

The National Security Archive

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May 2, 2003

By Facsimile

The Honorable John Warner
Chairman,
Committee on Armed Services
United States Senate
228 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Carl Levin
Ranking Member,
Committee on Armed Services
United States Senate
228 Russell Senate Office Building
Washington, D.C. 20510

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

Dear Senators Warner and Levin:

We are writing on behalf of the National Security Archive and the Federation of American Scientists to express our concern about a provision in the proposed FY 2004 Defense Authorization Act 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. There have been no public hearings on the proposed legislation, which is based on unsupported justifications, as described below.

We are aware of only a page and a half document explaining the reason that the National Security Agency (“NSA”) needs a new FOIA exemption. (See attached). It offers 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.

- The “justification” wrongly asserts that the NSA “almost invariably withholds” records that “document the means by which foreign intelligence or counter intelligence is collected through technical means.” The NSA has in the past released information relating to the use of signals intelligence in space, 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. A timely illustration of the impact of the proposed exemption 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, which 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

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bankruptcy court judge in Miami, has studied the matter and determined that the attack was a mistake and is currently seeking from the NSA electronic communications monitored by or near 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 “justification” misleadingly equates secrecy with “improve[d] security.” 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.
- The justification wrongly claims that the exemption will “help prevent the inadvertent release of sensitive information about the Agency’s operations to adversaries of the United States.” Instead, 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. Critically, the NSA has offered no examples at all of inadvertent release to justify such a broad extension of the FOIA.
- The justification contends that a provision for decennial review of those files placed within the protection of the exemption provides a safety net against excessive secrecy. 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 keeping secret documents of historical significance. 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.

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. Yet, in contrast to the CIA Information Act of 1984, which was preceded by numerous congressional hearings and extensive study, 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. Nor has the NSA made any of the commitments to FOIA that the CIA made in 1984. 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.

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 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.

For more information, please call Tom Blanton ((202) 994-7068), Meredith Fuchs ((202) 994-7059), or Steven Aftergood ((202)- 454-4691).

Respectfully submitted,

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