DOCUMENT EXPLOITATION

VIA FAX

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May 1, 2015

RE: Decennial Review of Operational Files Designations

Dear Mr. Lambert:

I write to comment on the decennial review of operational files designations under the CIA Information Act (the "Act") noticed at 80 Fed. Reg. 21,704 (Apr. 20, 2015).

Since the last decennial review in 2005, the public has had a rare glimpse into how the CIA interprets the Act and how the CIA treats its historically significant operational files. This has included a federal court finding that the CIA blatantly misinterpreted the Act, *ACLU v. DOD*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011), and a NARA finding that the CIA systematically destroyed operational files subject to the Act causing irreversible damage to the historical record. These disclosures and others – including the destruction of the interrogation tapes – follow a now familiar pattern: the CIA Office of General Counsel and/or *your* office behave as though you are cleverly parsing the law, when in fact you are clearly violating it.

As with earlier decennial reviews, other commenters will provide compelling arguments for why the Director should stay his hand and refrain from categorically exempting operational files and, as with earlier reviews, these arguments will largely fall on deaf ears. I will confine my comments to the more modest proposal that: (1) the CIA should *comply* with the Act and stop excluding records from FOIA that Congress never intended to exempt and (2) the CIA should refrain from improperly destroying operational files.

1. Improperly Exempting Operational Files

As you know, when Congress passed the Act permitting a FOIA exemption for CIA operational files, Congress simultaneously created exceptions to that exemption for operational files related to CIA investigations, 50 U.S.C. § 3141(c), and operational files disseminated to and referenced in non-operational files, 50 U.S.C. § 3141(d). Since the last decennial review, we have witnessed in detail how the CIA actually applies these laws. In particular, the *ACLU v. DOD* FOIA case graphically illustrates that CIA practices and legal interpretations have rendered these crucial exceptions nearly meaningless. *See generally ACLU v. DOD*, 827 F. Supp. 2d 217 (S.D.N.Y. 2011).

A. Investigation Exception under 50 U.S.C. § 3141(c)

First, the Act provides that "exempted operational files" are nevertheless subject to "search and review" under FOIA "for information concerning" the "specific subject matter of an investigation" by a number of entities, including the CIA Office of Inspector General ("OIG"), "for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity." 50 U.S.C. § 3141(c).

How does the CIA actually apply this law?

In November 2002, the CIA OIG first learned of the CIA Detention and Interrogation Program.[1] Around the same time, the OIG "received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights."[2] Moreover, in January 2003, the Deputy Director for Operations requested that the OIG "investigate allegations of unauthorized interrogation techniques against 'Abd al-Rahim al-Nashiri."[3] As a result, OIG "initiated a review of Agency counterterrorism detention and interrogation activities [redacted] and the incident with Al-Nashiri," which involved an extensive review of CIA operational files, including the 92 interrogation videotapes. The OIG report ultimately found, among other things, that the waterboarding technique utilized on the videotapes differed from that authorized by the Department of Justice and that the CIA used unauthorized tactics against al-Nashiri, including threatening him with a power drill.

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[1] SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, EXECUTIVE SUMMARY 121 (2014) ("SSCI REPORT").

[2] CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES 2 (2004). *See also* SSCI REPORT, at 56 (stating that OIG staff overheard "references to 'war crimes' and 'torture' at a CIA detention facility").

[3] SSCI REPORT, at 121.

By any reasonable interpretation of the law, the OIG investigation was precisely the situation Congress had in mind when it created the exception under § 3141(c). Yet CIA decided internally, to the contrary, that the exception was not triggered in response to FOIA requests, because the CIA denominated the OIG investigation a "special review" rather than an "investigation." Unsurprisingly, Judge Alvin K. Hellerstein in the ACLU FOIA litigation found this transparent evasion unpersuasive and held that, as a result of the OIG review, the interrogation videotapes had been subject to FOIA "under the investigation exception." *ACLU*, 827 F. Supp. 2d, at 226.

The CIA inexplicably tried to distinguish the "special review" from an "investigation" on the basis that "special reviews" are not triggered by allegations of wrongdoing. As Judge Hellerstein noted, however, the CIA's argument was directly "contradicted by its own contemporary writings" which confirm that the "impetus" for the OIG review was, in fact, allegations of wrongdoing as described above. *Id.* at 224.

More broadly, the CIA's assertion that the "special review" was not an "investigation," and that no investigation arose from the special review, is also inconsistent with representations CIA made to Congress, and on which Congress relied, in permitting FOIA exemptions under the CIA Information Act. Congress was led to believe that "Allegations which arise internally at the CIA are *never* dismissed without some recorded inquiry. Hence, they are *never determined not to warrant a documented investigation*." H.R. Rep. No. 98-726, at 29 (emphasis added). If this is untrue, as the CIA's representations in the ACLU litigation would seem to suggest, it raises serious questions about the CIA's broader compliance with the Act in response to FOIA requests relevant to *other* CIA investigations into potential CIA wrongdoing.

B. Operational Files Referenced in Non-Exempt Files under 50 U.S.C. § 3141(d)

Second, the CIA Information Act provides that any operational files "which have been disseminated to and referenced in files that are not exempted," but which "have been returned to exempted operational files for sole retention shall be subject to search and review." 50 U.S.C. § 3141(d). In crafting this language Congress again relied upon CIA representations about its practices and procedures, namely that CIA utilized "markers" or "dummy copies" that would identify operational records consulted in this way. H.R. Rep. No. 98-726, at 32.

This exception also supplements the investigation exception as it arose, in part, because of concerns in Congress that "information gathered in an investigation could be strategically placed by the CIA in exempted operational files" and thus the exception "was meant to make relevance, not storage site, the touchstone of public access." *ACLU v. DOD*, 351 F. Supp. 2d 265 (S.D.N.Y. 2005) (citing S. Rep. No. 98-305, at 25-26).

How does the CIA actually apply this law?

As a Feb. 7, 2003 CIA email entitled "Request of tape copies" appears to indicate, the OIG initially requested *copies* of the interrogation tapes as part of its review.[4] In order to alleviate "security" concerns, however, the OIG ultimately agreed to review the videotapes "at the overseas location where they were stored."[5]

Again, this is precisely the scenario Congress contemplated when it enacted this exception for operational files referenced in non-exempt files. Yet, again, contrary to the plain meaning and intent of the law, the CIA secretly decided that it would not apply the exception, because the OIG did not take actual custody of the original videos or make copies. Judge Hellerstein, again, found that the CIA's argument lacked any merit and held that the "OIG's written report makes clear that the videotapes had been identified and produced to and actually reviewed by the OIG as part of its investigation" and were therefore subject to FOIA and the Judge's orders despite their physical location in operational files. *ACLU v. DOD*, 827 F. Supp. 2d 217, 225 (S.D.N.Y. 2011).

More importantly, the CIA also disclosed that the OIG actually "*does not use* '*markers*' in its files to designate records consulted in non-exempt files that are maintained in operational files."[6] The significance of this admission, and the extent to which this has undermined decades of FOIA requests, is difficult to overestimate. Indeed, Judge Hellerstein expressed incredulity at the implications:

> If the videotapes were not put into the OIG files and no markers were put into the OIG files, both of which I find it very hard to understand, that's just that many other kinds of documents were looked at by inspectors general or the staffs and not referenced. It makes a sham out of this whole case.[7]

A frequent CIA FOIA requester, the National Security Archive, noted in comments during the *1995 decennial review* that, as an empirical matter, they had not seen evidence in FOIA productions "that such searches [for operational files noted by "markers" in non-operational files] are in fact undertaken in response to FOIA requests." We may now understand part of the reason why.

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[4] The index describing the email is available at http://www.dcoxfiles.com/aclu/71.pdf. See also the index describing Feb. 7, 2003 email concerning "IGs anticipated tape review," available at http://www.dcoxfiles.com/aclu/71.pdf.

[5] Decl. of Constance E. Rea, Deputy Assistant Inspector General for Investigations, CIA OIG, *ACLU v. DOD* (No. 04-4151) (S.D.N.Y. Jan 10, 2008) at ¶ 12 ("Rea Decl.").

[6] Rea Decl., at ¶ 9.

[7] Mot. Hr'g Tr. 20, Jan. 17, 2008, *available at* http://www.dcoxfiles.com/aclutranscript.pdf.

The CIA thus undermined basic assumptions on which the FOIA exemptions Congress permitted in the CIA Information Act rest. But there is more, and it gets worse.

C. Knowing & Intentional Evasion of the Act

Judge Hellerstein stopped just short of holding the CIA in contempt in the ACLU FOIA litigation for failing to comply with the Act and FOIA, because the "evidence suggests that the individuals responsible for processing and responding to plaintiffs' FOIA requests may not have been aware of the videotapes' existence." *ACLU v. DOD*, 827 F. Supp. 2d 217, 230 (S.D.N.Y. 2011). As you know, however, that is demonstrably false. The CIA first misled Judge Hellerstein and then violated its duty of candor to correct the court's misunderstanding.

In particular, the CIA led Judge Hellerstein to believe that the FOIA staff mechanically reviewed the OIG's files and simply did not know of the CIA tapes because they were not there. The DOJ attorney representing the CIA, Peter Skinner, stated that when the CIA "searched and reviewed documents collected by the OIG, *when the FOIA personnel did that*, they didn't have any videotapes because the videotapes weren't there." To which Judge Hellerstein responded in an elevated, intensifying voice:

> THE COURT: If your client was aware that that representation to me masked information that was important to the OIG, it was not put into the OIG files, I hesitate to state the inference I would take from that, Mr. Skinner.
>
> MR. SKINNER: Your Honor, I certainly don't –
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> THE COURT: It seems to me that you were gulled and the Court was gulled!
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> MR. SKINNER: I certainly don't think that any of us were gulled, because I think the determination was made by different people about a different time . . . [8]

As you are aware, the facts are just as Judge Hellerstein feared. The CIA official who handled the ACLU's FOIA request with respect to the OIG was CIA attorney John McPherson. Not only was McPherson aware of the videotapes' existence at the time, he had watched every minute of the tapes as part of an Office of General Counsel review in late 2002 and was later interviewed at length by the OIG about the tapes. In other words, directly contrary to what the CIA led Judge Hellerstein to believe, the individual responding to the ACLU's FOIA request knew more about the tapes than

[8] Mot. Hr'g Tr. 21 (emphasis added).

anyone else and understood completely the significance of the tapes to the OIG's investigation.

Thus the CIA not only failed to comply with the CIA Information Act and FOIA, but the CIA also misled a federal judge about it.

2. Improperly Destroying Operational Files

The purpose of the decennial review is to ensure that exemptions for operational files are narrowly drawn so that, wherever possible, the CIA can open such records to potential disclosure under FOIA. Since the last decennial review, however, we have learned that the real question is not *when* the public will be able to finally access such CIA files, but *whether*. The CIA has used the CIA Information Act exemptions not only to prevent disclosure, but to exclude operational files from *preservation* obligations and the CIA has repeatedly, systematically, and unlawfully destroyed operational files.

The importance of FOIA in serving a *preservation* function is illustrated by the so-called Panetta Review – records of unquestionable historical value that, by any reasonable interpretation of the law, should be permanent records. Every public statement by the CIA about the Panetta Review, however, is consistent with the possibility, if not likelihood, that the Office of General Counsel and/or *your* office is treating the Panetta Review as temporary or disposable working files under 36 CFR § 1222.12(c) and/or CIA Records Schedule N1-263-03-2 (I would sincerely love nothing more than to be informed that this is incorrect and that in fact all of the Panetta Review are permanent records). Some of the only methods available to the public to counteract such manipulation are FOIA requests and FOIA litigation, which trigger preservation obligations under General Records Schedule 14 and CIA Records Schedule NC1-263-85-1, Item 5(d) ("Records relating to actual or impending litigation"). *See, e.g.*, *Leopold v. CIA*, 2015 WL 1445106 (D.D.C. Mar. 31, 2015) (FOIA litigation over Panetta Review).

The CIA's interpretations of the CIA Information Act – overly narrow or overly broad as the occasion requires – allows the CIA to avoid even this small protection. Once again, the *ACLU v. DOD* FOIA case provides a compelling illustration. After internally determining that the interrogation tapes were somehow not subject to any exceptions to the CIA Information Act exemption, as described above, the CIA in turn decided that the tapes were therefore not "agency records" at all under FOIA,[9] thus excluding them, in the CIA's view of reality, from the obligation to *preserve* them for FOIA purposes. This was, of course, combined with the separate, but equally indefensible, assertion

[9] *ACLU v. DOD*, No. 04-4151, Central Intelligence Agency's Memorandum of Law in Opposition to Plaintiffs' Motion for Contempt and Sanctions, (Jan. 10, 2008), at 17 n.8 ("Since the videotapes were exempt from FOIA, they were not 'records' subject to this Court's jurisdiction.").

that the tapes "were not federal records as defined by the Federal Records Act."[10] It was these calculations, and others, by the Office of General Counsel and/or *your* office that allowed CIA attorneys to repeatedly advise Jose Rodriguez that there was no legal obligation to retain the tapes, which contributed to their ultimate destruction.

The interrogation tapes are, however, only a single example of a much broader pattern of improper destruction of historically significant operational files. Among other examples:

- NARA found that the CIA's extensive destruction of operational records documenting the 1953 coup in Iran was an unauthorized destruction of federal records.[11] The CIA simply refused, however, to accept NARA's conclusion.

- NARA found during its evaluation of CIA recordkeeping in 2000 that for decades the CIA improperly treated *all* documents at its field sites as "nonrecords" that could be destroyed at CIA's whim.[12]

- NARA found in 2001 that the CIA's "screening" of Operational Activity Files had been destroying – as "nonrecords" – "policy, management, development, and planning documents, as well as other significant documentation of a substantive nature." NARA concluded that the files contained "virtually no documentation that is non-record" and "document some of the most important and sensitive activities of the U.S. Government and must be preserved intact."[13]

These findings are not unrelated aberrations, but a discernable, connected pattern that, for all we know, continues. As you know, following the 2001 finding, NARA vigorously pushed *your* office for over five years (2001-2006) to put in place a revised schedule for Operational Activity Files that would remove any "nonrecord" carve-out and would require preserving "all parts of all" operational activity files as permanent records.[14]

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[10] Michael Isikoff, *The CIA and the Archives*, NEWSWEEK, Dec. 20, 2007 (quoting CIA spokesman), http://www.newsweek.com/cia-and-archives-94445.

11 Letter from Michael J. Kurtz, NARA, to Edmund Cohen, CIA (June 22, 1998), *available at* http://www.dcoxfiles.com/19980722.pdf.

12 *See* NAT'L ARCHIVES & RECORDS ADMIN., RECORDS MANAGEMENT IN THE CENTRAL INTELLIGENCE AGENCY 50 (2000), *available at* http://fas.org/sgp/othergov/naracia.pdf.

13 Letter from Michael J. Kurtz, Assistant Archivist for Records Services, NARA, to Edmund Cohen, Director, Office of Information Management, CIA (Feb. 8, 2001), *available at* http://www.dcoxfiles.com/governmentattic/8.pdf.

14 Letter from Michael J. Kurtz, NARA, to CIA (Apr. 17, 2003), at Bates 1016, *available at* http://www.dcoxfiles.com/20030417.pdf.

The failure of your office to take action in response to these demands while, unbeknownst to NARA and the world, the CIA had 92 interrogation videotapes classified as nonrecords in operational files, cannot be a coincidence.

A December 2010 letter from you, Mr. Lambert, to NARA stated that CIA would finally, substantively respond to NARA's ongoing inquiry into this unlawful destruction of operational files pursuant to 36 CFR § 1230.14.[15] Perhaps over four years later you are still waiting for a report from the Department of Justice or are still analyzing it. We eagerly await your explanation for whether the CIA finally accepts that its analysis regarding the CIA tapes was wrong.

For all the foregoing reasons, the CIA should *comply* with the CIA Information Act and refrain from excluding records from FOIA that Congress never intended to exempt and the CIA should stop improperly destroying operational files.

Thank you for your time and consideration.

Sincerely,

/s/ Douglas Cox

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[15] Letter from Joseph W. Lambert, CIA, to Paul M. Wester, Jr., NARA (Dec. 7, 2010), *available at* http://www.dcoxfiles.com/22.pdf

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