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98TH CONGRESS, 1st Session } SENATE { REPORT No. 98-305

INTELLIGENCE INFORMATION ACT OF 1983

NOVEMBER 9 (legislative day NOVEMBER 7), 1983.—Ordered to be printed

Mr. GOLDWATER, from the Select Committee on Intelligence, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1324]

The Select Committee on Intelligence, having considered (S. 1324), a bill to amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency, reports favorably with an amendment in the nature of a substitute and recommends unanimously that the bill as amended do pass.

PURPOSE

The purpose of S. 1324, as reported, is to relieve the Central Intelligence Agency (CIA) from undue burdens of searching and reviewing certain operational files for information in response to Freedom of Information Act requests and thereby enable the Agency to respond to other requests under the Act in a more timely and efficient manner.

AMENDMENT

Strike all after the enacting clause and insert thereof the following:

That this Act may be cited as the "Intelligence Information Act of 1983."

FINDINGS AND PURPOSES

SEC. 2(a). The Congress finds that—

(1) the Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decisionmaking processes of their Government, including the Central Intelligence Agency;

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and Technology, and Office of Security of the Central Intelligence Agency shall be exempted from the provisions of the Freedom of Information Act which require publication or disclosure, or search or review in connection therewith, if such files have been specifically designated by the Director of Central Intelligence to be—

"(1) files of the Directorate of Operations which document foreign intelligence or counter intelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or with intelligence or security services;

"(2) files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems; or

"(3) files of the Office of Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources;

Provided, however, That nondesignated files which may contain information derived or disseminated from designated operational files shall be subject to search and review. The inclusion of information from operational files in nondesignated files shall not affect the designation of the originating operational files as exempt from search, review, publication, or disclosure: *Provided further*, That the designation of any operational files shall not prevent the search and review of such files for information concerning any special activity the existence of which is not exempt from disclosure under the provisions of the Freedom of Information Act or for information reviewed and relied upon in an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, 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.

"(b) The provisions of this section shall not be superseded except by a provision of law which is enacted after the date of enactment of this section and which specifically cites and repeals or modifies its provisions.

"(c) Notwithstanding subsection (a) of this section, proper requests by United States citizens, or by aliens lawfully admitted for permanent residence in the United States, for information concerning themselves, made pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) or the Freedom of Information Act (5 U.S.C. 552), shall be processed in accordance with those Acts.

"(d) The Director of Central Intelligence shall promulgate regulations to implement this section as follows:

"(1) Such regulations shall require the appropriate Deputy Directors or Office Head to:

(A) specifically identify categories of files under their control which they recommend for designation;

(B) explain the basis for their recommendations; and

(C) set forth procedures consistent with the statutory criteria in subsection (a) which would govern the inclusion of documents in designated files. Recommended designations, portions of which may be classified, shall become effective upon written approval of the Director of Central Intelligence.

"(2) Such regulations shall further provide procedures and criteria for the review of each designation not less than once every ten years to determine whether such designation may be removed from any category of files or any portion thereof. Such criteria shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portion thereof and the potential for declassifying a significant part of the information contained therein.

"(e)(1) on the complaint under section 552(a)(4)(B) of title 5, United States Code, that the Agency has improperly withheld records because of improper designation of files or improper placement of records solely in designated files, the review of the district court, notwithstanding any other provision of law, shall be limited to a determination whether the Agency's regulations implementing subsection (a) conform to the statutory criteria set forth in that subsection for designating files unless the complaint is supported by an affidavit, based on personal knowledge or otherwise admissible evidence, which makes a prima facie showing, that—

duct of an intelligence activity. Third, a new subsection (d) is added to require the promulgation of regulations by the Director of Central Intelligence to implement section 701. These regulations have two separate purposes. The regulations under subsection (d)(1) require the appropriate Deputy Directors or Office Head to identify categories of files recommended for designation, explain the basis for their recommendation, and set forth criteria governing the inclusion of documents in designated files. The regulations under subsection (d)(2) provide procedures and criteria for the review of designations at least once every ten years to determine whether the designation may be removed from a category of files or portion thereof. Such criteria are to include consideration of the historical value or other public interest in the subject matter of the particular file or category of files and the potential for declassifying a significant part of the information contained therein.

The final change in section 701 is the addition of a new subsection (e) establishing procedures for judicial review. The procedures under subsection (e)(1) apply to cases of alleged improper withholding of records because of improper designation of files or improper placement of records solely in designated files. The procedures under subsection (e)(2) apply to cases of alleged improper withholding of records because of failure to comply with the regulations adopted under subsection (d)(2) for periodic review of file designations.

A more detailed explanation of each of these changes in the proposed section 701 is contained in the section-by-section analysis of this report.

History of the Bill

Concern over the burdens imposed on intelligence agencies under the Freedom of Information Act (FOIA) is not new. Congress considered the FOIA's impact on the Central Intelligence Agency as early as 1977, three years after the Act was amended to provide for *de novo* review of the withholding of classified information.

In September, 1977, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee heard CIA officials testify about the effects of the 1974 amendments on the Agency. Acting CIA Director John F. Blake, who was chairman of the CIA's Information Review Committee, stated that the 1974 amendments had "constituted a somewhat traumatic experience" and had "required a considerable adjustment in attitude and practice." He added, "We have been able to make the necessary adjustments. I am pleased to report that, in fact, I think the Agency is better off for it." [1]

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By 1979, however, CIA's position changed. Testifying before the House Intelligence Committee, Deputy Director of Central Intelligence Frank Carlucci declared that "the total application of public disclosure statutes like FOIA to the CIA is seriously damaging our

[1] *Freedom of Information Act*, Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 95th Congress, 1st session (1977), p. 69.

large amount of FOIA litigation, the risk of court-ordered disclosure of classified information, the possibility of human error in release decisions and processing, and the perception by foreign governments that the United States Government cannot maintain the confidentiality of the information entrusted to it. In his written statement, Admiral Inman expressed the view that while partial relief via the file designation process was a "promising approach" which "would have a major positive impact," only a total exclusion of CIA's records from the requirements of the FOIA could resolve all the problems caused by the Act.

Other witnesses included General Faurer, Director of the National Security Agency, General Larkin, Director of the Defense Intelligence Agency, and representatives of the news media, civil liberties groups, and historians.

Representatives of groups opposed to the legislation testified that valuable information had been released through the FOIA process, and the public interest in receiving such information outweighed any burdens in complying with the Act. The witnesses emphasized that current FOIA exemptions (b)(1), protecting classified information, and (b)(3), protecting information specifically covered by other statutes,[4] were adequate to meet CIA's needs. However, the witnesses did not rule out the possibility of a more carefully and narrowly framed alternative to relieve some of the burdens on the CIA. For example, Mark Lynch of the American Civil Liberties Union suggested adopting "a random sample procedure" to alleviate document-by-document review in response to requests on extremely sensitive subjects. Without amending FOIA itself, the courts could use such a procedure when "no information or very little information" on a subject could actually be released. Recognizing the CIA's special personnel and resource problems, Mr. Lynch urged "a careful and constructive approach . . . to examining the administrative procedure to see if it cannot be streamlined" before turning to a legislative solution.[5]

On November 24, 1981, Admiral Inman testified in closed session before the Select Committee regarding the Freedom of Information Act's impact on the CIA's ability to collect intelligence and to maintain its relationships with friendly intelligence services. The purpose of this hearing was to examine specific examples of damage that could not be discussed in open session. Admiral Inman stated that the "real damage" was not the personnel and resource burden or releases due to administrative error. Instead, he emphasized the damage in terms of "lost collection opportunity" where both individuals and foreign governments have been reluctant to provide information to CIA. He cited particular cases of FOIA responses where, even though no documents were released, sensitive information appeared to be disclosed. This occurred because the CIA in certain cases could not classify the fact that it possessed documents on a particular subject. The Agency's mere acknowledgement of possessing documents on a subject was characterized by the press as confirmation of controversial alleged CIA activity. Such inferences were almost always erroneous, but individ-

[4] An example of a (b)(3) statute is 50 U.S.C. § 403(d)(3), which gives the Director of Central Intelligence a duty to protect intelligence sources and methods.

[5] *Intelligence Reform Act of 1981*, Hearing Before the Select Committee on Intelligence United States Senate, 97th Congress, 1st session (1981), see esp. pp. 16–17, 44–48, 67.

Attorney General John Shenefield.[6] Mary Lawton, Counsel for Intelligence Policy in the Department of Justice, expressed "wholehearted support" for S. 1324 and indicated that the Department considered it appropriate to consider the CIA exemption "as separate and distinct from efforts to secure Government-wide amendments to the Freedom of Information Act itself."

Mark Lynch of the ACLU stressed three key principles that would prevent any meaningful loss of information currently available: (1) "all gathered intelligence" would continue to be subject to search and review; (2) U.S. citizens and permanent resident aliens could still use FOIA to request information concerning themselves; (3) covert action operations (or "special activities") would continue to be accessible if their existence can be disclosed under the FOIA. Mr. Lynch went on to state, however, that the ACLU could not support the bill without certain amendments. Essential, in his view, were amendments concerning FOIA requests for information about operations that had been the subject of "abuse" investigations and judicial review of whether a file has been properly characterized as an operational file.

The press was represented by Charles S. Rowe, editor and co-publisher of the Fredericksburg, Virginia, Free-Lance Star, testifying on behalf of the American Newspaper Publishers Association, and Steven Dornfeld of Knight-Ridder Newspapers, National President of the Society of Professional Journalists. These witnesses seconded the concerns raised by the ACLU and emphasized the importance of obtaining specific commitments from the CIA regarding improved servicing of FOIA requests.

Dr. Anna Nelson, Professor of History at George Washington University, testified on behalf of the National Coordinating Committee for the Promotion of History. Dr. Nelson called for a narrower definition of "operational files," a time limit on the duration of an operational file's designated status, and clarification of the bill's intent regarding policy memoranda and intelligence disseminated outside of designated files.

After the public hearings, members of the Committee, in consultation with the CIA and some of the other witnesses, formulated four principal modifications to the bill. Because of concern about the need to specify more clearly the standards for designation of operational files, bill language was revised to establish criteria for designation of files in each of the three affected CIA components. Access to information reviewed and relied on during investigations of alleged illegal or improper intelligence activities was assured by adding a new proviso to the bill. In addition, a new section provided for review of file designations at least every 10 years in order to permit removal of file designations based on the historical value or other public interest in the materials. Finally,

[6] At the time of the hearing, the ABA had not taken a stand on a proposed FOIA Resolution. Subsequent to the hearing, on August 3, 1983, the ABA adopted a Resolution calling for "significant relief from the FOIA for the intelligence agencies," limiting judicial review in FOIA to "determining whether there is non-frivolous certification . . . that the material has been properly classified," and a specific exemption for sources and methods. The ABA resolution also encouraged intelligence agencies to "experiment with modifications in current administrative practices for handling FOIA requests.

possibility of *de novo* judicial review. If the withholding of information is challenged in court, detailed justifications are required for "each and every segregable item." This means that almost every sentence must be scrutinized and justified. Affidavits explaining the withholding of sensitive operational information must be prepared by intelligence officers having the knowledge and expertise to attest to the probable consequences of public release. The ultimate risk is that sensitive information can be released mistakenly and jeopardize an intelligence relationship or technique. CIA makes every effort to minimize that risk, at the price of lengthy delays. It is this process that is responsible for the two to three year backlog facing requesters seeking CIA information.

The CIA advised the Committee there is a two to three year delay responding to FOIA requests where responsive documents are located in Operations Directorate files and review of documents is required. Moreover, responses to requests for information located in other CIA components are affected by this delay. For example, documents originating in the Operations Directorate but located in another Directorate's files are referred to the Operations Directorate for classification review. Also, documents originating outside the Operations Directorate are usually sent to the Operations Directorate for "coordination/review." Thus, the review necessary for documents found in the Operations Directorate is the primary cause of the overall CIA backlog in responding to FOIA requests. Because most requests must be handled on a first in, first out basis, those involving hundreds of pages of responsive documents can delay the processing of far smaller cases in the queue.

The Operations Directorate backlog developed rapidly in the 1970s and has remained stable since. The number of FOIA requests has declined gradually from a peak of 1,608 in 1978 to 1,010 in 1982. Because many of these requests continue to be broad and, thus, time-consuming, it has not been possible for CIA to reduce the backlog even with a large number of experienced employees. Of 26 full-time positions assigned to FOIA processing in the Operations Directorate, 22 are professionals with significant operational CIA experience. The Operations Directorate effort consists of 71 work-years (equivalent to 71 full-time positions) out of a total CIA effort of 128 work-years on processing requests for information during 1982.[7] Assignment of more personnel cannot significantly reduce the backlog in the Operations Directorate, because many declassification review decisions can be made only by officials having current responsibility for supervising intelligence operations.

Benefits of S. 1324

By eliminating search and review of these designated files, and where there are court challenges, eliminating the need to justify withholding of each segregable item, S. 1324 will enable the CIA to reduce this backlog substantially.

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[7] This figure includes full-time and part-time positions. The effort in other CIA components is as follows: Directorate of Administration (which houses the Information and Privacy Division having overall responsibility for all FOIA requests) 33 work-years, Office of the Director 18 work-years, Directorate of Intelligence 4 work-years, and Directorate for Science and Technology 2 work-years. CIA estimates that the services of some 100 professionals with a variety of intelligence disciplines are pulled away from regular duties to focus on FOIA matters.

The acceptance by the Agency of the obligation to provide information to the public under FOIA is one of the linchpins of this legislation. The Act has played a vital part in rebuilding the American people's faith in their Government, and particularly in agencies like the CIA that must necessarily operate in secrecy. In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.

The Committee believes that current FOIA requirements create greater burdens and risks for the CIA than is necessary to insure full public access to significant information. But of equal importance to the Committee was that relieving CIA from the search and review burden does not deny public access to releasable information. This is so because the characteristics of CIA file systems permit releasable information to be duplicated in designated and non-designated files.

For example, certain CIA operational files are the repository for documents generated in the course of the conduct and management of intelligence-gathering activities. Where there is collection from human sources, such documents concern development of potential sources, assessment of their value and likelihood of their cooperation, arrangements to approach and contact the individual, and a wide variety of decisions and problems that may be involved in working with the source, such as determining compensation, testing bona fides, and resettlement after completion of service.

Other administrative documents discuss maintenance of cover, development and use of clandestine communications methods, selection of personnel for hazardous assignments, evaluation of success and failure, and assessment of vulnerabilities of individuals and techniques. Virtually all of this information is highly sensitive and properly classified; most is strictly compartmented. It is the type of information that has always been withheld from FOIA release by exemption (b)(1) for classified information and exemption (b)(3) for information pertaining to intelligence sources and methods.

Nevertheless, these operational files also contain other information that may in some cases be releasable under FOIA. One typical example is "raw" intelligence reports. Intelligence information can be divided roughly into two categories: "finished" intelligence and "raw" intelligence. Finished intelligence is written by professional intelligence analysts to be read by policymakers. It ranges from National Intelligence Estimates coordinated among several agencies to research papers, studies, and regular publications all designed to convey assessments of intelligence to the President, the NSC, the State and Defense Departments, and other agencies. Finished intelligence is primarily the responsibility of the Directorate of Intelligence, which stores all CIA finished reports in its files.

Raw intelligence is the information provided by a CIA source and written to protect the source's identity in order to permit dissemination to analysts and policymakers. Raw intelligence and information from other agencies form the basis for the finished intelligence reports written by analysts. Unlike finished intelligence which is stored mainly

Such matters range from general policy directives to specific decisions approving particular operational activities.

The fact that raw intelligence reports and policy documents are accessible through index and retrieval systems located in the Directorate of Intelligence and the Office of the Director and Deputy Director has made it possible to refine the standards for designation of CIA operational files in the bill. Specific statutory language guarantees that all nondesignated files remain subject to search and review, including any information in those files that was derived or disseminated from designated operational files.

Moreover, in recognition of the public interest in CIA "special activities" (or covert action operations), the bill contains a proviso that preserves existing law for access to information about any special activity the existence of which is not exempt from disclosure under the FOIA. The bill also takes account of the comparable public interest in investigations of allegedly illegal or improper intelligence activities. As amended, the bill ensures access for search and review to information in designated operational files that was reviewed and relied on during an investigation. Finally, as the CIA originally proposed in 1979, United States citizens and permanent resident aliens will continue to have the same ability to obtain information about themselves from operational files.

Assured access to the files of important CIA components such as the Directorate of Intelligence and the Office of the Director, and the provisions for access to particular types of information, effectively safeguard continued public access to releasable CIA information.

The 1979–82 CIA proposals would have established general standards for designation of files of any CIA component as operational files exempt from search and review. By contrast, S. 1324 limits such designation to certain specified categories of files of only three CIA components—the Operations Directorate, the Directorate for Science and Technology, and the Office of Security. This ensures by statute that the files of the Directorate of Intelligence, analytic elements of the Directorate for Science and Technology, and the Office of the Director and Deputy Director, as well as other significant CIA components such as the Directorate for Administration and the Offices of Executive Director, Comptroller, General Counsel, Inspector General and portions of the Office of Security will remain subject to search and review.

II. FINDINGS AND PURPOSES

The Committee has considered various proposals to modify the effects of the Freedom of Information Act on the CIA since 1980. The issues were discussed extensively at hearings on S. 2284, the National Intelligence Act of 1980, and on S. 1273 during 1981. The hearings on S. 1324, detailed questions answered for the record by CIA, and additional information provided in staff briefings and interviews with CIA officials have provided the Committee a full picture of the value of the information released under FOIA from CIA files, the impact of current FOIA requirements on the CIA, and the probable consequences of various proposals. On the basis of this record, the Committee makes the following findings and recommends them to the Senate as Section 2(a) of S. 1324:

(2) To protect the right of individual United States citizens and permanent resident aliens to request information on themselves contained in all categories of files of the Central Intelligence Agency; and

(3) To provide relief to the Central Intelligence Agency from the burdens of searching and reviewing operational files, so as to improve protection for intelligence sources and methods and enable this agency to respond to requests for information in a more timely and effective manner.

III. ACTIONS TO IMPROVE CIA RESPONSIVENESS

In stating the purposes of this bill, the Committee expressly noted its intent "to enable this agency to respond to the public's requests for information in a more timely and efficient manner." With the enactment of S. 1324 the Committee expects that FOIA requesters will receive responses to their requests in a far more timly manner.

To achieve this objective, the Committee has requested the CIA to provide a specific program of administrative measures the Agency will take to improve processing of FOIA requests following enactment of this legislation. The Committee believes that the essential elements of this program should include a detailed plan for eliminating the present backlog of FOIA requests and a description of the bill's impact on the Agency's ongoing efforts to process promptly those requests that do not require extensive search, review, and coordination and to expedite other requests under criteria established by the Justice Department.

With respect to the allocation of resources and personnel freed by the bill's impact on search and review requirements, the Committee requests the Agency to appropriately apply such resources and personnel to the task of eliminating the present backlog. To accomplish this, the Committee expects the Agency not to reduce its budgetary and personnel allocation for FOIA during the period of 2 years immediately following enactment of this legislation. The Committee will examine the question of budgetary and personnel allocation thereafter during consideration of the annual CIA budget authorization. Moreover, the Committee intends and the CIA agrees that resources freed by elimination of the backlog will be reallocated to augment resources for search and review of nondesignated files.

For its part, the Committee will regularly and closely scrutinize the CIA's implementation of each aspect of this program to insure that concrete results are achieved toward stated objectives. The Committee expects its oversight performance will be facilitated by periodic progress reports and meetings in which Committee members will be apprised of the status of the agency's FOIA processing operations. To this end, the CIA will also provide the Committee with the annual statistical FOIA report it currently provides to the Senate. Finally, the Committee will insure that all FOIA requests are responded to in a timely and courteous manner.

Next-of-Kin Responsiveness

This legislation does not give next-of-kin a right to request information about a deceased person. However, the Committee expects the

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nated file. CIA feared that this process could result in the court becoming mired in an item-by-item review of large numbers of documents.

Other witnesses suggested the need for judicial review and disagreed with the CIA's interpretation of the bill. For example, Mark Lynch of the ACLU said there was "not really anything in the bill to indicate non-reviewability" and urged that the legislative history reject the CIA's interpretation. Summarizing the arguments in favor of judicial review, Mr. Lynch stated that "judicial review is absolutely essential, because I think that the public simply would not have confidence that the Agency had not succumbed to the temptation to go overboard in the designation of files as operational if there were no judicial review."

Mary Lawton, Counsel for Intelligence Policy in the Justice Department, testified that it would be "left to the court's own judgment as to whether there was an intent or not of Congress to preclude judicial review of the designation." As she understood the bill, it was "absolutely silent" and would neither invite nor bar judicial review of file designations. However, she also predicted that "courts would be very reluctant under . . . standing judicial precedent to engage in judicial review of the categorization of files of an agency by the head of the agency." She also predicted that the Justice Department would urge the courts to give "the greatest deference to the Executive branch." Similarly, former Associate Attorney General John Shenefield said he thought "a fair interpretation of the language would allow one to conclude that judicial review is not as a practical matter available in the typical case."

After reviewing these arguments as to the meaning of the bill and advantages and disadvantages of judicial review, the Committee amended the bill to provide for judicial review in certain circumstances. The Committee does not intend that this amendment will require CIA to expose through litigation, via discovery or other means, the makeup and contents of sensitive file systems of the Agency to plaintiffs. The Committee expects the procedure for judicial review in this bill will be entirely consistent with the objective of reducing the FOIA burden on the Agency. At the same time, the Committee believes this judicial review procedure is necessary to guard against any improper designation of CIA files or improper inclusion of documents solely within particular designated files. The Committee is confident that the CIA will implement this bill in accordance with the statutory requirements. Therefore, the Committee does not anticipate that judicial review will be needed routinely.

Section-by-Section Analysis

SECTION 701.—DESIGNATION OF FILES BY THE DIRECTOR OF CENTRAL INTELLIGENCE

Section 3 of the bill amends the National Security Act of 1947 by adding a new Title VII designating certain CIA files exempt from search and review under the Freedom of Information Act.

Section 701 authorizes the Director of Central Intelligence to designate certain operational files within the Directorate of Operations

torate of Operations which document foreign intelligence or counterintelligence operations. . . ."

Experience has shown that very little, if any, information of any meaningful benefit to the public has ever been released from these operational files.[9] By exempting these categories of files from search and review requirements, endless hours will no longer be spent by experienced intelligence officers in a line-by-line review process that invariably results in little or no actual release of information. Exemption of these categories of files from search and review will also substantially limit the risk of human error resulting in the mistaken release of classified information and assure those who cooperate with our country at great personal risk that the United States is able to maintain the confidentiality of such relationships and to safeguard the information entrusted to it.

The FOIA already exempts information concerning intelligence sources and methods from publication or disclosure. If properly classified, such information is exempt under subsection (b)(1) of the Act. Even if the information concerning sources and methods is unclassified, there is a separate exemption under subsection (b)(3) for such information so the DCI can fulfill his statutory duty under the National Security Act to protect intelligence sources and methods. Nevertheless, in some circumstances the FOIA requirement to search and review a file or set of files can pose a risk to intelligence sources and methods. This is especially so with regard to "operational files" located in the Directorate of Operations, Directorate for Science and Technology, and Office of Security.

It is, however, extremely important to understand that exempting certain files from search, review, publication or disclosure does not constitute a total exclusion of CIA files from the processes of the FOIA. The effect of section 701(a) will be that files located in any records system outside of these designated categories will remain subject to the search, review, publication, and disclosure requirements, as well as the exemptions, of the Act. The further effects of the provisos in section 701(a) are discussed separately below. In addition, under section 701(c), all files will continue to be subject to the present provisions governing the handling of requests from citizens and resident aliens for information about themselves pursuant to the Privacy Act of 1974.

The first category of files listed in Section 701(a) allows designation of files in the Directorate of Operations which document foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services. Special activities or covert action is included in this concept.

The Committee reviewed the file systems of the DO and found that by far the majority of the file systems in this Directorate deal with the sources and methods used in our collection efforts. The Committee is satisfied that information contained solely in these files systems has

[9] During 1982, the CIA released to the public, in whole or in part, material in twenty-eight percent of the FOIA cases processed. Although exact figures on the three affected CIA components are not readily available, the CIA estimates that no more than five percent of the material released came from those components. This small amount of material was itself fragmentary and seldom meaningful or significant.

tions for the purpose of designation by the Director of Central Intelligence. The information contained in these files systems has been protected from release under exemptions (b)(1) and (b)(3) and therefore there is no loss of information to the public. Files on activities within the United States to protect the physical security of agency facilities will be ineligible for designation.

PROVISO REGARDING DISSEMINATED INFORMATION

Section 701(a) contains two provisos. The first makes it clear that nondesignated files remain subject to search and review even if they include information derived or disseminated from designated operational files. The search and review of these nondesignated files include the information derived or disseminated from designated files. On the other hand, the fact that information from designated operational files has been included in the non-designated files shall not affect the designation of the originating operational files.

It is the Committee's intent that documents entered into a nondesignated file system, but returned for storage solely in designated files, will be considered part of the non-designated file system. Thus, if a request is made for information in non-designated files, and the records contained in those files indicate that a responsive document was entered into the non-designated files, that document will be retrieved from designated files. This search is not intended to affect the designation of the originating operational files.

Two examples illustrate the intent of the Committee. First, Deputy Director McMahon testified that documents handcarried to the Director or Deputy Director and returned to operational files for safekeeping are referenced in the CIA's Executive Registry, which logs all documents that go into or out of the Office of the Director and Deputy Director. All documents referenced in the Executive Registry will be subject to search and review. These documents deal with policy questions that receive the attention of the Director or the Deputy Director, ranging from general policy directives to approval of specific operational activities. Thus, for example, the record of any authorization by the Director, Deputy Director, or Executive Director will remain subject to search and review through the files of the Office of the Director, even if the authorizing document is returned for storage in files of the Operations Directorate.

The second example concerns sensitive intelligence reports that are disseminated to the Directorate of Intelligence and returned for storage solely in the files of the Operations Directorate. The files of the Operations Directorate that serve as the repository for these reports will not be designated as operational files. Moreover, if a sensitive intelligence report is entered into the Directorate of Intelligence file system and returned for storage solely in a designated operational file, that report will be considered part of the non-designated Directorate of Intelligence files and will be retrievable as if it continued to be stored in the non-designated files.

The first proviso is especially important for historians. Documents contained in non-designated files cannot be exempted from the search and review process because they discuss operational subject-matter or

specific covert action operation, such as the Bay of Pigs invasion or the CIA's role in replacement of the Guatemala regime in the 1950s, is not exempt from disclosure under the FOIA. A request is not sufficient to require search and review of designated files if it refers to a broad category or type of covert action operations. For example, a request predicated on declassification of the existence of CIA covert efforts to counter Soviet influence in Western Europe during the 1950s would not be sufficiently specific. In contrast, requesting information about a particular individual or organization alleged to have provided operational assistance in the conduct of a special activity would be sufficiently specific. However, these examples illustrate the specificity requirement and not the "Glomarization" standard. Thus, a request may be sufficiently specific, but nevertheless, as is presently the case, not be subject to search and review because the fact of the existence or non-existence of the special activity is properly classified.

It is not possible in unclassified legislative history to spell out all the relevant examples which would fully illustrate the meaning of the specificity requirement. Nevertheless, persons seeking to use this proviso as a means of securing access to information in designated files should understand that the purpose is to provide for search and review only if the existence of a particular special activity must be disclosed under the FOIA.

The determination of whether or not the fact of the existence or non-existence of a particular special activity is currently and properly classified will be treated in the same manner as any other classification determination by the CIA. The initial determination is made by Operational Directorate officers assigned to the Directorate's Information Management Staff in consultation with the concerned area division in the Directorate. They will consider, among other things, whether the fact of the existence of a special activity has been officially and publicly acknowledged by an authorized representative of the U.S. Government. Of course, the existence of an officially and publicly acknowledged special activity is *ipso facto* not classified. In any case where the fact of the existence of a particular special activity is not properly classified, files containing information concerning that activity will become accessible to an FOIA request for information concerning that activity.

The term "special activity" as used in this proviso means any activity of the United States Government, other than activities intended solely for obtaining necessary intelligence, which is planned and executed so that the role of the United States is not apparent or acknowledged publicly, and functions in support of any such activity, but not including diplomatic activities.

PROVISO REGARDING IMPROPRIETIES

Under this bill as introduced, files within the OGC and the Office of Inspector General, which are the components within the CIA charged with investigating allegations of improper or illegal intelligence activities, could not be designated exempt from search and review. This was intended to insure that material dealing with improper or illegal intelligence activites would continue to be accessible to search and review. Concern was expressed, however, that material relied upon in the course of an investigation of an illegal or improper intelligence activity would be located in a designated file rather than the files of the

his staff to advise him of any items that could require reporting by the General Counsel to the Intelligence Oversight Board under Executive Order 12334.

The Inspector General's staff substantively investigates all employee allegations of abuse or impropriety. When the allegation raises any question of illegality, the IG Staff either fully coordinates its investigation with the Office of General Counsel or refers the matter to the Office of General Counsel for reporting to the Attorney General under Executive Order 12333. Allegations which arise internally are never dismissed without some recorded inquiry. Hence, they are never determined to be "frivolous" in the sense of not warranting a documented investigation.

Allegations made by persons outside the Agency almost exclusively arrive in the form of a letter received by the Agency Mail Room. (On occasion, complaints are received by telephone, sometimes anonymously.) If the letter contains allegations of abuse, impropriety, or illegality, but appear frivolous (e.g., "CIA is manipulating my brain waves," or an actual and recent example, "CIA is making me fat"), there may not be an investigation or response. If the letter does not appear frivolous, it is forwarded to the Office of Inspector General or the Office of General Counsel, as appropriate, for action. The apparently frivolous letters are individually reviewed by a supervisory CIA official. An allegation will be deemed frivolous and closed without any investigation only where the writer has sent previous letters and the allegation is preposterous on its face. If Agency records reflect that the CIA has had contact with the individual making the allegation and the individual is not a prior correspondent of known frivolity, the allegation is never determined to be frivolous, but is forwarded to the Inspector General or General Counsel, as appropriate. In cases of repeated and frivolous correspondence, the letter may be destroyed and no record made of it. In all other cases, a record is made and retained in files that will not be designated under this bill.

The scope of investigations is determined by the Inspector General, General Counsel, or other investigating body. Consequently, the scope of information concerning the subject of an investigation accessible for search and review under the bill is contingent on the scope of the initial inquiry. If the records of an investigating body indicate that only a representative sample of documents in a specific file was examined but that particular entire file was considered directly relevant to the subject of the investigation, such file shall be accessible for search and review.

There may be rare instances in which a file was not reviewed in connection with the investigation because it was withheld or overlooked through inadvertence. To the extent that such file contains information relating to the subject of the investigation but not reviewed and relied upon by the investigating body, it can become accessible if the investigation is reopened or if the file is examined in a new investigation. For example, if it is established that a file was deliberately withheld, that matter would itself become a subject of investigation, and the records of that investigation would become accessible under the bill. Additionally, the Committee intends that where there is a prima facie showing that a document was withheld or overlooked through in-

SUBSECTION 701(d)(1)

Subsection 701(d)(1) mandates that the Agency shall promulgate regulations implementing section 701. These regulations will require that the appropriate Deputy Directors or Office Heads identify categories of files for designation, explain the basis for their recommendation, and set forth procedures governing the inclusion of documents within designated files. The recommended designations, which will include the explanation for the designation and the procedures for including documents in the designated files, will be forwarded to the DCI for approval. The Committee does not intend that the implementing regulations require the appropriate Deputy Directors or Office Heads to identify or list each file to be designated. Instead, the Committee intends that the implementing regulations will require that the appropriate Deputy Directors or Office Heads provide a description specific enough so that the purpose for which the categories of files were created could be identified. Because the description of certain specific categories of CIA files must of necessity be classified, the subsection specifically provides that portions of the recommended designation may be classified.

The procedures for including documents in designated files are especially important to insure proper implementation of the provisions of the bill and the DCI's designations. As is current practice in other areas, the Committee expects to be informed of proposed designations prior to their effective date. The proposed designations will become effective after reporting to the Intelligence Committee and written approval of the DCI.

SUBSECTION 701(d)(2)

Subsection 701(d)(2) requires a determination of "whether such designation may be removed from any category of files or any portion thereof." The phrase "or any portion thereof" is in no way intended to require the review and removal from designation of individual documents contained within designated files. It is intended, however, to provide for the de-designation of an individual file, or files, which belong to a larger category of designated files. For example, the file on a specific intelligence operation might be removed from designation even though contained in a larger designated category of project files which continue to merit designation. The Committee does not intend that the continuing sensitivity of particular files within a designated category serve as a basis for retaining the designation of those files within the designated category which meet the criteria for removal from designation.

One criterion to be applied in determining whether designation may be removed is "the historical value or other public interest in the subject matter of the particular category of files or portion thereof." The Committee intends this criterion to be applied solely by the CIA, but that the CIA should consult with and take into account the recommendations of persons who could provide an independent evaluation of what topics meet this criterion. Such persons could include the CIA Historian, historians in the Departments of State and Defense, the Archivist of the United States and outside historians. "Public in-

has improperly designated a file or improperly placed records solely in a designated file.

In conducting such review in an action in which the complainant has made a prima facie showing, the Court shall order the Agency to submit a sworn response. Such response shall consist of an affidavit setting forth the justification for designating the file containing the records requested or for filing such records solely in designated files and shall have attached to it the explanation required in subparagraph (d)(1)(B) of this section which serves as the basis for the designation or the procedures required in subparagraph (d)(1)(C) of this section which govern the inclusion of documents in the designated files. The Committee believes that review of these materials as well as the submissions of the plaintiff will in almost all cases be sufficient to enable the court to determine whether the Agency has improperly designated a file or improperly placed records solely in designated files. However, the court, after reviewing the Agency's affidavit, may require additional affidavits. The bill does not deprive the court of its authority to order the Agency to attach to its additional affidavits, as part of its sworn response, the requested Agency records in extraordinary circumstances where essential to determine whether such records were improperly placed solely in designated files. Because the Committee anticipates that the Agency submission may contain classified information, the Committee expects the court to permit such submissions to be made on an in camera, ex parte basis, when necessary to protect classified information. The Committee does not anticipate the court's review to include examining the file in question or conducting any other form of discovery.

Should the court find, after examining the Agency's affidavits and regulations, that there is no rational basis to conclude that the regulations implementing subsection 701(a) of this Act conform to the statutory criteria set forth in that subsection for designating files, or that the Agency has improperly designated a file or improperly placed records solely in designated files, the court shall order the Agency to search the particular designated file for the records which are the subject of the FOIA request and to review such records under the provisions of the FOIA. It is the intent of this Committee that this be the sole remedy for either nonconformance of the regulations with the statute, improper placement of records solely in designated files, or improper designation of a file. If the court finds that the Agency has improperly designated a file or improperly placed records solely in designated files, the court shall order the Agency to search the particular designated file for the records which are the subject of the FOIA request.

SUBSECTION 701(e)(2)

Subsection 701(e)(2) provides that judicial review of CIA application of its regulations pursuant to subsection 701(d)(2) "shall be limited to determining whether the Agency considered the criteria set forth in such regulations." A court could thus ascertain whether proper procedures had been followed, but would not be allowed to second-guess the CIA's substantive judgment regarding whether a particular file or portion thereof met the de-designation criteria outlined above.

It is estimated that there is no net cost to the federal government for this bill. Changes in procedures, as mandated in the bill, may reduce the level of effort needed to respond to Freedom of Information Act requests. Changes in staff levels are not anticipated, however, as resources would be used to reduce an existing backlog of requests and improve response time.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

RUDOLPH G. PENNER,
Director.

EVALUATION OF REGULATORY IMPACT

In compliance with subsection 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee finds that S. 1324 will improve protection of the CIA's sources and methods while enabling the CIA to respond to Freedom of Information requests in a more timely and effective manner. The bill will protect the public's right to request information from the CIA to the extent that these requests do not require search and review of operational files; and will protect the right of individual citizens and permanent resident aliens to request information on themselves contained in all category of CIA files. The Committee finds no additional paperwork will be required from individuals filing Freedom of Information requests. In addition, the amount of paperwork required from the CIA should, in fact, be reduced.

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Section 3(b) of S. 1324 sets forth an amendment to the table of contents at the beginning of the National Security Act of 1947 so as to reflect new section 701 of the new title VII.

EFFECTIVE DATE

Section 4 of the "Intelligence Information Act of 1983" sets forth the effective date of the proposed amendment to the National Security Act so that it will apply retroactively to all requests for records that are, on the effective date of the amendment, pending before the Central Intelligence Agency. This would include those requests on administrative appeal and any pending initial requests that had not been finally processed. The agency could, however, as a matter of administrative discretion, decide to complete the processing of any such requests which had been substantially completed. The amendment would also apply to any case or proceeding, including appeals, pending before any court of the United States on the effective date of the amendment. This would result in the dismissal by the courts of all such legal proceedings, or portions thereof, for want of jurisdiction, where the documents in question are located solely in designated operational files and not subject to search and review under the terms of section 701. Without retroactive applicability, it would take years for the relief envisioned by the amendment.

CHANGES IN EXISTING LAW MADE BY THE BILL

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in the existing law made by the bill, as

ADDITIONAL VIEWS OF SENATORS DURENBERGER, HUDDLESTON, INOUYE, AND LEAHY

For over four years under two Administrations, the CIA has sought relief from the burdens imposed on the Agency by the Freedom of Information Act. CIA officials presented their case at hearings in 1979, 1980, and 1981, but no action was taken on any of the bills then introduced to exempt the CIA from the FOIA. Introduction of the Intelligence Information Act (S. 1324) by Senator Goldwater in 1983 provided the first real prospect for passage of legislation to modify the CIA's responsibilities under the FOIA. This bill attempted to strike a balance between the public's right to access to information and the Agency's interest in protecting intelligence sources and methods involved in its operations. Because of the significant amendments to S. 1324 adopted by the Select Committee on Intelligence, we agree that this legislation deserves favorable consideration by the Senate.

CIA's past claims that the FOIA created major security problems for the Agency have engendered considerable skepticism. While sources and cooperating foreign governments have voiced complaints about intelligence disclosures in the United States, very few of those disclosures could actually be attributed to operation of the FOIA; and the CIA could point to no case in which the Act forced the disclosure of properly classified material relating to intelligence sources or methods. The FOIA permits the CIA to withhold any information that is properly classified pursuant to Executive Order. As revised by President Reagan in 1982, the Executive Order on National Security Information provides for classification of any information the unauthorized disclosure of which reasonably could be expected to cause damage to the national security. Therefore, the FOIA does not require the CIA to disclose any information from its files that would cause damage to the national security.

In fact, President Reagan's Executive Order was intended in part to make it easier for the CIA to justify withholding information under the FOIA when challenged in court. The new standard for classification no longer required the government to show "identifiable" damage to the national security. Moreover, a new provision in the order established a presumption that unauthorized disclosure of any "intelligence sources or methods" causes damage to the national security. Both of these changes, as well as other revisions in the Executive Order, were strongly recommended by the CIA as a means to make it easier for the Agency to justify withholding information requested under the FOIA. Some of us have serious concerns about aspects of the order and have cosponsored legislation to restore the "identifiable damage to national security" standard and a previous requirement to balance the public interest in disclosure.

whether the designation can be removed and the file made subject to FOIA search and review. The criteria for this review must include consideration of the historical value or other public interest in the subject of the file and the potential for declassifying a significant part of its contents. These criteria are especially significant in light of the Executive Order on classification, which eliminated the requirement to take the public interest in such materials into account in making declassification decisions. S. 1324 will restore that requirement at least for "de-designation" decisions. We fully share the Select Committee's view in the report that most files ought to be "de-designated" within 40 years.

This is not all that would be done for historical research in conjunction with this bill. As a result of an exchange of letters between Senator Durenberger and CIA Director Casey, the CIA has agreed to set up a new program to declassify historical documents. The CIA has pledged to review those materials that "would be of greatest historical interest and most likely to result in declassification of useful information." This program will extend to all types of CIA files, not just operational files, and should provide information to historians that they might not even have known existed in the absence of the CIA's review.

Further assurance of assistance for historical research is contained in the Select Committee's report. The CIA will continue to respond in its current manner to requests for material in designated operational files when requests are made under the mandatory search and declassification review provisions of the Executive Order on National Security Information. There is a significant connection between such requests and the FOIA. Appeals from initial CIA decisions in Executive Order mandatory review cases are processed by the CIA's Information and Privacy Division and considered by an Information Review Committee. Under S. 1324, the files of that division and committee are ineligible for designation. Thus, the documents in question will be subject to review under the FOIA if they are subsequently requested from Information and Privacy Division files pursuant to the FOIA rather than the Executive Order.

A final safeguard for continued public access to releasable CIA information is the provision in the bill, as introduced, that requires the CIA to respond to requests, in accordance with the FOIA or the Privacy Act, from U.S. citizens and permanent resident aliens for information concerning themselves. It is to the CIA's credit that all of its proposals for exemption from the FOIA have included such a provision, which recognizes the importance of assuring the American people access for search and review to any files on themselves.

Perhaps the most significant and difficult accomplishment of the Select Committee in considering S. 1324 has been the establishment of clear procedures for judicial review in cases of alleged improper file designation or alleged improper placement of records solely in designated files. At the first public hearing on the bill, CIA officials indicated their belief that there would be no judicial review whatsoever under the provisions of the bill. This raised very serious problems, because a basic principle developed under the Freedom of Information Act is that the courts have an opportunity to review administrative