Dear Jim, 9/8/84

Your 9/6 memo on the exempt CIA permanently bill in many ways if qyite good. It represent an enormous amount of work that, even if it has no influence on the outcome, still is quite worthwhile. We do care about history and what can be known in the future.

I have a general and two specific criticisms I hope you will think about not for this bill but for your own future because you inhibit yourself and what you can accomplish.

In general, you are, as you usually have been in court, defensive and in such circumstances, as history in general and ours in particular should have gotten through to you, is self-defeating. An academic approach is not what this outrage requires. Nor an academician's tone.

You should have made much more of the CIA's stonewalling, and in terms of its costs and flagrant contempt of clear and expressed Congressional intent.

There are two major omissions, and I wrote you about one and mentioned it to you when we spoke. If I did not make specific reference to the second, and I do not now recall, I have mentioned in it so much litigation I'd have hoped you'd remember it. The first is the menace to the country and to individual citizens this proposal means and the second is the value of disclosed information to the proper, better and more effecient- and less unconstitutional and illegal - operation of the CIA.

This bill assures police-state condition when bracketed with the ~~RRGGN~~ Reagan administration's assignment of domestic intelligence functions to the CIA. The bill,assures that any and all its improprieties will forever remain secret, and with that all expectable means of correcting and eliminating what we hitherto expected of the KGB and Gestapo only.

FOIA has led to an enormous amount of public good and has enabled elimination of wrongful and evil practises.

The CIA and other agencies resist exposure because they want to do what is wrong. Now the CIA will not have any fear of disclosure.

Regardless of what you and the ACLU and others may think of the present Congress or conjecture about the one that is coming, a good many are and will be concerned about the combination of Reagan and his outlaws in fine suits and the CIA as they have known it. You should have addressed such concerns. These concerns are not limited to liberals, in or out of Congress.

I also believe that some of the ultras who are willing for there to be abuses of liberals and opponents of the Reagan administration may have had second thoughts is they visualized this combination of exemptions and powers controlled by liberals. Or just Democrats anxious to score points on Republicans.

If there is further postponement and opportunity for additional expression, and if you do anything, I urgex you to make it political rather than academic. It is a political matter, to be decided by politicians who are more readily reached with political appwoaches.

I'm sure you'll get a good reaction from many who receive this, and it deserves a good reaction. But given the existing odds, I fear it is the wrong approach.

Good luck!

P.S. For personal contacts, PLEASE keep what I say in mind and give shocking illustrations that are at hand. Sacre 'em! They SHOULD be scared.

TED WEISS
17th District
New York
Chairman
Subcommittee on
Intergovernmental
Relations and
Human Resources
2442 Rayburn Building
Washington, D.C. 20515
202/225-5635
Patricia S. Fleming
Administrative Assistant

Harold – Vote has been postponed until 9/17, which gives us only needed time.

Congress of the United States
House of Representatives

Committees:
Foreign Affairs
Government Operations
Children, Youth and Families
National Commission
on Working Women
Executive Board Member,
Congressional Arts Caucus
Secretary, New York State
Congressional Delegation

URGENT: OPPOSE DANGEROUS LIMIT ON COURT REVIEW OF CIA ACTIONS

September 6, 1984

Dear Colleague:

The House will soon consider legislation which would severely limit public access to Central Intelligence Agency documents and unnecessarily restrict judicial review of the agency's compliance with the Freedom of Information Act (FOIA). I urge you to oppose this dangerous bill.

Advocates of the Central Intelligence Agency Information Act (H.R. 5164) argue it would permit the CIA to respond to FOIA requests from the public in a more timely manner by easing the agency's workload. Under the guise of increased efficiency, however, H.R. 5164 would result in the unjustified restriction of public access and judicial review.

Few would dispute that a legitimate need exists to protect some CIA information from public release. But restricting public access should be the exception, not the norm. Existing law is adequate to protect properly classified foreign intelligence information.

H.R. 5164 would effectively bar public access to almost all of the CIA's operational files. Had this law been part of the original FOIA legislation, it is likely that the American people would never have learned of the numerous illegal undertakings by the agency, at home and abroad, that have come to light in recent years.

The most alarming provisions of H.R. 5164 are those relating to the all-important judicial review. If the CIA were to improperly withhold information from disclosure, the ability of the person filing the FOIA request and of the courts to compel disclosure are so restricted by H.R. 5164 as to be rendered meaningless. For example, the bill would establish a Catch 22 whereby a requester could not use the FOIA to secure most relevant CIA documents unless he or she could convince an oversight agency or committee to investigate the specific subject of the request.

Moreover, in prohibiting the plaintiff's use of depositions and interrogatories, H.R. 5164 would severely limit the gathering of information by "discovery," even under close court supervision to protect sensitive information. The bill would also: alter normal rules of federal evidence law in unprecedented ways; eliminate, in almost all cases, the ability of the courts to review contested information; and, even if the court were to find the CIA had willfully violated the law, remove the courts' power to impose legal sanctions on the agency.

These provisions constitute an unwarranted gift to an agency whose record of meeting its responsibilities under present FOIA law has been questionable at best. H.R. 5164 is being vigorously opposed by the Southern and Northern California Chapters of the American Civil

September 9, 1984

Dear Colleague:

The House will soon consider legislation which would severely limit public access to Central Intelligence Agency documents and unnecessarily restrict judicial review of the agency's compliance with the Freedom of Information Act (FOIA). I urge you to oppose this dangerous bill.

Advocates of the Central Intelligence Agency Information Act (H.R. 5164) argue it would permit the CIA to respond to FOIA requests from the public in a more timely manner by easing the agency's workload. Under the guise of increased efficiency, however, H.R. 5164 would result in the unjustified restriction of public access and judicial review.

Few would dispute that a legitimate need exists to protect some CIA information from public release. But restricting public access should be the exception, not the norm. Existing law is adequate to protect properly classified foreign intelligence information.

H.R. 5164 would effectively bar public access to almost all of the CIA's operational files. Had this law been part of the original FOIA legislation, it is likely that the American people would never have learned of the numerous illegal undertakings by the agency, at home and abroad, that have come to light in recent years.

The most alarming provisions of H.R. 5164 are those relating to the all-important judicial review. If the CIA were to improperly withhold information from disclosure, the ability of the person filing the FOIA request and of the courts to compel disclosure are so restricted by H.R. 5164 as to be rendered meaningless. For example, the bill would establish a Catch 22 whereby a requester could not use the FOIA to secure most relevant CIA documents unless he or she could convince an oversight agency or committee to investigate the specific subject of the request.

Moreover, in prohibiting the plaintiff's use of depositions and interrogatories, H.R. 5164 would severely limit the gathering of information by "discovery," even under close court supervision to protect sensitive information. The bill would also: alter normal rules of federal evidence law in unprecedented ways; eliminate, in almost all cases, the ability of the courts to review contested information; and, even if the court were to find the CIA had willfully violated the law, remove the courts' power to impose legal sanctions on the agency.

These provisions constitute an unwarranted gift to an agency whose record of meeting its responsibilities under present FOIA law has been questionable at best. H.R. 5164 is being vigorously opposed by the Southern and Northern California Chapters of the American Civil Liberties Union, the Reporters Committee for Freedom of the Press, the Freedom of Information Project, the Fund for Open Information and Accountability, and the Newspaper Guild. The American Newspaper Publishers Association and the American Society of Newspaper Editors have also expressed concern about portions of the bill.

I urge you to join me in registering a vote against an unnecessary increase in secrecy. Please call Kevin Knobloch of my staff at 5-5635 with any questions you may have.

Sincerely,

Ted Weiss

TED WEISS
Member of Congress

Dear Jim (Lesar)

9/8/84

Your 9/6 memo on the exempt CIA permanently bill in many ways if quite good. It represent an enormous amount of work that, even if it has no influence on the outcome, still is quite worthwhile. We do care about history and what can be known in the future.

I have a general and two specific criticisms I hope you will think about not for this bill but for your own future because you inhibit yourself and what you can accomplish.

In general, you are, as you usually have been in court, defensive and in such circumstances, as history in general and ours in particular should have gotten through to you, is self-defeating. An academic approach is not what this outrage requires. Nor an academician's tone.

You should have made much more of the CIA's stonewalling, and in terms of its costs and flagrant contempt of clear and expressed Congressional intent.

There are two major omissions, and I wrote you about one and mentioned it to you when we spoke. If I did not make specific reference to the second, and I do not now recall, I have mentioned in it so much litigation I'd have hoped you'd remember it. The first is the menace to the country and to individual citizens this proposal means and the second is the value of disclosed information to the proper, better and more effecient- and less unconstitutional and illegal - operation of the CIA.

This bill assures police-state condition when bracketed with the Reagan administration's assignment of domestic intelligence functions to the CIA. The bill, assures that any and all its improprieties will forever remain secret, and with that all expectable means of correcting and eliminating what we hitherto expected of the KGB and Gestapo only.

FOIA has led to an enormous amount of public good and has enabled elimination of wrongful and evil practises.

The CIA and other agencies resist exposure because they want to do what is wrong. Now the CIA will not have any fear of disclosure.

Regardless of what you and the ACLU and others may think of the present Congress or conjecture about the one that is coming, a good many are and will be concerned about the combination of Reagan and his outlaws in fine suits and the CIA as they have known it. You should have addressed such concerns. These concerns are not limited to liberals, in or out of Congress.

I also believe that some of the ultras who are willing for there to be abuses of liberals and opponents of the Reagan administration may have h d second thoughts is they visualized this combination of exemptions and powers controlled by liberals. Or just Democrats anxious to score points on Republicans.

If there is further postponement and opportunity for additional expression, and if you do anything, I urgest you to make it political rather than academic. It is a political matter, to be decided by politicians who are more readily reached with political approaches.

I'm sure you'll get a good reaction from many who receive this, and it deserves a good reaction. But given the existing odds, I fear it is the wrong approach.

Good luck!

P.S. For personal contacts, PLEASE keep what I say in mind and give shocking illustrations that are at hand. Sacre 'em! They SHOULD be scared.

MEMORANDUM REGARDING H.R. 5164

by

James H. Lesar

Member of the District of Columbia Bar

September 6, 1984

MEMORANDUM REGARDING H.R. 5164

A. Background

On September 17th, just a few working days after the House of Representatives reconvenes briefly before the election, it will vote on a bill which awards the Central Intelligence Agency (CIA) a broad exemption from the Freedom of Information Act (FOIA). Because H.R. 5164 neither limits how long the CIA may impose secrecy on its "operational" files nor guards against their destruction, scholars may never be allowed access to many of the most important materials documenting CIA activities. As a result, the public may be denied an opportunity--forever--to fully evaluate the CIA's role in our government and history. There is no assurance that scholars will ever review these materials, or that the CIA will be accountable for its actions.

Just as ominously, H.R. 5164 may set a precedent that will allow still other agencies to obtain similar exemptions from the Freedom of Information Act. If this bill passes, pressures to give similar exemptions to other agencies will increase. Congress will soon be confronted with a parade of agencies seeking special exemptions, and once it has obliged the CIA, the argument against extending the favor to other agencies becomes much weaker.

Despite the importance of the issues and the complexity of the bill's implications, H.R. 5164 has sped through Congress on greased skids. Only a few hours of hearings have been held, and those were largely dominated by representatives of the CIA and the American Civil Liberties Union (ACLU), two traditional antagonists who have labored together on this legislation. Scant public attention has been given the bill, perhaps in part due to an assumption that the ACLU's position fully and adequately represents the interest of all segments of the public.

H.R. 5164, officially (and euphemistically) known as the "Central Intelligence Agency Information Act," is touted as a compromise bill. On the one hand, it is designed to relieve the CIA of the burden of searching for and reviewing certain "operational" records which are said nearly always to be exempt from disclosure under the current Freedom of Information Act. On the other hand, it is supposed to preserve the public's right to know about the activities of the Central Intelligence Agency and speed up the Agency's retrograde processing of information requests.

Scrutiny of the bill's provisions reveals, however, that it is the product not of compromise but of capitulation to the CIA. The bill is heavily weighted in favor of secrecy--now and forever. The provisions which purport to safeguard a measure of public access to information are limited, weak, unclear, uncertain and unenforce-

able. To anyone familiar with the CIA's Freedom of Information Act track record and the timidity of federal judges confronted with the task of evaluating claims that disclosure will jeopardize national security, it is virtually certain that these provisions will ultimately prove to be meaningless.

B. Definition of Exempted Operational Files

H.R. 5164 is patterned after S. 1324, a bill introduced in the Senate by Senators Barry Goldwater and Strom Thurmond, and already passed by that body. Although the two bills differ in some particulars, both seek to exempt the CIA from its obligation under current law to search and review "operational files." As defined in the proposed legislation, "operational files" consist of certain broadly described files of the Directorate of Operations, the Directorate for Science and Technology, and the Office of Security.

The files of these three CIA components are critical to public evaluation of the CIA and its activities. Each of these components is known to have engaged in illegal and reprehensible activities. The Directorate of Operations has engaged in foreign assassination plots and coups; through liaison with foreign security and intelligence services, it has spied on domestic political dissidents, burglarized their hotel rooms and homes, bugged their conversations. It also planted information in the U.S. media through foreign assets and subverted and used a wide variety of civil organizations.

The Directorate of Science and Technology (DST) tested mind-altering drugs on unwitting subjects. A U.S. Army Colonel, Robert Olson, plunged to his death from a hotel window after being subjected to such testing. DST also experimented in the effects of radiation, electric shock, psychological, sociological and harassment techniques.

The Office of Security spied on numerous persons and infiltrated such organizations as the Washington Ethical Society, The Urban League, The Congress of Racial Equality, and Women's Strike for Peace.

But whether the activities of these components are legal or illegal, proper or improper, routine or controversial, wise or unwise, the central fact is that full knowledge of them is ultimately essential if the CIA's performance and its role in our history and politics are to be accurately recounted and assessed by scholars. Since World War II, intelligence operations of one kind or another have become so pervasive that they may shape a country's history as much as its politics or economics. Intelligence factors cannot be omitted without producing a picture that is distorted, and in some cases highly distorted.

The potential scope of the exemption for "operational files" is extremely broad. For example, with respect to the Directorate of Operations, the CIA's department of "dirty tricks," the files which would be exempted are those which "document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services." Ralph W. McGehee, a former CIA official with personal knowledge of the CIA's operational files, told Congress that "some 80 to 90 percent" of Directorate of Operations files would fall into the liaison category.

The experience of author (Bitter Fruit) Stephen C. Schlesinger provides another indication of the importance to historical writing of the "operational files" which Congress is considering exempting. Seeking material on the CIA-backed coup in Guatamala in 1954, Schlesinger submitted a Freedom of Information Act request to the Agency. The CIA released 165 documents uncovered during two initial searches. After his attorney questioned the adequacy of the CIA's search, the Agency found an additional 180,000 pages in its operational file. Thirty years after the coup, the CIA still withholds them in toto. Under the proposed legislation, the CIA can continue to withhold them indefinitely without having its secrecy determinations subjected to any meaningful judicial review.

The failure of H.R. 5164 to contain certain safeguards protecting the right of the public to know, at least at some point in history, what the CIA has done in our name, is troubling. Last year the ACLU reportedly took the position that without a time limit on how long operational files are exempt from search and review, the proposed legislation was unacceptable. Yet H.R. 5164 contains no such provision, nor does it contain any provision forbidding the CIA from destroying its operational files.

C. Limitations on "Operational Files" Exemption

Subsection (c) of Sec. 701 makes an attempt to limit the extraordinarily broad sweep of the exemption for "operational files" by describing three exceptions which, if applicable, require the search and review of "exempted operational files." The first exception, set forth in paragraph (c)(1), is of limited scope, applying only to U.S. citizens or permanent resident aliens who have requested information on themselves under the Freedom of Information and Privacy Acts. The second exception, (c)(2), applies to "any special activity the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act. . . ." In plain language, this refers to covert operations whose existence is not classified. Since the existence of a covert operation is classified information unless officially acknowledged by the CIA, which it virtually never is, this provision is practically useless.

The third exception, (c)(3), provides that exempted operational files shall continue to be subject to search and review for information concerning: "the specific subject matter of an investigation by the intelligence committees of Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of Central Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity."

At first blush, this may seem impressive. Under analysis, however, its allure quickly fades. The list of investigative bodies has obvious omissions. There is no mention of Presidential commissions, and as it pertains to Congress, the list is restricted to "the intelligence committees of Congress" only. The investigations of the Rockefeller Commission and the House Select Committee on Assassinations do not come within the purview of this exception. Nor would the investigation of the Patman Commitee into the laundering of funds in the Watergate scandal be included.

The present list is almost entirely limited to investigative bodies that are either internal organs of the CIA or, like the intelligence committees of Congress, have a history of being quite deferential to the Agency. The scope and depth of their investigations may be too narrow and too shallow to fully explore the public interest, leaving pertinent CIA records on the general or related subject(s) unaccessible under the provisions of this bill. Or such investigations might even be cover-up type inquiries.

Moreover, the scope of this proviso is limited by several critical words and phrases whose effect is unclear. It excepts from the CIA's putative exemption "information concerning . . . the specific subject matter of an investigation by [the named investigative bodies] for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." One can easily envision endless haggling and stonewalling over what was the "specific subject matter" of each and every investigation.

The investigation must involve "an impropriety,"--whatever that means--"violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." What is the meaning of "an intelligence activity"? Does it include the CIA's investigation of the assassination of President Kennedy? Does it include the investigation into the alleged death or suicide of former CIA agent John Paisley?

Finally, it should be noted that this proviso fails to provide historians, journalists and scholars with access to operational files which do not involve illegality or impropriety, but which nonetheless document activities of interest to the public.

Needless to say, most CIA operational activities are not of the "Family Jewels" variety.

D. Judicial Review

Aside from interpretational problems, which abound in this bill, there is a major question as to whether H.R. 5164 permits the CIA to conceal controversial materials that are nonexempt by placing them in operational files. The answer to this hinges on whether the bill provides for effective judicial review. In hearings on the Senate bill, the CIA testified that designation of files as exempt operational files by the Director of Central Intelligence (DCI) would not be judicially reviewable because the bill gave the DCI authority to designate files at his sole discretion. The ACLU was reportedly "surprised" to learn that the CIA's legal experts were saying that it did not provide for de novo review, meaning, in layman's terms, that the courts would have to accept the CIA's designation of "operational files" as final rather than being required to reach an independent judgment on the basis of all the evidence placed in the court record.

The ACLU took the position that it would not support the legislation absent a provision for de novo review. But the de novo review provision incoporated in H.R. 5164 at the ACLU's insistence is extremely weak and applies only in limited circumstances. For example, if a requester alleges that the CIA has wrongly withheld requested records because they have been improperly placed solely in exempted operational files, he is required to support his allegation with "a sworn written submission, based on personal knowledge or otherwise admissable evidence." The class of requesters able to make such a statement on the basis of their own personal knowledge would appear to be limited to former CIA agents. De novo review on this issue under these terms hardly warrants the name; it is of little or no use.

Secondly, a requester may allege that the CIA has wrongly withheld the requested records "because of improper exemption of operational files." If this happens, all the CIA has to do to get the case dismissed is file a sworn statement that the files "likely" to contain the requested records are currently serving as exempted operational files. The CIA's sworn statement does not have to be made on personal knowledge. All that is required is a CIA employee willing to swear that exempted operational files are likely to contain the requested records and are currently serving as exempted operational files. The CIA's sworn statement does not have to be made on personal knowledge. All that is required is a CIA employee willing to swear that exempted operational files are "likely" to contain the records.

Unless the requester files a sworn statement disputing the CIA's claim, the CIA cannot be required to review the content of

any exempted operational file in order to meet its burden. Unlike the CIA's statement, which does not have to be made on personal knowledge and need not attest to the existence of any fact, only a speculative "likelihood," the requester's affidavit must be "based on personal knowledge or otherwise admissible evidence." If the requester is unable to submit such a statement, the court is forbidden to order the CIA to review the content of "any exempted operational file or files." These provisions negate any meaningful de novo review of this issue, too.

Although the chance of actual de novo review in these two circumstances is exceedingly slim, it apparently was too risky for the authors and supporters of H.R. 5164. So the bill removes the last vestige of hope for the requester, already bound hand and foot, by gagging him as well. It contains a unique feature abrogating all discovery provided by the Federal Rules of Civil Procedure other than requests for admissions, the least effective form of discovery. No meaningful opportunity to challenge the accuracy or veracity of the CIA's representations is to be allowed.

E. Review Every Ten Years, Release Never

H.R. 5164 provides that at least once every ten years the Director of Central Intelligence is to review the status of exempted materials to determine whether the exemptions "may be removed from any category of exempted operational files or any portion thereof." It also directs that this review "shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein."

It is unclear whether this provision obligates the CIA to review the status of all of its operational files once every ten years, or it it only has to review those exempted operational files which contain records that have been the subject of Freedom of Information Act requests. If the former is required, this bill might not reduce the CIA's FOIA burden much, at least to the extent that the review is in any sense meaningful.

But it is clear that in conducting its review, the CIA is not required to examine the records contained in the exempted operational files; all it has to do is "review the exemptions in force" and consider the "historical or other public interest in the subject matter" of the files. Nor is the CIA obliged to remove a single file or portion thereof from its exempt categories as a result of its ten-year review. All the CIA bureaucrat making the decision has to do is examine a list of exempted operational files and muse for a few moments on the historical value and public interest in the subject matter of the files. He is not required to re-

lease a single page, regardless of whether the records are 10 years old or 30 years old. Judicial review of this provision is limited to determining (1) whether the CIA has conducted the review within the specified ten-year period; and (2) whether the CIA in fact considered the historical value and public interest in the subject matter of the files.

In essence, any public benefit to be gained from this provision depends on a profound change in the CIA's own attitudes and practices. Nothing in the bill can compel this change, and experience suggests that only an inveterate delusionist could believe that such a change is even remotely likely.

The CIA's intransigent attitude toward disclosure is well-known. In 1965 the White House, reacting to citizen protest against keeping Warren Commission records secret, solicited the views of several federal agencies on what records could be released to the public. The CIA responded that "very little" of the material it had furnished to the Warren Commission was still withheld from the public. It remained adamant against all further disclosure, proposing that all its records pertaining to the Warren Commission investigation be kept secret for 75 years. After passage of 75 years, it would then conduct a review to see whether another period of secrecy was required. A Justice Department summary of the CIA's position states: "The Agency believes that the national security requires the continuance of restrictions on withheld documents and that this interest outweighs all other considerations."

The White House rejected this suggestion, and the Department of Justice promulgated guidelines requiring review of withheld Warren Commission materials every five years. Nonetheless, the CIA continued to withhold extremely important documents on spurious grounds. Ultimately, thousands of pages of CIA documents were obtained, but only as a result of FOIA litigation. Some played an important role in creating the climate of opinion which led to the creation of the House Select Committee on Assassinations, which ultimately concluded that there probably was a conspiracy to assassinate President Kennedy, and that the CIA had withheld significant information from the Warren Commission. Had the CIA not resisted disclosure of records pertaining to the assassination of President Kennedy, the Congressional investigation might have occurred at an earlier date, under far more advantageous conditions, when the facts and circumstances of the crime had not grown so cold.

In assessing the possibility that H.R. 5164's ten-year review will liberate any substantial amount of information, an examination of the CIA's performance under Executive Order 12065 is particularly germane. Promulgated by President Carter, E.O. 12065 established criteria for determining what information should be withheld in the interest of national security. A key provision asserted that the

need to protect classified information may sometimes be outweighed by the public interest in the disclosure of the information, and it directed that in such cases the information should be declassified.

The CIA skillfully ignored this balancing provision. First it promulgated guidelines which delineated the extremely narrow circumstances in which it would apply the balancing test. Even after these guidelines were found to be inadequate by the Information Security Oversight Office, a component of the General Services Administration which monitors the information security system throughout the executive branch, the CIA refused to apply the balancing test to even the most obvious and compelling cases of public interest. Its litany recited that it had not balanced the public interest in disclosure against the needs of national security because circumstances had not arisen which required it to do so. Although it lost some battles in lower courts, it successfully tied requesters up in litigation on this issue until the Reagan administration rescinded E.O. 12065 and issued a new Executive order on classification which eliminated the balancing provision.

Recent events do not suggest that the CIA is worthy of the trust H.R. 5164 exudes. Just this year relations between the Senate Intelligence Committee and the CIA were inflamed because the CIA, despite a legal obligation to do so, failed adequately to inform the committee of its clandestine activities in Central America. If the CIA will not in secret inform a customarily deferential congressional oversight committee of matters that it is required by law to report, then why should anyone expect the CIA to conform in good faith to a measure which meekly states that it should "consider" the historical and public interest in determining whether to disclose sensitive records on controversial subjects to persons it generally expects to be highly critical of, or outright hostile to, its endeavors?

F. Questionable Assumptions

H.R. 5164 rests on highly questionable assumptions. The CIA and the ACLU assert that it will clear up the CIA's backlog, thus resulting in faster processing of nonoperational files. They also promise that this will be done without any meaningful information being withheld that is currently obtainable under the FOIA.

1. Is the CIA's Backlog Self-Created? The CIA claims its current backlog is two to three years, but requesters have been known to wait far longer without action by the CIA. In one case the CIA assured the requester on no less than 11 occasions over a six year period that it was processing his request, that he should wait another two or three weeks, another two or three months, etc. When he finally filed suit after six years of waiting, he found

that all the CIA had done was to number the couple of hundred documents involved, many of which were newspaper clippings or records that previously had been released.

Another requester, inquiring as to the status of requests submitted "in the 1971/76 timeframe," was recently told that: "Our FOIA files on requests that have been dormant for two or more years almost certainly have been destroyed in accordance with the appropriate records disposition schedules approved by the Archivist of the United States."

These examples suggest that the CIA's backlog may be self-created. A statement submitted to the House Subcommittee on Government Information, Justice and Agriculture by former CIA officer Ralph McGehee lends credence to this suspicion. McGehee bluntly charged that "[t]he CIA has one of the worst records in responding to FOIA requests not due to the difficulty of the task but because of its deliberate delays." If this is the case, even an exemption for operational files is unlikely to clear up its backlog.

McGehee's accusation is supported by the common experience of FOIA requesters. The CIA employs a standard arsenal of obstructionist tactics to delay and impede access to information. Often it will do nothing more than acknowledge receipt of a request unless the requester writes several letters. Then it may put the requester off with vague promises or intimidate him by demanding hugely unreasonable search fees. It routinely denies fee waivers for requests which plainly qualify for them, forcing the requester to litigate the issue (if he can find an attorney) or accept the Agency's fiat. When it finally begins to process records, it does so with great torpor. When compelled to submit Vaughn affidavits justifying its withholdings, it supplies meaningless boilerplate which forces conscientious judges to engage in in camera review.

The CIA's tactics are designed to grind down requesters and drive up the cost (in both time and expense) of obtaining information. These tactics are proving successful. In Allen v. DOD, et al., Civil Action Nol 81-2543 (D.C.C.), District Judge Thomas A. Flannery found the CIA's argument that it did not know of plaintiff's intention to use the documents sought for scholarly purposes benefitting the public to be "incredible." August 24, 1984 Memorandum at p. 12. He criticized the CIA for using copying fees as "an obstacle to plaintiff's entitlement under FOIA to documents of such obvious public interest. . . ." Id. at 14. Yet by litigating the fee waiver and other threshhold issues found to be untenable, the CIA has already consumed three years of litigation without releasing any documents.

2. Will H.R. 5164 Result in a Loss of Meaningful Information? A second assumption is that the CIA has not in the past re-

leased any meaningful information from "operational files" that would not also be released if H.R. 5164 becomes law. Some researchers dispute this claim, notwithstanding the ACLU's acceptance of it. Alan Fitzgibbon, a researcher into the 1956 disappearance and death of Jesus de Galindez, an opponent of the Trujillo regime in the Dominican Republic, estimates that fewer than 5 percent of the 966 documents he has received through FOIA litigation would have been released had H.R. 5164 been the law.

Three points should be stressed regarding the claim that H.R. 5164 will not result in a loss of meaningful information now available under FOIA. First, the Freedom of Information Act only really became effective nine years ago, when Congress first amended it. Because of the CIA's bitter-end litigation tactics, fundamental issues regarding the exemption claims it primarily relies upon have yet to be definitively resolved. For example, Sims v. CIA, now pending before the United States Supreme Court, involves the definition and scope of the term "intelligence source" in 50 U.S.C. § 403(d)(3), the CIA's current Exemption 3 statute. Much of the information withheld by the CIA, if not most, is withheld under the claim that its disclosure would reveal the identity of an intelligence source. During the course of the Sims litigation it emerged that the CIA's definition of "intelligence source" is so broad that it includes publications such as Pravda and the New York Times.

In Fitzgibbon v. CIA, a district judge recently issued a lengthy opinion based on an exhaustive in camera review of documents pertaining to the disappearance and death of Trujillo opponent Jesus de Galindez. Chastising the CIA for in camera affidavits he called "practically worthless," Judge Harold Greene ruled in the plaintiff's favor on many points. He rejected the CIA's claim that it could justifiably withhold the names of sources it described as "potential or unwitting" sources, as well as the CIA's general assumption" that disclosure of the name of any individual with whom it spoke concerning the Galindez affair, no matter how long ago, would be likely to cause identifiable damage to the national defense or foreign policy of the United States today.

Judge Greene also found that in deleting "intelligence methods," "the CIA has withheld information so basic and innocent that its release could not harm the national security or betray a CIA method." In some instances, he said, "a weak claim is asserted with respect to particularly noteworthy information--such as the suggestion that Galindez may not have perished at all but may have fled to another country . . . and it may be that the CIA is acting more out of a desire to prevent a politically unpalatable reaction than out of a legitimate judgment that secrecy is required."

These and other holdings in the Fitzgibbon case are sure to result in appeals which may take years to finally resolve. Because their ultimate outcome could have a very considerable impact on the

amount of material which the CIA may withhold from "operational files," it is at best premature to claim that the proposed legislation, H.R. 5164, will not result in any greater withholding of significant information than presently occurs under the Freedom of Information Act. What a litigant is entitled to under the Act has not yet been resolved.

A second point to be kept in mind here is that a thorough and careful analysis of what may be withheld under H.R. 5164 that is not withholdable under the FOIA has not yet been made. The ACLU, it is true, has made an analysis of some materials and concluded that the CIA's claim is valid. But surely a bill with consequences as important as those which attend this measure requires that a wide range of materials released by the CIA in the past be carefully scrutinized, and not only by the ACLU, before the assumptions on which it is based on accepted as true.

Thirdly, as Washington attorney David L. Sobel has pointed out, H.R. 5164 deprives requesters of information obtainable through current FOIA litigation procedures, which require all agencies, including the CIA, to compile a public "Vaughn" index listing the materials located and justifying withholdings. Through such an index, a requester may learn of the existence or nonexistence of requested records even though they may not be released. In the example given by Sobel, the National Student Association (NSA) learned through a Vaughn index of CIA documents on it, that some were dated as recently as 1979, a fact that came as a surprise because the covert relationship between the NSA and the Agency purportedly ended when they signed a separation agreement in 1967.

Knowledge of the existence or nonexistence of documents can be valuable information to a researcher, as the case law reflects. As Judge Aubrey Robinson said in Eudey v. Central Intelligence Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979), "knowledge of the quantity of responsive documents in agency files alone, or of the absence of such documents, may itself benefit the public by shedding light on the subject of Plaintiff's research." H.R. 5164 deprives researchers of such knowledge.

G. No Attorney's Fees Provision

H.R. 5164 does not provide for attorney's fees for a litigant who compels the CIA to comply with its provisions. The failure to include a provision for attorney's fees is simply astounding. The original FOIA was little used because it lacked this feature. When an attorney's fees provision was added to the amended FOIA in 1974, it finally became possible for citizens to use the Act, and enormous public benefit resulted.

Without an attorney's fees provision, this bill is unenforceable. The absence of such a provision is an open invitation to the

CIA to violate the bill's requirements. Without a provision for attorney's fees in the bill, it will be able to do so with impunity. Few requesters will be able to retain counsel to represent them without the inducement of a possible award of attorney's fees.

Conclusion

The attempt to ram this legislation through Congress is ill-advised. The implications and consequences of H.R. 5164 have not been adequately discussed or analyzed. Congress has not obtained from the CIA or interested segments of the public all the pertinent information which needs to be developed before serious consideration can be given to such a sweeping change in the current law.

In its present form, H.R. 5164 is unacceptable. The members of the House should vote to defeat it.