

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,)
)
)
 Plaintiff,)
)
)
 v.)
) Civil Action No. 1:16-cv-00449-KBJ
)
 CENTRAL INTELLIGENCE AGENCY)
)
)
 Defendant.)
)
)

DEFENDANT’S COMBINED OPPOSITION
TO PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

THE CIA PROPERLY EXEMPTED ITS OPERATIONAL FILES FROM SEARCH AND
REVIEW IN RESPONSE TO JUDICIAL WATCH’S FOIA REQUEST 2

I. The CIA Has Satisfied Its Burden of Demonstrating that Its Operational Files Are
Exempt from Search and Review 3

II. The Special Activity Exception Does Not Apply 8

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

Marino v. Drug Enforcement Admin.,
729 F. Supp. 2d 237 (D.D.C. 2010) 10

Students Against Genocide (SAGE) v. U.S. Department of State,
No. CIV96-667(CKK/JMF), 1998 WL 699074 (D.D.C. Aug. 24, 1998)..... 8

**Sullivan v. Central Intelligence Agency*,
992 F.2d 1249 (1st Cir. 1993) 8, 9, 10

Unidad Latina En Accion v. U.S. Dep’t of Homeland Security,
253 F.R.D. 44 (D. Conn. 2008) 10

Yeager v. Drug Enforcement Admin.,
678 F.2d 315 (D.C. Cir. 1982) 7

Statutes

*50 U.S.C. § 31414,5

*50 U.S.C. § 3141(a)3

*50 U.S.C. § 3141(b)3, 4, 7

*50 U.S.C. § 3141(b)(1)4

*50 U.S.C. § 3141(c)(2)8

*50 U.S.C. § 3141(f)(3)7

*50 U.S.C. § 3141(f)(4)(A)3, 4

*50 U.S.C. § 3141(f)(4)(B).....7

*50 U.S.C. § 3141(g)5

50 U.S.C. § 3093(a)9

50 U.S.C. § 3093(a)(3)9

50 U.S.C. § 3093(b)9

50 U.S.C. § 3093(c)9

50 U.S.C. § 3093(e)9

50 U.S.C. § 3093(h)9

50 U.S.C. § 3094(c)9

Other Authorities

*S. Rep. No. 98-305 (1983)7, 8, 9, 10
*H. Rep. No. 98-726(I) (1984)8, 9, 10

INTRODUCTION¹

The Central Intelligence Agency (“CIA”) is entitled to summary judgment in this Freedom of Information Act (“FOIA”) case. The CIA conducted a reasonable search of its non-operational files for records responsive to Plaintiff’s FOIA request. The CIA Information Act (as codified in the National Security Act of 1947, as amended) exempts the CIA’s operational files from the FOIA’s search, review, publication, and disclosure requirements. Judicial Watch does not challenge the CIA’s search of non-operational files, and the agency properly declined to include operational files in processing the request.

Judicial Watch’s arguments regarding the application of the operational files exemption to this case are meritless. Judicial Watch contends that the CIA failed to demonstrate that exempted operational files perform the functions enumerated in the governing statute, but the CIA was not required to make this demonstration unless and until Judicial Watch alleged that requested records were withheld *because of improper exemption of operational files*, which Judicial Watch did for the first time in its opposition to the CIA’s motion for summary judgment. In any event, the additional declaration submitted with this brief describes the rigorous processes the CIA follows to designate and de-designate operational files, and satisfies the CIA’s obligation to show that its exempted operational files perform the statutory functions. Judicial Watch also argues that the alleged records it requested—pornography allegedly seized during the raid that killed Osama bin Laden—do not correspond to the statutory definition of operational files, but the dispositive issue under the operational files exemption is whether the exempt *files* perform the enumerated

¹ Defendant has lodged a classified declaration with the Department of Justice’s Classified Information Security Officer, which will be made available to the Court for ex parte, in camera review. Defendant has submitted this declaration to provide the Court with additional, classified information in support of Defendant’s motion for summary judgment. However, the public record provides a sufficient basis for the Court to enter judgment in Defendant’s favor (and for the Court to prepare an opinion in support of such a judgment without relying on or referencing the classified information in that declaration).

functions, not whether each of the records allegedly stored within those files does so. Indeed, absent limited circumstances not present here, the CIA is not required even to *review* the content of its operational files in order to demonstrate that those files meet the statutory exemption criteria.

Finally, Judicial Watch argues that the CIA should be required to search its operational files under the National Security Act's exception for FOIA requests concerning "any special activity the existence of which is not exempt from disclosure" under FOIA. This argument is unavailing. As the statute's legislative history makes clear and Judicial Watch itself acknowledges, Congress used the term "special activity" as a synonym for "covert action," a distinct category of defined activities subject to multiple procedural and congressional reporting requirements. The Government, however, has never indicated the existence of a covert action in connection with the bin Laden raid, much less indicated the declassification of a covert action operation. Judicial Watch's invocation of the special-activities exception thus fails.

Accordingly, the Court should grant the CIA's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.

ARGUMENT

THE CIA PROPERLY EXEMPTED ITS OPERATIONAL FILES FROM SEARCH AND REVIEW IN RESPONSE TO JUDICIAL WATCH'S FOIA REQUEST

As the CIA previously explained, the agency limited its search for responsive documents to non-operational files, because the CIA's operational files are exempt from FOIA's search, review, publication, and disclosure requirements. *See* ECF No. 9, Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment ("Mem.") at 7. The CIA conducted a methodical and thorough search of its non-operational files, targeting seven components for search and locating no records responsive to the Request. *Id.* at 5-7. Because the CIA conducted an adequate search of its non-operational files and located no responsive

documents, and because the agency properly declined to include its operational files in the processing of the FOIA Request, the CIA is entitled to summary judgment.

Judicial Watch does not challenge the CIA's search for responsive records in its non-operational files. *See* ECF No. 10 ("Opp.") at 3 n.1. Nor does Judicial Watch question the agency's representation that no responsive records were found as a result of that search. *Id.* Judicial Watch asserts, however, that the CIA cannot demonstrate the applicability of the operational files exemption and that the FOIA Request falls within the "special activities" exception to that exemption. Both claims lack merit.

I. The CIA Has Satisfied Its Burden of Demonstrating that Its Operational Files Are Exempt from Search and Review

The National Security Act generally exempts the CIA's operational files from the search, review, publication, and disclosure requirements of FOIA. 50 U.S.C. § 3141(a). In this case, the CIA determined that its exempted operational files currently perform the functions set forth in 50 U.S.C. § 3141(b), which defines the operational files exempted by statute, and properly declined to search these exempted operational files for responsive records. *See* Supplemental Declaration of Antoinette Shiner ("Supp. Decl." or "Supplemental Declaration") ¶ 10; *see also* 50 U.S.C. § 3141(f)(4)(A).

In opposing the CIA's motion for summary judgment, Judicial Watch notes that under the National Security Act, "if a complainant alleges that requested records were improperly withheld because of improper exemption of operational files," the CIA must "demonstrat[e] to the court by sworn written submission that exempted operation[al] files likely to contain responsive records currently perform the function[s] set forth in [50 U.S.C. § 3141(b)]." *Opp.* at 3 (quoting 50 U.S.C. § 3141(f)(4)(A)). Judicial Watch argues that the CIA has not satisfied this requirement, contending that the agency did "nothing more than assert" the applicability of the operational files

exemption. *Id.* at 4. But as the statute makes clear, the CIA’s obligation to demonstrate that its operational files perform the statutorily enumerated functions is only triggered when a plaintiff contends “that requested records were improperly withheld *because of improper exemption of operational files.*” 50 U.S.C. § 3141(f)(4)(A) (emphasis added). Judicial Watch’s Complaint did not allege that records were wrongly withheld “because of improper exemption of operational files.” *See generally* ECF No. 1. And Judicial Watch did not make clear that it was challenging the CIA’s invocation of that exemption (as opposed to the adequacy of the CIA’s search of non-operational files) until it filed its opposition brief.²

In any event, the CIA is now providing additional information in the Supplemental Declaration of Antoinette Shiner. *See* Supp. Decl. ¶¶ 4-9. Ms. Shiner’s supplemental declaration confirms that the CIA’s “exempted operational files likely to contain the records requested by plaintiff currently perform the functions set forth in 50 U.S.C. § 3141(b) because these files are files of the Directorate of Operations that document the conduct of foreign intelligence operations.” Supp. Decl. ¶ 10. The CIA has satisfied Section 3141(f)(4)(A)’s requirement that it show that the operational files the agency declined to include in the processing of the FOIA Request perform the functions set forth in 50 U.S.C. § 3141(b)(1).

The Supplemental Declaration also describes the rigorous processes in place to ensure that every file that is designated as an operational file actually does perform an enumerated statutory function, supporting the declarant’s attestation that the operational files do in fact perform a

² As noted in Defendant’s prior filing, the CIA issued its final response to the FOIA Request in a letter to Judicial Watch dated December 14, 2015, stating that “responsive records, should they exist, would be contained in operational files” and further noting that “[t]he CIA Information Act, 50 U.S.C. § 3141, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA.” *See* ECF No. 9, Defendant’s Statement Of Material Facts As To Which There Is No Genuine Issue ¶ 3. Judicial Watch did not, however, refer to that letter or its contents in its Complaint. Thus, the precise scope of Judicial Watch’s challenge did not become apparent until Judicial Watch filed its opposition brief on July 16.

statutory function. *Id.* ¶ 5. As the Supplemental Declaration explains, “[t]he scope of each designated file series is defined in classified internal regulations and policies,” which “are carefully and tightly defined to ensure that they serve the specific operational purposes.” *Id.* The CIA has also instituted a number of additional measures to maintain the integrity of its operational files, which the Supplemental Declaration describes and which are summarized further below:

Initially, an Agency-wide regulation details procedures for designating or eliminating the designation of operational files, and provides a rigorous process for doing so: the Deputy Director of CIA for Operations, the Deputy Director of CIA for Science and Technology, and the Director of Security may submit a recommendation to the CIA’s Director explaining how particular categories meet the standards for designation (or de-designation) of operational files, and the Director must approve the recommendation. Supp. Decl. ¶ 6. To ensure transparency in the designation and de-designation process, the regulation requires that the CIA notify Congress of all categories of files designated as operational, and of any changes to those categories. *Id.*

As an additional check, the CIA has also, as mandated by the National Security Act, established a process for the decennial review of exempted operational files. *See* 50 U.S.C. § 3141 (g); Supp. Decl. ¶ 7. As Ms. Shiner’s Supplemental Declaration explains:

Under this process, the Deputy Director of CIA for Operations, the Deputy Director of CIA for Science and Technology and the Director of Support, in consultation with the Chief of the CIA History Staff, are required to review the designations periodically, but not less than once every 10 years, and make recommendations to the [Director] as to which files or portions thereof no longer require designation as exempt or those that now require a designation as exempt.

Supp. Decl. ¶ 7. That decennial review also includes input from both information-management and subject-matter experts who ensure that files within each category continue to perform the statutorily enumerated functions, and who recommend changes to particular designations as appropriate. *Id.*

Before the results of each decennial review are sent to the CIA's Director for approval, an Agency-wide Operational File Validation Team independently examines the results of the decennial review. Supp. Decl. ¶ 8. The Validation Team likewise includes a broad cross-section of information management and subject-matter experts within the agency: the Director of Information Management chairs the Validation Team, and the Team's membership also includes the Information Review Officers for the Directorate of Operations, Directorate of Science and Technology, and Office of Security, as well as representatives from the CIA History Staff, Office of General Counsel, Office of Congressional Affairs, and Office of Public Affairs. *Id.* The Validation Team is required to, inter alia, solicit public comment concerning the public interests to consider in the designation process, to review a sample of files adequate to confirm both that the categories and subcategories chosen are appropriate and that the actual records in the file categories were appropriately placed within those categories, as well as to study and make recommendations concerning any specific proposed limitations to the proposed operational file designations. *Id.*

Finally, each of the CIA's Directorates have put in place additional internal procedures to ensure that their operational files are opened and maintained solely for proper purposes. Supp. Decl. ¶ 9. The Directorate of Operations, for example, has mandated multiple additional layers of review, including a requirement that an officer obtain written approval from specially trained staff before opening a new file within an exempt file series, a document-by-document review of all records tagged to go into an operational file in order to ensure that such placement is appropriate, and periodic review audits. *Id.*

Judicial Watch contends that the alleged *records* it requested are not operational files because “[a] collection of pornographic material . . . or an index of that material does not fit any of [the statute's definitions of operational files] in their basic form.” Opp. at 4. As a threshold matter

and irrespective of the operational files issue, the CIA is not required to create “an index” of pornography allegedly seized during the raid, or to create any other document in response to the FOIA Request. *See, e.g., Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) (“It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”).

And as to the alleged pornography itself, Judicial Watch’s argument misapprehends the relevant inquiry. To invoke the operational files exemption, the CIA need only demonstrate that the exempt *files* perform the enumerated functions, not that each of the *records* allegedly stored within those files performs those functions. *See* 50 U.S.C. § 3141(b); S. Rep. No. 98-305, at 20 (1983) (explaining that “the basis for file designation should be the function of the file, i.e., the purpose for which the file has been established, rather than the specific contents of the file”). Indeed, a court cannot ordinarily require the CIA “to review the content of any exempted operational file or files in order to make the demonstration” that the files perform one of the enumerated functions. 50 U.S.C. § 3141(f)(4)(B). And although the National Security Act contains a separate provision addressing the improper placement of records solely within operational files, *see* 50 U.S.C. § 3141(f)(3), Judicial Watch has not raised that provision, and a complainant can invoke Section 3141(f)(3) only by making a specific evidentiary showing, which Judicial Watch has not made (or attempted to make) here. *Id.*³ Because the CIA has demonstrated that its *operational files* perform the function set forth in 50 U.S.C. § 3141(b)—and because

³ Specifically, Section 3141(f)(3) provides that “when a complainant alleges that requested records were improperly withheld because of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission, based upon personal knowledge or otherwise admissible evidence.” 50 U.S.C. § 3141(f)(3).

Judicial Watch does not challenge the adequacy of the CIA’s search of non-operational files—the CIA is entitled to summary judgment.⁴

II. The Special Activity Exception Does Not Apply

The National Security Act provides that otherwise exempt operational files “shall continue to be subject to search and review for information concerning,” inter alia, “any special activity the existence of which is not exempt from disclosure” under FOIA. 50 U.S.C. § 3141(c)(2).

Plaintiff’s invocation of the special activities exception fails because the Government has never acknowledged the existence of any special activity in connection with the Bin Laden raid. The term “special activity” in Section 3141(c)(2) has a distinct and narrow meaning. As Plaintiff recognizes, *see* Opp. at 6-7, the term “special activity” is synonymous with “covert action.” *See* H. Rep. No. 98–726(I), at 21 (1984) (explaining that “foreign intelligence operations consist [] of . . . special activities (also called covert actions)”); S. Rep. No. 98-305, at 24-25 (1983); *Sullivan v. Central Intelligence Agency*, 992 F.2d 1249, 1253 (1st Cir. 1993). A covert action is set forth in the legislative history as “any activity of the United States Government, other than an activity intended solely for obtaining necessary intelligence, which is planned and executed so that

⁴ The unpublished report and recommendation in *Students Against Genocide (SAGE) v. U.S. Department of State*, No. CIVA96–667(CKK/JMF), 1998 WL 699074 (D.D.C. Aug. 24, 1998)—upon which Judicial Watch relies, *see* Opp. at 5-6—does not require a contrary result. In *Sage*, the plaintiff sought certain alleged aerial satellite images and the Government, without stating whether or not such records existed, asserted that the records were contained in operational files while also arguing (1) that “the records are exempt under FOIA Exemption 1 because their very existence is a classified fact under an Executive Order,” (2) that the records were exempt under a statute protecting intelligence sources and methods, and (3) that the imagery itself was classified under two Executive Orders. *See* 1998 WL 699074, at *7. The Plaintiff ultimately did not dispute that the aerial and satellite photographs at issue constituted intelligence sources and methods and the court concluded that “the CIA’s claim of Exemptions 1 and 3 [was] appropriate.” *Id.* at *8. The opinion contains no meaningful analysis of the operational files exemption and, because the court ruled for the CIA on other grounds, it is not even clear that the court decided the applicability of that exemption. *See id.* at *9 (“Furthermore, to the extent that the materials are contained in operational files, the CIA is relieved of FOIA’s burden of searching for responsive records altogether.”). The decision in *SAGE* thus lends no support to Plaintiff’s argument.

the role of the United States is not apparent or acknowledged publicly” *Sullivan*, 992 F.2d at 1253 (quoting H. Rep. No. 98-726(I), at 28 (1984)); *see also* 50 U.S.C. § 3093(e) (defining covert action as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly” and exempting certain activities from definition).

Where an action is taken pursuant to the President’s covert action authority, numerous requirements apply. The President must, *inter alia*, issue a finding in writing (or, where immediate action is required, documented in a contemporaneous written record and reduced to writing 48 hours after the decision), 50 U.S.C. § 3093(a), timely report information to congressional intelligence committees (or, in extraordinary circumstances requiring limited access, to certain specified congressional leaders), *id.* § 3093(b)-(c), “establish in writing a plan to respond to the unauthorized public disclosure” of any covert action, *id.* § 3093(h), and “specify each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action,” *id.* § 3093(a)(3); *see also id.* § 3094(c) (prohibiting expenditure of funds for covert action in the absence of a Presidential finding signed or otherwise issued in accordance with Section 3093(a)).

To invoke the special activities exception to the operational files exemption, a plaintiff must identify a specific covert action, the existence of which has been publicly disclosed or acknowledged. *See Sullivan*, 992 F.2d at 1253 (noting that plaintiff’s request “must relate to ‘a specific covert action operation, such as the Bay of Pigs invasion or the CIA’s role in replacement of the Guatemala regime in the 1950s’” (quoting S. Rep. No. 98-305, at 24–25)); *see also* S. Rep. No. 98-305, at 24 (explaining that “files containing information concerning an acknowledged

special activity become accessible” when “an authorized Executive Branch official has officially and publicly acknowledged the existence or nonexistence of a specific special activity”); H. Rep. No. 98-726(I), at 9 (stating that FOIA’s search and review requirements continue to apply to “information concerning those *covert actions* the existence of which is no longer classified” (emphasis added)). By confining the exception to special activities (i.e., covert actions), Congress made clear that a plaintiff cannot invoke that exception merely by pointing to a particular operation. Rather, the statute’s text and legislative history make clear that a plaintiff must establish that the Government has officially acknowledged the existence of a covert action. *See* S. Rep. No. 98-305, at 24 (explaining that declassification occurs only when “an authorized Executive Branch official has officially and publicly acknowledged the existence . . . of a *specific special activity*” (emphasis added)).

Plaintiff cannot meet that requirement here. Although Plaintiff has identified a specific operation (the raid that resulted in the death of Osama Bin Laden), neither the CIA nor any other component of the Executive Branch has acknowledged the existence of any covert action in connection with that raid. Supp. Decl. ¶ 12. Nor have any of the Government’s official acknowledgments concerning the raid indicated the declassification of a covert action operation. *Id.* Despite relying on authority that recognizes that “special activity” means “covert action,” *see* Opp. at 6-7 (citing *Sullivan*, 992 F.2d at 1253-54), Plaintiff does not even claim that the bin Laden raid was a covert action, let alone an acknowledged one.⁵

⁵ While it is the government’s burden to show that an exemption to FOIA applies, it is Plaintiff’s burden to show that an exception to the exemption applies. *Cf. Marino v. Drug Enforcement Admin.*, 729 F. Supp. 2d 237, 244 (D.D.C. 2010) (noting that, although the Government must show that documents are exempt from disclosure under Exemption 7(C), a party invoking the public domain exception to that exemption bears the burden of demonstrating that the information sought is already in the public domain); *Unidad Latina En Accion v. U.S. Dep’t of Homeland Security*, 253 F.R.D. 44, 53 (D. Conn. 2008) (collecting cases for similar proposition).

Because Plaintiff's request is not related to a specific and acknowledged covert action, the special activities exception does not apply.

CONCLUSION

For the above reasons, this Court should grant the CIA's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment.⁶

⁶ As noted previously, the CIA declined to include its operational files in the processing of the FOIA Request. To the extent the Court rules that a search and review of the CIA's operational files is required, the CIA reserves the right to assert applicable FOIA exemptions over any responsive material.

DATED this 9th day of September, 2016. Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director
U.S. Department of Justice
Civil Division, Federal Programs Branch

/s/ Andrew M. Bernie
ANDREW M. BERNIE (DC BAR# 995376)
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 616-8488
Fax: (202) 616-8470
E-mail: andrew.m.bernie@usdoj.gov
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Case No. 1:16-cv-00449

DECLARATION OF ANTOINETTE B. SHINER
INFORMATION REVIEW OFFICER
LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, ANTOINETTE B. SHINER, hereby declare and state:

I. INTRODUCTION¹

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). I am authorized to assess the current, proper classification of CIA information, based on the classification criteria of Executive Order 13526 and applicable

¹ The CIA has submitted a classified, ex parte declaration in addition to this public declaration.

CIA regulations. I am also responsible for the classification review of documents and information, including documents which may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

2. Through the exercise of my official duties, as detailed in my previous declaration filed 28 June 2016 and incorporated by reference, I have become familiar with this civil action and the underlying FOIA request.

3. I submit this second declaration in further support of the CIA's motion for summary judgment and in opposition to Plaintiff's cross-motion for summary judgment. Specifically, this declaration further explains, to the greatest extent possible on the public record, why the CIA properly declined to include its operational files in processing the FOIA Request in this case, and why the "special activity" exception does not apply.

II. OPERATIONAL FILE EXEMPTION DESIGNATION

4. Under 50 U.S.C. § 3141(a), the Director of the Central Intelligence Agency (DCIA) "may exempt operational files of the CIA" from the search and review requirements of the FOIA. Operational files are defined, in turn, to include certain files

of the Directorate of Operations², the Directorate of Science & Technology, and the Office of Personnel Security that contain sensitive information about CIA sources and methods. Relevant here, the "operational files" of the Directorate of Operations are those "which document the conduct of foreign intelligence or counterintelligence operations or intelligence or security liaison arrangements or information exchanges with foreign governments or their intelligence or security services." 50 U.S.C. § 3141(b)(1).

5. The DCIA implements his authority under 50 U.S.C. § 3141(a) by designating specific file series as exempt. In identifying the exempt file series, the DCIA and his advisers carefully consider whether files falling within each proposed series would perform the functions set forth in the statute. If a proposed file series would not perform one of the statutory functions, it would not be designated as exempt. The scope of each designated file series is defined in classified internal regulations and policies. Although I cannot provide additional detail about the designated file series in an unclassified setting, I can assure the Court that they are carefully and

²Due to a recent reorganization at the CIA, the National Clandestine Service is now known as the Directorate of Operations.

tightly defined to ensure that they serve the specific operational purposes.

6. To maintain the integrity of the Agency's exempted operational files, the CIA has an Agency-wide regulation that details procedures for designating or eliminating the designation of operational files. This regulation provides that at any time, the Deputy Director of CIA for Operations, the Deputy Director of CIA for Science and Technology, and the Director of Security may recommend to the DCIA that the DCIA add categories of operational files under their jurisdiction for designation as exempt from search, review, publication or disclosure under FOIA. The regulation also allows for eliminating previously designated categories of operational files. Such written recommendations must explain how the files meet the standards for designation (or elimination) and must be approved by the DCIA. The regulation further provides that the Agency will notify Congress of all categories of files designated and any subsequent additions to or changes in those categories.

7. As an additional check to ensure that the CIA's exempted operational files continue to perform the functions set forth in 50 U.S.C. § 3141(b), and pursuant to 50 U.S.C. § 3141 (g), the Agency has also established a process for the decennial

review of exempted operational files. Under this process, the Deputy Director of CIA for Operations, the Deputy Director of CIA for Science and Technology and the Director of Support, in consultation with the Chief of the CIA History Staff, are required to review the designations periodically, but not less than once every 10 years, and make recommendations to the DCIA as to which files or portions thereof no longer require designation as exempt or those that now require a designation as exempt. They do so in consultation with information management experts and subject-matter experts who review the designations to ensure that the files within each designated category perform the functions outlined in the statute, and who recommend validating or modifying the designations as appropriate.

8. Prior to being forwarded to the DCIA for approval, the results of each decennial review of the designations are independently reviewed by an Agency-wide Operational File Validation Team, which is chaired by the Director of Information Management with membership composed of the Information Review Officers for the Directorate of Operations, Directorate of Science and Technology, and Office of Security as well as representatives from the CIA History Staff, Office of General Counsel, Office of Congressional Affairs, and Office of Public Affairs. In conducting its validation, the Validation Team is directed to: (a) solicit public comments through a notice

published in the Federal Register regarding historical and other public interests that should be taken into account in the designation process³; (b) invite organizations known to have views about historical and other public interests to provide those views; (c) assure that an adequate sampling has been made of the files subject to the proposed designations to confirm that the categories and subcategories squarely fall within the boundaries of the statute, that the actual records in the file categories are the appropriate ones to have been filed there, and that the information in those records could not be meaningfully declassified and released if subject to the FOIA line-by-line review and release process; and (d) perform studies of and make recommendations about any specific proposed limitations to the proposed designations of files to be approved by the DCIA.

9. Beyond these processes for obtaining DCIA approval to designate, or eliminate the designation of operational files, the CIA Directorates also have in place their own internal procedures that serve to further ensure that operational files are opened and maintained for appropriate purposes. The Directorate of Operations has established a process involving multiple layers of review before a document ends up residing in

³The most recent notice published in the Federal Register may be found at 80 FR 21704 (April 20, 2015).

an exempt operational file. First, to open a new file within an exempt file series, an officer must submit a written request that is reviewed and approved by specially trained staff. The staff determines, among other things, whether the proposed file would perform one of the statutory functions. If it would not, the request is rejected. Second, records tagged by an officer to go into an operational file are subsequently reviewed on a document-by-document basis to confirm that such placement is appropriate. Finally, periodic review audits are conducted to verify that the operational files are being maintained for proper purposes. These processes collectively ensure that exempt operational files do, in fact, perform the statutory functions.

III. PROPRIETY OF OPERATIONAL FILE EXEMPTION IN THIS CASE

10. As documented in my initial declaration, the CIA conducted a search of its non-operational files—the adequacy of which Plaintiff does not challenge—and that search did not locate any responsive records. Consistent with 50 U.S.C. § 3141(f)(4)(B), I have not reviewed the content of any operational files that document the raid on bin Laden's compound prior to making this submission. I can affirm, however, that exempted operational files likely to contain the records requested by plaintiff currently perform the functions set forth

in 50 U.S.C. § 3141(b) because these files are files of the Directorate of Operations that document the conduct of foreign intelligence operations. I also affirm that the processes and procedures for designating and maintaining the Agency's operational files, as described above, have been followed by the CIA.

IV. INAPPLICABILITY OF THE SPECIAL ACTIVITY EXCEPTION

11. 50 U.S.C. § 3141(c)(2) provides that "exempted operational files shall continue to be subject to search and review for information concerning. . . any special activity the existence of which is not exempt from disclosure" under FOIA. "Special activity" has been understood as another term for covert action. Covert action means "an activity or activities of the United States government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly." 50 U.S.C. § 3093(e).

12. I understand that, in this case, the Plaintiffs have argued that the special activity exception applies because the raid that killed Osama bin Laden has been publicly acknowledged by U.S. officials. However, the special activities exception only applies in instances where an operation carried out under covert action authorities, such as the Bay of Pigs invasion or

the CIA's role in the replacement of the Guatemala regime in the 1950s, is officially declassified. Conversely, here, none of the U.S. Government's official acknowledgements even suggest the existence of a "special activity" contemplated under Section 701(c)(2) of the National Security Act much less indicate the declassification of a covert action operation. Therefore, the special activity exception does not apply in this instance and, accordingly, any operational files dealing with the raid, remain exempt from the FOIA's search and review requirements.

* * *

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

Executed this 9th day of September 2016.



Antoinette B. Shiner
Information Review Officer
Litigation Information Review
Office
Central Intelligence Agency

