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# THE CIA'S PUBLIC OPERATIONAL FILES: ACCESSING FILES EXEMPT FROM THE CIA INFORMATION ACT OF 1984 BECAUSE OF INVESTIGATIONS INTO ILLEGAL OR IMPROPER ACTIVITY

*Hannah H. Bergman\**

## INTRODUCTION

In 1984, only a decade after *The New York Times* reported the Central Intelligence Agency ("CIA") was involved in a variety of illegal domestic spying activities, including mind control experiments, Congress exempted certain CIA files from search and review under the Freedom of Information Act ("FOIA").<sup>1</sup> The reports in *The New York Times* inspired investigations by the Rockefeller Commission, appointed by President Gerald Ford, and the Church Committee, designated by Congress.<sup>2</sup> These investigations concluded that for decades the CIA had, used radiation and the drug lysergic acid diethylamide (LSD) in experiments on unwitting subjects in an attempt to control their minds as part of a program called MKULTRA.<sup>3</sup>

Those investigations also revealed the details of Operation CHAOS, which began as a Johnson administration program within the CIA for domestic spying in violation of the CIA's mandate not to conduct domestic operations.<sup>4</sup> The CIA amassed more than 13,000 files in the program, including 7,000 on United States citizens. CHAOS fo-

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1. See Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Force, Other Dissidents*, THE NEW YORK TIMES, Dec. 22, 1974 at 1.

2. Gerald K. Haines, *Looking for a Rouge Elephant*, STUDIES IN INTELLIGENCE, 1998, [https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98\\_99/art07.html](https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html)).

3. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Governmental Operations, Book I, at 389-90, 94th Cong. 2d Sess., No. 94-755 (Apr. 26, 1976) ("Church Committee"). See also, Linda Greenhouse, *Justices Grant C.I.A. Wide Discretion on Secrecy*, THE NEW YORK TIMES, April 17, 1985 at A18.

4. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Governmental Operations, Book 3, at 688-89.

cused primarily on Vietnam War protestors, including student activists, street protestors, and political dissidents.<sup>5</sup>

In 1984, the CIA was also drowning in FOIA requests.<sup>6</sup> The resulting backlogs meant requestors were waiting years for an answer from the CIA to receive the requested documents.<sup>7</sup> The CIA insisted, before Congress, that it had to divert its trained agents from more pressing needs to review FOIA requests from the U.S. citizenry and, sometimes, foreign officials.<sup>8</sup>

The Agency had long sought a blanket exemption to FOIA; but, Congress was reluctant to do so because witnesses before the intelligence committees reminded the public of MKULTRA and CHAOS.<sup>9</sup> In September, the CIA won some relief from FOIA in the form of the CIA Information Act of 1984.<sup>10</sup> The Act exempted the CIA's operational files from search and review under FOIA, except in cases where those files had been subject to an investigation.<sup>11</sup> The committees added the limitation on the exemption to ensure programs such as MKULTRA and CHAOS would not be hidden from the public in the dark reaches of the Agency.<sup>12</sup>

Today, the CIA refuses to abide by Congress' intent. It routinely refuses to search its operational files – particularly the ones which have been subject to an investigation and which Congress intended to be public. An examination of legislative history behind the 1984 Act focusing on arguments CIA officials made before Congress-

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5. *Id.* at Book 3, 688-89, 695.

6. H.R. REP. NO. 98-726, Part pt 1, at 10 (1984).

7. *Id.*

8. *Id.*

9. See generally, Freedom of Information Act: Central Intelligence Agency Exemptions, Before the Subcomm. on Government Information and Individual Rights of the H. Comm. on Gov't Operations, 96th Cong. (1980); H.R. 6588, The National Intelligence Act of 1980 Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select, 96th Cong. (1980); Freedom of Information Act, Vol. 1 and 2 Before the Subcomm. on Constitution, S. Comm. on the Judiciary, 97th Cong. (1981); Intelligence Reform Act of 1981 Before the S. Comm. on Intelligence, Select, 97th Cong. (1981); S. 1324, An Amendment to the National Security Act of 1947 Before the S. Comm. on Intelligence, Select, 98th Cong. (1983); Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select, 98th Cong. (1984); CIA Information Act Before the Subcomm. on Gov't Information, Justice, and Agriculture, H. Comm. on Gov't Operations, 98th Cong. (1984).

10. CIA Information Act of 1984, 50 U.S.C. § 431 (2007).

11. *Id.*

12. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select, 98th Cong. 33 (1984); S. 1324, An Amendment to the National Security Act of 1947 Before the S. Comm. on Intelligence, Select, 98th Cong. 21 (1983).

sional committees while pushing for the Act's passage will reveal Congressional efforts to minimize the possible harmful effects of the law. Further exploring the effect of the Act will illustrate the problems CIA officials promised the legislation would solve. Finally, looking at interpretations of the investigation exemption by courts and the CIA will make the courts struggle with the Act's interpretation apparent.

#### THE ORIGINS OF THE 1984 ACT: TRADING FOIA RELIEF FOR QUICKER PROCESSING

The CIA, in early years of Ronald Reagan's presidency, wanted immunity from the "bothersome" Freedom of Information Act. From 1980 until the CIA Information Act of 1984, three successive Congresses held a total of eight hearings on the issue.<sup>13</sup> The CIA repeatedly emphasized the Agency's need for relief from FOIA requests. The American Civil Liberties Union (ACLU), however, focused on the requestors' needs for the CIA to release information in a more timely fashion. The resulting 1984 legislation was a compromise between the CIA, the ACLU, and Congress.<sup>14</sup>

In its Congressional testimony, the CIA asserted five arguments for relief from FOIA requests: two were substantive and three were administrative or procedural. The substantive arguments stressed the burden that such requests generated on the Agency's intelligence gathering activities and the risks encountered by the use of FOIA by foreign governments. The administrative and procedural arguments focused on the Agency's growing backlog of FOIA requests, the costs of processing these requests, and the minimal likelihood that operational files could ever be made public under FOIA for national security reasons. Ultimately, the administrative and procedural arguments, rather than the substantive were what won Congressional support. These procedural arguments appeared convincing to the

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13. See generally, Freedom of Information Act: Central Intelligence Agency Exemptions, Before the Subcomm. on Government Information and Individual Rights of the H. Comm. on Gov't Operations, 96th Cong. (1980); H.R. 6588, The National Intelligence Act of 1980 Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select, 96th Cong. (1980); Freedom of Information Act, Vol. 1 and 2 Before the Subcomm. on Constitution, S. Comm. on the Judiciary, 97th Cong. (1981); Intelligence Reform Act of 1981 Before the S. Comm. on Intelligence, Select, 97th Cong. (1981); S. 1324, An Amendment to the National Security Act of 1947 Before the S. Comm. on Intelligence, Select, 98th Cong. (1983); Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select, 98th Cong. (1984); CIA Information Act Before the Subcomm. on Gov't Information, Justice, and Agriculture, H. Comm. on Gov't Operations, 98th Cong. (1984).

14. See 130 Cong. Rec. S27787-89.

ACLU, the Agency's long-time opponent and thus formed the basis for the compromise. However, the merits of both of these categories of arguments require further analysis.

*The CIA says responding to FOIA requests is a burden on the Agency's intelligence gathering activities.*

The CIA's strongest substantive argument was that responding to FOIA requests burdened the CIA's primary purpose of gathering and analyzing intelligence information. The Agency said intelligence sources feared their identities would be revealed in response to a FOIA request.<sup>15</sup> For example, John McMahon, the CIA deputy director of intelligence, told the Senate Select Committee on Intelligence that the presumption under FOIA that the CIA's files were open was troubling to sources.<sup>16</sup> "It is virtually impossible for most of our agents and sources . . . to understand the law itself, much less why the CIA operational files, in which their identities are revealed, should be subject to the Act," McMahon testified.<sup>17</sup> "It is difficult, therefore, to convince one who is secretly cooperating with us that some day he will not awaken to find in a U.S. newspaper or magazine an article which identifies him as a spy," he told the Senators.<sup>18</sup>

McMahon went on to explain that although the CIA may be able to withhold records under the national security exemptions to FOIA, sources often did not understand that distinction.<sup>19</sup> Other foreign intelligence services with whom the CIA worked were also confused.<sup>20</sup> Despite the CIA's best efforts, this argument appeared to have little sway over Congress. The House committee report found these fears were "not warranted," though the committee did concede the perception among sources may be different.<sup>21</sup> Moreover, it is unclear how McMahon intended to explain to foreign sources with sophisticated FOIA knowledge why the limited exceptions the bills were offering would protect them. Thus, in interpreting the statute today, the burden on the CIA's intelligence gathering activities should not be given much weight.

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15. S. 1324, An Amendment to the National Security Act of 1947 Before the S. Comm. on Intelligence, Select, 98th Cong. 6 (1983).

16. *Id.*

17. *Id.* at 7.

18. *Id.*

19. *Id.*

20. *Id.*

21. H.R. REP. NO. 98-726, *supra* note 6, at 17.

*The possibility FOIA could be abused by foreign governments distresses the CIA.*

Current and former CIA officials played on the fear that FOIA laws could allow foreign governments access to information the United States wanted to keep secret. Such fears appeared reasonable during the Cold War and in the wake of the Iranian hostage crisis. The CIA in the early 1980s received a FOIA request from the Ayatollah Khomeini, now the Supreme Leader of Iran, for information on the Shah of Iran.<sup>22</sup> The Agency and perhaps many of the Senators found this request loathsome.<sup>23</sup> CIA officials also told Congress that KGB agents, secret Russian police during the communist era, could request information under FOIA.<sup>24</sup> The fear of "legal espionage" by the Soviet Union effectively invoked the atmosphere of the Cold War.<sup>25</sup> Interestingly, no one pressed the CIA on why the Agency was actively trying to protect such files when the KGB may not have known these files existed, but for the publicity the CIA was generating. Today, as in 1984, many requesters hire others to make FOIA requests for them, effectively hiding the identity of the beneficiary of the information. Thus, the concern that information will be utilized by individuals unfriendly toward the United States is really as scare meant to divert attention from the purpose of open government laws.

*The Agency's backlog of FOIA requests is sizeable because many files that can never be released for national security reasons have to be searched and reviewed before the Agency can deny the request.*

Despite these more substantive arguments, the most powerful argument in the Agency's arsenal was the existence of a massive backlog of FOIA requests – a backlog that the ACLU and Congress also wanted to eliminate. The House Select Committee on Intelligence found in its report, "The review necessary for documents found in the Directorate of Operations is the primary cause of the overall CIA backlog in responding to FOIA requests."<sup>26</sup> The CIA processed requests in a first in, first out basis which was the only form of processing allowed

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22. S. 1324, *supra* note 15, at 27.

23. *Id.*

24. *Id.* at 63.

25. *Id.* In this statement legal espionage means the KGB could commit espionage by gaining information that was publically available under the FOIA

26. H.R. REP. NO. 98-726, *supra* note 6, at 10.

before the 1996 amendments to FOIA. This meant that requests for dozens of records in the Directorate of Operations files would often slow down processing of smaller, simpler requests.<sup>27</sup> Often the most sensitive operational files had to be reviewed line by line by experienced Agency professionals to determine if any portion of the files could be released without harming national security.<sup>28</sup> By exempting some of the Directorate of Operations files from release under FOIA, Congress reasoned that other requests would be filled more quickly. Although all files would still have to be reviewed, less time would be spent looking at the operational files that in most cases could never be released.<sup>29</sup>

The Senate Select Committee on Intelligence agreed with the House's assessment. Senator Patrick Leahy, a member of the committee at that time and now the chair of the Senate Judiciary Committee, said during the hearings in 1983, "the search and review of operational files. . . is causing a major backlog in responding to FOIA requests, including those which would otherwise result in the release of useful information." According to Senator Leahy, the backlog at that time was more than 2,500 requests and it took about two years between the time of a request and the receipt of a denial or the requested files.<sup>30</sup> However, the House had a more optimistic vision of the numbers. It found the CIA received 1,266 new FOIA requests in 1983, which gave the Agency at year end a backlog of 1,711 requests.<sup>31</sup> This was up 351 requests from 1982.<sup>32</sup>

Congress expected the relief to be dramatic. "The Committee firmly expects that CIA final responses to FOIA requesters after enactment of H.R. 5164 will be measured in months at the outside, not in years, and that the CIA will redouble its efforts to meet the deadlines established in FOIA," according to the House report.<sup>33</sup> In turn, "the Committee views this substantial reduction in CIA response time as a primary benefit of this bill."<sup>34</sup> Thus, today when interpreting the CIA's actions with regard to FOIA processing and requests for operational files, it is important to consider whether the Agency is following

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27. *Id.*

28. *Id.*

29. *Id.* at 11.

30. *Id.* at 3.

31. *Id.* at 11.

32. *Id.*

33. *Id.*

34. *Id.*

through on its assurances to Congress. If the Agency is not fulfilling its obligations, the continued benefit of the Act should be questioned.

*The cost of processing FOIA requests also burdens the CIA.*

In Congressional testimony, McMahon explored the costs of administering FOIA through 1983. Just seven years after FOIA was enacted, the CIA had spent \$21 million processing FOIA requests.<sup>35</sup> At the same time, the Agency collected only \$76,000 in fees.<sup>36</sup> Part of these costs was presumably ascribed to the hours of work required to search through the CIA's files and compile the records. Unlike other government agencies that relied on staff trained for searching and reviewing, the CIA diverted case officers from their normal job duties to compile and review the materials for release.<sup>37</sup> This practice would have inflated the processing costs because trained intelligence agents would cost the Agency more than the average FOIA officer. The cost to the CIA today to search its files should be considered in this context, and where the burden is less for various administrative reasons it is more important that the CIA fulfills its obligations.

*The CIA said there was a slim likelihood operational files could ever be made public because of national security concerns.*

Finally, the CIA argued despite the delays and costs associated with the review, the Agency rarely, if ever, released information in operational files.<sup>38</sup> Essentially, the review of operational files occurred only so that the Agency could deny FOIA requests. Information that was released from the operational files was often so fragmented it was of no use to the requester. This was in an essence a denial of the request.<sup>39</sup>

McMahon explained to the House intelligence committee that the documents were "scrutinized line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source revealing or other sensitive information."<sup>40</sup> The agents worked under the assumption any information released

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35. S. 1324, *supra* note 15, at 11.

36. *Id.* at 7.

37. *Id.* at 3.

38. *Id.* at 2.

39. *Id.*

40. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, Select. 98th Cong. 8 (1984).



could be combined with other information and used against the United States.<sup>41</sup> "After the responsive records have been properly reviewed, the public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph," McMahon concluded.<sup>42</sup>

McMahon explained the CIA was not comfortable releasing even this amount of information; the black markings could have been misplaced, the agent could have missed the significance of one piece of information that was released. "As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated." The harm done to the Agency's mission by such errors is, of course, unknowable and incalculable. The potential harm is, in our judgment, extreme," McMahon told Congress.<sup>43</sup> When considering the Agency's decisions to release information from its operational files, it is important to consider whether that information has already been released in some form. When the Agency has been careless with its information, it should be allowed to assert that its release would not be in keeping with the 1984 Act.

Nevertheless, though the CIA marshalled several arguments for relief under FOIA, the reduction in the backlog was easiest to understand and the most tangible. This argument convinced, even the Agency's longtime opponents that FOIA processing would improve if the exemption for operational files was granted. However, Congress remained somewhat skeptical about the CIA's genuineness. Congress extracted promises from the CIA that staff devoted to FOIA processing and other resources would not diminish for at least two years until the backlog was improved.<sup>44</sup> Congress also received assurances that an exemption for the CIA would not simply be the first of many for the intelligence gathering agencies.<sup>45</sup>

#### THE CIA'S FOIA RELIEF DID NOT HAVE THE EFFECT CONGRESS INTENDED

Congress was right to remain skeptical that the exemption the CIA received would reduce processing times of FOIA requests and Agency backlogs. Twenty-three years after the passage of the Act, the CIA's backlog is still significant, if it is even considered to be an appro-

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41. *Id.*

42. *Id.* at 11.

43. *Id.*

44. H.R. REP. NO. 98-726, *supra* note 6, at 11.

45. S. 1324, *supra* note 15, at 25.

pritate measure of the Agency's workload. The Agency's FOIA related expenses have more than doubled. The Act has been viewed as a model for several similar FOIA exemptions for other intelligence agencies. Moreover, the CIA has failed to abide by the limitations of the 1984 Act and search files which the Act did not protect.

*The CIA's current backlog is sizable.*

The CIA's backlog, along with backlogs in other federal agencies, is frequently examined by a variety of nonprofit groups. Invariably, the CIA ranks among the agencies with the greatest backlogs and has the oldest pending requests. According to the National Security Archive's 2005 study of the 10 Oldest Pending FOIA Requests across 64 government agencies, the CIA was responsible for four, despite handling only 0.08 percent of FOIA requests to the federal government.<sup>46</sup> Those requests include: one made in 1989 for records related to the bombing of Pan American Flight 103, a 1990 request (initially made in 1987) for records related to Jonathan Pollard, a former U.S. Naval Intelligence Officer convicted of being an Israeli agent, a 1991 request for records related to Regan-era National Security Decision Directive 112, and a 1991 request for specific and detailed information related to the Pan-American bombing.<sup>47</sup> At the age of 18, the oldest pending request at the CIA can now join the Army and vote; this is undoubtedly not what Congress intended when it predicted that because of the 1984 Act, processing time would be measured in months.<sup>48</sup>

Perhaps even more important, the CIA's year-end backlog over the last several years has been considerable. In fiscal year 1998, the Agency's backlog of pending requests was 4,716; in 2002, it was 1,547; and in 2006, it was 896.<sup>49</sup> Prior to the 1984 Act, the backlog was between 1,700 and 2,500 requests.<sup>50</sup> While the backlog is currently less than it was when the 1984 Act was passed, government agencies were not required to report data on FOIA processing until FOIA was amended in 1996. Therefore, it is not possible to know what happened

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46. The National Security Archive, A FOIA Request Celebrates its 17th Birthday (2006) <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/tenoldest.htm>.

47. *Id.*

48. *Id.*

49. COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, THE WAITING GAME: FOIA PERFORMANCE HITS NEW LOWS (2007), [http://www.cjog.net/documents/FOIA\\_Performance\\_Report\\_Part\\_1.pdf](http://www.cjog.net/documents/FOIA_Performance_Report_Part_1.pdf).

50. H.R. REP. NO. 98-726, *supra* note 6, at 11.

to the CIA's processing times in the intermediary period between the 1984 law and the effect of the 1996 amendments.

Still, there are other disturbing trends in the data which indicate the backlog may not be a true measure of the CIA's current workload. The CIA is denying a greater number of requests than previously, a process which is more expeditious than granting requests, because it does require the extensive review of each fragment of information for release. This could have the effect of decreasing the backlog without fulfilling the spirit of increased access to information. For example, in 1998, the Agency fully denied 13.3 percent of requests it received, and partially denied 23 percent.<sup>51</sup> In 2002, the Agency fully denied 17 percent, while partially denying 32.8 percent.<sup>52</sup> In 2006, the Agency fully denied 19.2 percent, while partially denying 36.4 percent.<sup>53</sup> Over six years, this is a steady increase in partial and full denials; when the number of requests the CIA received dropped 59 percent. Therefore, the Agency's backlog reduction should be viewed with skepticism, particularly when analyzing the Agency's credibility.

In addition, the CIA's FOIA processing costs remain high, despite hopes the exclusion of operational files from search and review would reduce expenses. In 2006, the CIA reported it had 75 employees devoted to FOIA fulfilling the 2,579 requests it received.<sup>54</sup> The Agency spent \$8.8 million on FOIA in FY 2006.<sup>55</sup> By comparison, FOIA costs averaged \$3 million a year before the 1984 Act.<sup>56</sup> Accounting for inflation, that is still more than a \$2 million increase.<sup>57</sup>

Indeed, this coupled with processing times still measured in years according to the National Security Archive study, makes it uncertain as to what impact the 1984 Act had. While the CIA's response time to requests is now technically measured in days, the CIA is only required to acknowledge receipt of a request and can report that data as a response time.<sup>58</sup> Thus, there is no way to measure the time it

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51. CIA, FY 98 FOIA REPORT (1998), [http://www.foia.cia.gov/txt/annual\\_report\\_1998.pdf](http://www.foia.cia.gov/txt/annual_report_1998.pdf).

52. CIA, FY 02 FOIA REPORT (2002), [http://www.foia.cia.gov/txt/annual\\_report\\_2002.pdf](http://www.foia.cia.gov/txt/annual_report_2002.pdf).

53. CIA, FY 06 FOIA REPORT (2006), [http://www.foia.cia.gov/txt/annual\\_report\\_2006.pdf](http://www.foia.cia.gov/txt/annual_report_2006.pdf).

54. COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, THE WAITING GAME: FOIA PERFORMANCE HITS NEW LOWS, *supra* note 28.

55. *Id.*

56. *S. 1324*, *supra* note 15, at 11.

57. CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl>.

58. COALITION OF JOURNALISTS FOR OPEN GOVERNMENT, THE WAITING GAME: FOIA PERFORMANCE HITS NEW LOWS, *supra* note 28.

actually takes to fulfill a FOIA request without making a FOIA request for that information.<sup>59</sup>

*The CIA's exemption for operational files has led to a proliferation among intelligence agencies of identical exemptions.*

During Congressional hearings on the 1984 Act, members repeatedly emphasized they did not want this relief for the CIA to turn into a barrage of requests from other intelligence agencies for the same legislation. Senator Leahy, a member of the Senate Intelligence Committee, was particularly interested in this point, saying, "I made it very clear that I did not want this bill to be a prelude to an attempt to gain a generalized exemption from FOIA for the FBI, the NSA, DIA or any other intelligence agency. The testimony was clear that this bill is just for the particular situation of the CIA."<sup>60</sup> McMahon, the CIA's deputy director, tried to reassure him, replying, "there would be no further efforts from the intelligence community for such a bill and the administration would not support any additional efforts."<sup>61</sup>

McMahon's statement proved to be a false assurance. President Reagan's signing statement read in part, "I anticipate that in the future such relief will be expanded in scope. And I expect that it will become available to other agencies involved in intelligence, who also must protect their sources and methods, and who likewise wise to avoid unnecessary and expensive paperwork."<sup>62</sup> President Reagan's expectation has been fulfilled: the National Security Agency, the Defense Intelligence Agency, the National Reconnaissance Office, and the National Geospatial Intelligence Agency have each received similar exemptions.<sup>63</sup> These exemptions have passed as part of defense spending bills without hearings or floor debate.

As a result, these new exemptions lack any legislative history. Thus, the legislative history surrounding the CIA's FOIA relief remains relevant to the interpretation of these newer exemptions. The language of these exemptions is almost exactly the same as the 1984

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59. See The National Security Archive, A FOIA Request Celebrates its 17th Birthday (2006), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/tenoldest.htm> (describing that this is how the National Security Archive conducts its 10 Oldest Audit).

60. S. 1324, *supra* note 15, at 25, 51.

61. *Id.* at 25.

62. 20 Weekly Comp. Pres. Doc. 1543.

63. See 50 USC § 40c-53 (2007) (exempting the National Reconnaissance Office), 50 USC § 403-5c (exempting the National Geospatial Agency (then the National Imagery and Mapping Agency)); 50 USCS § 432c (exempting the Defense Intelligence Agency); 50 USCS § 432b (exempting the National Security Agency).

Act; therefore leading courts to turn to the 1984 Act's legislative history in interpreting the similar exemptions.<sup>64</sup> By fully understanding what Congress intended with respect to the 1984 Act, the courts and the intelligence agencies themselves can now understand what these later laws are intended to protect.

However, some concerns expressed during the debates over the CIA's 1984 Act may not be relevant to the exemptions obtained by other agencies. For example, Congress likely had a different motivation for granting an exemption to agencies, such as the National Reconnaissance Office (NRO). The NRO does not have the same FOIA backlogs as the CIA. The NRO only received 121 requests for the 2006 fiscal years and had a backlog of a mere 18 requests.<sup>65</sup> Since the NRO's workload is substantially less than the CIA's workload, Congress could not have hoped to speed processing times by granting its operational files exemption from FOIA. At the same time, because other agencies that have received operational files protection are components of the Defense Department, specific numbers related to their FOIA backlogs are not available.<sup>66</sup> This makes it impossible to evaluate the administrative needs for FOIA relief or the effect of such relief for the agencies on the requestors. Still, while it is not possible to glean Congressional intent in the latest round of exemptions, Congress' decision to use the same language in these separate laws indicates they should be interpreted the same by the courts. It would be a fallacy for the courts to hold that the same language in two separate statutes designed to protect the same information – but for the fact that the information is maintained by two different agencies – should be mean wholly different things.

*The CIA's recent interpretation of the 1984 Act differs greatly from Congress' interpretation of the language in 1984.*

Congress worked diligently to ensure that some CIA operational files would remain subject to FOIA by adding language to the original bill. This required the CIA to continue to search those files which were the "specific subject matter of an investigation by the intelligence committees of the Congress, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central

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64. See *Aftergood v. NRO*, 441 F. Supp. 2d 37, 44 n.8 (D.D.C. 2006).

65. NRO, FY 06 FOIA REPORT (2006), [http://www.nro.gov/foia/Annual\\_Report\\_2006.pdf](http://www.nro.gov/foia/Annual_Report_2006.pdf).

66. See 5 USCS § 552 (2007) (requiring under for FOIA agencies to aggregate data, but not break it out into requests components received).

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.”<sup>67</sup> This language was meant to assure Congress that evidence of illegal activities, such as MKULTRA or Project CHAOS would still come to light, and was added over objections by the CIA that it was not necessary. While these CIA transgressions are a faint memory today, other recent CIA troubles surrounding the military operations in Iraq and Afghanistan reinforce the need for public scrutiny of the Agency. Moreover, any calls for a new interpretation of the law in light of the War on Terror and the events on September 11, 2001 should be weighed against the context of the Cold War and recent Iranian hostage crisis in which Congress passed 1984 Act. Indeed, at the House Intelligence Committee hearings, Representative Louis Stokes questioned the Department of Justice’s intelligence policy counsel on this point, saying, “Some of us are concerned about the revelation of certain improper actions that took place on the part of the agencies back in the 1950’s and 1960’s and even the 1970’s.”<sup>68</sup> Additionally, in the Senate hearings too, Senator Walter Huddleston focused on this point. Senator Huddleston asked McMahon specifically about MKULTRA and CHAOS wondering whether the operational files, as they related to the abuse, would be subject to search and review.<sup>69</sup> McMahon told the Senate committee, “that the very process of the abuse being reported would create a separate set of files outside of the operational files, which would be subject to FOIA.”<sup>70</sup> Thus, there would be no more hindrance than before the legislation to releasing that information.<sup>71</sup> The Department of Justice counsel likewise assured the House.<sup>72</sup>

Yet, the senators pressed this point. Senator Barry Goldwater, then the chairman of the Intelligence Committee asked, “Would the CIA support an amendment which would make it clear that designated files will be subject to search and review if they concern any intelligence activity which the DCI, the Inspector General, or General

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67. 50 USC § 431 (2007).

68. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, *supra*, note 38, at 33.

69. S. 1324, *supra* note 15, at 21.

70. *Id.*

71. *Id.*

72. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, *supra*, note 38, at 33.

Counsel of the Agency has reason to believe may be unlawful or contrary to Executive order or Presidential directive?"<sup>73</sup> This time, the CIA's deputy general counsel, Ernest Mayerfield, assured the committee, "In my view such a specific item to be legislated would be unnecessary by the very definition. If the Inspector General or the General Counsel or the Director's office has reason to believe that something may be unlawful, there is documentation on this particular matter located in those files, and they are not in designated 'operational files'."<sup>74</sup> The CIA's assurances were not enough. Eventually, the House bill was adopted by the full Congress, which makes it clear that operational files that were subject to an investigation are not exempt from FOIA.

Today, however, the CIA refuses to search these operational files and abide by the assurances the Agency gave the Intelligence Committees more than twenty years ago. This is evidenced by the CIA's responses to several requests from the National Security Archive for files which were the subject of an investigation and by the court's decision in *ACLU v. DOD*.<sup>75</sup>

For example, in October 2006, the National Security Archive requested, "the April 2002 Central Intelligence Agency assessment of the Iraqi National Congress source that stated that the Department of Homeland Security had terminated contact with him after four meetings because of suspicions that he was a fabricator."<sup>76</sup> This request included a paragraph noting the requested file was previously provided to the Senate Select Committee on Intelligence by the CIA as part of the investigation that produced, "Report on the U.S. Intelligence Community's Prewar Intelligence Assessment in Iraq." Thus, the Archive argued the file fell under the investigation provision of section of the 1984 Act and should be released.<sup>77</sup> Indeed, the House report on the 1984 Act prior to its passage made clear the Senate Intelligence Committee's investigation was exactly the Congress had in mind, stating:

When the House Permanent Select Committee on Intelligence [or] the Senate Select Committee on Intelligence . . . carries out an investigation for impropriety or illegality in the conduct of an intelligence activity, all CIA files, including exempted operational

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73. *S. 1324*, *supra* note 15, at 29-30.

74. *Id.* at 30.

75. See *ACLU v. DOD*, 351 F. Supp. 2d 265, 271 (S.D.N.Y. 2005).

76. Letters from Scott Koch, CIA Information and Privacy Coordinator, Central Intelligence Agency, to Roger Strother, National Security Archive (Mar. 7, 2007) (on file with author).

77. *Id.*

files will remain subject to FOIA search and review for information concerning the specific subject matter of the investigation.<sup>78</sup>

The CIA responded to the National Security Archive on November 27, 2006:

With regard to your request, responsive records, should they exist, would be contained in operational files. Please note that according to the National Security Act of 1947, as amended, 50 USC § 431, operational files of the CIA are exempt from the publication, disclosure, search and review provision of the Freedom of Information Act, 5 U.S.C. § 552. As such, the files that would contain responsive records, if any exist, are not subject to search in response to your request.<sup>79</sup>

This denial did not address the question of whether the citation by the Senate Intelligence Committee affected the status of the documents. However, in subsequent denials, the CIA has been more specific.

Similarly, the National Security Archive requested files in September 2004 related to the interrogation of Khalid Sheikh Mohammed which were referenced in *The 9/11 Commission Report*. The request was denied in December 2004. In an appeal later that month, the Archive argued that because these documents were part of the 9/11 Commission's investigation and numerous other Congressional investigations, they were not exempt from FOIA. The CIA has not ruled on the more than two-year-old appeal, which again illustrates the Agency's slow processing times following the 1984 Act.

However, in response to six other requests by the National Security Archive made under Executive Order 12958, which provides for declassification of documents, the CIA has issued final decisions. These decisions each contain a paragraph which may be a prelude to the Agency's final decisions on the Archive's FOIA requests for operational files. This paragraph reads in part:

You note that the Presidential Commission on the Intelligence Capabilities of the United State Regarding Weapons of Mass Destruction cited the requested information in its report of 31 March 2005 (Silberman-Robb Commission Report). The Commission's citation of the requested information in its report does not change the status of this information as CIA operational files that are exempt from the search, review, publication, and disclosure re-

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78. H.R. REP. NO. 98-726, *supra* note 6, at 28.

79. Letters from Scott Koch, CIA Information and Privacy Coordinator, Central Intelligence Agency, to Roger Strother, National Security Archive (Mar. 7, 2007) (on file with author).



quirements of the FOIA and from the mandatory declassification review provisions of Executive Order 12958, as amended.<sup>80</sup>

Again, this suggests the CIA is not following the intent of Congress, and the understanding of the Intelligence Committees that the citation of requested information by an investigatory committee would change the status of the operational files under the 1984 Act. However, this denial leaves several issues open for argument, as the Agency did not explain why the citation is not status changing. While it is true that the Silberman-Robb Commission is not an investigatory body named within the statute, its efforts to assess the conduct of the executive branch, particularly with regard to Iraq, are within the spirit of what Congress intended under the 1984 Act. Moreover, other sections of the 1984 Act, which deal with the dissemination of information from the CIA's operational files, suggest the process of sending information to the Silberman-Robb Commission's removes the protection of the 1984 Act.<sup>81</sup>

The National Security Archive has also requested files used by the Senate intelligence committee in its reports on the "U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq." CIA denials of these requests say, "This report did not result from a Senate Select Committee on Intelligence (hereinafter SSCI) investigation into any impropriety or violation of law, Executive order, or Presidential directive in the conduct of intelligence activity." Therefore, the CIA says it believes the requests cannot be fulfilled. The Senate intelligence committee's purpose in releasing these reports is admittedly difficult to ascertain. There are no Congressional Record or news statements by the committee members that shed light on this, nor are the reports so damning that they were obviously the result of investigations into illegal activity. Moreover, there is not a definitions section within the statute to turn to for clarity on what constitutes an investigation, impropriety, or illegal activity.

Yet, from the plain language of the statute and the introduction of the Senate intelligence committee's report there is a strong argument that it was investigating at the minimum improper activity. Chairman Pat Roberts and Vice Chairman John D. Rockefeller, IV, said the committee was to examine, among other things, "the objectivity, reasonableness, independence, and accuracy of the judgments reached by the Intelligence Community."<sup>82</sup> This would include assess-

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80. *Id.*

81. 50 USC § 431 (d)(1)-(3) (2007).

82. S. REP. NO. 108-301, at 1 (2004).

ing “whether those judgments were properly disseminated to policymakers in the executive branch and Congress” and “whether any influence was brought to bear on anyone to shape their analysis to support policy objectives.”<sup>83</sup> The failure to inform Congress, particularly the intelligence committees, of crucial information regarding weapons of mass destruction is improper protocol within the government. It is also a violation of 1991 amendments to the National Security Act which requires the White House to keep the intelligence committees “fully and currently informed” of intelligence activities.<sup>84</sup> Equally problematic would be influencing intelligence information to support political goals. Thus, the National Security Archive has several strong arguments to challenge the CIA’s denials of its requests.

Beyond the National Security Archive’s requests, the CIA has also denied the requests of the American Civil Liberties Union. In 2005, U.S. District Court Judge Alvin K. Hellerstein ordered the CIA to search its operational files for records related to the “treatment of Detainees in United States custody,” their “deaths,” and “their rendition to countries known to employ torture” after finding the ACLU’s request fell within the investigation exemptions to the 1984 Act.<sup>85</sup> The ACLU argued these files were part of the CIA Office of Inspector General’s investigation into incidents in Iraq, a concession the CIA made in its briefs.<sup>86</sup> Yet, the Agency argued it should not be required to search its files, because the investigation was ongoing.<sup>87</sup> Judge Hellerstein ruled against the CIA on this point, holding the statute itself said nothing related to the timing of an investigation.<sup>88</sup>

In dicta, Judge Hellerstein went further stating that because the CIA had already begun its investigation into improprieties in Iraq, the files in the relevant operational files had been searched, and those documents were now in the Inspector General’s files.<sup>89</sup> Thus, there could be “no additional material burden in searching and reviewing the documents already in the inspector general’s files.”<sup>90</sup> In addition, under the reasoning of CIA officials, who testified before Congress as the 1984 Act was debated, these files would no longer be correctly

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83. *Id.*

84. 50 USCS § 431 (2007).

85. See *ACLU v. DOD*, 351 F. Supp. 2d 265, 278 (S.D.N.Y. 2005).

86. *Id.* at 272.

87. *Id.* at 271.

88. *Id.* at 272.

89. *Id.*

90. *Id.*

termed operational files and should be released. Citing this testimony, Judge Hellerstein concluded:

The legislative history reinforces the clearly expressed intent of section 431(c)(3) to require that the CIA search and review its information produced or gathered 'concerning . . . the specific subject matter' of the investigation, for public release, or specific exemption under FOIA. The documents in question need not actually have been reviewed and relied upon by the OIG staff, and the CIA may not delay compliance until such time, if ever, an investigation is closed.<sup>91</sup>

This language could be a powerful citation in future arguments against the CIA.

*The CIA is failing on two fronts and there is ample opportunity for litigation on the Agency's actions.*

Thus, the CIA's denial of the National Security Archive's and ACLU's requests shows the Agency refuses to obey the 1984 law in two crucial ways. The Agency is not making initial searches of operational files which have been subject to an investigation, as the 1984 Act requires. Furthermore, when operational files have been searched during an investigation and the responsive documents have been moved to investigatory files, the Agency is not searching those files in response to requests. There has been little litigation surrounding the CIA's behavior. Thus, the bounds of the 1984 Act are somewhat unclear and worth exploring in significant detail.

#### UNDERSTANDING THE LANGUAGE AND THE MEANING OF THE INVESTIGATION EXEMPTION

The 1984 Act is neither long nor elaborately constructed. The premise of the law is straightforward: the CIA maintains operational files which contain secret information about how the Agency conducts its work, and those files are almost never able to be made public. Thus, in most situations, the CIA will not have to search operational files in response to a FOIA request, and the courts will have limited power to review this decision. In this construction, however, there are several key definitions included: "operational files", the "specific subject matter" of an investigation, who may conduct the investigation, and finally, the power of the court to review the CIA's actions, with regard to the 1984 Act.

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91. *Id.* at 276-77.

*The definition of operational files under the 1984 Act has not been given significant attention.*

Foremost, is the issue of what constitutes operational files within the meaning of the 1984 Act. The statute defines these files as:

- (1) files of the Directorate of Operations 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;
- (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; and
- (3) files of the Office of Personnel Security which document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources; except that files which are the sole repository of disseminated intelligence are not operational files.<sup>92</sup>

In the two key cases dealing with “operational files,” the courts have not dwelled on the question of what constitutes an operational file. Indeed, in *Aftergood v. NRO*<sup>93</sup>, the court specifically declined to decide whether the file at issue was an operational file. There, the plaintiff requested the “unclassified portions of the NRO Congressional Budget Justification Book (“CBB”) for Fiscal Year 2006.”<sup>94</sup> The budget book was designated by the head of the National Reconnaissance Office as an operational file, but the plaintiff argued it could not be “operational” in nature. The file did not “document the means by which foreign intelligence or counterintelligence is collected through scientific and technical means,” but rather was produced to inform Congress of the NRO’s work so its funding requests could be met.<sup>95</sup> However, the court decided the case based on another exception to operational files exemption. The exemption provides that records which had been released from operational files are no longer exempt if they have been referenced in files that are not exempt and now are only maintained in operational files for retention purposes.<sup>96</sup> Finding this,

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92. 50 USC § 431 (2007).

93. *Aftergood v. NRO*, 441 F. Supp. 2d 37, 40 (D.D.C. 2006) (following that because the National Reconnaissance Office’s operational files exemption to FOIA is a mirror of the CIA’s, the court’s reasoning is relevant to interpretation of the 1984 Act).

94. *Id.*

95. *Id.* at 41.

96. *Id.* at 46.

the court declined to address whether the files were truly “operational” at all.<sup>97</sup>

The National Security Archive cited the court’s decision in *Aftergood* in its recent requests to the CIA for operational files it believed should be released under the investigation exemption. In the letters referred to above in response to mandatory declassification requests, the CIA said:

Similarly, the decision of the U.S. District Court for the District of Columbia in *Aftergood v. National Reconnaissance Office*, 441 F.Supp. 2d 37 (2006), to which you cite, is limited by the facts of the case to the National Reconnaissance Office and does not change the status of the requested documents as CIA operational files that are exempt from the search, review, publication, and disclosure requirements of the FOIA and from mandatory declassification review provisions of the Executive Order.<sup>98</sup>

This language is troubling because the NRO’s operational files exemption mirrors the CIA’s and court’s interpretation of the language should be acceptable by the CIA as at least offering guidance, if not controlling.

Also, in *ACLU v. DOD*, the court did not address the question of whether the pictures in question were properly considered “operational files.” Indeed, the court did little more than quote the same statutory language and then move on to a discussion of whether the CIA followed proper procedure in designating the requested files as “operational.”<sup>99</sup>

Given this lack of thorough judicial interpretation and the courts’ fondness for the 1984 Act’s legislative history in both the *Aftergood* and *ACLU* cases, it is again useful to turn to the Congressional hearings and reports.<sup>100</sup> The House report, in its section by section analysis of the bill, explains “only those files concerning intelligence sources and methods are comprehended by the definition of ‘operational files.’”<sup>101</sup> The report goes on to explain that it is not the final intelligent product which would be considered operational, but

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97. *Id.* at 41.

98. Letters from Scott Koch, CIA Information and Privacy Coordinator, Central Intelligence Agency, to Roger Strother, National Security Archive (Mar. 7, 2007) (on file with author).

99. *See ACLU v. DOD*, *supra* note 80, at 271.

100. The National Security Archive’s amicus brief in *Aftergood v. NRO* focused on this question, arguing: “Indeed the wide reach of the agency’s designations suggest that the NRO has interpreted the term “operational files” so broadly as to mean simply any files that document or concern in any way how the NRO operates, but this cannot be what Congress intended when it granted the NRO exception.”

101. H.R. REP. NO. 98-726, *supra* note 6, at 20-1.

the process by which that product was compiled, such as the identities of the Agency's sources, the technical means used, and the management of these means, would be an operational file.<sup>102</sup> Hence, files can be designated as exempt if they illustrate the conduct of foreign intelligence operations, counterintelligence operations, intelligence agreements, the means by which the operations are conducted, and investigations into the suitability of potential agents.<sup>103</sup>

The Senate report offers a similar analysis of the designating files as "operational." The report also explains that for the most part the administrative and management files of the Operations Directorate will be considered "operational," because they will "directly concern sources and methods" of the CIA.<sup>104</sup> However, when these files are relied on by policymakers or Agency executives, the Senate report says copies of the files will be made; thus it follows that the files will be accessible under FOIA through the other non-operational files of the Agency.<sup>105</sup>

An appendix to the House hearing also offers insight into what was meant by "operational files." The House Intelligence Committee asked the CIA to respond to fifty scenarios in which files had been previously released by informing the committee of the availability of the files under the proposed amendment.<sup>106</sup> Many of these scenarios describe memos sent to CIA employees, memos sent between the CIA and other agencies, documents describing the organization of the CIA's offices, or memos between these offices. In almost all of these situations, the CIA responded by saying the files were contained in the Executive Registry, and thus would continue to be subject to FOIA. Therefore, at the very least, it is clear the CIA considered correspondence as non-operational and still accessible under FOIA.

Thus, the legislative history indicates that the definition of operational files was meant to be a narrow one. Indeed, the Senate report also notes that for the most part these files would have fallen under an already existing exemption to FOIA. To construe "operational files" as any files of the Agency would be a gross misunderstanding of the narrow construction of the statute.

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102. *Id.*

103. *Id.*

104. S. REP. NO. 98-305, at 22 (1984).

105. *Id.*

106. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, *supra*, note 38, at 100-09 (1984). S. Rep. No. 98-305 at 114-126 (1984).

*The meaning of "specific subject matter" is crucial to properly framing a request.*

The second important part of the statutory language concerns the phrase "specific subject matter" of an investigation. This language was at issue in the case *Davy v. CIA*,<sup>107</sup> where the plaintiff, an author, requested information related to alleged CIA contact Clay Shaw.<sup>108</sup> The plaintiff believed that the requested files of Project QKENCHANT and Project ZRCLIFF would show that Clay Shaw was a CIA contact involved in Cuban operations.<sup>109</sup> This information, the plaintiff contended, should be released because the investigations by various Congressional committees, the CIA's general counsel and the Warren Commission into President Kennedy's assassination touched on Clay Shaw, the subject of his request.<sup>110</sup> The court disagreed, noting that the plaintiff's FOIA request was about the two projects and not Clay Shaw.<sup>111</sup> The court found those two projects were never the subject of an investigation; thus the information could not be released.

In dicta, the court also maintained, "[m]oreover, even if Davy had put forth evidence tending to show that these CIA projects were somehow tangentially related to the Kennedy assassination, 'a congressional investigation that touches on CIA conduct in a particular incident or region, standing alone, is not sufficient to warrant the release of all CIA documents' regarding such an incident or region."<sup>112</sup> Here, the court relied on language from *Sullivan v. CIA*,<sup>113</sup> a 1993 case in which the plaintiff requested information about her father, whom she believed disappeared while dropping U.S. government propaganda over Cuba.<sup>114</sup>

In *Sullivan*, the plaintiff argued the Church Committee, which inquired "into certain covert operations against Cuba mounted by the CIA and other (putatively independent) anti-Castro groups," made the CIA's files on her father the "specific subject matter of an investigation by an intelligence committee of the Congress. . .for any impropriety, or violation of law. . .in the conduct of an intelligence activity."<sup>115</sup> The

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107. *Davy v. CIA*, 357 F. Supp. 2d 76, 79 (D. D.C. 2004).

108. *Id.*

109. *Id.*

110. *Id.* at 82.

111. *Id.* at 83.

112. *Id.* at 82.

113. *Sullivan v. CIA*, 992 F.2d 1249 (1st Cir. 1993).

114. *Id.*

115. *Id.* at 1254-55.

court did not agree with her, holding, “[t]he congressional investigation and the documents sought must specifically relate to CIA wrongdoing, that is, some ‘impropriety’ or ‘violation of law’ in the conduct of the designated intelligence activity.”<sup>116</sup>

Indeed, the Church Committee was concerned with investigating a relationship between the assassination of President Kennedy and any operations against Cuba. “Seen from that perspective, the Committee’s mission does not fit within the contours of section 431(c)(3) for two reasons. First, the Committee’s inquiry was not a direct investigation into CIA wrongdoing. Second, appellant’s request for information about her father’s disappearance bears no claimed or readily discernible relationship to the investigation’s purposes.”<sup>117</sup>

The court explained:

This latter obstacle is insurmountable: a pivotal requirement of section 431(c)(3) is that, to be extractable, the information requested must concern the specific subject matter of the official investigation. Thus, although there were instances in which the Committee searched for agency misconduct, that happenstance does not allow appellant to catapult herself over the statutory parapet. It is simply not enough that information which bore in some remote way on the request surfaced in the course of an official investigation.<sup>118</sup>

This court also cited to the legislative history, in particular the House report. Again, on this point, the legislative history is clear. It explains the “specific subject matter of the investigation” language was meant to tailor the information still subject to FOIA, avoiding an “expansive” interpretation of the provision.<sup>119</sup> The report also offers a helpful example of this language in action.<sup>120</sup> The Intelligence Oversight Board could investigate illegal surveillance activity conducted by the Agency.<sup>121</sup> If the CIA received FOIA request for information related to that investigation, the Agency would have to release files.<sup>122</sup> But, if the CIA received a request for information about the target of the investigation, the CIA would not have to search its operational files.<sup>123</sup>

However, the appendix to the House hearings also illuminates the Church Committee’s investigation. The House Intelligence Com-

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116. *Id.* at 1255.

117. *Id.* at 1249.

118. *Id.* at 1255.

119. H.R. REP. NO. 98-726, *supra* note 6, at 31.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*



mittee asked whether files related to President Nixon's decision in 1969 and 1970 to order "destruction of existing stockpiles of biological and toxic weapons" would be accessible under the new bill.<sup>124</sup> The files included press releases, CIA documents listing the contents of the Agency's biological arsenal, and the text of international agreements prohibiting development and use of such weapons.<sup>125</sup> In response, the CIA said, "CIA biological weapons were the subject of investigation by the Church Committee and it is likely that the documents described in this category were relied upon in the course of the investigation. Therefore, these documents would be accessible. . . ."<sup>126</sup> In fact, the official name of the Church Committee was the "United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities." Together, the title and the CIA's response to the question suggest the scope of the Church Committee's investigations may have been much wider than the court in *Davy* portrayed it.

This illustrates the importance of carefully framing both a FOIA request and the description of the investigation in which the records would have been relied on. To narrow a vision of the investigation can be a death blow to the request. For this reason, it appears that the plaintiff in *Sullivan* would have been better served by requesting CIA files related to the Church Committee's investigation into its operations in Cuba. After receiving these files, she then could have searched them for information on her father. But by narrowing her request, she could not take advantage of the Act's exemptions. The same might be said for the plaintiff in *Davy*. Had he requested information directly related to the Warren Commission or another committee's investigation into Kennedy's assassination, his request may have been treated differently. Instead, he narrowly requested information about specific CIA projects he thought the investigatory bodies had relied on and that he believed would contain information about Clay Shaw. Thus, requesting more information than needed seems to be necessary to avail oneself of the exemptions to the 1984 Act.

However, there is a strong policy argument to be made in response to this tactic. It neither serves the requester's interest to ask for more information than the individual needs nor does it serve the CIA's limited FOIA resources or its apparent desires to control the release of

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124. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, *supra*, note 38, at 125.

125. *Id.*

126. *Id.* at 120.

its files to be forced to provide more information. The requester may have limited resources to pay the CIA search and duplication fees. The request may also take substantially longer to process because of the broader scope. This would increase the CIA's backlog in clear contravention of Congress's expressed wishes when it passed the 1984 Act. But this appears, in some cases, to be the only way to obtain information. This theory might be tested by two requestors making parallel requests – one for only the information the individual needed and the other for a large amount of files related to an investigation in which the information desired would be contained.

*Defining who is an appropriate investigator under the statute is the key to releasing information.*

There has been relatively little litigation addressing who may conduct an investigation for purposes of the exemption. The language of the statute lists several possibilities, including the Congressional intelligence committees, the Agency's own general counsel or its inspector general. Based on the Agency's denials of requests from the ACLU and National Security Archive, it appears the CIA may not view this language as clear. For example, the October 2006 request of the National Security Archive for information on the Iraqi National Congress explains that this information was cited in the Senate Select Committee on Intelligence's investigation into Iraqi intelligence. Such an investigation clearly falls within the black-letter meaning of the statute, but the CIA refused to acknowledge this.

With regard to the National Security Archive's September 2004 request for files cited in the 9/11 Commission report, again the CIA failed to acknowledge that the investigations that would trigger an exception to the 1984 Act. Although the 9/11 Commission itself does not fit within the ambit of the 1984 Act, the Archive in its appeal to the CIA argued the files it requested were also the specific subject matter of an investigation by the Congressional intelligence committees. Those investigations particularly the one which produced the "Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001 by the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence," have relied on the same documents as the 9/11 Commission.

The appendix of the House hearings sheds light on whether these types of files can be released. The House Intelligence Committee submitted a series of questions to the CIA, asking if the Agency would release certain files under the proposed law. For example, the commit-

tee asked the CIA if a "Formal Memorandum on Respective Responsibilities of the FBI and CIA in the United States," that was dated February 7, 1966 and was referred to on page 57 of the Rockefeller Commission report, would be released under the 1984 Act.<sup>127</sup> The CIA responded, "This category of documents describes a memo that was examined by the Rockefeller Commission and referred to in the report of that Commission. Since material that was transmitted to an official investigatory body in the course of conducting an investigation into an illegal or improper intelligence activity will continue to be accessible to search and review, the types of documents described in this category will remain accessible."<sup>128</sup> This answer implies that any document which was provided to an investigating body will be subject to release, not just documents which are finally considered by the body. This interpretation provides a broader basis for requesters to draw parallels between the documents they are seeking and the Agency's answer to this question, particularly in court.

*There is the possibility of judicial review under the statute.*

The availability of judicial review of the CIA's administration of the 1984 Act was one of the more contentious issues before Congress. Agency and Department of Justice officials testified at the Congressional hearings that such review would undermine the law and lead to ill-equipped judges making significant decisions related to national security.<sup>129</sup> Once again, Congress rejected the Agency's position and provided in the statute for limited judicial review. The statute requires that in most situations, the court review the requested information *ex parte* and *in camera*, and rely substantially on the sworn statements of the parties. Furthermore, in cases where the plaintiff argues the records are improperly deemed operational files, the plaintiff must make such an assertion with a statement based on personal knowledge or other admissible evidence.<sup>130</sup> Furthermore, if the plaintiff argues the CIA is not properly applying an exemption to the Act, the agency can meet its burden of proof with a sworn statement that the files in question fall within the statute's definition of operational files.<sup>131</sup> The statute also significantly limits discovery; the only traditional tool discovery tool available are requests for admis-

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127. *Id.* at 123.

128. *Id.* at 116.

129. *S. 1324, supra* note 15, at 23.

130. 50 U.S.C. § 431(f)(1)-(3) (2007).

131. 50 U.S.C. § 431(f)(4)(A) (2007).

sions.<sup>132</sup> This means there are no interrogatories, depositions, or requests for production of documents. The court may only order the CIA to search and review its operational files and release responsive portions.<sup>133</sup>

Although this review is much more limited than in other areas of the law, particularly compared to FOIA which provides for *de novo* review of an agency's decisions, it imposes more judicial review than CIA officials desired. In initial hearings before the Senate intelligence committee, the CIA's deputy general counsel presented the view that the bill as written at that point did not provide for judicial review of a decision by the Director of Central Intelligence (now the Director of National Intelligence) to designate a particular set of files as exempt.<sup>134</sup> "Quite frankly, any other interpretation, I think would turn this legislation on its head, because if every time the designation by the DCI were challenged in court, we would be right where we started," he said.<sup>135</sup> Subsequently, the Justice Department's intelligence policy counsel also testified against any judicial review citing the inability of a judge to make decisions which effect national security, saying, "It would very difficult, it seems to me, Mr. Chairman, for a court which has no knowledge of or experience with the CIA filing system to second-guess the Director on a description of whether the files fit the statutory definition."<sup>136</sup>

Additionally, John Moore, a law professor at the University of Virginia, an expert in national security, represented the American Bar Association before the Senate committee. He said he believed judicial review was inappropriate, in part because of the policy implications it may have.<sup>137</sup> "The real cost of judicial review is one of the perceptions or misperceptions that we are creating with respect to the potential to operate within the intelligence community and maintain the secrecy of actions," he told the Senate committee.<sup>138</sup> He added rather dramatically, "I have no difficulty in saying what the law ought to be in this case is no reviewability whatsoever."<sup>139</sup> Professor Moore explained his fear was that a court could confuse whether provision of the 1984 Act,

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132. 50 U.S.C. § 431(f)(5) (2007).

133. 50 U.S.C. § 431(f)(6) (2007).

134. *S. 1324*, *supra* note 15, at 23.

135. *Id.*

136. *Id.* at 47.

137. *Id.*

138. *Id.* at 103.

139. *Id.*

FOIA or the National Security Act applied and that the possibility of such a review could have a "chilling effect on intelligence."<sup>140</sup>

Unsurprisingly, the ACLU and committee members believed differently. Senator Dave Durenberger scoffed, for practical reasons, at the suggestion the only oversight for the CIA's actions with regard to the 1984 Act may be from the Congressional intelligence committees. "I have the least amount of faith in the oversight that comes from those before whom you are testifying today because by the time a matter reaches our attention, it probably has reached everyone else's in the world."<sup>141</sup> The ACLU also lobbied for judicial review, arguing that there must be some sort of oversight for the CIA.<sup>142</sup>

However, neither the judicial review provisions in House nor Senate bills became the final language of the law which changed during conference. Both the House and Senate bills focused on the CIA's need to issue regulations for operational files, and provided a court to review whether the Agency followed those regulations.<sup>143</sup> Thus, unlike with other sections of the bill, there is little useful legislative history concerning judicial review. Indeed, the floor debate from the Congressional Record, in which several senators urged final passage of the House bill, does not reference the topic of judicial review.<sup>144</sup>

To some degree, the Agency's concern for judicial review has gone unfounded – there have been few cases reviewing the CIA refusals to release records. There has also been little Congressional oversight on this issue. What is not possible to know, at least for the general public, is the extent to which the possibility of judicial review may have stifled the Agency's sources as it suggest.

Nevertheless, the language of the law clearly provides for judicial review and relief in court, but that provision has seldom been invoked. There are only a handful of cases interpreting the 1984 Act, almost of all which have been previously discussed. This suggests a dearth of knowledge among FOIA requests regarding the 1984 Act. On the CIA's FOIA Web site, generally the principal place for getting the information necessary to make a FOIA request, the Agency tells requesters the 1984 Act "exempts from the search, review, and disclosure provisions of the FOIA all operational records of the CIA maintained

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140. S. 1324, *supra* note 15, at 103-104.

141. *Id.* at 103.

142. *Id.* at 74.

143. Legislation To Modify the Application of the Freedom of Information Act to the Central Intelligence Agency Before the Subcomm. on Legis., of the H. Comm. on Intelligence, *supra*, note 38, at 125. S. Rep. No. 98-305 at 1-4 (1984).

144. See 130 Cong. Rec. S27787-89.

by its Directorate of Operations, its Directorate of Science and Technology, and its Office of Security.”<sup>145</sup> The Agency does not explain the exemptions to the Act, the judicial review rights. Additionally, in some rejections to the National Security Archive FOIA requests for operational files, the CIA has not advised the requestor of their administrative appeal rights. Together, these tactics offer some explanation for the small number suits brought under the Act.

*Arguing for release of operational files within the current statutory interpretations is still possible.*

When the statutory language is still broadly considered, the requester is best served, given these interpretations of the 1984 Act, by making a broad request for files which relate to a specific investigation by either the Agency's general counsel, inspector general or one of the Congressional intelligence committees. Such a broad request, while possibly producing more information than is required, will safely place the request within the “specific subject matter” framework and allow the requester to search the files received for the relevant information. In addition, if such a request is denied, it is possible to argue the files the Agency considers “operational” are in fact not. Finally, the requester should argue for the widest possible judicial review, stressing Congress's concern that without it there will be no effective oversight of the Agency.

#### CONCLUSION

Despite the enactment of the CIA Information Act of 1984, much of the CIA's files remain open for review under FOIA. This is true even for the exempted operational files – particularly those which have been the subject of an investigation. The exemption means those files containing the most controversial information, the most interesting, and the most likely to shed light on the government's activities are available. While the Agency has not responded favorably to request for operational files, the courts, particularly in *ACLU v. DOD*<sup>146</sup>, have been kinder. The time is ripe for more litigation surrounding this issue, especially as more probes are made into the Agency's post 9/11 actions.

The legislative history of the CIA Information Act can also be used forcefully in lawsuits if directed at other intelligence agencies

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145. CIA: The Freedom of Information Act, <http://www.foia.cia.gov/foia.asp>.

146. See *ACLU v. DOD*, *supra* note 80, at 265.

such as the DIA, the NGA, the NSA, and the NRO which now have similar provisions. With the ongoing nature of the war in Iraq and operations in Afghanistan, the focus cannot remain solely on the CIA's actions but should be expanded. These agencies hold a wide variety of files and are likely to be no less forthcoming with them than the CIA has been.

Finally, the legislative history of the CIA Information Act should be used to prevent the continued enactment of similar laws aimed at the intelligence community. As Congress is increasingly concerned with FOIA and improving compliance government wide with the law as it seeks to amend it, Congress should not be undermining itself by enacting other statutes exempting agencies from FOIA. A unified policy is important in furthering the overall goals of FOIA. The primary purpose of the 1984 Act – to provide timelier processing of FOIA requests and eliminate the Agency's backlog— should not be forgotten. As the federal government continues to have significant backlogs of FOIA requests, including at the CIA, it is apparent the Agency is not keeping its promise to Congress to work quickly to process the requests it receives. Congress must exercise its oversight power to enhance Agency compliance with the 1984 Act.