

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY COUNSELORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11-cv-00443 (BAH)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant,	)	
	)	

**ADDITIONAL AUTHORITY FOR THE CIA’S POSITION  
REGARDING 5 U.S.C. § 552(a)(3)(B)**

**INTRODUCTION**

The Freedom of Information Act (“FOIA”) states that “an agency shall provide records in any form or format requested by the person if the record is *readily reproducible* by the agency in that form or format.” 5 U.S.C. § 552(a)(3)(B) (emphasis added). The Act also instructs that “a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to ... reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B).

In one of the FOIA requests at issue in this case, Plaintiff National Security Counselors (“NSC”) asked Defendant Central Intelligence Agency (“CIA”) to provide responsive records in electronic format. The Agency considered the nature of its Information Technology (“IT”) systems and electronic security procedures and determined that the documents responsive to NSC’s FOIA request were not readily reproducible in electronic format. CIA subsequently provided NSC with the responsive records in paper form.

NSC has now challenged CIA's determination that the records responsive to NSC's FOIA request are not readily reproducible in electronic format, and the Court has scheduled a status conference on the issue. CIA has submitted, as an attachment to this brief, a detailed declaration explaining that the classified IT system that the Agency uses to process FOIA requests can print paper documents but is not able to download documents to CDs or other forms of electronic media. Declaration of Susan Viscuso ("Declaration"), Exhibit 1, ¶ 6. The Agency also states that the process of moving responsive documents from the classified system to the unclassified system and then burning the documents to a CD that can be produced to a FOIA requester is labor intensive and can take weeks or even months to complete. *Id.* at ¶¶ 6-10.

The CIA declaration conclusively establishes that the records responsive to NSC's FOIA request are not readily reproducible in electronic format. The Court should accord substantial weight to the Agency's declaration and deny NSC's request for a Court order directing CIA to produce responsive records in electronic format.

### **BACKGROUND**

By letter dated May 12, 2010, NSC submitted a FOIA request to the CIA seeking "copies of all Tables of Contents ("TOCs") from the Central Intelligence Agency ("CIA") in-house journal *Studies in Intelligence*." Dkt. No. 15-1. In its FOIA request, NSC specified that it wanted responsive records "provided in electronic (soft-copy) form wherever possible." *Id.* CIA assigned NSC's FOIA request reference number F-2010-01186. Declaration at ¶ 3.

By letter dated December 5, 2011, CIA responded to NSC's TOC request by providing NSC with 174 documents in paper form. CIA Letter, Dec. 5, 2011, Exhibit 2. A letter accompanying the production explained that the Agency had determined that the responsive records were not readily

reproducible in an electronic format. *Id.*

On December 1, 2011, NSC filed a Motion for a Status Conference regarding CIA's determination that the records responsive to NSC's TOC request were not readily reproducible in electronic format. Dkt. No. 15. CIA filed an Opposition to NSC's Motion on December 2, Dkt. No. 16, and NSC filed its Reply later that same day, Dkt. No. 17. On December 8, the Court entered a Minute Order granting NSC's Motion and scheduling a status conference for Friday, December 16, at 10:00AM. Dkt. No. 18. The order also stated that the parties could submit by noon on December 14, a submission of five pages or less setting forth any additional authority for their positions regarding 5 U.S.C. § 552(a)(3)(B). *Id.*

### ARGUMENT

#### **A. CIA APPROPRIATELY DETERMINED THAT THE RESPONSIVE RECORDS WERE NOT READILY REPRODUCIBLE IN ELECTRONIC FORMAT**

Under the FOIA, an agency is required to provide responsive documents in the form or format requested if the responsive records are readily reproducible in that form or format. 5 U.S.C. § 552(a)(3)(B). In determining whether records are "readily reproducible," courts are to consider the "agency's technical capability to create the records in a particular format," *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1088 (D.C. Cir. 2006), and "accord substantial weight to an affidavit of an agency concerning the agency's determination as to ... reproducibility under paragraph (3)(B)." 5 U.S.C. § 552(a)(4)(B).

In this action, CIA has provided a detailed declaration explaining why the documents responsive to NSC's TOC request are not readily reproducible in electronic format. Because of the unique and sensitive nature of the information that CIA collects and stores, the Agency maintains two different information technology systems: a classified system and an unclassified system.

Declaration, ¶ 5. In order to guard against the inadvertent disclosure of classified information, CIA processes all FOIA requests on its classified system. *Id.* at ¶6. CIA's classified system can print paper documents but cannot download documents onto CDs. *Id.* Because of this limitation, CIA could not readily reproduce the documents responsive to NSC's TOC request in electronic format. *Id.* at ¶12.

In order to provide NSC with responsive documents in an electronic format, a CIA FOIA analyst would have to extract the responsive documents from the classified system, manually conduct a quality control review to make certain that all appropriate documents have been properly extracted, and ensure that all metadata has been properly removed. *Id.* at ¶7. Next, an authorized CIA data-transfer officer would have to move the releasable information from the classified system to the unclassified system and download the documents onto a CD. *Id.* at ¶8. The CD would then have to be provided to a FOIA analyst who would have to travel to a different office location to review the contents of the CD to ensure that no classified information has been inadvertently recorded to it. *Id.* at ¶9. Only after each of these steps has been taken could a CD with responsive documents be provided to NSC. *Id.*

The process of taking documents from the classified system, preparing them to be moved to the unclassified system, moving them to the unclassified system, burning them to a CD, reviewing the CD for classified information, and providing the CD to the requester requires significant Agency resources and can take weeks or even months to complete. *Id.* at ¶10. According to the CIA's declaration, "[i]f the CIA were to undertake this process for every FOIA requester seeking electronic versions of documents, the CIA's FOIA processing backlog would grow exponentially, thereby resulting in even greater delays in responding to FOIA requests." *Id.*

The CIA's declaration establishes that the classified IT system that the Agency uses to process FOIA requests cannot reproduce documents in an electronic format. It also shows that converting responsive records into an electronic format that could be provided to NSC would require significant Agency resources and could take weeks or even months. The term "readily" means "promptly, quickly, easily"<sup>1</sup> and its inclusion in 5 U.S.C. § 552(a)(3)(B) represents a decision by Congress that agencies, like the CIA, should not have to dedicate their finite FOIA resources to undertaking time-consuming and labor-intensive processes to convert documents into requested formats.

### CONCLUSION

For all the foregoing reasons, NSC's request for a Court order directing CIA to produce responsive records in electronic format should be denied.

Dated: December 16, 2011

Respectfully submitted,

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<sup>1</sup> Random House Dictionary, © Random House, Inc. 2011, available at [www.dictionary.com](http://www.dictionary.com).

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Civ A. No. 1:11-cv-00443-BAH

**DECLARATION OF SUSAN VISCUSO,  
INFORMATION AND PRIVACY COORDINATOR  
CENTRAL INTELLIGENCE AGENCY**

**I, Susan Viscuso, hereby declare and state:**

1. Declarant Background. I am the Chief, Public Information Programs Division (PIPD), Information Management Services (IMS), Office of the Chief Information Officer (CIO), Central Intelligence Agency (CIA). I served as the Deputy Chief, PIPD from 26 October 2009 until 5 September 2010. From 6 September 2010 until 6 January 2011, I was Acting Chief, PIPD. I assumed my current position on 7 January 2011, at which time I also assumed the position of CIA Information and Privacy Coordinator. I have served with the CIA for approximately 21 years and, in addition to my current positions, have held other supervisory positions with the CIA.

2. In my capacity as Chief of PIPD and CIA Information and Privacy Coordinator, I am responsible for managing the Freedom of Information Act (FOIA), Privacy Act, and Executive Order 13526 Mandatory Declassification Review programs in the CIA. These responsibilities include directing searches of CIA records systems pursuant to public requests for records under these programs and coordinating the reviews of any records retrieved in such searches. As part of my official duties, I ensure that the CIA processes FOIA requests, including the search for and review of responsive information, in accordance with the law and as efficiently as possible with the personnel and resources available. My office is also responsible for providing requestors with documents responsive to their FOIA requests.

3. Through the exercise of my official duties, I am familiar with this civil action. Accordingly, I make the following statements based upon my personal knowledge and all of the information made available to me in the course of performing my official duties. This declaration will explain why I have determined that records responsive to Plaintiff's FOIA request (F-2010-01186), challenged in Count Three of Plaintiff's Complaint, are not readily reproducible in electronic format.

4. Unique Security Environment. The CIA operates within the confines of a unique information security environment designed to safeguard our nation's most sensitive national

security secrets. Most CIA information is classified and must be appropriately stored and protected. Additionally, to ensure that classified information may only be accessed by individuals with a strict need-to-know, CIA information is highly compartmented. This is because the CIA is the target of, among other threats, counterintelligence efforts by hostile foreign governments, foreign intelligence services, and terrorist organizations. Because of the security concerns relating to CIA information and information systems, the Director of the CIA has created stringent standards and guidelines for Agency information systems. These policies support the Agency's efforts to combat increasing cyber threats against U.S. Government information and to protect information from foreign spies.

5. Additional Security Measures. The Director's stringent security standards require that additional security measures be taken any time electronic media are imported into or exported from CIA information technology (IT) systems. Accordingly, only a limited number of officers within the CIA are authorized to move data to and from Agency information systems, and only a limited number of CIA computers are capable of reading or writing electronic media. The complexity of these measures is amplified by the fact that the CIA maintains two different IT systems, a classified system and an unclassified system. As explained below, these dual systems do not permit the easy downloading of responsive FOIA documents to a CD or similar electronic format.

6. When records responsive to Plaintiff's FOIA request were located, they were scanned and uploaded to the classified system. All FOIA processing occurs on the classified system, even for unclassified documents, to guard against the inadvertent compromise of classified information (and because the necessary redaction software only exists on the classified system). The documents were appropriately redacted, printed out, and mailed to the requestor in compliance with FOIA. Providing the Plaintiff with electronic versions of responsive documents, however, would require additional time-consuming steps dictated by the CIA's information security procedures because responsive FOIA information cannot simply be downloaded from the classified system to a CD.

7. In order to produce the documents NSC requested in an electronic format, CIA FOIA analysts would have been required to extract the responsive documents from the electronic FOIA processing tool. The extracted documents are then stored on a shared electronic space for review. The FOIA analyst would have also had to manually conduct a quality control review to make certain that all appropriate documents had been properly extracted and were ready for review. This quality review entails the analyst to open each document to perform a page by page review and open each accompanying metadata file ensuring that no classified data has been extracted. If any documents failed to extract for technical reasons, the technical team is then required to address said document to ensure all appropriate information is updated so that the document can be extracted. The analyst would have to perform another extraction for the updated documents. Once completed, another manual review is necessary.

8. Next, a data transfer officer would have had to move the releasable information from the classified system to the unclassified system. Only a limited number of authorized officers exist within the CIA to accomplish this task, all of whom have other non-FOIA job duties and responsibilities. The data transfer officer would then have had to download the

documents to removable media, such as a CD. The CD would then be provided to a member of the FOIA staff.

9. Finally, a FOIA analyst would have had to travel to a different office location to conduct a security review of the contents of the CD to insure that no classified information had been inadvertently transmitted. After all of these steps were completed, the CD would have been ready to mail to the requestor.

10. This process could take weeks or months to complete for any single FOIA requester, depending upon the volume of records at issue. If the CIA were to undertake this process for every FOIA requester seeking electronic versions of documents, the CIA's FOIA processing backlog would grow exponentially, thereby resulting in even greater delays in responding to FOIA requests. Using these limited resources to provide electronic responses to FOIA requests is an unreasonable burden that the FOIA does not require.

11. In some limited instances, responsive records are readily reproducible in electronic format. The CIA maintains electronic volumes of some large collections of documents that are frequently requested pursuant to the FOIA. For example, the CIA provides requestors with electronic records when the records pertain to MKULTRA, Nazi war crimes, and imperial Japanese war criminals. Unlike this FOIA request, creating an electronic repository of large, frequently requested topics actually decreases the amount of time necessary to process other similar requests, even though a large amount of time is spent at the onset creating the electronic records. Additionally, the FOIA staff periodically extracts, compiles and reviews newly released documents for posting to the CIA's FOIA Electronic Reading Room. Because these documents are made available to a large number of individuals, their release can promote efficiency since requestors with similar FOIA requests can be directed to the reading room for responsive information.

12. For the reasons noted above, I have determined that records responsive to Plaintiff's FOIA request challenged in Count Three are not *readily reproducible* in electronic format.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 13 day of December 2011.



Susan Viscuso  
Information and Privacy Coordinator  
Central Intelligence Agency