

NATIONAL SECURITY PROJECT



via FAX

April 25, 2013

Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505
Fax: 703-613-3007

Reference: F-2013-00829

To Whom It May Concern:

The American Civil Liberties Union and the American Civil Liberties Union Foundation (collectively "ACLU") write to appeal from the CIA's response to FOIA Request F-2013-00829, in which we sought a report recently adopted by the Senate Select Committee on Intelligence ("SSCI") on the CIA's rendition, detention, and interrogation program in the years following 9/11. See FOIA Request of February 13, 2013 ("Request") (Exhibit 1, attached).

In a letter dated February 22, 2013 ("Response Letter"), Information and Privacy Coordinator Michele Meeks stated that our request could not be accepted because we seek "a Congressionally generated and controlled document that is not subject to the FOIA's access provisions." See Response Letter (Exhibit 2, attached).

The ACLU appeals from Ms. Meeks' decision. It is true that the FOIA only applies to agency records, and not to congressional documents. See 5 U.S.C. §§ 551(1), 552(f); see also e.g., *United We Stand America v. I.R.S.*, 359 F.3d 595, 597 (D.C. Cir. 2004) ("Because Congress is not an agency, congressional documents are not subject to FOIA's disclosure requirement."). But an agency may not avoid a valid FOIA request by unilaterally asserting that the record requested is not an agency record.

The Supreme Court has held that two requirements "must be satisfied for requested materials to qualify as 'agency records.'" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989). First, an agency "must 'either create or obtain' the requested materials," and second, the agency "must be in control of the requested materials at the time the FOIA request is made." *Id.* at 144-45 (quoting *Forsburn v. Harris*, 445 U.S. 169, 182 (1980)).

It is indisputable that the CIA has "obtain[ed]" the SSCI Report requested. See, e.g., Statement to CIA Employees from CIA Acting Director Michael Morrell on the SSCI Report on Past Agency Program, Dec. 14, 2012

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("The Committee voted to make the report available for comment to several Executive Branch agencies, including CIA, and I very much appreciate [SSCI] Chairman Feinstein's commitment that the report is open to revision"), available at <http://tinyurl.com/d8qz8sa>. The only question, therefore, is whether the CIA is "in control of" the SSCI Report at this time.

The Supreme Court has explained that "[b]y control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. As Acting Director Morrell made clear last December, the CIA has received the SSCI Report in the legitimate conduct of its official duties. Moreover, the SSCI Report reportedly makes a number of recommendations to the CIA that the CIA presumably has reviewed in the conduct of its official duties in determining whether and how to implement those recommendations. The CIA thus may not reject the ACLU's FOIA request by claiming that the SSCI Report falls outside the statute's purview.

For the foregoing reasons, Ms. Meeks' decision was in error. The CIA should promptly process the ACLU's request.

Sincerely,

[Redacted Signature]

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