

1 1997 (Public Law 104-201; 110 Stat. 2469; 10 U.S.C. 2501 note), as amended by section
2 242 of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65;
3 113 Stat. 551)".

4 **TITLE IX—DEPARTMENT OF DEFENSE ORGANIZATION AND**
5 **MANAGEMENT**

6 **Subtitle A—Intelligence-Related Matters**

7 **→ SEC. 901. OPERATIONAL FILES OF THE DEFENSE INTELLIGENCE AGENCY.**

8 (a) PROTECTION OF OPERATIONAL FILES OF DEFENSE INTELLIGENCE AGENCY. Title I of
9 the National Security Act of 1947 (50 U.S.C. 401 et. seq.) is amended by inserting after section
10 705 the following new section:

11 **"§ 706. Operational files of the Defense Intelligence Agency**

12 (a) EXEMPTION OF OPERATIONAL FILES.—The Director of the Defense Intelligence
13 Agency, in coordination with the Director of National Intelligence, may exempt operational files
14 of the Defense Intelligence Agency from the provisions of section 552 of title 5, United States
15 Code, which require publication, disclosure, search, or review in connection therewith.

16 (b) OPERATIONAL FILES DEFINED.—(1) In this section, the term 'operational files' means:

17 (A) files of the Directorate of Human Intelligence of the Defense
18 Intelligence Agency (and any successor organization of that directorate) that
19 document the conduct of foreign intelligence or counterintelligence operations or
20 intelligence or security liaison arrangements or information exchanges with
21 foreign governments or their intelligence or security services; and

limits it to NASINT

"(B) files of the Directorate of Technology of the Defense Intelligence Agency (and any successor organization of that directorate) that document the means by which foreign intelligence or counterintelligence is collected through technical systems. (NASINT)

"(2) Files that are the sole repository of disseminated intelligence are not operational files.

"(c) SEARCH AND REVIEW FOR INFORMATION.—Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning:

"(1) United States citizens or aliens lawfully admitted for permanent residence who have requested information on themselves pursuant to the provisions of section 552 or 552a of title 5, United States Code. Privacy

"(2) Any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5, United States Code. //

"(3) The specific subject matter of an investigation by any of the following for any impropriety, or violation of law, Executive Order, or Presidential directive, in the conduct of an intelligence activity:

"(A) The Committee on Armed Services and the Permanent Select Committee on Intelligence of the House of Representatives.

"(B) The Committee on Armed Services and the Select Committee on Intelligence of the Senate;

"(C) The Intelligence Oversight Board. — COVERS DNF

1 "(D) The Department of Justice.

2 "(E) The Office of General Counsel of the Department of Defense or of the
3 Defense Intelligence Agency.

4 "(F) The Office of Inspector General of the Department of Defense or of
5 the Defense Intelligence Agency.

6 "(G) The Office of the Director of the Defense Intelligence Agency.

7 "(D) INFORMATION DERIVED OR DISSEMINATED FROM EXEMPTED OPERATIONAL
8 FILES.—(1) Files that are not exempted under subsection (a) of this section which contain
9 information derived or disseminated from exempted operational files shall be subject to search
10 and review.

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of analysis version.*

11 "(2) The inclusion of information from exempted operational files in files that are not
12 exempted under subsection (a) of this section shall not affect the exemption under subsection (a)
13 of this section of the originating operational files from search, review, publication, or disclosure.

makes sure you don't open any in it is used

14 ~~disseminated~~ "(3) Records from exempted operational files that have been disseminated to and
15 referenced in files that are not exempted under subsection (a) of this section and that have been
16 returned to exempted operational files for sole retention shall be subject to search and review.

disseminated

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17 "(e) ALLEGATION; IMPROPER WITHOLDING OF RECORDS; JUDICIAL REVIEW.—(1) Except
18 as provided in paragraph (2), whenever any person who has requested agency records under
19 section 552 of title 5, alleges that the Defense Intelligence Agency has withheld records
20 improperly because of failure to comply with any provision of this section, judicial review shall
21 be available under the terms set forth in section 552(a)(4)(B) of title 5, United States Code.

22 "(2) Judicial review shall not be available in the manner provided under paragraph (1) as

1 follows:

2 "(A) In any case in which information specifically authorized under criteria
3 established by an Executive order to be kept secret in the interest of national defense or
4 foreign relations which is filed with, or produced for, the court by the Defense
5 Intelligence Agency, such information shall be examined ex parte, in camera by the court.

6 "(B) The court shall determine, to the fullest extent practicable, determine issues
7 of fact based on sworn written submissions of the parties.

8 "(C) When a complaint alleges that requested records were improperly withheld
9 because of improper placement solely in exempted operational files, the complainant
10 shall support such allegation with a sworn written submission based upon personal
11 knowledge or otherwise admissible evidence.

12 "(D)(i) When a complainant alleges that requested records were improperly
13 withheld because of improper exemption of operational files, the Defense Intelligence
14 Agency shall meet its burden under section 552(a)(4)(B) of title 5, United States Code, by
15 demonstrating to the court by sworn written submission that exempted operational files
16 likely to contain responsible records currently perform the functions set forth in
17 subsection (b).

18 "(ii) The court may not order the Defense Intelligence Agency to review the
19 content of any exempted operational file or files in order to make the demonstration
20 required under clause (i) of this paragraph, unless the complainant disputes the Defense
21 Intelligence Agency's showing with a sworn written submission based on personal
22 knowledge or otherwise admissible evidence.

1 "(E) In proceedings under subparagraphs (C) and (D), the parties shall not obtain
2 discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except
3 that requests for admission may be made pursuant to rules 26 and 36.

4 "(F) If the court finds under this subsection that the Defense Intelligence Agency
5 has improperly withheld requested records because of failure to comply with any
6 provision of this subsection, the court shall order the Defense Intelligence Agency to
7 search and review the appropriate exempted operational file or files for the requested
8 records and make such records, or portions thereof, available in accordance with the
9 provisions of section 552 of title 5, United States Code, and such order shall be the
10 exclusive remedy for failure to comply with this section (other than subsection(g)).

11 "(G) If at any time following the filing of a complaint pursuant to this subsection
12 the Defense Intelligence Agency agrees to search the appropriate exempted operational
13 file or files for the requested records, the court shall dismiss the claim based upon such
14 complaint; and"(H) Any information filed with, or produced for the court pursuant to
15 subparagraphs (A) and (D) shall be coordinated with the Director of National Intelligence
16 before submission to the court.

17 "(f) DECENNIAL REVIEW OF EXEMPTED OPERATIONAL FILES.—(1) Not less than once
18 every ten years, the Director of the Defense Intelligence Agency and the Director of National
19 Intelligence shall review the exemptions in force under subsection (a) to determine whether such
20 exemptions may be removed from a category of exempted files or any portion thereof. The
21 Director of National Intelligence must approve any determinations to remove such exemptions.

22 "(2) The review required by paragraph (1) shall include consideration of the historical

1 value or other public interest in the subject matter of the particular category of files or portions
2 thereof and the potential for declassifying a significant part of the information contained therein.

3 "(3) A complainant that alleges that the Defense Intelligence Agency has improperly
4 withheld records because of failure to comply with this section may seek judicial review in the
5 district court of the United States of the district in which any of the parties reside, or in the
6 District of Columbia. In such a proceeding, the court's review shall be limited to determining the
7 following:

8 "(A) Whether the Defense Intelligence Agency has conducted the review required
9 by paragraph (1) before the expiration of the 10-year period beginning on the date of the
10 enactment of this section or before the expiration of the 10-year period beginning on the
11 date of the most recent review.

12 "(B) Whether the Defense Intelligence Agency, in fact, considered the criteria set
13 forth in paragraph (2) in conducting the required review."

14 (b) CLERICAL AMENDMENT.—The table of sections at the beginning of such title is
15 amended by inserting after the item relating to section 705 the following new item:

16 "706. Operational files of the Defense Intelligence Agency."

17 (c) OTHER AMENDMENTS.—The National Security Act of 1947 is further amended—

18 (1) by inserting at the end of section 702(a)(3)(C) the following new clause:

19 "(vii) The Office of the Inspector General of the National Geospatial-Intelligence
20 Agency,";

21 (2) by inserting at the end of section 703(a)(3)(C) the following new clause:

22 "(vii) The Office of the Inspector General of the NRO."; and

1 (3) by inserting at the end of section 704(c)(3) the following subparagraph:

2 "(H) The Office of the Inspector General of the National Security Agency."

3 **SEC. 902. DEFENSE COUNTERINTELLIGENCE POLYGRAPH PROGRAM.**

4 Section 1564a of title 10, United States Code, is amended—

5 (1) in subsection (a), by inserting "or successor directive" before the period at the end;

6 and

7 (2) in subsection (b), by inserting after "(or a successor Executive order)" the following:

8 ", or who have access to other information whose unauthorized disclosure or manipulation would
9 have significant potential impact upon national security, as determined under standards
10 established by the Secretary of Defense, "

11 **Subtitle B—Other Matters**

12 **SEC. 911. OPERATIONAL TEST AND EVALUATION; EXPANDING THE**

13 **ELIGIBILITY CRITERIA FOR THE LEADERSHIP OF DEPARTMENT**

14 **OF DEFENSE TEST RESOURCE MANAGEMENT CENTER.**

15 Section 196(b) of title 10, United States Code, is amended—

16 (1) by amending paragraph (1) to read as follows:

17 "(1) At the head of the Center shall be a Director, selected by the Secretary from
18 among individuals who have substantial experience in the field of test and evaluation.;"

19 and

20 (2) in paragraph (2), by striking "senior civilian officers and employees of the
21 Department of Defense" and inserting "individuals".

22 **TITLE X—GENERAL PROVISIONS**

Defense Research Plan, by referencing 10 U.S.C. 2501 (note). The section corrects title 15 by changing the reference. This correction is necessary to retain a DoD document as the SBIR/STTR topic determination; otherwise the non-DoD authority identified in title 42 is the default SBIR/STTR topic determinant.

This section is very important to the DoD. SBIR set-aside funds are approximately \$1 billion in R&D investment, and as such represent a significant part of the DoD R&D program. The section allows the SBIR program to best meet DoD needs, that is to ensure DoD SBIR funds are spent on technologies important to the DoD.

TITLE IX—DEPARTMENT OF DEFENSE ORGANIZATION AND MANAGEMENT

Subtitle A—Intelligence-Related Matters

→ **Section 901.** The proposed section 706 of the National Security Act of 1947, as laid out above, is based directly on existing sections 701 through 704 of the National Security Act of 1947. These sections currently provide the Central Intelligence Agency, the National Geospatial-Intelligence Agency, the National Reconnaissance Office, and the National Security Agency with specific exemptions from the Freedom of Information Act (FOIA). The section above will extend these FOIA exemptions to the Defense Intelligence Agency's (DIA's) Human Intelligence and Technology Directorates' operational files in a manner similar to the other Agencies' exemptions. The new section closely follows the wording of section 704, which provided a FOIA exemption for certain NSA operational files. Section 704 is the most recently enacted FOIA exemption of the group.

Amendments to the National Security Act of 1947 that would allow FOIA exempted operational files to continue to be subject to search and review for information concerning the specific subject matter of an investigation by the respective National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency Inspector General for any impropriety, or violation of law, Executive Order, or Presidential directive, in the conduct of an intelligence activity. The proposed amendments are consistent with the language proposed by the DIA.

Section 902 would make a technical correction to permit the Department of Defense to modernize its internal directive governing the defense counterintelligence polygraph program, and it would expand the class of persons covered.

In enacting 10 U.S.C. § 1564a, Congress recognized that polygraph examinations are a useful tool in screening DoD's military and civilian personnel, contractor personnel, detailees, and applicants whose duties involve access to Top Secret or Special Access information. Recent experience in Cuba, Afghanistan, and Iraq has demonstrated that such personnel may also have access to other types of highly sensitive information whose disclosure or manipulation would