

May 1, 2015

Joseph W. Lambert  
Director, Information Management Services  
Central Intelligence Agency  
Washington, DC 20505

via fax

(703) 613-3020

Dear Mr. Lambert:

OpenTheGovernment.org submits the following comments regarding the CIA's decennial operational files review.

We join the Federation of American Scientists' five recommendations regarding categories of files that should not be designated as operational files or exempted from Freedom of Information Act searches and processing.<sup>1</sup>

We also write separately to emphasize the importance of the CIA complying fully with 50 U.S.C. § 3141(c)(3), which states that operational files shall continue to be subject to search and review for information concerning:

the specific subject matter of an investigation by the congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the Central Intelligence Agency, the Office of Inspector General of the Central Intelligence Agency, or the Office of the Director of National Intelligence for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.

During the past decade the CIA used the operational files exception to justify not only failing to search operational files, but actually destroying evidence held there, despite the evidence's relevance to investigations by the CIA Inspector General.<sup>2</sup> The CIA argued that because the CIA Inspector General's office had reviewed videotapes of waterboarding sessions at black sites as part of a "special review" rather than an "investigation," and because the Inspector General did not keep copies in its own files, the CIA was not obliged to search or preserve those videotapes.<sup>3</sup>

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<sup>1</sup> <http://fas.org/sgp/news/2015/04/fas-opfile.pdf>. The five categories that FAS recommended for exclusion are: CIA records over 25 years old; Clandestine Service History Program files; Imagery Analysis and Exploitation files; files pertaining to civilian casualties from CIA operations; and files pertaining to detention and interrogation of detainees.

<sup>2</sup> E.g. <https://www.aclu.org/sites/default/files/torturefoia/legaldocuments/Opposition011008.pdf>

<sup>3</sup> *ACLU v. Dep't of Defense*, Opinion and Order Denying Motion to Hold Def. CIA in Civil Contempt, (S.D.N.Y. Case No. 04-cv-4151, Dkt. # 472, October 5, 2011), available at [http://www.wired.com/images\\_blogs/threatlevel/2011/10/cianocontempt.pdf](http://www.wired.com/images_blogs/threatlevel/2011/10/cianocontempt.pdf).

A federal court rightly rejected this argument, holding that the destruction of the videotapes was unlawful.<sup>4</sup>

Rather than using semantic arguments to artificially narrow 50 U.S.C. § 3141(c)(3), the CIA should use this decennial review ensure that files relevant to Congressional and other investigations are fully preserved.

More specifically, the following categories of documents should be preserved and made available for search and review under the Freedom of Information Act:

**(1) Documents on the CIA's rendition, detention, and interrogation program:**

Given the number and breadth of the investigations into the CIA's rendition, detention and interrogation program, virtually every document on the CIA's rendition, detention and interrogation program should be available for search and review under FOIA (subject to applicable exemptions). These include:

- (a) documents produced to the Senate Select Committee on Intelligence for its Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, including the full contents of the RDINet computer system used to conduct the review, as well as all documents cited in the Senate's full study or its publicly available executive summary.
- (b) documents produced to, reviewed by, or otherwise relevant to any CIA Office of the Inspector General review or investigation into the rendition, detention, and interrogation program.
- (c) documents that were produced to, considered by, generated by, or otherwise relevant to CIA Accountability Boards regarding alleged improprieties and violations of law in the course of the interrogation program
- (d) documents provided to the Department of Justice for its criminal investigations into the destruction of CIA videotapes, the deaths of Manadel al Jamadi, and the death Gul Rahman; its preliminary review into the CIA's rendition, detention and interrogation program; and the Office of Professional Responsibility report into the Office of Legal Counsel torture memos.
- (e) documents that, while they may not have been produced to the Senate, the Inspector General, or the Department of Justice, concern the same subject matter as the above-listed investigations.

**(2) Documents on the CIA's targeted killing program**

Investigations into the CIA's role in targeted killing have been far more limited than investigations into its treatment of prisoners. However, there have been numerous public assurances that the Executive Branch and the intelligence oversight committees carefully

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<sup>4</sup> *Id.*

investigate all reports of civilian casualties in drone strikes, and ensure that the strikes comply with presidential directives on avoiding civilian casualties.

In February 2013, the then-Chair of the Senate Select Committee on Intelligence stated that the committee

receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, *verifying the care taken to avoid deaths to non-combatants* and understanding the intelligence collection and analysis that underpins these operations.<sup>5</sup>

According to press articles, intelligence committee staff regularly views footage of drone strikes. There have also been reports of investigations into specific strikes by the CIA Office of the Inspector General, the White House, and other entities within the Executive Branch.

The CIA may be tempted to argue, as it did in the case of the torture videos, that these reviews are not technically “investigations”. It may also argue that civilian deaths were unavoidable “collateral damage” rather than “impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity.” But it should resist this temptation, given the high stakes and the overwhelming public interest in disclosure regarding this topic. As the President of the United States himself has stated, the families of the deceased “deserve the truth,” and “the United States is a democracy committed to openness in good times and in bad.”<sup>6</sup> Accordingly, even if some files regarding the targeted killing program remain designated as operational files, all files relevant to Congressional oversight and executive investigation of specific strikes and assessments of civilian casualties should be subject to FOIA review and processing.

Thank you for your consideration of these comments.

Sincerely,

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<sup>5</sup> <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8>.

<sup>6</sup> <http://www.washingtonpost.com/news/post-nation/wp/2015/04/23/full-text-obamas-remarks-on-the-killing-of-american-held-by-al-qaeda-in-a-u-s-operation/>