UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE AND VETERANS FOR PEACE,<br><br>Plaintiffs,<br><br>v.<br><br>DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY,<br><br>Defendants. | ECF CASE<br><br>No. 04 Civ. 4151 (AKH) |

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE CENTRAL INTELLIGENCE AGENCY'S APPLICATION FOR LIMITED RELIEF FROM THE SEPTEMBER 15, 2004 ORDER**

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Defendant Central Intelligence Agency (the "CIA") respectfully submits this reply memorandum of law in further support of its application for limited relief from the terms of the Court's September 15, 2004 Order.

## PRELIMINARY STATEMENT

There are four reasons why the CIA should not be required to conduct a search under the Freedom of Information Act ("FOIA") of operational or investigatory files before the Office of Inspector General ("OIG") completes its investigation into improprieties in Iraq.

First, the Central Intelligence Agency Information Act (the "Act") is silent concerning when operational files that are the specific subject matter of an OIG investigation lose their exemption from search under FOIA. The legislative history to the Act, however, demonstrates that Congress did not intend for operational files to be searched before an investigation is completed.

Second, Directorate of Operations ("DO") personnel must be included in the search and review of operational files. For the DO to know which files to search and review, however, the OIG must disclose the subject matter of its search. The OIG cannot disclose the subject matter of the investigation to the DO – the target of its investigation – before the investigation is closed without jeopardizing its investigation.

Third, the statutory requirement to search and review otherwise exempted operational files is narrowly confined to the "specific subject matter" of an investigation into impropriety or illegality. It is impractical, if not impossible, to determine the exact scope of an investigation until the investigation is completed.

Finally, under the facts of this case, a search of operational and investigatory files before the OIG's internal investigation is completed would unreasonably interfere with and jeopardize the ongoing investigation with no resulting benefit for plaintiffs. Indeed, documents

in those files are likely exempt from disclosure at this time under FOIA exemption (b)(7)(A) and other applicable FOIA exemptions.

Plaintiffs provide no reason why the CIA must conduct its search of operational and investigative files at this time. Although they argue that such a search should be conducted immediately, they point to nothing in the statutory scheme or legislative history that compels such a result and fail to refute the contrary legislative history cited in the Government's moving brief. Nor do plaintiffs explain how the CIA could conduct such a search at this time without jeopardizing the OIG's ongoing investigation. Tellingly, plaintiffs fail even to explain how they would be harmed if they have to wait until the OIG investigation is closed for the CIA to search operational and investigative files.

In their opposition, plaintiffs instead characterize the Government's request as an attempt to avoid its obligations under FOIA and to improperly narrow the exceptions to the Act. The Government, however, does not seek to exclude non-exempt operational or investigative files from FOIA's reach. Nor does the Government argue that it cannot or will never search and review its operational and investigative files. Rather, consistent with the Act and the equities in this case, the Government seeks leave to search and review operational and investigative files after the OIG internal investigation is completed.

## ARGUMENT

### A. The Legislative History Demonstrates That Congress Intended for the CIA to Search Operational Files After Investigations Are Completed

The CIA's motion turns on the timing of its obligation to search operational files when an investigation triggers § 431(c)(3)'s exception to the Act. The Act is silent on this point.[1] The legislative history of the Act, however, makes clear that the obligation to search operational files arises when the investigation is closed.[2]

In describing the exceptions to the Act, the legislative history states that information "that *was* the subject of an investigation for alleged illegality or impropriety" will continue to be subject to FOIA. H.R. Rep. 98-726(II) at 6, 1984 U.S.C.C.A.N. at 3780 (emphasis added). Plaintiffs do not dispute that Congress used this language to describe information from closed investigations. See Pls' Br. at 12. Instead, plaintiffs assert that Congress also demonstrated an intent to include information from open investigations by stating that FOIA's requirements will apply to "information concerning any intelligence activity that was improper or illegal." See id.

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1 The Act provides that operational files will "continue to be subject to search and review" where, *inter alia*, they were "the specific subject matter of an investigation" by any of a list of enumerated entities. 50 U.S.C. § 431(c)(3). The Act does not state *when* an investigation will trigger § 431(c)(3) – at the initiation of the investigation, when the investigation is completed, or at some other time. Therefore, the Act is not, as plaintiffs suggest, "plain and unambiguous" on this point. See Plaintiffs' Opposition Memorandum of Law ("Pls' Br.") at 7-8.

2 Given the Act's silence, it is appropriate to turn to legislative history to determine Congress's intent. Toibb v. Radloff, 501 U.S. 157, 162 (1991) ("'Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.'") (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)); Sullivan v. CIA, 992 F.2d 1249, 1253 (1st Cir. 1993) (considering legislative history to the Act where "the statute is silent").

Plaintiffs do not explain how this language demonstrates an intent to include information from open investigations. Nor could they, as it indicates the contrary. For an intelligence activity to be "improper or illegal," there must be a finding of illegality or impropriety. There can be no such finding until *after* an investigation into the improper or illegal activity is closed. Therefore, the description in the legislative history of the type of information that will remain subject to FOIA, including the language upon which plaintiffs rely, demonstrates Congress's intent to have § 431(c)(3) apply to closed rather than open investigations.

Furthermore, plaintiffs do not dispute that the legislative history uses the past tense to describe investigations that would trigger section 431(c)(3). See Pls' Br. at 12-13. Instead, plaintiffs argue that the purpose of these descriptions was to expand the scope of § 431(c)(3) to include records that were not specifically reviewed in the course of an investigation and that it would be inconsistent for such expansive language "to then limit the exception to closed cases." Pls' Br. at 13. But it is not inconsistent, as there is a difference between the scope of the exception and the timing of its application. Congress wanted the exception to apply to information that was the specific subject matter of an investigation, regardless of whether or not the information was considered by the investigators. Congress also wanted the CIA to search for this type of information after investigations are closed, as demonstrated by its use of the past tense to describe the investigations. The timing of the search and review does not limit the scope of the exception; the same information is subject to search and review, it simply is not searched for or reviewed until after the investigation is closed.

Having failed to refute the legislative history cited by the CIA, plaintiffs point to additional legislative history that they contend supports their interpretation of the Act. See Pls'

Br. at 13-14. However, the language plaintiffs cite does nothing of the sort. First, plaintiffs note that the legislative history states that "[r]equests under the FOIA for information of these three types [including the specific subject matter of an investigation] will continue to be processed in accordance with the Freedom of Information Act in the same manner as if section 701(a), which provides for exemption of operational files, were never enacted." H.R. Rep. 98-726(I) at 23, 1984 U.S.C.C.A.N. at 3761. This language does not explain when the exceptions to section 431(a) are triggered. To the contrary, it explains that when an exception is implicated, the CIA has the same search and review obligations for operational files as it had before the Act was enacted. As made clear by other portions of the legislative history, however, section 431(a)'s broad exemption is not abrogated under section 431(c)(3) unless and until the exception is triggered by the completion of an investigation into alleged impropriety or illegality.

Plaintiffs' remaining citation to the legislative history is equally unpersuasive. See Pls' Br. at 14. The legislative history states that "when allegations received by the CIA from outside the agency result in investigations of intelligence activities for illegality or impropriety, exempted operational files will remain subject to search and review for information concerning the specific subject matters of those investigations." H.R. Rep. 98-726(I) at 29, 1984 U.S.C.C.A.N. at 3767. Plaintiffs claim that the phrase "will remain subject to search and review" is in the "present tense," thereby demonstrating an intent to have the CIA search and review operational files during the pendency of open investigations. Pls' Br. at 14. Plaintiffs mistake both the rules of grammar and the meaning of the legislative history.

The legislative history plaintiffs cite is cast in the future rather than the present tense. See Webster's Grammar Handbook 72 (J. Radcliffe ed., 1994) (use of "will" expresses "anticipation of a future happening"). The phrase at issue concerns a future condition – *when*

something happens in the future (i.e., allegations from outside the Agency result in an investigation), operational files *will remain* subject to search and review. See H.R. Rep. 98-726(I) at 29, 1984 U.S.C.C.A.N. at 3767. But this says nothing about Congress's intent with regard to the timing of the CIA's obligation to conduct a search and review of those files that "will remain" subject to FOIA.

Instead, the language plaintiffs cite is part of a larger description of the types of investigations covered by section 431(c)(3). See H.R. Rep. 98-726(I) at 28-31, 1984 U.S.C.C.A.N. at 3766-69. The language plaintiffs cite does not state that when outside allegations result in an investigation, the CIA must search and review operational files while that investigation is pending. It merely states that operational files will remain subject to FOIA when this type of investigation arises despite section 431(a)'s general exemption for operational files. By contrast, the specific language in the legislative history that touches upon the *timing* of the CIA's obligation to search and review operational files under § 431(c)(3) refers to investigations in the past tense, thereby demonstrating Congress's intent to have the exception apply to closed rather than open investigations. See CIA's Opening Memorandum of Law ("CIA Br.") at 10-11.

Given this clear legislative history, it is reasonable to infer that Congress did not intend to make operational files subject to search and review under FOIA until investigations triggering § 431(c)(3) are completed.[3]

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[3] Plaintiffs incorrectly suggest that cases interpreting the nine exemptions to FOIA are relevant to the Court's analysis here. Pls' Br. at 10. The CIA's motion for limited relief does not implicate exemptions set forth in the FOIA statute. Rather, the CIA's motion addresses the timing of its obligation to search and review operational files that ordinarily are not subject to FOIA. Moreover, the Act reverses the presumption that FOIA exemptions are narrowly construed, as it presumes that information contained in operational files is exempt from disclosure. 50 U.S.C. § 431(a). Indeed, the Act is an amendment to the statute that created the

[Footnote continued on next page]

**B. The Statutory Scheme Further Demonstrates Congress's Intent to Have Searches Under § 431(c)(3) Conducted After Investigations Are Completed**

Congress's intent is further demonstrated by the statutory scheme, which makes the search for operational files before the completion of an investigation impractical, if not virtually impossible. Plaintiffs counter that this argument amounts to nothing more than "complaints" about the "inconvenience" created by the exception. Pls' Br. at 15. But this argument misses the point. The CIA does not argue that it is entitled to relief because of the undue burden created by § 431(c)(3). Rather, the statute has two requirements that are impractical, if not virtually impossible, to satisfy if the CIA is obligated to search operational files before an investigation is completed, which is itself further evidence of Congress's intent with regard to the timing of the CIA's obligations under § 431(c)(3).

First, the Act requires the CIA to search operational files for information that is the "specific subject matter" of an investigation into impropriety or illegality, regardless of whether the information was considered by the investigators. Therefore, as plaintiffs concede, non-investigators will have to conduct some portion of the search and review. Pls' Br. at 15-17. The OIG, however, cannot reveal the "specific subject matter" of an ongoing investigation to non-investigatory personnel while an investigation is pending. See Declaration of Mona B. Alderson, dated November 9, 2004 ("Alderson Decl."), ¶ 8 ("communicating the specific subject matter of the Iraq investigation – before it is complete – to the CIA components responsible for

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CIA (the National Security Act of 1947, 50 U.S.C. §§ 401-442), rather than an amendment to FOIA. The Act addresses only the CIA and gives CIA operational files a unique carve-out from all of FOIA's search, review or disclosure requirements. Quite simply, FOIA does not apply to files covered by the Act. Therefore, cases considering the production of documents under FOIA are have no bearing on this motion.

this FOIA request, including the DO, presents an unacceptable risk of disclosing the focus of the OIG investigation to potential targets of the investigation").

Plaintiffs maintain that this is not a problem, because non-operational personnel can conduct the search and review while an investigation is pending. See Pls' Br. at 15. However, the CIA cannot select non-operational personnel to conduct a search and review of operational files because "the DO is among the components that must be consulted . . . in determining what records systems to search, what FOIA exemptions to claim, and what information to release." Alderson Decl. ¶ 8; see also Declaration of Scott A. Koch, dated October 15, 2004, ¶ 8 (explaining that CIA component in possession of documents responsive to a FOIA request "must devise its own search strategy" for responding to the request because "the CIA's records systems are decentralized and compartmentized" in the interests of national security). Indeed, the legislative history to the Act notes that operational files must be searched by operational personnel and that one purpose of the Act was to relieve this burden. H.R. Rep. 98-726(I) at 10, 1984 U.S.C.C.A.N. at 3748 ("There is a two-to-three year delay at CIA in providing responses to FOIA requests which involve review of responsive records retrieved from Directorate of Operations of files. Directorate of Operations officers must conduct a security review of these records on a time-consuming line-by-line basis."); H.R. Rep. 98-726(I) at 5, 1984 U.S.C.C.A.N. at 3743 (justifying the Act in part because "[t]he unproductive process of searching and reviewing CIA operational records systems which contain little, if any, information releasable under FOIA absorbs a substantial amount of the time of *experienced operational personnel* and scarce tax dollars") (emphasis added).

Plaintiffs further suggest that investigatory personnel could conduct a search and review while an investigation is pending, and non-investigatory personnel could then review

operational files for whatever the investigators did not cover after the investigation is over. See Pls' Br. at 16. But this is not the point. It is undisputed that the time investigatory personnel spend on plaintiffs' requests will interfere with the OIG's ongoing investigation. Alderson Decl. ¶ 13. Moreover, the "OIG cannot review the documents and identify the applicable FOIA exemptions without consulting with the other CIA components, which would interfere with the integrity of the ongoing investigation." Id. ¶ 14. Therefore, the CIA cannot merely reallocate investigatory personnel to respond to plaintiffs' requests without interfering with an ongoing law enforcement investigation.

Obligating the CIA to dedicate investigatory personnel to FOIA requests while an investigation is pending and non-investigatory personnel to the same request after an investigation is completed would also create duplicative obligations that clearly were not anticipated by Congress. Indeed, one of the primary purposes of the Act was to "relieve the Central Intelligence Agency from an unproductive Freedom of Information Act (FOIA) requirement." H.R. Rep. 98-726(I) at 30-31, 1984 U.S.C.C.A.N. at 3742. Plaintiffs suggest that this purpose is trumped by another purpose of the Act – "to improve the ability of the Central Intelligence Agency to respond to Freedom of Information Act requests in a timely and efficient manner." There is nothing "efficient" about duplicative review obligations, however; Congress plainly did not intend to increase the CIA's burden under FOIA by implementing the Act. Further, the two purposes of the Act are in fact linked – relieving the CIA of a burden to search files that would likely be exempt would improve the CIA's ability to respond to FOIA requests generally. See H.R. Rep. 98-726(I) at 5-6, 1984 U.S.C.C.A.N. at 3743-44.

Second, it is impractical if not virtually impossible to determine the specific subject matter of an investigation – and therefore the scope of § 431(c)(3) – before it is closed.

Plaintiffs maintain that it is "not impossible to determine the scope of the investigation while it is ongoing." Pls' Br. at 17. But plaintiffs do not explain how it is possible to do so. Instead, plaintiffs summarily conclude that "the scope of the investigation is clearly known to the OIG." Id. To the contrary, the OIG made clear that it will not know all of the illegal or improper activity that is the subject of the investigation until the investigation is completed. See Alderson Decl. ¶ 6 ("I cannot conclusively determine the scope of the Iraq investigation until the investigation is complete."). In any event, to the extent the OIG knows the Iraq investigation's direction, it cannot reveal that information without jeopardizing the investigation. Alderson Decl. ¶ 7 (OIG "cannot disclose the specific subject matter of the ongoing Iraq investigation to the CIA components responsible for the FOIA request because doing so would interfere with the integrity of the OIG's independent investigation").

Further, the legislative history and the case law make clear that § 431(c)(3) is read narrowly. See CIA Br. at 13-15.[4] The "narrow" reading given to the scope of the exception cautions against prematurely searching operational files before an investigation is completed. Indeed, an interim search and review may address information that is not within the "specific subject matter" of the closed investigation and therefore never subject o FOIA. See Alderson Decl. ¶ 6. Given the exception's limited scope, Congress clearly did not intend to obligate the

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[4] Plaintiffs concede that section 431(c)(3) is "narrowly drawn" but mistakenly conclude that the exception includes "only those files relevant to the *allegations* of impropriety or illegality." See Pls' Br. at 19 (emphasis added). The exception does not concern "allegations." See 50 U.S.C. § 431(c)(3) (limited to "the specific subject matter of an investigation . . . for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity"). Indeed, allegations that trigger an investigation may not relate to the ultimate subject matter of the investigation. Alderson Decl. ¶ 6 ("the scope of an investigation contracts as new information disproves allegations or eliminates subjects of inquiry").

CIA to search and review operational files before investigations are completed, thereby risking the disclosure of information that may not even be within the "specific subject matter" of the closed investigation. See H.R. Rep. 98-726(I) at 9-10, 1984 U.S.C.C.A.N. at 3747-48 (the Act addressed "risk . . . of accidental or unintended disclosure of sensitive material" from operational files).

### C. Under the Facts of This Case, the CIA Cannot Search Operations Files Before the OIG Investigation Is Completed

Finally, as explained in the CIA's opening brief (at 16-17), under the facts of this case the CIA cannot search for information contained in operational or investigative files until the OIG investigation is completed. The CIA components responsible for responding to plaintiffs' requests, who are not part of the OIG, cannot conduct the search because they do not and cannot know the scope of the OIG's investigation. Alderson Decl. ¶ 7. Further, the OIG cannot conduct the search itself without interfering with its ongoing investigation into improprieties in Iraq. Id. ¶¶12-13.

Plaintiffs offer no substantive response. Instead, plaintiffs allege that the CIA's arguments "question the wisdom of FOIA in general." Pls' Br. at 20. The CIA, however, does not seek to avoid its obligations under FOIA. It merely seeks leave to satisfy those obligations after the OIG investigation is completed.

Tellingly, plaintiffs do not argue that they will be harmed if the CIA does not conduct a search of operational and investigatory files before that time. In fact, plaintiffs likely would not be harmed. Even if a search could be done while the Iraq investigation is open, the documents retrieved would likely be exempt from production under FOIA exemption (b)(7)(A). CIA Br. at 17-18. The CIA does not, as plaintiffs suggest, argue that the applicability of (b)(7)(A) insulates the CIA from its search and review obligations. See Pls' Br. at 21. The CIA

merely notes that regardless of the outcome of this application, the documents at issue could not be produced, if at all, until after the OIG investigation is completed. Therefore, for practical purposes, plaintiffs will likely suffer no harm if this application is granted.

Given the concrete harm the CIA will suffer and the absence of any potential harm to the plaintiffs, there is no reason to compel the CIA to search its operational files before the OIG investigation is completed.

## CONCLUSION

For all of these reasons, the Court should enter an order relieving the CIA of its obligations under the September 15, 2004 Order with regard to operational and investigatory files until the ongoing OIG investigation into improprieties in Iraq is completed.

Dated: New York, New York
December 8, 2004

Respectfully submitted,

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