



The National Security Archive

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FAX COVER SHEET

Date: May 1, 2015

To: Joseph Lambert, 703-613-3020

Organization:
CIA

From: Tom Blanton

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Message:

Please find the attached comments for the CIA's decennial review of operational files designations.

Thank you very much.

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May 1, 2015

Joseph W. Lambert
Director, Information Management Services
Central Intelligence Agency
Washington, DC 20505
Via fax (703) 613-3020

Thank you for inviting the National Security Archive to submit comments on the CIA's third decennial review of operational files designations.

In May of 1995 the CIA completed its first decennial review and opened four operational file categories to search and review and possible access to the public. The CIA's history staff even took this opportunity to offer the suggestion that many operational files older than forty years old should be subject to search and review under the Freedom of Information Act. (The CIA rejected this wise suggestion.)¹

The CIA's second decennial review, completed in June of 2005, was less successful and more harmful than the first. The Agency chose to open no new categories of operational files for search and review, instead adding twenty-three new categories.²

The most damaging of these new withholdings was the category of Policy and Management Files "Including Clandestine Service History Program files." The re-categorization of these histories – by definition a history cannot be an operational file – was completely counter to the purpose of the decennial review to identify files of "public interest" and "historical value" which no longer must be protected.

Therefore, the National Security Archive is writing to request that the CIA allow the public to request search and review of the "Clandestine Service History Program files," and realign its implementation of the Operational Files Exemption to match the intent of the legislation, the professed policies of the Agency, and the Obama Administration's position that "No information may remain classified indefinitely."³

Historical material, such as the Clandestine Service History Program, was a matter of particular concern to Congress, which specifically raised questions about the disclosure of historical operations with the CIA during hearings on the CIA Information Act of 1984. For example, when asked whether a special study on the Berlin Tunnel Operation – a historical study – would remain subject to release under the FOIA, the then-Director of

¹ Letter to Arlen Specter, Re: Decennial Review of CIA Operational Files Exemptions, 11 May 1995, <https://nsarchive.files.wordpress.com/2015/04/cia1.pdf>

² Letter to Mike Meermans, Subject: Notification, 28 June 2005, <https://nsarchive.files.wordpress.com/2015/04/cia2.pdf>

³ Executive Order 13526, Classified National Security Information, Sec. 1.5 (d)

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the Office of Legislative Liaison of the Agency, Clair George, confirmed that such “special studies will not be in designated [operational] files, this type of material will continue to be accessible.”⁴

The CIA used the 2005 decennial review to renege on this promise.

In addition, the CIA has declared histories of acknowledged covert activities exempt from search and review even though the CIA Information Act excludes from the definition of an operational file “any special activity the existence of which is not exempt from disclosure under the [FOIA].”⁵

The CIA now even refuses to search or review the many Clandestine Service History Projects the CIA allowed journalist Evan Thomas to examine while he was writing *The Very Best Men: Four Who Dared*, his 1995 book on Richard Bissell and other key CIA officials. The fact that a researcher was provided access to the document is an indicator that the sensitivity of the record has diminished over time.

Before the second decennial review, the CIA had also committed to declassification of eleven CIA covert operations covered in these histories, including the 1948 Italian and French elections, the 1953 Iranian coup, the 1954 Guatemalan coup, the 1958 Indonesian coup, the 1962 Cuban missile crisis, support to Tibetan guerrillas in the 1950s-60s, operations against North Korea during the Korean War and operations in Laos in the 1960s, and operations in the Dominican Republic and the Congo.⁶ These publicly acknowledged special activities are not protected by the operational file exemption and are of tremendous interest to the public, both for the myth and reality of CIA involvement.

More recently, John Fitzpatrick, the Director of the Information Security Oversight Office has written, “I understand your criticism of the application of the CIA’s operations file exemption to historical products

⁴ Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency, Hearings before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 98th Cong., 2d Sess., at 121 (1984).

⁵ 50 U.S.C. Sec. 431(b)(2).

⁶ See Recommendation of the CIA's Task Force on Openness, 1991 (DCI Gates accepted this recommendation in January 1992, promising "a bias toward declassification" of these documents) ("Initiate in the near-term the declassification of specific events, particularly those which are repeatedly the subject of false allegations, such as the 1948 Italian Elections, the 1953 Iranian Coup, 1954 Guatemalan Coup, 1958 Indonesian Coup and the Cuban Missile Crises in 1962 [and n]otify the public of the availability of the resulting materials."); Testimony of DCI R. James Woolsey to Congress (Sept. 28, 1993) ("I have also directed review for declassification of significant Cold War covert actions more than 30 years old. These include the following: activities in support of democracy in France and Italy in the 1940s and 1950s; support to anti-Sukarno rebels in Indonesia in 1958; support to Tibetan guerrillas in the 1950s and early 1960s; operations against North Korea during the Korean War; and, operations in Laos in the 1960s. In reviewing these actions for declassification, we are building on the steps my predecessors took in announcing plans to declassify records on the Bay of Pigs operation, the coups against President Arbenz of Guatemala and against Prime Minister Mossadeqh in Iran, and operations in the Dominican Republic and the Congo."); Letter to the Editor from DCI John Deutch, New York Times, Page A30, May 3, 1996 ("We have doubled the resources devoted to the agency's declassification of historically valuable records [W]e have also promised to review records of 11 covert actions of the cold war era.").

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produced over 40 years ago that detail events in the 1950s” and suggested we examine Section (f) of 50 U.S. Code §3141, “Allegation, improper withholding of records; judicial review.”⁷ A better solution would be for the Agency to use this decennial review as an opportunity to change its policy relating to the improper withholding of important histories.

David Robarge, chief historian at the CIA agrees. At a public panel on declassification at the US National Archives, he stated, “I’d like to see us acknowledge more covert actions, but within that set that we have [acknowledged], we need to get more documentation out.”

The Archive is also resubmitting its recommendations for the previous decennial review (none of which were adopted by the agency), including the same 1995 recommendation as the CIA’s history staff that operational files over forty years old be subject to search and review for release.

Thank you,

A handwritten signature in black ink that reads "Tom Blanton".

Tom Blanton
Executive Director of the
National Security Archive

A handwritten signature in black ink that reads "Nate Jones".

Nate Jones
Director of the FOIA Project for the
National Security Archive

A handwritten signature in black ink that reads "Lauren Harper".

Lauren Harper
Associate FOIA Project Director for the
National Security Archive

⁷ Letter from John P. Fitzpatrick, Reference: ISCAP Appeal No. 2007-033, February 27, 2014.

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May 12, 2008

Via Facsimile (703) 613-3007
Chief of Information Management Services
Central Intelligence Agency
Washington, DC 20505

RE: Request for Public Comment on CIA Proposed Rule Implementing the
Freedom of Information Act, 73 Fed. Reg. 20882 (April 17, 2008)

To Whom It May Concern:

The National Security Archive (the “Archive”) submits these comments regarding the Central Intelligence Agency’s (“CIA” or “the Agency”) proposed amendment to its Freedom of Information Act (“FOIA”) regulations, to implement the FOIA, as amended by the OPEN Government Act of 2007, and Executive Order 13392, 73 Fed. Reg. 20882 (April 17, 2008) (“Proposed Rule”).

Implementation of Executive Order 13392

We commend the CIA’s efforts to “promote the administration of a citizen-centered FOIA program and provide the public with important information about the assistance these entities can offer to FOIA requesters and the public” by incorporating the customer service structure contained in E.O. 13392 and the OPEN Government Act into the Agency’s FOIA regulations. The customer service mandates—most notably the FOIA Requester Service Center and the Public Liaison—offer FOIA requesters a mechanism for assistance and dispute resolution. *See National Security Archive, Mixed Signals, Mixed Results: How President Bush’s Executive Order on FOIA Failed to Deliver* (March 16, 2008) <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm>.

Based on our experiences as a frequent FOIA requester, however, there are several additional changes that the CIA should make to ensure that its FOIA program is customer-oriented and that assistance is easily accessible to members of the public. It is essential that the CIA’s FOIA Service Center and Public Liaison are not simply formalized in regulations, but also that they are readily available as part of a functional customer service program. While conducting research for our recent report on Executive Order implementation, we were unable to reach the CIA’s service center or public liaison because the phone line shared by both contacts (the same phone number published in the proposed regulations subject to this comment) was not staffed and no voicemail service was available. We recommend that the CIA ensure that a staff member is available to take calls at the FOIA Service Center during regular business hours. Moreover, it would be preferable for the Agency to distinguish the service center contact information

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from that of the public liaison, provided in § 1900.03(a) and (b), respectively, to emphasize the liaison's role as a supervisory official to whom requesters can bring concerns and disputes. Finally, the CIA should use its FOIA Web site to clarify the distinct roles of the Service Center and the Public Liaison and to emphasize the availability of both options to assist FOIA requesters.

Requirements as to Form and Content of Requests for Electronic Communications

Sec. 1900.12 of the proposed regulations adds new language requiring that "requests for electronic communications must specify the dates and parties." The proposed language suggests that electronic communications will not be searched when CIA processes subject-matter requests. We recommend that the CIA clarify that e-mails and other electronic records will be searched for records responsive to *any* request, and not simply a request that identifies one or more specific e-mails by date and by the names of the parties involved in receipt or transmission of the e-mails.

As part of the Electronic Freedom of Information Act of 1996, Congress clarified that electronic records are "records" subject to the FOIA. 5 U.S.C. § 552(f)(2). The courts also clearly have held that the FOIA "makes no distinction between records maintained in manual and computer storage systems," *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982), and that e-mails are "records" under federal law. *Armstrong v. Bush*, 721 F. Supp. 343 (D.D.C. 1989), *aff'd in part, rev'd in part*, 924 F.2d 282 (D.C. Cir. 1991). As the CIA accurately recognizes in its proposed regulations, "each agency, upon any request for records which . . . reasonably describes such records . . . shall make the records promptly available to any person." § 552(a)(3)(A). A description of a requested record that enables an employee of the agency familiar with the subject matter to locate the record with a "reasonable amount of effort" is sufficient. H.R. Rep. No. 93-876, at 6 (1974).

Moreover, realistically given the agency's policies regarding identification of its personnel, a requirement that FOIA requesters identify the parties to requested e-mails effectively means that no e-mails will be properly requested or released under FOIA. To comply with the law, the Agency must search for records responsive to any request, the subject matter of which could reasonably cover e-mail or other electronic records, and not only those e-mails specifically identified by a requester.

Appeals of Fee Status Denials

Section 1900.13 of the proposed regulations amends the CIA's existing regulations by deleting the following language:

(c) Fee waiver appeals. Denials of requests for fee waivers or reductions may be appealed to the Chair of the Agency Release Panel via the Coordinator. A requester is encouraged to provide any explanation or argument as to how his or her request satisfies the statutory requirement set forth above.

It is possible that the Agency is removing this paragraph because it has determined that it is duplicative of other portions of the regulations, notably the language in § 1900.42 which provides that "[a] right of administrative appeal exists whenever . . . a request for a fee waiver is denied." Moreover, the FOIA statute itself mandates that agencies provide a right of appeal for "any adverse determination." § 552(a)(6)(A)(i).

We recommend, however, that the CIA clarify in its final regulations that requesters who are placed in a fee category under § 552(a)(4)(A) other than the one they requested—particularly when a requester seeking fee reductions as a representative of the news media or an educational or scientific requester is placed in the “all other” or “commercial” fee category such that he or she may be required to pay significant fees—are entitled to an administrative appeal of the agency’s determination. Just as a denial of a public interest fee waiver is considered an “adverse determination,” fee category determinations that will require a requester to pay higher fees are clearly “adverse” to the requesters’ interests and must be treated as such for purposes of administrative appeal rights. The CIA’s proposed changes to its regulations would result in a situation where, paradoxically, a requester who argues that his fees should be reduced because his request is in the public interest is entitled to an administrative appeal, while a requester who argues her fees should be reduced because she is the type of requester Congress presumptively placed in a preferred fee category cannot appeal the CIA’s denial on fees. The CIA should either reinsert § 1900.13(c) to make clear that “[d]enials of requests for fee . . . reductions” are subject to appeal, or clarify in § 1900.42(a) that adverse determinations regarding fee status, as well as fee waivers, can be appealed.

Thank you for considering our comments on the proposed changes to the CIA’s FOIA regulations. If you have any questions or if we can provide any additional information, please do not hesitate to contact me by phone at (202) 994-7000.

Sincerely,

Meredith Fuchs
General Counsel