

1984

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Gregory G. Brooker

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Notes

FOIA Exemption 3 and the CIA: An Approach to End the Confusion and Controversy

INTRODUCTION

Public access to information controlled by the federal government is a recent development in American law. Enacted in 1966, the Freedom of Information Act (FOIA)¹ gives "any person"² an enforceable legal right to request disclosure of documents in the control of federal departments and agencies.³ In an attempt to balance a democratic society's need for information⁴ and the government's need to maintain the secrecy of certain matters,⁵ Congress specified nine exemptions, detailing the

1. 5 U.S.C. § 552 (1982). President Johnson signed the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966), on July 4, 1966; however, agencies were given one year to promulgate FOIA rules and the Act was not fully implemented until July 4, 1967. *See generally* Note, *The Freedom of Information Act of 1966: A Legislative History Analysis*, 74 L. LIBR. J. 231 (1981).

The Freedom of Information Act was not the first attempt by Congress to provide a procedure by which agencies would disclose documents in their control. In 1946 Congress enacted the Administrative Procedure Act, a section of which required agencies to adopt rules by which the public could request information held by agencies. *See* Administrative Procedure Act of 1946, Pub. L. No. 404, § 3(a), 60 Stat. 237 (1946). Section 3(a), however, allowed agencies to withhold information that should be "held confidential for good cause found." *Id.* Many commentators expressed dissatisfaction with the broadness of the exception and noted that little information was in fact being disclosed. *See* Note, *supra*, at 232-35. *See also* S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

2. The Act is not limited to American citizens or even resident aliens. *See* 5 U.S.C. § 552(a)(6)(C) (1982).

3. *See infra* note 34. While the Administrative Procedure Act of 1946 established a procedure for the public to acquire information from the federal government, it gave the individual requesting documents no legal right to compel disclosure in the courts. Thus, the FOIA is the first law to establish an enforceable procedure for attaining government information. *See* Note, *supra* note 1, at 231-32.

4. Public disclosure of government documents has long been recognized as essential to the maintenance of a democratic society. James Madison noted that "[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (August 4, 1822), *reprinted in* 3 J. MADISON LETTERS AND OTHER WRITINGS 276 (1865).

5. Many have recognized the necessity of keeping certain government

kinds of documents that government agencies may withhold from the public.⁶

Although the Central Intelligence Agency (CIA) can withhold classified documents under exemption 1,⁷ it can also rely on exemption 3 to withhold documents that are specifically exempted from disclosure by other federal statutes.⁸ In applying exemption 3 to review Agency decisions to withhold information requested under the FOIA, courts have struggled to adopt a procedure that both upholds the FOIA's emphasis on disclosure and protects confidential intelligence documents.⁹ In recent years, several commentators have questioned whether exemption 3 adequately protects information vital to national security and effective intelligence-gathering activities.¹⁰ Con-

documents secret for security reasons. George Washington noted in 1777 that "[t]he necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is that you keep the whole matter as secret as possible. For upon secrecy, success depends in most enterprises of this kind, and for want of it they are generally defeated however well planned." Letter from General George Washington to Colonel Elias Dayton (July 26, 1777), reprinted in 8 WASHINGTON 4787 (J. Fitzpatrick ed. 1933).

6. See 5 U.S.C. § 552(b)(1)-(9) (1982).

7. 5 U.S.C. § 552(b)(1) (1982). This provision exempts from § 552 matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *Id.*

8. 5 U.S.C. § 552(b)(3) (1982). See *infra* text accompanying note 24.

9. See *infra* notes 45-82, 108-19 and accompanying text.

10. Several commentators have expressed such concerns. See, e.g., *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 963 (1981) (statement of William Casey, Director of Central Intelligence) ("My purpose is to bring before you the damage the Freedom of Information Act has caused American intelligence and to urge quick and prompt action on the proposed legislation by the requested exemption.") [hereinafter cited as *FOIA: Hearings on S. 587*]; *The Freedom of Information Act: Central Intelligence Agency Exemptions: Hearings on H.R. 5129, H.R. 7055, and H.R. 7056 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 32 (1980) (statement of Frank Carlucci, Deputy Director of Central Intelligence) ("FOIA has called into question around the world our ability to keep a secret. Its application in its current form to CIA is inappropriate, harmful, and unnecessary in light of current oversight mechanisms.") [hereinafter cited as *FOIA: CIA Exemptions*]; Cole, *The Freedom of Information Act and the Central Intelligence Agency's Paper Chase: A Need for Congressional Action to Maintain Essential Secrecy for Intelligence Files While Preserving the Public's Right to Know*, 58 NOTRE DAME L. REV. 350, 372 (1982) ("If the information cannot be classified as an intelligence source or method, the CIA cannot exempt the information under section 403(d)(3)."); D'Amato, *The Freedom of Information Act and the CIA: How S. 1235 Will Enhance Our Nation's Security*, 9 J. LEGIS. 179, 190 (1982) ("Although the internal operation, office management, and organization of the CIA could arguably come under Exemptions One or Three of the Freedom of Information Act, neither provision effectively protects such information.") (footnotes omitted).

Other commentators, however, have questioned the validity of this criti-

cerned that a narrow reading of exemptions 1 and 3 by courts is hampering the CIA in its intelligence-gathering functions, some members of Congress recently have introduced bills designed to protect intelligence information.¹¹

cism of exemption 3. See, e.g., *Freedom of Information Act Oversight: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 1st Sess. 98 (1981) (statement of Edward Cony, Vice-President for News, Dow Jones Publishing Co.) ("Given the breadth of the exemption accorded the CIA, it is plain that the CIA is not shovelling out mounds of information unwillingly as a result of FOIA requests by the Soviet Embassy or by foreign agents, as some of the proponents of a blanket exemption for the CIA have appeared to suggest.") [hereinafter cited as *FOIA Oversight Hearings*]; *Intelligence Reform Act of 1981: Hearing Before the Senate Select Comm. on Intelligence*, 97th Cong., 1st Sess. 45-46 (1981) (statement of Mark Lynch, attorney, American Civil Liberties Union (ACLU)) ("Now, the Freedom of Information Act, it must be stressed, is of all the things that threaten the disclosure of information the one that the CIA has the greatest control over. It has been emphasized throughout the hearings that the Agency has never lost a Freedom of Information case concerning classified information.") [hereinafter cited as *Intelligence Reform Act Hearings*].

11. In 1979, Representative McClory introduced H.R. 5129, a bill that would have amended the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g, to exempt documents that concerned foreign intelligence information and intelligence arrangements with foreign governments. H.R. 5129, 96th Cong., 1st Sess. (1979). See generally *FOIA: CIA Exemptions*, *supra* note 10 (hearings on the bill).

In 1980, Senator Moynihan introduced the Intelligence Identities Protection Act, a bill that would have allowed the director of Central Intelligence to withhold sensitive information and counterintelligence documents. S. 2216, 96th Cong., 2d Sess. (1980).

In 1981, Senator D'Amato and Representative Shumway introduced legislation that would have exempted from the FOIA all documents related to CIA personnel selection and training, internal operations and management, and clandestine and covert operations. S. 1235, 97th Cong., 1st Sess. (1981); H.R. 4518, 97th Cong., 1st Sess. (1981). See 127 CONG. REC. S5373-74 (daily ed. May 20, 1981) (statement of Sen. D'Amato); D'Amato, *supra* note 10, at 184-92.

Also in 1981, Senator Hatch introduced S. 1730, a bill that would have amended several sections of the FOIA. Although the bill did not propose any new exemptions for intelligence information, the Hatch proposal did address the administrative burdens many agencies, including the CIA, arguably were experiencing. The bill would have allowed each agency to establish a fee schedule for processing FOIA requests. Agencies also would have been allowed to extend, in unusual circumstances, the ten-day deadline for answering FOIA requests, see 5 U.S.C. § 552(a)(3) (1982), for up to thirty days. S. 1730 § 3, 97th Cong., 1st Sess. (1981). See generally *FOIA: Hearings on S. 587*, *supra* note 10.

Several bills have been introduced in the 98th Congress. On May 18, 1983, Senators Goldwater and Thurmond introduced a bill that would have amended the National Security Act of 1947 so as to authorize the director of Central Intelligence to designate certain records specifying the operational methods used by the CIA. S. 1324, 98th Cong., 1st Sess. § 3 (1983). All such designated documents would be immune from a FOIA search and from review by the CIA or the courts. *Id.*

On April 12, 1983, Senator Leahy introduced a bill that would amend several sections of the FOIA. S. 1034, 98th Cong., 1st Sess. (1983). One section of the bill would require an agency to publish a list of statutes on which it plans

The debate concerning proposals to protect certain kinds of intelligence information from disclosure centers on the effect the Act has on the CIA's intelligence-gathering capabilities. The Agency receives approximately 1500 FOIA requests annually¹² and has a backlog of over 2000 unanswered requests.¹³ Some commentators note that the large number of requests prevents senior intelligence officers who must inspect requested documents to determine whether disclosure would harm national security from devoting their full energies toward organizing intelligence information for government policy-makers.¹⁴ Agency officials assert that the FOIA requests have made foreign intelligence sources reluctant to provide the CIA with information because of fear that their involvement with the Agency will be disclosed.¹⁵ Moreover, individuals advocating restrictive amendments to the Act question whether intelli-

to rely under exemption 3. *Id.* at § 8. The agency also would have to describe the scope of the information covered by each exempting statute on its list and would be precluded from relying on any statute not on its list. *Id.*

Senator Hatch recently introduced a bill similar to the one he proposed in the 97th Congress. S. 774, 98th Cong., 1st Sess. (1983). See Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1 (1983). None of the proposed amendments submitted by Senator Hatch bear directly on the amendment this Note suggests.

12. *National Security, Law Enforcement, and Business Secrets Under the Freedom of Information Act*, 38 BUS. LAW. 707, 713 (1983) (statement of Stanley Sporkin, CIA general counsel, at program presented at ABA annual meeting on August 10, 1983) [hereinafter cited as *National Security*].

13. See *FOIA: CIA Exemptions*, *supra* note 10, at 29 (statement of Frank Carlucci, Deputy Director of Central Intelligence).

14. See D'Amato, *supra* note 10, at 184; Cole, *supra* note 10, at 359-62. See also S. 1324, 98th Cong., 1st Sess. § 2(a)(4) (1983); *National Security*, *supra* note 12, at 717 (statement of Morton Halperin, director of Center for National Security Studies).

15. See Cole, *supra* note 10, at 358-9. In 1980, Deputy Director of Central Intelligence Carlucci testified:

Although we assure these individuals that their information is and will continue to be well protected, we have on record numerous cases where our assurances have not sufficed. Foreign agents, some very important, have either refused to accept or have terminated a relationship on the grounds that, in their minds—and it is unimportant whether they are right or not—but in their minds the CIA is no longer able to absolutely guarantee that information which they provide the U.S. Government is sacrosanct. Again, we believe we can keep it so, but it is, in the final analysis, their perception—not ours—which counts.

FOIA: CIA Exemptions, *supra* note 10, at 26.

ACLU attorney Mark Lynch presented a different view:

So I think this perception problem has to be put into perspective. There really are far many more factors, far more important factors, far more weighty factors than the Freedom of Information Act that lead a foreign service or foreign source to decline to cooperate with the CIA. The Freedom of Information Act in my view is at the bottom of the barrel of problems in this perception area.

Intelligence Reform Act Hearings, *supra* note 10, at 46. See also *FOIA: CIA Ex-*

gence information disclosed under the Act actually contributes anything to public discussion of foreign affairs and national security.¹⁶

This Note analyzes the differing standards of review applied by courts when the CIA withholds documents under exemption 3 of the FOIA. Part I examines the language and legislative history of exemption 3. Part II studies the judicial application of exemption 3 in cases in which the CIA has acknowledged the existence of documents requested and concludes that the conflicting approaches established by courts have led to disparate results. Part III considers application of the exemption in cases in which the CIA has refused to confirm or deny the existence of documents requested. In this context as well, the conflicting approaches have led to confusion. Part

emptions, supra note 10, at 107 (report prepared by Center for National Security Studies).

16. The "Findings and Purposes" section of S. 1324, the bill authored by Senators Goldwater and Thurmond, states that "information concerning the means by which intelligence is gathered generally is not necessary for public debate on the defense and foreign policies of the United States." S. 1324, 98th Cong., 1st Sess. § 2(a)(9) (1983).

Critics of proposals to restrict the FOIA, however, point out that information made available under the Act has, on several occasions, disclosed illegal and unethical activities by the Agency. See *Intelligence Reform Act Hearings, supra* note 10, at 38 (statement of K. Prescott Low, Publisher of the *Quincy Patriot Ledger*). CIA documents released under the Act that suggest illegal or unethical activities of the Agency include:

(1) Files from May 1970 to May 1973 compiled by the Agency as a result of a directive from James Schlesinger, Director of Central Intelligence, requesting employees to report Agency activities that may be in violation of the CIA charter. The files document various "questionable" activities of the CIA, including its surveillance of American citizens in the United States, its arrangements with American businesses, and its assistance to local police. See *FOIA Oversight Hearings, supra* note 10, at 714 (app., statement of ACLU attorneys John Shattuck and Allan Adler).

(2) A collection of documents detailing CIA projects relating to drug experiments and behavior modification tests conducted in the late 1950s and early 1960s. Some of the experiments included the administering of chemical and biological substances to human beings, some of whom were unwitting participants in the testing. At least one person died as a result of the experiments. See *id.* at 715.

(3) Information regarding Lee Harvey Oswald and possible "Castro Cuban involvement in the John F. Kennedy assassination." See *id.*

(4) Documents concerning the CIA's mail opening project in the early 1970s. One memorandum explains that the United States postal service and FBI worked with the CIA in conducting the project. See *id.*

(5) Documents regarding the CIA's investigation of the disappearance of Dr. Riha, a naturalized U.S. citizen born in Czechoslovakia who was teaching at the University of Colorado. The documents include the written statement of William Colby before the Senate Intelligence Committee explaining the role of the CIA in the investigation of the disappearance, which was a domestic concern and therefore outside of the Agency's charter. See *id.*

IV proposes an amendment to the FOIA that would allow courts, in both types of exemption 3 cases, effectively to oversee CIA decisions concerning requested information while still protecting vital intelligence information.

I. FOIA EXEMPTION 3

Unlike the other eight exemptions to the FOIA,¹⁷ exemption 3 does not itself detail the types of documents that it exempts from disclosure. Rather, as originally enacted in 1966, exemption 3 protected documents "specifically exempted from disclosure by statute."¹⁸ The United States Supreme Court construed this language broadly in *FAA Administrator v. Robertson*,¹⁹ holding that the Federal Aviation Act of 1958,²⁰ which gives the Federal Aviation Administration considerable discretion to withhold agency records from disclosure,²¹ qualified as an exempting statute.²² In reaction to *Robertson*, Congress modified exemption 3 to narrow the range of statutes that fall within the scope of the exemption.²³ Exemption 3 now provides that the FOIA is inapplicable to matters that are

17. See 5 U.S.C. § 552(b) (1982).

18. Pub. L. No. 89-487, § 3(e)(3), 80 Stat. 250, 251 (1966); see 5 U.S.C. § 552(b)(3) (1970).

19. 422 U.S. 255 (1975).

20. 49 U.S.C. § 1504 (Supp. V 1981).

21. The statute allowed the administrator or the board of the Federal Aviation Administration to withhold agency documents upon the application of "any person" requesting information if, in the administrator's or board's judgment, "a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." *Id.*

22. After studying the legislative history of the exemption, the Court noted that the extensive power to withhold documents conferred on the FAA by Congress in the 1958 Act did not conflict with the congressional intent to enact narrow exemptions to the FOIA. 422 U.S. at 266. Rejecting the contention that Congress intended the FOIA to repeal by implication prior statutes granting specific agencies the discretion to withhold information, the Court found that the FAA provision at issue fell within the scope of exemption 3. *Id.* at 266-67.

23. Section 5 of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976), amended the terms of 5 U.S.C. § 552(b)(2) (1970). The House Committee on Government Operations explained:

Believing that the decision misconceives the intent of exemption (3), the committee recommends that the exemption be amended to exempt only material required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information. The committee is of the opinion that this change would eliminate the gap created in the Freedom of Information Act by the *Robertson* case without in any way endangering statutes such as the Atomic Energy Act of 1954, 42 U.S.C. § 2161-6, which provides explicitly for the protection of certain nuclear data.

H.R. REP. NO. 880, pt. 1, 94th Cong., 2d Sess. 22, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2183, 2204-05.

specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.²⁴

Although exemption 1 shields classified documents in control of the CIA, the Agency also possesses much unclassified information and frequently invokes exemption 3 to protect such information from disclosure. When invoking exemption 3, the CIA typically relies on either the National Security Act of 1947²⁵ or the Central Intelligence Agency Act of 1949.²⁶ The National Security Act provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources²⁷ and methods from unauthorized disclosure."²⁸ In furtherance of this duty to protect agency sources and methods, the Director also has the power, under the Central Intelligence Agency Act, to withhold information regarding "[t]he organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."²⁹

The legislative history of exemption 3 supports the CIA's claim that the National Security Act and the Central Intelligence Agency Act qualify as "exempting statutes." The Conference Report accompanying the 1974 FOIA amendments specifically acknowledged that the two laws were exempting statutes for purposes of exemption 3.³⁰ Furthermore, during the consideration of the 1976 amendment to exemption 3 in the House of Representatives, the sponsor of the amendment observed that the Central Intelligence Agency Act met the requirements of the revised exemption.³¹ Finally, the House

24. 5 U.S.C. § 552(b)(3) (1982).

25. 50 U.S.C. § 403(d)(3) (1976).

26. 50 U.S.C. § 403g (1976).

27. The United States Court of Appeals for the District of Columbia Circuit defined "intelligence source" as "a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." *Sims v. CIA*, 642 F.2d 562, 571 (D.C. Cir. 1980). *But see Sims v. CIA*, 709 F.2d 95, 97 (D.C. Cir. 1983) (reaffirming definition in earlier *Sims* case), *cert. granted*, 104 S. Ct. 1438 (1984).

28. 50 U.S.C. § 403(d)(3) (1976).

29. 50 U.S.C. § 403g (1976).

30. H.R. CONF. REP. NO. 1380, 93d Cong., 2d Sess. 12 (1974) states that "intelligence sources and methods (50 U.S.C. 403(d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act."

31. During congressional debate on the Government in the Sunshine Act, Representative Bella Abzug, its primary sponsor, stated: "I have been asked

Judiciary Committee, in recommending passage of the same amendment, noted that the National Security Act also qualified as an exempting statute.³² In light of this legislative history, courts consistently have held that both statutes "refer to particular types of matters to be withheld" and thus qualify as exempting statutes.³³

When hearing appeals from CIA decisions to withhold documents on exemption 3 grounds,³⁴ courts review Agency decisions de novo,³⁵ as mandated by the Act.³⁶ The Senate

whether 50 U.S.C. § 403g, a statute relating to CIA exemption from laws such as the Sunshine Act and the Freedom of Information Act, comes within the third exemption as recommended by the conference. I have examined section 403g and believe that it does come within the exemption." 122 CONG. REC. 28,473 (1976) (statement of Rep. Abzug).

32. H.R. REP. NO. 880, pt. II, 94th Cong., 2d Sess. 14-15 n.2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2212, 2225. The judiciary committee noted: "This would clarify the fact that statutes such as 50 U.S.C. 403(d)(3) concerning security information and 8 U.S.C. 222 concerning confidential records of the State Department concerning visas and related matters, are included."

33. *See* *Goland v. CIA*, 607 F.2d 339, 349 (D.C. Cir. 1978) (the CIA Act and the National Security Act are both exempting statutes), *cert. denied*, 455 U.S. 927 (1980); *National Com'n on Law Enforcement v. CIA*, 576 F.2d 1373, 1375-76 (9th Cir. 1978) (same); *Marks v. CIA*, 590 F.2d 997, 1000 (D.C. Cir. 1978) (the National Security Act is an exempting statute); *Phillipi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (both Acts are exempting statutes); *Weissman v. CIA*, 565 F.2d 692, 694 (D.C. Cir. 1977) (the CIA Act is an exempting statute); *Baker v. CIA*, 565 F. Supp. 664, 667 (D.D.C. 1978) (same); *Fonda v. CIA*, 434 F. Supp. 498, 504 (D.D.C. 1977) (the National Security Act is an exempting statute).

Several commentators also have concluded that the two statutes meet the requirements of the revised exemption. *See, e.g.,* O'REILLY, FEDERAL INFORMATION DISCLOSURE ¶ 13.07 (1981) ("Since the CIA enabling statute mandates the withholding of CIA information by its Director, this mandatory statute bars disclosure under either the original or revised versions of exemption (b)(3).") (footnotes omitted); Note, *The Effects of the 1976 Amendment to Exemption 3 of the Freedom of Information Act*, 76 COLUM. L. REV. 1029, 1044 n.91 (1976) ("Section 403g of title 50 of the United States Code, mentioned by Representative Abzug as an example of a statute that would qualify under exemption three, also seems to specify the particular types of matter to be withheld.").

34. A request under the FOIA must reasonably describe the records sought and be in accordance with the agency rules detailing the time, place, fees, and other FOIA procedures. *See* 5 U.S.C. § 552(a)(3) (1982). The agency must respond within ten working days of receiving the request by either granting or denying the entire request. *Id.* at (a)(6)(A)(i). If the request is denied and the person requesting the documents appeals the decision, the agency has twenty days after the appeal is received to rule on it. *Id.* at (a)(6)(A)(ii). If the denial is affirmed on administrative appeal, the person seeking disclosure can file suit in the federal district court "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia" to enjoin the agency from withholding the requested documents and to compel their production. *Id.* at (a)(4)(B). *See also* O'REILLY, *supra* note 33, at chs. 7-8.

35. "De novo" means "anew; afresh; a second time." BLACK'S LAW DICTIONARY 483 (5th ed. 1979). *See also infra* note 86 and accompanying text.

36. 5 U.S.C. § 552(a)(4)(B) (1982).

Judiciary Committee, in reporting the FOIA out of committee in 1965, noted that de novo review of agency refusals to disclose information was necessary "to prevent proceedings from becoming meaningless judicial sanctioning of agency discretion."³⁷ The Conferees to the 1974 FOIA amendments explained the de novo review in more detail, stating that, before conducting *in camera* inspection of withheld agency records, courts should give the agency an opportunity to prove by detailed affidavits or testimony that the documents are clearly exempt.³⁸ The Act places the burden of justifying decisions to withhold information on the government³⁹ and provides that the agency must disclose any portion of a document that is "reasonably segregable" from the exempted part.⁴⁰

Although the legislative history of the FOIA clearly indicates Congress's intent to include the National Security Act and the Central Intelligence Agency Act as exempting statutes within the meaning of exemption 3, the Act offers little insight into how a court should conduct a de novo review of an agency decision to withhold documents based on one of these statutes.⁴¹ As a result, courts, while applying ostensibly the same de novo review standard, have exhibited varying degrees of deference to CIA decisions.⁴² This inconsistency arises in two distinct types of exemption 3 cases: (1) cases in which the Agency acknowledges the existence of requested documents but refuses to disclose them,⁴³ and (2) cases in which the Agency refuses to acknowledge the existence of requested documents.⁴⁴

37. S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965). As the committee elaborated, "That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court." *Id.*

38. S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 9, *reprinted* in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6287-88. The provision as enacted provides simply that courts may "examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B) (1982).

39. 5 U.S.C. § 552(a)(4)(B) (1982).

40. *Id.* § 552(b).

41. *See supra* notes 37-40 and accompanying text.

42. Chief Judge Wright has observed: "Persistent controversy has surrounded the question whether FOIA cases involving national security claims should be treated differently from other FOIA cases. Arguments have focused on the proper standard of judicial review and on the use of certain techniques—primarily *in camera* inspection—in the review process." *Ray v. Turner*, 587 F.2d 1187, 1205 (D.C. Cir. 1978).

43. *See infra* notes 45-82 and accompanying text.

44. *See infra* notes 108-19 and accompanying text. The problem of courts' exhibiting varying degrees of deference to agency decisions while purporting to

II. CASES IN WHICH THE CIA ACKNOWLEDGES THE EXISTENCE OF THE DOCUMENTS REQUESTED

A. JUDICIAL APPLICATION OF EXEMPTION 3

Since the passage of the FOIA, courts reviewing Agency decisions have adopted varying degrees of deference under exemption 3.⁴⁵ Some courts have emphasized the unique nature of the exemption and, as a result, have summarily upheld Agency decisions without scrutinizing the factual basis for the claimed exemption.⁴⁶ Conversely, other courts have rejected the notion that exemption 3 entails a less detailed review than do other exemptions and have required the CIA to explain the factual basis for its exemption claims.⁴⁷

apply the same standard of review is not confined to cases arising under the FOIA; it is recognized as plaguing many areas throughout administrative law. For example, in a case involving FCC licensing procedures, Circuit Judge Leventhal explained:

There was once a day when a court upheld the "sensible judgments" of a board, say of tax assessors, on the ground that they "express an intuition of experience which outruns analysis." There may still exist narrow areas where this approach persists, partly for historic reasons.

Generally, however, the applicable doctrine that has evolved with the enormous growth and significance of administrative determination in the past forty or fifty years has insisted on reasoned decision-making. The requirement of reasoned decision-making is under great tension when a certifying agency is required to choose between two or more applicants endowed with virtually equivalent qualifications. But at least so long as government uses the forms of adjudication, . . . reasoned decision-making remains a requirement of our law.

444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted).

45. O'Reilly characterizes the distinctive degrees of deference in terms of a conflict in the "standard of proof" among the circuits:

Counsel seeking documents from the CIA would be well advised to do some forum-shopping since the agency is held to a much higher standard of proof in the Washington courts than in other circuits. The Ninth Circuit has indicated willingness to accept statutory exemption claims by the agency on the face of sufficient affidavits, while the D.C. Circuit has been less receptive and more curious about the actual harms to the agency which disclosure would create. An affidavit which is suitable for one court is not suitable for the other, as the CIA may have learned in several of the D.C. Circuit cases.

O'REILLY, *supra* note 33, at ¶ 13.07 (footnotes omitted).

46. See *infra* notes 48-58 and accompanying text.

47. See *infra* notes 59-82 and accompanying text. See also *Phillipi v. CIA*, [1980 Transfer Binder] Gov't DISCLOSURE (P-H) ¶ 80,188, at 80,464 (D.D.C. June 10, 1980), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981). The court in *Phillipi* remarked:

An unrestricted reading of this statute [the National Security Act] would, however, permit the CIA to withhold a broad range of information regardless of any actual need for maintaining its secrecy. While it is by no means obvious or required on the face of the statute, the courts have apparently imposed an additional requirement that the disclosure of the request[ed] information would pose a risk of some harm to the national security. . . . This requirement is born of an apprehen-

Courts emphasizing the difference between exemption 3 and the other eight exemptions pattern their approach after a passage from Justice Stewart's concurrence in *EPA v. Mink*⁴⁸ which suggested that, under exemption 3, "the only 'matter' to be determined in a district court's de novo inquiry is the factual existence of a statute, regardless of how unwise, self-protective, or inadvertent, the enactment might be."⁴⁹ In *Goland v. CIA*,⁵⁰ for instance, the United States Court of Appeals for the District of Columbia Circuit affirmed a summary judgment for the CIA based on Agency affidavits attesting that the deleted portions of documents contained descriptions of (1) "intelligence collection and operational devices . . . still utilized," (2) "methods of procurement and supply," (3) "basic concepts of intelligence methodology," (4) "specific clandestine intelligence operations," and (5) "certain intelligence methodologies of a friendly foreign government."⁵¹ The court of appeals suggested

sion that a statute as potentially expansive as 50 U.S.C. § 403(d)(3) [the National Security Act] could significantly frustrate the Congressional policy in favor of disclosure expressed in the FOIA without advancing any countervailing interest in the continuing effectiveness of intelligence operations.

Id. at 80,466 (citations omitted).

48. 410 U.S. 73 (1973).

49. *Id.* at 95 n.* (Stewart, J., concurring). With regard to the *Mink* decision, the conference committee for the 1974 FOIA amendments noted:

In *Environmental Protection Agency v. Mink* . . . , the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court.

S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6287 (citations omitted).

Congress ultimately enacted H.R. 12471, thereby reversing the holding of *Mink* by legislation. The reference to exemption 3 in Justice Stewart's concurrence, however, was untouched by the legislation and some courts have quoted it.

50. 607 F.2d 339, 344 n.21 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). In *Goland*, the appellants had requested documents that detailed the legislative history of the National Security Act and the Central Intelligence Agency Act. *Id.* at 342-43. After the CIA failed to respond to their supplemental administrative appeal, the appellants filed suit to compel disclosure. During the litigation, the CIA released the full text of one requested document (a transcript of the 1947 statement of CIA Director Lt. Gen. Hoyt A. Vandenberg before the Senate Armed Service Committee) and 80% of another (the 1948 statement of CIA Director Hillenkoetter before the House Armed Services Committee). *Id.* at 344. The appellants argued to the lower court that the deleted portions were not protected by either exemption 1 or 3. Rather than answer the appellants' interrogatories and submit to a deposition, the CIA moved for summary judgment on the basis of its affidavits alone. *Id.*

51. *Id.* at 351. Although the court stated that the affidavit was noncon-

that lower courts could determine by affidavits, without discovery or *in camera* inspection of documents, that the deleted portions of documents were protected from disclosure.⁵² Because "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents," the court reasoned, "the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage."⁵³

clusory, *id.*, an examination of the language of the affidavit viewed in light of the two exempting statutes undercuts the court's conclusion. The Central Intelligence Agency Act, for example, protects "agency methods," but the affidavit refers to "methods" and "methodology" without ever presenting the factual basis for the conclusion that the documents actually do detail intelligence "methods." Circuit Judge Bazelon, dissenting in *Goland*, observed:

The affidavit filed here by the CIA . . . plainly fails to supply the information necessary to facilitate the adversary process and *de novo* review. First, the affidavit speaks for the most part only of intelligence "devices," "sources," "methods," and "operations." Essentially it parrots the language of the exempting statutes . . . rather than providing the detailed description the "requesting party [needs] to present its case effectively," . . . and a reviewing court requires to make an independent evaluation of an agency's exemption claims.

Id. at 365 (citations omitted).

More importantly, however, the CIA in *Goland* failed to index specifically the document, of which 23 pages were deleted, and to explain sufficiently what protected information each division thereof contained. Such a breakdown is critical to the ability of courts to determine whether any unprotected portions can be separated from the validly protected portions. The court in *Goland*, however, basing its decision on the unindexed affidavits, concluded that, because 80% of the documents already had been disclosed by the Agency, no remaining separable portions existed. *See id.* at 351 n.65. Criticizing this approach, the dissent pointed out that "for want of an itemized index, it is impossible to determine whether all nondisclosed portions of the statement have been described, much less properly withheld." *Id.*

An example of an affidavit that details the factual basis for the Agency's conclusions in *Goland* and that includes an itemized index of the portions exempted could read as follows. Instead of merely alleging that one document contained "methods of procurement and supply," the Agency could have stated more specifically:

Pages 4 through 6, paragraphs 1, 4, & 5, have been withheld. The portions disclose one of many methods of procuring intelligence by describing how an individual (whose identity is disclosed in these paragraphs) supplied information to the Agency. The portions detail how the individual gathered the intelligence and transmitted it to the CIA. Names of two CIA employees are contained in these portions, as are the code names of three intelligence-gathering operations run by the CIA in two foreign countries. The substance of the information detailed in paragraphs 4 & 5 is so specific that, if disclosed, it would allow the public to ascertain, with near certainty, the identity of the operations and the method by which intelligence was obtained. Disclosure of any part of the three paragraphs withheld would implicate the individuals with CIA operations in the two countries and thereby pose a substantial risk to their safety.

52. *Id.* at 343.

53. *Id.* at 350. The court of appeals, *id.* n.65, quoted the portion of Justice

In *National Commission on Law Enforcement v. CIA*,⁵⁴ the United States Court of Appeals for the Ninth Circuit rejected the appellants' contention that the Agency's affidavits were conclusory and that, as a result, the court should order an *in camera* inspection of documents.⁵⁵ After quoting from *EPA v. Mink*,⁵⁶ the court concluded that "[w]hen an agency has supplied detailed affidavits or testimony, *in camera* inspection of documents allegedly exempt from disclosure under Exemption Three rarely will be necessary, particularly where the claim of

Stewart's concurrence in *EPA v. Mink* that appears in the text accompanying *supra* note 49.

54. 576 F.2d 1373 (9th Cir. 1978)

55. *Id.* at 1376-77. In *National Commission*, a private committee studying law enforcement and social justice sued to compel the release of documents that concerned the CIA's relationship with the International Criminal Police Organization (INTERPOL). The Committee sought:

(1) All policies, manuals, instructions and/or orders issued by and to personnel or sections of the CIA, both within the U.S. and abroad, regarding the status, funding, work of and/or cooperation with INTERPOL, the International Criminal Police Organization.

(2) All correspondence between the CIA and INTERPOL, both within the U.S. and abroad, regarding the status, funding, work of and/or cooperation with that organization.

(3) All correspondence between officials of the CIA and agencies within the Executive Branch, including but not exclusively limited to the Treasury Department and its sections, the Justice Department and its sections, the State Department and its sections, and any branches of the Armed Forces, regarding the policies toward, work with, funding of and/or cooperation with INTERPOL, both within the U.S. and abroad.

(4) A list of all committees, active or not, of which the CIA is a member and INTERPOL was a subject of discussion and/or decision.

Id. at 1372 n.1.

After limited discovery had taken place, the CIA filed affidavits which it claimed supported its reliance on exemption 3 and moved for summary judgment. *Id.* at 1375. One affidavit filed by the CIA for a document marked "Number 1" read as follows:

Memo for Chairman, CCINC (Cabinet Committee on International Narcotics Control) Working Group, Mr. Egil Krogh, Jr. from CIA employee acting within his capacity within the Working Group, dtd Nov. 20, 1972, marked "Secret," two pages with attachment. This document consists of information concerning deliberations regarding means by which INTERPOL collects intelligence abroad and describes intelligence sources and methods. In addition, it contains the name of a CIA employee. Attached to the memo described above is a Memo for the Record dtd Nov. 20, 1972, containing the minutes of a meeting of the Foreign Intelligence Subcommittee of the CCINC Working Group, consisting of five pages, each marked "Secret." About one half or seven of 13 paragraphs of this document is devoted to the deliberations mentioned above. The remainder is not responsive to plaintiff's request. This attachment also contains the names of Agency employees.

Id. at 1377 n.6.

56. *Id.* at 1376 n.5. The court actually quoted from the concurring opinion of Justice Stewart in *FAA v. Robertson*, 422 U.S. 255, 270 (1975), in which Justice Stewart quoted part of his own concurrence in *Mink*.

exemption touches on national security."⁵⁷ The court explained that it would not second-guess the director of Central Intelligence on national security matters.⁵⁸

The United States Court of Appeals for the District of Columbia Circuit, however, in effect departed from the deferential approach of *Goland* in *Ray v. Turner*,⁵⁹ a suit brought by two individuals who sought disclosure of all CIA documents in which their names appeared. In response to this request, the CIA filed an affidavit similar to the one in *Goland*. One part of the affidavit stated:

This document is a three-page memorandum the subject of which is "Rennie Davis and Friends." It is essentially the debriefing report of a sensitive intelligence source. The majority of the information concerns individuals other than the plaintiffs.

This document has been denied in its entirety, primarily to protect intelligence sources and methods since the release of any meaningful portion would disclose the identity of the source, and further, to protect cryptonyms, names of CIA personnel and CIA organizational data. Thus exemptions (b)(1), (b)(3) and (b)(6) apply.⁶⁰

The *Ray* court held, however, that the allegations in the Agency's affidavits regarding applicable FOIA exemptions were conclusory and generalized and that the legislative history of the Act did not support the district court's limited view of *in camera* inspection.⁶¹ The Agency could not merely allege that disclosure would reveal the identity of a "sensitive intelligence source"; it had to provide the court with enough information to facilitate a determination of whether the Agency could disclose any segregable portion of the document without revealing the intelligence source.⁶² The CIA's affidavits, the *Ray* court stated, must detail the grounds for exempting the various portions of the document as specifically as possible without re-

57. 576 F.2d at 1377 n.7.

58. *Id.* at 1377. This deferential approach has been followed by lower courts. See *Ray v. Turner*, D.C. Civil 76-0903 (Jan. 1977). See also *Winter v. National Sec. Agency*, 569 F. Supp. 545, 546-47 (S.D. Cal. 1983) (After the plaintiff in *Winter* moved to compel the National Security Agency (N.S.A.) to submit a detailed justification for its refusal to disclose the requested documents, the court ordered the N.S.A. to submit a more detailed affidavit. The affidavit, however, was viewed *in camera*, and the court subsequently granted summary judgment for the N.S.A.).

59. 587 F.2d 1187 (D.C. Cir. 1978).

60. *Id.* at 1198-99 app.

61. *Id.* at 1195-96.

62. *Id.* at 1196. The FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b) (1982).

vealing the intelligence source.⁶³

In reversing the district court's decision, the court of appeals in *Ray* appeared to abandon the notion that de novo review under exemption 3 necessarily must differ from review under the other exemptions.⁶⁴ After detailing the characteristics of a de novo review under exemption 1,⁶⁵ the court noted that the same considerations "also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests."⁶⁶ Similarly, Circuit Judge Wright concluded in his concurring opinion that the "propriety and necessity of an *in camera* examination as part of the court's *de novo* review of the relevant factual issues in Exemption 3 cases is . . . essentially the same as in *de novo* review of Exemption 1 cases."⁶⁷

63. 587 F.2d at 1197. The court concluded:

The agency must provide a reasonable segregation as to the portions of the document that are involved in each of its claims for exemption. . . . [I]t is important that the affidavit indicate the extent to which each document would be claimed as exempt under each of the exemptions. The courts cannot meaningfully exercise their responsibility under the FOIA unless the government affidavits are as specific as possible.

Id.

64. The movement by the District of Columbia Circuit toward a lesser degree of deference to the CIA's decisions under exemption 3 can be measured by comparing the affidavits accepted by the court in *Goland* with those rejected by the court in *Ray*. Both parrot the language of the exempting statutes, and both lack indexes that relate the specific justification for nondisclosure with specific portions of the documents. In fact, the affidavit rejected by the court in *Ray* as conclusory does not appear to parrot the language of the two exempting statutes nearly as much as does the one accepted by the court in *Goland* as nonconclusory. Compare 587 F.2d at 1198-99 (text of the affidavit in *Ray*) with 607 F.2d at 351 (excerpts from the affidavit in *Goland*).

65. The court explained:

The salient characteristics of de novo review in the national security context can be summarized as follows: (1) the government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." (4) Whether and how to conduct an *in camera* examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. To these observations should be added an excerpt from our opinion in *Weissman* (as revised): "If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated."

Ray, 587 F.2d at 1194-95 (footnotes omitted).

66. *Id.* at 1195.

67. *Id.* at 1221. Moreover, the *Ray* court's rejection of the idea that the procedure for judicial review in exemption 3 cases is less strict than that for other exemptions is apparent from the conspicuous absence of any reference to Justice Stewart's *Mink* concurrence, see *supra* note 49, which often had been quoted in exemption 3 cases prior to *Ray*. See *supra* notes 53, 56.

The *Ray* court relied substantially on *Vaughn v. Rosen*,⁶⁸ an early FOIA case. In *Vaughn*, a professor researching the Civil Service Commission sued the Commission under the FOIA for withholding information about the personnel policies of several government agencies.⁶⁹ The district court granted summary judgment for the Commission, but the court of appeals reversed and remanded the case, noting that the affidavits submitted by the Commission were couched in conclusory terms.⁷⁰ The appellate court ordered the Commission to submit a "relatively detailed analysis" of the allegedly exempt material and an index that cross-referenced portions of documents to the allegedly applicable exemptions.⁷¹ The court explained:

[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document.⁷²

*Allen v. CIA*⁷³ also reflects the lower degree of deference developed in *Ray*. In *Allen*, the District of Columbia Circuit held that the CIA's affidavits failed to establish that the withheld portions of documents were protected by exemption 3.⁷⁴

68. 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

69. *Id.* at 822. While Vaughn requested the personnel policies of many federal agencies, he did not request those of the CIA. The opinion, nonetheless, frequently has been cited in cases involving CIA withholding of documents under exemption 3. *See, e.g.*, Holy Spirit Ass'n for the Unification of World Christianity, 636 F.2d 838, 846 (D.C. Cir. 1980); Phillippi v. CIA, 546 F.2d 1009, 1012 (D.C. Cir. 1976); Jaffe v. CIA, 516 F. Supp. 576, 578 (D.D.C. 1981); Medoff v. CIA, 464 F. Supp. 158, 160 (D.N.J. 1978).

70. *Id.* at 825.

71. *Id.* at 827.

72. *Id.* at 826-27 (footnotes omitted).

73. 636 F.2d 1287 (D.C. Cir. 1980). *Allen* arose out of a challenge to the Agency's decision to withhold a fifteen-page document containing information about the activities of Lee Harvey Oswald during the seven weeks preceding the assassination of President Kennedy. The United States District Court for the District of Columbia granted a motion to dismiss based on the CIA's affidavits. *Id.* at 1289.

Allen appealed immediately; however, before the court of appeals heard arguments, the CIA requested a remand to supplement the record. The request was granted and the Agency, in district court, released some portions of the document and filed a supplemental affidavit to justify withholding the remaining portions. The district court granted summary judgment for the CIA without having made an *in camera* inspection of the document. *Id.* Allen again appealed, arguing that the affidavits failed to establish that the portions withheld were protected under exemption 3. *Id.*

74. *Id.* at 1300. The affidavits submitted by the CIA stated in part:

Deletions designated with the letters "A & B" on pages 4 through 9, in paragraphs 5 through 12, show where portions were deleted to protect

Pointing out the similarity between exemptions 1 and 3 in national security cases, the court commented: "With respect to those portions of the document withheld under Exemption 3, the affidavits fail to demonstrate that the portions are clearly exempt. Indeed, the affidavits . . . are no less conclusory or nonsupportive with respect to the Exemption 3 claims than they are with respect to the Exemption 1 claims."⁷⁵ Consequently, the court of appeals ordered the lower court to conduct an *in camera* inspection of the requested document to determine whether it was, in fact, exempt.⁷⁶

In dicta, the *Allen* court also established guidelines for courts considering whether to conduct *in camera* inspections of documents. Unlike the *Goland* and *National Commission* courts, which would have required *in camera* inspections only in rare cases,⁷⁷ the *Allen* court apparently sanctioned more widespread use of the device. Specifically, it suggested that *in camera* inspection is most appropriate when judicially economical,⁷⁸ when Agency affidavits are conclusory,⁷⁹ when the Agency acts in bad faith,⁸⁰ when parties dispute the actual contents of the documents,⁸¹ or when strong public policy interests

against the disclosure of intelligence sources and methods. The substance in these paragraphs concern one sequence of events, which has been the subject of a number of other documents which have been released for public access. The material is presented in such a manner, in this document, that to name the principal figures would result in the eventual identification of the intelligence sources who produced the information and the intelligence methods used in the process. Such a disclosure would compromise the intelligence sources and methods involved, which are currently viable and functioning.

Id. at 1292.

75. *Id.* at 1294.

76. *Id.*

77. See *Goland*, 607 F.2d at 350; *National Commission*, 576 F.2d at 1377 n.7.

78. The court observed that if there are only a few documents or if the documents are brief, an *in camera* inspection often is preferable because it typically would take less time than requiring more Agency affidavits or conducting further discovery. 636 F.2d at 1298.

79. The *Allen* court pointed out that when the affidavits are couched in conclusory terms or when requiring sufficiently detailed affidavits would disclose the very information sought to be protected, *in camera* inspections allow the court to conduct a meaningful *de novo* review. *Id.*

80. *In camera* inspections are appropriate, the court noted, when there is evidence that the Agency has acted in bad faith since in such circumstances all statements by the Agency become suspect. *Id.* Although the *Allen* court did not elaborate on what would constitute bad faith on the part of the Agency, in *Ray* Chief Judge Wright remarked: "A court might suspect bad faith if an agency failed to correct deficiencies in its affidavits when given a second chance to be more specific, or if an agency submitted affidavits in the first instance that suffered from defects pointed out in previous court decisions." 587 F.2d at 1214 n.55.

81. When courts are merely interpreting the scope of an exemption and

warrant disclosure.⁸²

B. CRITICISM OF THE APPLICATION

In the FOIA, Congress explicitly mandated that courts review agency decisions *de novo*.⁸³ It failed, however, to give adequate guidance as to how courts should conduct the review,⁸⁴ thereby inviting the inconsistency that now plagues the case law. This lack of congressional guidance, however, is not the sole cause of the inconsistent application of the Act's *de novo* review requirement. Exemption 3 deals primarily with intelligence documents, which by their nature elude meaningful review. As the Senate Judiciary Committee explained:

It is not an easy task to balance the opposing interests [of secrecy and disclosure], but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.⁸⁵

Although Congress gave little express guidance, its deliberate use of the term "de novo," a standard of review reasonably well-defined by prior case law,⁸⁶ compels a stricter review than if Congress had chosen either a "substantial evidence" or an "arbitrary and capricious" standard. At the very least, Con-

the parties agree on the contents of the documents, the *Allen* court pointed out that *in camera* inspections are irrelevant. Rather, inspections are most beneficial when the issue of the applicability of an exemption concerns the contents of the documents. 636 F.2d at 1298.

82. The court noted that when citizens request information concerning whether an agency is effectively serving the public interest, the agency may have a self-interest in withholding the information. *In camera* inspection allows a court to insure the information truly is exempt. *Id.* at 1299.

Courts confronted with CIA documents allegedly exempt under exemption 3 frequently refer to the *Allen* considerations. See *McGehee v. CIA*, 697 F.2d 1095, 1114 (D.C. Cir.), *modified*, 711 F.2d 1076 (D.C. Cir. 1983); *Jaffe v. CIA*, 516 F. Supp. 576, 586 (D.D.C. 1981).

83. 5 U.S.C. § 552(a)(4)(B) (1982).

84. See *supra* notes 37-40 and accompanying text.

85. S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965).

86. See, e.g., *Stoner v. Presbyterian University Hospital*, 609 F.2d 109, 112 (3d Cir. 1979) (a trial that is subject to a *de novo* review is not an appellate proceeding but an exercise of a court's original jurisdiction); *National Industrial Sand Assoc. v. Marshall*, 601 F.2d 689, 699 n.34 (3d Cir. 1979) (all relevant issues of law may be decided *de novo* by a court under the Administrative Procedure Act section that provides for a lower standard of review for factual issues); *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir.) (judicial review *de novo* under the FOIA requires considering whether conditions of the exemption in truth exist), *cert. denied*, 398 U.S. 965 (1970); *Farmingdale Supermarket, Inc. v. U.S.*, 336 F. Supp. 534, 536 (D.N.J. 1971) (a *de novo* review entails trying a matter anew, as if it had not been heard before).

gress must have intended that courts take a "hard look"⁸⁷ at the factual basis for Agency decisions to deny disclosure. Admittedly, since Congress did not grant an automatic right to an *in camera* inspection,⁸⁸ the *de novo* review mandated by the FOIA arguably differs from the unrestricted *de novo* standard employed under the Administrative Procedure Act.⁸⁹ There is, however, a fundamental difference between the standard of review Congress directed the courts to employ and the procedures that Congress authorized courts to use in conducting such review. Thus, while the modification regarding *in camera* inspections may limit courts hearing exemption 3 cases procedurally, Congress did not intend that courts defer to Agency decisions generally. Otherwise it would have used one of the more deferential standards in providing for judicial review.

In cases such as *Goland* and *National Commission*, however, courts have misread *EPA v. Mink*⁹⁰ by failing to examine Agency decisions in accordance with the traditional *de novo* review standard. For example, the *Goland* court's conclusion that exemption 3 "depends less on the detailed factual contents of specific documents" than do the other eight exemptions⁹¹ is not supported by *EPA v. Mink*. As Justice Stewart stated in *Mink*, a court cannot question the appropriateness of the exempting statute. That does not, however, prevent a court from determining whether the exemption protects the contents of the document, a necessary step under *de novo* review. When courts review *de novo* the CIA's claim that a particular statute authorizes nondisclosure under exemption 3, they at least must take a hard look at the Agency's decision. They must first decide whether the statute is, in fact, an exempting statute and then determine, based on the facts of the case, whether the disputed documents fall within the scope of the exempting stat-

87. Circuit Judge Leventhal, in reviewing an FCC license renewal, noted:

Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a "hard look" at the salient problems, and has not genuinely engaged in reasoned decision-making.

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 851 (footnote omitted).

88. The conference committee in 1974 explained "H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate." S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6287.

89. See 5 U.S.C. § 706(2) (F) (1982).

90. 410 U.S. 73. See *supra* note 49 and accompanying text.

91. *Goland v. CIA*, 607 F.2d at 350.

ute. Although the *Goland* court's opinion seemed to acknowledge this two-stage inquiry,⁹² the court side-stepped the second part of its task by granting the Agency's summary judgment motion on the sole basis of conclusory affidavits which did not explain the factual justification for the exemption.⁹³

The inability of courts adopting the *Goland* and *National Commission* approach to conduct meaningful de novo reviews of agency decisions is most evident in their treatment of Agency affidavits. Had the affidavits explained in detail the factual basis for the Agency's reliance on the exempting statutes, the courts would have been justified in relying on them. In *National Commission*, however, the CIA merely stated that disclosure would reveal "intelligence sources," "intelligence methods," and Agency employees.⁹⁴ Likewise, in *Goland* the Agency simply repeated the language of the exempting statute by alleging that the documents would divulge intelligence "devices," "methods," and "sources."⁹⁵ These conclusory claims did not allow the courts to determine whether the withheld information was protected by the exempting statutes⁹⁶ or whether the Agency could have disclosed any reasonably segregable portions of the documents.⁹⁷ Had the *Goland* and *National Commission* courts instead forced the Agency to detail how the documents revealed intelligence "sources," "methods," "devices," and employees, they could have conducted meaningful de novo reviews.⁹⁸

92. See *id.* at 350-51.

93. See *supra* note 51.

94. The affidavit for document #1 stated: "This document consists of information concerning deliberations regarding means by which INTERPOL collects information abroad and describes intelligence sources and methods. In addition, it contains the name of a CIA employee." *National Commission*, 576 F.2d at 1377 n.6.

95. 607 F.2d at 365 (Bazelon, J., dissenting). See also *supra* note 51.

96. By repeating in its affidavits the language of the National Security Act (one of the exempting statutes), the Agency provided the court with no substantive information about the document from which the court could determine whether withholding the document was justified.

97. See 5 U.S.C. § 552(b) (1982).

98. The District of Columbia Circuit has acknowledged that the phrase "intelligence sources and methods" is susceptible to many different interpretations, the broadest of which encompasses more than is necessary to achieve the Act's purpose of safeguarding national security. See *Sims v. CIA*, 642 F.2d 562, 570 (D.C. Cir. 1980), *cert. granted*, 104 S. Ct. 1438 (1984). Thus, the court observed in *Allen*, "unless greater specificity is provided regarding the nature of the 'intelligence sources and methods,' it is impossible for a trial court to conclude that withholding of portions of the document under Exemption 3 was proper." 636 F.2d at 1294.

The procedure for conducting *in camera* inspections in *Goland* and *National Commission* also violates the recognized congressional intent.⁹⁹ In concluding that *in camera* inspections are rarely justified when national security documents are at issue, the *National Commission* court ignored the specific language in the 1974 conference committee report. That report noted that “[t]he conference substitute follows the Senate amendment, providing that in determining de novo whether agency records have been properly withheld, the court may examine records *in camera* in making its determination under any of the nine categories of exemptions under section 552(b) of the law.”¹⁰⁰ Thus, the de novo review process in national security cases includes *in camera* inspections just as it does in all other FOIA cases. Because they failed to recognize the importance of *in camera* inspections as part of the overall review framework adopted by Congress, the *Goland* and *National Commission* courts did not apply the de novo review procedure mandated by Congress.

In contrast, the approach developed in *Ray* and *Allen* allows meaningful de novo review and implements the FOIA’s burden of proof allocation.¹⁰¹ That approach, which requires the Agency to articulate the factual basis for denying a FOIA request, enables a plaintiff to challenge the CIA’s allegations in more specific terms, thus preserving “the traditional adversary nature of our legal system’s form of dispute resolution.”¹⁰² As the *Ray* court noted, in FOIA cases the parties typically dispute the nature of the documents withheld, but only the Agency can assert confidently that the documents contain statutorily protected information. The plaintiff, who lacks knowledge of the full contents, is unable to rebut the Agency’s characterization. In light of the government’s burden of justifying nondisclosure under the Act,¹⁰³ the *Ray* and *Allen* courts properly required the Agency to explain, in reasonable detail, how release of portions of withheld documents would reveal protected intelligence information.¹⁰⁴

With respect to *in camera* inspections, the *Allen* court’s

99. See *supra* notes 38, 88.

100. S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 9 (1974), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6287.

101. See *supra* note 39 and accompanying text.

102. *Vaughn*, 484 F.2d at 824.

103. 5 U.S.C. § 552(a)(4)(B) (1982).

104. The Senate Judiciary Committee report on the 1974 FOIA amendments specifically supported the approach of the court in *Vaughn*, relied on by the *Ray* and *Allen* courts, of requiring the Agency to submit a detailed and indexed

flexible plan provides courts with reasonable guidelines for exercising discretion. By suggesting situations that warrant *in camera* treatment, it recognizes the congressional observation that "in many situations it will plainly be necessary and appropriate" to conduct such inspections.¹⁰⁵ Moreover, the *Allen* approach to *in camera* inspections does not necessarily risk unauthorized disclosure of sensitive intelligence information since courts can minimize that risk by ordering security clearances for court personnel handling the documents. Although requiring security clearances would slow the de novo review process, it would help to insure the secrecy of the documents. Moreover, documents inspected under exemption 3 typically are not classified records; exemption 1 protects classified information.¹⁰⁶ In fact, courts rarely order security clearances in exemption 1 cases. A security clearance procedure for cases involving unclassified information being withheld under exemption 3 would thus provide even more protection than that afforded classified information under the existing de novo review process. The court also could reduce the number of court personnel handling the secret information by appointing special masters to examine the documents.¹⁰⁷

III. CASES IN WHICH THE CIA REFUSES TO ACKNOWLEDGE THE EXISTENCE OF THE DOCUMENTS REQUESTED

A. JUDICIAL APPLICATION OF EXEMPTION 3

Courts also have applied conflicting procedures in cases in which the Agency refuses, on exemption 3 grounds, to confirm or deny the existence of requested documents.¹⁰⁸ One line of

analysis of the withheld documents along with its justification for their nondisclosure. S. REP. NO. 854, 93d Cong., 2d Sess. 15 (1974).

105. S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6285, 6287.

106. 5 U.S.C. § 552(b)(1) (1982).

107. Rule 53(b) of the Federal Rules of Civil Procedure provides that a reference to a special master in a case tried by a judge shall be made only when required by some "exceptional condition." See generally 5A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ch. 53 (2d ed. 1984). Although some commentators question the legality of appointing a special master in FOIA cases, see Recent Cases, Administrative Law: *Vaugh v. Rosen*, 87 HARV. L. REV. 854, 861 (1974), the trend appears to allow a court to utilize a master "in connection with any matter arising in an action pending before it that is governed by Rule 53." 5A J. MOORE, W. TAGGART & J. WICKER, *supra*, ¶ 53.05(2), at 53-67.

108. The Agency's rationale in such cases is exemplified in an excerpt from its supplemental affidavit in *Medoff v. CIA*, 464 F. Supp. 158 (D.N.J. 1978):

cases requires the CIA to submit, to the court and opposing counsel, affidavits explaining why exemption 3 permits the Agency to refuse to reveal whether such documents exist. Another assumes the requested documents exist and requires the Agency to submit affidavits justifying their protection under exemption 3.

*Phillipi v. CIA*¹⁰⁹ demonstrates the first approach. In *Phillipi*, the district court granted the Agency's motion for summary judgment after having conducted, without the presence of Phillipi's attorney, an *in camera* examination of the Agency's secret affidavits justifying its refusal to confirm or deny the existence of the requested records.¹¹⁰ The United States Court of Appeals for the District of Columbia Circuit reversed, pointing out that the *in camera* examination conducted by the lower court was "without benefit of criticism and illumination by a party with the actual interest in forcing disclosure."¹¹¹ To remedy this defect, the court of appeals ordered the CIA to submit to the court and the plaintiff an affidavit explaining why the Agency could neither confirm nor deny the existence of the documents.¹¹²

The United States District Court for the District of Colum-

As to documents concerning covert CIA activities, if any, it is axiomatic that *both* their *existence* (or non-existence) and relevant *details* (if any) must remain secret. Any listing, such as contemplated in a *Vaughn* Motion, regardless of the detail and notwithstanding a withholding of the documents, would reveal at a minimum the existence of the covert activity, if not some details. Thus, whenever a FOIA request is received which inquires into an activity which, if it existed, would constitute a covert CIA activity, then the Agency must respond by neither confirming nor denying the existence of records.

Id. at 161.

109. 546 F.2d 1009 (D.C. Cir. 1976). See also *Phillipi v. CIA*, [1980 Transfer Binder] Gov't DISCLOSURE (P-H) ¶ 80,188, at 80,464 (D.D.C. June 10, 1980) (summary judgment for CIA on remand of case), *aff'd*, 655 F.2d 1325 (D.C. Cir. 1981).

110. 546 F.2d at 1012. Phillipi had requested all CIA records relating to the Agency's alleged efforts to persuade several news organizations not to publicize information concerning the *Hughes Glomar Explorer*, a large vessel publicly registered as a research ship and owned by the Summa Corporation. *Id.* at 1010-11. Many newspaper accounts, however, revealed that the United States Government actually owned and operated the ship to perform secret missions, including the raising of a sunken Soviet submarine in the Pacific Ocean. *Phillipi*, 655 F.2d 1325, 1327.

111. *Phillipi*, 546 F.2d at 1013 (quoting *Vaughn*, 484 F.2d at 825).

112. *Id.* The court explained: "As we have indicated, on remand appellees will be asked to submit a public justification, which is as detailed as is possible, for refusing to confirm or deny the existence of the requested records. Appellant will then have the opportunity to test that justification through appropriate discovery." *Id.* at 1014 n.12.

bia followed the *Phillipi* approach in *Gardels v. CIA*.¹¹³ Gardels, a student at the University of California at Los Angeles, requested documents specifying any arrangements the Agency had with the eleven campuses of the University of California.¹¹⁴ The CIA notified Gardels that it could not confirm the existence of any covert CIA connections with the University.¹¹⁵ Following *Phillipi*, the district court ordered the Agency to file affidavits detailing how confirming or denying the existence of documents would disclose intelligence sources and methods protected by the exempting statute.¹¹⁶

*Edwards v. CIA*¹¹⁷ evidences a second approach to CIA refusals to confirm the existence of documents. Don Edwards, a member of the House of Representatives, requested all documents the CIA had relating to the book *Chile's Marxist Experiment*. The Agency refused to confirm or deny any involvement with the book, asserting that if any records existed they would be protected under exemptions 1 and 3.¹¹⁸ The district court agreed, finding that such documents, if they existed, would contain the names of writers and publishers employed by the CIA, the costs or expenses borne by the CIA, and the involvement of the CIA in publishing the book. Such information, the court held, "would directly disclose a covert program operated by the agency, and those involved in its operation. . . . Accordingly, . . . the information is exempt under Section 552(b)(3)."¹¹⁹

B. CRITICISM OF THE APPLICATION

The inconsistency evident in cases in which the Agency re-

113. 484 F. Supp. 368 (D.D.C. 1980), *rev'd. on other grounds*, 637 F.2d 770 (D.C. Cir. 1980), *on remand*, 510 F. Supp. 977 (D.D.C. 1981), *aff'd*, 689 F.2d 1100 (D.C. Cir. 1982).

114. 484 F. Supp. at 369. The request was later revised to include any documents held by five named divisions within the CIA and any reports given to congressional committees. *Id.*

115. *Id.*

116. *See id.* at 370-71. In response, the CIA stated in one of its two affidavits: If we (the CIA) adopt the practice of publicly disclosing our campus contacts we must surely anticipate active and abrasive campaigns to discover and expose the individuals concerned on at least some of the campuses on which our replies are affirmative To deny the existence of CIA confidential contacts at a particular college or university could through FOIA requests by the plaintiff or others result in the ultimate identification, by a process of elimination, of those colleges or universities where CIA has confidential contacts.

Id. Based on the affidavits and depositions of Agency officials, the court granted the Agency's motion for summary judgment. *Id.* at 372.

117. 512 F. Supp. 689 (D.D.C. 1981).

118. *See id.* at 691.

119. *Id.* at 693.

fuses to confirm or deny the existence of documents is due partially to the lack of congressional guidance regarding the de novo review process. Nevertheless, when the CIA argues that release of such information would impair national security, the approach expounded in *Phillipi* and *Gardels* more closely resembles the congressional notions of de novo review¹²⁰ than does the one established in *Edwards*. Courts should require the Agency to submit public affidavits detailing its alleged inability either to confirm or to deny the existence of the requested material.

On the one hand, the *Edwards* approach fails to recognize the importance of allowing the Agency to disassociate itself from certain intelligence operations. Undoubtedly, the CIA is involved in some covert activities that would, if the CIA admitted its association, risk national security or embarrass the United States. As the *Edwards* court admitted, however, the affidavits submitted under its approach cannot explain adequately the factual basis for the Agency's exemption 3 claim without referring to specific portions of the documents.¹²¹ Thus, conclusory affidavits typically would remain the only basis of review, since inspecting documents *in camera* is not a viable alternative because doing so would reveal whether the documents exist.¹²²

On the other hand, the *Phillipi* approach, which requires affidavits detailing why the Agency cannot confirm or deny the existence of the documents, allows the court to determine whether the Agency can rely on exemption 3 and refuse the plaintiff's FOIA request. This procedure comports with the congressional intent in mandating de novo review that "the ultimate decision as to the propriety of the agency's action [be] made by the court" and not the agency.¹²³ By freeing courts from the need to rely on conclusory affidavits, this approach allows them to make an independent evaluation of the Agency's rationale for not recognizing the requested documents.

120. See *supra* notes 37-40 and accompanying text.

121. See 512 F. Supp. at 692 n.3.

122. Since an *in camera* inspection is inappropriate, under the *Edwards* approach the CIA could submit affidavits stating: "Assuming such documents exist, they would contain information about 'intelligence sources,' 'intelligence methods,' and Agency employees." See *supra* notes 94-98 and accompanying text.

123. S. REP. NO. 813, 89th Cong., 1st Sess. 8 (1965).

IV. A SUGGESTED CONGRESSIONAL APPROACH

The lack of congressionally prescribed procedures for de novo reviews of Agency decisions to withhold requested documents has led to conflicting judicial approaches to exemption 3 cases. Just as Congress in 1974 amended the ambiguous language concerning *in camera* inspections,¹²⁴ so should it now address the current controversy by modifying the language mandating de novo review. Unfortunately, recent legislative proposals to amend the FOIA¹²⁵ largely have ignored this issue.¹²⁶ It remains a crucial one, however, since even proposals that would preclude judicial review of Agency decisions regarding certain kinds of documents would leave the vague de novo review language for those decisions that remain reviewable.¹²⁷ A uniform de novo procedure that specifies both the standard that Agency affidavits must meet and when *in camera* inspections are appropriate would ameliorate the current problem. Although a more objective and specific standard cannot eliminate the inconsistency resulting from judicial discretion, the disparity would be minor compared to that under the existing statutory scheme.

124. See H.R. REP. NO. 876, 93d Cong., 2d Sess. 7-8, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6267, 6272-73. See also *supra* notes 38-40 and accompanying text.

125. See *supra* note 11.

126. The inadequacy of the present vague de novo language has not been a major part of the FOIA debate. Since 1979, Congress has conducted approximately seven major hearings on the FOIA. The problem was discussed, in general terms, before the Senate Committee on Intelligence in 1981. See *Intelligence Reform Act*, *supra* note 10, at 17 (statement of Lt. Gen. Lincoln Faurer, National Security Agency). In 1980, the Committee on Government Operations also discussed the de novo review process in general. See *FOIA: CIA Exemptions*, *supra* note 10, at 156 (statement of Mark Lynch, ACLU attorney).

The congressional debate on the FOIA has been focused, rather, on the impact of the FOIA on the Agency's intelligence-gathering capacities. In every congressional hearing held since 1979, the major part of the discussion has been on this subject. See *FOIA Oversight Hearings*, *supra* note 10; *Intelligence Reform Act*, *supra* note 10; *FOIA Hearings on S. 587*, *supra* note 10; *FOIA: CIA Exemptions*, *supra* note 10; *Impact of the Freedom of Information Act and the Privacy Act on Intelligence Activities: Hearing Before the Subcomm. on Legislation of the House Select Comm. on Intelligence*, 96th Cong., 1st Sess. (1979).

127. The Goldwater-Thurmond proposal, for example, would totally exempt from the FOIA certain designated "operational files," thereby precluding even judicial review of Agency decisions to withhold such documents. S. 1324, 98th Cong., 1st Sess. § 3 (1983). The bill, however, does not modify the de novo review mandate of the Act. See *id.* See also *supra* note 16 for discussion of the bill.

A. A SUGGESTED APPROACH FOR CASES IN WHICH THE CIA
ACKNOWLEDGES THE EXISTENCE OF THE DOCUMENTS
REQUESTED

Congress should amend the FOIA to provide that if the CIA recognizes the existence of documents related to a plaintiff's FOIA request, it must demonstrate in nonconclusory language that the information is protected under exemption 3. Under the basic scheme of the Act, documents are to be disclosed unless the Agency can establish that a specific exemption applies by submitting affidavits and testimony describing the withheld documents.¹²⁸ For a true *de novo* review, however, courts must adhere to the congressional mandate that the review of agency decisions be meaningful. The amendment, therefore, should require that the affidavits describe, in sufficient detail, not only which portions of the documents allegedly are protected by exemption 3, but also the factual basis for the exemption claim.

Congress should continue to require the disclosure of any nonexempt portion of a document that reasonably can be segregated from the exempted portions. Although some commentators fear that this practice allows unfriendly foreign intelligence agencies to "piece together" secret information,¹²⁹ their concern is exaggerated. In its affidavits, the Agency can articulate its fear that release of the allegedly segregable portion would disclose sensitive material and request that the court protect the information. The FOIA, after all, mandates the disclosure only of reasonably segregable parts; the Act does not permit courts to order the disclosure of documents so related to exempted information that their release would imperil national security.

In some cases, the Agency affidavits or the oral testimony of senior intelligence officials alone will establish that the information withheld falls within the scope of the exempting stat-

128. See 119 CONG. REC. 6930, 6930 (1973) (statement of Sen. Kennedy) ("Congress' overriding concern in passing the . . . FOIA . . . was that disclosure of information be the general rule, not the exception."). See generally 5 U.S.C. § 552 (1982).

129. See *FOIA: CIA Exemptions*, *supra* note 10, at 28 (statement of Frank C. Carlucci, Deputy Director of Central Intelligence) ("[I]t is also probable that a sophisticated foreign intelligence service could piece together, from bits and pieces of released information in one or another area, a larger portion of the entire picture regarding a particular intelligence activity or operation."); *FOIA: Hearings on S. 587*, *supra* note 10, at 963-73 (statement of William Casey, Director of Central Intelligence) (discussing the dangers of disclosure and the need for a total exclusion of the Agency from the Act).

ute. In cases in which such evidence is not conclusive, however, Congress should require courts to inspect the documents *in camera* in order to determine whether the contents are protected from disclosure by exemption 3.¹³⁰ Although some commentators believe *in camera* inspections of CIA documents and affidavits increase the reluctance of allied foreign intelligence services and sources to supply information to the CIA,¹³¹ Congress already has recognized the need for such inspections as part of the *de novo* review procedure.¹³² Moreover, the need to balance exemption 3 proceedings by forcing the Agency—which typically possesses the information and has superior knowledge concerning the documents—to submit to an *in camera* inspection outweighs the speculated danger that such inspections have a chilling effect on the ability of the CIA to gather foreign intelligence.

In order to guide courts conducting *in camera* inspections, Congress specifically should authorize courts to use the factors presented in *Allen*¹³³ and to adopt security measures. The situations described in *Allen* warrant *in camera* inspections because, in each situation, the court cannot rely satisfactorily on the detailed affidavits. *In camera* inspections, however, increase the risk of disclosing secret CIA documents, which may imperil national security. Thus, Congress also should authorize courts to require security clearances for court personnel handling the documents and to appoint special masters to conduct the *in camera* inspections, procedures not adopted in *Allen* and not often used by courts considering exemption 3 claims. Explicit authorization to order such safety measures should dispel judicial fears of revealing exempt material while conducting *in camera* inspections.¹³⁴

In addition, Congress should consider whether evidence of bad faith by the CIA in responding to an FOIA request should permit the plaintiff to have an attorney or expert present at the *in camera* inspection.¹³⁵ Exclusion of the plaintiff's attorney

130. In such situations Congress now leaves the decision of whether to conduct *in camera* inspections to the discretion of the judge. *See supra* note 100 and accompanying text.

131. *See supra* note 15 and accompanying text.

132. S. REP. NO. 1200, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6267, 6287.

133. *See supra* notes 78-82 and accompanying text.

134. This fear was expressed by the court in *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

135. Agency conduct that suggests bad faith includes imposing long delays in processing a reasonably straightforward document request without provid-

from an *in camera* inspection of documents often prevents the plaintiff from being able to make specific challenges regarding the Agency's characterization of the documents.¹³⁶ This deficiency in the *de novo* review procedure is even more pronounced in cases of Agency bad faith, since all of the Agency's affidavits and testimony supporting nondisclosure are then suspect. While inspecting the documents at issue, the court in such cases needs the insight of an opposing counsel or an expert; it cannot necessarily rely on the knowledge gained from the confrontation of counsel when the suspect affidavits or testimony were first submitted. Therefore, the FOIA should provide that if a plaintiff offers evidence of the CIA's bad faith in responding to the information request, the court can conduct the inspection of documents with the plaintiff's attorney or expert present. This provision not only would allow a plaintiff to challenge an Agency characterization of a document, but also should deter bad faith handling of FOIA requests by the CIA.

Allowing plaintiff's counsel or an expert appointed by the plaintiff to view the documents *in camera* would not increase the likelihood of unauthorized disclosure of secret intelligence information since the provision applies only when there is evidence of bad faith on the part of the CIA and since the court could order security clearances for all individuals inspecting the documents. The plaintiff's need to be represented outweighs the risk that the plaintiff's representative will divulge sensitive information. Moreover, the Intelligence Identities Protection Act of 1982¹³⁷ should deter the plaintiff's representative from disclosing the identity of any CIA agent.

Finally, to reduce the CIA's administrative burden and backlog of unanswered requests,¹³⁸ Congress should amend the FOIA to allow the Agency to use either written affidavits or less time-consuming means of proving that an exemption applies. If the Agency could satisfy its burden of proof with the oral testi-

ing an explanation to the person requesting documents. Limiting the scope of a search by using a cutoff date beyond which Agency personnel will not look for documents, without informing the person requesting the search of such limitation, also may indicate bad faith on the part of the Agency. *See also supra* note 80.

136. The Senate in 1974 recognized this deficiency and suggested that the plaintiff's counsel be included in the *in camera* inspection "whenever possible." *See S. REP. NO. 854, 93d Cong., 2d Sess. (1974)*.

137. *See* 5 U.S.C.A. § 421 (West Supp. 1984) (making it a crime, punishable by a fine or imprisonment or both, intentionally to disclose under certain circumstances the identity of a covert agent).

138. *See supra* notes 12, 13, and accompanying text.

mony of senior intelligence officers, FOIA compliance would require less work. Consequently, some of the specialized senior intelligence officers now answering FOIA requests instead could devote their time to organizing intelligence information for government policy-makers.

B. A SUGGESTED APPROACH FOR CASES IN WHICH THE CIA REFUSES TO ACKNOWLEDGE THE EXISTENCE OF THE DOCUMENTS REQUESTED

Congress also should mandate that courts, in deciding cases in which the CIA refuses to confirm or deny the existence of documents, require the Agency, through either affidavits or oral testimony, to justify its exemption claim to both the court and opposing counsel. Instead of detailing how the disclosure of documents would divulge intelligence sources and methods, as suggested in *Edwards*, the CIA first should be required to document how acknowledging the existence of the documents would pose a risk to national security. If the CIA fails to demonstrate by a preponderance of evidence that such a risk exists, the court then should require it to submit an affidavit detailing the justification for protecting the requested documents, assuming they exist. This affidavit would detail the factual basis for the Agency's exemption claim and would resemble the affidavits submitted by the Agency when it admits the existence of documents.

The plaintiff could challenge the CIA's contention that the mere acknowledgement of documents in its control would pose national security risks by offering evidence that the Agency's association with the disputed covert operation already has been publicized. If the Agency already has been publicly linked to the operation, the acknowledgement of documents by the CIA would not damage national security. Thus, if the plaintiff shows prior publicity, the court should order the Agency to submit affidavits or oral testimony that meet the standards articulated in the second tier.

By allowing the Agency initially to articulate how its mere acknowledgement of requested documents would disrupt national security, the CIA will have an opportunity to disassociate itself from an intelligence operation, the mere admission of which might embarrass the United States or disrupt its foreign policy. If the Agency fails to cooperate in this first stage, the court would order the Agency to submit the more factually detailed affidavits. Courts may never need this second tier of the

proposed procedure, but its existence should be an incentive for the Agency to comply with the FOIA.

C. A PROPOSED AMENDMENT TO THE FOIA

The following proposed amendment to 5 U.S.C. § 552(a)(4)(B) is designed to incorporate the changes suggested by this Note:

In cases in which Central Intelligence Agency justifies its withholding of records or portions thereof under subsection (b)(3) [5 U.S.C. § 552(b)(3)], the court shall conduct its review as follows:

(i) The court shall require the Central Intelligence Agency to demonstrate, by either affidavits or testimony, that the records or portions thereof being withheld are specifically exempted by a statute meeting the requirements of such subsection. Provided, however, that in cases in which the Central Intelligence Agency refuses to confirm or deny the existence of the requested records, it need not submit such evidence regarding the records themselves if it can demonstrate, by either affidavits or testimony, that acknowledging the existence of such records would pose a risk to national security.

(ii) The court shall conduct an inspection of the withheld records when the evidence submitted by the Central Intelligence Agency is too conclusory for the court to determine either whether the records are protected under subsection (b)(3) or whether any reasonably segregable portions can be released, when the parties dispute the actual contents of the records and the court cannot adjudicate the dispute based on the affidavits or testimony alone, or when strong public policy interests warrant disclosure. Such inspection shall be conducted without the presence of counsel or experts, except that in cases in which the plaintiff establishes that the Central Intelligence Agency has acted in bad faith in responding to the plaintiff's information request for the records at issue, the court may permit counsel or experts for both parties to attend the inspection.

(iii) The court, when it deems appropriate for national security considerations, shall require security clearances of counsel and court personnel having access to the withheld records and appoint special masters to conduct the inspection of such records.

This detailed de novo amendment sanctions a less deferential approach to CIA decisions to withhold documents requested under the FOIA. Contrary to the premise of recent congressional proposals to amend the FOIA,¹³⁹ the Act in its present form has not forced the CIA to disclose vital intelligence information. Since the amendment to exemption 3 was enacted in 1976, virtually no court has ordered the disclosure of documents that the CIA claimed were protected by the exemption.¹⁴⁰ The recent congressional proposals, which include

139. See *supra* note 11.

140. Lt. Gen. Lincoln Faurer of the National Security Agency testified in 1981: "While we have been fortunate in never having lost a FOIA case, we have been forced to place far more information concerning our activities on the pub-

measures that either would exempt all documents related to CIA clandestine and covert operations¹⁴¹ or would exempt the CIA itself,¹⁴² seem unnecessarily restrictive in light of the Agency's undefeated record in court.¹⁴³

Since courts rarely, if ever, order total disclosure of documents, an important issue in exemption 3 cases is whether reasonably segregable portions can be disclosed. Courts cannot decide this vital issue, however, unless the Agency's affidavits divide documents into portions small enough to allow informed decisions to be made regarding segregability. Conclusory statements about the document as a whole do not give the court a basis on which to decide what parts are segregable. Moreover, since *in camera* inspections commonly result in the court's ordering the disclosure of segregable portions of the withheld document, the decision of whether to conduct such an inspection often determines whether any portions of documents will be released.

CONCLUSION

The need for secrecy in national security matters and the desire for public disclosure of government information clash when the CIA withholds documents under FOIA exemption 3. The difficulty courts face in developing a workable formula that protects intelligence information yet emphasizes the fullest responsible disclosure has led to disparate results both within and among the federal circuits. The inability of courts to resolve this inconsistency warrants the enactment of an amendment detailing the *de novo* review process for Exemption 3 cases. The suggested amendments to the FOIA, designed to provide courts with the guidance they need when reviewing Agency decisions under the Act, are sufficiently detailed to end

lic record than we believe to be prudent or required." *Intelligence Reform Act Hearings*, *supra* note 10, at 17. ACLU attorney Mark Lynch testified the year before that "in all of the many many cases which have been litigated so far under the Freedom of Information Act there is only one case wherein Judge Gerhardt Gesell ordered information that the CIA contended was classified to be released, and they were just a very few fragments of information in a document." *FOIA: CIA Exemptions*, *supra* note 10, at 79. The information in the case referred to by Mr. Lynch ultimately was not released. See Holy Spirit Ass'n for the Unification of World Christianity v. CIA, 636 F.2d 838 (D.C. Cir. 1980), *vacated as moot*, 455 U.S. 997 (1982).

141. See S. 1235, 97th Cong., 1st Sess., H.R. 4518, 97th Cong., 1st Sess.

142. *National Security*, *supra* note 12, at 712-13 (statement of Stanley Sporkin, CIA general counsel).

143. See *supra* note 140.

the conflicting de novo procedures, but not so overly specific as to abrogate proper judicial discretion in exemption 3 cases.

Gregory G. Brooker