The National Security Archive

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MEMORANDUM

FROM: The National Security Archive

RE: Freedom of Information Act Exemption for National Security Agency Files in S. 747, Defense Authorization Act

DATE: May 1, 2003

This is to alert you to pending legislation that would dramatically reduce public access to valuable National Security Agency ("NSA" or "Agency") records now released under the Freedom of Information Act, including important historical records on the use of signals intelligence and cryptology in U.S. defense history. There have been no public hearings on the proposed legislation, which is based on unsupported justifications, as described below.

The proposed FY 2004 Defense Authorization Act contains a provision that would exempt all "operational files of the National Security Agency" from the search, review, and disclosure provisions of the Freedom of Information Act ("FOIA"), 5 USC 552. (S. 747, sec. 933). While much of the information in those files is classified, many valuable documents are routinely released from such files that no longer would be available to the public if the FOIA exemption is enacted into law.

ANALYSIS OF JUSTIFICATION FOR NSA EXEMPTION

We are aware of only a page and a half document explaining the reason that the NSA needs a new FOIA exemption. (See http://www.fas.org/sgp/news/2003/03/nsaopfiles.html). This "justification" document provides no concrete examples of any harm to national security suffered as a result of NSA's FOIA obligations and provides no assurance that the new exemption would not result in an extensive reduction in the number of records available to the public about the NSA's historical involvement in key U.S. foreign policy and intelligence activities. This is in sharp contrast to the extensive record, discussed below, that was developed before Congress passed the CIA Information Act of 1984, upon which the proposed FOIA exemption for NSA operational files is explicitly modeled.

At a minimum, the proposed exemption should not be enacted into law until the NSA has conducted a study examining the impact of and need for the exemption and until public hearings are held on the matter.

- The NSA asserts that the exemption will "allow NSA to better focus on its signals intelligence mission." Because NSA "almost invariably withholds" "records that document the means by which foreign intelligence or counterintelligence is collected through technical means," the Agency contends that FOIA requests have diverted Agency personnel.

The claim that the NSA "almost invariably withholds" records that "document the means by which foreign intelligence or counter intelligence is collected through technical means" simply is not correct. The NSA has in the past released information relating to the use of signals intelligence in space[1], and has produced extensive information concerning the use of cryptology in the United States. These releases include records concerning the U.S. Signals Intelligence effort to collect and decrypt the text of Soviet KGB and GRU messages known as the VENONA project, the Cuban Missile Crisis, SIGSALY Secure Digital Voice Communications in World War II, and the Korean War. Through its project OPENDOOR it also has released 1.3 million pages of previously classified documents from the pre-World War I period through World War II. The proposed FOIA exemption would stop all such releases in their tracks and deny the public important information about the role that the NSA, signals intelligence, and cryptology played in U.S. foreign policy and history. The proposed exemption would largely eliminate FOIA as a means of learning about similar activities. The information control that would be left in the hands of the NSA is completely antithetical to the system of checks and balances that is the core of our political system and that finds clear expression in FOIA.

A timely illustration of the impact involves a current FOIA request before the Agency. At issue are electronic intercepts concerning the 1967 attack on the U.S.S. Liberty by Israeli forces. The U.S.S. Liberty was a U.S. intelligence vessel and the attack led to the death of 34 American sailors. Despite official designation of the incident as an accident of war, there has been an extended controversy about the intent behind the attack. FOIA requester A. Jay Cristol, a bankruptcy court judge in Miami has studied the matter and determined that it was a mistake, is currently in litigation with the NSA to obtain the electronic communications monitored by or neat the U.S.S. Liberty at the time of the attack. These documents, which are critical to analyzing an important historical event, may become completely unavailable if the proposed FOIA exemption is adopted.

- The NSA further contends that the exemption will "improve security." The Agency contends that even withholding of records or "no records" responses permit FOIA requesters to piece together a mosaic that "may reveal the Agency's intelligence capabilities against or interests in its specific targets."

Instead of improving security, the proposed exemption would simply increase secrecy. Despite the reflexive response to recent security challenges, security and secrecy <u>are not</u> the same thing. As was noted by Eleanor Hill, Staff Director of the Joint House/Senate Intelligence Committee Inquiry into September 11, secrecy can sometimes undermine security: "[T]he record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public." Ms. Hill reiterated the question "[C]ould 'the devastation of September 11th [have] been diminished in any degree' had the public been more aware, and thus more alert, regarding the threats we were facing during the summer of 2001?" (Statement of Oct. 17, 2002).

In fact, the vast majority of the releases by the NSA that would be cut off by the proposed exemption are historical and have no negative impact on national security despite the fact that they serve to educate and inform the populace. If the NSA really wants to prevent the world from knowing what targets it is interested in, then it would have to muzzle the President, the Secretary of Defense, and the Secretary of State, each of whom has repeatedly spoken of the foreign countries and terrorists at the top of the nation's target list.

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[1] N.C. Gerson, "SIGINT In Space," Studies in Intelligence, Vol. 28 No. 2 (Summer 1984) (describing the use of signals intelligence in space).

- The NSA further contends that the exemption will "help prevent the inadvertent release of sensitive information about the Agency's operations to adversaries of the United States."

There is a real risk that by expanding the shroud of secrecy around Agency information, the NSA is increasing the risk of inadvertent release of sensitive information. With the fragile assurance that records are "secret" there may be a tendency not to institute the rigorous security and review procedures now utilized by the agency to evaluate documents for release. In addition, leaks occur when insiders feel that information is being improperly hidden from scrutiny, not when legitimately sensitive information is being properly protected. Moreover, the NSA has offered no examples at all of inadvertent release to justify such a broad extension of the FOIA.

- Finally, the Agency seeks to reassure by highlighting the safeguards against improper agency secrecy. Among these safeguards is the requirement that the Director "review exempted operational files for continued exemption not less than once every 10 years."

The promised decennial review is not a real check on the Agency's over-protection of information. This same review is required by the CIA, but has failed to prevent the agency from keeps secret documents of historical significance. As discussed below, the CIA has refused to release histories of operations that have been officially acknowledged and declassified. Although efforts to obtain release of such materials are proceeding, it demonstrates the cumbersomeness of a decennial review process that cannot respond to changing security needs.

BACKGROUND ON CIA INFORMATION ACT OF 1984

The proposed Defense Authorization bill proposes to extend to the NSA the statutory exemption from search and review under FOIA that was specifically crafted for the Central Intelligence Agency Directorates of Operations and Science and Technology.

1. The Purpose of the CIA Information Act of 1984

The CIA Information Act of 1984 was enacted only after an extensive congressional review of:

- The CIA's distinctive compartmentalization of files and restrictions on access to information within the Agency;
- The reasons that exempting operational files from search and review would not diminish the type or amount of information releasable under the FOIA;
- The operational and administrative impact of the FOIA on the CIA;
- The impact the Exemption would have on FOIA requesters, including the reduction of backlogged FOIA requests; and
- The impact of the FOIA and the Exemption on sources of intelligence.

Congress conducted numerous hearings over several years regarding the impact of the FOIA on the CIA's activities before passing the CIA Information Act.[2] Ultimately, Congress determined that the CIA should

[2] S. 1324, An Amendment to the National Security Act of 1947, Hearings before the Select Committee on Intelligence of the United States Senate, 98th Cong., 1st Sess., at 6 (1983); Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency, Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 98th Cong., 2d Sess., at 5, 12 (1984) (statements of John N. McMahon, Deputy Director of the Central Intelligence Agency); CIA Information Act: Hearing on H.R. 5164 before the Government Information, Justice, and Agriculture Subcomm. Of the House Comm. on Government Operations, 98th Cong., 2d Sess. (1984).

be relieved from the unproductive requirement to search and review its operational files because: (1) the records that were releasable under FOIA would be available under FOIA from other files within the CIA; and (2) both FOIA processing times and CIA effectiveness would be improved by such an exemption. In the 98th Congress, over the course of many months, congressional staff engaged in negotiations with the CIA, the Department of Justice, and public interest organizations, considered numerous alternative proposals, and ultimately hammered out a narrowly constrained exemption of CIA operational files from search and review.

There has been no showing that any of the reasons supporting the enactment of the CIA Information Act applies to the files of the NSA. As explained above, those rationales that have been put forth by the Agency have not been supported by anything other than conclusory assertions that rely on a generalized security fear rather than real examples of risk associated with release of documents under FOIA. The organization and function of the NSA is so different from the CIA that it is unreasonable to simply extend the application of the CIA Information Act to the NSA.

2. The CIA's Commitment to its FOIA Obligations

Even with its extensive study of the impact of the FOIA on the CIA, the CIA Information Act of 1984 could not have achieved passage if there had not a clear *quid pro quo*, offering benefit both to the CIA and to the public. As the legislative history explains, the CIA made repeated representations to the House Permanent Select Committee on Intelligence, the House Committee on Government Operations, and the Senate Select Committee on Intelligence that:

- There would be no change or diminishment in the amount of information releasable to the public under the FOIA[3];
- The CIA would reduce its backlog of FOIA requests from years to weeks[4];
- The CIA would continue to allocate a stable level of resources to its FOIA program for at least two years[5]; and
- The CIA would establish a program designed to produce compliance with the FOIA processing deadlines and to effect a substantial reduction of the backlog of FOIA requests.[6]

Additional hearings were held in 1977, 1979, 1980 and 1982 before Senate and House committees concerning the impact of the FOIA on the CIA. We are happy to provide additional citations upon request.

[3] E.g. Central Intelligence Agency Information Act, H. Rep. No. 98-726, Part II, at 6 (1984) ("CIA Executive Director Charles A. Briggs [] testified that the bill will not result in the withholding of any information that is now made public.")

[4] E.g. Legislation to modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 98th Cong., 2d Sess., 23 (1984) (Statement of Chief, Information and Privacy Division of the CIA, Larry Strawderman) (estimating that with the passage of the CIA Information Act of 1984, the Agency should "be able to respond in terms of weeks or at most, months, to get a request back to the public.")

[5] See Intelligence Information Act of 1983, S. Rep. No. 305, 98th Cong. 1st Sess., at 17 (1983).

[6] See Intelligence Information Act of 1983, S. Rep. No. 305, 98th Cong. 1st Sess., at 17 (1983); In the House Report accompanying the bill, the Committee cited to then-CIA Director William Casey's promise to "establish a specific program designed to produce compliance with the current FOIA processing deadlines for new requests and to effect a substantial reduction, if not the entire elimination, of the current backlog of FOIA requests." Central Intelligence Agency Information Act, H. Rep. No. 98-726, Part II, at 7 (1984).

These promises were instrumental in obtaining congressional ratification of the CIA Information Act. As the Senate Select Committee on Intelligence reported: "[t]he acceptance by the Agency of the obligation to provide information to the public under FOIA is one of the linchpins of this legislation."[7]

The NSA has not made any similar commitments, and particularly has not represented or demonstrated that the amount of information releasable under the FOIA will not be diminished by the proposed exemption. Thus, the NSA seeks to make a substantive change to the FOIA without Congress even having the benefit of public hearings to determine if such a change is justified. The proposed FOIA exemption should not be enacted into law without a study concerning the need for and impact of the exemption and public hearings on the proposal.

THE RISK OF ENACTING A BLANKET FOIA EXEMPTION FOR OPERATIONAL FILES

Finally, despite the promises the CIA offered in exchange for a blanket FOIA exemption for operational files, not even the CIA's promises have been met. First, the CIA Information Act has been applied too broadly and is being used to interfere with efforts to document the historical record of CIA activities, The Agency has refused to search for records such as a history of the Office of Special Activities from its inception to 1969 even though the specific history requested has been cited and relied upon by the CIA in other released records and even though substantial aspects of the activities of the Office of Special Activities have been released and officially acknowledged. To protect from disclosure histories about CIA operations that have been publicly acknowledged and declassified plainly violates the core principle of FOIA without providing any national security benefit.

Second, the CIA's commitment to FOIA processing still has not been fully satisfied. Notably, while CIA's 2002 Annual Report to the Department of Justice report median response times for the Agency ranging from 7 days for a simple request to 83 days for a complex requests, the over 1500 requests that the Agency's FY 2002 Annual Report describes as pending at the end of the fiscal year had a median age of over 600 days. The CIA has acknowledged that it still has pending some requests that were filed in 1986 and 1987 and have been pending for well over 3500 business days. The delays severely interfere with FOIA's usefulness to the public. Delaying release of appropriate information about these matters for over 15 years completely undercuts the purpose of the FOIA and makes it impossible for the Act to serve the purpose of informing the electorate and permitting for public debate about the activities and operations of the government.

Third, despite assurances that the information protected from search and review was information that should not be released in any event, there have been numerous releases of CIA files due to separate statutory requirement that involved documents that: (1) would have fallen within the CIA Information Act FOIA Exemption; (2) that Congress recognized and mandated should be released; and (3) that compromised no significant national security concern. These include the records covered by the Nazi War Crimes Disclosure Act, the Japanese Imperial Government Disclosure Act, and the President John F. Kennedy Assassination Records Collection Act of 1992. Thus, in the case the Kennedy assassination

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[7] Intelligence Information Act of 1983, S. Rep. No. 305, 98th Cong. 1st Sess., at 13 (1983); Central Intelligence Agency Information Act, H. Rep. No. 98-726, Part I, at 17 (1984) ("*The Committee considered it to be of primary importance in providing CIA relief from undue FOIA processing burdens to preserve undiminished the amount of meaningful information releasable to the public under the FOIA*.") (emphasis added); Central Intelligence Agency Information Act, H. Rep. No. 98-726, Part II, at 7 (1984) (The Report notes that "the promise of a substantial reduction in the response time for FOIA requests by the CIA as a primary benefit of the bill.").

release, there were hundreds of cables from the CIA stations in Miami and Mexico City that would have been wholly unreachable through FOIA due to the operational files exemption. Yet the release was justified by the strong public interest in access to the information and the passage of time having eliminated any national security risk. Similarly, we now have several thousand pages of documents from the CIA's operational files, obtained not through the Freedom of Information Act but from special releases such as those ordered by President Clinton for the U.N. truth commissions in El Salvador and Guatemala. It is clear that the substance of many of these documents, with sources deleted, could and should have been released under the Freedom of Information Act. Thus, there is a significant risk that in permitting a blanket exemption for unspecified "operational files," Congress will be permitting the NSA to protect from FOIA search and review numerous records of significant historical importance.

CONCLUSION

The proposed Defense Authorization Bill relies on the specter of terrorism to pull a curtain of secrecy around the NSA's activities without any demonstration of a need for such secrecy. To permit the NSA to adopt the exemption for its own records without any examination of the need and impact for the exemption and without any commitment to the FOIA program by the NSA would vitiate the FOIA with respect to the Agency. The NSA's hope that its request will be unquestioningly accepted because of the fear of terrorism is all the more shocking when the learning since September 11, 2001 has reinforced the importance of access to information for fighting the terrorist threat and the administration's increased penchant for secrecy is increasingly coming under congressional attack. Congress should not permit the proposed exemption to slide into law without public hearings to examine the need for the legislation.

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