

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

NATIONAL SECURITY COUNSELORS, *

*

Plaintiff, *

*

v. *

Case: 1:11-cv-00443 (BAH)

*

CENTRAL INTELLIGENCE AGENCY, *

*

Defendant. *

*

* * * * *

**PLAINTIFF’S NOTICE OF ADDITIONAL AUTHORITY
REGARDING COUNT 3 AND ELECTRONIC RECORDS**

Pursuant to the Court’s Minute Order of December 8, 2011, Plaintiff submits this notice of additional authority for its position regarding 5 U.S.C. § 552(a)(3)(B).

The requirement that “an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format” has been part of FOIA since the 1996 amendments. 5 U.S.C. § 552(a)(3)(B). Since then, several courts, including the D.C. Circuit, have opined on exactly what “readily reproducible by the agency” means in practical terms. The most recent D.C. Circuit case, *Sample v. Bureau of Prisons*, summarized the case law thusly:

Under any reading of the statute, however, “readily reproducible” simply refers to an agency’s technical capability to create the records in a particular format. . . . See, e.g., *TPS, Inc. v. United States DOD*, 330 F.3d 1191, 1195 (9th Cir. 2003) (interpreting “readily reproducible” as referring to technical capability); see also, e.g., *Carlson v. United States Postal Serv.*, [Case No. C-03-4113], 2005 WL 756573, at *7 (N.D. Cal. 2005) (holding that “readily reproducible” in a requested format means “readily accessible” by the agency in that format); *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (construing “readily reproducible” as the ability to duplicate).

466 F.3d 1086, 1088 (D.C. Cir. 2006). The first case cited, *TPS, Inc. v. DOD*, further held that the agency is required to produce electronic records if the agency has and uses the technical capability to create records in that format as “business as usual,” regardless of whether the *FOIA* office of the agency does so. *TPS, Inc.*, 330 F.3d at 1195. “The statute, on its face, requires that the agency satisfy a FOIA request when it has the capability to readily reproduce documents in the requested format. We see no reason to give FOIA the narrow reading crafted by the district court. Indeed, it would seem anomalous for an agency that is regularly reproducing documents in a particular format as part of its ongoing business to be able to shield itself from similar production under FOIA.” *Id.*

Defendant regularly reproduces records in electronic Adobe Acrobat format that were originally maintained in other formats or on classified systems. In fact, the *FOIA office* regularly reproduces records in electronic Adobe Acrobat format that were originally maintained in other formats or on classified systems. For proof of this capability *and* usage, one need look no further than Defendant’s own FOIA Electronic Reading Room, at <http://www.foia.cia.gov/> (last accessed Dec. 13, 2011). Using this website, researchers can enter terms into the search engine, and the documents that contain those terms will be listed *and available for download as pdf files*. To demonstrate how common this reproduction is, Plaintiff has provided examples of the types of searches that can be conducted. A search for the term “CIA” yields 8867 documents, which are available as pdf files. (*See Ex. C.*) A search for the term “intelligence” yields 8738 documents, which are available as pdf files. (*See Ex. D.*) A search for the term “studies” yields 1130 documents, which are available as pdf files. (*See Ex. E.*) Lastly, a search for the exact phrase “studies in intelligence” yields 275 documents, which are available as pdf files. (*See Ex. F.*)

What Plaintiff is requesting is well within Defendant's technical capabilities, and is in fact regularly done as "business as usual." In fact, despite Defendant's protestations that the recent classified nature of some of the responsive records makes them not "readily reproducible," Defendant has a special webpage for just such recently declassified documents. *See* http://www.foia.cia.gov/special_collections.asp (last accessed Dec. 13, 2011), attached as Ex. G. On this page Defendant makes available in pdf format many of the high-interest documents that it has released, some of which were classified up until the day they were posted on the website. *See, e.g., id.* at 2 ("The Central Intelligence Agency today declassified the United States Government's six oldest classified documents") Because Defendant "is regularly reproducing documents in [Adobe Acrobat] format as part of its ongoing business" (*TPS, Inc.*, 330 F.3d at 1195), it must reproduce them in that format in response to FOIA requests. Defendant's argument that the records at issue in this request are not readily reproducible in electronic format is belied by the evidence provided herein. Defendant's argument that *no* records are readily reproducible in electronic format as a matter of policy is laughable.

Date: December 14, 2011

Respectfully submitted,

/s/ Kelly B. McClanahan
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EXHIBIT C

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EXHIBIT G

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Special Collections

An important part of CIA's ongoing effort to be more open and to provide for more public accountability has been a recognition of the importance of declassifying historically significant Agency documents. The process of opening up the Agency's historical record began in the 1980s when then Director of Central Intelligence (DCI) William Casey authorized the declassification and transfer of nine million pages of OSS records to the National Archives and established the Historical Review Program.

A more formal Historical Review Program (HRP) was established by DCI Robert Gates in 1992. Reaffirming the principle that the US government's records should be open to the public, the program called for significant historical information to be made available unless such release could cause damage to the national security interests of the United States. Subsequent DCIs R. James Woolsey and John Deutch, and current Director of Central Intelligence George Tenet have supported a vigorous historical declassification program.

CIA's Historical Review Program, with the exception of several statutorily mandated requirements, is a voluntary declassification program that focuses on records of historical value. The program's managers rely on the advice and guidance of the Agency's History Staff, the DCI's Historical Review Panel, and the general public in selecting topics for review. Under guidelines laid out for the program, historical records are released except in instances where disclosure would damage national security—that is, for example, where it would reveal sensitive foreign government information or identify intelligence sources and methods that are currently in use and that are subject to denial and/or deception. The Historical Review Program coordinates the review of the documents with CIA components and other US Government entities before final declassification action is taken and the documents are transferred to the National Archives.

What was the Missile Gap?

(November 28, 2011)

The Missile Gap was in essence a growing perception in the West, especially in the USA, that the Soviet Union was quickly developing an intercontinental range ballistic missile (ICBM) capability earlier, in greater numbers, and with far more capability than that of the United States. Even as that perception was disproved, it became evident that the Soviets were placing their major effort toward developing strategic missiles against which, once launched, there was no defense. The perceived missile gap that ensued was based on a comparison between US ICBM strength as then programmed, and reasonable, although erroneous estimates of prospective Soviet ICBM strength that were generally accepted.

Both the Eisenhower and Kennedy administrations struggled to formulate policy in response to what was then believed to be an ever-growing advantage in Soviet strategic missiles. Breakthroughs in technology and innovative use of aerial and satellite photography eventually provided the CIA with a more accurate assessment of Soviet missile capacity, allowing policy makers to shift gears.

To convey the intelligence controversy, CIA's Historical Collections Division has released a large selection of documents (189) declassified for the first time, coupled with other documents which were formerly declassified, but released here again with significant previously withheld text now restored based on new, broader declassification guidelines.

Historical Collection on Ronald Reagan, Intelligence, and the End of the Cold War

(November 3, 2011)

In the 1980s, the Cold War was going strong and was made worse by events such as the death of three Soviet leaders in a span of three years, the Soviet shootdown of a Korean airliner, and the USSR's support for Communist governments and movements in Afghanistan and Central America. This collection of declassified documents and other material highlights what the CIA provided President Reagan and other top members of his national security team on key issues affecting US-Soviet relations. The collection--made up of intelligence assessments, National Intelligence Estimates, high-level memos, and DCI talking points--consists of over 200 documents, some 60 of which are either being made available to the public for the first time or are being re-released with new material. To help put this material in perspective, we are also including non-CIA documents from the archives of the Reagan Library to fill out the collection on the policy

end.

The Berlin Wall Collection

(October 26, 2011)

Erected literally overnight, the building of the Berlin Wall was the culmination of over a decade of escalating confrontations and contentious blockades contrived to encourage the west to abandon Berlin to the Communist Bloc. The Berlin Wall Collection contains the documents, essays and overviews from the eleven U.S. Government organizations that provide the background and the political ramifications of the Wall's construction.

Bay of Pigs Release

(Updated August 2, 2011)

The CIA history of the Bay of Pigs operation in 1961, originally classified top secret, based on dozens of interviews with key operatives and officials and hundreds of CIA documents. The four volumes include information never before released and comprise (I) Air Operations, March 1960-1961; (II) Participation in the Conduct of Foreign Policy; (III) Evolution of CIA's Anti-Castro Policies, 1959-January 1961; and (IV) The Taylor Committee Investigation of the Bay of Pigs.

Volume I - Air Operations, March 1960-April 1961

- Part 1
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- Part 3

Volume II - Participation in the Conduct of Foreign Policy 92

- Part 1
- Part 2

Volume III - Evolution of CIA's Anti-Castro Policies, 1951-January 1961

Volume IV - The Taylor Committee Investigation of the Bay of Pigs

CIA Declassifies Oldest Documents in U.S. Government Collection

(April 19, 2011)

The Central Intelligence Agency today declassified the United States Government's six oldest classified documents, dating from 1917 and 1918. These documents, which describe secret writing techniques and are housed at the National Archives, are believed to be the only remaining classified documents from the World War I era. Documents describing secret writing fall under the CIA's purview to declassify.

"These documents remained classified for nearly a century until recent advancements in technology made it possible to release them," CIA Director Leon E. Panetta said. "When historical information is no longer sensitive, we take seriously our responsibility to share it with the American people."

One document outlines the chemicals and techniques necessary for developing certain types of secret writing ink and a method for opening sealed letters without detection. Another memorandum dated June 14, 1918 - written in French - reveals the formula used for German secret ink.

"The CIA recognizes the importance of opening these historical documents to the public," said Joseph Lambert, the Agency's Director of Information Management Services. "In fiscal year 2010 alone, the Agency declassified and released over 1.1 million pages of documents."

The documents will be available on CIA.gov and in the CIA Records Search Tool (CREST) at the National Archives in College Park, Maryland. CREST currently houses over 10 million pages of declassified Agency documents. Since 1995, the Agency has released over 30 million pages as a result of Executive Orders, the Freedom of Information Act (FOIA), the Privacy Act, and mandatory declassification reviews.

Secret writing document one
Secret writing document two
Secret writing document three
Secret writing document four
Secret writing document five
Secret writing document six

Wartime Statutes - Instruments of Soviet Control

(March 18, 2011)

The collection, consisting of 22 documents, provides insight into how the Soviet Union codified its control over the armed forces of its Eastern European allies. **The release of this collection coincides with a panel discussion at the Wilson Center on April 5,**

2011.

Baptism By Fire: CIA Analysis of the Korean War

(June 16, 2010)

This collection includes more than 1,300 documents consisting of national estimates, intelligence memo, daily updates, and summaries of foreign media concerning developments on the Korean Peninsula during 1947 - 1954. The release of this collection, which coincides with the 60th anniversary of the start of the war, makes available to the public the largest collection of Agency documents released on this issue. **The release of these documents is in conjunction with the conference, "New Documents and New Histories: Twenty-First Century Perspectives on the Korean War," co-hosted by the Harry S. Truman Presidential Library and the CIA in Independence, Missouri.**

The Office of Inspector General's (OIG) 2008 Report on the Peru Airbridge Denial Program

Strategic Warning and the Role of Intelligence: Lessons Learned From The 1968 Soviet Invasion of Czechoslovakia

(April 13, 2010)

The Czechoslovak crisis began in January 1968. The Czech communist leadership embarked on a program of dramatic liberalization of the political, economic, and social orders. These reforms triggered increasing Soviet concerns culminating in the invasion of 21 August 1969. This collection of documents pertains to these issues, the responses and analysis of this event in history.

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