

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

THE NATIONAL SECURITY ARCHIVE,)
FUND, INC.)
George Washington University)
Gelman Library Suite 701)
2130 H Street, NW)
Washington, DC 20037)
Plaintiff,)
v.)
THE CENTRAL INTELLIGENCE)
AGENCY,)
Washington, DC 20505)
Defendant.)

Case No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive, declaratory and other appropriate relief, and seeking the expedited processing and release of agency records requested by the National Security Archive Fund, Inc., (the "Archive") from the Central Intelligence Agency ("CIA").

2. This lawsuit seeks release of the 2004 National Intelligence Estimate on Iraq (the "2004 Iraq NIE") that has been widely reported in the news media, that has been the subject of a CIA background briefing to news media, and that several members of Congress – after reviewing the 2004 IRAQ NIE – have asked be released in declassified form to the public. The 2004 IRAQ NIE is relevant to an urgent public debate concerning the actions of the U.S. government in Iraq, the future conditions in Iraq, and

U.S. government involvement in the region; it is an essential element to an informed public discourse concerning U.S. strategy in the war in Iraq.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii).

This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

4. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

5. Plaintiff the National Security Archive Fund, Inc., is a not for profit corporation located at George Washington University, established to promote research and public education on U.S. governmental and national security decision-making and to promote and encourage openness in government and government accountability. The Archive collects and publishes declassified documents acquired through the Freedom of Information Act. In the course of its research on U.S. government policy and decision-making, Archive analysts file more than 1,000 FOIA requests annually and publish numerous document sets, briefing books and other publications for dissemination to the public. The Archive is the world's largest nongovernmental library of declassified documents, has published more than 500,000 pages of declassified records in various formats, and has become the leading non-profit user of the FOIA.

6. Defendant Central Intelligence Agency is a Department of the Executive Branch of the United States Government. The CIA is an agency within the meaning of 5 U.S.C. § 552(f). It has possession and control over the document sought by Plaintiff.

THE 2004 NATIONAL INTELLIGENCE ESTIMATE ON IRAQ

7. On September 16, 2004, the New York Times reported that “[a] classified National Intelligence Estimate prepared for President Bush in late July spells out a dark assessment of prospects for Iraq The estimate outlines three possibilities for Iraq through the end of 2005, with the worst case being developments that could lead to civil war, the officials said. The most favorable outcome described is an Iraq whose stability would remain tenuous in political, economic and security terms.” The disclosure of the 2004 Iraq NIE was widely reported by news media throughout the country.

8. In the two weeks after disclosure of the 2004 Iraq NIE, over 1300 media sources reported on the Iraq NIE, according to a search on Google News. Google News presents information culled from approximately 4,500 news sources worldwide. It is updated continuously and covers only articles that appeared within the thirty days prior to the search. See “About Google News” <http://news.google.com/intl/en_us/about_google_news.html> (last viewed October 18, 2004).

9. Upon information and belief, on or about September 21, 2004, CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar delivered a CIA-approved speech concerning the situation in Iraq in his official capacity as a National Intelligence Officer for the CIA. His statements were based in part on the 2004 Iraq NIE.

10. On September 23, eight members of the Senate Select Committee on Intelligence asked the CIA to provide a declassified version of the 2004 Iraq NIE. They explained:

[t]he assessment places the current turmoil in an historical context and projects the likeliest scenarios for the next eighteen months. This kind of information not only informs policymakers, but it also can play a critical

role as the Congress grapples with the difficult issues surrounding America's involvement in Iraq. To facilitate that role, we believe that the substance of this assessment should be made public in some fashion as soon as possible.

September 23, 2004 Letter to John Mc Laughlin, Acting Director of Central Intelligence.

The Senators further stated that “[a]ny public discussion of such an important intelligence assessment should be balanced, and informed to the greatest extent possible by the document itself,” and that “[a]n unclassified version of this assessment will significantly improve the quality of the debate.”

PRESIDENT BUSH'S EXECUTIVE ORDER

11. On August 27, 2004, President Bush issued Executive Order 13356 for “Strengthening the Sharing of Terrorism Information to Protect Americans.” President Bush’s order requires intelligence community “records and reports related to terrorism information to be produced with multiple versions at an unclassified level and at varying degrees of classification,” in “unclassified versions for distribution wherever possible,” and “to be shared free of originator controls,” among other provisions (posted at www.whitehouse.gov/news/releases/2004/08/20040827-4.html).

PLAINTIFF'S FOIA REQUEST FOR THE 2004 IRAQ NIE AND DEFENDANT CIA'S RESPONSE

12. On September 16, 2004, Plaintiff wrote to Defendant CIA and requested under the FOIA:

[T]he National Intelligence Estimate (NIE) prepared in July 2004 on Iraq.

13. As noted in the FOIA request, the front page of the September 16, 2004, *New York Times*, a copy of which was attached to the FOIA request, described the 2004 IRAQ NIE as:

the first formal intelligence estimate on the situation in Iraq since October 2002. Described as approximately 50 pages long, the document was prepared by the National Intelligence Council and was approved by the National Foreign Intelligence Board under John E. McLaughlin, the acting Director of Central Intelligence.

14. Plaintiff requested that the processing of its FOIA request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E). The FOIA request asked for expedited processing because:

there exists a “compelling need” to review this document because the information is sought “by a person primarily engaged in disseminating information” and is “urgen[tly][needed] to inform the public concerning actual or alleged Federal Government activity.”

15. Plaintiff provided extensive evidence to support its assertion that there existed “an urgency to inform the public about an actual or alleged federal activity.” In support of expedited treatment and release, the FOIA request explained:

The front-page treatment of the existence of this document, the front-page treatment on a daily basis of its subject (conditions in Iraq and the future of Iraq), the intense public interest in Iraq as a matter of policy debate, the concerns of the families of the over 100,000 American servicemen and servicewomen in Iraq today – all demonstrate the compelling need for expedited review and release of this document.

16. The FOIA request further explained:

In addition, this document is covered by President Bush’s executive order, issued on August 27, 2004, for “strengthening the sharing of terrorism information to protect Americans.” President Bush’s order requires that the intelligence community’s “records and reports related to terrorism information to be produced with multiple versions at an unclassified level and at varying degrees of classification,” in “unclassified versions for distribution wherever possible,” and “to be shared free of originator controls,” among other provisions (posted at www.whitehouse.gov/news/releases/2004/08/20040827-4.html). Since this NIE contains extensive terrorism information about conditions in Iraq, threats to Americans, and future threats, the President’s order requires the CIA to undertake declassification review of the NIE and prepare an unclassified version of it.

17. Finally, in support of its argument for expedition and its contention that plaintiff is “primarily engaged in disseminating information,” the FOIA request explained:

As CIA has long recognized, the National Security Archive qualifies for waiver of search and review fees as a representative of the news media. This request is made as part of a scholarly and news research project and not for commercial use.

18. By letter dated October 4, 2004, Plaintiff amended its FOIA request to inform Defendant of additional information in support of its FOIA request. With respect to arguments in favor of release, Plaintiff explained:

the substance of the NIE has been officially acknowledged and released into the public domain through official CIA channels, including the unclassified comments of CIA National Intelligence Officer for the Near East and South Asia Paul R. Pillar that were delivered on or about September 21, 2004 at a meeting on the West Coast. Mr. Pillar, a senior official in the Agency, presented an Agency- approved text concerning the situation in Iraq in his official capacity as a National Intelligence Officer for the CIA. His statements, which reveal the main themes in the NIE, are official disclosures of the substance of the NIE and thus support the release.

19. Plaintiff further noted that:

Moreover, the Agency has previously released portions, including the key findings, of the October 2002 CIA intelligence estimate about Iraq's weapons of mass destruction “NIE 2002-16HC, October 2002, Iraq's Continuing Programs for Weapons of Mass Destruction,” and an unclassified summary of that document (which was released in October 2002). Similarly, here, the Agency should be able to quickly review and release the key findings, table of contents, and other segregable portions of the 2004 NIE on Iraq without any harm to sources or methods.

20. With respect to arguments in favor of expedited processing, Plaintiff provided extensive additional evidence to support its assertion that there existed “an urgency to inform the public about an actual or alleged federal activity”:

I wish to draw the Agency’s attention to the compelling urgency to inform the public concerning actual or alleged Federal Government activity that would be served by prompt release of the NIE. The strong public concern

about the situation in Iraq and the likely outcome of the war in Iraq is evidenced in part by the overwhelming media interest in the document. A News Search on www.google.com for current news stories concerning the NIE collected more than 1,300 news articles (as of October 1, 2004). The decision of a government to prosecute a military campaign is clearly of the highest public interest, and the coverage generated about the NIE demonstrates that my FOIA request for the document meets the FOIA's and the CIA's standards for expedited processing.

This compelling need and public urgency is also evidenced by the request of several members of the Senate Intelligence Committee who have reviewed the NIE asking the CIA and President George W. Bush to disclose a copy of the NIE. They state that the analysis "can play a critical role as the Congress grapples with the difficult issues surrounding America's involvement in Iraq. To facilitate that role, ... the substance of [the NIE] should be made public in some fashion as soon as possible." September 23, 2004 Letter to Mr. John McLaughlin (attached).

21. In further support of its argument for expedited processing, Plaintiff again reminded the CIA that expedited processing is appropriate:

when the request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." The National Security Archive, as an established member of the news media, is an organization that is primarily engaged in disseminating information to the public. As noted above, the information sought by this FOIA request is pertinent to an urgent public debate concerning the actions of the U.S. government in Iraq, the future conditions in Iraq, and U.S. government involvement in the region. It is difficult to imagine an issue of greater national concern than the state of affairs facing the United States in the current conflict in Iraq. This NIE is central to the public debate on the realities in Iraq and is an essential element in an informed public discourse on Iraq that will serve to hold U.S. officials accountable for their decisions. Such accountability and informed public debate are fundamental principles of the Freedom of Information Act.

22. In support of its assertion that it is "primarily engaged in disseminating information" within the meaning of the FOIA and DOJ regulations, Plaintiff addressed its news collection and dissemination activities:

The National Security Archive, as an established member of the news media, is an organization that is primarily engaged in disseminating information to the public.

23. By telephone communication on October 5, 2004, Defendant CIA informed Plaintiff that it had sent a letter dated September 26, 2004, that denied the request for expedited processing and would send a response to Plaintiff's supplemental information amending the request.

24. By letter received October 5, 2004, and dated September 26, 2004, Defendant CIA denied Plaintiff's request for expedited processing. Defendant explained:

With regard to your request for expedited processing, I must inform you that all requests are handled in the order received on a 'first-in, first-out' basis. Exceptions to this rule will be made only when a compelling need is established to the satisfaction of the Agency. ... Since your request does not demonstrate a 'compelling need' ... we must decline your request to expedite processing.

Defendant CIA granted Plaintiff news media status and accepted the FOIA request for regular processing. Defendant CIA advised Plaintiff of its right to file an administrative appeal of the denial of expedited processing.

25. By letter dated October 6, 2004, Defendant CIA confirmed its denial of the request for expedited processing.

26. By telephone conversation on October 20, 2004, Defendant CIA informed Plaintiff that it had considered the matters in Plaintiff's October 4, 2004 amendment to the FOIA request, that the October 4, 2004 communication was interpreted as a continuation of the original September 16, 2004 FOIA request, and that the request for expedited processing was still denied.

Causes of Action

Count I: The CIA has Violated the FOIA by

Failing to Grant Plaintiff's Request for Expedited Processing

27. Plaintiff realleges the allegations contained in ¶¶ 1-26.

28. The CIA has failed to comply with the statutory expedited processing provision contained in 5 U.S.C. §§ 552(a)(6)(E) with respect to Plaintiff's September 16, 2004 (as amended October 4, 2004) FOIA request.

29. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request for expedited processing.

30. The CIA has wrongfully denied Plaintiff's request for expedited processing.

31. Plaintiff is entitled to injunctive relief with respect to the expedited processing of the requested document.

Count V: The CIA has Violated the FOIA by Failing to Complete Its Processing of Plaintiff's September 16, 2004 Request (as amended October 4, 2004)

32. Plaintiff realleges the allegations contained in ¶¶ 1-31.

33. The CIA has failed to comply with the statutory time limits contained in 5 U.S.C. §§ 552(a)(6)(A) with respect to Plaintiff's September 16, 2004 (amended October 4, 2004) FOIA request.

34. Plaintiff has exhausted the applicable administrative remedies with respect to the above-referenced request.

35. The CIA has wrongfully withheld responsive agency records from Plaintiff.

36. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

REQUESTED RELIEF

WHEREFORE, plaintiff prays that this Court:

- A. Enjoin and order the Defendant CIA to expedite the processing of Plaintiff's September 16, 2004 FOIA request (as amended October 4, 2004);
- B. Enjoin and order Defendant CIA to disclose the requested records in their entireties and make copies available to Plaintiff;
- C. Declare that Defendant's refusal to release the records requested by Plaintiff violates the FOIA;
- E. Provide for expeditious proceedings in this action;
- F. Award Plaintiff his costs and reasonable attorneys fees incurred in this action; and
- G. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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Counsel for Plaintiff

DATE: October 20, 2004