S. HRG. 98-464

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

JUNE 21, 28, OCTOBER 4, 1983

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[Established by S. Res. 400, 94th Congress, 2d Session]

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PREFACE

The Senate Select Committee on Intelligence heard testimony concerning S. 1324 at public hearings on June 21 and June 28, 1983. The June 21 hearing included testimony from the original cosponsor, Senator Strom Thurmond, and witnesses from the Central Intelligence Agency who explained how the Agency interpreted the legislation as introduced.

The June 28 hearing presented testimony from the following individuals and organizations interested in the legislation: Maj. Gen. Richard Larkin, president of the Association of Former Intelligence Officers; John Norton Moore and John Shenefield, two members of the American Bar Association's Standing Committee on Law and National Security; Mary Lawton, Counsel for Intelligence Policy in the Department of Justice; Mark Lynch, representing the American Civil Liberties Union; Charles S. Rowe, testifying on behalf of the American Newspaper Publishers Association; Steven Dornfeld, representing the national president of the Society of Professional Journalists; and Dr. Anna Nelson, representing the National Coordinating Committee for the Promotion of History.

On October 4, 1983, the committee met to mark up the legislation and then voted unanimously to report S. 1324 as amended. Since then the bill has passed the Senate.

BARRY GOLDWATER,
Chairman.

DANIEL PATRICK MOYNIHAN,
Vice Chairman.

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S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

TUESDAY, JUNE 21, 1983

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The committee met, pursuant to notice, at 1:56 p.m., in room SD-124, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater, Chafee, Huddleston, and Leahy.

The CHAIRMAN. The meeting will come to order.

Today we welcome John McMahon, the Deputy Director of Central Intelligence, who is appearing on behalf of the CIA to present the Agency's view on S. 1324. He has brought with him Ernie Mayerfeld, Deputy General Counsel, and Larry Strawderman, Chief of the Information and Privacy Section of the Agency.

I also welcome Senator Strom Thurmond, who I will introduce in just a few moments.

Next Tuesday afternoon I will again have a public hearing so that interested individuals and organizations can testify.

This bill amends the National Security Act of 1947 so that the major operational components of the Central Intelligence Agency will be relieved of the overwhelming burden of searching and reviewing sensitive operational files in response to certain requests for information under the Freedom of Information Act.

This relief will allow these components to devote their resources to gathering the vital intelligence our Government needs to make informed decisions in foreign policy and national defense.

In order to expedite these hearings, I will insert the remainder of my opening remarks to be printed in the record as if read.

[The prepared opening statements of Senators Goldwater and Leahy follow:]

PREPARED OPENING STATEMENT OF CHAIRMAN BARRY GOLDWATER

The hearing will come to order.

Today I welcome John McMahon, Deputy Director of Central Intelligence, who is appearing on behalf of the CIA to present the Agency's views on S. 1324. He has brought with him Ernie Mayerfeld, Deputy General Counsel, and Larry Strawderman, Chief of the Information and Privacy Division for the Agency. Next Tuesday afternoon, I will again have a public hearing so that interested individuals and organizations can testify.

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relief will allow these components to devote their resources to gathering the vital intelligence our Government needs to make informed decisions in foreign policy and national defense.

Let me explain very briefly why I think that this legislation is needed.

In the eight years since FOIA has been in its present form, the CIA has worked hard to comply with the Act. However, it has been darned near impossible to keep up with all the requests in the way the Act requires. I don't think Congress really contemplated what burdens FOIA would place on an intelligence agency.

FOIA mandates that if someone requests all the information on a certain subject that all the files have to be located. In the intelligence agency, most of the information is classified. But that fact does not end the agency's job. An experienced person must go through stacks and stacks of these papers, sometimes they are many feet tall, and justify the reason that almost every single sentence should not be released. If this is not done well, a court could then order the information released.

What has been the result of this burdensome process? Very little information, if any, is released from operational files when the request seeks information concerning the sources and methods used to collect intelligence. Even then the released information is usually fragmented.

There is a great risk of a mistaken disclosure due to this mandatory search and review of sensitive files and the possibility that some court may order the release of information which could reveal a source's identity or a liaison relationship. It is only these most sensitive operational files which this bill would exempt from search and review.

It is important to know that this legislation does not frustrate the essential purposes of the FOIA. Requestors will continue to have access to CIA files containing the intelligence product, and to information on policy questions and debates on these policies. Additionally, access to files for individual U.S. citizens and permanent resident aliens who seek information on themselves will not be affected by S. 1324.

The American public can only stand to benefit by this bill. By exempting those operations files from search and review, the processing of all other requests can be completed much sooner. The public will receive that information which is releasable under the Freedom of Information Act and Privacy Acts in a far more efficient and satisfying manner. The wait for a response from the CIA now takes anywhere from two to three years. This kind of situation benefits no one.

In short, this bill relieves the CIA of certain time consuming search and review requirements. By so doing, it provides the FOIA requestor speedier responses for those areas which should be subject to public scrutiny. At the same time, it will enable the Agency to take a number of experienced personnel out of the business of reviewing files and permit them to get back to intelligence work.

We scheduled this hearing so that the public can know, as much as possible within security restrictions, how this legislation will work at the Agency. John, let's begin.

PREPARED OPENING STATEMENT OF SENATOR PATRICK LEAHY

Welcome Mr. McMahon. Today, we are taking up an issue which concerns me as a defender of the Freedom of Information Act . . . whether to exempt a portion of the central intelligence agency's files from search and review.

As a member of the Select Committee on Intelligence, I of course understand and share your concerns about protecting sensitive information on intelligence sources and methods. In the abstract, protection of the CIA's operational files is unarguable. The FOIA was never meant to require disclosure of our intelligence sources and methods.

In practice, however, I wonder how much of a genuine problem you have on your hands. As I understand it, there is no question of the Agency's being compelled by the FOIA now to release sources and methods information. The courts sustain your denials of such information. The courts support your policy of refusing to acknowledge or to confirm the existence of "special activities." On that basis you do not search files for information bearing on such activity.

Therefore, it seems to me that the FOIA is not jeopardizing sensitive intelligence information. Your problem, in reality, is something else.

Let me be certain I understand the heart of your argument for S. 1324.

Despite FOIA's existing exemptions and the protection afforded by the courts, good faith compliance with the search and review requirements of the FOIA is

alleged to be imposing an unnecessary and unproductive burden on the Agency. The situation you describe seems to be that the Agency is forced to search and review the operational files of the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security which it patently cannot release.

From the materials before me, there appear to be three major costs in meeting this requirement:

1. Because of the sensitivity of the sources and methods information in operational files, case officers must be diverted from their normal duties to review and sanitize these materials. This is at the expense of regular intelligence work.

2. The need to amass all relevant documents pertaining to a request is breaking down vital compartmentation of operational information. You fear that sooner or later information will be released which will lead to the identification of human sources or intelligence methods.

3. The search and review of operational files, which for the reasons already stated will not produce significant releasable information, is causing a major backlog in responding to FOIA requests, including those which would otherwise result in the release of useful information. As I understand it, the backlog is more than 2,500 cases and the delay in responding is about two years.

Mr. McMahon, before I make up my mind on this bill, I must be shown that the consequence of its passage will not be the release of less information from the CIA's files than at present. I cannot support a bill whose purpose or result is to deny information to the public that would otherwise be made available. My view is that public access through the FOIA to intelligence information used by policy makers, consistent with national security requirements, has been valuable—and must be continued. A good example is the release of national intelligence estimates from the 1950's and early 1960's, such as the NIE's on the Cuban Missile Crisis.

Moreover, I will need to see solid Agency assurances on the record that relief from search and review of designated operational files will lead quickly to elimination of the backlog, and to better and more expeditious response to future FOIA requests.

Signs of CIA seriousness about dealing with FOIA in the future will be important in helping me decide whether I can support S. 1324. Frankly, the Agency's attitude toward FOIA in the past has not been encouraging. This bill offers an opportunity for you to show that the CIA accepts the public's right to access to information which does not jeopardize intelligence sources and methods or disclose secrets vital to the nation's security.

Finally, Mr. McMahon, I want to review carefully with you and your associates precisely how operational files would be designated, which files would fall in this category, and how information in operational files which does not fit the four categories in the bill would be reachable through FOIA. I realize much of this will have to be handled in a classified manner. Neverthless, to the extent possible, it is important to have at least general answers on the public record.

In short, we must establish a thorough record which addresses all legitimate concerns of FOIA users if this bill is to have my vote.

The CHAIRMAN. I welcome Senator Strom Thurmond, the distinguished chairman of the Senate Judiciary Committee, who is an original cosponsor of S. 1324. For this reason, I have asked him to say a few words as lead-off witness. Because of other commitments that he has, he cannot stay for questions.

Strom, why don't you begin.

STATEMENT OF HON. STROM THURMOND, MEMBER OF THE U.S. SENATE FROM SOUTH CAROLINA

Senator THURMOND. Thank you very much, Mr. Chairman. I am pleased to comment today on S. 1324, the Intelligence Information Act of 1983. It was my great pleasure to join the able chairman of this committee, Senator Goldwater, in introducing that bill on May 18, 1983.

Mr. Chairman, I believe that we are all in accord on several basic premises. First, the workings of a democratic government must be as

open to its citizens as is consistent with protecting the national security. The electorate must have sufficient information to make national choices concerning the policies and representatives which best serve their interests.

We contrast our cherished tradition of open government with the chilling secrecy of countries behind the Iron Curtain. Those citizens are captive, not only by the threat of jail and torture, but by the lack of information and the manipulated information which they receive.

The second principle upon which we agree is that effective security measures are essential to the preservation of our form of government. We need only look abroad and south of our borders to see certain elements determined to undermine the liberties of freedom-loving peoples throughout the globe. This imposes upon our democratic government the unfortunate, but absolutely imperative burden of preserving our security against those forces.

Finally, we can agree that our brave intelligence officers and agents, on whose shoulders the day-to-day responsibility of protecting our freedom falls, deserve the maximum protection that our democratic society can afford them. These individuals place their lives in jeopardy to protect our safety and the safety of our families. They must not be repaid with Government policies, no matter how well intentioned, that unnecessarily risk their lives.

I am proud to have worked with the members of this committee to pass the Intelligence Identities Protection Act last year. This was a long-overdue effort to address one threat to the safety of these courageous men and women. In addition, on June 16 of this year, the Judiciary Committee reported S. 779, the Intelligence Personnel Protection Act, which will make it a Federal crime to kill, or attempt to kill, an intelligence officer or employee.

Mr. Chairman, as chairman of the Committee on the Judiciary, one of my highest priorities has been revision of the Freedom of Information Act to address the three goals that I have outlined—open government, national security, and agent protection.

I am pleased to report that the Committee on the Judiciary, at its executive session on June 16, 1983, only last week, ordered reported S. 774, the Freedom of Information Reform Act of 1983. This is a bipartisan compromise which addresses some of the problems which have arisen under the original act, while recognizing our shared goal of open government. I am hopeful that we will soon be able to send that bill to the House so that legislation can be on the President's desk by the end of this Congress.

S. 1324 is a complementary piece of legislation which deals with the unique problems that the Central Intelligence Agency faces in this area. Specifically, it amends the National Security Act of 1947 to exempt from disclosure and attendant search and review under the Freedom of Information Act certain operational files designated by the Director of Central Intelligence to be concerned with specified matters, including foreign intelligence, counterintelligence, or counterterrorism operations.

In order to protect the public's access to certain information, the bill specifically states that nondesignated files which contain information from designated files remain subject to search and review and that designation will not prevent the search and review of a file for infor-

mation concerning special activities which are not exempt from disclosure under the Freedom of Information Act.

Finally, the bill states categorically that these new provisions will not affect proper requests by U.S. citizens and lawfully admitted resident aliens for information concerning themselves under the Privacy Act or the Freedom of Information Act.

Mr. Chairman, I realize that this is a modest effort to address the FOIA problems which the Central Intelligence Agency has encountered. However, I believe that it is an absolutely essential proposal which has a realistic chance of enactment in this Congress.

Not only will it continue protection for information which is clearly exempt from disclosure under the Freedom of Information Act and court decisions under the act, but it will substantially reduce the administrative burden on the Central Intelligence Agency.

This accrues to the benefit not only of the hardworking taxpayers of this country, but also to those who have filed or plan to file Freedom of Information Act requests. The reduced administrative burden will permit the CIA to respond to requests more quickly, thus providing more useful and timely information.

Mr. Chairman, I want to commend you for your outstanding leadership in this area and for scheduling such prompt hearings on this important bill. I look forward to working with you on this and other legislation aimed at protecting our brave agents, our national security, and the openness of our Government which we so dearly cherish.

The CHAIRMAN. Thank you very much, Senator Thurmond. We appreciate those remarks more than I can tell you and thank you for coming over.

Senator THURMOND. Thank you, Mr. Chairman.

The CHAIRMAN. Our next witness will be Mr. John McMahon, Deputy Director of Central Intelligence, who I believe has served that agency over 30 years.

Mr. MCMAHON. Yes, sir.

The CHAIRMAN. We are very happy to have you with us, John, so you may proceed as you desire.

STATEMENT OF JOHN McMAHON, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE, ACCOMPANIED BY JOHN STEIN, DEPUTY DIRECTOR OF OPERATIONS, CENTRAL INTELLIGENCE AGENCY; R. EVAN HINEMAN, DEPUTY DIRECTOR FOR SCIENCE AND TECHNOLOGY, CIA; ERNEST MAYERFELD, DEPUTY GENERAL COUNSEL, CIA; LARRY STRAWDERMAN, CHIEF, INFORMATION AND PRIVACY DIVISION, CIA; AND WILLIAM KOTAPISH, DIRECTOR OF SECURITY

[Prepared statement of John N. McMahon follows:]

PREPARED STATEMENT OF JOHN N. MCMAHON, DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Mr. Chairman, Members of the Select Committee on Intelligence, it is a pleasure to appear before you today to discuss S. 1324. The Central Intelligence Agency urges enactment of this Bill. It is carefully crafted to have positive benefits for all those affected by it. It is unique legislation in this area of conflicting public interests because it does not require the agonizing trade-offs between protection of the Agency's intelligence mission and the public's access to government information. In essence, this legislation would exclude the Agency's sensitive opera-

tional files from a search and review process that results in an ever-present risk of exposure of sources and methods, and creates a perceived risk on the part of our sources and potential sources which greatly impairs the work of this Agency. At the same time, with this exclusion, the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the Act. It is hoped the CIA can substantially curtail the present 2–3-year wait that requesters must now endure.

Under present law, there is in effect a presumption of access to CIA operational files, and the Agency must defend a denial of our most sensitive information to anyone who asks for it line by line, sometimes word by word. We, of course, attempt to assure our sources, who live in fear of this process, that the exemptions available under the FOIA are sufficient to protect their identities, but that assurance is too often seen as hollow. They ask, with justification in my view, that, in exchange for the risks which they undertake on our behalf, we provide them with an absolute assurance of confidentiality. So long as we are compelled by law to treat our operational files as potentially public documents, we are unable to provide the iron-clad guarantee which is the backbone of an effective intelligence service. In addition, the review of operational files withdraws uniquely capable personnel from intelligence operations, and compels us to violate our working principles of good security. Let me explain these points in more detail.

For security reasons Agency information is compartmented into numerous self-contained file systems which are limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific filing systems only on a "need to know" basis. Operational files are more stringently compartmented because they directly reveal intelligence sources and methods. Yet a typical request under the FOIA will seek information on a generally described subject wherever it may be found in the Agency and will trigger a search which transgresses all principles of compartmentation. A relatively simple FOIA request may require as many as 21 Agency records systems to be searched, a difficult request can involve over 100.

In many instances the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search. [Exhibit 1.] Although, in the case of records gleaned from operational files, virtually none of this information is released to the requester, security risks remain which are inherent in the review process. The documents are scrutinized line by line, word by word, by highly skilled operational personnel who have the necessary training and experience to identify source-revealing and other sensitive information. These reviewing officers must proceed upon the assumption that all information released will fall into the hands of hostile powers, and that each bit of information will be retained and pieced together by our adversaries in a painstaking effort to expose secrets which the Agency is dedicated to protect. At the same time, however, the reviewing officer must be prepared to defend each determination that an item of information is classified or otherwise protected under the FOIA. Furthermore, the officer must bear in mind that under the FOIA each "reasonably segregable" item of unprotected information must be released. Sentences are carved into their intelligible elements, and each element is separately studied. When this process is completed for operational records, the result is usually a composite of black markings, interspread with a few disconnected phrases which have been approved for release. Here is a typical example. [Exhibit 2.]

The public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we never cease to worry about these fragments. We cannot be completely certain of the composite information in our adversaries possession or what further element they need to complete a picture. Perhaps we missed the source-revealing significance of some item. Perhaps we misplaced one of the black markings. The reviewing officer is confronted with a dizzying task of defending each deletion without releasing any clue to the identity of our sources. He has no margin for error. Those who have trusted us may lose their reputation, their livelihood, or their lives; the well-being of their families is at stake if one apparently innocuous item falls into hostile hands and turns out to be a crucial lead. As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated. The harm done to the Agency's mission by such errors is, of course, unknown and uncalculable. The potential harm is, in our judgment, extreme.

Aside from this factor of human error, we recognize that, under the current Freedom of Information Act, subject to judicial review, national security exemp-

tions do exist to protect the most vital intelligence information. The key point, however, is that those sources upon whom we depend for that information have an entirely different perception.

I will explain how that perception has become for us a reality which hurts the work of the Agency on a daily basis. The gathering of information from human sources remains a central part of CIA's mission. In performance of this mission, Agency officers must, in essence, establish a secret contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the United States Government.

This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationships is trust. To build such a relationship, which in many cases entails an individual putting his life and the safety of his 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 then, the slightest problem, particularly a breach or perceived breach of trust, can permanently disrupt the relationship. A public exposure of one compromised agent will obviously discourage others.

One must recognize also that most of those who provide us with our most valuable and therefore most sensitive information come from societies where secrecy in both government and everyday life prevails. In these societies, individuals suspected of anything less than total allegiance to the ruling party or clique can lose their lives. In societies such as these, the concepts behind the Freedom of Information Act are totally alien, frightening, and indeed contrary to all that they know. It is virtually impossible for most of our agents and sources in such societies to understand the law itself, much less why the CIA operational files, in which their identities are revealed, should be subject to the Act. It is difficult, therefore, to convince one who is secretly cooperating with us that some day he will not awaken to find in a U.S. newspaper or magazine an article that identifies him as a CIA spy.

Also, imagine the shackles being placed on the CIA officer trying to convince the foreign source to cooperate with the United States. The source, who may be leaning towards cooperation, will demand that he be protected. He wants absolute assurance that nothing willl be given out which could conceivably lead his own increasingly sophisticated counter-intelligence service to appear at his doorstep. Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, unauthorized disclosures by former Agency employees, and espionage activities by foreign powers all contribute, but the perceived harm done by the FOIA is particularly hard for our case officers to explain because it is seen as a deliberate act of the United States Government.

Although we try to give assurances to these people, 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 they can be protected. How many cases of refusal to cooperate where no reason is given but if known would be for similar reasons, I cannot say. I submit, that, based upon the numerous cases of which we are aware, there are many more cases of sources who have discontinued a relationship or reduced their information flow based on their fear of disclosure. No one can quantify how much information vital to the national security of the United States has been or will be lost as a result.

The FOIA also has had a negative effect on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation over what is seen as an inability to keep information entrusted to us secret. Again, the unanswerable question is how many other services are now more careful as to what information they pass to the United States.

This legislation will go a long way toward relieving the problems that I have outlined. The exclusion from the FOIA process of operational files will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the process. They will know that their identities are not likely to be exposed as a result of a clerical error and they will know that the same information will be handled in a secure and compartmented manner and not be looked at by people who have no need to know that information. A distinguished Judge of the U.S. Court of Appeals, Judge Robert Bork, in a recent dissenting opinion, had this to say about the need to protect those sources that provide valuable information to the nation: "The CIA and those who cooperate with it need and are entitled to firm rules

that can be known in advance rather than vague standards whose application to particular circumstances will always be subject to judicial second-guessing. Our national interest, which is expressed in the authority to keep intelligence sources and methods confidential, requires no less."

At the same time, as I have explained before, by removing these sensitive operational files from the FOIA process, the public is deprived of no meaningful information whatsoever.

The paltry results from FOIA review of operational files are inevitable. These records discuss and describe the nuts and bolts of sensitive intelligence operations. Consequently they are properly classified and are not releaseable under the FOIA as it now stands. The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. It is crucial to note in this regard that their determinations have been consistently upheld when tested in litigation. The simple fact is that information in operational rceords is by and large exempt from release under the FOIA, and the few bits and pieces which are releasable have no informational value.

When I speak of reviewing officers absorbed in this process, it is important to stress that these individuals are not and cannot be simply clerical staff or even "FOIA professionals." In order to do their job, they must be capable of making difficult and vitally important operational judgments, and consequently most of them must come from the heart of the Agency's intelligence cadre. Moreover, before any item of information is released under the FOIA, the release must be checked with a desk officer with current responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources of our operating components. That is so because we have a practice in the Operations Directorate which requires that every piece of paper which is released, even including those covered with black marks like the one I showed you before, must be reviewed by an officer from the particular desk that wrote the documents or received it from the field, and we cannot alter this practice because the risk of compromise is so great. You can imagine the disruption, for example, on the Soviet desk when the people there must take time off from the work they are supposed to do to review a document prepared for release under the FOIA. And it is obvious, of course, that, when a CIA operation makes the front pages of the newspapers, the FOIA requests on that subject escalate. This loss of manpower cannot be cured by an augmentation of funding. We cannot hire individuals to replace those lost, we must train them. After the requisite years of training, they are a scarce resource needed in the performance of the Agency's operational mission.

Let me make clear that this legislation exempts from the FOIA only specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not designated operational files will remain accessible under the FOIA even if documents taken from an operational file are placed in them. This will ensure that all disseminated intelligence and all matters of policy formulated at Agency executive levels, even operational policy, will remain accessible under FOIA. Requests concerning those covert actions the existence of which is no longer classified would be searched as before, without exclusion of operational files. And of particular importance, a request by a U.S. citizen of permanent resident alien for personal information about the requester would trigger all appropriate searches throughout the Agency without exception.

I would also like to address the benefit to the public from this legislation. As I mentioned earlier in my testimony, FOIA requesters now wait two to three years to receive a final response to their requests for information when they involve the search and review of operational files within the Directorate of Operations. We estimate that, should S. 1324 be enacted, the CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, if this Bill is enacted, I assure you that every effort will be made to pare down the queue as quickly as possible. This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and efficient manner. The public would continue to have access to the disseminated intelligence product and all other information in files which would not be designated under the terms of the Bill.

There is one final issue, Mr. Chairman, which I would like to address before concluding my testimony. This is the issue of how it would be possible for the American public to have access to information concerning any Agency intelligence activity that was improper or illegal. My firm belief is that, given the specific guidance which we now have in Executive orders and Presidential directives

along with the effective oversight provided by this Committee and its counterpart in the House, there will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill Casey and I consider it our paramount responsibility that the rules and regulations not be violated. However, should there be an investigation by the Inspector General's office, the Office of General Counsel, or my own office of any alleged impropriety or illegality, and it is found that these allegations are not frivolous, records of such an investigation will be found in nondesignated files. In such a case, information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this Bill. The same would be true, for similar reasons, Mr. Chairman, whenever a senior Intelligence Community official reports an illegal intelligence activity to this Committee or to the House Intelligence Committee pursuant to the requirements in Section 501 of the National Security Act.

Mr. Chairman, the CIA urges adoption of this legislation, and I understand that the Administration also supports your Bill. This concludes my testimony, Mr. Chairman. I have with me my Deputy General Counsel, Ernest Mayerfeld, as well as Chief of the Information Privacy Division, Larry Strawderman. In addition, accompanying me to provide substantive expertise are Deputy Director for Operations John Stein, Deputy Director for Science and Technology Evan Hineman, Director of Security William Kotapish, as well as others who will be pleased to answer any specific questions you or the other Members may have.

Mr. McMAHON. I am also very grateful for Chairman Thurmond taking the time to give us his strong support for this bill, and I also welcome the opportunity to address the members of the Select Committee on Intelligence and discuss S. 1324.

The Central Intelligence Agency urges enactment of this bill. It is carefully crafted to have positive benefits for all those affected by it. It is unique legislation in this area of conflicting public interest because it does not require the agonizing tradeoffs between protection of the Agency's intelligence mission and the public's access to Government information.

In essence, this legislation would exclude the Agency's sensitive operational files from a search and review process that results in an ever-present risk of exposure of sources and methods and creates a perceived risk on the part of our sources and potential sources which greatly impairs the work of the Agency. At the same time, with this exclusion the public would receive improved service from the Agency under the FOIA without any meaningful loss of information now released under the act.

Under present law, there is in effect a presumption of access to CIA operational files and the Agency must defend a denial of our most sensitive information to anyone who asks for it line by line, sometimes word by word.

We, of course, attempt to assure our sources who live in fear of this process that the exemptions available under the FOIA are sufficient to protect their identities, but that assurance is too often seen as hollow. They ask, with justification, in my mind, that in exchange for the risks which they undertake on our behalf we provide them with an absolute assurance of confidentiality.

So long as we are compelled by law to treat our operational files as potentially public documents, we are unable to provide the ironclad guarantee which is the backbone of an effective intelligence service.

In addition, the review of operational files withdraws uniquely capable personnel from intelligence operations and compels us to violate

our working principles of good security. Let me explain these points in more detail.

For security reasons, Agency information is compartmented into numerous self-contained file systems which are limited in order to serve the needs of a particular component or to accomplish a particular function. Agency personnel are given access to specific filing systems only on a need-to-know basis.

Operational files are more stringently compartmented because they directly reveal intelligence sources and methods. Yet a typical request under the FOIA will seek information on a generally described subject, wherever it may be found in the Agency, and will trigger a search which transgresses all principles of compartmentation.

A relatively simple FOIA request may require as many as 20 Agency record systems to be searched. A difficult request can involve over 100. In many instances, the results of these searches are prodigious. Thousands of pages of records are amassed for review. Here is a graphic illustration of the product of an FOIA search, although in the case of records gleaned from operational files virtually none of this information is released to the requester.

Security risks remain which are inherent in the review process.

The CHAIRMAN. May I interrupt? Is that one request?

Mr. MCMAHON. Yes, sir, that is one request, and we had to screen those two mountains of files in order to produce 6 inches of releasable material.

The CHAIRMAN. Would you guess how many pages you had to go through to get to that information?

Mr. MCMAHON. The documents are 9½ linear feet.

The CHAIRMAN. Nine and a half linear feet.

Senator LEAHY. Is that a typical result? I mean, that would be the median one, the average?

Mr. STRAWDERMAN. This would probably be in the minority, but when you have one like this you have quite an extensive search process to go through, and every page has to be read and scanned word by word and line by line. No, this is not the garden variety case, but we do have a number of these in the Agency to deal with at any particular time.

Senator LEAHY. Thank you.

Senator CHAFEE. Could I ask a question here, Mr. Chairman?

A request comes in, Mr. McMahon. Is it a generalized request such as please send me all the information you have on your Operation in Chile?

Mr. MCMAHON. Yes, sir. Often it is like that. What we have done in recent years is attempt to negotiate with the requester to narrow down the request into a topic that is specific enough for us to target where the information is located.

In earlier days we had to take a request like that and fan it out all through the Agency and seek information from files that may not have it in there. That took a considerable amount of time. But by negotiating with requesters we are able to narrow the requests down so that we know what files to look at. Even though it may be as many as 21 different systems, at least that is a lot better than 100 or more.

Senator CHAFEE. Now the typical person that is asking, would they be an author or columnist or would it be an individual just wanting to——

Mr. MCMAHON. It has varied over the years, Senator Chafee. Right after the enactment of the new provisions or the amendments to the FOIA back in 1974, we had a tremendous rush from citizens all throughout the United States. That has now narrowed down to what I would call the professional requester.

These are people from think tanks and institutes, from professors and possibly even other intelligence services seeking to acquire information on what CIA may have regarding them. So the composition is still a good cross section, but we seem to have drifted away from the average U.S. citizen coming in with a request.

Senator CHAFEE. And they have to pay a certain amount per page?

Mr. MCMAHON. We negotiate not so much with the private citizen as opposed to an institute or a journalist who wants CIA to do their reference work for them. So we negotiate that out.

I must say in some $21 million or more that we have spent since FOIA was enacted, we have only extracted about $76,000 in fees.

Senator CHAFEE. Thank you. Thank you, Mr. Chairman.

Mr. MCMAHON. The documents which we review, as I mentioned, Mr. Chairman, are scrutinized line by line, word by word by highly skilled operational personnel who have the necessary training and experience to identify source-revealing or other sensitive information.

These reviewing officers must proceed upon the assumption that all information released will fall into the hands of hostile powers and that each bit of information will be retained and pieced together by our adversaries in a painstaking effort to expose secrets which the Agency is dedicated to protect.

At the same time, however, the reviewing officer must be prepared to defend each determination that an item of information is classified or otherwise protected under the FOIA. Furthermore, the officer must bear in mind that under the FOIA each reasonably segregable piece of unprotected information must be released.

Sentences are carved into their intelligible elements and each element is separately studied. When this process is completed for operational records, the result is usually a composite of black markings interspersed with a few disconnected phrases which have been approved for release, and the exhibit here typifies what happens to a good number of our released information, and I believe the staff has prepared for you examples of this.

The public derives little or nothing by way of meaningful information from the fragmentary items or occasional isolated paragraph which is ultimately released from operational files. Yet we never cease to worry about these fragments. We cannot be completely certain of the composite information in our adversary's possession and what further element they need to complete a picture for them.

Perhaps we missed a source-revealing significance of some item. Perhaps we misplaced one of the black markings. The reviewing officer is confronted with the dizzying task of defending each deletion without releasing any clue to the identity of our sources. He has no margin for error.

Those who have trusted us may lose their reputation, their livelihood, and, indeed, their lives. The well-being of their families is at stake if one apparently innocuous item falls into hostile hands and it turns out to be a crucial lead.

As long as the process of FOIA search and review of CIA operational files continues, this possibility of error cannot be eradicated. The harm done to the Agency's mission by such error is, of course, unknown and incalculable. The potential harm is, in our judgment, extreme.

Aside from this factor of human error, we recognize that under the current Freedom of Information Act, subject to judicial review, national security exemptions do exist to protect the most vital intelligence information. The key point, however, is that those sources upon whom we depend for that information have an entirely different perception.

I will explain how that perception has become for us a reality which hurts the work of the Agency on a daily basis. The gathering of information from human sources remains a central part of CIA's mission. In performance of this mission, Agency officers must in essence establish a secret contractual relationship with people in key positions with access to information that might otherwise be inaccessible to the U.S. Government.

This is not an easy task, nor is it quickly accomplished. The principal ingredient in these relationships is trust. To build such a relationship, which in many cases entails an individual putting his life and the safety of his 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 then, the slightest problem, particularly a breach or perceived breach of trust, can permanently disrupt the relationship. Public exposure of one compromised agent will obviously discourage others. One must recognize also that most of those who provide us with our most valuable and, therefore, most sensitive information come from societies where secrecy in both government and everyday life prevails.

In these societies individuals suspected to anything less than total allegiance to the ruling party or regime can lose their lives, and in societies such as these the concepts behind the Freedom of Information Act are totally alien, frightening, and indeed contrary to all that they know.

It is virtually impossible for most of our agents and sources in such societies to understand the law itself, much less why the CIA operational files in which their identities are revealed should be subject to that act. It is difficult, therefore, to convince one who is secretly cooperating with us that someday he will not awaken to find in a U.S. newspaper or magazine an article that identifies him as a CIA spy.

Also, imagine the shackles being placed on the CIA officer trying to convince the foreign source to cooperate with the United States. The source, who may be leaning toward cooperation, will demand that he be protected. He wants absolute assurance that nothing will be given out which could conceivably lead his own increasingly sophisticated counterintelligence service to appear at his doorstep.

Of course, access to operational files under FOIA is not the only cause of this fear. Leaks, unauthorized disclosure by former Agency

employees, and espionage activities by foreign powers all contribute, but the perceived harm done by the FOIA is particularly hard for our case officers to explain because it is seen as a deliberate act of the U.S. Government.

Although we try to give assurances to these people, 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 they can't be protected.

How many cases of refusal to cooperate where no reason is given but if known would be for similar reasons I cannot say. I submit, however, that based upon the numerous cases of which we are aware that there are many more cases of sources who have discontinued a relationship or reduced their information flow based on the fear of disclosure. No one can quantify how much information vital to the national security of the United States has been or will be lost as a result.

The FOIA has also had a negative impact on our relationships with foreign intelligence services. Our stations overseas continue to report increasing consternation of what is seen as an inability to keep information entrusted to us secret. Again, the unanswerable question is how many other services are now more careful as to what information they pass to the United States.

This legislation will go a long way toward relieving the problems I have outlined. The exclusion from the FOIA of operational files will send a clear signal to our sources and to those we hope to recruit that the information which puts them at risk will no longer be subject to the process. They will know that their identities are not likely to be exposed as a result of a clerical error, and they will know that the same information will be handled in a secure and compartmented manner and will not be looked at by people who have no need to know that information.

A distinguished judge of the U.S. court of appeals, Judge Robert Bork in a recent dissenting opinion had this to say about the need to protect those sources that provide valuable information to the Nation. He said, and I quote:

> The CIA and those who cooperate with it need and are entitled to firm rules that can be known in advance rather than vague standards whose application to particular circumstances will aways be subject to judicial second-guessing.

Our national interest which is expressed in the authority to keep intelligence sources and methods confidential requires no less. At the same time, as I have explained before, by removing these sensitive operational files from the FOIA process the public is deprived of no meaningful information whatsoever.

The paltry results from FOIA review of operational files are inevitable. These records discuss and describe the nuts and bolts of sensitive intelligence operations. Consequently, they are properly classified and are not releasable under the FOIA as it now stands.

The reviewing officers who produce these masterpieces of black markings are doing their job and doing it properly. It is crucial to note in this regard that their determinations have been consistently

upheld when tested in litigation. The simple fact is that information in operational records is by and large exempt from release under the FOIA, and the few bits and pieces which are releasable have no informational value.

When I speak of reviewing officers absorbed in this process, it is important to stress that these individuals are not and cannot be simply clerical staff or even FOIA professionals. In order to do their job, they must be capable of making difficult and vitally important operational judgments. Consequently, most of them must come from the heart of the Agency's intelligence cadre.

Moreover, before any item of information is released under the FOIA, the release must be checked with the desk officer with current responsibility for the geographical area of concern. Hence, we must not only remove intelligence officers on a full-time basis from their primary duties, we must also continually tap the current personnel resources of our operating components.

That is so because we have a practice in the operational directorate which requires that every piece of paper which is released, even including those covered with black marks like the ones I have shown you here before, must be reviewed by an officer from the particular desk that wrote the documents or received them from the field, and we cannot alter this practice because the risk of compromise is so great.

You can imagine the disruption, for example, on the Soviet desk when the people there must take time off from their work that they are supposed to do in order to review a document prepared for release under the FOIA. It is obvious, of course, that when a CIA operation makes the front pages of the newspapers the FOIA requests on that subject escalate.

This loss of manpower cannot be cured by an augmentation of funding. We cannot hire individuals to replace those lost; we must train them. After the requisite years of training, they are a scarce resource needed in the performance of the Agency's operational mission. Let me make clear that this legislation exempts from FOIA only specified operational files. It leaves the public with access to all other Agency documents and all intelligence disseminations, including raw intelligence reports direct from the field. Files which are not designated operational files will remain accessible under the FOIA, even if documents taken from an operational file are placed in them.

This will insure that all disseminated intelligence and all matters of policy formulated at Agency executive levels, even operational policy, will remain accessible under FOIA. Requests concerning those covert actions the existence of which is no longer classified would be searched as before without exclusion of operational files.

And, of particular importance, a request by a U.S. citizen or permanent resident alien for personal information about the requestor would trigger all appropriate searches throughout the Agency without exception.

I would also like to address the benefit to the public from this legislation. Because of the backlog, FOIA requesters now wait 2 to 3 years to receive a final response to their request for information when they involve the search and review of operational files within the Directorate of operations. We estimate that should S. 1324 be enacted, the

CIA could in a reasonable time substantially reduce the FOIA queue. Indeed, if this bill is enacted, every effort will be made to pare down the queue as quickly as possible.

This would surely be of great benefit if the public could receive final responses from the CIA in a far more timely and effective manner. The public would continue to have access to the disseminated intelligence product and all other information in files which would not be designated under the terms of the bill.

There is one final issue, Mr. Chairman, which I would like to address before concluding my testimony. This is the issue of how it would be possible for the American public to have access to information concerning any Agency intelligence activity that was improper or illegal.

My firm belief is that given the specific guidance which we now have in the executive orders and Presidential directives, along with the effective oversight provided by this committee and its counterpart in the House, there will not ever again be a repeat of the improprieties of the past. And let me assure you that Bill Casey and I consider it our paramount responsibility that the rules and the regulations not be violated.

However, should there be an investigation by the Inspector General's office, the Office of General Counsel or my own office of any alleged impropriety or illegality and it is found that these allegations are not frivolous, records of such an investigation will be found in non-designated files.

In such a case, information relevant to the subject matter of the investigation would be subject to search and review in response to an FOIA request because this information would be contained in files belonging to the Inspector General's office, for example, and these files cannot be designated under the terms of this bill.

The same would be true for similar reasons, Mr. Chairman, if under the Congressional Oversight Act a senior intelligence community official reports an illegal intelligence activity to this committee or to the House Intelligence Committee.

Mr. Chairman, the CIA urges adoption of this legislation. I understand that the administration also supports your bill.

This concludes my testimony, Mr. Chairman. You have introduced those colleagues of mine who have joined with me here to testify on this bill. But before I close, I would like to note the words of Judge Gerhard Gesell of the U.S. District Court for the District of Columbia in addressing an FOIA case.

He said, and I quote, "It is amazing that a rational society tolerates the expense, the waste of resources, and the potential injury to its own security which this process necessarily entails." I share his views. This country needs S. 1324.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. McMahon.

Now I must apologize for having made my opening statement and not having recognized other members of the committee who might have wanted to do the same.

Senator Chafee.

Senator CHAFEE. I have nothing, Mr. Chairman.

The CHAIRMAN. Senator Leahy.

Senator LEAHY. I do, Mr. Chairman, if I might.

This is a matter of some interest to me. I was glad to hear Senator Thurmond's support for the compromise legislation that Senator Hatch and I worked out in the Judiciary Committee. It was a matter of about a year and a half of work.

Today we take up an issue that follows on with that, an issue that concerns me as one who has spent a great deal of time as a defender of FOIA. That issue is whether to exempt a portion of the Central Intelligence Agency's files from search and review.

I think Mr. McMahon's testimony, as always, was to the point, very substantive, and is welcomed by us here. As a member of the Select Committee on Intelligence I understand and I share your concerns about protecting sensitive information on intelligence sources and methods. I have stated this over and over.

In the abstract, protection of the CIA's operational files does not even rate an argument. It is a given. The FOIA was never meant to require disclosure of our intelligence sources and methods. It should not, and it would be absolutely wrong if it did.

But in practice you have to question just what the problem is, the real problem that CIA may have on its hands. As I understand it, there is no question of the Agency being compelled by the FOIA now to release sources and methods information, and the courts have sustained your denials of such information. The courts support your policy of refusing to acknowledge or confirm the existence of special activities. On that basis you do not search files for information bearing on those activities. So it seems to me that FOIA is not jeopardizing sensitive intelligence information per se, and the problem in reality may be something else. Let me make sure I fully understand the argument for this legislation.

Despite FOIA's existing exemptions and the protection afforded by the courts, good faith compliance with the search and review requirements of the FOIA is alleged to be imposing an unnecessary and unproductive burden on the Agency. The situation described here seems to be that the Agency is forced to search and review the operational files of the Directorate of Operations, the Directorate of Science and Technology, and the Office of Security, which are files that patently it cannot release.

There are three major costs in meeting the search requirements for these materials, as I see it. One, because of the sensitivity of the sources and methods information in operational files case officers have to be diverted from their normal duties to review and sanitize these materials. That is at the expense of their regular intelligence work.

Second, the need to amass all relevant documents pertaining to the request is breaking down vital compartmentation of operational information. You fear that sooner or later information is going to be released which will lead to the identification of human sources or intelligence methods—again a major concern.

And, third, the search and review of operational files, which for the reasons already stated would not produce significant releasable information, is causing a major backlog in responding to FOIA requests, including those which would bring about normal release of information. I understand there is a backlog of about 2,500 cases and the delay in responding is around 2 years.

Now, before I make up my mind on this bill, I want to be shown that the consequence of its passage will not be the release of less information from the CIA's files than at present. I understand from your testimony that that is not the intent of the CIA. Is that correct?

Mr. McMAHON. That is correct, Senator.

Senator LEAHY. I would not support a bill whose purpose would result in denying information to the public that would otherwise be made available. My view is that public access under FOIA to intelligence information used by policymakers, consistent with national security requirements, has been valuable. It has resulted, for example, in the release of National Intelligence Estimates from the 1950's and early 1960's, such as the NIE on the Cuban missile crisis.

I also want to see solid Agency assurances on the record that relief from search and review of designated operational files will lead quickly to elimination of the backlog and a more expeditious response to future FOIA requests.

Signs of the Agency's seriousness about dealing with FOIA in the future will be important in helping me to decide whether to support S. 1324. In the past, its attitude has not been encouraging. The bill offers an opportunity for you to show that the CIA accepts the public's right to access to information which does not jeopardize intelligence sources and methods or disclose secrets vital to the Nation's security.

I very much appreciate the statements made here. The Director of the CIA said in a speech that FOIA should not even apply to the CIA. The facts are, of course, that it does. You are not suggesting that here, and I am glad of that.

I want to review carefully with you and your associates precisely how these operational files would be designated, which files would fall in this category, and how information in operational files that does not fit the four categories in the bill would be reachable under FOIA.

Some of that will have to be done in a classified session, Mr. Chairman, but a lot can be handled on the public record. This is the longest opening statement I have given in this committee on any matter, Mr. Chairman. But I probably have spent as much time as any Senator, and perhaps more than most, on FOIA during the last 2½ years. The progress of our bill in the Judiciary Committee on FOIA will to a greater or lesser degree be affected by the progress of this one. I thought it best to set my feelings on the record for those who are following what I might be doing on it.

Thank you.

The CHAIRMAN. Senator Huddleston.

Senator HUDDLESTON. Well, thank you very much, Mr. Chairman.

As you know, this committee for at least the last 4 years has been trying to resolve the issue of the CIA's role under the Freedom of Information Act. In 1979 Admiral Turner asked us to exempt from the act the operational files of every agency of the intelligence community. Some of us felt that was a little too broad, and instead the intelligence charter bill in 1980 included a narrower provision just for the CIA's operational files.

When that bill was introduced, I thought the exemption ought to be considered within the framework of charter legislation and I still think so. The safeguards in a new CIA charter would make it less

necessary to have the Freedom of Information Act as a check against abuses. However, without a new charter the issue takes on a different light.

In 1981 we held hearings on separate legislation to exempt operational files of all intelligence agencies, as well as Director Casey's proposal to exempt the entire CIA. At that time it became clear to me that any legislation on CIA and the Freedom of Information Act must be very carefully balanced. The new bill introduced by Senator Goldwater this year represents an effort to benefit both CIA's operational interests and the public's right to know and to have as much information as possible about their government.

It seems to me our job is to determine whether or not this bill does in fact serve both of those interests adequately. There is no question that CIA would gain from not having to search its operational files in response to an FOIA request, but what about the public's need to know? Some of the questions I want to check out are:

Is it true that the bill would not reduce the actual amount of information that comes out because the courts already let CIA withhold operational data?

Will reporters and scholars still have access to as much information as possible consistent with national security about the CIA intelligence product that goes to national policymakers?

What will happen to the enormous backlog of CIA requests, and how does CIA plan to improve its processing of requests for information that can be declassified?

And, finally, does the bill affect the right of an American citizen to have the courts review CIA decisions to keep secret the facts about controversial operations or alleged intelligence abuses?

The committee needs to submit detailed questions to the CIA on these matters, and some of them will be discussed during this hearing. I hope that most of the information or all of it can be made public so that everyone who is interested can understand the purpose and the effects of this particular legislation.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

We will begin the questioning with Senator Chafee, who was very instrumental in this work in the past year. John.

Senator CHAFEE. Thank you very much, Mr. Chairman.

Mr. McMahon, we have some statistics here before us. I do not know whether you have the same group that show a very dramatic decline in the FOIA requests. Let me take these statistics starting in 1975.

It shows in 1975 you received 6,600 requests; in 1982 you received 1,000. Furthermore, in the bar graphs that you have here, although 1975 was the peak—well, this shows 1975, and then it jumps to 1978, and then 1979 right to the present. There has been a rather astonishing decline in these requests.

Is there any particular reason for that? Was it the novelty of it that started it off? Let us see. This started in 1975, did it not?

Mr. STRAWDERMAN. I will take that, Senator Chafee. In 1975 we had an influx of people asking for what do you have on me, or a my-file request when the act was passed in 1974. We can service those fairly easily, since for about 84 percent of them there are no records available.

Senator CHAFEE. That disappointed them probably, did it not?

Mr. STRAWDERMAN. We have gotten down to the more serious requesters in the last couple of years, so it seems to be a gradual tailoff of the my-file requests coming in from the early days.

Senator CHAFEE. But, even so, take the difference between 1978 and 1982. It went down 50 percent from 2,100 to 1,000, and——

Mr. STRAWDERMAN. The green line on the chart, Senator, is the Privacy Act requests. The middle line, I believe, are the Freedom of Information Act requests, so it really came down from 1,600 to 1,010, and it is continuing at about that same rate this year.

Mr. MCMAHON. I think you also have to bear in mind, Senator Chafee—and I hate to admit this—but I would suspect that a number of well-meaning requesters when they know it is going to take 2 to 3 years to get an answer are discouraged.

Senator CHAFEE. Well, I suspect that might well be so.

Is the term "operational file" a term of art? Does that mean something by its very terminology? If so, why is it not very convenient for you or the Director just to mark everything an operational file?

Mr. MAYERFELD. I think the bill defines that quite clearly because it does say that operational files may be designated only if they concern the items listed on page 5, beginning line 20. In other words, they have to concern the means by which foreign intelligence, et cetera, is collected by scientific and technical means. They have to concern foreign intelligence operations, counterintelligence and counterterrorism operations, and on those files in the Office of Security that are concerned with the investigations conducted to determine the suitability of sources, and a very important item, beginning on line 4, page 6, intelligence and security liaison arrangements or information exchanges with foreign governments or their intelligence or security services.

In other words, if you will, this constitutes the definition of operational files.

Senator CHAFEE. I see. Let me ask you—Mr. Chairman, when my time is up, just let me know.

The CHAIRMAN. Go ahead.

Senator CHAFEE. On these charts here it shows the appeals from 1975 to 1982. Now is that a litigating appeal, an appeal to a court?

Mr. STRAWDERMAN. This is an administrative appeal, right.

Senator CHAFEE. That is an administrative appeal.

Mr. STRAWDERMAN. That is right.

Senator CHAFEE. I must confess I do not know. Who do you appeal to? Is there an appeal procedure set up?

Mr. MAYERFELD. Yes; to a committee composed of Deputy Directors.

Senator CHAFEE. But in addition there is a judicial right of appeal, is there not?

Mr. MAYERFELD. That is right, Senator.

Senator CHAFEE. Now how many of those—is it my understanding that the CIA has won every one of those?

Mr. MAYERFELD. It has won every one of those where we asserted a national security exemption, a classification exemption, or the authority under the Director's authority to prevent disclosure of sources and methods. We have won every one of those. I should say, Senator, with one exception.

Senator CHAFEE. When you say every one, roughly how many are you talking about—not exactly, just roughly?

Mr. MAYERFELD. Well, we are talking in terms of hundreds. We have had, I think, some 300 FOIA lawsuits since the act has been in effect.

Senator CHAFEE. Well, that is a pretty good batting average. You have won 299.

Mr. MAYERFELD. 256 to be precise. That is the exact figure.

Senator CHAFEE. That is better than Lou Hall's.

Mr. MAYERFELD. Well, in a way, Senator, if I may, this proves the need for this bill because what we usually battle over in the courts is this kind of operational information.

Senator CHAFEE. Now in the course of defending ourselves, do you have to go and reveal the information, or how do you work that? Is that a problem in itself?

Mr. MAYERFELD. It is a very serious problem. The law requires that every segregable piece of a document that you withhold has to be individually described. It is very hard to describe an item of secret information without giving away the secret, and once you have described it you have to justify the need to withhold that.

If I may take you back to that document here, those block letters in there, this was a document which was subject to litigation, and in the affidavit that we had to file to support our arguments to withhold these, each one of these, beginning from A and it runs through L, was a certain kind of information which we were withholding, whether it was the name of an agent, the name of an employee, the identification of a source, the location of a CIA secret installation, and so forth.

And each one of those block letters represents one of those. And in the accompanying affidavit we had to say wherever the letter K appears the name of a CIA source appeared, and then we have to go on and say in the affidavit that we are required to file why it is necessary to protect Mr. K as a CIA source.

Senator CHAFEE. I see, that is dangerous. Now let me ask you this, in conclusion, Mr. McMahon. You testified in favor of this act and you are for it. Does it do you much good? On a scale of 10, if 10 were your best wish—which I suspect might be to be exempt entirely from the act—how much does this do for you?

Mr. MCMAHON. If you are running an intelligence service, Senator Chafee, you would like to have total exemption for the Agency.

Senator CHAFEE. I am not faulting you for that one bit.

Mr. MCMAHON. But if you are trying to live within the spirit of FOIA and what it was intended to do for the American people, then I support this bill because it makes available or accessible to the citizens of the United States that information which they might legitimately inquire about, and hence we are obliged under this bill to do a search and make sure that we search information against that request.

But the key is that it protects our sources. There will not be instances where our source's name may be inadvertently revealed or an incident described which reveals that source through an oversight, and that is what we are trying to do.

Senator CHAFEE. I know that is the objective of the act, but in fact do you think that will succeed largely?

Mr. MCMAHON. Yes, sir, it will, and it will do away with the perception that a number of our sources have that they are threatened because of the present FOIA Act.

Senator CHAFEE. Do you agree with that, Mr. Stein?

Mr. STEIN. I do indeed, Senator Chafee. I would add simply to it another very important feature of the bill.

In the espionage business, as mentioned in Mr. McMahon's testimony, the mere act—the mere act of searching—causes a breakdown in one of the cardinal rules of the intelligence business, namely, the compartmentation of its information.

When a request comes in, anything relating to that request is lumped together and it is taken out of compartmented sections of the operational files, put together, xeroxed, and so forth, and so there is an automatic breaking down of security within the Directorate of Operations itself—a very dangerous practice.

Senator CHAFEE. Well, thank you, Mr. Chairman.

The CHAIRMAN. Thank you, John. Do you have some questions?

Senator HUDDLESTON. Yes, Mr. Chairman.

One of the key questions, of course, raised about the bill itself is how it will affect information that might appropriately come out relating to intelligence abuses. I think if we look back we can point to the fact that each of the CIA Directorates covered by the new exemption was involved in some kind of abuse disclosed by the Rockefeller commission and by the Church committee.

The MKULTRA program for testing drugs on unwitting subjects was conducted by a component of the Directorate for Science and Technology, for instance. And the CHAOS program for collecting information about domestic protests and dissent was carried out by the Directorate of Operations. And then two projects of the Office of Security, Resistance and Merrimack, involved infiltration of domestic groups protesting against the CIA itself.

Now in your opening statement, Mr. McMahon, you said that CIA would search the records of investigations of abuses, but what about the operational files as they relate to the abuses themselves? Would they be subject to search and review?

Mr. MCMAHON. Yes, sir, if there is any abuse, Senator Huddleston, within the Agency, that would automatically be reported upward. I am sure this committee can attest to Agency employees carrying to its attention things that they are concerned about, whether they are illegal or not. So we know that happens.

The Agency is also spring-loaded as an institution right now regarding the propriety and legitimacy of everything it is doing. The whole structure, the whole management structure, within the Agency is designed to make sure that abuses do not occur, and if they do occur that they are addressed. And any process by which that takes place would not be a part of the operational file. It would be part of either my office or the Inspector General's office, or General Counsel's office and would be available for search and review under the FOIA.

Senator HUDDLESTON. So you do not see this act as inhibiting in any way the information that is available or the investigation that may be conducted that might relate to some actual or alleged abuses by CIA?

Mr. MCMAHON. No, sir, no more so than it does right now.

Senator HUDDLESTON. What about when an operation has become declassified or has been officially acknowledged by the Government? What happens then to an actual operation?

Mr. McMAHON. Then that would become a nondesignated file and would be subject to search and review.

Senator HUDDLESTON. Would that be an automatic process?

Mr. McMAHON. Go ahead.

Mr. MAYERFELD. Yes; the bill specifically provides, Senator, that information in operational files on special activities, that is covert action operations which, as the bill says, the fact of which can no longer be classified would be subject to search and review.

Senator HUDDLESTON. That is an automatic process?

Mr. MAYERFELD. The bill provides for that specifically as to covert action.

Senator HUDDLESTON. Now, questions have been raised as to whether or not the bill would reduce the amount of information actually produced by the CIA to reporters and scholars and concerned citizens, and as I understand it the bill is not intended to exempt files that contain intelligence product—that is, either raw or finished intelligence reports used by CIA analysts and by the policymakers.

And the bill is not supposed to exempt declassified special activities, even covert activities, that go beyond intelligence collection. Is that correct?

Mr. MAYERFELD. That is correct.

Senator HUDDLESTON. What about historically valuable information on collection operations themselves? I think one example is a document that we have that is entitled "The Berlin Tunnel Operation," which is a very intriguing document. It was a clandestine service history of the tunnel from West to East Berlin built by CIA back in the 1950's. The study was obtained from the CIA under the Freedom of Information Act by David Martin, who was then a Newsweek reporter, and he used it in writing his book "A Wilderness of Mirrors."

Now, would studies like this that deal with important CIA collection operations be subject to search and review under the bill?

Mr. STRAWDERMAN. Yes, sir, we envision that intelligent studies would be subject to search and review. We have studies of intelligence that are produced and articles from those have been released over recent years—67 of them in total—and they would be subject to search and review under the bill. So, they would be accessible to historians and researchers seeking that sort of information.

Senator HUDDLESTON. So, the bill providing for search and review of information about declassified covert operations, would it also permit the search and review on those rare cases when the existence of a collection operation can be declassified for historical purposes?

Mr. MAYERFELD. Well, as to the Berlin Tunnel example, that particular document released to David Martin was found in nonoperational files. There is a constant process going on where our Center for Studies in Intelligence writes pieces of historical value and actuallly puts out an in-house publication. Much of the contents of that particular publication is unclassified. but even the classified portions of that will be subject to the act, will be subject to requests for declassification review under FOIA.

Senator HUDDLESTON. Mr. Chairman, I have a few more questions.

Senator CHAFEE [presiding]. Go ahead.

Senator HUDDLESTON. Well, I think another area is the role of the courts. I would like to get that pinned down. The basic principle of

the Freedom of Information Act for many is that the courts will have an opportunity to review the bureaucratic decisions that keep information secret.

Looking at the role of the courts in this specific legislation, we have already dealt with the definition of "operational files" and I assume that the courts would be able to review the determination that a particular file or set of files is exempt from search and review. Is that your understanding?

Mr. MAYERFELD. No, Senator, I do not think it is. I think the way this bill is crafted it leaves that discretion to the DCI because it does specifically state that if such files—in other words, they will be exempt if such files have been designated by the DCI. My understanding of that bill would be that the designation by the DCI would not be judicially reviewable and that this bill would delegate that authority to the DCI.

Quite frankly, any other interpretation I think would turn this legislation on its head, because if every time the designation by the DCI were challenged in court, we would be right where we started.

Mr. MCMAHON. I think your concern, Senator Huddleston, can be handled through the oversight process where this committee will be knowledgeable of our files and what files have been so designated.

Senator HUDDLESTON. So the person seeking information, then, would have to pretty well rely on the oversight committees to assure that the Agency is making a proper designation of the files.

Mr. MCMAHON. I think that goes to the very essence of everything we do.

Senator HUDDLESTON. Do you think any kind of court review would be detrimental to what you hope to accomplish by this act?

Mr. MAYERFELD. I would say so, Senator.

Mr. MCMAHON. I think it would defeat it, Senator. In fact, the courts have found in cases in the past that the best authorities on the sources and methods and the classification are those in the business of doing it.

Senator HUDDLESTON. You do not see this as a major problem for those who are seeking the information?

Mr. MCMAHON. No, sir. Knowing what I know about our operational files and the content and the information in there, what the citizenry of the United States should have access to is our product and the disseminated intelligence, and that is where the information is of interest to them.

Senator HUDDLESTON. I will have some further questions.

Senator CHAFEE. All right. Senator Leahy.

Senator LEAHY. Thank you. Let me just make sure I understand one part of this—how we would move into what files to be looked at.

Suppose we have a covert operation, but then it is acknowledged, thereby becoming an overt operation. Can someone then request a search of the operational files on this operation?

Mr. MCMAHON. They could request information that is contained in those operational files and they would then be considered non-designated files and a search and review would take place and we would then apply the standards that presently exist under FOIA.

Senator LEAHY. So the President having acknowledged a covert operation in Nicaragua makes those files a lot different than they were say 2 months ago?

Mr. MCMAHON. If the President acknowledged a covert operation in Nicaragua, we would still be obliged to protect any alleged sources or methods we have there.

Senator LEAHY. I understand. I just wanted to use a concrete example to make it easier. [Laughter.]

You have got to understand us small town lawyers. We come down here to Washington, Mr. McMahon, and we have to just go simple fact by simple fact.

Mr. MCMAHON. Coming from New England I appreciate that.

Senator LEAHY. That's how we keep up with you big city fellows.

Let me ask a couple of specific questions. By the way I think that this type of open session is very good, and I think that you well understand and encourage us to lay down a solid legislative history. Your answers to Senator Huddleston's questions just now are going to be an integral part of the legislative history if this act is to be passed.

To follow up on one of Senator Chafee's lines of questions, again an important area to go into, the Agency has a present position on FOIA. I understand your own feelings as an intelligence professional would be what any of us would have in a similar position. Given your preferences as a professional intelligence officer, there would be no FOIA requirement of the Agency whatsoever. I do not think anybody disputes that.

But, within the context of the way our Government functions, the Agency being part of the Government, and in the context of FOIA applying to the rest of the Government, what is the Agency's position on the public's right to access to information influencing this Nation's foreign and national security policy?

Mr. MCMAHON. That is a tough call, Senator. I think that we are obliged to support the wisdom that Congress and the Constitution determined years ago when it gave the President the responsibility for conduct of foreign affairs. And in order to carry that out it was determined that certain forms of classification or secrecy had to exist.

I think that we would support the secrecy which protects the ability of the President to prosecute foreign policy in a manner that is effective and efficient.

Senator LEAHY. Well, let me go to a followup question on that. Is this bill what you want, or is it a camel's nose under the tent kind of bill? Is it a prelude to renewed pressure for broader exemption?

Mr. MCMAHON. I think it is a bill that is a compromise of the Agency's recognizing that it cannot have total exemption and must seek something that protects our sources, yet at the same time lives within the spirit and the intent of Freedom of Information. I think we have struck an arrangement which just borders on acceptability in CIA.

Senator LEAHY. I see. Well, your answer to that is still important in gathering whatever kind of support there might be. It is like the FOIA work that Senator Hatch and I have done in the rest of the FOIA legislation.

Depending upon what particular problem each one of us may have been looking at, everybody has had to give somewhat to reach a workable compromise. A lot of the areas where we reached agreement has

been on the basis of an understanding of where the bill is going, and that if we agree on a particular area, for example, we would do our best to fight off further amendments.

I would think that in trying to get support for this Goldwater-Thurmond bill, a telling factor in the minds of a lot of Senators, and certainly in mine, will be whether this is the final product or prelude for a quick followup.

Now I am not suggesting CIA or anybody else is precluded from coming back on a piece of legislation if it is not working out, to seek the normal kinds of adjustments, as we are doing in FOIA. But I want to know if this is a prelude to asking next year for a wider exemption?

Mr. McMAHON. There is no hidden agenda here, Senator Leahy. What you see is what you get, and this is what we are standing by.

Senator LEAHY. Do you understand my question and the reason for it?

Mr. McMAHON. Yes, I do.

Senator LEAHY. Is that the White House position on this bill?

Mr. McMAHON. I am led to believe that, yes.

Senator LEAHY. So we should not expect further efforts from them to exempt more of the intelligence community from FOIA?

Mr. McMAHON. Not from them. I imagine there may be an effort or two, but it would not be sanctioned.

Senator LEAHY. Well, if it is not sanctioned, it isn't going anywhere, let me tell you. [Laughter.]

Whoever did that would have two strikes against them. That would be interesting. At that point the White House and I would be joining hands.

I have a number of questions for the record, Mr. Chairman, but there is one more I would like to ask Mr. McMahon.

On page 8 of your prepared testimony you state that:

> Should there be an investigation by the Inspector General's office, the Office of General Counsel, or my own office of any alleged impropriety or illegality and it is found these allegations are not frivolous, records of such investigation would be found in nondesignated files.

I applaud that conclusion. I want to know who makes the determination that an allegation of abuse or impropriety is either serious or frivolous—the sort of threshold determination.

Mr. McMAHON. Well, I think that the process of the investigation which the Inspector General or the General Counsel would undertake would determine that and that is usually done in concert with the Director or myself.

Senator LEAHY. Does that mean that documents relating to any allegation deemed frivolous would be placed in designated files and therefore would not be searchable?

Mr. McMAHON. I do not think so.

Senator LEAHY. Did you want to comment?

Mr. MAYERFELD. Well, that was not the intent, I do not think, that is what Mr. McMahon had in mind there, but there are an awful lot of frivolous allegations that arrive in our mailbox. There is a large volume of crank letters that we do get that I think would have to be treated as frivolous.

Senateor LEAHY. I have a great deal of sympathy for that.

A few weeks ago I was walking across the west front of the Capitol, Mr. Chairman, on the first nice day we had. It had stopped raining. And a guy walked up to me and made some statement about Japan. Unfortunately, I am blind in my left eye, which makes me a sucker for the right punch. He hauled off and belted me.

I thought that was an unfriendly sort of thing to do, and fortunately so did a police officer who made me look like a midget and who suggested that the man might want to stay around for a bit.

It turned out he had been released the day before from St. Elizabeth's, where, among other things, he had been visiting following his criminal charges of assault with intent to kill a police officer and other things—not enough to keep him there, but just enough for observation.

He has now written to the Democratic leader of the Senate, from whose State he comes—by coincidence, of course. [Laughter.]

We try to keep this thing all in the family—saying that he had a very definite reason for hitting me, because after I committed a murder in Chicago. He said I let poor Mr. Loeb and Mr. Leopold take the blame for it. As nearly as I can tell, that murder occurred about 20 years before I was born, so I would categorize that as a frivolous accusation. [Laughter.]

So if I get a few of those, I can imagine the number you get.

There is a person who prowls the Halls here who has told each one of us that she is protecting us from rays from some machine you have out at CIA directing the activities of the members of this Intelligence Committee. At least all of us now know how to explain to our constituents just why we vote the way we do.

Mr. McMAHON. I think we have to put that machine in for a rehab; it's not working very well. [Laughter.]

Senator LEAHY. My last question is, can you assure the committee that any information relating to alleged abuse or impropriety will be searchable?

Mr. McMAHON. Definitely.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN [presiding.] Thank you very much.

The question was asked about the President's position on this legislation. I wrote to President Reagan on April 11 this year and reminded him that the 1980 Republican Party platform stated, "We will support amendments to the Freedom of Information Act to reduce costly and capricious requests to the intelligence agencies."

I then asked him whether he and his administration would suppport some form of legislative relief for the intelligence community from the Freedom of Information Act in the 98th Congress. The President responded to me a few days later and said that he would support a bill which would allow CIA to devote more attention to their primary mission of developing accurate and timely intelligence while assuring continued access by the public, to information in nonoperational files, which would still be subject to the existing FOIA exemptions.

And then he went on to say that he looked forward to early introduction of the bill and that he would work with me and my Senate colleagues to achieve this important goal. In summary, then, I think it is very fair to say that the President and the administration will support this piece of legislation which Senator Thurmond and I have introduced.

Now let's address some of the smaller problems that you have. I understand that the Ayatollah Khomeini has submitted four requests to the CIA for information about the Shah of Iran. Must the CIA answer FOIA requests by the Ayatollah Khomeini under the language of my bill?

Mr. McMAHON. No, not under the language of your bill, as long as that information is contained in operational files. If it is contained in disseminated intelligence, then we would have to do a search and review.

The CHAIRMAN. Did you have an answer to that?

Mr. MAYERFELD. No; that is correct.

The CHAIRMAN. I thought that was just a little bit farfetched to have that fellow asking anything from the U.S. Government.

Mr. McMAHON. Mr. Chairman, I think that a rough count of the FOIA requests shows that about 7 or 8 percent of it comes in from overseas.

Senator LEAHY. Mr. Chairman, I should note that the bill that Senator Hatch and I have worked on would preclude a foreign national from making such a request.

The CHAIRMAN. I just want to say under the language of this act the CIA will still be required to respond to proper requests from U.S. citizens and lawful aliens under the Privacy Act.

Mr. STEIN. Mr. Chairman, may I comment there with regard to the comment of Senator Leahy? In the case of the request by the Ayatollah for information on the Shah, that was done by a New York law firm.

Senator LEAHY. That does create a problem under either of these acts.

Mr. STEIN. Yes, sir.

The CHAIRMAN. Can Philip Agee submit a request under this bill?

Mr. McMAHON. Yes, he can, sir. You may recall that we have been working for a number of years on a request for Philip Agee. We estimated that we have done research totaling the equivalent of about 300,000 dollars' worth of man-year effort which went into review of his request.

The CHAIRMAN. But under this legislation a fellow like Agee or any other requester could not get information from your designated files?

Mr. McMAHON. No, sir, they may not. That is why we endorse this bill.

The CHAIRMAN. What will be the effect of the bill on the workload required by pending lawsuits?

Mr. McMAHON. I am sorry, sir, I did not hear that.

The CHAIRMAN. What will be the effect of this bill on the workload required by pending lawsuits?

Mr. MAYERFELD. I have some pretty close figures on that, Mr. Chairman. There are currently 77 pending lawsuits before the court. If this legislation is enacted, 46 of those lawsuits would be affected. Twenty-two of them should be dismissed entirely because they only deal with documents culled from files which would be designated. As to the remaining, 24, the majority of the documents that are involved in the lawsuit would be taken out of the controversy.

[An updated and more complete response to this question follows:]

Mr. Mayerfeld submits the following information to amend his response to the Chairman's question concerning the potential effect of S. 1324 on pending lawsuits.

27-445 O - 84 - 3

There are now 69 currently active lawsuits under the Freedom of Information Act in which CIA is a defendant. From among these, it is believed that 39 litigations would be unaffected if S. 1324 is enacted.

Although, on a basis of a preliminary examination I had believed that 22 currently pending lawsuits would be dismissed entirely because they only involved documents found in files that are likely to be designated as exempt from search and review under S. 1324, a closer look into these litigations now leads me to conclude that I cannot with certainty state how many, or if indeed any, of these 22 would be dismissed. Some of these cases involve issues such as fee waivers or attorneys' fees which would not be affected by this bill. Others involve issues such as the scope of the search. One case concerns the question of whether or not the fact of the existence of a given special activity is classified. Several lawsuits which had been included in the original number of 22 lawsuits expected to be dismissed, concern documents culled from files likely to be designated but, inasmuch as the designation process has not yet taken place, I cannot with certainty state that all the records involved in these lawsuits would be found only in designated files.

In addition, with respect to the remaining 8 lawsuits that will also be affected by the enactment of S. 1324, there may be a narrowing in scope and simplification of issues, however, the impact of this legislation on each of these individual lawsuits cannot be predicted with certainty at this time.

The CHAIRMAN. Thank you. How many full-time positions are assigned to handling FOIA requests in each component and subcomponent of the CIA?

Mr. STRAWDERMAN. We have 56 positions allocated to FOIA, but that is not a good measure really of the workyears that we devote to it. We actually devote 128 workyears to the effort, which is really the hours worked of more than 200 people working on the project throughout the course of a year.

I would judge that over 100 of those people are professionals with other disciplines in intelligence that are pulled away from their regular duties and work on FOIA. So I guess a better measure of the effort that goes into FOIA is the workyear effort that we provide each year, and that was 128 for 1982.

The CHAIRMAN. I have heard that the FBI has several hundred people.

Mr. STRAWDERMAN. I believe that is correct.

The CHAIRMAN. And these several hundred people do nothing but FOIA requests at a cost of about $15 million a year.

Mr. STRAWDERMAN. Our cost runs about $3.9 million a year, I believe.

The CHAIRMAN. Oh, well, you are cheap. [Laughter.]

Do you have any idea how many person years or other personnel are devoted to handling such requests in each component or subcomponent of the CIA?

Mr. STRAWDERMAN. Well, the personyears we would refer to are the workyears, or 128. A predominant number of those are in the Directorate of Operations, where we judge about 70 or so are involved in FOIA. In other areas, Science and Technology, there are two; in the Intelligence area there are four; and the others are in the Directorate of Administration; and the DCI area or the independent offices of the Agency.

A lot of those are involved in the legal processes of administrative appeals and the litigations in the DCI area.

The CHAIRMAN. John, I do not know if you have had time to think about this, but what specific steps does the CIA intend to take when this bill is passed to reduce the backlog in processing FOIA requests and to improve CIA responsiveness?

Mr. McMAHON. I think, Mr. Chairman, that we do realize we have an obligation if we are granted the relief that we seek under this bill to cut down on the backlog as quickly as possible and we will certainly take meaures to do that. I think if we can eliminate a number of the operational files, that will go a long way in reducing the work load just in itself.

The CHAIRMAN. Under Executive Order 12356, will designated operational files remain subject to search and review under this legislation?

Mr. McMAHON. Yes.

Mr. MAYERFELD. Yes, they do, Mr. Chairman.

The CHAIRMAN. This is a little bit farfetched, but more and more of this type of activity is taking place, and it is taking place, in my opinion, to the detriment of our intelligence community. Have you released a clandestine services history of "The Berlin Tunnel Operation" to David Martin, the author of "The Wilderness of Mirrors"? Have you done that?

Mr. McMAHON. Yes, sir, we have.

The CHAIRMAN. How many other such studies exist now and would they be exempted from search and review under this bill?

Mr. STRAWDERMAN. I do not have a precise number on those that exist, but we have given out 67 articles over the last 2 or 3 years in the studies of Intelligence area. That information is in nondesignated files and will be subject to search and review under this bill.

The CHAIRMAN. It would be subject?

Mr. STRAWDERMAN. Yes, sir.

The CHAIRMAN. Is there any way you can clamp down on that type of literary effort, if you can call it that? [Laughter.]

I say that seriously because in my association with the activities of other intelligence services in other countries they do not allow anything like that. They do not even print calling cards, and, my God, in this country you can get away with holy murder.

Mr. McMAHON. We treat a great deal of the articles that go in the studies in Intelligence as really training aids, Mr. Chairman, because we sanitize them from a source and method standpoint. If the document is in an unclassified form, even though it is in an in-house document, for those articles that we feel have a message to tell to our employees, we retain the security classification.

So we would review those documents, but we would be able to extract any revealing or classified information from them as we would under the existing law.

The CHAIRMAN. I just have one more question. If designated files contain information concerning possible illegal intelligence activities, such as violations of Executive Order 12333, would they be exempt from search and review under this bill?

Mr. McMAHON. No, they would not. The mere process of that illegal action coming up through the process would place that information into nondesignated files which would mean that they would be susceptible to search and review.

The CHAIRMAN. Well, would the CIA support an amendment which would make it clear that designated files will be subject to search and review if they concern any intelligence activity which the DCI, the Inspector General, or General Counsel of the Agency has reason to

believe may be unlawful or contrary to Executive order or Presidential directive?

Mr. MAYERFELD. Mr. Chairman, in my view such a specific item to be legislated would be unnecessary by the very definition. If the Inspector General or the General Counsel or the Director's office has reason to believe that something may be unlawful, there is documentation on this particular matter located in those files, and they are not in designated files.

The CHAIRMAN. Do you have any other questions, either one of you gentlemen?

Senator LEAHY. Just one note on the Berlin tunnel operation. Sometimes it is not all bad that some of this information becomes public. In the CIA's own report, in the part that has been made public, it says:

> As a result, the tunnel was undoubtedly the most highly publicized peacetime espionage enterprise in modern times prior to the U–2 incident. Worldwide reaction was outstandingly favorable in terms of enhancement of U.S. prestige. There was universal admiration, including informed Soviets on the technical excellence of this installation. The non-communist world reacted with surprise and unconcealed delight to this indication that the U.S. was capable of a coup against the Soviet Union and thoughtful editorial comment applauded this indication the U.S. was capable of fulfilling its role of free world leadership in the struggle.

It is not all bad that we know some of the things the agency can do. The Chairman's thrust, of course, was that sometimes the other things come out, but so much of the Agency's work is so important to us and yet it remains secret. I wish there were ways that more of the accomplishments could be made part of the record, but unfortunately they cannot.

The CHAIRMAN. Well, I am very happy to report, as I have to your boss, that returning last weekend from a trip to several European countries for the purpose of looking into intelligence matters our intelligence community is increasingly well thought of. It shows an improvement in morale, in how to do things, and I am very proud of the fact that our intelligence now, in my opinion, ranks right up with the best.

I want to thank all of you for your help. Do you have another question?

Senator HUDDLESTON. I guess one other question, Mr. Chairman. I do not want to duplicate anything.

Mr. MCMAHON. I was going to go out on a high roll there, Senator. [Laughter.]

Senator LEAHY. We will adjust the record to show that the last remarks of Senator Goldwater will come after this.

Senator HUDDLESTON. I just want to pull together all the loose ends we can, Mr. McMahon, and there are always some, of course.

This has to do with intelligence product and the policy documents that are in operational files. Now the theory of the bill is that we can exempt operational files from search and review for intelligence product and for policy documents because that kind of information is kept in other file systems that duplicate what is in the operational files.

There might be a problem, however, with the theory if some of those materials are shown to policymakers and then returned for storage to the operational files only. Is it the intent of the bill that the

intelligence products stored in operational files will continue to be subject to search and review, if it was in fact used by policymakers and analysts?

Mr. McMahon. I think the answer is unequivocally yes. Whenever there is an occasion such as that where a document which came forward and then say was handcarried back to the operational files for safekeeping, a dummy copy is placed on the Executive Registry which services the Director's office and my office. So a search there would reveal the content, an index of where to go to check that.

So it would be maintained outside of the operational file and there would be an indicator that that information has progressed out of the operational file.

Senator Huddleston. So it would then be accessible?

Mr. McMahon. It would then be accessible, yes, sir.

Senator Huddleston. Would you give the committee a report, classified if necessary, on how you do store that kind of intelligence information?

Mr. McMahon. We would be happy to.

Senator Huddleston. And on policy documents that go to the Director or to the National Security Council, but that still might be stored only in operational files?

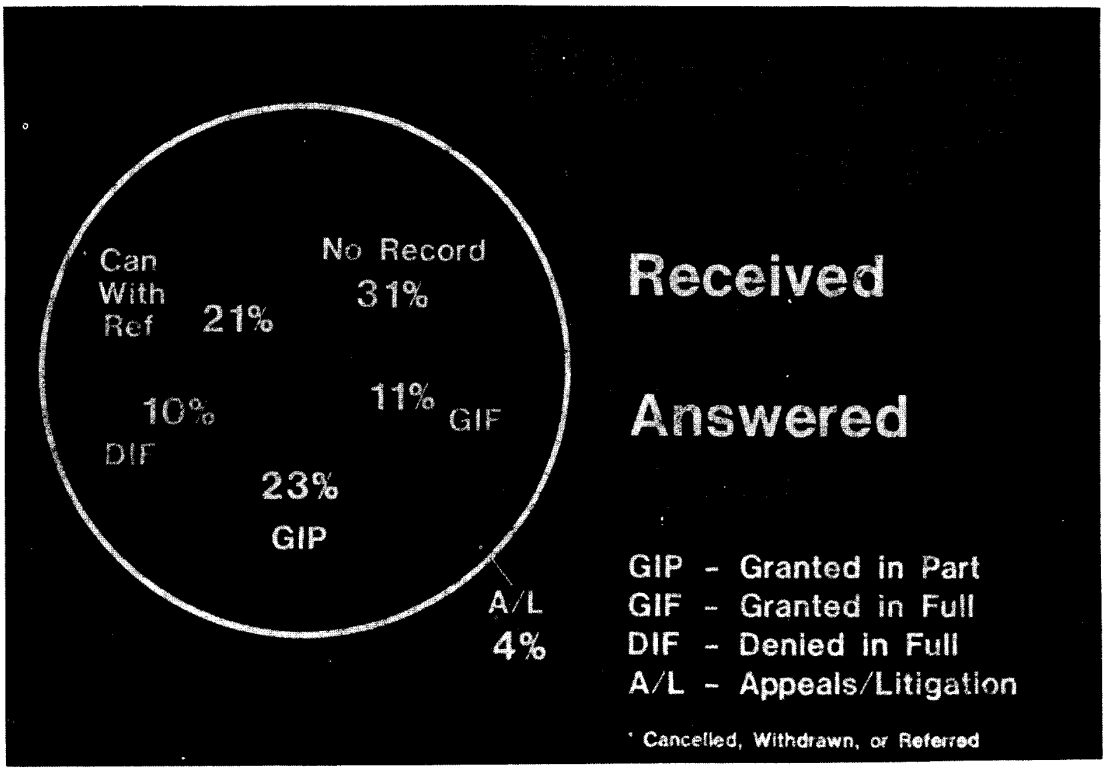
Mr. McMahon. I cannot think of an example, but I know how the system would work and we would be happy to give the committee an explanation of that.

Senator Huddleston. All right. Thank you very much.

The Chairman. I have several vugraphs for the record and Senator Durenberger's statement for the record.

[The information and Senator Durenberger's statement follow:]

Requests Logged:		Responses:	
FOIA	1,010	No Record	807
		Granted in Part	610
PA	1,016	Granted in Full	288
		Denied in Full	272
EO	252	Canceled	456
		Other	209
TOTAL	2,278	TOTAL	2,642



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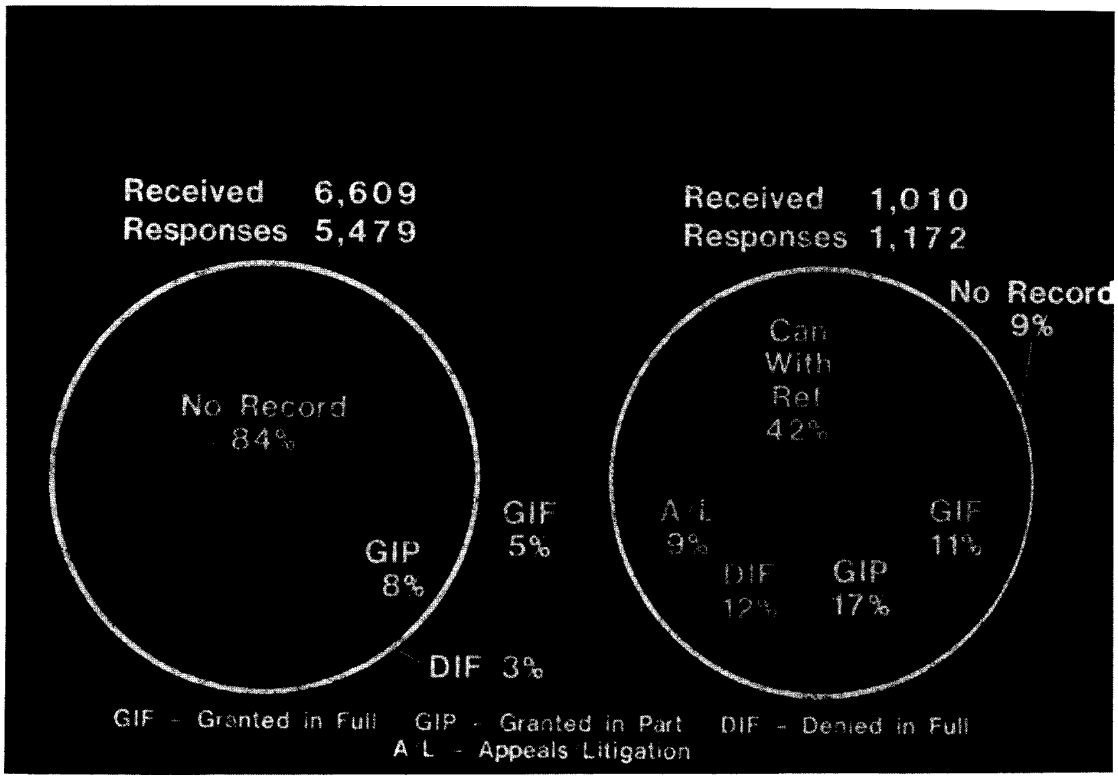

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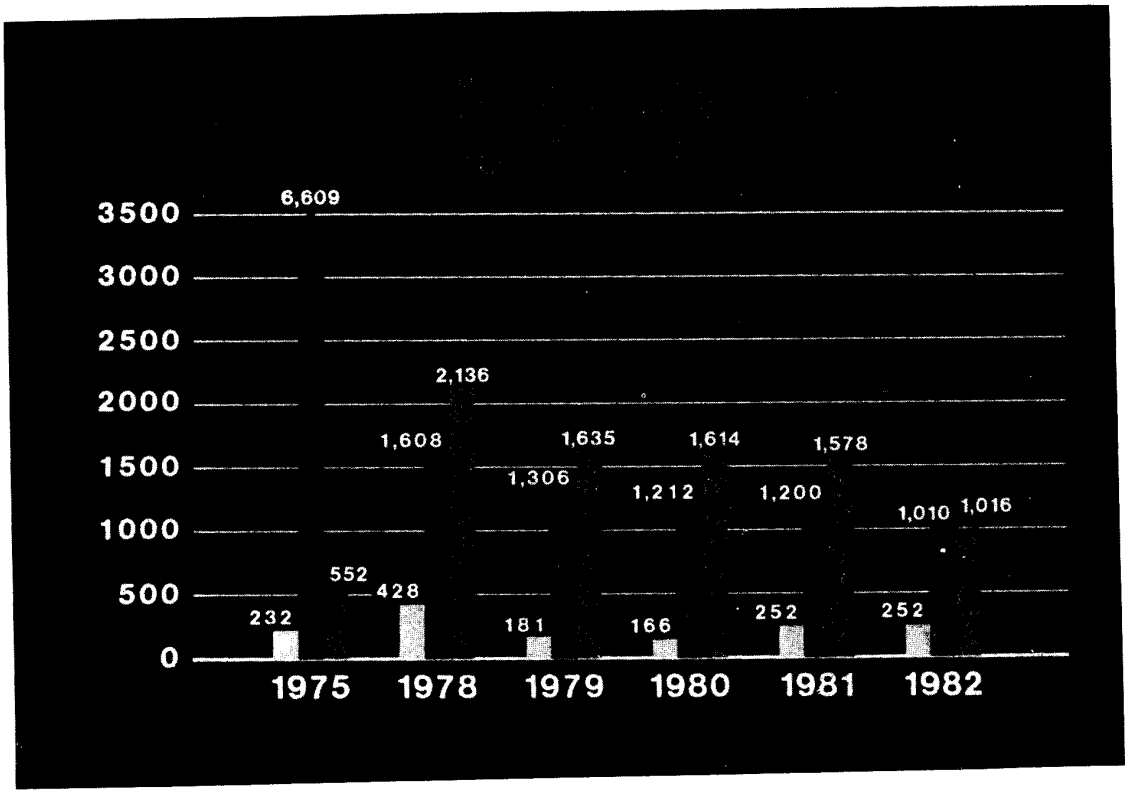

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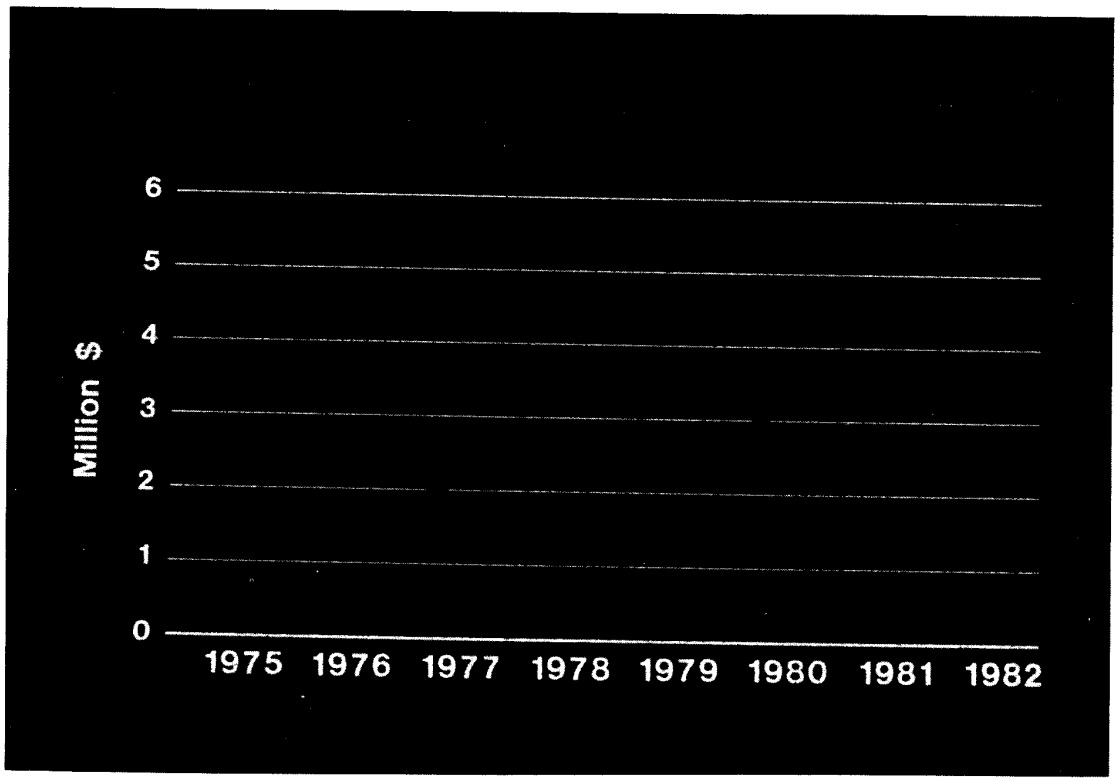

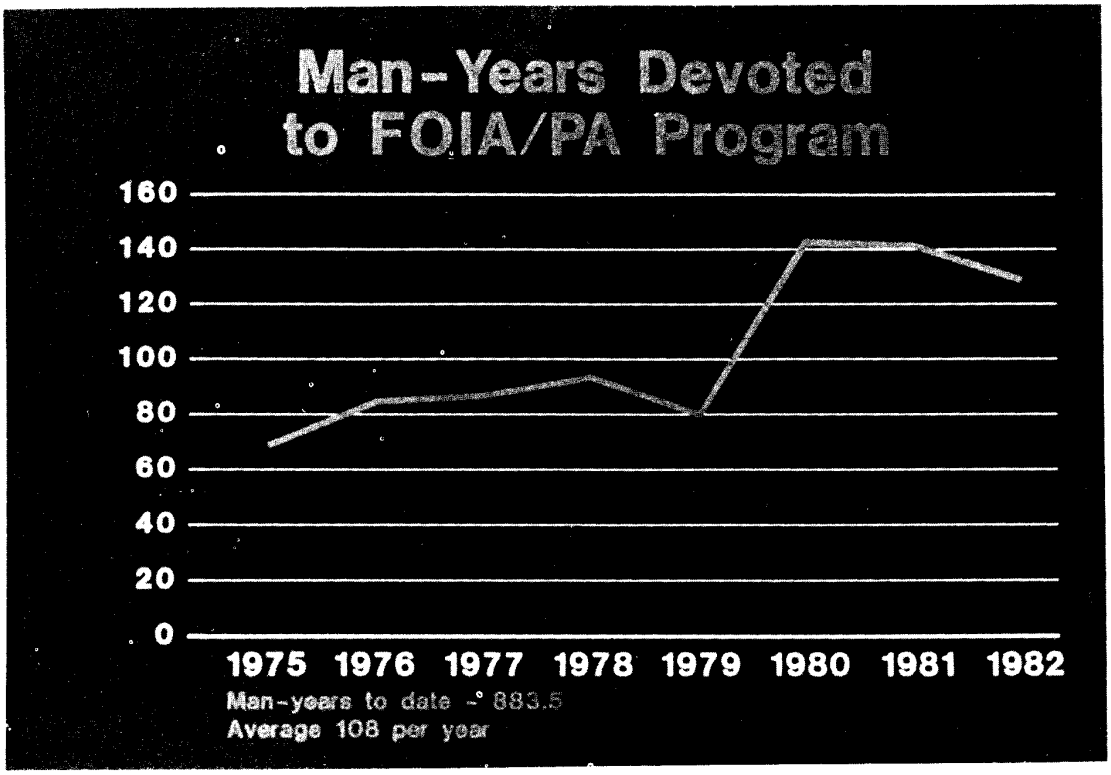

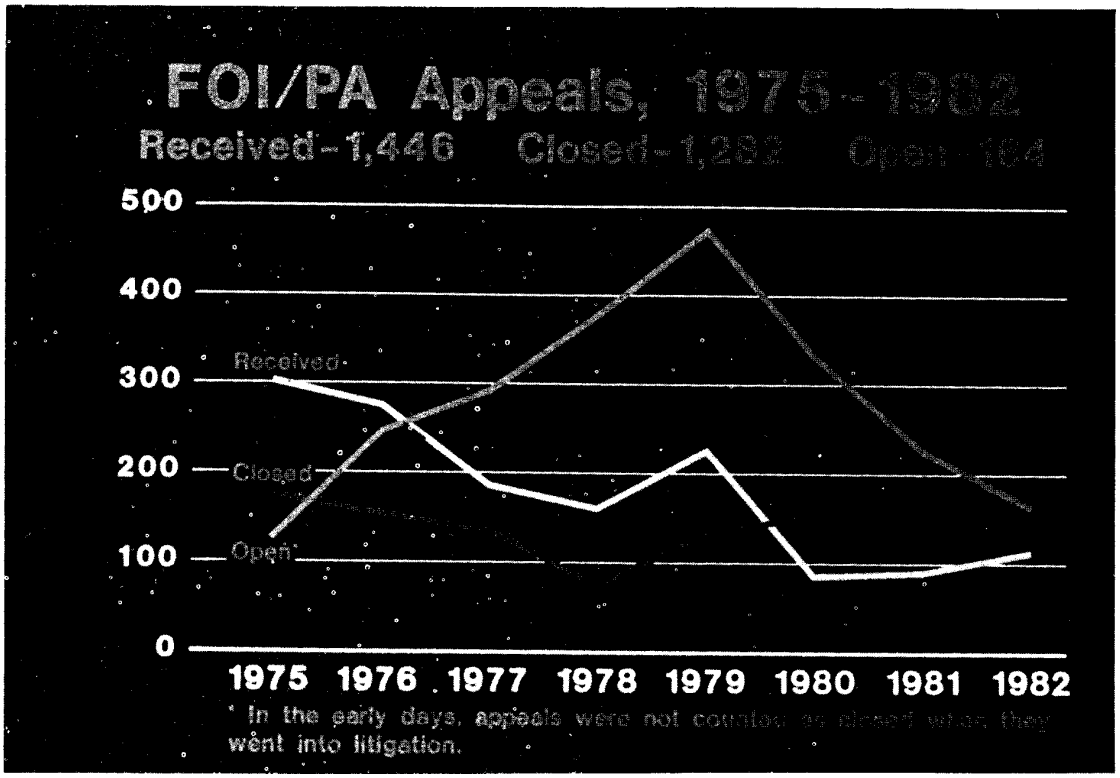

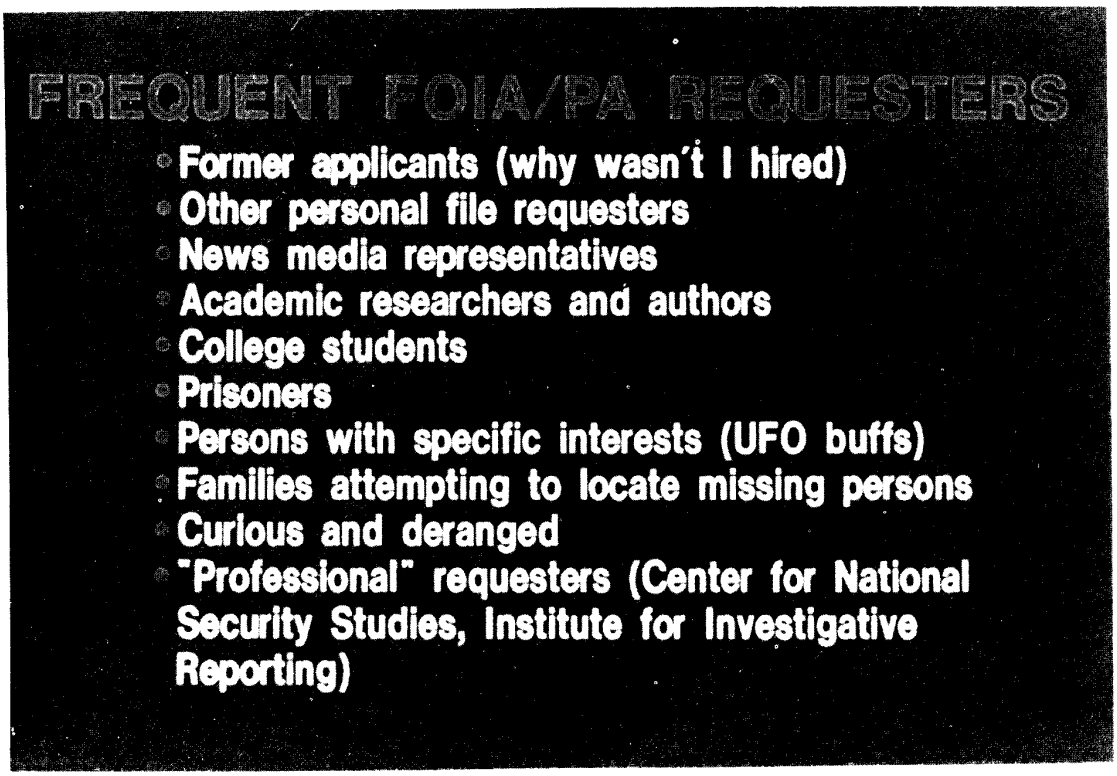

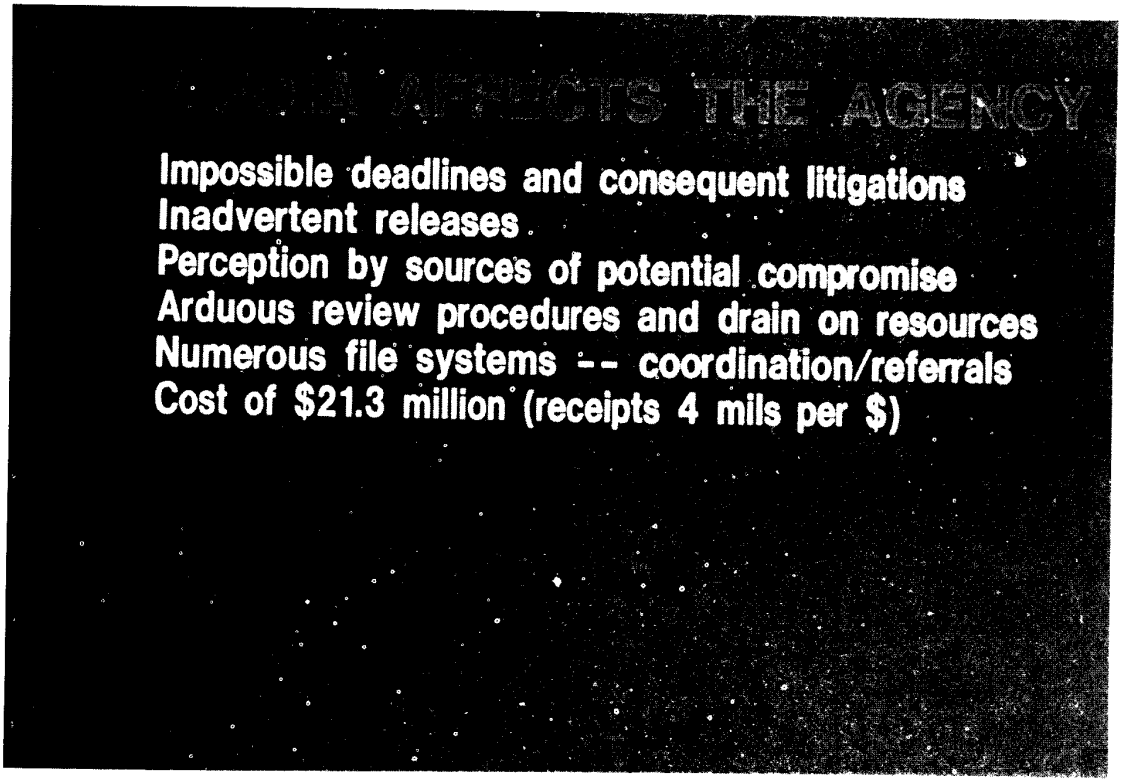

PREPARED STATEMENT OF SENATOR DAVE DURENBERGER ON THE INTELLIGENCE INFORMATION ACT OF 1983

Today's Hearings on the "Intelligence Information Act of 1983" are part of a long process. FOIA relief for the CIA was proposed back in 1980, and the Select Committee held hearings on this issue in 1981. The bill we are considering today is notably better than those we looked at two years ago. We are all indebted to our chairman, Senator Barry Goldwater, for the CIA's progress from rhetoric to realism.

Two years ago, the Intelligence Community was demanding a complete exemption from the Freedom of Information Act. Now their proposal is more modest: an exemption for portions of their operational files. Before, intelligence officials claimed that FOIA was incompatible with an effective intelligence service. Now they strongly endorse a bill that states:

"The Freedom of Information Act is providing the people of the United States with an important means of acquiring information concerning the workings and decisionmaking processes of their Government, including the Central Intelligence Agency."

As they say in the ads, you've come a long way, baby!

But the journey is not yet over. There are many assurances that must be given before we can ask the public to accept this retreat from full FOIA accountability. And there are changes that will have to be made before we can honestly tell the American people that we have struck the proper balance between secrecy and openness.

Two years ago, I called this issue one of a conflict of rights, in which each side had an interesting case to make. I suggested "that finely-honed instruments will do a better job than meat-axe 'reforms'. . . . The executive branch should not let narrow problems be justifications for broad exemptions." We are on the way to crafting such a finely-honed bill. But the executive branch may have to bend a little more if we are to succeed.

The CHAIRMAN. The next session will be Tuesday morning next week at 10 in room SD–342.

We stand adjourned. Thank you, gentlemen.

[Whereupon, at 3:30 o'clock p.m., the committee adjourned, to reconvene upon the call of the Chair.]

S. 1324, AN AMENDMENT TO THE NATIONAL SECURITY ACT OF 1947

TUESDAY, JUNE 28, 1983

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, D.C.

The select committee met, pursuant to notice, at 10 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Barry Goldwater (chairman of the committee) presiding.

Present: Senators Goldwater, Durenberger, Inouye, and Leahy.

The CHAIRMAN. The meeting will come to order.

OPENING STATEMENT OF CHAIRMAN BARRY GOLDWATER

Last week the committee heard the CIA's views on S. 1324, a bill to amend the National Security Act of 1947. This legislation would relieve the CIA of searching and reviewing certain operational files under FOIA requests. This relief will enable the Agency to become more efficient so that other FOIA requests may be answered speedily.

I want to take just a few minutes to outline why this legislation is needed.

In the 8 years since FOIA has been in its present form, the CIA has worked hard to comply with the act. However, it has been impossible to keep up with all the requests in the way the act requires. I do not think Congress really contemplated the burdens FOIA would place on an intelligence agency.

As we heard in last week's testimony, FOIA mandates that if someone requests all the information on a certain subject, all the files have to be located. In an intelligence agency, most of the information is classified. But that does not end the Agency's job. An experienced person must go through stacks and stacks of these papers—sometimes they are many feet tall—just to justify why almost every single sentence should not be released. If this is not done well, a court could order the information released.

Now, what has been the result of this burdensome process? Very little information, if any, is released from operational files when the requester seeks information concerning the sources and methods used to collect intelligence. Even then, the information that is released is usually fragmented.

Also, there is always the risk that there will be a mistaken disclosure or that some court may order the release of information which could reveal a source's identity or a liaison relationship. That is why these most sensitive operational files should be exempt from search and review under the provisions of my bill.

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It is important to know that this legislation does not frustrate the essential purposes of the FOIA. Requesters will continue to have access to CIA files containing the intelligence product, and to information on policy questions and debates on these policies. Additionally, access to files for individual U.S. citizens and permanent residents who seek information on themselves will not be affected by S. 1324.

Presently, the wait for a response under an FOIA request to the CIA takes anywhere from 2 to 3 years. This kind of situation benefits no one. By exempting these operational files from search and review, the processing of all other requests can be completed much sooner. Thus, the public will receive information which is releasable under the Freedom of Information Act and Privacy Acts in a far more efficient and satisfying manner.

Today we have witnesses from various organizations that could be affected by this legislation. We have the Department of Justice, the Association of Former Intelligence Officers, the American Civil Liberties Union, the Society of Professional Journalists, the American Newspaper Publishers Association, the chairman and a member of the ABA Standing Committee on Law and National Security, and the National Coordinating Committee for the Promotion of History.

We look forward to hearing your testimony.

We have an opening statement from Senator Durenberger.

OPENING STATEMENT OF SENATOR DURENBERGER

Senator DURENBERGER. Mr. Chairman, I thank you very much for the opportunity and for giving me just a couple of minutes to summarize my statement, which I would like to have made a part of the record. I will probably be in and out to help you with this hearing. We are doing a markup on the Clean Water Act this morning.

I was sorry not to be able to be in attendance at the last hearing, and probably even more sorry when I saw the transcript of the hearing, because it created some problems for me with this bill. I really believe that it is possible to balance the needs of the CIA and of outside groups in a way that will give each side a better deal than it now believes it is getting. But I do not think that we have yet quite struck that balance, and until we do I will have to reserve my support for the bill.

What are the problems, at least for this Senator, with the bill as it now stands?

First, it could be used to keep the wraps on intelligence abuses.

Second, it would provide exemptions for all intelligence collection operations, even acknowledged ones, in spite of the fact that these are often more important than covert actions.

Third, it would exempt material that was declassified or ready for declassification, thus cutting off important areas of historical research.

I just want to say, with regard to that, that I do not believe in history for history's sake. I do not believe in history just for the sake of the people who make their living writing history. But as a person who has been in and out of various forms of public and private service during my lifetime, I find a great deal of benefit particularly in my role now as a policymaker, in studying both the achievements and the failures of those who preceded me. For that reason, I would accent my concerns about access to materialfor historical research.

Fourth, it is apparently intended to prevent any form of judicial review.

And fifth, it would appear to remove the Freedom of Information Act as a means by which bereaved families can seek information about family members who have died under mysterious circumstances during or after service in the CIA.

Aside from the provisions of the bill itself, other concerns remain. First, we need concrete assurances that the backlog of FOIA request cases will be ended and the CIA will handle FOIA requests with more sensitivity than in the past.

Second, we must be sure that this bill is not the nose of an Intelligence Community camel or a national security mammouth trying to get in under the tent. The CIA has assured us that they do not intend to let other agencies into their bill, but if this is just the first of many bills for each agency, then we should know about it and consider the full ramifications of what begins as a narrow bill for part of one agency.

We should also think carefully about the message this bill sends to the American people. We in this room may view the bill as a complex compromise, a solution to a conflict of rights. But the people see it simply as an FOIA exemption. If we want to send a balanced message, we would do well to add provisions that clearly buttress FOIA.

Six of us on this committee have cosponsored the Freedom of Information Protection Act, S. 1335, which would do just that.

On the positive side, Mr. Chairman—I do not know why I always leave these things for the end—I am pleased by the CIA's assurances that all disseminated intelligence and all policy memoranda will remain open to FOIA search and review. I have asked the CIA questions for the record to pin down those points and I am very confident that they will be answered satisfactorily. In this respect, congressional oversight is working.

I recognize the importance of the CIA's acceptance of FOIA as it applies to nonoperational materials. That is a great step forward. It compels us to reconcile the differences that I have noted, for we can still craft a bill that will ease the CIA's burdens while reinforcing FOIA in its vital role of keeping Government accountable to the people.

Thank you very much, Mr. Chairman.

The CHAIMAN. Thank you very much, Senator. I think you have summed up your feelings on this. As usual, you are very fair and to the point. I am sure we will come out with a bill that we can all live with.

Our first witness this morning is Ms. Mary Lawton, who is Counsel on Intelligence Policy of the Department of Justice. Welcome.

STATEMENT OF MARY LAWTON, COUNSEL ON INTELLIGENCE POLICY, DEPARTMENT OF JUSTICE

Ms. LAWTON. Thank you, Mr. Chairman.

We appreciate the opportunity to appear before the committee in support of S. 1324. While the bill by its terms relates solely to information in the files of the Central Intelligence Agency, it has significance

for the Department of Justice, which of course represents the CIA in Freedom of Information Act litigation.

As the committee is aware, the Freedom of Information Act requests to the CIA impose enormous burdens on the Agency and on the Department of Justice when litigation ensues. While many agencies are burdened with FOIA requests, the comparted nature of CIA files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. These difficulties are compounded in litigation.

The Department of Justice can only assign to CIA cases those attorneys who have the necessary clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in *Phillippi* v. *CIA* and *Ray* v. *Turner*, without at the same time disclosing the very information they are required to protect.

Often, in order for the courts to appreciate the national security implications of requested records, extensive classified affidavits explaining their sensitivity must be filed. The courts in turn must juggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts.

And all to what end? When the litigation is over, the information remains classified, just as it was before the request was filed.

If there were any public benefit served by FOIA requests of this type, consideration of this bill would require this committee to weigh the benefit against security concerns. With respect to the records covered by S. 1324, however, we perceive no such benefit.

The CIA must divert valuable intelligence personnel from their mission to identify and review the records. Processing must be scrutinized to minimize the risk of erroneous release which must jeopardize sources or diminish the value of the intelligence. Attorneys at the Agency and the Department spend countless hours preparing documents. Already heavy court dockets are further burdened by these cases. Yet in the end the public receives only the bill for this needless expense.

The findings set forth in S. 1324 essentially recognize that this process wastes intelligence community and litigative resources without any offsetting public benefit. Equally important, S. 1324 recognizes the problem posed by the perception of those who cooperate with intelligence agencies that protection of information furnished cannot be insured.

Whether or not this perception is justified, it is real. Congressional recognition that the problem exists and that it warrants remedy should help to allay the concern.

I am sure that the committee is aware that the Department of Justice sought in the last Congress and is seeking in this Congress generic relief from some of the undue burdens imposed by FOIA on the Government as a whole. We are delighted that the Senate Judiciary Committee has agreed to report S. 774. The need for that legislation, however, in no way diminishes the need for legislation such as S. 1324.

This bill focuses on the specific protection of CIA sources and methods and addresses the particiular problems of processing and reviewing compartmented files. It is, quite properly, an amendment to the National Security Act of 1947. As exemption (b)(3) of the Freedom