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Description of document: Memorandum of Understanding (MOU) between the Central Intelligence Agency (CIA) and the National Archives and Records Administration (NARA) concerning the transfer of CIA records to NARA, 2008

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Title of document: Memorandum of Understanding between the Central Intelligence Agency and the National Archives and Records Administration

Source of document: FOIA Officer
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August 6, 2012

Re: Freedom of Information Act Request NGC12-190

This is in response to your Freedom of Information Act (FOIA) request of July 21, 2012, for the current Memorandum of Understanding (MOU) between the Central Intelligence Agency and the National Archives and Records Administration concerning the transfer of CIA records to NARA. It was received in this office on June 30, 2012, and assigned tracking number NGC12-190.

I am providing you a copy of the MOU signed in 2008 by the Archivist of the United States and the Director of the CIA. It is released in full. I believe this fully satisfies your request.

You may appeal the processing of your FOIA request by writing to the Deputy Archivist (ND), National Archives and Records Administration, College Park, MD 20740 within 35 calendar days and explain why you think our response does not meet the standards of the FOIA. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please include the tracking number NGC12-190 in your appeal letter.

Sincerely,

JAY OLIN
NARA Deputy FOIA Officer
Office of General Counsel

Enclosures

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MEMORANDUM OF UNDERSTANDING BETWEEN
THE CENTRAL INTELLIGENCE AGENCY
AND THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

1. In accordance with Executive Order 12958, as amended, and 44 U.S.C. 2108, this memorandum of understanding (MOU) serves as a procedural agreement to memorialize the conditions which govern the treatment of Federal records of the Central Intelligence Agency (CIA) transferred to the legal custody of the National Archives and Records Administration (NARA). Further, this MOU establishes the procedures that NARA and the CIA will follow in reviewing for public disclosure Federal records of the CIA and of other agencies and organizations within NARA's legal custody that contain identifiable and classified CIA information and/or identifiable information protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the Freedom of Information Act (FOIA). This MOU also establishes the procedures that NARA and the CIA will follow in reviewing for public disclosure CIA Office of General Counsel records that are specifically marked and identified on a SF 258 as containing attorney-client and/or attorney work product privileged information. This MOU does not apply to Presidential records.

2. Section 3.2(c) of Executive Order 12958, as amended, provides, in pertinent part, that:

Classified records accessioned into [NARA] as of the effective date of this order shall be declassified or downgraded by the Archivist of the United States (Archivist) in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

3. Section 3.3(a) of Executive Order 12958, as amended, provides, in pertinent part, that:

Subject to paragraphs (b)-(e) of this section, on December 31, 2006, all classified records that (1) are more than 25 years old and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records

UNCLASSIFIED

UNCLASSIFIED

have been reviewed. Subsequently, all classified records shall be automatically declassified on December 31 of the year that is 25 years from the date of its original classification, except as provided in paragraphs (b)-(e) of this section.

4. Section 3.6 of Executive Order 12958, as amended, provides, in pertinent part, that:

In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this order, or pursuant to the automatic declassification or systematic review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors.

(b) When an agency receives any request for documents in its custody that contain information that was originally classified by another agency, or comes across such documents in the process of the automatic declassification or systematic review provisions of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order or its predecessors. In cases in which the originating agency determines in writing that a response under paragraph (a), of this section, is required, the referring agency shall respond to the requester in accordance with that paragraph.

5. Section 2108 of title 44 of the U.S. Code provides, in pertinent part, that:

(a) The Archivist shall be responsible for the custody, use, and withdrawal of records transferred to him. When records, the use of which is subject to statutory limitations and restrictions, are so transferred, permissive and restrictive statutory provisions with respect to the examination and use of records

UNCLASSIFIED

applicable to the head of the agency from which the records were transferred or to employees of that agency are applicable to the Archivist and to the employees of the National Archives and Records Administration, respectively.

. . . Statutory and other restrictions referred to in this subsection shall remain in force until the records have been in existence for thirty years unless the Archivist by order, having consulted with the head of the transferring Federal agency or his successor in function, determines, with respect to specific bodies of records, that for reasons consistent with standards established in relevant statutory law, such restrictions shall remain in force for a longer period.

6. (a) The CIA and NARA hereby agree that this MOU reflects the determination of the Archivist of the United States, pursuant to 44 U.S.C 2108, that:

(1) NARA shall abide by all statutory limitations and restrictions applicable to the protection of records containing classified CIA information or information protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the FOIA until the CIA has determined that such limitations and restrictions are no longer necessary or, with respect to CIA classified information, such information is properly declassified after:

(a) CIA review (regardless of whether the information is found in CIA records or the records of other agencies or organizations, or whether the information is older than thirty years); or

(b) Referral to CIA in accordance with section 3.3(h) of Executive Order 12958, as amended, when such information is being processed by NARA for automatic declassification under section 3.3 of the Order; and

(2) In addition to any classification review conducted by CIA, NARA shall review all CIA information identified in paragraph 6(b)(5) of this MOU in accordance with the procedures of that paragraph regardless of whether the information is older than thirty years.

(b) It is also agreed that when NARA locates information that (i) NARA determines is responsive to a request from anyone

UNCLASSIFIED

pursuant to the Freedom of Information Act, the Privacy Act (to the extent it applies to NARA), the Mandatory Declassification Review provisions of Executive Order 12958, as amended, or in connection with any judicial or administrative proceeding, or a request from any federal, state, local, tribal, or foreign government entity; and (ii) is contained in a CIA document in the custody of NARA, or is identifiable CIA information contained in a document of another agency or organization that is in the custody of NARA (other than a first party request from the originating agency); and (iii) consists of information CIA has not previously reviewed and approved for release in whole or in part, NARA, prior to responding to the request, shall:

(1) Refer copies of the request and the pertinent records to the CIA through established channels to determine whether the records contain currently classified information (and have not already been subject to automatic declassification) or contain information currently protected by CIA statutes that would also constitute withholding statutes under section (b) (3) of the FOIA and therefore cannot be released. If a CIA-originated record requested under the Freedom of Information Act or the Mandatory Declassification Review (MDR) provisions of Executive Order 12958, as amended, has been previously released by CIA and is available on the CREST System, NARA may offer to provide requesters with the CREST version in lieu of processing the record under the FOIA or under the MDR provisions of the Executive Order, and referring the record to CIA;

(2) After consultation with the CIA, inform any requester of the referral to CIA, unless such association is itself classified under Executive Order 12958, as amended. In cases where referral to CIA cannot be acknowledged and the CIA determines in writing that the existence or nonexistence of responsive records is classified, NARA shall, without identifying the CIA, inform the requester that NARA will neither confirm nor deny the existence or nonexistence of responsive information. In cases where referral to CIA cannot be acknowledged, but CIA determines that the existence or nonexistence of responsive records is not classified, NARA shall, without identifying the CIA, provide the requester with CIA's review and release determinations;

(3) Not release to the public any information from classified CIA records and records protected by CIA statutes that would also constitute withholding statutes under section (b) (3) of the FOIA, or records of other agencies or

UNCLASSIFIED

organizations containing identifiable classified CIA information or CIA information protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the FOIA, without the written approval of the CIA (subject to section 3.3(h) of Executive Order 12958, as amended, with respect to information being processed by NARA for automatic declassification under section 3.3 of the Order), unless the CIA has provided NARA with an express written authorization (executed subsequent to the effective date of this MOU¹) to release specific categories of records after any specific items of classified CIA information, or CIA information protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the FOIA, identified by CIA in its written authorization have been redacted as directed by CIA;

(4) Provide to the CIA, at the time of each substantive update or at CIA's request, a copy of its procedures for the protection of classified CIA information and CIA information protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the FOIA; and

(5) Consult with the CIA with respect to retired records from the CIA Office of General Counsel that are specifically marked and identified on a SF 258 as containing attorney-client and/or attorney work product privileged information that the CIA believes warrants continued protection under 28 U.S.C. 2072 and also, in response to any FOIA request, under section (b)(5) of the FOIA, after such records are transferred to NARA.

7. In conjunction with NARA's efforts, it is agreed that the CIA shall:

(a) Review the copies of the document request as well as the pertinent records referred to CIA by NARA;

(b) Inform NARA of the results of the CIA's review of the information and the CIA's decision regarding whether the requested CIA information shall be withheld or released, in whole or in part;

(c) Provide a written response to NARA in those cases

¹ Any written authorizations that CIA has provided to NARA on specific FOIA or MDR cases that remain in NARA's processing queue shall continue in effect after the execution of the MOU.

UNCLASSIFIED

where the CIA has determined that the existence or nonexistence of responsive information is classified;

(d) Clearly identify any records that have been reviewed and exempted or excluded, in whole or in part, from automatic declassification, that are subsequently transferred by CIA to NARA (noting the exemption code, and any future declassification re-review date²). For records released by CIA in whole or in part on the CREST system, shelf lists shall be prepared by CIA to enable researchers to obtain such records by accessing the CREST system. If any files series (or portion of any file series) that has been exempted from automatic declassification review is subsequently transferred by CIA to NARA, CIA shall provide NARA with a copy of the relevant exemption notification sent by CIA to the President, as well as the date by which the records contained in the transferred exempt file series (or exempt files series portion) will be declassified unless they have been appropriately reviewed and exempted before that date;

(e) Clearly identify, whenever records transferred to NARA by CIA have been approved for release by CIA, any records containing other agency equities, and the agencies to which NARA should make any additional referrals; and

(f) Comply with all applicable NARA procedural regulations and policies regarding the handling of archival materials.

8. It is further agreed that CIA shall periodically, review the exemptions in force under subsection (a) of section 701 of the National Security Act of 1947 to determine whether such exemptions may be removed from any category, or any portion thereof, of any exempted files that have been transferred to NARA. Such reviews may be conducted as part of the CIA's decennial review process required by section 701.

9. It is also agreed that the procedures contained in this MOU shall apply to any classified CIA records and CIA records protected by CIA statutes that would also constitute withholding statutes under section (b)(3) of the FOIA, or records of other agencies or organizations containing identifiable classified CIA information or information protected by CIA statutes that would

² Records containing information the release of which could be expected to reveal the identity of confidential human sources or human intelligence sources will not reflect a specific date or event for declassification in accordance with sections 3.3(c)(3) and (d)(3) of Executive Order 12958, as amended.

UNCLASSIFIED

also constitute withholding statutes under section (b) (3) of the FOIA, that have been transferred to NARA when they undergo automatic declassification review under section 3.3 of Executive Order 12958, as amended, or systematic declassification review under section 3.4 of Executive Order 12958, as amended. The procedures for the review of the records identified under paragraph 6(b) (5) of this MOU shall also apply when such records undergo automatic or systematic declassification review.

10. Finally, the CIA and NARA agree that classified records of the Office of Strategic Services (OSS), the Strategic Services Unit (SSU), and the Central Intelligence Group (CIG) that are transferred to NARA, shall be treated by NARA in the same manner as CIA records identified under this MOU.

11. The procedures set forth in this MOU will become effective upon the execution of this MOU by both NARA and the CIA. This MOU does not address or govern the periodicity of records transfers to NARA by CIA. This MOU does not supersede Executive Order 12958, as amended, or Information Security Oversight Office implementing directives set forth in title 32 of the Code of Federal Regulations. If any provisions of this MOU become expressly prohibited by any Executive order or statute subsequent to the effective date of this MOU, all other provisions of this MOU will continue in full force and effect. In such a case, NARA and CIA shall confer as soon as possible regarding the adoption of alternate provisions to replace the invalidated provisions.

Allen Weinstein
Archivist of the United States

4/7/08
Date

Michael V. Hayden
Director, Central Intelligence Agency

18 Mar '08
Date