

The National Security Archive

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May 16, 2003

Via Facsimile 301-688-4546 and First Class Mail

Vito T. Potenza
Acting General Counsel
National Security Agency
9800 Savage Road
Fort George G. Meade, MD 20755-6000

Dear Mr. Potenza:

I appreciate your willingness to listen to the National Security Archive's ("Archive") concerns about the proposed new Freedom of Information Act ("FOIA") exemption for the operational files of the National Security Agency ("NSA"). I am writing to summarize and emphasize some of the issues that are particularly troubling to the Archive and to restate some of the suggestions that could help ease our concerns.

The FOIA has existed for thirty-seven years and the NSA has successfully operated throughout that time without an exemption from searching its operational files. I am aware of no harm caused to the agency or to national security, no change of circumstances, and no specific evidence of wasted effort on FOIA processing that could justify a new broad FOIA exemption for the NSA. The fact that other agencies with different missions have been granted similar FOIA exemptions does not demonstrate that the NSA needs the exemption for a good and sufficient reason. The enactment of a new secrecy measure without any record demonstrating a need for the provision severely undercuts the FOIA.

It is my understanding that the NSA seeks only to protect the operational records generated in the Signals Intelligence Directorate during the course of establishing signals intelligence activity with respect to a particular target, including evaluating a request for surveillance from a government agency, determining the appropriate method of the surveillance, the technology to use, and other technical parameters, and setting up the surveillance. The product of the surveillance itself is not something the NSA seeks to exempt from search under the FOIA. Nor does the NSA seek to protect historical materials that concern completed operations.

As you can imagine, the Archive's experience with a FOIA exemption for operational files stems largely from its requests to the Central Intelligence Agency ("CIA"). Although the language of the proposed NSA exemption is similar to that enacted for the CIA, it is not identical and we have detailed below a number of provisions in the proposal that are broader than the equivalent provisions in the CIA Information Act. As detailed below, moreover, the impact of the proposed language is potentially much broader than that permitted the CIA.

Letter to Vito Potenza

May 16, 2003

Page 2

First, the language of the proposal on its face appears easily susceptible to a broader interpretation than the one that we understand is sought by the NSA. For example, "files ... that document the means by which foreign intelligence or counterintelligence is collected through technical means" could easily include harmless historical materials documenting the agency's surveillance activities, agency reports concerning the product of surveillance, and documentation of the agency's involvement in the development of technology, including critiques relating to technological standards. In our view the proposed statutory language does not clearly appear limited to records that relate to the technology of current surveillance operations. This problem is exacerbated by the extremely broad proposed report language, which talks about the exemption applying to "files concerning signals intelligence or counterintelligence" (emphasis added), which presumably is almost every file held by the agency. It also states that "[i]n addition" (emphasis added) the exemption would apply to files "that document the means by which foreign intelligence or counterintelligence is collected by technical means." Finally, the examples of files that fall outside the exemption that are included in the proposed report language, provide little comfort; "routine personnel or security files" are a far cry from the historical records and product records that we understand to also be outside what the agency intends to exempt from search, review and disclosure. If the agency's intention is truly to limit the operational files exemption to its records generated in the setting up of a surveillance, then this should be clearly expressed in the statutory language and reflected accurately in the report language.

Second, while there has been no public description of the NSA's record keeping systems, I assume that – in light of the vastly different missions and organization of the two agencies – it is not identical to the CIA's. Thus, the similarity of the proposed new FOIA exemption for NSA operational files is not a sufficient defense for the proposal without further explication of how the NSA's distinctive records system would be affected. For example, to what extent are the so-called "operational files" segregated from the product records, historical/archival records, and other materials that do not relate to the setting up of a surveillance? Is the NSA in a position to describe exactly how the new exemption would affect the processing of currently pending FOIA requests or pending FOIA litigation? The Archive has advocated that a public hearing be held regarding the proposal so that these questions can be clarified.

Third, the potential for over-reliance on the proposed exemption is heightened by the fact that the proposal applies broadly to the entire NSA, instead of limiting it to the Signals Intelligence Directorate. As you know, the CIA Information Act does not apply across that entire agency, but instead is limited only to specified files within the Directorates of Operations and of Science and Technology, and to the Office of Security.

Fourth, the provision of the proposed NSA exemption that states that "[t]he declassification of some of the information contained in operational files shall not affect the status of the operational file as being exempt from search, review, publication, or disclosure" does not appear in the CIA Information Act. There has been no explanation on the record of this provision. On its face, this exemption undercuts NSA's entire explanation for the need for a new FOIA exemption, i.e., that the operational files exemption is an efficiency measure since none of the information covered by it would have been released anyway.

Fifth, the list of entities whose investigations would result in the NSA searching its operational records is too narrow. It does not permit for any inquiry by several important organizations that have oversight or monitoring obligations with respect to the NSA. Among others, these include the Senate Armed Services Committee, the Department of Defense Inspector General and the Information Security Oversight Office.

Letter to Vito Potenza

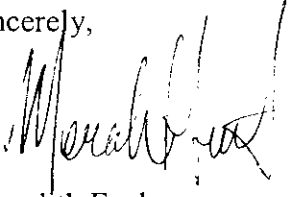
May 16, 2003

Page 3

Finally, I wish to reiterate concerns about the lack of adequate oversight on the process of designating operational files. Our experience with the CIA has been that the CIA includes valuable histories of declassified activities within its definition of operational files. Clearly, the decennial review program has been inadequate as a means of guaranteeing the public access to valuable, yet harmless, records.

I would be happy to meet with you or anyone from the NSA to discuss these concerns further and want to thank you again for your willingness to consider the important matters that I have raised.

Sincerely,

A handwritten signature in black ink, appearing to read "Meredith Fuchs". The signature is written in a cursive style with some loops and flourishes.

Meredith Fuchs
General Counsel

cc: John N. Greer