

September 7, 1994

VIA FAX ((703) 482-8361) and VIA MAIL

Edmund Cohen  
Director, Information Management  
Central Intelligence Agency  
Washington, D.C. 20505

RE: Solicitation of public comment on CIA decennial review of operational files exemption, 59 Fed.Reg. 40339 (August 8, 1994)

Dear Mr. Cohen:

Thank you for the opportunity to comment on the Central Intelligence Agency's decennial review, currently underway as required by the CIA Information Act of 1984 (codified at 50 U.S.C. sections 431 and 432), of the record categories in the Directorates of Operations and Science and Technology and the Office of Security that are currently designated as exempt from the search and review requirements of the Freedom of Information Act (FOIA), 5 U.S.C. section 552.

These comments are submitted on behalf of the National Security Archive and the American Civil Liberties Union Center for National Security Studies. The Archive is a non-profit foreign policy research institute and library that extensively uses the FOIA at CIA and other federal agencies to build collections of declassified government agency records documenting key U.S. foreign policy issues. In its work, the Archive regularly faces serious barriers to fully documenting these issues due to the broad range of records now designated as "operational files" exempt from FOIA. The Archive has found that the lack of public access to CIA documents -- especially records now several decades old -- resulting from the current "operational files" designations severely restricts the ability of scholars, researchers, and the public to know about, understand, and learn from events in our nation's past in which CIA played a role. The ACLU is a nonpartisan organization dedicated to the principles of individual liberty embodied in the Constitution that works to ensure that broad access to government information, including the records of intelligence agencies, and other civil liberties are not eroded in the name of national security.

### Introduction

The CIA's primary justifications for seeking the "operational files" exemption, as recorded at length in hearing testimony and the 1984 Act's legislative history, were its assurances that by allowing the CIA's director to designate large blocks of files for exemption from the FOIA's search and review requirements no noticeable shrinkage of the amount or type of information releasable to the public would result, responses to FOIA requests would be far quicker, and that declassification review of "operational files" was a waste of time because it never yielded significant useful material. Although the Agency's August 8 Federal Register notice itself recognizes that the purpose of the Act was to expedite the Agency's review of information for release to the public, we believe that the Agency is wrong in asserting that the Act's original purposes have been met. The Agency's FOIA operation, freed of its burden to search for and review "operational files", has not become more efficient but in many cases is far less responsive to public requests than before.

Our comments address two major issues. First, we recommend subject categories and file groups that should be removed from the "operational files" exemption based on their historical value or other public interest in them and the potential for declassifying and releasing to the public significant information contained in those records. Second, we describe the continuing delays and other serious defects in the CIA's FOIA practices that requesters have consistently experienced during the decade since the "operational files" exemption was passed and identify necessary reforms that are long overdue.

**I. Records groups recommended for removal from "operational files" exempt status.**

CIA witnesses at the congressional hearings prior to the 1984 Act's passage testified that the Agency's need for the "operational files" exemption was based on the premise that FOIA's

"search and review process[] results in an ever-present risk of exposure of sources and methods, and creates a perceived risk on the part of our sources and potential sources . . . At the same time, with this exclusion, the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act . . . In the case of records gleaned from operational files, virtually none of this information is released to the requester . . . The public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files." 1

We acknowledge that there likely are files in the CIA's Directorates of Operations and of Science and Technology, and Office of Security that require continued secrecy in whole or in part on national security grounds to protect intelligence sources and methods. However, it has become increasingly clear over the past decade that there is much information contained in files now designated as exempt "operational files" which can and should be publicly released.

As the August 8 Federal Register notice soliciting public comment states, many thousands of pages of CIA records have in fact been declassified in whole or in part to reveal much information crucial to understanding past actions and policymaking involving the CIA. Many of these apparently come from record groups that fall under the current "operational files" designation. For example, the initial declassification and release to the public of scores of boxes related to the assassination of President John F. Kennedy, done pursuant to a separate statutory mandate, has resulted in the declassification of hundreds of cables from the CIA stations in Miami and Mexico City, materials that the current "operational files" exemption render wholly unreachable through FOIA. 2 Other examples

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1 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. 6. (Statement of John N. McMahon, Deputy Director of Central Intelligence).

2 The CIA's declassification of a handful of Cuban missile crisis records, cited in the Federal Register notice as another example of CIA's declassification efforts reveals the problems inherent in too broadly exempting whole record groups from FOIA's search and review requirements. Although the 100-odd documents declassified in 1992 and published in a book distributed at its conference on the crisis were important and useful, CIA's actions here ended up not being particularly useful to researchers and scholars because the documents were taken out of the context of the files from which they came, their origins

of CIA records relating to once-highly sensitive intelligence operations and special activities but declassified and made publicly available in the recent past, which can serve as models for types of files that can be removed from the "operational files" exemption, include:

- \* the Penkovsky case, one of the CIA's most important intelligence operations;
- \* covert activities against Cuba in the early 1960s, including details of assassination plots against Castro and their planning;
- \* covert political and psychological warfare in western Europe, e.g., Germany; and
- \* intelligence findings referring to and drawing on data provided by U-2 and satellite photography.

Thus, it is critically important to take the opportunity provided by this decennial review to limit the number of records and record groups designated as exempt "operational files."

If the review the Agency is undertaking here is to have a useful and lasting impact, it should seek not just to identify particular subjects that should be deemed eligible for FOIA search and review but also establish a set of workable, common-sense standards to apply in identifying record groups for removal from the "operational files" category in the future. The 1984 Act does not limit the Agency's review of designations to once every ten years but only requires that at a minimum a review be done decennially. As the "operational files" designations currently operate, they treat a file or document from 1954 no differently from one generated in 1994. In adopting such standards, we encourage the Agency to take into account the passage of time, recognize that changing circumstances in the world require flexibility in evaluating what needs continued secrecy, and incorporate a variety of review strategies such as bulk declassification. These standards should also require that when documents or record groups are identified for removal from the "operational files" exemption, the declassification review should incorporate markings that indicate where and why information has been redacted, from what agency component and file group the records originated, and provide access to contextual information about the entire set of records from which the document or file group came.

#### A. Directorate of Operations Files.

While not exhaustive, the following list identifies file groups in the Directorate of Operations that should be removed from the current "operational files" designations of records exempt from search and review:

- \* Records related to U.S. government support for non-communist political and social movements in Western Europe, especially during the early years of the Cold War from 1947 through the mid 1950s. This includes material relating to support for anti-communists in the 1948 Italian election, support for the Force Ouvriere in France during the late 1940s, and Psychological Strategy Board activities in the 1950s;

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were not identified, nor was the scope and range of materials not declassified for the conference described.

In contrast, in response to a lawsuit brought by the National Security Archive in 1988, the State Department over a period of time declassified and released in whole or in part several thousand documents on the crisis, many of them formerly classified at the "Top Secret/Eyes Only" level and no less sensitive than the documents on the crisis that are still being kept secret by CIA. These declassified State Department documents, now housed at the Archive (and disseminated to the public through an indexed microfiche collection containing over 15,000 pages of documents and a document reader) provide a far more comprehensive view of the event than the CIA's selected declassification of only a few records possibly can.

\* Records related to political and economic warfare against communist regimes in eastern Europe, for example U.S. government support for WIN in Poland;

\* Records related to covert political activities in the third world, including Guatemala in 1954, Iran in 1953, Indonesia during the late 1950s and early 1960s, Syria in 1957, and those records designated by the CIA's Center for the Study of Intelligence for block declassification (for which no timetable for release been publicly announced), including France in the 1940s, Italy during the 1940s and 1950s, North Korea during the early 1950s, Tibet in the 1950s and 1960s, the Bay of Pigs operation in 1961, and the Congo, the Dominican Republic and Laos in the 1960s; and

\* Files currently included in the "Obsolete Category", as described in the August 8 Federal Register notice.

We also strongly recommend that the CIA affirmatively state as part of this review that it will not deem "assassination records" under the President John F. Kennedy Records Collection Act of 1992 to be "operational files" that are exempt from search and declassification review under the terms of the CIA Information Act of 1984.

#### B. Directorate of Science and Technology files.

We recommend the removal of record groups in the Directorate of Science and Technology from the "operational files" exemption based on their historical value and the likelihood that significant amounts of information can be released after declassification review without harm to national security. Examples of record groups from this directorate that we believe could and deserve to be made eligible for declassification review and public release include records related to the history of the U-2 program, the early years of the reconnaissance satellite programs, and on early efforts to collect data on the Soviet nuclear program.

An instructive perspective on the suitability of files from the Science and Technology Directorate, in particular satellite imagery, for inclusion in FOIA search and review procedures is contained in an observation by Admiral Bobby Ray Inman at a conference a few years ago organized by the Carnegie Endowment for International Peace:

"Some years ago, Hans Mark [then director of the National Reconnaissance Office] and I conspired to declassify U.S. satellite imagery. We believed that making quantities of that imagery selectively available would help inform public debate. We were eminently unsuccessful--not because of the raging policy debated: we might have won that. Instead, lawyers carried the day by rendering the judgement that the Freedom of Information Act, in their opinion, made it very clear that if selected photos were released, then all photographs derived from all systems would become fully subject to the Freedom of Information act process, meaning a laborious and expensive review process for everyone involved." 3

We believe that the CIA should, as it undertakes its review of the current "operational files" designations, adopt Admiral Inman's and Hans Marks' conclusion, based on their extensive experience with imagery, that at least some of these materials can be safely declassified and released to the public based on evaluation of the materials' particular nature and the

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3 B.R. Inman, in M. Krepon, et al., Commercial Observation Satellites and International Security at 5 (St. Martin's Press, in association with the Carnegie Endowment for International Peace, 1990).

contribution to the historical record and informed debate that public release would provide.

Similarly, we believe that CIA should consider including some categories of signal intelligence records in the files removed from the "operational files" exemption. SIGINT, particularly COMINT (and especially the cryptanalytic portion of COMINT) traditionally has been treated as the most sensitive of sources -- so much so that some material relating to U.S. cryptanalytical successes in the 1920s is still classified at the "Top Secret" level. Yet at the same time, the government has declassified historical material concerning COMINT/cryptanalysis from World War II. Other COMINT material has been made public on selected events, such as the C-130 incident in the 1950s, the KAL-007 downing, and the Berlin nightclub bombing. The most useful COMINT that could be declassified is historical material that has been written about extensively and the declassification of which would be of great use to scholars -- for example, VENONA material related to Soviet espionage in the U.S. and Britain.

C. Office of Security files.

As described in the August 8 Federal Register notice and based on our experience with government records, the files of the Office of Security appear the least likely of the three main categories of exempt "operational files" to produce significant releasable information of great interest to scholars, historians, and students of intelligence policymaking. We encourage the CIA to remove from the "operational files" exemption all records in this office that may appear eligible for declassification review and release based on the passage of time, changing circumstances, and their historical and public interest value. Given the finite resources available for the Agency's review of records for removal from the current "operational files" designations, we suggest that the bulk of those resources be focused on identifying files in the directorates of Operations and of Science and Technology rather than on those of less broad significance and interest in the Office of Security.

II. **Reform of CIA's FOIA practices.**

In hearings before Congress seeking support for passage of the CIA Information Act, representatives of the CIA repeatedly promised that "[t]he public can only stand to benefit" from an "operational files" exemption to the FOIA because the law's "reduced administrative burden will permit the CIA to respond to requests more quickly, thus providing more useful and timely information." 4 Congressional support for the law was based on the belief that "this legislation does not frustrate the essential purposes of the FOIA. Requesters will continue to have access to CIA files containing the intelligence product and to information on policy questions and debates on these policies." 5 In our experience as frequent FOIA requesters at CIA, this has not turned out to be the case.

A. Use of "glommarization" to avoid searches for requested records.

Over the years an increasingly large percentage of our requests have not been processed on the grounds that "the agency may neither confirm nor deny the existence or nonexistence of records responsive to your request." This overreliance on "glommarization" has been extended even to requests for types of records other agencies routinely produce

4 Hearings on S. 1324, supra note 1, at 8.

5 Id. at 2 (Statement of Chairman Barry Goldwater).

under FOIA such as biographical records on foreign political leaders, basic information that the CIA as an intelligence organization should be compiling if it is not doing so now. See, e.g., Exhibit A (refusal to confirm or deny existence of records containing biographical information on certain Czech political leaders involved in the country's reform movement in 1967-68, including Alexander Dubcek).

Moreover, despite acknowledgement from the CIA Office of General Counsel that non-designated "operational files" remain subject to search and that materials contained in "operational files" that are referred to by "markers" in non-operational files are also subject to FOIA, we cannot identify a single category where it appears that such searches are in fact undertaken in response to FOIA requests. See Exhibit B, copy of July 19, 1990 letter to the Center for National Security Studies from the CIA Office of General Counsel.

B. Continuing multi-year delays in receiving responses to requests.

It is simply not correct, as claimed in the August 8 Federal Register notice, that "a primary goal of the Act [to hasten FOIA response time] has been and continues to be met." It is true that "the major benefit to the public from this legislation" was, in the words of a CIA official, that:

"FOIA requesters now wait two to three years to receive a final response to their requests for information when they involve the search and review of operational files within the Directorate of Operations . . . [I]f this bill is enacted, I assure you that every effort will be made to pare down the queue as quickly a possible. This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and efficient manner. 6

Another CIA representative summarized the delay situation in 1984 and predicted improvements for the future in this way:

"It takes about 2 or 2 1/2 years today to process a request if it involves Directorate of Operations records. *If it does not involve the Directorate of Operations, it can take less, say up to 6 months to clear a case. We are hopeful that with the passage of this bill we will be able to respond in terms of weeks, or at most, months, to get a request back to the public.* The DDO queue is by and large the holdup at the moment. They have the bulk of our workload, and with some of the cases dropping out with the passage of this bill, we believe that the flow of materials throughout the Agency would be enhanced." (emphasis added) 7

The current median time lapse cited in the August 8 Federal Register notice of 2.4 months before requesters receive substantive responses to their FOIA requests is not even close to the delays we, as regular CIA requesters, have experienced for years. Nor has the average processing time we have experience even been close to the CIA's estimate of 6 months or less for non-operational files. Instead, based on our analysis of hundreds of requests filed

6 Hearings on S. 1324, supra note 1, at 8.

7 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)(testimony of Larry Strawderman, Chief, Information and Privacy Division, Central Intelligence Agency).

since 1984, our average delays in 1989 and 1990 were three to four years, and in 1992 the median time before a substantive response still stretched to two years or more. Worse, even after waiting several years for a response, the end product is often the release only of documents already in the public domain, such as Foreign Broadcast Information Service records. See, e.g., Exhibit C (of eight documents retrieved after a three-year wait, six FBIS documents were released and the two substantive policy documents denied in full).

Those requests for which we have received a response in six months' time or less have all, in our experience, been complete denials, "glomarizations" (refusals to confirm or deny that CIA has documents responsive to the request), or requests in which the CIA did no new search or declassification review but only pulled from its database of previously released FOIA documents (called "ORIS") a handful of materials, sometimes last reviewed for declassification several years before the request was filed.

C. Requests rejected as "unsearchable" or "requiring research".

Increasingly, bureaucratic hurdles imposed by the CIA's FOIA operation make it extremely difficult for requesters to use the FOIA in a meaningful fashion. For example, the CIA regularly refuses to conduct searches in response to requests on the alleged grounds that the subject of the request is "unsearchable" -- a response we receive from no other agency in the federal government. No other agency in our experience has responded to a narrowly-drawn request like the following one for "copies of all items concerning the People's Republic of China in the National Intelligence Daily from June 1-30, 1989" by stating:

"Your request as stated is unsearchable in our records systems. The FOIA does not require us to perform research or create records for a requester. Neither are we required to study a body of material to see if any of it is related to a specific event, activity, or incident. To study a body of material to see if any of it relates to the specifics of your request would constitute research which is neither required nor authorized under the FOIA."

See Exhibit D, July 13, 1994 letter from CIA to the National Security Archive. Even more astonishing was the rejection as "unsearchable" of a request for retrieval and release of two public statements issued by CIA itself discussing congressional testimony on and CIA information regarding the Banca Nazionale del Lavoro (BNL) affair. Id., August 9, 1994 letter from CIA to the Archive. (Other examples of requests rejected as "unsearchable" are also found at Exhibit D.) Given that a reasonably described request for records is all that the FOIA requires to trigger an agency search for responsive documents, these "unsearchable" responses to precise, narrowly-worded requests frustrate the requester and betray the access purposes of the Freedom of Information Act. Nor do practices like these tend to convince the public that the CIA takes its FOIA responsibilities seriously in the wake of having been granted its unique waiver from searching for and processing "operational files."

D. Inadequate searches.

The CIA's refusals to conduct even preliminary searches and the small number of documents generally produced in response to requests is especially troubling to us given the existence of the Agency Records and Information System ("ARCINS"), which contains "subject listings down to the folder level" of over 30 million records. Searching additional databases maintained by various directorates, such as the Directorate of Intelligence's three central data bases which index raw and finished intelligence reports at the document,

not merely folder title, level, should produce even more documents in response to requests, even if portions of them are ultimately denied under a FOIA exemption. See Exhibit E, excerpt from June 27, 1994 Advisory Committee on Human Radiation Experiments Staff Memorandum re "Methodological Review of Agency Data Collection Efforts: Initial Report on the Central Intelligence Agency Document Search" (describing CIA databases able to access agency records).

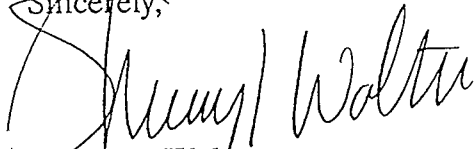
It is difficult to believe that any database at all was used in processing a recent request from the National Security Archive for the declassification and release of copies of four intelligence reports on the BNL affair, all of which were provided by the CIA to the Senate Select Committee on Intelligence and were specifically referred to in a letter from that committee to then Director Robert Gates. The response to this request was, again, that it was considered "unsearchable" and included the same boilerplate language quoted above as the rationale for refusing to process the request. See Exhibit F, letter from CIA to the National Security Archive dated July 1, 1994 rejecting request and appeal letter from the Archive dated August 9, 1994, with attached Congressional correspondence listing the CIA documents sought in the request. We urge the Agency to encourage all components to fully utilize all databases and other finding aids at their disposal to conduct adequate searches for records requested under the FOIA.

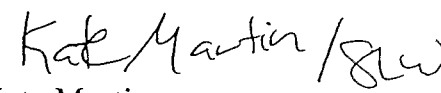
### Conclusion

We are hopeful that this decennial review will result in removal of a substantial body of records currently categorized as "operational files" exempt from the search and review requirements of the FOIA. As part of this review, we encourage the establishment of standards for evaluating and removing additional record groups from the exemption in the future on a regular basis which reflect current realities, not outdated assumptions, about releasability to the public. We also urge the CIA to demonstrate that it takes seriously its statutory obligations under the FOIA and to commit to cure the serious problems with its current FOIA process, as described above, to comply with law and make the Agency more responsive to the public it serves. Adopting more user-friendly practices, including establishing a public reading room containing copies of material previously released by CIA under FOIA, are crucial if the CIA's FOIA practices are ever to reach some level of credibility with the public. Without a major overhaul of the CIA's FOIA operation, it will be increasingly difficult to justify the CIA's continued exemption, unique in the government, of large record groups from the scope of the FOIA.

We greatly appreciated the opportunity on August 29 to meet at CIA headquarters with many of the CIA staff intimately involved in this review to share our ideas on what needs to be done and how best it can be accomplished, and believe that the meeting was a very useful first step. If you have any questions or if we can provide further information or assistance, please do not hesitate to contact Sheryl Walter at the National Security Archive at (202) 797-0882 or Kate Martin of the ACLU/CNSS at (202) 675-2327.

Sincerely,

  
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Attachments