

Center for National Security Studies

Protecting civil liberties and human rights

Director
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Corrected Memorandum to Interested Persons

Intelligence bills give blanket FOIA exemption to all NID information, would cover information not now exempt.

The pending intelligence reorganization bills would provide a blanket exemption from the Freedom of Information Act – with no meaningful court review – for all information within the control of a new National Intelligence Director (NID). While the Senate and House bills differ concerning the authority of the NID, both would substantially expand existing FOIA exemptions by granting a blanket exemption to all information within the control of the NID.

There has been no discussion of this new FOIA exemption. Indeed, it is not clear that this is the intent of these lengthy bills, because as far as we can determine, no Member has even given notice that these bills contain such an exemption. If this is the intent of the bills, public debate is essential before the public's right to know about crucial government operations is limited in secret and by the backdoor. If this is not the intent of the bills, the language should be amended to prevent this result.

Background: National security information generally may be withheld either under exemption (b)(1) for properly classified information or, in the case of the FBI, (b)(7) for law enforcement information. The CIA has an additional exemption under (b)(3) as a result of the Supreme Court opinion in *CIA v. Sims*, 471 U.S. 159 (1985), holding that the provision of the National Security Act giving the DCI the responsibility “for protecting intelligence sources and methods from unauthorized disclosure” constitutes a “withholding statute” for the purpose of exemption (b)(3) of the FOIA. The result of information being claimed exempt under (b)(3) rather than (b)(1) is that there is essentially no judicial review of the applicability of the exemption. When national security information is claimed to be exempt because it is properly classified under (b)(1), the statute provides that a court shall determine whether that is the case and the government is required to justify its assertion that the information falls within the classification standards. When the CIA claims that information is exempt as “sources and methods” under (b)(3) that claim is simply accepted by the courts without even requiring any justification by the government.

Pending bills: Both the Senate and House bills (sec. 112(a)(13) and sec. 1079(a) respectively) would give all information within the NID's control an automatic and blanket (b)(3) exemption. They do this by providing that the NID “shall protect intelligence sources and methods from unauthorized disclosure” in the Senate bill and by substituting the NDI for the DCI in the relevant National Security Act provision in the House bill.

The Senate language is the very language held by the Court in *Sims* to constitute a withholding statute under exemption (b)(3). The effect of this would be to exempt vast amounts

of information from any review under the FOIA because the NID will have control over not just information from the CIA, but information from many other agencies which today may be withheld under (b)(1) or (b)(7), but is not entitled to an automatic and blanket exemption under (b)(3). This provision is likely to be deemed to cover all information received by the NID from other agencies because the NID is being given some authority over the intelligence activities of those agencies.

The result would be a substantial infringement on the FOIA's protection for the public's right to know. This is particularly troubling in light of the bill's expansion of the NID's authority beyond traditional CIA concerns to domestic intelligence matters going to the core of Americans' civil liberties. The FBI and Justice Department for example, withheld the list of names of those secretly arrested in the wake of 9/11 under exemption (b)(7), claiming that providing the names would reveal its terrorism investigation methods. If the pending language is enacted, such a list could be claimed as intelligence methods under (b)(3) and no court will even have the opportunity to require a justification for such secrecy.

We are unaware of any statement by the sponsors or other Members explaining these provisions. Certainly there has been no public hearing or consideration of this proposal.

Recommendation: A final bill should not include language that can be read to come within the *Sims* holding and be construed as a (b)(3) withholding statute. If it is deemed necessary to provide the NID with explicit authority concerning intelligence sources and methods, which is not in our judgment necessary, it should be done in a manner that makes clear that no expansion of the existing (b)(3) exemption for CIA originated information is intended. If Members believe that the NID should have its own (b)(3) statute, that issue should be taken up by the next Congress with public notice and debate. The following language should be inserted in Title I:

“Nothing in this Title shall be deemed to constitute a withholding statute under section (b)(3) of the Freedom of Information Act for any sources and methods information other than information that originates in the office of the NID or at the DoD or the CIA.”

White House Letter on the bill:

The White House letter states that while the Administration supports the NID's authority to protect intelligence sources and methods, it “believes that the head of each element of the Intelligence Community should be explicitly charged with carrying out this critical authority according to the NID's guidance.” There is no explanation about why such direction needs to be included in the statute. *If this were done by including language to the effect that each such head shall protect sources and methods from unauthorized disclosure, the effect would be to enact new (b)(3) exemptions for each agency by the back door.* It would not provide any greater protection for national security information, but would eviscerate any accountability for such government secrecy.

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