D.C. 2006).

In *Hall v. CIA*, 437 F.3d 94 (D.C. Cir. 2006), the Court of Appeals affirmed the denial of leave to supplement a complaint to include a supplemental FOIA claim.¹ There the court noted:

Delay and prejudice are precisely the matters to be addressed in considering whether to grant motions for supplemental pleadings; such motions are to be ‘freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, and will not prejudice the rights of any of the other parties to the action.’

Hall v. CIA, 437 F.3d at 100-101.

In this case, Plaintiff has added a new claim based on a FOIA request to the CIA made on

¹ The Court stated that “the addition of the new FOIA request [by the plaintiff] is plainly a supplemental pleading as defined by Federal Rule of Civil Procedure 15(d), as it ‘sets forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.’” *Id.* (citing *United States v. Hicks*, 283 F.3d at 385)).

August 11, 2008.² Furthermore, Plaintiff now seeks to add new claims based on FOIA requests to the U.S. Department of Justice and the Federal Bureau of Investigation, two new parties to this action.

The addition of these new claims and new parties in this suit will unreasonably delay the resolution of this case and should, therefore, not be allowed by the Court. Moreover, this amendment will prejudice Defendant CIA's ability to reach a just and speedy resolution of the pending claims. *See* Fed. R. Civ. P. 1 (indicating that the rules of the Court should be "construed and administered to secure the just, speedy, and inexpensive determination of every action."). Therefore, Plaintiff's amended complaint should be dismissed.

III. PLAINTIFF FAILED TO SEEK LEAVE OF COURT TO ADD ADDITIONAL PARTIES

The Federal Rules of Civil Procedure provide, in relevant part, that:

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Fed. R. Civ. P. 21. Although Fed. R. Civ. P. 15(a) permits a plaintiff to amend a complaint without leave of Court prior to any responsive pleading being filed, Plaintiff has run afoul of Fed. R. Civ. P. 21, by filing its amended complaint and adding additional parties, without first seeking leave of Court. *See Age of Majority Educational Corp. v. Preller*, 512 F.2d 1241 (4th Cir. 1975) (plaintiff was required to seek leave of court before filing an amended complaint that dropped one plaintiff, added two new plaintiffs and added eight defendants); *Commodity Futures Trading Commission v. American Metal Exchange Corp.*, 693 F.Supp. 168, 189 (D. N.J. 1988) (even

² On August 27, 2008, Plaintiff amended its new request. In addition, Plaintiff sought a fee waiver, which the CIA granted on August 28, 2008.

though plaintiff complied with Fed. R. Civ. P. 15 in amending to add new causes of action, a proposed amended complaint that adds parties not named in the original complaint can be amended only with leave of court); *Madery v. International Sound Technicians*, 79 F.R.D. 154 (D. C. Cal. 1978) (notwithstanding written consent of defendants, plaintiff was required to secure leave of court to add parties not named in the original complaint); *International Brotherhood of Teamsters v. AFL-CIO*, 32 F.R.D. 441, 442 (E.D. Mich. 1963) (an amendment to complaint to add or drop a party requires an order of court and limits Rule 15(a)). Accordingly, Plaintiff's first amended complaint should be dismissed.

Conclusion

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's First Amended Complaint should be granted.

Respectfully submitted,

/s/

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/s/

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.: 08-0708 (JR)
)	
CENTRAL INTELLIGENCE AGENCY,)	
)	
Defendant.)	
_____)	

ORDER

UPON CONSIDERATION OF Defendant Central Intelligence Agency's motion to dismiss Plaintiff's first amended complaint, any opposition thereto, and the entire record, it is hereby,

ORDERED, that Defendant's motion to dismiss Plaintiff's First Amended Complaint is granted; and it is

FURTHER ORDERED, that Plaintiff's First Amended Complaint is dismissed.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Civil Action No.: 08-0708 (JR)

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY
TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS FIRST AMENDED COMPLAINT¹

I. Plaintiff Has Filed A Supplemental Pleading Under Fed. R. Civ. P. 15(d)

Plaintiff filed its initial complaint on April 22, 2008. The complaint concerned an October 2007, Freedom of Information Act ("FOIA") request made by Plaintiff to Defendant. *See* Complaint ¶ 15. After briefing had closed, Plaintiff filed its First Amended Complaint adding two additional defendants and three additional FOIA requests. These requests had been made after the request on which its initial complaint was based, and, in fact, while this case was pending. *See* First Amended Complaint ("A. Compl.") ¶ 22 (August 11, 2008 FOIA request to CIA²), ¶ 29 (May 26, 2008 FOIA and Fee Waiver requests to the DOJ Criminal Division), ¶ 38

¹ Plaintiff has alternatively filed a "Notice of Intent To Seek Leave Of The Court To File An Amended Complaint" to which no response is required. Defendant will file its opposition to such motion after it is filed and within the time proscribed by the Rules of this Court.

² Notably, Plaintiff sought a fee waiver and amended its request to expand the time frame of the request on August 27, 2008, a date after it had filed its opposition in this case. *See* A. Compl. ¶¶ 22, 24; Docket No. 9.

(May 26, 2008 FOIA and Fee Waiver requests to the FBI).³

Plaintiff argues that its First Amended Complaint which adds these additional parties and new claims is not a supplemental pleading under Fed. R. Civ. P. 15(d). *See* Plaintiff's Opposition ("Plf. Opp.") at 3-5. Plaintiff's argument is without merit.

Amended and supplemental pleadings differ in two respects. The former relate to matters that occurred prior to the filing of the original pleading and entirely replace the earlier pleading; the latter deal with events subsequent to the pleading to be altered and merely represent additions to or continuations of the earlier pleadings. *See Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006); *United States v. Hicks*, 283 F.3d 380, 385 (D.C. Cir. 2002). Additionally, leave of Court must be requested to file a supplemental pleading, whereas, a party may amend its complaint once as a matter of course. *Compare* Fed. R. Civ. P. 15(d) and 15(a). In this case, it is clear that Plaintiff's new claims, which accrued while this case was pending, deal with events subsequent to its initial complaint and, therefore, constitute supplemental pleadings under Fed. R. Civ. P. 15(d).

II. Plaintiff's Supplemental Pleading Will Not Promote Judicial Economy Or The Speedy Disposition of the Case

Plaintiff's argument that granting it leave to file its supplemental pleading will somehow promote judicial economy is equally without merit. The briefing in this matter closed on August 26, 2008, and the parties were merely awaiting the Court's decision concerning one FOIA request to the CIA. However, with the addition of new parties, who have to be served, and three new FOIA claims, the briefing on the old issue will become moot, additional pleadings and briefing from several defendants will be required, and the resolution of this case will be delayed

³ After the FBI's no records response, Plaintiff appealed to the Office of Information and Privacy on September 11, 2008. *See* A. Compl. ¶¶ 39-40.

well into the New Year. Moreover, it is questionable whether Plaintiff would indeed have filed a new suit with respect to its new FOIA requests in light of the fact that it received a no records response from one of the new parties and did not wait any substantial time beyond the 20-day constructive exhaustion period to obtain a response on the other two FOIA requests. Plaintiff's arguments are self-serving and its supplemental pleading will not promote any economy, except its own.

Conclusion

For the foregoing reasons, Plaintiff's First Amended Complaint should be dismissed.

Respectfully submitted,

/s/

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United States Attorney

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No. 08-0708 (JR)
	:
CENTRAL INTELLIGENCE AGENCY,	:
	:
Defendant.	:

MEMORANDUM

The James Madison Project (JMP) brought this FOIA action to compel the CIA to respond to its October 2007 request for "copies of all internal [CIA] documents *pertaining to discussions concerning the decision to initiate an internal review of the operations of the CIA's Inspector General ("IG"), John Helgerson, and of the IG's office as a whole.*" Dkt. 5, Ex. A (emphasis added). The CIA has since reported that it has found no responsive records, *id.*, Ex. D, and has moved to dismiss, or, alternatively, for summary judgment.

To prevail, the CIA must "show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The CIA must defend the search process, not its outcome: "the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested

records." Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) (citations omitted).

The CIA's initial attempt to meet this standard was the affidavit of Delores M. Nelson, a senior CIA public information official. See First Nelson Decl. JMP challenged Ms. Nelson's affidavit on two grounds: that it did not explain why the CIA searched only for records within the Director of the Central Intelligence Agency (DCIA) component, and that it did not explain why the CIA searched only for records generated before November 5, 2007.¹ The CIA has addressed both of those points in a second affidavit of Ms. Nelson. She states that the CIA only searched the DCIA component because "the Director of the CIA decided to initiate the review [,] the Office of the DCIA carried out the review of the IG . . . [and] the other directorates of the CIA . . . were not involved in the decision to initiate the internal review." Second Nelson Decl., at ¶ 3. She also explains that the CIA's search for pre-November 5, 2007 documents

¹ JMP's other concerns about the first Nelson declaration -- its failure to describe "which of the 'example' search terms were used in which particular record systems," "what other search terms were used in conducting the search," and "whether and to what degree the CIA revised its initial search in light of information discovered during initial phases of the search" -- ask too much of the CIA. See, e.g., Miller v. Dept. of State, 779 F.2d 1378, 1383 (8th Cir. 1985) ("An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith").

was reasonable because the CIA's decision to conduct an internal review of the IG occurred well before that date. Id., at ¶ 4.

JMP also finds the CIA's failure to produce at least one of the IG's semiannual reports suspicious, since the internal inquiry into the IG's performance lasted approximately ten months. JMP concedes that "the inability of an agency to find a particular document does not generally render a search inadequate," but relies on Nation Magazine, Wash. Bureau v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995), for the proposition that "in certain circumstances a court may place significant weight on the fact that a records search failed to turn up a particular document." Dkt. 9, at 12. Ms. Nelson notes, however:

While the IG's Office is obligated to meet certain reporting requirements under the CIA Act, the CIA did not search for any IG reporting relating to the internal review of the IG's office simply because these documents would not be responsive to Plaintiff's request. Any documentation relating to the IG Office's compliance with the internal review would not be responsive to a request for records relating to the *decision to initiate* the internal review of the IG and the IG's office as a whole.

Second Nelson Decl., at ¶ 5 (emphasis in original).

The CIA's position rests upon a careful and literal, but not improper, reading of JMP's narrow and awkwardly worded FOIA request. The two Nelson declarations demonstrate that the search -- for what JMP asked for -- was reasonable.

* * *

The CIA's motion to dismiss JMP's amended complaint will be granted. The exquisitely nuanced question of whether plaintiff filed an amended or supplemental complaint is mooted, in this instance, by the exercise of my discretion not to allow plaintiff to alter and expand this litigation more than two months after a motion for summary judgment on its original complaint was fully briefed and under submission. The FOIA requests plaintiff made to different agencies about the same or similar subjects involved in this case will have to be pursued separately.

An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge