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# 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

*Patrick E. Cole\**

"Secrecy is the first essential in the affairs of the State."<sup>1</sup>

Since the Freedom of Information Act (FOIA)<sup>2</sup> was enacted in 1966, the price of accountability has been high for the Central Intelligence Agency (CIA) and for other agencies that comprise the intelligence community.<sup>3</sup> Congress apparently overlooked the drawbacks of establishing an "open house" policy for the government documents of intelligence organizations, and this oversight has resulted in a clash of statutory duties. The National Security Act of 1947<sup>4</sup> requires the CIA to collect foreign intelligence, and the Central Intelligence Agency Act of 1949<sup>5</sup> requires the Director of Central Intelligence to protect sources and methods of intelligence.<sup>6</sup> The

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1 Armand Jean du Plessis Richelieu (1585-1642), the French statesman and chief minister to King Louis XIII.

2 5 U.S.C. § 552 (1976). The Freedom of Information Act (FOIA) is the chief federal law mandating openness in government files. Originally passed in 1966 and amended in 1974, 1976, and 1978, the FOIA provides that "any person" has a legal right to see all "agency records" except those exempted by subsection (b) of the Act.

3 The "intelligence community" refers to the group of federal agencies that collects and disseminates intelligence for the United States government. The agencies include the CIA, FBI, Department of Defense (Army, Navy, Air Force and Marines), Defense Intelligence Agency, National Security Agency, Department of Treasury, Drug Enforcement Administration, Department of Energy, and State Department.

4 50 U.S.C. § 403(d) (1976). The Act provides (emphasis added): "[I]t shall be the duty of the Agency . . . to correlate and evaluate intelligence relating to national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities. . . ."

5 50 U.S.C. § 403(d)(3) (1976).

6 See 50 U.S.C. § 403(a) (1976). Under the Central Intelligence Agency charter the Director of Central Intelligence has two functions. First, he is the primary advisor to the President and the National Security Council on national foreign intelligence matters. Second, he is the head of the CIA.

FOIA, however, creates an administrative burden on the CIA and on other agencies by draining their manpower resources to comply with numerous information requests. The CIA claims that this burden detracts from the agency's foreign intelligence mission.

Although the most sensitive documents can be exempted from disclosure, public access to government documents has had a chilling effect on agents and foreign intelligence services who provide information to the U.S. government.<sup>7</sup> The prospect of unintentional disclosure,<sup>8</sup> which exists as long as CIA records are subject to the FOIA, has led some allied intelligence services to stop assisting the United States intelligence community.<sup>9</sup> This problem makes it difficult for the Director of Central Intelligence to fulfill his statutory mandate.

Unless Congress further restricts the public scrutiny of intelligence files, America's foreign intelligence mission will continue to erode. Congress faces the challenge of granting relief to the agency while preserving the public's right to know. Simple solutions will not provide an effective remedy to this dilemma. Requiring a need to know,<sup>10</sup> for example, will only lead those anxious to secure an intelligence document to create a fictitious reason for requesting the information.

To explore the problems confronting the intelligence community, Part I of this article will examine the FOIA's purpose and underlying policy, the CIA's duty to collect foreign intelligence, and the Director of Central Intelligence's responsibility to keep foreign intelligence secret. Part II will discuss the strengths and limitations of the statutory exemptions frequently invoked to restrict the release of sensitive information. Part III will explain why simple solutions do not adequately prevent damaging access to intelligence files, and will discuss the proposal for which the CIA has lobbied and the efforts of the Reagan Administration to curb the flow of sensitive information. Finally, this article will present a proposal that reckons the competing interests of secrecy and openness to effectively restrict the release of information that could damage important intelligence contacts.

## I. The Origin of Freedom of Information

The practice of providing public access to information about government activities reflects a policy of zealously protecting a free

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7 See notes 44-49 *infra* and accompanying text.

8 See note 68 *infra* and accompanying text.

9 See note 48 *infra* and accompanying text.

10 See notes 131-32 *infra* and accompanying text.

press. Statesmen like Thomas Jefferson believed that a free press was indispensable to democracy. Jefferson stated:

The people are the only censors of their governors; and even their errors will tend to keep those to the true principles of their institution. . . . The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our government being the opinion of the people the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate to prefer the latter.<sup>11</sup>

From this Jeffersonian principle emerged the idea that people have a right to know about government affairs.

While the news media largely provided the accountability which Jefferson had cherished, a new form of accountability between constituents and bureaucracies was initiated with the passage of the Administrative Procedure Act (APA),<sup>12</sup> the FOIA's predecessor. The APA was enacted in part because of President Franklin D. Roosevelt's fear that administrative agencies might evolve into a fourth branch of government. Administrative agencies, he remarked, performed not only administrative work, but also judicial work for which there was no express constitutional provision.<sup>13</sup> Some years after the APA's passage, Congress learned that the Act was being used to conceal information from the public. The APA contained broad ambiguous language that could be interpreted to allow the

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11 Letter from Thomas Jefferson to Lieutenant Colonel Edward Carrington (January 16, 1787), reprinted in *A JEFFERSON PROFILE AS REVEALED IN HIS LETTERS* 44 (S. Padover ed. 1956). James Madison made a similar observation about the consequences of a lack of public information: "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 9 *THE WRITINGS OF JAMES MADISON* 103 (Hunt ed. 1910), quoted in *EPA v. Mink*, 410 U.S. 73, 110-11 (1973) (Douglas, J., dissenting). For more views on the right to know, see Note, *Access to Government Information and the Classification Process—Is There a Right to Know?*, 17 N.Y.L.F. 814, 815-18 (1971). In Madison's view, the Constitution gave no authority to Congress to exercise power over the press. See generally Horton, *The Public's Right To Know*, 3 N.C. CENT. L.J. 123 (1972); Kutner, *Freedom of Information: Due Process of the Right to Know*, 18 CATH. LAW. 50 (1972) (discussion of the right to know with analysis of Madison's free speech concerns as written in his *Federalist Papers*); Note, *The Constitutional Right to Know*, HASTINGS CONST. L.Q. 109 (1977).

12 Pub. L. No. 79-404, 60 Stat. 237 (1946).

13 See H.R. REP. NO. 1980, 79th Cong., 2d Sess. 1, reprinted in 1946 U.S. CODE CONG. & AD. NEWS 1195.

withholding of information.<sup>14</sup>

The reflections of Jefferson<sup>15</sup> and James Madison,<sup>16</sup> and the Congressional vision of an open government finally became federal law when President Johnson signed the Freedom of Information Act on July 4, 1966.<sup>17</sup> The FOIA greatly increased public accountability of bureaucracies. The Act requires agencies to disclose government records by either publishing the documents,<sup>18</sup> making them available for inspection,<sup>19</sup> or releasing the documents as requested. Congress abandoned the APA's restriction that only a person who is properly and directly concerned may request information. Instead, the FOIA provides that "any person" could obtain public records.<sup>20</sup> Congress improved the old law's vague exceptions<sup>21</sup> by providing nine clearly defined exemptions.<sup>22</sup> A citizen who disagrees with an agency's decision to exempt information from disclosure may appeal to a federal

14 H.R. REP. NO. 1497, 89th Cong., 2d Sess. 5, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2419, 2421. Under § 3 of the Administrative Procedure Act, the government could withhold information if the information is related to internal management of the agency, if secrecy is required "in the public interest," or "for good cause found." The House reaction to this was:

Neither in the [APA] nor its legislative history are these broad phrases defined, nor is there a recognition of the basic right of any person—not just those special classes "properly and directly concerned"—to gain access to the records of official Government actions. Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records.

H.R. REP. NO. 1497 at 6, 1966 U.S. CODE CONG. & AD. NEWS at 2422.

One of the main problems with the APA was that an agency decision to refuse to release a requested document was a final decision. *See Note, The Freedom of Information Act: Shredding the Paper Curtain*, 47 ST. JOHN'S L. REV. 694, 696 (1973).

15 *See* note 11 *supra* and accompanying text.

16 *See* note 11 *supra*.

17 The Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383 (1966).

18 5 U.S.C. § 552(a)(2) (1976).

19 5 U.S.C. § 552(a)(3) (1976).

20 *Id.* Congress intended to provide for the widest disclosure possible.

21 *See* note 14 *supra* and accompanying text.

22 The FOIA provides: This section does not apply to matters that are—

(1)(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;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), 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

district court.<sup>23</sup>

### A. FOIA's Policy of Disclosure

Passage of the FOIA initiated a policy of disclosure, and only specific exemptions would allow government agencies to withhold information. Although a citizen may request any document, the nine statutory exemptions protect various types of information from disclosure. Six years after the FOIA was passed, Senator Edward Kennedy felt compelled to clarify that the statute's primary goal was not to exempt material from disclosure.

Congress' overriding concern in passing the Freedom of Information Act—FOIA—was that disclosure of information be the general rule, not the exception. The act reversed previous law and practice in that it provided that all persons have equal rights of access and that the burden be placed on government to justify refusal to disclose information, not the person requesting it. Finally, the act allowed persons wrongfully denied access to documents the right to seek injunctive relief in the courts.<sup>24</sup>

The Supreme Court has similarly maintained that the FOIA requires the broadest possible disclosure "to ensure an informed citizenry, vital to the functioning of a democratic society."<sup>25</sup>

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particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source. . . ;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1976).

<sup>23</sup> See 5 U.S.C. § 552(a)(4)(B) (1976).

<sup>24</sup> *Freedom of Information: Hearings on S. 1142 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

<sup>25</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). See also *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976); *EPA v. Mink*, 410 U.S. 73, 79 (1973). Other federal courts also apply this policy. See, e.g., *Robbins Tire & Rubber Co. v. NLRB*, 563 F.2d 724 (5th Cir. 1977), *rev'd*, 437 U.S. 214 (1978) (attempt to have the NLRB turn over

*NLRB v. Sears, Roebuck & Co.*<sup>26</sup> illustrates the FOIA's disclosure policy. In *Sears*, the NLRB sought to set aside a federal district court order directing the NLRB to release certain documents known as "Advice Memoranda." The district court had ruled that the memoranda were expressions of legal and policy decisions already adopted by the agency and constituted "final opinions" and "instructions to staff that affect a member of the public," all of which could be disclosed under the FOIA.<sup>27</sup> The Supreme Court declared that the FOIA was "clearly intended to give *any* member of the public as much right to disclosure as one with a special interest therein . . . ."<sup>28</sup> Accordingly, a person with no urgent need for the information has as much right to request the information as one who is the subject of the document.<sup>29</sup>

To enhance the objective of informing the public about agency action, the courts construe the Act broadly to encourage as much disclosure as possible. The Supreme Court in *EPA v. Mink*<sup>30</sup> explained that the reason for encouraging maximum disclosure was to ensure that government officials would not shield information of

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copies of written statements of all those witnesses who would be called to testify in an unfair labor practice proceeding); *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (plaintiff requests documents relating to former acting FBI Director L. Patrick Gray's involvement in the Watergate scandal); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 941 (D.C. Cir. 1975) (operators of a multi-family housing unit attempted to enjoin HUD from disclosing financial information); *Theriault v. United States*, 503 F.2d 390 (9th Cir. 1974), *on remand*, 395 F. Supp. 637 (C.D. Cal. 1975) (widow of civilian Air Force employee sought documents relating to her husband's death); *LaMorte v. Mansfield*, 438 F.2d 448 (2d Cir. 1971) (dispute over requested transcript of testimony); *Nationwide Mut. Ins. Co. v. Friedman*, 451 F. Supp. 736 (D. Md. 1978) (government contractor attempts to prevent disclosure of information); *Stern v. Richardson*, 367 F. Supp. 1316 (D.D.C. 1973) (FBI documents related to counterintelligence did not fall under the exemptions).

26 421 U.S. 132 (1975). *See also* *NLRB v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977) (NLRB appeals from an order to disclose affidavits obtained from employees during investigation of unfair labor practice charges).

27 421 U.S. at 137-38.

28 *Id.* at 149 (emphasis added).

29 In *Mitsubishi Electric Corp. v. Dept. of Justice*, 39 Ad. L.2d (P & F) 1133 (D.D.C. 1976), the court expressed the need to weigh heavily the public interest in releasing information. Mitsubishi made a request for certain documents in the possession of the Foreign Commerce Section of the Antitrust Division of the Department of Justice. The agency records were questionnaire responses to a survey of patent and know-how practices of approximately 100 U.S. corporations conducted within the past eight years. The Department of Justice denied the request on the basis of exemptions 4 and 7(A) of the FOIA. The court ruled that the FOIA is not for the benefit of private litigants and should not serve as a tool for discovery. Instead, the FOIA is "fundamentally designed to inform the public about the agency action." *Id.* at 1141.

30 410 U.S. 73 (1973).

public interest.<sup>31</sup> This policy of encouraging maximum disclosure often clashes with government's statutory duty to collect foreign intelligence and maintain secrecy to further national security interests.

### B. *The CIA's Statutory Duty To Collect Foreign Intelligence*

The Japanese surprise attack on Pearl Harbor at the beginning of World War II taught U.S. defense officials an important lesson: national security means possessing strong intelligence-gathering capabilities. Historians point to a lack of communication between key government officials and to a lack of centralization in the intelligence-gathering process as the cause of the surprise.<sup>32</sup>

After the Japanese attack on Pearl Harbor, American government officials sought to eliminate deficiencies in the nation's intelligence capabilities. Before the end of World War II, President Harry S. Truman began reorganizing the intelligence community by issuing Executive Order 9,621, which dissolved the Office of Strategic Services (OSS).<sup>33</sup> Intelligence matters at that time were handled by the State and War Departments. After the rise and fall of other intelligence organizational schemes, Congress in 1947 passed the National Security Act,<sup>34</sup> establishing a charter for the CIA.

The National Security Act authorizes the CIA to collect and assess foreign intelligence, and to advise and make recommendations to the National Security Council.<sup>35</sup> Other agencies, such as the National Security Agency, Federal Bureau of Investigation, and Drug Enforcement Administration, collect information for the intelligence community.<sup>36</sup> The Departments of State, Treasury, Energy, and Defense also provide intelligence.<sup>37</sup> The Act requires the Director of Central Intelligence to protect intelligence sources and methods. This statutory duty is crucial because significant pieces of intelli-

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31 *Id.* at 80. See also S. REP. NO. 813, 89th Cong., 1st Sess. 3 (1965): "It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."

For a general treatment on the scope of the exemptions, see Note, *The Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177, 206-07 (1973). The author concludes that the exemptions are too general to provide guidance on what the agencies can withhold.

32 See J. FLYNN, *THE TRUTH ABOUT PEARL HARBOR* 31-33 (1945); G. MORGENSTERN, *PEARL HARBOR, THE STORY OF THE SECRET WAR* 260-63 (1947).

33 Exec. Order No. 9,621, 3 C.F.R. 431 (1945).

34 50 U.S.C. § 403 (1976).

35 50 U.S.C. § 403(d)(1)-(2) (1976).

36 *Id.*

37 See 50 U.S.C. § 403(e) (1976). This provision gives the Director of Central Intelligence the power to inspect the intelligence of other agencies if it relates to national security.



gence, collected secretly, are effective only when kept secret. The Act orders the Director of Central Intelligence to protect the identity of overseas intelligence officers and shield details of intelligence operations.<sup>38</sup>

The Central Intelligence Agency Act of 1949,<sup>39</sup> which more clearly defined the agency's internal housekeeping procedures, reiterated the Director's statutory duty to keep intelligence safe from disclosure. Both the CIA charter and the CIA Act serve as grounds by which the agency can withhold information under section (b)(3) of the FOIA.<sup>40</sup>

### C. *Effect of FOIA's Disclosure Policy on the Intelligence Community*

The passage of the FOIA has resulted in disclosures about the CIA that otherwise would not have been made public. Both individuals and the press have used the Act frequently to learn about past CIA operations. For example, a reporter for the Northwestern University campus daily newspaper requested information under the FOIA and then alleged that the CIA had conducted spying on the suburban Chicago campus.<sup>41</sup> Similarly, Syracuse University filed suit against the CIA for its reluctance to release information on covert activities.<sup>42</sup> In another incident, an FOIA request made by the *Los Angeles Times* revealed that former Attorney General Robert F. Kennedy had ordered the FBI to wiretap the phone calls of the late civil rights leader, the Rev. Dr. Martin Luther King, Jr.<sup>43</sup>

Although the disclosure of past operations does not substantially damage the CIA, access to past operations has damaged the agency's relationship with some foreign contacts, and has imposed burdens on the agency's manpower. Additionally, attention has focused recently on the impact of foreign FOIA requests on the CIA. These problems will be considered below.

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38 50 U.S.C. § 403(d)(3) (1976).

39 50 U.S.C. § 403(g) (1976).

40 Since the CIA has authority to classify information under Executive Order No. 12,356, the information can be exempt under 5 U.S.C. § 552(b)(1), which exempts documents classified pursuant to executive order. Information that would release sources and methods of intelligence would be exempt.

41 See Baksys, *The CIA on Campus*, *The Daily Northwestern* (Northwestern University), May 25, 1979, at 1, col. 1.

42 *The Syracuse New Times*, June 20, 1979, at 2, col. 1.

43 See Nelson, *Documents Reveal CIA Spied on Civil Rights Leader, Martin Luther King*, *L.A. Times*, Feb. 20, 1980, § 1, at 4, col. 1.

## 1. FOIA Evaporates Foreign Contacts

The CIA's most compelling ground for relief from the FOIA provisions is that the flow of intelligence information to the public hampers the CIA's ability to gather information abroad. After the intelligence is collected, the nation's security or the existence of a covert action can remain protected only if the information remains secret. The United States relies heavily on intelligence from foreign sources and from allied intelligence services.<sup>44</sup> According to former Deputy Director of Central Intelligence, Frank C. Carlucci, the most serious problem confronting the intelligence community is convincing foreign contacts who are unwilling to provide information to the government that their identity will not be revealed.<sup>45</sup>

The essential ingredient for cooperation with an allied intelligence service is trust. An intelligence officer must establish a contractual relationship with a person overseas. The job is not a simple one, as Carlucci explained to the House Permanent Select Committee on Intelligence:

This is not an easy task nor is it quickly accomplished. The principal ingredient in these relationships is *trust*. To build a relationship which in many cases entails putting one's life and that of one's family in jeopardy to furnish information to the U.S. government is a delicate and time-consuming task. Often it takes years to convince an individual that we can protect him. Even the slightest problem can disrupt this relationship.<sup>46</sup>

Because most agents live in societies where government secrecy prevails,<sup>47</sup> many foreign agents fail to understand the purpose of disclosure demanded by the FOIA. Thus, it is difficult to convince foreign agents that, in light of this law which makes intelligence accessible to the public, they will never find that a U.S. newspaper or magazine has published information they provided to the U.S. government.

Foreign concern for protecting revelation of the source of information has prompted some foreign intelligence services to flatly refuse to provide information to the CIA and the FBI. Because of the FOIA, the foreign agent believes that he cannot get absolute assurance that nothing will be made public which could conceivably be

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<sup>44</sup> See generally *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. (1981) [hereinafter cited as *Testimony of Carlucci*].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 25.

<sup>47</sup> *Id.*

traced back to his doorstep. In numerous cases, assurances have failed to preserve crucial intelligence contacts.<sup>48</sup> Regardless of whether the intelligence community believes it can keep a secret, "in the final analysis, it is their [foreign agents'] perception—not ours—which counts."<sup>49</sup>

## 2. Administrative Burdens Caused by the FOIA

The demands of public access seriously drain the CIA's manpower. The CIA receives about 16 requests per day,<sup>50</sup> or over 4,100 FOIA and Privacy Act requests per year. From 1975 to 1978, the agency logged 19,889 total requests; 10,230 of these were logged under FOIA.<sup>51</sup> Agency officials see little relief in sight, and anticipate that the agency will receive some 4,000 to 5,000 requests per year through 1983.<sup>52</sup> Other agencies have experienced similar difficulties with the public demand for information. In 1975, for example, the Justice Department received 30,000 requests for information under the FOIA.<sup>53</sup>

In an attempt to meet this public demand, the CIA hired 65-70 persons to answer FOIA requests.<sup>54</sup> Hundreds of other employees

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48 Frank Carlucci told Congress:

A recent approach made to a U.S. businessman with good access to foreign military information was initially rejected. The potential source interrogated the CIA officer at length, asked about disclosure policies, the FOIA and its requirements, CIA responsibilities under disclosure statutes, guarantees that CIA could really protect his information from disclosure, the effects of release by CIA of information to Congress, and the ability, under the FOIA or otherwise, of his competitors to uncover information passed to CIA by his company. An agreement was finally reached where CIA was given limited access to one person, restricted to one very narrow area of information. We are convinced that this man's fear of disclosure caused this severe limitation on what might otherwise have been a considerable flow of important intelligence information.

Over the past few years this dilemma has prompted other important U.S. sources of information to discontinue their cooperation with U.S. intelligence.

*Testimony of Carlucci, supra* note 44, at 27.

49 *Testimony of Carlucci, supra* note 44, at 27.

50 *Testimony of Carlucci, supra* note 44, at 29.

51 Report on the Central Intelligence Agency's Experiences in Administering the Freedom of Information Act and Related Programs—Burdens and Other Problems Resulting Therefrom 2 (unpublished internal memorandum) [hereinafter cited as CIA/FOIA Report]. In this declassified CIA memorandum, the Agency reports on how the FOIA has affected the CIA's effort to make information available to the public.

52 *Id.*

53 See Lardner, *Freedom of Information Act: Costly, Much Used*, Washington Post, July 25, 1976, at A4, col. 1. During 1975, the Defense Department expenditures in complying with the FOIA alone amounted to about \$5.9 million. During the summer of 1975, the CIA received 6,609 FOIA requests.

54 CIA/FOIA Report, *supra* note 51, at 2.

contribute their services and time on a part-time basis to answer the public demand for information.<sup>55</sup> This expenditure of manpower, the CIA claims, has diverted the agency's attention from its foreign intelligence-gathering duties. Although the agency might increase the staff of the Information and Privacy Department to meet public demand more efficiently, even a doubling of the present staff would not immediately eliminate the backlog of requests. The CIA questions whether the FOIA process of chasing paper for those trying to frustrate the agency results in the most beneficial use of its time. To emphasize this problem, agency officials reported that in one incident, the CIA was forced to hire one person on a full-time basis for 17 months to handle the demands of a single requester.<sup>56</sup>

As a result of public demand for information, the agency's cost of public accountability increased from \$1.4 million in 1975 to \$2.9 million in 1978.<sup>57</sup> Other agencies in the intelligence community have experienced even higher costs. During 1975, for example, the Defense Department recorded expenditures of \$5.9 million alone to comply with FOIA requests.<sup>58</sup> In 1976 the Defense Department spent \$4.7 million and had 90 employees committed to handling FOIA requests.<sup>59</sup> In 1977, then FBI Director Clarence Kelley spent \$6.5 million to summon 400 agents to Washington, D.C. to eliminate a backlog of FOIA requests involving some 10 million pages of material.<sup>60</sup> At that time, nearly 379 persons were employed at FBI headquarters, researching 16,000 appeals per year at an annual cost of \$9 million.<sup>61</sup>

The tremendous backlog that has developed since the FOIA was enacted further complicates the FOIA dilemma. Although the backlog fluctuates from week to week, little progress has been made in reducing the number of unanswered requests. For instance, during April 1979, the CIA faced a backlog of 2,700 requests.<sup>62</sup>

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55 *Id.*

56 *Testimony of Carlucci, supra* note 44, at 30. Frequently, authors who are writing books on intelligence topics make several requests. Carlucci revealed that over four man-years of work have been spent by the agency to handle the requests of Phillip Agee, a former employee who has exposed CIA operations in his books. *Id.*

57 CIA/FOIA Report, *supra* note 51, at 2.

58 Lardner, *The Freedom of Information Act: Costly, Much Used*, Washington Post, July 25, 1976, at A4, col. 1.

59 *Id.*

60 *FBI to Use 400 Agents in Effort to Clear Backlog of Inquiries About Files*, N.Y. Times, Mar. 18, 1977, at A11, col. 5.

61 *Id.*

62 *Testimony of Carlucci, supra* note 44, at 27. The backlog of requests fluctuates during any given week. In April 1979, for example, Carlucci reported that the backlog was at 21,700

In addition to problems of backlog, the agency faces difficulties in meeting a ten day deadline for answering requests. The law requires each agency to produce the document requested or to claim an exemption within ten working days after it receives a letter.<sup>63</sup> Since requests are handled on a first-in-first-out basis, the sizeable backlog in requests makes fulfilling this requirement virtually impossible. A backlog produces two complications. First, because the agency's failure to reply within the deadline can be construed as a refusal of the requester's demands,<sup>64</sup> the requester can then file for an administrative appeal. Second, the agency—in view of its backlog—can ask for an extension for answering and handling an FOIA request.<sup>65</sup> If extensions are regularly granted, backlogs can only be expected to increase. During January 1980, the CIA had 2,800 unanswered requests and 300 unanswered appeals.<sup>66</sup>

The review of documents for public disclosure requires considerable time. Because access to information is granted on a need-to-know basis, files at the CIA and other branches of the intelligence community are decentralized. Once information is retrieved, it is then cautiously reviewed by the Information and Privacy Staff. If the record being sought concerns foreign intelligence, for example, each document must be reviewed by persons on at least two levels of authority.<sup>67</sup> If national security information is to be protected at all costs, this review cannot be performed hastily in order to meet a statutory deadline. Thus, under the present law it is difficult for the Director of Central Intelligence to fulfill his statutory duty to protect sources and methods of intelligence to the best of his ability. Even when due care is applied, information can still be inadvertently released. For example, in 1978, the CIA mistakenly released a classi-

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requests. According to a spokesperson for the CIA's Information and Privacy Staff, the backlog had leveled off to 2,494 requests during the week of July 19-25, 1979. During that week, 79 new FOIA cases were begun while 53 cases were closed. Four requesters had made appeals from the CIA's denial to release documents. Eighty-eight persons were involved in answering and processing FOIA requests during that week.

63 See 5 U.S.C. § 552(a)(6)(A)(i) (1976).

64 See 5 U.S.C. § 552(a)(6)(C) (1976).

65 *Id.*

66 CIA/FOIA Report, *supra* note 51, at 2-3. *But see* *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). The D.C. Circuit Court of Appeals said that an agency which is deluged with a large volume of requests would be experiencing "exceptional circumstances." The court observed that this factor could allow the agency to have additional time beyond the ten day limit imposed by § 552(a)(6)(A)(i) of the Act. 547 F.2d at 610-12.

67 CIA/FOIA Report, *supra* note 51, at 2-3.

fied report which stated that Israel had obtained nuclear weapons.<sup>68</sup>

### 3. Foreign Access

Requests by foreign governments have alerted the intelligence community to the possible dangers that could result from releasing intelligence documents to persons who may have been hostile to the United States government. Mystery engulfs information requests because the agency does not know the requester's intent. If past secrets are sought, the agency rarely knows how much information the requester presently possesses to aid in identifying what might be a secret.

In 1978, the agency was alerted to the dangers of foreign access when it released a declassified secret memorandum on the Agency and its academic relations to the librarian of the Polish embassy in Washington, D.C.<sup>69</sup> This memorandum revealed details of how the CIA should defend its relationship with the academic community. The document recommended that the universities defend their relationship with the CIA by relating work for the agency to traditional

68 Flaika, *CIA's Top Secret "Mistake" on Israel and the Bomb*, *The Washington Star*, Jan. 28, 1979, at 1, col. 1.

69 Agency-Academic Relations, Memorandum for R.J. Smith, Deputy Director of Intelligence for the Central Intelligence Agency (Feb. 25, 1969). This secret document, which was later declassified, was released to Margaret Romaniuk, the librarian of the Polish Embassy in Washington, D.C., after she had sent the following letter to the Information and Privacy Coordinator of the CIA:

AMBASADA POLSKIEJ RZECZYPOS POLITEJ LUDOWEJ W  
WASZYNGTONIE

Embassy Of the Polish People's Republic  
2640 16th Street, N.W.  
Washington, D.C. 20009  
12 15.1978

Information Privacy Coordinator  
C.I.A.  
Washington, D.C. 20505

Dear Sir,

I would like to obtain on the basis of the Freedom of Information Act the memorandum by Earl C. Bolton entitled "Agency-Academic Relations."

I read about the memorandum in the *New York Times* of November 22 where it is stated that it had been declassified [sic] early this year.

I called your Agency in November and was advised to write this letter to you in order to be sent Mr. Bolton's memorandum.

Sincerely,  
Margaret Romaniuk (signed)  
Librarian

On March 13, 1979, George W. Owens, CIA Information and Privacy Coordinator, sent a copy of the memorandum to Ms. Romaniuk.

university functions and “long established academic values.”<sup>70</sup> The document also stated that an apology can best be made by “some distant academic who is not under attack” in a “respectable” publication of general circulation. The memorandum recommended that the CIA might wish to offer off-campus leased space to scholars doing work for the agency.<sup>71</sup> Another proposal in the memorandum advised scholars to use substitute phrases such as “limited access research,” instead of labelling classified research projects as “secret” and “confidential” or “classified.”<sup>72</sup> To improve the CIA’s image, the document urged that all recruiting be conducted off campus and that all visits by CIA representatives be made during the summer months, preferably after the last issue of the student paper has been printed.<sup>73</sup>

The CIA was probably concerned about the librarian’s ties to the Polish government, although nothing could be done if ties existed. Under the language of the Act, Ms. Romaniuk need not even declare her reasons for seeking the document. The CIA’s concern centered around how the Polish embassy might use the information. The Polish government may have wished to identify a classified research project at an American university. The Polish government could not learn anything directly from the document, since any classified information would be exempted from disclosure. It is possible, though, that the librarian was making a request on behalf of another foreign intelligence service or was involved in a series of requests to piece together information on aspects of CIA academic relations that were not released in the memorandum.<sup>74</sup> Certainly, if the Polish government learned of a research project labeled “limited access research,” it could identify a past CIA classified research project.

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70 Agency-Academic Relations 1 (Aug. 5, 1968) (unpublished CIA memorandum). This secret document, now declassified, has deleted the name of the person for whom it was written to protect the writer’s identity. Information that is classified or which will identify sources and methods of intelligence is also deleted, thus “sanitizing” the CIA documents released under FOIA.

71 *Id.* at 3.

72 *Id.* at 4.

73 *Id.* at 6.

74 It is not clear from Ms. Romaniuk’s letter exactly why she was seeking this document. She merely expressed a general interest in the memorandum. Since the requested documents on their face bear no relation to the Polish government, the requester may have been trying to learn about a past CIA research project.

D. *Judicial Enforcement of Disclosure Policy to Intelligence Agencies: Not in the Best Interests of Preserving Essential Secrecy*

The courts have made no exceptions in applying the FOIA's disclosure policy to the CIA and other components of the intelligence community. In ensuring the widest possible disclosure, the courts have required intelligence agencies, as well as others, to release segregable portions of classified documents. In *Florence v. Department of Defense*,<sup>75</sup> the plaintiff brought an action under the FOIA to obtain technical records produced by the Defense Documentation Center. The records were classified as "confidential," although most of the reports in the bulletin were actually unclassified. The Court held that although a document may be classified according to regulations set by Executive Order, any portion of the information which is unclassified must be disclosed to the requester.<sup>76</sup> The court in *Florence* may have released clues about information damaging to national security by disclosing the documents that were unclassified. Even a simple request can give a requester a hint about the nature of the classified information, depending on what he or she may already know about the file.

Because the Act places no restrictions on an individual's reason for seeking a document, it is difficult for the intelligence community to thwart the attempts of requesters who seek to learn clues about classified information. Even when the requester's need for the information is not legitimate, this factor still has no impact on the agency's decision. In *Baker v. CIA*,<sup>77</sup> the plaintiff and five other CIA employees were fired from the agency because of a "surplus" of employees. The discharged employees made an FOIA request for CIA hiring regulations and vacancy notices. The court ruled that the requesters' interest and need for seeking this information was irrelevant, but still ordered the CIA to grant the plaintiffs the documents. Similarly, the agencies could not deny information on the ground that one's purpose in making the request is for espionage.

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75 415 F. Supp. 156 (D.D.C. 1976).

76 *Id.* at 157. See also *Halperin v. Department of State*, 565 F.2d 699, 705-06 (D.D.C. 1977). In *Halperin*, the court of appeals ruled that the lower court correctly held that deleted portions of a transcript of a press conference, although classified confidential, could not be exempted, because they were not properly classified under (b)(1)'s criteria. However, because the State Department believed that releasing portions of the transcript would gravely damage national security, the court remanded the case to the district court to determine whether the alleged damage would be so great as to justify the extraordinary step of prohibiting the release.

77 425 F. Supp. 633 (D.D.C. 1977), *aff'd*, 580 F.2d 664 (D.C. Cir. 1978).



*Cooper v. Department of Navy of United States*<sup>78</sup> presents another example of how courts enforce the FOIA's disclosure policy. An attorney who represented the family of a person killed in a Marine Corps helicopter brought an action against the Department of the Navy for disclosure of a judge advocate general's manual investigation report and aircraft accident safety investigation. The court declared that a need to know is not a criterion for disclosure under the FOIA.<sup>79</sup> If everyone can have the information, then anyone can as well.

### III. Exemptions Generally Protect the Most Sensitive Documents But Fail to Provide Absolute Protection

Although public access to files has damaged foreign intelligence operations, the FOIA exemptions protect the most sensitive intelligence documents. The Act's requirement that an FOIA request must "reasonably" describe the records sought provides further relief from blanket requests.<sup>80</sup> Without this clause, government agencies would have an even greater backlog of requests, many of which would be impossible to fulfill. For example, the United States Court of Appeals for the Ninth Circuit in *Marks v. United States (Dept. of Justice)*,<sup>81</sup> denied a man's requests for all FBI files and documents maintained under his name, stating that sweeping unspecific requests under the FOIA are not permissible.

#### A. *The National Security Exemption*

The first exemption listed in section (b) of the FOIA says that the Act does not apply to classified national security information.<sup>82</sup>

78 558 F.2d 274 (5th Cir.), *cert. denied*, 444 U.S. 926 (1977). *See also* *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 466 F.2d 345 (D.C. Cir. 1972), *rev'd*, 415 U.S. 1 (1974); *Mercy Hospital, Iowa City, Iowa v. NLRB*, 449 F. Supp. 594 (S.D. Iowa 1978) (hospital, denied discovery of written statements by witnesses, not entitled to preliminary injunction enjoining NLRB from calling those witnesses, absent showing of irreparable harm); *Kanter v. IRS*, 433 F. Supp. 812 (N.D. Ill. 1977) (persons indicted for conspiring to defraud the U.S. government sought disclosure of certain documents).

79 558 F.2d at 276.

80 5 U.S.C. § 552(a)(3)(A) (1976).

81 578 F.2d 261 (9th Cir. 1978).

82 5 U.S.C. § 552(b)(1) (1976). The FOIA does not apply to 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.* § 552(b)(1).

The basis for withholding information is Executive Order No. 10,501, which established three degrees of classification ("top secret," "secret," and "confidential"). This classification much improved President Truman's Executive Order No. 10,290, which defined categories imprecisely, delegated unrestricted authority to classify, and failed to establish classification

The original Act passed by Congress in 1966 devoted little emphasis to national security information. The original law exempted material "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy."<sup>83</sup> When the Act was amended in 1974, the language of the (b)(1) exemption was revised; the phrase "required to be classified by Executive Order" in the old (b)(1) exemption was changed to information which was "authorized" to be classified under the criteria of an Executive Order. This meant that if a court chose to review a classification determination, including examination of the records *in camera*, the court may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive Order.<sup>84</sup> The previous language established a standard which was applied when a document was marked "top secret" or "confidential," according to the provisions of past Executive Orders 10,501,<sup>85</sup> 11,652,<sup>86</sup> and 12,036.<sup>87</sup>

The most recent Executive Order on classification (No. 12,356)<sup>88</sup> sets out three categories in which documents can be classified. "Top secret" classification applies to information that, if released, could be expected to cause exceptionally grave damage to national security.<sup>89</sup> "Secret" classification applies to information that could reasonably

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procedures. As a result of Truman's order, much information was classified, and declassification rarely occurred. See Note, *National Security Information Under the Amended Freedom of Information Act: Historical Perspectives and Analysis*, 4 HOFSTRA L. REV. 759, 765-66 & n.38 (1976).

The President derives his exclusive control over foreign affairs matters by authority of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See Note, *Executive Privilege and the Freedom of Information Act: The Constitutional Foundation of the Amended National Security Exemption*, 1976 WASH. U.L.Q. 609, 637-45 (Presidential powers over national security information and related matters). For a discussion of Executive Order No. 11,652, the predecessor of Executive Order No. 12,065, see Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401, 407-22 (1976).

83 Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966).

84 1974 U.S. CODE CONG. & AD. NEWS 6267, 6273; Attorney General's 1974 FOIA Amendments Memorandum, at 1. In *EPA v. Mink*, 410 U.S. 73, 81 (1973), the court ruled that subsection (b)(1) exempts materials specifically required by Executive Order to be kept secret and that classification of material under Executive Order is sufficient to protect documents from disclosure. At the time of the *Mink* case, the classification procedures were governed by Executive Order. Executive Order No. 10,501, 3 C.F.R. 280 (1970), was superseded by Executive Order No. 11,652, 3 C.F.R. 375 (1973).

85 Exec. Order No. 10,501, 3 C.F.R. 280 (1970).

86 Exec. Order No. 11,652, 3 C.F.R. 375 (1973).

87 Exec. Order No. 12,036, 3 C.F.R. 112 (1979).

88 Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982). This Executive Order by President Reagan on April 2, 1982, replaced Executive Order No. 12,065. This new order did not alter the definitions of "top secret," "secret," and "confidential."

89 47 Fed. Reg. at 14,874.

be expected to cause serious damage to the national security.<sup>90</sup> "Confidential" classification applies to information that could be expected to cause identifiable damage to national security.<sup>91</sup>

Section 1.3 of this Executive Order provides guidance for the intelligence community on what can and cannot be considered for classification. Information cannot be classified unless it involves: (a) military plans, weapons or operations; (b) foreign government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States; or (e) scientific, technological, or economic matters relating to the national security.<sup>92</sup> Information received from a foreign intelligence service can also be protected by the (b)(1) exemption.

Executive Order 10,501 enabled the government to successfully withhold sensitive information. In *Epstein v. Resor*,<sup>93</sup> the Department of the Army refused a Stanford University historian's request to release documents concerning the forcible repatriation of displaced Soviet citizens. The document was classified as "top secret" under Executive Order 10,501. The Ninth Circuit Court of Appeals affirmed the Army's refusal.<sup>94</sup> In *Maroscia v. Levi*,<sup>95</sup> details about CIA operations classified as "secret" under provisions of Executive Order 11,652 were exempt from disclosure because the documents would name the foreign country and would identify the foreign intelligence sources. Executive Orders have been instrumental in refusing FOIA

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90 *Id.* at § 1.1(a)(2).

91 *Id.* at § 1.1(a)(3).

92 *Id.* at § 1.3(a)(1)-(6).

93 296 F. Supp. 214 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

94 421 F.2d 930, 933 (9th Cir. 1970). For further discussion of this decision, see Epstein, *Epstein v. Resor or the Emasculation of the Freedom of Information Act*, 7 LINCOLN L. REV. 82 (1971). In its amicus curiae brief, the ACLU objected to the Army's decision to keep the document, arguing, "The judgment must be reversed because the trial court applied an unauthorized and overly restrictive test of judicial review of an agency's claim of exemption and failed to discharge statutory responsibility to determine whether the records requested were improperly withheld." *Id.* at 95. The brief strongly rejected the Army's claim of the exemption. See also Recent Cases, *File Classified "Top Secret" Is Within National Security Exemption from the Act and Is Not Obtainable Unless the Classification Is Arbitrary and Unreasonable*, 83 HARV. L. REV. 928 (1970).

95 569 F.2d 1000 (7th Cir. 1977). The plaintiff in this case requested all FBI files concerning himself. After some correspondence, FBI Director Clarence Kelley informed the plaintiff that his request had been completed. One document that had originated with the CIA but was in the FBI's possession was withheld.

In *Lesar v. Department of Justice*, 455 F. Supp. 921 (D.D.C. 1978), materials on Martin Luther King's assassination classified in strict compliance with Executive Order No. 11,652 to protect the identity of confidential sources were exempt from disclosure.

demands for CIA financial records<sup>96</sup> and Department of Defense estimates of Soviet naval force levels.<sup>97</sup> In *Aspin v. Department of Defense*,<sup>98</sup> the court ruled that past release of confidential information does not bind the executive branch if further release would jeopardize national security.

The court in *Ray v. Turner*<sup>99</sup> underscored section (b)(1)'s applicability to information regarding the CIA's relationship with a foreign intelligence service. The plaintiff brought a suit under the FOIA and demanded that the agency disclose CIA documents concerning him and others. The court held that if the information in the documents originates from or reveals a relationship with a foreign intelligence organization, the documents fall within the (b)(1) exemption of the FOIA. Although the information from the foreign intelligence service was not specifically classified by Executive Order 12,065, it could still be exempted under part (a) of section (b)(1).<sup>100</sup>

### 1. Shortcomings of the (b)(1) Exemption in Ensuring Secrecy

Despite section (b)(1)'s ability to protect information which clearly qualifies as national security information, the exemption does not always guarantee that the information will be kept secret. First, an inability to comply with the procedural criteria<sup>101</sup> of Executive Order 1,256 could result in the disclosure of classified information. Although some courts are reluctant to release an agency's documents merely because the agency failed to comply with the procedural formalities, one judge suggested that release is appropriate when formalities of the exemption process are not satisfied.<sup>102</sup> In *Alfred A. Knopf, Inc. v. Colby*,<sup>103</sup> for example, the Fourth Circuit did not hesitate to release documents which failed to meet the classification procedures spelled out by the Executive Order. In this suit by a publisher against the CIA, the court decided that the classifications given to

96 *Richardson v. Spahr*, 416 F. Supp. 752, 753 (W.D. Pa. 1976).

97 *Aspin v. Department of Justice*, 453 F. Supp. 520, 522 (E.D. Wis. 1978).

98 *Id.* at 524. In another FOIA request made to the Department of Defense by Les Aspin, the issue was whether the Secretary of the Army should release a report entitled "Department of the Army Review of the Preliminary Investigation into the My Lai Incident." This information was not released. *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973).

99 468 F. Supp. 730 (D.D.C. 1979).

100 *Id.* at 734.

101 *See* Exec. Order No. 12,356, 47 Fed. Reg. 14,874, at §§ 1.3-1.6, 2.1-2.2, & 3.1-3.4 (1982). These procedural requirements cover such matters as the authority and identification of the classifier, the duration of the classification, the marking of classified material, the segregability of nonclassified information, and the period of declassification.

102 *See* *Lesar v. Department of Justice*, 636 F.2d 472, 485 (D.C. Cir. 1980).

103 509 F.2d 1362 (4th Cir. 1975).

certain portions of information were made in an *ad hoc* fashion, and not by a classifying officer as required by the Executive Order. The documents, nevertheless, were released.<sup>104</sup> A mistake in the classification process could conceivably lead to the release of information which justifiably could be exempt under section (b)(1).

Second, the Freedom of Information Act places the burden on the agency to prove that section (b)(1) applies to the information sought to be withheld.<sup>105</sup> To meet this burden, the agency must submit an affidavit<sup>106</sup> proving that proper classification procedures were followed,<sup>107</sup> that the document logically falls within the exemption,<sup>108</sup> and that unclassified or segregable portions can be released.<sup>109</sup> Meeting these criteria is not always an easy task. An intelligence document may be so sensitive that the agency cannot explain why it is exempt. Although *in camera* review can be made available, the information may be too sensitive for the court to review. Sometimes to even suggest that a document *exists* may reveal or give clues about sources and methods of intelligence.<sup>110</sup> The agency alternatively can avoid *in camera* inspection and plead for a ruling on the affidavits submitted. In this situation, however, the agency has an implied burden to show that the information logically meets the criteria of the exemption. If the agency fails to do so, the information can be released.

In *Hayden v. National Security Agency*,<sup>111</sup> the D.C. Circuit granted substantial relief to intelligence agencies. The requester in *Hayden* had sought details about electromagnetic signals which had been monitored by the NSA. In preparing a *Vaughn* index, the NSA failed to provide the required itemization of documents and detailed justifi-

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104 *Id.* at 1367.

105 5 U.S.C. § 552(a)(4)(B) (1976).

106 *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). In this case, the District of Columbia Circuit Court of Appeals suggested a standard affidavit format and index system for agencies to use in describing whether information or documents requested should be exempt. The court recommended that the affidavit should be specific by using cross-references to the relevant portion of information. The court also recommended that the affidavit be itemized and indexed. *Id.*

107 *See, e.g., Allen v. CIA*, 636 F.2d 1287, 1292-93 (D.C. Cir. 1980) (affidavit submitted by the agency did not reveal the classification officer).

108 *Id.*

109 SUBCOMM. ON ADM. PRAC. & PROC. OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION SOURCE BOOK; LEGISLATIVE MATERIALS, CASES, ARTICLES, S. DOC. NO. 9382, 93d Cong., 2d Sess. 226 (Comm. Print 1974).

110 In cases where an intelligence source could be obtained only by one means or by one person, revealing that the document is in the government's hands may reveal the person involved in the mission or the method used to secure it.

111 608 F.2d 1381 (D.C. Cir. 1979).

cation for nondisclosure. The court observed that an itemization of the NSA's signal intelligence operations could reveal the substantive content of the messages and could help identify the communications intercepted by the agency. Because of the NSA's unique mission in collecting signals intelligence, the secrecy interests outweighed the public's right to know. The court concluded that the NSA provided a sufficient index by stating generally what the documents were used for under the *Vaughn* standard.<sup>112</sup> Under *Hayden*, therefore, an intelligence agency need not provide all the details about the classified documents. The agency should, however, include at least some evidence that detailed disclosure might damage national security interests.

### B. *Third Exemption Serves as an Effective Shield*

The (b)(3) exemption states that the FOIA does not require disclosure of matters that are exempted by a withholding statute.<sup>113</sup> Generally, a withholding statute authorizes or requires withholding information from public disclosure if the information fits the statutory criteria.<sup>114</sup> Under this exemption, the government has the burden of proving that the requested information should be properly withheld.<sup>115</sup>

The CIA cites its charter, the National Security Act of 1947, as its authority for withholding information. The National Security Act states "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."<sup>116</sup> In *Phillippi v. CIA*,<sup>117</sup> the court said that this

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112 *Id.* at 1385.

113 5 U.S.C. § 552(b)(3) (1976). The statute does not require the release of information that is "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."

114 See note 116 *infra*.

115 See, e.g., *Irons v. Gottschalk*, 548 F.2d 992, 995-96 (D.C. Cir. 1976). See also *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977) (political activist sought access to files on himself); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (journalist sought disclosure of CIA records on contact with media about purported spy ship); *Cerveney v. CIA*, 445 F. Supp. 772 (D. Colo. 1978) (conservator of absentee estate sought information from CIA on whereabouts of the person); *Founding Church of Scientology of Washington, Inc. v. National Sec. Agency*, 434 F. Supp. 632 (D.D.C. 1977) (religious organization sought information from the National Security Agency on the church and its founder); *Marks v. CIA*, 426 F. Supp. 708 (D.D.C. 1976) (former State Department employee sought CIA files on himself).

116 50 U.S.C. § 403(d)(3) (1976). The CIA also cites the CIA Act of 1949 as a withholding statute. See note 5 *supra*. If an agency can show that disclosure would violate a particular federal statute, the information is exempt from disclosure under the FOIA. See *Shermco In-*

withholding statute placed a burden on the CIA to show that the release of the information could reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods.

The CIA has successfully used the third exemption to prevent the disclosure of information which could reveal sources and methods of intelligence. A district court, for example, recognized that disclosure of information provided to the CIA by a Communist insurgency group might reveal the agency's intelligence source, and prevented the disclosure of this information under section (b)(3).<sup>118</sup> Details about the CIA's financial arrangements were also withheld under this exemption.<sup>119</sup> The exemption also prevented a church from obtaining details about a CIA investigation into its relationship with a foreign government, for disclosure of such information would risk revealing sources and methods of intelligence.<sup>120</sup>

CIA relationships with individuals who support or assist in the agency's intelligence-gathering operations have been protected by the (b)(3) exemption. In *Halperin v. CIA*,<sup>121</sup> the plaintiff requested CIA documents detailing legal bills and fee arrangements with private attorneys retained by the agency. The district court rejected Halperin's demands, and the court of appeals affirmed. The D.C. Circuit pointed to three reasons for withholding this information. First, the court observed that the disclosure of legal bills might subject the attorney to hostile action by a foreign power, embarrass the U.S. government, and jeopardize relations with foreign states.<sup>122</sup> Second, identifying an attorney who is working under contract with the CIA might discourage others who would wish to have their relationship remain confidential from seeking employment with the

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*dus. v. Secretary of the U.S. Air Force*, 452 F. Supp. 306, 323 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980). There are over 100 statutes enacted by Congress that allow or require agencies to withhold information. Other (b)(3) statutes include:

(a) 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) (1976), directing EEOC to keep information based on charges of employment discrimination secret prior to the initiation of a formal proceeding.

(b) 49 U.S.C. § 1461 (1976), directing the Civil Aeronautics Board to keep decisions on foreign routes secret until submitted to the President.

(c) 42 U.S.C. §§ 2161-2166 (1976), relating to atomic energy.

117 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976). The information in this case was classifiable under (b)(1) of the Act.

118 *Ferry v. CIA*, 438 F. Supp. 664, 669 (S.D.N.Y. 1978).

119 *Richardson v. Spahr*, 416 F. Supp. 752, 753-54 (W.D. Pa.), *aff'd*, 547 F.2d 1163 (3d Cir. 1976), *cert. denied*, 434 U.S. 830 (1977).

120 *Serbian Eastern Orthodox Diocese v. CIA*, 458 F. Supp. 798, 802 (D.D.C. 1978).

121 629 F.2d 144 (D.C. Cir. 1980).

122 *Id.* at 148.

agency.<sup>123</sup> Finally, the court said that revealing the lawyer's identity could disclose details about the particular operation.<sup>124</sup> The court recognized that a lawyer's life could be endangered by disclosing his or her name.

Since domestic organizations frequently provide information to the CIA, courts have protected documents concerning the agency's relationship with domestic organizations. In *Gardels v. CIA*,<sup>125</sup> the court denied disclosure of documents which contained details about the CIA's relationship with the University of California, since disclosure could reveal the identity of contacts that the agency maintained on the university campuses.<sup>126</sup> Similarly, the Ninth Circuit exempted from disclosure documents concerning the agency's relationship with the International Criminal Police Organization because disclosure could "reasonably be expected to lead to unauthorized disclosure of intelligence sources [or] methods."<sup>127</sup>

The (b)(3) exemption will not serve as a *carte blanche* to exempt all documents the CIA wishes to protect. In *Navasky v. CIA*,<sup>128</sup> the court refused to protect authors, publishers, and books connected with an agency clandestine book publishing operation.<sup>129</sup> The court recognized that these authors and books could not be classified as intelligence sources and methods under section 403(d)(3), the CIA's withholding provision, since they only assisted in producing the final intelligence product.<sup>130</sup> If the information cannot be classified as an intelligence source or method, the CIA cannot exempt the information under section 403(d)(3).

#### IV. Search For A Compromise Between Secrecy And Openness

##### A. *Why Restricting the Requesters' Powers Fails to Cure the Problem*

When searching for a solution to the problem of protecting intelligence, two fundamental approaches come to mind: requiring a need to know and limiting access to U.S. citizens. On the surface, a need-to-know requirement could prevent those who do not have any

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123 *Id.* at 149.

124 *Id.*

125 484 F. Supp. 368 (D.D.C.), *remanded*, 637 F.2d 770 (D.C. Cir. 1980), *on remand*, 510 F. Supp. 977 (D.D.C. 1981) (summary judgment granted).

126 484 F. Supp. at 371.

127 National Comm'n on Law Enforcement & Social Justice v. CIA, 576 F.2d 1373, 1377 (9th Cir. 1978).

128 499 F. Supp. 269 (S.D.N.Y. 1980).

129 *Id.* at 275.

130 *Id.*



legitimate use for information from having access to it. To prevent foreign nationals from having access to intelligence documents, the simple solution might be to prohibit foreigners from making requests under the Act. With either approach, however, certain factors would render policing these practices virtually impossible.

### 1. A Need-To-Know Requirement

Because the requester need not state reasons for seeking a document under the FOIA<sup>131</sup> and because any person can make a request, the transformation of an intelligence document from government information to public information might cause unknown adverse effects to our nation's security. Requiring a need to possess the document will arguably enable the intelligence organization to detect more easily when the requester has hostile intentions and to refuse to disclose the document. Possible guidelines to determine whether the requester had a need to know include first, whether the person seeking the information has any relation to the document he is seeking, and second, whether the information will be useful to the person in his work or research.

It would be difficult, if not impossible, to enforce a need-to-know prerequisite to obtaining information under the FOIA. First, if a requester had no legitimate reason to request a certain document, he or she could devise a fictitious reason for seeking the document. Second, a need-to-know restriction would be repugnant to the FOIA's policy of disclosure. It would be a misnomer to refer to a "Freedom of Information Act" that allows the requester to have only that information that he needs to know. Third, it is difficult to determine what the requester should know. For the government to make that determination would amount to state control of information. The courts have traditionally denounced such government control of public information.<sup>132</sup>

### 2. Narrow Interpretation of "Any Person"

An alternate tactic now being considered to protect intelligence involves limiting access under the FOIA to U.S. citizens. In drafting and adopting the FOIA, Congress never addressed the citizenship of the requester.

Restricting the definition of any person to "any citizen" would

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<sup>131</sup> The FOIA does not require justifying reasons for a request. Section (a)(3) of the Act says that information will be disclosed "upon any request."

<sup>132</sup> See, e.g., *Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

not successfully alleviate the agency's burden or thwart attempts by foreign intelligence services to gather clues about past intelligence operations. If the law were reworded to exclude aliens from making requests, a foreign national could get an American citizen to make the request. Officials in the intelligence community believe that some intelligence services already use this practice.<sup>133</sup> Additionally, once information enters the public domain, it can be made available to all who request it, regardless of whether it is requested by an American journalist or a Soviet Intelligence officer. Even if the law imposed a criminal penalty to restrict requesters from giving information to foreigners, the penalty would be impossible to enforce because information is so freely disseminated in American society.

### B. *The CIA's Proposed Remedy*

The most desirable option sought by the CIA is to completely exempt the agency from the public's demands except to allow persons to seek information about themselves in intelligence files. The House of Representatives attempted to mold the agency's lobbying efforts into law three years ago. In 1979, the House drafted H.R. 5129,<sup>134</sup> a proposal "to enhance the foreign intelligence and law enforcement activities of the U.S. by improving the protection of information necessary to their effective operation." This bill attempted to restrict the information released to the public through the Act's (b)(3) withholding exemption.<sup>135</sup> Since the CIA Act of 1949 qualifies as a withholding statute within the meaning of the (b)(3) exemption, the House proposed to amend the CIA Act to include other sensitive documents, to define more clearly the meaning of intelligence sources and methods,<sup>136</sup> and to exempt the agency from the provisions of the FOIA except in cases where someone was requesting data about himself or herself.<sup>137</sup>

In January 1980, Sen. Daniel P. Moynihan introduced the Intelligence Reform Act of 1980,<sup>138</sup> S. 2216, the Senate's legislative effort to support the CIA's proposal. This bill sought to exempt the agency from any law requiring it to disclose information relating to the pub-

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133 See generally *Testimony of Carlucci*, *supra* note 44, at 25-29.

134 H.R. 5129, 96th Cong., 1st Sess. (1979). This bill was introduced in the House of Representatives on Aug. 2, 1979, by Rep. Robert McClory (R-Ill.) and was referred to the Permanent Select Committee on Intelligence and the Committee on Government Operations.

135 H.R. 5129, 96th Cong., 1st Sess., 125 CONG. REC. H7201 (1979).

136 *Id.*

137 *Id.*

138 See 126 CONG. REC. S239 (daily ed. Jan. 24, 1980) (remarks of Sen. Moynihan).

lication or disclosure of the organization, functions, names, official titles, salaries, or number of personnel employed by the Agency.<sup>139</sup> The bill granted the Director of Central Intelligence authority to exempt any intelligence component of the U.S. government from the provisions of any law which require "publication or disclosure, or the search or review in connection therewith" if these files concern sensitive information, counterintelligence, data regarding the collection of foreign intelligence, or information from a foreign government.<sup>140</sup> This bill, like H.R. 5129, allowed American citizens and permanent resident aliens to request information concerning themselves.<sup>141</sup>

The CIA's approach offers some advantages. Because the bill limits requesters to only those persons seeking information about themselves, the bill excludes hundreds of requests for information about any imaginable subject unrelated to the requester. The bill would deter many persons from making a request. Unless they had been employed by the agency or had knowledge that the agency had conducted surveillance of them, many potential requesters would realize that they probably would not be the subject of any given intelligence file.

Cutback in public access would aid in convincing informants and allied intelligence services that the intelligence community can keep a secret. Since the only requesters would be those who are the subject of the file, it is less likely that these requesters would be working from a tip given by a foreign intelligence officer. With only a minimal disclosure of information, the chance of an inadvertent release of sensitive documents decreases.

The CIA's approach, while best protecting against the release of classified information, fails to provide adequate accountability to the public. Though there is a need for secrecy in the intelligence community, the public will still demand a means of being informed about the activities of the CIA and other intelligence organizations. Accountability can arguably be provided effectively by the Congress, the branch of government closest to the intelligence community's activities. Currently, most covert intelligence activities must be approved by two congressional committees. Further oversight is provided by the President and by the National Security Council. Despite benefits to the CIA, it is doubtful whether Congress will accept a sweeping solution that eliminates public accountability. The

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139 S. 2216, 96th Cong., 2d Sess., 126 CONG. REC. S366 (1980).

140 *Id.*

141 *Id.*

CIA's approach would thwart the purpose of the FOIA, and there exists no evidence that the public wishes to give up the access afforded by the Act.

C. *Recent Efforts Under the Reagan Administration to Provide Relief*

The 97th Congress has taken action to reduce the administrative burdens that most agencies face in complying with the FOIA. In S. 1730,<sup>142</sup> the Senate proposed to require agencies to promulgate rules that would impose fees for the search of documents or records by agency personnel.<sup>143</sup> The initial draft of the bill stated that a fee would not be charged for a request or series of requests that did not require more than two hours of agency work to process.<sup>144</sup> The bill also stated that "reasonable" charges shall be imposed for the services of agency personnel who process a request.<sup>145</sup> By imposing a fee, the Senate seeks to deter duplicative requests and multiple requests made simply to harass an agency. The bill states that if a request is made for items already in the public domain, such as news articles or court records, the agency will not be required to copy that record for the requester.<sup>146</sup> Instead, the agency need only identify the portion of the record by date and source.<sup>147</sup> Additionally, the bill would require a requester to state the number of requests he or she has made under the FOIA within the past two years.<sup>148</sup> If the person has made successive or multiple requests within that period, the agency would not be required to copy the document, but could merely provide updated information on the requested subject.

Although Congress addressed the CIA's concern for preventing the loss of foreign contacts, Congress failed to provide the kind of relief the agency had been seeking. S. 1730 rejected the CIA's lobbying efforts to exclude the agency from the provisions of the FOIA, as proposed in H.R. 4219 and S. 2216. S. 1730 failed to incorporate any sweeping modifications to the FOIA. Instead, the bill put more relief into the agency's hands by expanding its classification authority under Executive Order 12,356.<sup>149</sup> This new Executive Order allows

142 S. 1730, 97th Cong., 1st Sess. (1981).

143 *Id.* at § 2.

144 *Id.* at § 2(a).

145 *Id.* at § 2(b).

146 *Id.* at § 4(7).

147 *Id.*

148 *Id.* at § 4(8).

149 47 Fed. Reg. 14,874 (1982). *See also* Shribman, *Panel Sets Aside Plan to Weaken Information Act*, N.Y. Times, May 21, 1982, at A1, col. 1. The author notes here that the administration did not include the agency's proposal to exclude the CIA from the FOIA. Instead, the

the President, agency heads and officials designated by the President in the *Federal Register*, and officials with top secret classification authority to classify information.<sup>150</sup> The order thus allows the CIA director to classify documents, since the CIA director is appointed by the President. The order further allows the agency head to delegate classification authority to other officials.<sup>151</sup>

The Senate proposals address the administrative burdens caused by releasing information. A requester who wishes to make duplicative requests would have to weigh the cost of making unnecessary requests. This approach may not prevent duplicative requests entirely. If a person has made a number of requests within the two-year period mentioned in the bill, he or she could use some simple tactics to appear as a first-time requester seeking information from a given agency. One could, for example, change his name or address, have a family member make another request, or use friends to make duplicative or several requests on a given subject. Despite this shortcoming, the Senate proposal is a step in the right direction in reducing the agencies' burdens.

Despite recognizable advantages, increasing the CIA's classification authority may not solve the problem of protecting information provided by a foreign contact. Delegating the power to classify documents to other agency heads may permit them to make judgments on what should and should not be classified. However, once that information is classified and is requested under the Act, the agency's refusal to provide the requested information could still be challenged and disputed in litigation. This possibility is precisely the risk that foreign agents and allied intelligence services wish to avoid when providing the CIA with intelligence.<sup>152</sup>

Although Congress intends to reduce the administrative burdens that agencies have faced, the problem of preserving important intelligence contacts still remains. In order to be acceptable to the public and to the intelligence community, any proposal must guarantee that information provided will not be disclosed, while still allowing for public accountability. An approach which has the potential to offer this compromise will be considered below.

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applicability of the Act could be restricted by the classification order which makes it easier for government officials to keep national security information secret.

150 47 Fed. Reg. at 14,875.

151 *Id.*

152 See note 48 *supra* and accompanying text.

D. *A Proposal—A Limited Exemption for Information Provided by a Foreign Contact*

In order to achieve a compromise between the competing interests of secrecy and openness, a proposed amendment to the FOIA must exempt information provided by a foreign government from the provisions of the Act. The amendment would exclude this information not only from public disclosure, but also eliminate the agency's duty *to even search* for information provided by a foreign government. This approach still allows the public to have access to other unclassified materials and information that does not fall within the exemptions. An absolute prohibition on public access to intelligence provided by foreign contacts should convince foreign contacts that the provided information will not be leaked. The proposed amendment would require repealing the FOIA only with respect to foreign providers.

Not all intelligence collected by the agency comes from foreign agents. Much of the intelligence collected by the agency is derived from open sources such as magazines or newspapers, which are also available to the public. Under the proposal, information contained in agency documents which does not come from a foreign intelligence agency would still be subject to the Act. Thus, total accountability will not be eliminated by denying the public access to information from allied intelligence services or foreign contacts.

The proposal to exempt information provided by a foreign contact could be incorporated into practice by amending the (b)(1) or the (b)(3) exemption. The (b)(1) exemption could be amended if other agencies in the intelligence community which have classification authority besides the CIA need similar relief. The exemption could read as follows:

(b) This section does not apply to matters that are—

(1)(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. *Where the information authorized to be kept secret is provided by a foreign government or intelligence source or foreign agent, Section 552 of this Title will not be applicable to this information, and the agency will be relieved of its duty to search for the information.*

Another alternative would be to amend the CIA Act of 1949,<sup>153</sup> a provision used as a withholding statute under the (b)(3) exemption. Since the CIA's withholding provision permits the Director of Cen-

153 50 U.S.C. § 403(g) (1976).

tral Intelligence to protect sources and methods of intelligence, this provision can be amended to exempt from the FOIA information provided by a foreign source under a promise of confidentiality.

In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency: *Provided, The Agency, furthermore, will be exempted from the provisions of section 552 of Title 5 requiring the disclosure of information, names and the like if such information is provided by a foreign intelligence agency, informant or foreign agent.*

Both proposals can effectively shield information provided by a foreign source from any possibility of disclosure. If, beyond exempting the information from the requester's demands, the information is exempted from the FOIA process, there would be no risk of disclosure. Such an exemption would convince the provider that the information would not be released under the Act, for the language explicitly excludes information provided by a foreign source from public disclosure or even from consideration for review.

The revised exemptions could require monitoring to prevent the agency from exploiting loopholes to withhold information that was not intended to be protected. Since this proposal will exempt the information and excuse the agency's duty to search for the document, the agency could filter other types of information that did not originate from a foreign contact to qualify for exemption. Additionally, the information provided by a foreign source could be incorporated into a document, cable, or intelligence report that also contains information from another independent source. The agency faces the question of whether the information that is not derived from a foreign source should be segregated and released, or whether it should not be released to preserve absolute assurance to the provider that the information will remain secret.

These problems and others can be handled by an internal system of review to ensure that information from foreign sources is not unnecessarily restricted. The agency could implement additional internal review procedures to more carefully check the information withheld from the public as well as screen the documents which are being released. This review would be most pertinent to those docu-

ments which, on the surface, appear to be segregable from a classified document.<sup>154</sup> An internal tribunal may be established to review documents that may be damaging to national security. A similar review process, independent of the federal courts, has been adopted by the Department of Justice with its Foreign Intelligence Surveillance Court.<sup>155</sup> The review court could be staffed by experienced and impartial judges who are experts on assessing national security implications of releasing certain kinds of information. By incorporating specialists on classification matters, the chances of error in judging whether information is or is not classified would be greatly reduced. Specialists could render an accurate and expert judgment about the national security implications of disclosing certain types of information to the public. Review by qualified specialists could eliminate the concerns of having a judge review information which is too sensitive even to view *in camera*.

#### IV. Conclusion

The clash of statutory duties under the Freedom of Information Act and the National Security Act of 1947 has created a dilemma in a somewhat weakened intelligence process. Finding the proper balance between the public's need for access to information and the CIA's duty to protect sources of intelligence is not an easy task. However, swift action should be taken to protect foreign government information provided to the agency. Without protecting the relationship between providers and agency from public disclosure, the quality of intelligence provided by these sources will continue to decline and will affect the agency's statutory duty to collect foreign intelligence.

The provision proposed in this article<sup>156</sup> could strike an effective balance because it restricts only information that is provided by a reluctant informer, while still allowing the public to review documents that are not damaging to national security. Problems such as access by foreign requesters and backlogs of requests should continue to be recognized and constructively analyzed. A comprehensive solution which protects the CIA's statutory duty to collect foreign intelli-

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154 See 5 U.S.C. § 552(b) (1976): "Any 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."

155 See L.A. Times, Mar. 20, 1982, § I, at 1, col. 1. The Foreign Intelligence Surveillance Court was instituted as an "extra-judicial" device to determine whether requests for wiretaps by agencies such as the FBI violated federal law.

156 See notes 153-55 *supra* and accompanying text.



gence but also preserves public accountability will ultimately strengthen the CIA's foreign intelligence mission.