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ROUTING AND RECORD SHEET

"SJUD Bfg 2 Aug 88"

SUBJECT: (Optional) Proposed Response to Senator Leahy's Letter dated 5 Jan 1989				
FROM: John H. Wright Information & Privacy Coordinator 1107 Ames Building		EXTENSION	NO. OCA 0175-89	
			DATE 23 January 1989	
TO: (Officer designation, room number, and building)	DATE		OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
	RECEIVED	FORWARDED		
1. OGC/LD [Redacted] 6U24 NHB				<p>Attached is a suggested response to Senator Leahy's letter dated 5 Jan 1989. Request your input.</p> <p>Please note Sen. Leahy has asked for a response from the Agency by the end of the month.</p> <p>[Redacted]</p> <p>JHWright</p> <p>Atts: Sen. Leahy's letter Proposed Response Testimony (Wright) Response to Peek</p> <p>STAT</p> <p>STAT</p> <p>STAT</p> <p>STAT</p>
2.				
3. OCA [Redacted] 7B14 OHB				
4.				
5. OIT/MSG/MSD Lee Strickland [Redacted]				
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~~United States Senate~~

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WASHINGTON, DC 20510-6275

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January 5, 1989

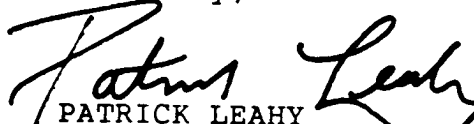
John H. Wright
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Dear Mr. Wright:

Thank you for participating in the August 2, 1988 hearing on the Freedom of Information Act.

Enclosed are questions for the record. Please provide answers by the end of the month to the Subcommittee on Technology and the Law, SH-815 Hart Senate Office Building, Washington, D.C. 20510. If you have any questions, contact Ann Harkins, Chief Counsel to the Subcommittee, at 224-3406.

Sincerely,


PATRICK LEAHY
United States Senator

cc: Joyce Woodburn

PJL/kbm

FOIA OVERSIGHT HEARING, AUGUST 2, 1988,

BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON TECHNOLOGY AND THE
LAW. QUESTIONS FOR THE HEARING RECORD BY SENATOR PATRICK LEAHY
FOR:

JOHN H. WRIGHT, INFORMATION AND PRIVACY COORDINATOR, CENTRAL
INTELLIGENCE AGENCY

1. Mr. Tim Peek, editor of the Addison County Independent in Vermont, testified at the hearing about his FOIA requests to the CIA about CIA recruiting at Middlebury College and his fee waiver request. Was it correct for the CIA to deny Mr. Peek's fee waiver?

2. You testified that the Agency reduced its response time from about 15 months on average in 1985 to about one and one-half months in 1987. You attributed this improvement to the Agency's authorization under the CIA Information Act of 1984 to respond to FOIA requests without searching certain CIA operational files. Does any of the improvement come from responding only with previously released documents? Does any of the improvement come from referring requesters to other agencies? What is the Agency response time for requests ~~that~~ require searching? In other words, what is the Agency's response time when the request is for new materials not previously released and not exempt under the 1984 CIA

Information Act? How much new material is the CIA releasing each year compared to previous years?

3. Various requesters have advised the Subcommittee that the CIA often uses the so-called "Glomar" response, neither confirming nor denying the existence of records, while the Defense Intelligence Agency rarely does so. Why would this be so?

4. I received a letter from Chuck Babcock, a respected Washington Post reporter, who uses some very strong language to describe the Agency's administration of the FOIA. On one of his requests relating to ITT's involvement in Chile in the early 1970s' -- an incident of major public interest -- it took the Agency from 1979 to 1987 to respond and process some 3200 pages. How could that request or any request have taken eight and one-half years to process?

5. In the cases of Mr. Peek, Mr. Babcock, and a number of other requesters, it seems that the CIA has taken upon itself the power to decide what information is of public interest and newsworthy. At the time of Mr. Peek's request, CIA recruiting at Middlebury was a prominent issue, with campus demonstrations and stories in the press. Is it appropriate for the CIA to substitute its judgement for that of experienced journalists,

scholars and research groups to decide whether released
information is of public interest?

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ANSWERS TO QUESTIONS ENCLOSED IN SENATOR LEAHY'S 5 JANUARY 1989 LETTER
TO THE CENTRAL INTELLIGENCE AGENCY

1. "Mr. Tim Peek, editor of the Addison County Independent in Vermont, testified at the hearing about his FOIA requests to CIA about CIA recruiting at Middlebury College and his fee waiver request."

Question: "Was it correct for the CIA to deny Mr. Peek's fee waiver?"

Answer:

At this time, given the benefit of additional information provided during the 2 August 1987 hearings and having had the opportunity to review the file of this particular FOIA request, no, I do not believe that it was correct for CIA to deny Mr. Peek's fee waiver.

As I mentioned in my testimony at the hearings, at the time

Mr. Peek's request was received the CIA had had relatively little experience with the new provisions of the Reform Act, specifically with administration of the new fee provisions. Since the hearings, I have reviewed the complete record of Mr. Peek's 29 October 1987 FOIA request, and conclude that the original determination on fee issues involved in Mr. Peek's request appears to have been based upon two factors:

One was a decision that a request for records about CIA's open recruiting and other overt relations with Middlebury College did not meet the standard that a fee waiver or reduction be granted if the disclosure of information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. With the benefit of the additional information provided at the 2 August hearings, our initial decision clearly did not give adequate weight to the keen interest which local subscribers to Mr. Peek's newspaper would have had in records about CIA's open or acknowledged relationships with Middlebury College.

The second was a decision that Mr. Peek's a request for such records was in the commercial interest of the requester. Mr. Peek made his FOIA request on letterhead of "The Addison Press, Inc." At the time, this information led to a conclusion that The Addison Press was a commercial publishing company. This decision clearly appears to have given inadequate weight to the additional information provided, namely, to the information which described The Addison Press as "Printers-Publishers of the ADDISON INDEPENDENT," to Mr. Peek's statement that "[t]his material will be used in newspaper articles for general public education ... ," and, to a lesser extent, to his title of "editor." Again, with the benefit of hindsight and the information provided at the 2 August hearings, we have no question at this time that the non-commercial nature of The Addison Press and Mr. Peek's status as a representative of the news media have been firmly established.

In my testimony at the 2 August hearings, I invited Mr. Peek to contact me further about fees associated with his request, and stated that I was prepared to reconsider our previous fee determinations. Such contact is a routine procedure used by requesters who have reason to believe that a fee determination has been based on a lack of adequate information or incorrect interpretation of pertinent information. Informal inquiries of this sort from requesters are welcomed, and are weighed on the merits of the information presented. Additionally, CIA's regulations for implementing the FOIA provide for a formal reexamination of initial fee determinations via the administrative fee appeal.

To date, I have not been contacted by Mr. Peek, and again I invite him to write to me to request reconsideration of the fee issues involved in his 29 October 1987 FOIA request.

2. "You testified that the Agency reduced its response time from about 15 months on average in 1985 to about one and one-half months in 1987. You attributed this improvement to the Agency's authorization under the CIA Information Act of 1984 to respond to FOIA requests without searching certain CIA operational files."

Question: "Does any of the improvement come from responding only with previously released documents?"

Answer: There are no data upon which to base an answer to this question. We can advise you, however, that since our computerized data base of previously released documents was initiated in 1980, it has been routinely searched in connection with incoming requests in order to locate documents responsive to those requests. As the size of the data base has increased over the years, it is reasonable to conclude the number of incoming requests which can be appropriately satisfied by documents in this data base has also increased. Hence, we conclude that some portion, although probably a relatively small portion, of our improved response time can reasonably be attributed to the ready availability of previously released documents. Unquestionably, however, the major factor contributing to improved response time has been the provisions of the CIA Information Act of 1984.

Question: "Does any improvement come from referring requesters to other agencies?"

Answer: Although no data are available, we estimate that the proportion of requests for which referrals to other agencies are appropriate has remained more or less constant. It has always been the policy of this agency to refer requesters to other agencies when the topics of their requests involve matters or records under the purview of other agencies and outside of the purview of this agency.

Question: "What is the Agency response time for requests that require searching? In other words, what is the Agency's response time when the request is for new materials not previously released and not exempt under the 1984 CIA Information Act?"

Answer: There are no readily available data on which to base an answer to this question. Obtaining this data would require a computer search to identify requests that require search, and then a file-by-file review of such FOIA requests received and of the responses made within any one specific time frame.

Question: "How much new material is the CIA releasing each year compared to previous years?"

Answer: We have no data based on year of release, but we can provide the following data which are based upon the year in which released documents were entered into our computerized data base:

1980: 148 pages	1985: 32,318 pages
1981: 23,907 pages	1986: 22,971 pages
1982: 5,924 pages	1987: 8,880 pages
1983: 23,662 pages	1988: 22,291 pages
1984: 7,064 pages	

Total number of pages entered from 1980-1988: 147,165

3. "Various requesters have advised the Subcommittee that the CIA often uses the so-called 'Glomar' response, neither confirming nor denying the existence of records, while the Defense Intelligence Agency rarely does so."

Question: "Why would this be so?"

Answer: We cannot speak to determinations made by the Defense Intelligence Agency, but only to determinations made by the Central Intelligence Agency. In accordance with the provisions of Section 3.4(f)(1) of Executive Order 12356, the CIA can neither confirm nor deny the fact of the existence or nonexistence of records whenever the fact of the existence or nonexistence of such records is itself classifiable under the Order. Determinations to neither confirm nor deny the fact of the existence or nonexistence of records are also frequently based upon the Director's statutory responsibility and authority to protect sources and methods from unauthorized disclosure. The applicable statutes are subsection 102(d)(3) of the National Security Act of 1947, as amended, 50 U.S.C. §403(d)(3), and the Central Intelligence Act of 1949, as amended, 50 U.S.C. §403g.

4. "I received a letter from Chuck Babcock, a respected Washington Post reporter, who uses some very strong language to describe the Agency's administration of the FOIA. On one of his requests relating to ITT's involvement in Chile in the early 1970's -- an incident of major public interest -- it took the Agency from 1979 to 1987 to respond and process some 3200 pages."

Question: "How could that request or any request have taken eight and one-half years to process?"

Answer:

The 3200 pages referenced above represent only a portion of the total pages reviewed on behalf of Mr. Babcock and five additional requesters pursuant to their FOIA requests to the Department of Justice for records about ITT.

In increments dating from 7 August 1979 to 18 December 1980, DOJ referred approximately two linear feet of documents for our review and direct response to the requesters. Of this volume, approximately one linear foot (equivalent of 3200 pages) was released in whole or in part. The remaining documents were reviewed, and either referred to other government agencies for direct response or denied in full; the number and page count of the denied documents remains currently and properly classified.

The documents were referred from Justice in the same form as submitted to Justice by CIA pursuant to congressional hearings held in the 1970's; most were in redacted form, and many were heavily redacted. During our preliminary review of the referred documents, it became readily apparent that the redacted copies did not lend themselves to equitable FOIA review. Accordingly, further review was delayed by the time required to locate and duplicate as many full text copies of the referred documents as possible.

As our review progressed, information originated by four other government agencies was identified in over 100 CIA documents. Outgoing requests for coordination on these documents began in March 1982, and all incoming responses had been received by January 1986. The coordination responses then required followup review by the responsible CIA component before a final determination could be made. Additionally, over 70 documents were reviewed and referred to five other government agencies for their review and direct response to the requesters.

Following completion of CIA component review, the case was assigned to FOIA officers for compilation of determinations, final review, and response to the six requesters on whose behalf the referrals had been made. A response was sent to Mr. Babcock on 22 October 1987.

5. "In the cases of Mr. Peek, Mr. Babcock, and a number of other requesters, it seems that the CIA has taken upon itself the power to decide what information is of public interest and newsworthy. At the time of Mr. Peek's request, CIA recruiting at Middlebury was a prominent issue, with campus demonstrations and stories in the press."

Question: "Is it appropriate for the CIA to substitute its judgement for that of experienced journalists, scholars and research groups to decide whether released information is of public interest?"

Answer:

As set forth in CIA regulations, 32 CFR Part 1900, published pursuant to the provisions of the FOIA, as amended by the Freedom of Information Reform Act of 1986, it is the responsibility of the designated CIA officials to make determinations on fee issues, including but not limited to evaluation of the merits of a particular request vis-a-vis "public interest." Such a determination frequently involves a judgment call to one degree or another, but the responsibility for making that judgment clearly lies with the responsible official and not with the individual requester. The Agency carefully considers the merits of each request based upon the information provided by the requester and guidelines issued by the Office of Management and Budget and the Department of Justice.

Specifically with respect to the term "public interest," the Department's 2 April 1987 Memorandum, entitled "New Fee Waiver Policy Guidance," states that "[t]he new fee waiver standard, found at U.S.C. §552(a)(4)(A)(iii), more specifically defines the term 'public interest' and provides:

"Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

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1 Department of Health and Human Services.

2 Mr. Wright, Mr. Faulk, Mr. Roberts, it is good to have
3 you all here. Mr. Faulk, it is good to see you again, and I
4 should add that somebody had asked me whether we had had an
5 earlier hearing and in the interests of appropriate reflec-
6 tions of freedom of information, when I had mentioned
7 chatting with Mr. Faulk before this was over the weekend in
8 simply a chance encounter.

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9 Mr. Faulk is a dedicated and hard-working public servant
10 and we have known each other for years and I have had the
11 benefit of his expertise as a member of the State Department
12 going back to an early trip to China to normalization. So I
13 just wanted to hasten to add we did not rehearse testimony
14 before we started. It was more a discussion of the weather
15 than anything else.

16 Mr. Wright, I wonder if I might ask you--and all of the
17 statements will be put in the record and we will go back to
18 that, but just in case we have another vote, you heard Mr.
19 Peek, who is the Editor for the Addison Independent, tell us
20 he was treated as commercial requestor by the CIA. That sort
21 of puts him in the same category as Exxon or Citibank.

22 Was that a right decision?

1 STATEMENT OF A PANEL CONSISTING OF JOHN H. WRIGHT,
2 INFORMATION AND PRIVACY COORDINATOR, CENTRAL
3 INTELLIGENCE AGENCY; RUSSELL M. ROBERTS, DIRECTOR,
4 FREEDOM OF INFORMATION/PRIVACY ACTS DIVISION,
5 UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
6 SERVICES; AND RICHARD C. FAULK, DEPUTY ASSISTANT
7 SECRETARY FOR OPERATIONS, DEPARTMENT OF STATE.

8 Mr. Wright. It is not really clear at this point. I
9 think that, well, first of all, in many of the FOIA requests
10 we get, many requestors allege that they have journalist
11 connections and we do require a fairly high degree of
12 specificity before we can make that determination.

13 And in the case of Mr. Peek, we do offer administrative
14 appeal rights in the event that the initial determination
15 either denies the fee waiver or the requestor is not satisfied
16 with the initial category determination.

17 At the time that request was serviced, we had relatively
18 little experience with the new provisions of the ~~Reform~~ Act,
19 and my advice to Mr. Peek at this point would be, if he did
20 not exercise his administrative appeal rights, to do so
21 because in the process of doing that, we do expand the
22 record. There is an exchange of information, and so forth.

23 The request for other fee considerations is looked at
24 more broadly in our organization, and that really is the
25 proper course of action at this point.

1 Senator Leahy. Well, let me tell you the statute is
2 fairly clear. It says, "Fees shall be limited to reasonable
3 standard charges for document duplication when records are
4 not sought for commercial use and the request is made by a
5 representative of the news media."

6 Now, a description of a newspaper which has county-wide
7 circulation in a county where there is a well-known college,
8 and one with which your agency has had a long and open
9 relationship, I might add, as has the Foreign Service and
10 others because of the language programs and all--members of
11 the agency give lectures and open-to-the-public forums at
12 Middlebury. Mr. Peek is an editor for that newspaper.

13 I mean, just based on what he has said here today, is
14 there any reason why he has to go through an appeal process?
15 I mean, isn't it pretty much on the face of it that he
16 qualifies as a representative of the news media, or are
17 editors precluded?

18 Mr. Wright. Well, I believe he identified himself in
19 the letterhead as Editor of the Addison Press, and it may not
20 have been entirely clear to our professional officers who
21 processed the case that he was indeed the editor of a
22 newspaper.

23 He did say in his request letter, and I have just had
24 the opportunity to look at it today, that newspaper articles
25 would be written based on the information disclosed. And the

1 only thing I can say at this point is that the initial
2 reaction to that request may have been to not see a connection
3 between him as editor as Addison Press and editor of the
4 newspaper.

5 [Laughter.]

6 Mr. Wright. Based on what has been said today, my guess
7 is that were he to supply us additional information, he might
8 well qualify for a fee waiver, or at least placement in the
9 news media category.

10 The issue of whether he would be entitled to a fee
11 waiver is--that would be considered on other merits.

12 Senator Leahy. Well, I don't think he is going to have
13 any difficulty proving the fact that he is a member of the
14 news media, and if you would like an affidavit from me, I
15 will be happy to do that. I have been both praised and
16 damned by his newspaper, usually with even-handed heavy-
17 handedness. So it is not for any other reason that I say
18 that.

19 But, you know, the thing that bothers me more than
20 anything else is in your letter, or your agency's letter that
21 was written by Mr. Strickland, it says this: "Although you
22 are an editor of the Addison Press, Inc., the information you
23 seek does not meet the regulatory requirement of current
24 events or information that would be of current interest to
25 the general public."

1 Now, that is kind of an outrageous statement, not to put
2 too fine a point on it, isn't it?

3 Mr. Wright. Well, I think you have to look at the
4 information requested, and essentially, as I recall, there
5 were three items in that request. One of those items clearly
6 involved a request for information on the possible conduct of
7 intelligence activities involving representatives from the
8 college.

9 Another of the items asked for information dealing with
10 relationships with individuals associated with Middlebury
11 College, and what we indicated there was that any records
12 which might reflect the existence of a covert relationship,
13 we would neither confirm nor deny the existence of any such
14 records.

15 Senator Leahy. But that is not the point. It says,
16 "would not be of current interest to the general public."
17 Now, any ongoing intelligence activity may be of current
18 interest, and none of us disagree that you have an exemption
19 for that and you neither confirm nor deny, and so on.

20 Mr. Wright. Yes.

21 Senator Leahy. I have no problem with that; I strongly
22 support that. But on his specific request, to say that it
23 could be of current interest to the general public--I mean,
24 isn't this exercising an editorial function that goes way
25 beyond anything that is set out in the law?

1 Mr. Wright. Well, yes, I agree with that, but I would
2 like to, if I could, come back to the nature of the request.
3 In essence, the way that request was treated--and, again,
4 forgive me; I do not have the correspondence in front of me
5 and I am trying to recall this from memory.

6 Senator Leahy. Sure.

7 Mr. Wright. Essentially, a significant portion of that
8 request was denied, and we cited exemptions, named a denying
9 official, and gave Mr. Peek appeal rights. We focus,
10 however, down to what was left, and the remaining portion of
11 the request focused primarily, as I recall--again, I do not
12 have the letter in front of me--on CIA recruiting activities
13 at Middlebury College.

14 The CIA does recruit at colleges and universities
15 throughout the nation; it is a matter of public record. That
16 fact has been made known many times with regard to many
17 colleges and universities.

18 And, again, I come back to the point as to whether the
19 information on the fact that we are, again, recruiting on a
20 college campus in the U.S. would be of public interest or,
21 and I believe we may have stated in the response letter,
22 contribute significantly to an understanding of the operations
23 of the U.S. government.

24 And I think depending on which of those two criteria you
25 apply, you might very well come up with a different viewpoint

1 as to whether a fee waiver should be granted.

2 Senator Leahy. Mr. Wright, I might say in that regard,
3 along with one of the administrators of the CIA I went to
4 Middlebury in a public forum. We discussed why it was very
5 appropriate for the CIA to be there. I did this at the
6 request of the Director of the CIA, who was at that time
7 hearing from a number of different schools not only in my
8 State, but in a lot of other States, about why the CIA
9 shouldn't be there recruiting.

10 I felt they had the absolute right to be there recruit-
11 ing, as well as any company would or anything else. But if
12 one agrees or disagrees with it, that is a choice for the
13 student to make.

14 Middlebury had invited in somebody who was strongly
15 opposed to the CIA who spoke one night, or a couple of people
16 did, and then one of the assistant directors of the CIA and
17 myself spoke of why they should be allowed to be there.
18 Again, they are public things.

19 The only reason I mention this is that it was an
20 overflow crowd each time. Trust me, there was a great deal
21 of public interest, and I suspect there would be today.

22 [The statement of Mr. Wright follows:]

1 background. It takes a long time to get that, and so we do
2 miss some of the hiring opportunities that other agencies
3 have.

4 Given the background and the information that people
5 deal with, they have to have a good clearance, and high-level
6 clearances take time. But we are working on trying to
7 improve the working area of our people, and also their grade
8 levels, and bring in more people.

9 Senator Leahy. Mr. Wright, what about over at the CIA?
10 Is this considered almost--well, in an open session I am not
11 going to mention a couple of the assignments that are
12 considered one step short of Alcatraz.

13 But going into the FOIA part of the CIA probably would
14 not be the most sought after area for a career CIA officer,
15 would it?

16 Mr. Wright. Senator Leahy, actually, some of the FOIA
17 positions are highly coveted. We do have a career track in
18 records management activities and an assignment in the FOIA
19 office would be considered an important tour of duty for an
20 individual on that career track.

21 As far as the review of records for releasability is
22 concerned, the CIA operates on the basis of using its most
23 senior intelligence officers to conduct those reviews. So
24 outside of the main workforce cadre, you do find a very

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1 officers and intelligence analysts, and what have you,
2 involved in the review of records to determine their ultimate
3 releasability.

4 Senator Leahy. So then if somebody gets well trained
5 into handling FOIA, they actually do have a career available
6 to them there. They would not be in a position where they
7 would almost immediately be looking for somewhere else to go?

8 Mr. Wright. Yes, sir, that is correct. It would be in,
9 overall, our records management field.

10 Senator Leahy. Now, Mr. Faulk, in regard to the fee
11 issues, I looked at the form letter that the department sends
12 to requestors to inquire as to their credentials and intent.
13 It seems like there is an awful lot of paperwork here.

14 Most of the initial request letters I have seen have a
15 lot of information, such as a university letterhead or a
16 listing of publications which would help people make waiver
17 determinations.

18 Are you able to categorize how much time is spent on fee
19 determination as compared to actual search and retrieval and
20 review of documents?

21 Mr. Faulk. If you don't mind, Senator, I will turn to
22 my expert on that and ask the question.

23 Senator Leahy. We will get the fee determination expert
24 here. Sir, you understand what I am--.

25 Mr. Faulk. I would like to introduce--.

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