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PROPOSAL
FOR EXEMPTION FROM THE FREEDOM OF INFORMATION ACT
FOR OPERATIONAL FILES

The Administration has approved the request by the National Security Agency ("NSA") to seek authority for the Director of NSA, in coordination with the Director of Central Intelligence, to exempt certain files from the Freedom of Information Act ("FOIA"). The exemption would cover NSA files that document the means by which foreign intelligence or counterintelligence is collected through technical systems. NSA is seeking the exemption so that it can stop diverting resources away from its signals intelligence mission to the search for highly classified records about how it conducts that mission, records that almost invariably are properly withheld under the FOIA. This authority is virtually identical to the exemptions granted to other defense intelligence agencies. NSA would like to allay any concerns about the scope of the request by explaining the intent behind it. NSA recently met with representatives of several public interest groups for that purpose.

Several points need to be made. First, the exemption is not intended to be broad. Some people may be concerned that NSA is seeking to be relieved of all or most of its FOIA obligations. To the contrary, the exemption is intended to be narrow in scope. It is intended to be limited to technical material that documents the conduct of signals intelligence, or "SIGINT," activities. This is information that goes to the nuts and bolts of the sources and methods used in conducting SIGINT activities. It would include information about how NSA does its SIGINT business at the operational level, i.e., the means by which SIGINT is collected. This would not include intelligence information NSA disseminates to its customers in the form of foreign intelligence reports. NSA will continue to search for and review this foreign intelligence information in response to FOIA requests.

Second, the exemption will not result in the withholding of any more material than is withheld today. Some may be concerned that NSA would use the exemption to greatly restrict the flow of information that is currently released under the FOIA. They may be particularly concerned that it would mean the end of the highly successful historical review program that released material on VENONA, the Cuban Missile Crisis, cryptography in World War II and the Korean War, and other topics of major historical interest. These concerns are unfounded. The exemption will not affect how much information FOIA requesters get or how much information will be reviewed and released under the historical review program. FOIA requesters will not get any less information because any responsive exempt material would have been legally withheld for classification reasons. NSA will continue to search for and review records on the signals intelligence produced by NSA, i.e., foreign intelligence reports. Moreover, the operational files exemption will not be applied to NSA's historical review program. This

program will continue to release records pertaining to the national security history of the United States.

Third, NSA needs the exemption in order to prevent the continued diversion of resources from its SIGINT mission. Without the exemption, NSA will have to continue to divert resources from SIGINT activities in order to search for and review materials that invariably will be properly withheld under the FOIA. With the exemption in place, these resources can be used to promote NSA's mission of producing signals intelligence activities for the security of the country.

Some recent examples illustrate this need. Since September 2001, nine of the FOIA requests tasked by the NSA FOIA office to the operations organization resulted in search estimates of nearly 12,500 person-hours at a cost of over \$433,000. An additional seven requests are expected to require massive searches of operational files, including one request that will take an estimated two years to complete the search.

In another example, NSA's FOIA staff received a FOIA request for records on a foreign group and because it was judged to involve records of NSA's main operations organization, tasked it out to them. Per the current practice, the operations organization conducted two types of searches. The first type of search was for responsive records in a database consisting of foreign intelligence reports. This search is automated and took about 6 hours (person-hours and computer time) at a cost of about \$1,000. It yielded nearly 2,000 NSA-originated records. The proposed exemption would not apply to these records. NSA will continue to search for and review these types of records.

The second search was a manual search of operational files. Because of the highly specialized expertise needed, the FOIA staff cannot conduct this search. It requires the expertise of operators who understand how NSA does its SIGINT business. The problem was that these experts were also responsible for the actual conduct of SIGINT activities, and had to stop that mission related work in order to conduct the FOIA search. In this case, the search for operational files took 120 person-hours and cost \$5,300. Only 22 documents were identified and all will be withheld under the proper application of the FOIA rules. The types of records found included SIGINT analyst notes and technical targeting information, not the intelligence produced from the source. It is this type of technical operational information to which the exemption is intended to apply. The time that SIGINT specialists spent looking for records, which in the end could legally be withheld under the current provisions of FOIA, could have been better applied to current national security issues, such as counterterrorism and the proliferation of weapons of mass destruction.

Finally, NSA is not asking for anything new. The exemption is modeled after CIA's exemption in the CIA Information Act of 1984 (P.L. 98-477, Oct. 15, 1984) and is virtually identical to the exemptions Congress granted to the National Imagery and Mapping Agency in 1999 (P.L. 106-120, Dec. 3, 1999) and to the National Reconnaissance Office last year (P.L. 107-306, Nov. 27, 2002). NSA is seeking no new authority beyond what has already been granted to other defense intelligence agencies.