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MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Presidential control over documents sent to or from White House but kept in agency or department files

You have requested the views of this Office with respect to the President's power to control access to documents sent to or from the White House, copies of which are currently kept in the files of a Federal agency or department. In particular, your question involves documents whose originals may be found in the White House but copies of which have been filed with the agency to or from which the documents were sent. For the reasons stated below, we believe that a President has no statutory or constitutional power to control access to or dissemination of documents that are required by law to be retained in the files of federal agencies.

A comparatively recent statement by the Attorney General on the subject of presidential control over papers generated in the White House contains an extensive discussion of the governing law prior to the passage of the Presidential Records Act of 1978, Pub. L. No. 95-951, 92 Stat. 2523, 44 U.S.C. §§ 2201-2207. (That Act is not applicable in this context because it is not effective until January 20, 1981. *See* Pub. L. No. 95-591, § 3.) In 43 Op. A.G. 1 (1974), Attorney General Saxbe concluded that "papers and other historical materials retained by the White House" were, by virtue of an established historical practice acknowledged by all three Branches of government, the personal property of the President. According to the Attorney General, every President has reached this conclusion with respect to "all the papers and historical materials which accumulated in the White House during his administration." *Id.* at 2. Such documents would "not become the property or a record of the government unless [they] go[ ] on to the official files of the department to which [they] may be addressed." *Id.*, quoting Taft, The Presidency 30-31 (1916).

This conclusion was buttressed by similar views expressed on various occasions by Congress, see, e.g., Pub. L. No. 90-260, 82 Stat. 1288 (Administrator of General Services may accept for deposit all papers of President or former President); 101 Cong. Rec. 9935 (1955) (remarks of Rep. Moss) ("Presidential papers belong to the President"); H.R. Rep. No. 966, 93d Cong., 2d Sess. 28-29 (1974). Indeed, the same position was articulated in the House Report accompanying the Presidential Records Act of 1978. See H.R. Rep. No. 1487, 95th Cong., 2d Sess. 2, 5-7 (1978). Although the Supreme Court has not addressed the matter, see Nixon v. Administrator of General Services, 433 U.S. 425, 445 n.8 (1977), Mr. Justice Story, acting as Circuit Judge, concluded over one hundred years ago that President Washington's official correspondence was his private property. See Folsom v. Marsh, 9 F. Cas. 324 (No. 4901), 2 Story, 100, 198-109 (C.C.D. Mass. 1841).

No comparable historical practice supports the proposition that the President is authorized to control access to documents which are not in the custody or control of the White House. Attorney General Saxbe's conclusion was expressly restricted to materials "retained by the White House." President Taft's views, which the Attorney General quoted with approval, plainly suggested that the President's correspondence becomes "the property or a record of the government" when "it goes on to the official files of the department to which it may be addressed." To our knowledge, no judge or member of Congress—has expressed the view that the President has rights of ownership in documents not in the custody or control of the White House. We do not believe this conclusion is altered by the fact that either the original or a copy of the document remains in the custody of the President. To be sure, that original or copy is subject to the President's control. But no statute or historical practice suggests that documents that are kept in another agency's official files are nonetheless within presidential control.

This conclusion is compelled by the provisions of the Records Disposal Act, 44 U.S.C. 3301 et seq. That Act places careful controls on the removal or disposal of agency records. The term "records" is defined as including

> [A]ll books, papers . . . or other documentary materials . . . made or received by an agency of the United States Government under Federal law or in connection with the transac-

tion of public business and preserved or appropriate for preservation by that agency or by its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value or data in them.

44 U.S.C. § 3301. Documents sent to or from the President and retained in agency files are undoubtedly "records" within the meaning of this provision. Such documents may not be disposed of except in accordance with the provisions of the Records Disposal Act. In the absence of an express or implied statutory exclusion or an applicable constitutional provision, we do not believe that it would be proper to infer an exemption for documents sent to or from the White House. We therefore conclude that access to such documents may not be controlled or restricted by the President. */

Sincerely,

Larry L. Simms
Acting Asssistant Attorney General
Office of Legal Counsel

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*/ For the same reasons, we do not believe that a member of the Cabinet is permitted to assure the President that he will restrict access to documents sent to or from the White House but retained in agency files. Under the federal records statutes, a Cabinet member has no general authority to remove documents filed in the agency or department which he leads. If the relevant agency's regulations so provide, however, he may be permitted to remove documents found by the agency to be not "appropriate for preservation," such as working drafts or papers whose substance is adequately reflected in other documents filed with the agency. See Brief for the Federal Parties, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980). With respect to documents not "appropriate for preservation," the President may enter into a contractual relationship with Cabinet officials without offense to the federal records statutes. The enforceability of any such agreement would depend on general principles of contract law.

NEPA, which would otherwise limit FERC action, have already been removed from our consideration. In order to accept jurisdiction and step in to overturn this action of the Commission, we would have to ignore the ANGTA in precisely the type of situation where it most compellingly applies. This would produce exactly the result that Congress tried to prevent.

For instance, to require a separate EIS for the pipeline pressure issue would delay eventual construction by months and perhaps years. The interrelationship between issues, which is the foundation of complainants' argument, could make the delay even longer. Decisions on various design features of the pipeline must be made sequentially; *e. g.*, final design of the pipeline must await approval of operating pressure, and financing arrangements are influenced by design specifics and their cost. Thus a delay in deciding on pipeline pressure can have ripple effects that upset planning certainty for financing purposes.[29]

Such concerns underlie the Commission's decision to proceed with separate issues and Congress's decision to shield the decision-making process from judicial review when constitutionally permissible. Even with the ANGTA provision to expedite pipeline construction, it has already taken the Commission two years since the President's decision just to approve a pressure level for the pipeline. Final certificates and commencement of construction are still further in the future. In this light, if there is any shortcoming in the Commission proceedings, it is certainly not in a lack of deliberation or in denial of time and opportunity for interested parties to express their views.

Of course the questions before us in this case are quite narrow. But these broader considerations of congressional intent to expedite do drive home the importance of taking ANGTA's judicial review provisions seriously. We may not strain for a statutory interpretation that will circumvent congressional intent by allowing delay to result from a complaint that goes only to the reasonableness and record support of FERC decisions. In this case complainants have not pointed to any Commission action or omission of the type Congress intended us to review. The complaint is therefore

Dismissed.

Tom W. RYAN, Jr., Missouri Public Interest Research Group, Appellants,

v.

DEPARTMENT OF JUSTICE.

Charles R. HALPERN, Judicial Selection Project, Dorothy J. Samuels, Committee for Public Justice, Appellants,

v.

DEPARTMENT OF JUSTICE.

Nos. 79-1777, 79-1778.

United States Court of Appeals, District of Columbia Circuit.

Argued 22 Oct. 1979.

Decided 7 Jan. 1980.

As Amended on Denial of Rehearing Feb. 25, 1980.

Suit was instituted to obtain disclosure of documents under the Freedom of Information Act. The United States District Court for the District of Columbia, Parker, J., 474 F.Supp. 735, entered order granting summary judgment to defendant, and plaintiffs appealed. The Court of Appeals, Wilkey, Circuit Judge, held that: (1) documents in form of responses made by various senators to a questionnaire sent by the At-

29. An increase in the approved pressure level can cause even greater delay. The Canadian National Energy Board rejected pressure levels above 1260 psig partly because the engineering studies and burst testing necessary to ensure the reliability of such new technology could delay the project by up to two years. *See* Joint Appendix at 87.

torney General inquiring about procedures employed by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were "agency records" for purposes of the Freedom of Information Act where, aside from fact that documents were within exclusive control of the Attorney General, there was no basis for distinguishing between the Attorney General and the Department of Justice in such a way that the former was not an "agency" because he functioned in a purely advisory capacity to the President, and (2) documents were exempt from disclosure under Act as "inter-agency or intra-agency memorandums or letters" except for factual segments which did not reveal deliberative process and were not intertwined with policy-making process.

Vacated and remanded.

1. Records ⚬=53

Standard for determining whether a document is an agency record, namely, whether under all facts of case document has passed from control of Congress and become property subject to free disposition of agency with which document resides, requires court to look at circumstances under which document was generated, whether it was generated by a nonagency, and how, and why, and to look at nonagency's intent in transferring document to agency. 5 U.S.C.A. § 552.

2. Records ⚬=54

Documents in form of responses made by various senators to a questionnaire sent by the Attorney General inquiring about procedures employed by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were "agency records" for purposes of the Freedom of Information Act where, aside from fact that documents were within exclusive control of the Attorney General, there was no basis for distinguishing between the Attorney General and the Department of Justice in such a way that the former was not an "agency" because he functioned in a purely advisory capacity to the President. 5 U.S.C.A. § 552.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⚬=617

Though Court of Appeals did not normally give consideration to issues that were neither raised nor decided below, where issue with respect to applicability of an exemption under the Freedom of Information Act was raised and briefed in summary judgment motions before the district court, there was no doubt as to proper resolution of case, and delay by extensive further proceedings in district court could render plaintiffs' efforts futile, it was fully appropriate for Court of Appeals to proceed to exemption issue. 5 U.S.C.A. § 552(b)(5).

4. Records ⚬=57

Exemption accorded in Freedom of Information Act to "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency was created to protect deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers without fear of publicity. 5 U.S.C.A. § 552(b)(5).

5. Records ⚬=55

A narrow interpretation must be given to an exemption in Freedom of Information Act. 5 U.S.C.A. § 552(b)(5).

6. Records ⚬=57

In enacting statute affording an exemption to "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency, Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather, to include any agency document that is part of deliberative process. 5 U.S.C.A. § 552(b)(5).

See publication Words and Phrases for other judicial constructions and definitions.

7. Records ⇐57

When an agency record is submitted by outside consultants as part of deliberative process, and it was solicited by agency, it is entirely reasonable to deem resulting document to be an "intra-agency" memorandum for purposes of determining applicability of statutory exemption. 5 U.S.C.A. § 552(b)(5).

8. Records ⇐57

Statute exempting "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency protects only those memoranda which would not normally be discoverable in civil litigation against an agency. 5 U.S.C.A. § 552(b)(5).

9. Records ⇐54

Standard of what is discoverable in civil litigation against any agency, as interpreted by the Supreme Court, indicates that purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed. 5 U.S.C.A. § 552(b)(5).

10. Records ⇐53

Factual segments are protected from disclosure as not being purely factual if manner of selecting or presenting those facts would reveal deliberate process or if facts are "inextricably intertwined" with policy-making process. 5 U.S.C.A. § 552(b)(5).

11. Records ⇐57

Provision for "inter-agency or intra-agency memorandums or letters" which would not be available by law to a party other than an agency in litigation with agency does not apply to final actions of agencies, in sense of statements of policy and final opinions which have force of law or which explain actions an agency has already taken, but applies only to communications before adoption of an agency policy; communications that promulgate or implement an established policy are not privileged. 5 U.S.C.A. § 552(b)(5).

12. Records ⇐54

That an individual senator may have taken final action by deciding which individuals he would recommend to the President for appointment to the new federal district court judgeships was not material to whether the documents in form of responses to a questionnaire from the Attorney General constituted the final opinion or action of an agency. 5 U.S.C.A. § 552(b)(5).

13. Records ⇐54

Finality could not justify disclosure of documents in form of responses made by various senators to a questionnaire from the Attorney General respecting procedures adopted by state nominating commissions for selecting and recommending persons to the President for appointment to federal district court judgeships. 5 U.S.C.A. § 552(b)(5).

14. Records ⇐57

Responses by various senators to a questionnaire from the Attorney General respecting procedures adopted by state nominating commissions for selecting and recommending persons to the President for appointment to new federal district court judgeships were exempt from disclosure under Freedom of Information Act as "inter-agency or intra-agency memorandums or letters" except for factual segments which did not reveal deliberative process and were not intertwined with policy-making process. 5 U.S.C.A. § 552(b)(6).

15. Federal Courts ⇐612

Government was precluded from raising issue whether questioned documents were exempt from disclosure as "personnel and medical files and similar files" where government failed to raise that issue in original proceeding before district court. 5 U.S.C.A. § 552(b)(6).

16. Records ⇐66

Once the district court orders the government to disclose all purely factual material in the questioned documents and to identify those advisory segments protected by the statutory exemption, it may then be necessary for the district court to inspect

documents in camera to decide if individual segments properly fall within the exemption. 5 U.S.C.A. § 552(b)(6).

Appeal from the United States District Court for the District of Columbia. (D.C. Civil Nos. 79-1042 & 79-1043)

Girardeau A. Spann, Washington, D. C., with whom Alan B. Morrison and David C. Vladeck, Washington, D. C., were on brief, for appellants.

Joseph B. Scott, Atty., Dept. of Justice, Washington, D. C., with whom Carl S. Rauh, U. S. Atty. and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on brief, for appellee.

Before McGOWAN and WILKEY, Circuit Judges, and GESELL *, United States District Judge for the District of Columbia.

Opinion for the Court filed by WILKEY, Circuit Judge.

WILKEY, Circuit Judge:

This case is an appeal from a district court order granting summary judgment to the Government in a Freedom of Information Act (FOIA) suit, on grounds that the requested documents were not "agency records" for FOIA purposes. We find on the basis of the undisputed facts that the documents are agency records; we therefore reverse with instructions to enter summary judgment for plaintiffs on this issue. We also consider the applicability of FOIA Exemption 5 to these documents, and remand for the district court to determine the extent to which that exemption bars disclosure.

I. FACTS

In order to guide the selection of new federal district court judges, President Carter issued "merit selection" guidelines in Executive Order 12097.[1] This Order charges the Attorney General with the duty to evaluate potential nominees, receive recommendations from others, evaluate selection processes, and recommend persons to the President for appointment. Included in this task is the obligation to consider whether an affirmative effort has been made to identify qualified candidates, including women and members of minority groups. In November 1978 the Attorney General sent to all Senators a questionnaire inquiring about their procedures for selecting and recommending potential nominees. By June 1979 the Attorney General had received more than fifty responses.

In early 1979 plaintiffs sought FOIA disclosure of questionnaire responses from the Department of Justice, as part of an effort to monitor federal judicial appointments and their inclusion of women, racial minorities, and "public interest" lawyers. The Department of Justice denied disclosure, claiming that the responses were not agency records within the scope of the FOIA and were exempt under FOIA Exemption 5 as pre-decisional advisory material.

Plaintiffs filed suit in United States District Court to compel disclosure. On 11 July 1979 the district court, ruling on cross-motions for summary judgment, granted judgment for the Government. The district court held the documents not to be agency records, and thus found it unnecessary to rule on the Exemption 5 issue, which had been briefed and argued. The court also conducted *in camera* inspection of five randomly selected questionnaire responses. Plaintiffs appealed to this court, and we have taken expedited action to resolve the case before the President's completion of the judicial selection process renders plaintiffs' action futile.

II. THE AGENCY RECORDS ISSUE

In several prior FOIA cases courts have been called upon to determine whether requested documents are "agency records." This issue commonly arises when the requested documents are in the possession of

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

1. 3 C.F.R. § 254 (1978).

an agency but were created by an entity not defined as an "agency" under the FOIA: Congress, federal courts, outside consultants not in corporations controlled by the government,[2] or the President's immediate personal staff and units in the Executive Office whose sole function is to advise and assist the President.[3] For such cases the FOIA does not specify a test for determining what is an agency record.[4]

A. *Standard as to What Is an Agency Record*

The straightforward question of who has physical possession of documents has not sufficed, in cases before this court, to define whether documents are agency records.[5] A simple possession standard would permit agencies to insulate their activities from FOIA disclosure by farming out operations to outside contractors. It would also create a severe problem whenever confidential congressional documents or materials from the President's immediate staff come into the possession of an agency, as may occur when Congress oversees and supervises an agency. A standard that automatically made such records subject to FOIA disclosure as soon as they are transferred to agency hands would seriously impair Congress's oversight role.[6]

[1] Recognizing these difficulties, this court has adopted a standard more consistent with the intent and general framework of the FOIA disclosure system. Our opinion in *Goland v. Central Intelligence Agency*[7] examined this issue in the context of a FOIA request for a congressional document that was in the hands of an agency. We adopted a standard of control rather than possession: "whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides."[8] Under the *Goland* standard, the court looks at the circumstances under which the document was generated—whether it was generated by a non-agency, and how, and why—and at the non-agency's intent in transferring the document to the agency. In *Goland*, Congress's actions generating the document during an executive session of a committee, marking the document "Secret," and transferring it to the CIA solely for internal reference purposes, showed that Congress intended to refrain effective control while the document was in agency hands.[9]

Goland follows the structure and intent of the FOIA by determining what entity controls the document and deciding whether that entity is within the category of "agency" defined by the Act. An earlier decision of this court pursued a similar approach, inquiring whether the generation of a document by consultants of the Office of Science and Technology brought it within control of that Office so as to make it a "record," and whether that Office was an "agency" or rather a part of the President's staff.[10] In a more recent case we have again examined whether an agency controlled the documents of an outside entity, in the sense of being involved in the "core planning or execution" of a program, such

2. *See* 5 U.S.C. § 552(e) (1976).

3. *See* S.Rep.No.1200, 93d Cong., 2d Sess. 15 (1974), U.S.Code Cong. & Admin.News 1974, p. 6267.

4. 44 U.S.C. § 3301 is the only statutory definition of "record," and it is not applicable to the FOIA. *See Goland v. Central Intelligence Agency*, 607 F.2d 339, 345 n.30 (D.C. Cir. 1978).

5. The Ninth Circuit has also rejected the possession standard. *See Warth v. Department of Justice*, 595 F.2d 521, 522–23 & n.7 (9th Cir. 1979).

6. *See Goland v. Central Intelligence Agency*, 607 F.2d at 346.

7. 607 F.2d 339 (D.C. Cir. 1978).

8. *Id.* at 346–47. *See also Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968).

9. *See Goland v. Central Intelligence Agency*, 607 F.2d at 347.

10. *See Soucie v. David*, 145 U.S.App.D.C. 144, 150–53, 448 F.2d 1067, 1073–1076 (D.C. Cir. 1971).

as to make the documents agency records within the FOIA.[11]

B. *Control of the Records in this Case*

In the present case, although the requested documents were in the possession of the Department of Justice, the district court concluded that the history and purpose of their generation showed them not to be agency records under the FOIA. The court found that the documents did not belong to and were not within the control of either the Attorney General who possessed them, the Senators who participated in their generation, the state nominating commissions about which they reported, or the President for whose ultimate benefit they were created. Rather, the court found, the documents were the "collective product and property" of all of these entities, none of which were agencies for FOIA purposes. The court concluded that the Attorney General was not an "agency" in this case because he was acting as "counsel and advisor to the President," in furtherance of the President's power to nominate federal judges.[12]

[2] We find, on the contrary, that the requested documents are in the control of the Attorney General and the Department of Justice which he heads. The Department possesses the documents; and while this factor is not conclusive on the crucial issue of control, it is certainly relevant. Unless there is evidence of control by some other entity, we must conclude that the Attorney General and his Department control these documents. We find no such evidence. Senators generated these materials at the specific request of the Attorney General, and they gave no indication that they wished to limit his use of them. There are no express or reasonably implied senatorial instructions concerning the Attorney General's disposition of these documents. The Senators gave no indication that their responses were to be treated as secret or sensitive, and nothing in the Attorney General's questionnaire or other circumstances indicated that Senators would have the prerogative to maintain secrecy. On this record we cannot find control by the Senators. Nor have the nominating commissions exercised any degree of control over the documents.

Although the documents are for the ultimate benefit of the President in a nominating role that is exclusively his, we find that the Attorney General was acting as an independently controlling entity, and not a mere conduit. The questionnaires solicited responses from Senators at the request of the Attorney General, not the President. In his cover letter enclosed with the questionnaires, the Attorney General stated the independent role he was to play in this process: he was to consider certain factors before making his own recommendations to the President as to judicial nominees. This is an independent exercise of judgment that the Attorney General has traditionally taken in the judicial nomination process. The logical deduction from the facts is that the Attorney General was to control the questionnaire responses for the purpose of carrying out his independent duties. We have no evidence before us that the President in any way diminished the Attorney General's control over these documents; there is no indication that they will ever be transmitted to or seen by the President or his staff. By all indicia of ownership, the documents are within the exclusive control of the Attorney General.

C. *The Attorney General as Advisor and as Administrator*

We must next consider whether there is any basis in the FOIA for distinguishing between the Attorney General and the Department of Justice, in such a way that the former is not an "agency" where he func-

11. *See Forsham v. Califano,* 190 U.S.App.D.C. 231, 239, 587 F.2d 1128, 1136 n.19 (D.C. Cir. 1978), *cert. granted,* 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979). *See also Washington Research Project, Inc. v. Department of HEW,* 164 U.S.App.D.C. 169, 176–78, 504 F.2d 238, 245–48 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975).

12. *See Ryan v. Department of Justice,* 474 F.Supp. 735, 738–39 (D.D.C.1979).

tions in a purely advisory capacity to the President. Our analysis must start from the FOIA's definition of agency, which includes "any executive department." [13] There is no basis in this definition or its legislative history to view the Attorney General as distinct from his department for FOIA purposes. On the contrary, it is only reasonable to consider him as much a part of the Department of Justice as any other official or employee in that Department.

Since the creation of the Department of Justice in 1870 the Attorney General has always had two roles: advisor to the President and administrator of the Department of Justice. The same dual role would be true, to a greater or lesser extent, of all other Cabinet officers. Whether these documents are agency records raises the question: can any meaningful distinction be made between documents generated and kept in the Department on the basis of the two different roles? And, if so, would the same distinction not apply in all Executive Departments?

The Government argues that the questionnaire responses are not agency records because they do not fall out of the sphere of the appointment process into Department of Justice business.[14] The problem with this argument is that the appointment of federal judges has always been a *regular* business of the Attorney General and his Department. This responsibility was shifted in 1978 to the office of the Associate Attorney General.[15] Shortly before we heard this case on appeal, it was shifted once again, so that responsibility now falls directly on the Attorney General.[16] Whatever the formal channels of responsibility, the task of receiving, processing, and clearing names of judicial nominees has long been a routine function of the Department of Justice.[17] Whether the official responsibility falls directly on the Attorney General, or rather on one of his subordinates, makes no difference to the fact that this function is regular business of the agency.

Judicial nominations are by no means unique as an instance where normal agency functions involve some element of giving advice to the President. The entire Office of Legal Counsel, under an Assistant Attorney General, exists to assist the Attorney General in advising the President and Cabinet officers on major legal questions. Thus a substantial number of people, integral parts of the Department of Justice, are there to assist the Attorney General in performing his duty as advisor to the President on a variety of matters. If we broke out all documents connected with these functions as not being "agency records" under the FOIA, we would have a substantial percentage of Department of Justice records that were somehow transformed into the Attorney General's personal records as advisor to the President. This does not appear as either a realistic or intended distinction under the Freedom of Information Act.

This conclusion is underscored if we examine the likely results if the Government's theory, adopted by the trial court, were applied to other Executive Departments. For example, in the Department of State a huge portion of the Secretary's functions

13. 5 U.S.C. § 552(e) (1976).

14. Brief for Appellee at 12–19.

15. *See* Dept. of Justice Order No. 790–78, 43 Fed.Reg. 26,001, 26,002 (1978).

16. *See* Dept. of Justice Order No. 858–79, 44 Fed.Reg. 58,908 (1979).

17. As a matter of law we are not called upon to decide whether non-routine documents are outside the scope of the FOIA. But we note that our opinion in *Soucie v. David* did not purport to place any sharp limitation on the category of "records" when it defined them as materials made in the performance of the ordinary functions of an agency. *See* 145 U.S.App.D.C. at 153, 448 F.2d at 1076. *Cf. Forsham v. Califano*, 190 U.S.App.D.C. 231, 239, 587 F.2d 1128, 1136 (D.C. Cir. 1978) (FOIA applies only to record created or obtained by agency "in the course of doing its work"), *cert. granted*, 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979). While there may be exceptional circumstances that render documents in an agency's possession not "records," this case presents no such situation. *Cf. SDC Dev. Corp. v. Mathews*, 542 F.2d 1116 (9th Cir. 1976) (agency reference library of medical writings stored in computer bank, and available to public only under a set fee system, deemed not to be agency records).

could be described as advising the President on the conduct of foreign relations, his selection of ambassadors, and utilization of those ambassadors abroad. We could hardly say all the documents in the Department of State relating to the Secretary advising the President were not "agency records," although a substantial percentage of these agency records might well be protected from disclosure by one of the FOIA exemptions.

Turning to another argument of the Government to classify the Attorney General as a non-agency in this case, the appellee points to the rule that "agency" does not include the President's immediate personal staff or Executive Office units whose sole function is to advise the President. This rule was set forth in our opinion in *Soucie v. David*,[18] and endorsed by the Conference Committee Report on the 1974 FOIA Amendments.[19] As expounded in these two sources, however, the rule applies only to the initial decision of whether a unit falls within the category of "agency" for FOIA purposes. Neither *Soucie v. David*, nor the Committee Report implies that once a unit has been found to be an agency, one of its component parts can nevertheless be treated as a non-agency when engaged in presidential advisory functions.

Soucie found that the Office of Science and Technology was an agency, because the Office had functions in addition to advising the President.[20] But the opinion did not intimate that the Office might be an agency only when performing its non-advisory functions, and still be a presidential staff component, or non-agency, when performing its other function of advising the President. In fact, the reports under consideration in *Soucie* were requested by the President precisely for advisory purposes, but we did not deem the Office to be a non-agency in that specific context.[21]

The logical conclusion from the FOIA language and from *Soucie* is that, depending on its general nature and functions, a particular unit is either an agency or it is not. Once a unit is found to be an agency, this determination will not vary according to its specific function in each individual case. There is an obvious exception where private entities and their documents are controlled by agencies in limited circumstances; there the private entity certainly does not become a government agency irrevocably for all its activities.[22] But we can see no basis for excepting the Attorney General and the Department of Justice; we find they are an agency without respect to their particular functions in individual cases.

The Government argues that nomination of judges is a purely presidential function; that had the President himself solicited this information from Senators, their responses to him would be exempt from the FOIA; and that the President's choice to draw the Attorney General into this presidential activity should not make the responses disclosable. Such an approach, defining "agency records" by the purpose for which they exist, would cut back severely on the FOIA's reach as interpreted by courts since its inception. Documents of the Central Intelligence Agency and the National Security Agency are compiled precisely for the function of advising the President in the solely presidential role of Commander-in-Chief. Yet in many FOIA encounters with NSA and CIA, we have never held or seriously considered that they might not be "agencies" when acting in this capacity.

As we indicated above, other departments —State, Defense—come quickly to mind as

18. 145 U.S.App.D.C. 144, 150–53, 448 F.2d 1067, 1073–76 (D.C. Cir. 1971).

19. *See* S.Rep.No.1200, 93d Cong., 2d Sess. 15 (1974). Failure to exempt presidential staff from the FOIA would raise a constitutional issue of separation of powers. *See Soucie v. David*, 145 U.S.App.D.C. at 157–58, 448 F.2d at 1080–81 (Wilkey, J., concurring).

20. *See* 145 U.S.App.D.C. at 150–53, 448 F.2d at 1073–76.

21. *See id.*, 145 U.S.App.D.C. at 152–155, 448 F.2d at 1075–76.

22. *See Forsham v. Califano*, 190 U.S.App.D.C. 231, 236–41, 587 F.2d 1128, 1133–38 (D.C. Cir. 1978), *cert. granted*, 441 U.S. 942, 99 S.Ct. 2159, 60 L.Ed.2d 1044 (1979).

examples where the Government's argument proves far too much. Many cabinet officers, like the Attorney General, or the Office of Legal Counsel under him, act as advisors to the President for many of their important functions; yet they are not members of the presidential staff or exclusively presidential advisors, and are thus not exempt from FOIA requirements. The Government cites a district court case which held the Pardon Attorney of the Justice Department not to be an agency for FOIA purposes, because his sole function is to advise and assist the President.[23] Whatever the merits of this reasoning—yet to be determined in this court—we face an easier question in this case because the Attorney General has functions in addition to advising the President. Any unit or official that is part of an agency and has non-advisory functions cannot be considered a non-agency in selected contexts on a case-by-case basis.

It is certainly true, as the Government contends, that had the President's staff itself solicited these responses from Senators, the documents would not be agency records. In many different areas the President has a choice between using his staff to perform a function and using an agency to perform it. While not always substantively significant, these choices are often unavoidably significant for FOIA purposes, because the Act defines agencies as subject to disclosure and presidential staff as exempt. To redraw this statutory line in a different manner, based on complex functional considerations, would strain the language of the Act and present much greater complexity in litigation.

III. THE APPLICABILITY OF FOIA EXEMPTION 5

[3] We proceed now to consider whether the requested documents fall within Exemption 5 of the FOIA. The district court did not decide this issue, since it considered the agency records issue a sufficient basis on which to dispose of the case. An appellate court normally does not give consideration to issues that were neither raised nor decided below;[24] in this case, however, the Exemption 5 issue was raised and briefed in summary judgment motions before the district court. On those portions of the Exemption 5 issue that we decide today, we do not believe there is any doubt as to the proper resolution of the case, and the delay of extensive further proceedings in district court could render appellants' efforts futile. Thus it is fully appropriate for us to proceed to the Exemption 5 issue.[25]

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[26] Appellants argue that since the documents at issue here were submitted to the Department of Justice by Senators, who are not agencies within the meaning of the FOIA, the documents cannot be termed "inter-agency" or "intra-agency."

[4] When interpreted in light of its purpose, however, the language of Exemption 5 clearly embraces this situation. The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity.[27] In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit

23. *See Stassi v. Department of Justice*, No. 78-532 (D.D.C.1979).

24. *See Hormel v. Helvering*, 312 U.S. 552, 556-57, 61 S.Ct. 719, 85 L.Ed.2d 1037 (1941).

25. *See Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976).

26. 5 U.S.C. § 552(b)(5) (1976).

27. *See* H.R.Rep.No.1497, 89th Cong., 2d Sess. 10 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 9 (1965), U.S.Code Cong. & Admin.News 1966, p. 2418.

frank discussion of policy matters and likely impair the quality of decisions.

[5–7] We start from the proposition that FOIA exemptions are to be interpreted narrowly. The Senate Committee attempted to keep Exemption 5 as narrow as was "consistent with efficient Government operation."[28] Unquestionably, efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects. Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, but rather to include any agency document that is part of the deliberative process. We cannot overlook the fact that the documents here were generated by an initiative from the Department of Justice, *i. e.*, the questionnaire sent out by the Department to the Senators. The Senators replied to the questionnaire. The questionnaire plus replies must correspond in origin and process to literally *millions* of documents and memoranda of various kinds on a myriad of subjects which repose in the files of the executive departments and independent agencies, *i. e.*, memoranda which were created by someone outside the executive branch but in response to an initiative from the executive branch.[29] When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an "intra-agency" memorandum for purposes of determining the applicability of Exemption 5. This common sense interpretation of "intra-agency" to accommodate the realities of the typical agency deliberative process has been consistently followed by the courts.[30]

[8–10] Exemption 5 protects only those memoranda which would not normally be discoverable in civil litigation against an agency.[31] The standard of what is discoverable in civil litigation against an agency, as interpreted by the Supreme Court, indicates that purely factual material which is severable from the policy advice contained in a document, and which would not compromise the confidential remainder of the document, must be disclosed in an FOIA suit.[32] This court has further elaborated the standard for determining which segments of an advisory document are disclosable under Exemption 5. We have held that factual segments are protected from disclosure as not being purely factual if the manner of selecting or presenting those facts would reveal the deliberate process,[33] or if the facts are "inextricably intertwined" with the policy-making process.[34] The Supreme Court has substantially endorsed this standard.[35]

[11–13] As an additional ground, appellants argue that advisory material in the questionnaires should be disclosed if it represents a final decision rather than interim advice. Exemption 5 does not apply to final actions of agencies, in the sense of

28. S.Rep.No.813, 89th Cong., 1st Sess. 9 (1965).

29. For example, the Department of Agriculture must have bales of information in response to questionnaires.

30. *See Brockway v. Department of Air Force*, 518 F.2d 1184, 1191 (8th Cir. 1975) (statements of witnesses in a military aircraft safety investigation are within Exemption 5); *Wu v. National Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972) (statements of professors who were not agency employees deemed to be intra-agency memoranda), *cert. denied*, 410 U.S. 926, 93 S.Ct. 1352, 35 L.Ed.2d 586 (1973); *Soucie v. David*, 145 U.S.App.D.C. 144, 155, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971) (materials prepared for an agency by outside experts should be treated as intra-agency memoranda).

31. 5 U.S.C. § 552(b)(5) (1976).

32. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 91, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

33. *See Montrose Chem. Corp. v. Train*, 160 U.S.App.D.C. 270, 275, 491 F.2d 63, 68 (D.C. Cir. 1974).

34. *See Soucie v. David*, 145 U.S.App.D.C. at 155, 448 F.2d at 1078.

35. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 92, 93 S.Ct. 827, 838, 35 L.Ed.2d 119 (1973).

statements of policy and final opinions which have the force of law or which explain actions an agency has already taken.[36] Further, Exemption 5 applies only to communications before the adoption of an agency policy; communications that promulgate or implement an established policy are not privileged.[37] In the present case, however, the communications all precede the adoption of any agency policy—*i. e.*, the Attorney General's evaluation of selection processes and transmittal of his own recommendations to the President—and also precede the final action on nominations that can only be taken by the President with consent of the Senate. That an individual Senator may have taken final action by deciding which potential nominees he will recommend, as urged by appellants, is not material to whether the documents constitute a final opinion or action of an *agency*. Hence finality cannot justify disclosure of the questionnaire answers in this case.

[14] We conclude that the requested documents are exempt from FOIA disclosure under Exemption 5, except for factual segments which do not reveal the deliberative process and are not intertwined with the policy-making process. On remand the district court will determine which segments are disclosable under this standard. Because expedition is necessary in this case, we comment on those aspects of disclosability that are clear on the record before us.

The questionnaires sent by the Attorney General to the Senators asked for the following information:

1. Describe the effort which was made to identify qualified candidates.

2. Describe the process by which all persons identified and interested were considered?

3. How many persons were considered?

4. With respect to each person recommended, does he or she meet each of the standards set forth in Section 2 of the Executive Order?

5. With respect to each person recommended, submit a copy of any questionnaire or resume of biographical information furnished by that person.

6. If a nominating commission was used:

(a) how was the commission appointed?

(b) how many persons were on the commission?

(c) how many of the members were female?

(d) how many of the members were of a minority race?

(e) how many of the members were non-lawyers?

Some segments of Senators' responses to these questions will be factual, and disclosure of them will not reveal aspects of the deliberative process. Answers to questions 3 and 6 will clearly be of this nature. Expressions of personal views or recommendations of a Senator, on the other hand, are clearly exempt from disclosure. Other segments of responses may or may not be subject to disclosure, depending on circumstances to be evaluated on remand. Any biographical information of a routine, nonprivate nature, such as would commonly appear in *Who's Who* or similar reference works, is not inextricably intertwined with the protected deliberative process of making recommendations, and is thus subject to disclosure. Other more probing analysis of a candidate's background, on the other hand, might constitute a specific recommendation of the candidate on grounds of his qualifications and experience, and thus be exempt.

IV. EXEMPTION 6 ISSUE

[15] The Government claims on appeal that some portions of the Senators' responses to the Department questionnaire may be within FOIA Exemption 6, for "personnel

36. *See National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 153–54, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

37. *See Jordan v. United States Department of Justice*, 192 U.S.App.D.C. 144, 165, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc).

and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," [38] and that the Government should be allowed to raise this exemption upon remand to the district court. The Government did not raise Exemption 6, however, in the original proceedings before the district court.[38a] This court has held that an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings.[39] This the Government has failed to do. The danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding, is especially apparent in this case, where any delay through this means could easily render the appellants' claim futile. We therefore hold, in accordance with our en banc decision in *Jordan v. U. S. Department of Justice*, that the Government may not raise FOIA Exemption 6 upon remand to the district court.

As we have noted in *Jordan*, there is a possible exception to this disqualification, under 28 U.S.C. § 2106, in that the appellate court has discretion to remand the case and "'require such further proceedings to be had as may be just under the circumstances.'" [40] This could happen in the present case if sensitive, personal private information might be revealed. The Government may of course raise such a claim if warranted at the district court, but only if it can show extraordinary circumstances. On the present record, the need to claim such extraordinary circumstances is diminished by the likelihood that sensitive material bearing on a potential nominee will be intertwined with advice based on his qualifications and experience, and thus come within Exemption 5.

V. CONCLUSION

[16] Since we find the requested documents to be agency records, we must order disclosure of all segments not within specific FOIA exemptions. On remand, the district court will, according to accepted procedures, order the Government to disclose all purely factual material in the responses and to identify those advisory segments protected by Exemption 5.[41] It may then be necessary for the district court to inspect documents *in camera* to decide if individual segments do properly fall within Exemption 5. The judgment of the district court is vacated and the case remanded for further proceedings in accordance with this opinion.

So ordered.

38. 5 U.S.C. § 552(b) (1976).

38a. In its Petition for Rehearing, the Government points out that it did mention Exemption 6 in one sentence of a footnote to its Memorandum of Points and Authorities submitted to the district court. The purpose of this footnote was to inform the district court that the Government did not wish its assertion of Exemption 5 to be construed as waiving the possible applicability of remaining exemptions under section 552(b), for example Exemption 6. Our opinion in *Jordan v. United States Department of Justice*, however, requires that the agency raise the exemption by identifying it at the district court level *and by demonstrating that the exemption applies to the documents in question. See* 591 F.2d at 779. By simply stating that "for example" Exemption 6 might apply, the Government did not meet its burden of *demonstrating* that the exemption applies. The Government did not assert Exemption 6 as a defense in a manner in which the district court could rule on the issue. Thus the government did not "raise" Exemption 6 at the district court level in the manner required by *Jordan*.

39. *See Jordan v. United States Department of Justice*, 192 U.S.App.D.C. at 170, 591 F.2d at 779.

40. *Id.* 192 U.S.App.D.C. at 171, 591 F.2d at 780 (quoting 28 U.S.C. § 2106 (1976)).

41. *See Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

these factors as they appear in the case at bar, the court should have construed all ambiguous or disputed facts in the light most favorable to the defendants. Had this been done, the defendants' motion to vacate the entry of the default judgment would have been granted. We therefore reverse and remand for entry of an order setting aside the default judgment and for further proceedings not inconsistent with this decision.

Reversed and remanded.

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, Appellant,

v.

CENTRAL INTELLIGENCE AGENCY and Stansfield Turner.

Nos. 79-2143, 79-2202.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 9, 1980.

Decided Dec. 23, 1980.

As Amended April 2, 1981.

Appeals were taken from an order of the United States District Court for the District of Columbia, Gerhard A. Gesell, J., ruling that most of the material requested by church from Central Intelligence Agency under the Freedom of Information Act was exempt, but ordering disclosure of segments of certain documents. The Court of Appeals, Mikva, Circuit Judge, held that: (1) neither the Congress-created records transferred to the CIA nor the CIA-generated documents sent to Congress were congressional records immune from disclosure; (2) the CIA was entitled to withhold certain documents in carrying out its statutory duty to protect intelligence sources; (3) the district court properly determined that in camera review of certain documents was necessary; and (4) the court properly denied the CIA's motion for partial relief from judgment, which included an offer of an in camera affidavit.

Affirmed in part, reversed and remanded in part.

1. Records ⟹53

Congress can assert its exemption from Freedom of Information Act and can also reassert the exemption; however, exemption can be lost if there is a request for documents at a time when Congress has not designated the documents as falling within congressional control. 5 U.S.C.A. § 551(1)(A).

2. Records ⟹53

An entire document is not exempt from Freedom of Information Act merely because isolated portions of it may be protected from disclosure. 5 U.S.C.A. § 552.

3. Records ⟹54

Thirty-five documents generated by Congress and requested by church from Central Intelligence Agency under Freedom of Information Act were not excluded from disclosure as congressional records, in that even if they were once excluded as congressional records, they were no longer covered by that exemption since nothing either in circumstances of their creation or in conditions under which they were sent to the CIA indicated Congress' intent to retain control over the records or to preserve their secrecy. 5 U.S.C.A. § 551(1)(A).

4. Records ⟹54

Documents created by Central Intelligence Agency which were related to a congressional investigation were not exempt from disclosure under Freedom of Information Act as congressional records, in that even if they were once congressional documents since they were generated in response to congressional inquiry and transferred to Congress, they subsequently lost their exemption when Congress failed to retain control over them. 5 U.S.C.A. § 551(1)(A).

5. Records ⇐55

Central Intelligence Agency was entitled to withhold documents sought by church under Freedom of Information Act in carrying out its statutory duty to protect intelligence sources, in that information contained in documents was of type that Agency could not obtain without a guarantee of confidentiality. 5 U.S.C.A. § 552(b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3).

6. Federal Civil Procedure ⇐2539
Records ⇐65, 66

Affidavits submitted by an agency intended to show exemption of documents from Freedom of Information Act must show, with reasonable specificity, why the documents fall within the exemption; affidavits will not suffice if agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping; if affidavits provide specific information sufficient to place documents within the exemption category, if such information is not contradicted in the record, and if there is no evidence of agency bad faith, then summary judgment is appropriate without in camera review of the documents. 5 U.S.C.A. § 552(b).

7. Records ⇐66

Trial court did not abuse discretion in determining that in camera review of Central Intelligence Agency documents was necessary to determine Agency's claim that documents were exempt from disclosure under Freedom of Information Act for national security reasons where Agency's affidavits were of a general nature which made it impossible to undertake meaningful review of the CIA's claims in the area of national security. 5 U.S.C.A. § 552(a)(4)(B), (b)(1).

8. Records ⇐63

While a more complete indication of district court's rationale for its order that segments of a few Central Intelligence Agency documents be disclosed to church under Freedom of Information Act would have been helpful, such failure did not require reversal, in that Agency had custody over documents and knowledge of their contents, and Agency did not allege any prejudice to its efforts on appeal from failure of court to give a full explanation for its order of disclosure. 5 U.S.C.A. § 552.

9. Records ⇐67

District court did not abuse discretion in denying Central Intelligence Agency's motion for partial relief from judgment ordering it to disclose documents pursuant to Freedom of Information Act and refusing Agency's post-judgment offer of an in camera affidavit explaining in greater detail Agency's determination that the material was covered by exemptions. 5 U.S.C.A. § 552(b)(1, 3).

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 79–0151).

Dorothy Sellers, Washington, D. C., for appellant.

Freddi Lipstein, Atty., Civ. Div., Dept. of Justice, Washington, D. C., with whom Alice Daniel, Asst. Atty. Gen., Charles F. C. Ruff, U. S. Atty., and Leonard Schaitman, Atty., Civ. Div., Dept. of Justice, Washington, D. C., were on the brief, for appellee.

Stanley M. Brand, Gen. Counsel to the Clerk, United States House of Representatives, Washington, D. C., with whom Steven R. Ross, Asst. Counsel to the Clerk, Washington, D. C., was on the brief, for amicus curiae, Clerk of the United States House of Representatives.

Before BAZELON, Senior Circuit Judge, and MIKVA and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

In May of 1978, appellant (Unification Church) filed a request pursuant to the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552 (1976), for all Central Intelligence Agency (CIA or Agency) records relating to the Church or to its members. When the Agency failed to respond, appel-

lant filed this action for injunctive relief. Since then, the Agency has disclosed some documents in their entirety but, claiming a variety of exemptions, has withheld parts or all of others. On cross-motions for summary judgment, and after examining the documents *in camera*, the court below ruled that most of the unreleased material was exempt. The court did, however, order disclosure of at least segments of nine documents. Each party appeals from that portion of the district court's order adverse to it.[1]

The Church appeals the court's ruling that about fifty of the documents were not agency records because they were subject to congressional control and therefore were exempt under 5 U.S.C. § 551(1)(A) (1976). Of these documents, thirty-five were generated by Congress and sent to the CIA for reasons that are in dispute. The remaining fifteen originated in the Agency but were related to congressional investigations; some of these records were sent to Congress and were then returned to the CIA—again for reasons that are not entirely clear. We find that these fifty documents, even if once excluded from the FOIA as congressional records, are no longer covered by that exemption because Congress failed to express with sufficient clarity its intent to retain control over the documents. We therefore reverse the district court's holding with respect to these records and remand for consideration of other exemptions of the Act which the Agency claimed apply to these records and on which the court below had no occasion to rule.

The Church also disputes the district court's holding that the CIA could invoke FOIA exemption 3 and refuse to disclose ten documents in order to protect intelligence sources under 50 U.S.C. § 403(d)(3) (1976). Relying on this court's recent opinion in *Sims v. Central Intelligence Agency*, Nos. 79-2203 & 79-2554 (D.C.Cir. Sept. 29, 1980), we affirm the court's finding of exemption.[2]

On cross-appeal, the CIA challenges the court's order of disclosure with respect to six documents. The Agency alleges three errors: that the court did not give substantial weight to the Agency's affidavits; that the court failed to articulate reasons for its disclosure order; and that the court refused to accept the Agency's post-judgment offer of further evidence in the form of an *in camera* affidavit. We reject all arguments raised on the cross-appeal.

I. COMMUNICATIONS BETWEEN CONGRESS AND THE CIA

A. *Records Generated by Congress*

Thirty-five of the documents the Church seeks are, in the words of the court below, "correspondence and memoranda originated by one of four congressional committees that investigated various aspects of Korean-American relations between 1976 and 1978." Mem. op. at 3, JA at 115 (footnote omitted). These materials were, the district court found, sent to the CIA for safekeeping. Relying on this court's opinion in *Goland v. Central Intelligence Agency*, 607 F.2d 339 (D.C.Cir.1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C.Cir.1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980), the court below ruled that, because Congress retained control over the thirty-five documents, they were not "agency records" subject to disclosure under the FOIA.

Although *Goland* does stand for the proposition that records in an agency's possession may be congressional documents, as opposed to agency records, that case does not support the conclusion of the court below. In *Goland*, this court began by noting that "agency" as defined in the Administrative Procedure Act does not include Congress. *See* 5 U.S.C. § 551(1)(A) (1976). Finding that Congress has the authority to

1. The district court's opinion, Civ. No. 79-0151 (D.D.C. July 30, 1979), is reprinted in the Joint Appendix (JA) at 113.

2. The court agreed with the CIA that the other deleted portions of the documents were protected by FOIA exemptions 1, 3, and 6. Some of these documents are involved in the cross-appeal, but the Church has not challenged the district court's order that the bulk of the unreleased material is exempt.

keep its records secret, the court articulated the following test for determining the applicability of the FOIA to documents such as those requested here:

> Whether a congressionally generated document has become an agency record . . . depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.

607 F.2d at 347. The court considered two factors dispositive: the circumstances attending the document's creation and the conditions under which it was transferred to the agency. Consideration of those factors led the court to hold that the document sought by plaintiffs there—a stenographic transcript of hearings held before a House committee, which had been forwarded to the CIA—was a congressional, rather than an agency, record.

[1] Thus, Congress can assert its exemption from the FOIA; it can also reassert the exemption. But the exemption can be lost if there is a request for documents at a time when Congress has not designated the documents as falling within congressional control.

Comparison of the facts of *Goland* with those involved here convinces us that Congress did not indicate its intent to maintain control over the documents requested by the Church. The hearing transcript at issue in *Goland* was quite obviously meant to be secret: the congressional committee met in executive session to conduct the hearing; the stenographer and typist were sworn to secrecy; and the transcript was marked "Secret." In addition, the confidential nature of the transcript was evident—it was known to contain "discussions of basic elements of intelligence methodology, both of this country and of friendly foreign governments, as well as detailed discussions of the CIA's structure and disposition of functions." 607 F.2d at 347 (footnote omitted).

[2] In contrast, the circumstances surrounding Congress' creation of the documents requested by the Church do not demonstrate any intent that they be kept secret. The district court failed to analyze this first element of the *Goland* test, and appellees can only assert that the records were "created in the context of sensitive investigations concerning Korean-American relations." Brief for Appellee at 31. Although perhaps sensitive, not every aspect of the work of these congressional committees was confidential; in fact, the House Subcommittee on International Relations published a 1200-page report on the investigation. Appellees' general characterization thus does not suffice to prove that no part of the thirty-five documents may be disclosed.[3]

The second prong of the *Goland* test inquires whether Congress transferred the records in such a way as to manifest its intent to retain control. In *Goland*, for example, this court found that

> [t]he fact that the CIA retains the Transcript *solely for internal reference purposes* indicates that the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a "trustee" for Congress.

607 F.2d at 347 (emphasis supplied).

[3] Here, the Agency maintains—and the district court agreed—that the CIA was given the records for safekeeping. But the record does not support that finding. The Agency affidavit discussing these documents does not specify the purpose of their transfer to the CIA. *See* Affidavit of Frederick P. Hitz, CIA Legislative Council, JA at 99.[4] Moreover, that affidavit makes

3. An entire document is, of course, not exempt merely because isolated portions of it may be protected from disclosure. *See Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

4. In contrast, in describing three sealed cartons of other documents transferred to the CIA from the House Committee on International Relations, the affidavit specifies that "[s]ince the cartons are merely held by CIA in security custody, the actual contents are not known to CIA." JA at 100.

clear that only some congressional documents transferred to the CIA contain classified information or details of intelligence activities. *See id.* at 100.

As evidence of Congress' intent to retain control over these records, the court below and appellees do point to a letter to the CIA from the Clerk of the House of Representatives, which objected to the release of any portion of the thirty-five documents. *See* JA at 104. But this letter was written as a result of the Church's FOIA request and this litigation—long after the actual transfer to the CIA. *See id.*; Document Disposition Index, JA at 75. We do not consider the letter sufficient evidence that Congress forwarded the documents to the Agency only "for a limited purpose and on condition of secrecy." *Goland*, 607 F.2d at 348 n.48. *Cf. Halperin v. Department of State*, 565 F.2d 699, 705 (D.C.Cir.1977) (remarks regarding national security justification for classification of press conference transcript, which were made five months after classification and eight months after press conference, did not necessarily reflect true reasons for classification).

Comparison of the circumstances surrounding the transfer to the CIA of three sealed cartons of additional congressional documents is instructive. These records, which are not at issue here, also relate to Congress' investigation into Korean-American relations. When these materials were sent to the Agency, they were accompanied by a memorandum from the House Committee on International Relations indicating that the Committee retained jurisdiction over the documents, that the documents contained classified information, and that access to the files was limited to those with authorization from the Clerk of the House. JA at 103. As a result of these instructions, the Agency has not opened the sealed cartons, does not know their contents, and maintains them for the express purpose of safekeeping. *See* Hitz Affidavit, JA at 100. The thirty-five documents in dispute here, on the other hand, were forwarded to the CIA without any such instructions, and the Agency appears to be aware of their content.[5]

Although we hold that Congress failed to assert control over these thirty-five documents, we do not adopt appellant's position—that Congress must give contemporaneous instructions when forwarding congressional records to an agency. Nor do we direct Congress to act in a particular way in order to preserve its FOIA exemption for transferred documents. Nevertheless, both the spirit of the Act and *Goland* require some clear assertion of congressional control. Nothing here—either in the circumstances of the documents' creation or in the conditions under which they were sent to the CIA—indicates Congress' intent to retain control over the records or to preserve their secrecy.

B. *Records Generated by the CIA*

[4] Also in dispute are fifteen documents created by the CIA and related to Congress' investigation of Korean-American relations.[6] Eleven of these were sent to Congress in response to a congressional inquiry and were then returned to the Agency, again without instruction. The court below read *Goland* as extending to these eleven documents and to all materials prepared by an agency specifically at the request of Congress. Mem. op. at 4, JA at 116. The court refused, however, to apply *Goland* to purely internal memoranda that are created at the initiative of the agency and are not intended for Congress, even if such documents relate to congressional investigations. *Id.* at 4–5, JA at 116–17. The court found that four of the fifteen documents were merely inter- or intra-agency memoranda that were not directly sent to Congress and therefore were not entitled to

5. We reject the Agency's assertion that the memorandum accompanying the three sealed cartons of materials was intended to apply also to the thirty-five documents at issue here. That memorandum seems specifically related to the three boxes of documents which it accompanied. *See* JA at 103.

6. These are Documents 47–61.

exemption as congressional documents. *Id.* at 5, JA at 117.[7]

We reverse the court's ruling that any of these fifteen records qualified as congressional records. In so doing, we do not find it necessary to decide whether *Goland*, which involved communications from Congress to an agency, applies to transfers in the other direction. That is, we do not resolve the question whether agency-created records, when sent to Congress, can lose their status as agency records and become exempt from FOIA disclosure.[8] Instead, we hold that, even if these CIA-created records were once congressional documents because generated in response to congressional inquiries and transferred to Congress, they subsequently lost their exemption as congressional records when Congress failed to retain control over them.

Again, we rely on the two-pronged *Goland* test. As with the congressional records analyzed above, there is no evidence surrounding the generation of these CIA-created records indicating that Congress intended that they remain secret. The conditions under which they were transferred back to the CIA are similarly ambiguous: they were merely returned to the Agency with no accompanying letter or instructions. Appellees again point to the *post hoc* letter from the Clerk of the House, but, for the reasons discussed above, we find that letter insufficient evidence of Congress' intent to retain control over these documents.

The Agency argues in the alternative that, if the CIA-created documents are agency records and thus within the ambit of the FOIA, various other exceptions mandate nondisclosure of all or portions of the materials: exemptions 1 and 3 of the FOIA, which protect national security information and intelligence sources and methods, 5 U.S.C. § 552(b)(1) & (3); the deliberative process privilege, included within exemption 5 of the Act, 5 U.S.C. § 552(b)(5); and constitutional protection of the legislative process under the Speech or Debate Clause, art. 1, § 6, cl. 1. Because the court below found the documents exempt as congressional records, it had no occasion to rule on these additional arguments. We therefore remand for consideration of the applicability of these exemptions.

II. PROTECTION OF INTELLIGENCE SOURCES

[5] The second major challenge made by the Church involves ten documents withheld by the Agency on the ground that they were covered by exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), because their disclosure would endanger intelligence sources. Exemption 3 excludes from the FOIA's coverage records specifically exempted from disclosure by statute. We have held that one such withholding statute is section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3) (1976), which imposes on the Director of Central Intelligence responsibility for "protecting intelligence sources and methods from unauthorized disclosure." *See, e. g., Halperin v. Central Intelligence Agency*, 629 F.2d 144, 147 & n.7 (D.C.Cir. 1980); *Goland v. Central Intelligence Agency*, 607 F.2d 339, 349 (D.C.Cir.1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir.1979), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980).

The Church disputes the CIA's definition of "intelligence source"; specifically, appellant contests the Agency's right to withhold documents under these statutes in order to protect those who have not received a pledge of confidentiality from the Agency. Those who voluntarily provide information to the CIA, or do so without a promise of confidentiality, argues the Church, are not intelligence sources within the meaning of the statute.

7. The court directed the CIA to segregate nonexempt portions of these four documents (Documents 52, 53, 56, & 57). After reviewing the supplemental materials and inspecting the documents *in camera*, the court held them protected by exemptions 1 and 3. The Church has not appealed from this ruling.

8. *Cf. Goland*, 607 F.2d at 348 n.48 (statement prepared by CIA Director and delivered before House Committee not a congressional document).

Since briefing and argument in this case, this court has addressed this issue and examined the meaning of "intelligence source" in the context of FOIA disclosure. *See Sims v. Central Intelligence Agency*, Nos. 79-2203 & 79-2554 (D.C.Cir. Sept. 29, 1980). There, we rejected the broad definition of "intelligence source" advanced by the CIA in that case, which included anyone providing information rationally related to national security. Instead, recognizing that the appropriate focus is on "the practical necessity of secrecy," the court defined "intelligence source" as follows:

> [A] person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

Slip op. at 20. The court thus declined to adopt either the expansive construction of "intelligence source" suggested by the Agency in *Sims* or the rigid interpretation urged upon us here by the Church.

Having applied the *Sims* definition to the documents at issue here, we find no error in the finding of the court below, which inspected the records *in camera*, that they are covered by exemption 3. The Document Disposition Index [9] submitted by the Agency specifically indicates that three of the ten documents are withheld because their disclosure would identify persons who gave information with the understanding that it would be kept in confidence.[10] Three others detail "clandestine contracts" between the Agency and the informant.[11]

The index with respect to the remaining four documents does not specifically mention confidentiality, but we are satisfied from the descriptions that the information contained in those documents is of the type that the Agency could not obtain without a guarantee of confidentiality.[12] Moreover, the Agency affidavit accompanying the Document Disposition Index indicates that all documents withheld on the basis of exemption 3 contain information from persons who willingly cooperated with the CIA on a pledge of secrecy. *See* Affidavit of Robert E. Owen, Information Review Officer for the CIA's Directorate of Operations, JA at 23-24.

We therefore affirm the holding of the court below, as specified in its order, *see* mem. op. at 6, JA at 118, that the Agency was entitled to withhold some of these ten documents in their entirety, and others in part, in carrying out its statutory duty to protect intelligence sources.

III. THE CROSS-APPEAL

On cross-appeal, the CIA challenges the district court's ruling that portions of five documents and another entire record must be disclosed to the Church. The court rejected the Agency's assertions that this material was protected by exemptions 1, 3, and 6.[13] Although the government has turned over the segments for which an exemption 6 claim was made, it contests the court's finding that exemptions 1 and 3 are inapplicable to these documents. Specifically, the Agency maintains that the court erred in failing to give sufficient weight to the Agency's affidavits, in not providing reasons for its disclosure order, and in reject-

9. The Document Disposition Index describes the various portions of the documents for which the Agency claims exemption and the reasons for those claims, in compliance with this court's opinion in *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

10. *See* JA at 48 (Document 12); *id.* at 52 (Document 17); *id.* at 64 (Document 31).

11. *See* JA at 42-43 (Document 4); *id.* at 45-46 (Document 8); *id.* at 61 (Document 27).

12. *See* JA at 55-56 (Document 21); *id.* at 57-58 (Document 22); *id.* at 58 (Document 23); *id.* at 70 (Document 39).

13. Exemption 1, 5 U.S.C. § 552(b)(1), protects classified, national security information. Exemption 3, *id.* § 552(b)(3), covering material specifically exempted by statute, prevents release of records whose disclosure would endanger intelligence sources. *See* section II *supra*. Personnel and similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy are protected by exemption 6, 5 U.S.C. § 552(b)(6).

ing the CIA's post-judgment offer of an *in camera* affidavit. We dismiss each of these arguments in turn.

A. *Deference to Agency Affidavits*

The CIA alleges, first, that the court below failed to accord to the Agency's affidavits the deference required by decisions of this court. The FOIA directs trial courts to conduct de novo review of an agency's claims of exemption, while at the same time giving "substantial weight" to the agency's affidavits. *See Halperin v. Central Intelligence Agency*, 629 F.2d at 147–148 (D.C.Cir. 1980); *Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C.Cir.1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980). And, in the area of national security, as is allegedly involved here, courts must be especially sensitive to an agency's expertise.

[6] Nevertheless, the affidavits submitted by an agency must be specific enough to enable the judge to execute his responsibility to make a de novo determination of exemption. Such affidavits will be sufficient to justify summary judgment without *in camera* inspection when they meet the following standard:

> [T]he affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping. If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.

Hayden, 608 F.2d at 1387 (footnotes omitted).

If the affidavits do not satisfy this standard, the trial judge may inspect the documents *in camera*. In deciding whether and how to conduct review *in camera*, the court has substantial discretion. *See Hayden*, 608 F.2d at 1384; *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C.Cir.1978). In fact, in amending the FOIA in 1974 to permit *in camera* inspection, *see* 5 U.S.C. § 552(a)(4)(B), Congress indicated its intent to facilitate *in camera* inspection and to minimize judicial unwillingness to take an active role in reviewing FOIA claims. *See Allen v. Central Intelligence Agency*, 636 F.2d 1287 at 1294–1297 (D.C.Cir.1980).

[7] The court below followed the appropriate procedures and standards here. Finding that the Agency's affidavits were "of a general nature," which made it "impossible to undertake meaningful review" of the CIA's "broad, often conclusory claims in the area of national security," the court determined that *in camera* review was necessary. Mem. op. at 2, JA at 114 (footnote omitted). We do not find this characterization of the affidavits and Document Disposition Index inaccurate. The descriptions of the documents are primarily conclusory and often repeat the terms of the FOIA, thereby impeding the court's efforts to rule on the claims of exemption. *See Allen*, 636 F.2d at 1292, 1294, 1298. As the court below recognized, such generality is understandable in a national security context, where a detailed affidavit may be as damaging to governmental concerns as actual disclosure of the document.

The district court thus undertook to review the documents itself. We find no abuse of discretion in this decision.

B. *Explanation of Disclosure Order*

[8] The second argument raised by the Agency on cross-appeal criticizes the court below for failing to articulate a justification for its order that at least segments of a few documents be disclosed to the Church. In ruling in appellant's favor, the court merely remarked that the Agency's claims of exemption had been "overly broad" with respect to some documents. Mem. op. at 6, JA at 118.

This court has previously observed that a more informative statement of rationale by trial courts facilitates the appellate inquiry in FOIA cases. *See Schwartz v. Internal Revenue Service*, 511 F.2d 1303, 1307 (D.C.

Cir.1975); *Vaughn v. Rosen*, 484 F.2d 820, 825 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974); *Ackerly v. Ley*, 420 F.2d 1336, 1341–42 (D.C. Cir.1969). And this court has even remanded for a more detailed explanation from the trial court. *See Ackerly*, 420 F.2d at 1341–42; *cf. Schwartz*, 511 F.2d at 1307–08 (reversing district court's denial of motion for clarification).

Although we agree that a more complete indication of the district court's rationale would have been helpful here, we decline to reverse on this ground. The cases cited above emphasize the special importance of a statement of reasons to those requesting documents, who do not know the exact content of the records and whose efforts to argue for disclosure are therefore hampered. That need is less pressing where, as here, those seeking a fuller justification from the district court are the ones with custody over the documents and knowledge of their contents. And the CIA has not alleged here any prejudice to its efforts on appeal from the failure of the court below to say more than that inspection of the records did not corroborate the Agency's assertions of exemption.[14]

We wish to reiterate, however, that the preferable practice is a full explanation by the district court of both rulings of exemption and orders of disclosure. Here, for example, the court below should have indicated why it found the documents unprotected by the exemptions claimed.

C. *Post-Judgment Offer of Proof*

[9] Finally, the Agency argues that the court below erred in denying its Motion for Partial Relief from Judgment, which included an offer of an *in camera* affidavit explaining in greater detail the Agency's determination that the material was covered by exemptions 1 and 3. Citing *Public Citizen Health Research Group v. United States Dep't of Labor*, 591 F.2d 808 (D.C. Cir.1978), the CIA maintains that if the court below found the Agency's affidavits insufficient, it should have accepted the post-judgment offer of additional proof. The national security ramifications of revealing the information contained in the documents may not have been apparent, notes the Agency, from inspecting the documents.

In *Public Citizen Health Research Group*, this court did reverse a trial court's refusal to examine an *in camera* affidavit that explained why disclosure of the document at issue would harm privacy interests. But there the affidavit was submitted from the outset and not, as here, after *in camera* inspection and judgment.

Even if an *in camera* affidavit would have been helpful and appropriate here, the court below did not abuse its discretion in denying the Agency's post-judgment offer of proof.[15] The interests of judicial economy and finality militate against a court's tolerating a piecemeal approach by a party. This court has accordingly directed that agencies not make new exemption claims to a district court after the judge has ruled in the other party's favor. *See Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 482 F.2d 710, 721–22 (D.C.Cir.1973) (upholding denial of motion for rehearing), *rev'd on other grounds*, 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). Similarly, an agency may not wait until appeal to raise additional claims of exemption or additional rationales for the same claim. *See Ryan v. Department of Justice*, 617 F.2d 781, 792 (D.C.Cir.1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 779–80 (D.C.Cir.1978) (en banc); *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C.Cir.1975). In *Ryan*, for example, the court warned of "[t]he danger of permitting the Government to raise its FOIA exemption claims one at a time, at different stages of a district court proceeding." 617 F.2d at 792.

14. The Agency did not, for example, submit a motion for clarification, as had the appellant in *Schwartz v. Internal Revenue Service*, 511 F.2d 1303 (D.C.Cir.1975).

15. This court has indicated that *in camera* affidavits, though appropriate in some cases, should be used with caution because they do not permit a response from the opposing party. *See Allen v. Central Intelligence Agency*, 636 F.2d at 1298 n.63 (D.C.Cir.1980).

Here the Agency knew that the sufficiency of its affidavits was at issue—the Church had questioned the government's claims of exemption in its motion for summary judgment. If the Agency felt that it could not give a complete explanation on the record of its reasons for asserting exemptions 1 and 3, it should have considered submitting an *in camera* affidavit at a much earlier point.

Moreover, despite the Agency's suggestion to the contrary, this is not a case in which the government's exemption arguments were not explored in depth below. The court conducted a thorough *in camera* inspection of the documents, and it had as a guide the Agency's Document Disposition Index, which explained in general terms the Agency's national security concerns and justifications for its exemption claims.[16] An *in camera* affidavit may have provided more details, but the contours of the CIA's arguments were evident in the Index. And we have detected no indication that these arguments were not understood or fully considered by the court below. We therefore find no abuse of discretion in the denial of the Agency's Motion for Partial Relief from Judgment and refusal of an *in camera* affidavit.[17]

IV. CONCLUSION

Because we find that Congress failed to exercise its control over both the Congress-created records transferred to the CIA and the CIA-generated documents sent to Congress, we hold that neither set of materials contains congressional records immune from the FOIA under 5 U.S.C. § 551(1)(A). Congress obviously has the prerogative to act to ensure the secrecy of its records and their exemption from the FOIA. But applying the criteria first articulated by this court in *Goland v. Central Intelligence Agency*, we detect nothing in either the circumstances attending these documents' generation or the conditions under which they were transferred between Congress and the Agency that indicates that Congress intended to retain control over them. Accordingly, we reverse on this point, but remand for consideration of the Agency's other exemption claims never ruled on below.

We affirm all other portions of the district court's opinion and reject both the Church's arguments with respect to the definition of "intelligence source" and the CIA's challenges on cross-appeal to the court's disclosure order.

Reversed and remanded.

16. Typically, when an agency's affidavits are an insufficient basis for summary judgment, a trial court will inspect the documents *in camera* or accept *in camera* affidavits. *See Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C.Cir.1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980).

17. Moreover, the court below granted the CIA a stay of its disclosure order pending appeal, and the Agency has not been able to elaborate on the need for an *in camera* affidavit on appeal. It only alleges that the court paid insufficient attention to its affidavits and failed to understand the national security implications of disclosure, speculations that are unsupported by the record.

We reject the Church's contention that the district court's imposition of a stay was an abuse of discretion. *See Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889 (1st Cir. 1979).

Susan D. GOLAND and Patricia B. Skidmore, Appellants,

v.

CENTRAL INTELLIGENCE AGENCY et al.

No. 76–1800.

United States Court of Appeals, District of Columbia Circuit.

Argued 5 Oct., 1977.

Decided 23 May, 1978.

Rehearing Denied 28 March, 1979.

In suit for an injunction directing the Central Intelligence Agency to comply with plaintiffs' request for documents relating to the legislative history of the CIA's organic statutes, the United States District Court for the District of Columbia, D.C.Civil 76–0166, George L. Hart, Jr., J., granted summary judgment in favor of the CIA, and plaintiffs appealed. The Court of Appeals, Wilkey, Circuit Judge, held that: (1) transcript of hearings conducted by the House Committee on Expenditures in the Executive Department was a "congressional document" and not an "agency record" within the meaning of the Freedom of Information Act, where the transcript was released to the CIA for limited purposes as a reference document only and remained within the control of Congress; (2) deleted portions of certain statement given by the Central Intelligence Director before the House Armed Services Committee on 8 April 1948 were properly withheld by the CIA under the Freedom of Information Act's third exemption, relating to matters "specifically exempted from disclosure by statute," since the nondisclosure provisions of the National Security Act and the Central Intelligence Agency Act remain qualifying statutes under amended exemption 3, and since the CIA showed by affidavit that release of the statement in its entirety would reveal "intelligence sources and methods," and (3) plaintiffs made no showing of CIA bad faith sufficient to impugn information coordinator's affidavit, which on its face sufficed to demonstrate that the search for responsive documents was complete; accordingly, the court's grant of summary judgment without discovery was within its discretion.

Affirmed.

Bazelon, Circuit Judge, filed a dissenting opinion and also dissented, with opinion, from the denial of rehearing.

1. Records ⇐14

Transcript of hearings conducted by the House Committee on Expenditures in the Executive Department was a "congressional document" and not an "agency record" within the meaning of the Freedom of Information Act, where the transcript was released to the Central Intelligence Agency for limited purposes as a reference document only and remained within the control of Congress. 5 U.S.C.A. §§ 551(1)(A), 552.

2. Records ⇐14

As regards the Freedom of Information Act which requires that an agency make agency records available to the public upon reasonable request, an agency's possession of a document does not per se dictate that document's status as an "agency record." 5 U.S.C.A. § 552.

3. Records ⇐14

An agency's possession of a document, standing alone, no more dictates, for purposes of the Freedom of Information Act, that it is an "agency record" than the congressional origins of a document, standing alone, dictate that it is not; whether a congressionally generated document has become an agency record, rather, depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides. 5 U.S.C.A. § 552.

4. Records ⇐14

In ascertaining whether a record in the possession of an agency is nonetheless a congressional document exempt from disclo-

sure under the Freedom of Information Act, a court will accord due weight to these factors: (1) Congress' clear intent to exempt congressional documents from disclosure under FOIA; (2) Congress' clear prerogative to prevent disclosure of its own confidential materials; and (3) the danger of inhibiting the legislative and judicial branches from making their records available to the executive branch. 5 U.S.C.A. § 552.

5. Records 🔑14

When Congress, which has broad powers to keep documents secret, transfers secret documents to an agency for a limited purpose and on condition of secrecy, it does not thereby waive its own prerogatives of confidentiality and resign itself to the Freedom of Information Act exemptions which bind the agency and not it. 5 U.S.C.A. § 552.

6. Records 🔑14

Deleted portions of certain statement given by the Central Intelligence Director before the House Armed Services Committee on 8 April 1948 were properly withheld by the Central Intelligence Agency under the Freedom of Information Act's third exemption, relating to matters "specifically exempted from disclosure by statute," since the nondisclosure provisions of the National Security Act and the Central Intelligence Agency Act remain qualifying statutes under amended Exemption 3, and since the CIA showed by affidavit that release of the statement in its entirety would reveal "intelligence sources and methods." 5 U.S.C.A. § 552(b)(3); National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); Central Intelligence Agency Act of 1949, § 7, 50 U.S.C.A. § 403g.

7. Federal Civil Procedure 🔑2544

In order to prevail on a Freedom of Information Act motion for summary judgment, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements. 5 U.S.C.A. § 552.

8. Records 🔑14

As regards the Freedom of Information Act, Congress has instructed the courts to accord "substantial weight" to agency affidavits in national security cases, and these affidavits are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt. 5 U.S.C.A. § 552.

9. Federal Civil Procedure 🔑2538

While an agency's affidavits, on a Freedom of Information Act motion for summary judgment, must be relatively detailed and nonconclusory and must be submitted in good faith, the district court has discretion, if these requirements are met, to forego discovery and award summary judgment on the basis of affidavits. 5 U.S.C.A. § 552.

10. Records 🔑14

As regards a request for records under the Freedom of Information Act, an agency is not required to reorganize its files in response to a plaintiff's request in the form in which it was made, and if an agency has not previously segregated the requested class of records, production may be required only where the agency can identify that material with reasonable effort. 5 U.S.C.A. § 552.

11. Federal Civil Procedure 🔑2539

In suit for an injunction directing the Central Intelligence Agency to comply with plaintiffs' request for documents relating to the legislative history of the CIA's organic statutes, plaintiffs made no showing of CIA bad faith sufficient to impugn information coordinator's affidavit, which on its face sufficed to demonstrate that the search for responsive documents was complete; accordingly, the court's grant of summary judgment without discovery was within its discretion.

On Petition for Rehearing

12. Records 🔑65

In suit for an injunction directing the Central Intelligence Agency to comply with

plaintiffs' request for documents relating to the legislative history of the CIA's organic statutes, the mere fact that, subsequent to the issuance of the Court of Appeals' opinion affirming the district court's grant of summary judgment for the CIA, additional documents were discovered did not, as a substantive matter, impugn the accuracy of CIA information coordinator's sworn affidavits, since the issue was not whether any further documents might conceivably exist but whether the CIA's search for responsive documents was adequate. 5 U.S.C.A. § 552.

13. Records ⟹62

An agency, in response to a Freedom of Information Act request, is required only to make reasonable efforts to find responsive materials; it is not required to reorganize its filing system. 5 U.S.C.A. § 552.

14. Federal Civil Procedure ⟹2655

Occasions when newly discovered evidence or changed circumstances will warrant setting aside a final judgment are limited procedurally as well as substantively.

15. Federal Civil Procedure ⟹2641
Federal Courts ⟹541

A final district court judgment may be altered on direct review only through two procedures: by appeal, and by a motion in district court for relief from the judgment under Federal Rule 60(b). Fed.Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

16. Federal Courts ⟹707

Appellate review is ordinarily unaffected by matters not contained in the record.

17. Federal Courts ⟹744

An appellate opinion is based on the record before it, and hence cannot be set aside on the basis of newly discovered facts outside the record.

18. Federal Courts ⟹776

An appellate court has no fact-finding function; it cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination.

19. Federal Courts ⟹708

Factfinding and creation of a record are the functions of the district court; therefore, consideration of newly discovered evidence is a matter for the district court.

20. Federal Civil Procedure ⟹2655

Proper procedure for dealing with newly discovered evidence is for the party to move for relief from the judgment in the district court under Rule 60(b). Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

21. Federal Courts ⟹931

Court of Appeals may, in appropriate cases, have ample revisory power under statute providing that "* * * any . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review," but the instant suit, in which plaintiffs sought to compel the Central Intelligence Agency to comply with their request for documents relating to the legislative history of the CIA's organic statutes, would not be a proper occasion for such extraordinary relief, despite the CIA's postjudgment revelation of various germane documents, since the CIA's original failure to uncover said documents was fully understandable and not inconsistent with the district court's finding that the search was thorough. 28 U.S.C.A. § 2106.

22. Federal Civil Procedure ⟹2643

Rule 60(b) does not extinguish the historical authority of equity courts to reform judgments in appropriate cases. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

23. Federal Civil Procedure ⟹2658

One-year limit on certain Rule 60(b) motions is not applicable to an independent action to relieve a party from a judgment, order or proceeding, leaving such independent action, apart from collateral attack, as the only manner of obtaining relief from a judgment in those cases where a 60(b) motion has become time barred. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

24. Records ⟹54

Neither the discovery of additional documents, nor the Central Intelligence Agency's delayed disclosure of this discovery, nor CIA's ultimate release of the documents in any way undermined the Court of Appeals' prior holdings that the congressional hearing transcript was not an "agency record" but a congressional document to which the Freedom of Information Act did not apply, that the deleted portions of the Hillenkoetter Statement could properly be withheld pursuant to FOIA Exemption 3, and that no live and genuine controversy remained on the definition of "agency records" issue. 5 U.S.C.A. § 552; National Security Act of 1947, § 102(d)(3), 50 U.S.C.A. § 403(d)(3); Central Intelligence Agency Act of 1949, § 7, 50 U.S.C.A. § 403g.

25. Federal Courts ⟹945

While the Court of Appeals, in its prior decision, declined to award attorneys' fees to plaintiffs, holding that plaintiffs had not "substantially prevailed" even though the Central Intelligence Agency had released certain statements after plaintiffs commenced suit to compel the CIA to comply with plaintiffs' requests for documents relating to the legislative history of the CIA's organic statutes, the subsequent release by the CIA of additional documents discovered postjudgment necessitated a remand for reconsideration of the attorney's fees issue.

James H. Wallace, Jr., Washington, D. C., with whom Thomas C. Arthur and Mark H. Lynch, Washington, D. C., were on brief, Alan B. Morrison and Larry P. Ellsworth, Washington D. C., were on the motion to vacate and on the petition for rehearing, for appellants.

John F. Cordes, Atty., Dept. of Justice, Washington, D. C., with whom Earl J. Silbert, U. S. Atty., Rex E. Lee, Asst. Atty. Gen., and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on brief for appellees.

Thomas C. Martin, Dept. of Justice, Washington, D. C., entered an appearance for respondent.

Before BAZELON, TAMM and WILKEY, Circuit Judges.

Opinion for the Court filed by WILKEY, Circuit Judge.

OUTLINE OF OPINION

I. FACTUAL BACKGROUND ....
II. COURSE OF THE LITIGATION ...
III. ANALYSIS ....
  A. The Hearing Transcript ....
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  D. The CIA's Definition of Agency "Records." ....
  E. Attorneys' Fees ....

WILKEY, Circuit Judge:

This case arises under the Freedom of Information Act (FOIA).[1] Plaintiffs Goland and Skidmore requested documents from the Central Intelligence Agency (CIA) relating to the legislative history of the Agency's organic statutes. In this suit they challenge the thoroughness of the CIA's search for responsive documents and the Agency's refusal to give them certain admittedly responsive material it does possess. The district court granted summary judgment in favor of the CIA. We affirm.

I. FACTUAL BACKGROUND

The chronology of events must be elaborated in some detail. On 2 May 1975 Sara Holtz[2] filed an FOIA request with the CIA, seeking access to "all records concerning the legislative history" of the National Security Act of 1947,[3] the CIA Act of 1949,[4]

1. 5 U.S.C. § 552 (1976).

2. Holtz is not a party to this suit.

3. Act of 26 July 1947, ch. 343, § 102, 61 Stat. 497 (presently codified at 50 U.S.C. § 403 (1970)).

4. Act of 20 June 1949, ch. 227, §§ 1–10, 63 Stat. 208 (presently codified at 50 U.S.C. §§ 403a–403j (1970)).

and two bills introduced into Congress in 1948 providing for the administration of the Agency.[5] Specifically, Holtz requested access to "all reports of the Committees of the House and Senate and the Conference Committee which reported on the bills, and any hearings which may have been held on these bills or related to the subject of the authority, organization and administration" of the CIA.[6]

On 14 May the CIA responded to Holtz' letter, advising her that the documents she sought were congressional materials which would be available in the Library of Congress or the Government Printing Office. On 20 May 1975 Holtz wrote the Agency a second letter, stating her belief that hearings had been held on the bills she cited for which no transcripts were available in the Library of Congress, and requesting access to records of these hearings and to "any House, Senate or Conference Reports, besides those available in public libraries, that more fully explain the basis for the Committees' actions on these bills." [7]

The Agency responded on 23 June 1975, informing Holtz that a search of its records had revealed that it possessed one document relating to the legislative history of the CIA's organic statutes which was not publicly available, namely, a stenographic transcript of Hearings held before the House Committee on Expenditures in the Executive Departments on 27 June 1947 (hereinafter "Hearing Transcript"). The Agency stated, however, that the Hearing Transcript had been classified "Secret" by Congress and could be declassified only by that body; it suggested that Holtz request declassification and release of the document from the House of Representatives. There were no further communications between Holtz and the CIA.

On 20 October 1975 plaintiffs Goland and Skidmore notified the CIA that they, like Holtz, were "investigating the authority, organization and administration" of the Agency, and requested "the documents requested by Ms. Holtz' letters." [8] Treating the CIA's failure to respond within ten days as a denial of their request,[9] plaintiffs on 20 November 1975 appealed that denial. On 26 November 1975 the CIA offered to send plaintiffs copies of five previously published hearings and reports, even though these documents were "generally available in the Library of Congress and various depository libraries." [10] With respect to the Hearing Transcript, however, the CIA reiterated its position that the Transcript was a "legislative document under the control of the House of Representatives" which was "classified 'Secret'" and to which FOIA did not apply.[11]

On 16 December 1975 Goland and Skidmore wrote the CIA to "elaborate on the basis of [their] appeal," asserting that the Agency's letter of 26 November failed to make clear whether the Transcript and the five published documents accounted for all the material they had requested.[12] In addition, plaintiffs expanded the scope of their request to embrace not only the reports and hearings they had sought originally, but also any "materials which may have been the basis for testimony at hearings" or "materials used by or submitted by the CIA or other Executive Branch sources which are included in [unpublished] reports" on the cited bills.[13] When the CIA failed to respond to this supplemental appeal within 20

5. S. 2688, 80th Cong., 2d Sess. (1948); H.R. 5871, 80th Cong., 2d Sess. (1948).

6. Joint Appendix (J.A.) 12.

7. J.A. 14–15.

8. J.A. 18.

9. Under 5 U.S.C. § 552(a)(6)(A)(i) (1976), an agency must respond to an FOIA request within ten working days; under § 552(a)(6)(C), a requester is deemed to have exhausted administrative remedies if the agency fails to comply with this time limit.

10. J.A. 22. These five documents (65 pages in all) were sent to plaintiffs on 12 January 1976. J.A. 78.

11. J.A. 22.

12. J.A. 23–24.

13. J.A. 24, 25.

working days,[14] plaintiffs filed suit on 28 January 1976.

On 10 March 1976 the CIA notified plaintiffs' counsel that it had identified two additional documents responsive to plaintiffs' FOIA request which "had not previously been located." [15] The first document was entitled "Statement of Lt. Gen. Hoyt S. Vandenberg, Director of Central Intelligence," delivered before the Senate Armed Services Committee on 29 April 1947. This document was released to plaintiffs in full. The second document was entitled "Statement of the Director of Central Intelligence [Hillenkoetter] Before the House Armed Services Committee [on] 8 April 1948" (hereinafter "Hillenkoetter Statement"). This document was released to plaintiffs with certain portions (about 20% of the total) deleted; the Agency explained that the deleted material was exempt from disclosure under FOIA.

II. COURSE OF THE LITIGATION

The complaint sought an injunction directing the CIA to make available for copying all "records requested in plaintiffs' . . . letter" of 20 October 1975,[16] a declaratory judgment holding the CIA's allegedly restrictive definition of "agency records" [17] invalid, and an award of attorneys' fees. On 19 March 1976 plaintiffs filed interrogatories, a request for production of documents, and a notice of deposition to the CIA. Rather than submit to discovery, the CIA on 5 April 1976 filed a motion for summary judgment based on affidavits. The Agency contended that the Hearing Transcript was not an "agency record" but rather a congressional document not subject to FOIA; [18] that both the Transcript and the deleted portions of the Hillenkoetter Statement were properly withheld under FOIA Exemption 3, relating to matters "specifically exempted from disclosure by statute;" [19] that both the Transcript and the deleted portions of the Hillenkoetter Statement were properly withheld under FOIA Exemption 1, relating to matters "specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy;" [20] that the CIA's search had been complete and there existed no other responsive documents; and that plaintiffs lacked standing to challenge the CIA's definition of "agency records" inasmuch as the Agency had not relied on that definition in processing their FOIA request. Plaintiffs responded to the motion principally on the grounds that discovery was needed to resolve disputed issues of fact.

Judge Hart granted the CIA's motion for summary judgment on 26 May 1976.[21] He found that the Hearing Transcript was a congressional document outside the ambit of FOIA, that the deleted portions of the Hillenkoetter Statement were properly withheld under FOIA Exemption 1, and that no further discovery was justified since the CIA had "made a full search in good faith." [22] Judge Hart made no findings about plaintiffs' standing to challenge the CIA's definition of agency records or about their request for attorneys' fees. We consider these issues in turn.

III. ANALYSIS

A. *The Hearing Transcript.*

[1] The FOIA requires that an agency make "agency records" available to the

14. *See* 5 U.S.C. § 552(a)(6)(A)(ii) & (C) (1976).

15. J.A. 129.

16. J.A. 9.

17. 32 C.F.R. § 1900.3(g) (1976). The definition has recently been amended. *See* 42 Fed.Reg. 24,049 (12 May 1977) (codified at 32 C.F.R. § 1900.3(g) (1977)).

18. Congress is not an "agency" under FOIA. *See* 5 U.S.C. § 551(1)(A) (1976).

19. 5 U.S.C. § 552(b)(3) (1976).

20. 5 U.S.C. § 552(b)(1) (1976). These documents were classified "Secret" under Executive Order No. 11652, 3 C.F.R. 678 (1971–75 Compilation).

21. Judge Hart's decision, rendered from the bench, is printed at J.A. 187–90.

22. J.A. 190.

public upon reasonable request.[23] The Act does not define "records" or "agency records."[24] Plaintiffs argue that since the CIA is an "agency" its possession of the Hearing Transcript, without more, renders that document an "agency record" subject to disclosure absent specific exemption.[25] The CIA argues that possession is not enough; it points out that "agency," as defined by the Administrative Procedure Act, "does not include (A) the Congress . . . ,"[26] and that the Hearing Transcript, regardless of whether it is a "record," is not an "*agency* record" on the facts of this case.[27] The district court found that the Hearing Transcript was "released to the CIA for limited purposes as a reference document only" and that it "remain[ed] within the control of Congress;"[28] the court concluded that the Transcript was in consequence a "Congressional document,"[29] and not an "agency record" within the meaning of FOIA. We agree.

[2] At the outset, we reject plaintiffs' argument that an agency's possession of a document *per se* dictates that document's status as an "agency record."[30] We base

23. 5 U.S.C. § 552(a)(3) & (4)(B) (1976).

24. *See* U. S. Dept. of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23 (1967) [hereinafter Attorney General's FOIA Memorandum].

25. Brief of Appellants at 40; J.A. 24.

26. 5 U.S.C. § 551(1)(A) (1976).

27. The CIA also argues that if the Hearing Transcript were an agency record for purposes of § 552(a)(3), it would be exempt from disclosure under FOIA Exemptions 1 and 3. *See* p. — of — U.S.App.D.C., p. 344 of 607 F.2d *supra*. Since we hold that the Hearing Transcript is a Congressional document, we do not consider these arguments.

28. J.A. 189.

29. *Id.*

30. In support of this argument, plaintiffs cite 44 U.S.C.A. § 3301 (West Supp.1977), an earlier version of which is quoted in the Attorney General's FOIA Memorandum, *supra* note 24 at 23. Section 3301 defines "records" for purposes of the management, disposal, and archival preservation of Government documents by the Administrator of General Services; it states that "[a]s used in [chapter 33 of 44 U.S.C.], 'records' includes all . . . papers . . . made *or received by* an agency of the United States Government . . . appropriate for preservation by that agency . . . ." (emphasis added). This definition is hardly controlling here. In enacting legislation on management and disposal of Government records, Congress was concerned with preserving an "[a]ccurate and complete documentation of the policies and transactions of the Federal Government." 44 U.S.C.A. § 2902(1) (West Supp.1977). With this objective in mind, Congress might well regard the Hearing Transcript as a "record . . . appropriate for preservation" by the CIA, since the Transcript contains information regarding "basic elements of [the CIA's] intelligence methodology" and details of the CIA's "structure and disposition of functions." Affidavit of CIA Legislative Counsel George L. Cary, J.A. 80 [hereinafter "Cary Affidavit"]. The sole result of the Hearing Transcript's being deemed an "agency record" under § 3301 by virtue of its receipt by the CIA is that the Transcript could not thereafter be destroyed except in conformity with the procedure Congress prescribed—a result plainly harmonious with Congress' objectives. *See* 44 U.S.C. § 3314 (1970). Congress' objectives in the FOIA, of course, were rather different. In the interests of secrecy, Congress exempted itself from the Act's disclosure requirements; yet the result of the Hearing Transcript's being deemed an "agency record" under § 552(a)(3) by virtue of its receipt by the CIA is that the Transcript's release could be required, regardless of Congress' wishes, unless the CIA could prove a specific exemption. Given this difference in result, we doubt Congress would agree that an "agency record" under 44 U.S.C. § 3301 is an "agency record" under 5 U.S.C. § 552(a)(3). Indeed, the two titles define "agency" differently. *Compare* 5 U.S.C. § 551(1)(A) & (B) (1976) ("agency" excludes Congress and the federal courts) *with* 44 U.S.C.A. § 2901(13) (West Supp.1977), *cross-referring* to 40 U.S.C. § 472(b) (1970) ("agency" includes not only executive agencies, but also "any establishment in the legislative or judicial branch," with exceptions). Congress, in any event, has had ample opportunities to make the § 3301 definition of "records" applicable in § 552(a)(3) of FOIA, but has never done so. *Cf.* 44 U.S.C.A. § 2906(a)(3) (West Supp.1977) (stating that under certain circumstances "records" under § 3301 shall be deemed records for purposes of 5 U.S.C. § 552a). One recent commentator has stated that § 3301, although it contains the "only statutory definition of 'record,'" is "an inappropriate answer to the definitional issue." J. T. O'Reilly, Federal Information Disclosure, ¶ 5.03 n.1 (1977).

Plaintiffs point out that the § 3301 definition of records was quoted in the Attorney Gener-

our conclusion both on precedent and on policy. The precedent is the Tenth Circuit's opinion in *Cook v. Willingham*,[31] the only decision cited to us or discovered by our own research that is squarely on point. In *Cook*, a prisoner sought a copy of his presentence investigation report under FOIA. Although the document was physically in the possession of the warden of a United States penitentiary, the Tenth Circuit held the place of possession not controlling. Noting that FOIA "does not apply to 'the courts of the United States,'"[32] it concluded that the presentence report, "made for the use of the sentencing court," thereafter "remains in the exclusive control of that court despite any joint utility it may eventually serve."[33] In consequence, the judicial document was "not an agency report and [was] therefore not available to the public" under FOIA.[34] Since the FOIA's exemptions for Congress and the federal courts are *in pari materia*,[35] *Cook* is firm support for the conclusion that the Hearing Transcript, a congressional document, is not "an agency record" here.

This conclusion likewise finds firm support in policy. Congress has undoubted authority to keep its records secret, authority rooted in the Constitution,[36] longstanding practice,[37] and current congressional rules.[38] Yet Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent.[39] If plaintiffs' argument were accepted, Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role. We decline to confront Congress with this dilemma absent a more convincing showing of self-abnegating congressional intent. It may be assumed that plaintiffs could not easily win release of the Hearing Transcript from the House of Representatives; we will not permit them to do indirectly what they cannot do directly because of the fortuity of the Transcript's location.

[3] For reasons both of precedent and policy, then, we believe that plaintiffs' litmus test must be rejected. An agency's possession of a document, standing alone, no more dictates that it is an "agency record" than the congressional origins of a

al's FOIA Memorandum *supra* note 24 at 23. We do not see how this helps plaintiffs' case. The Attorney General noted that the FOIA did not define "records," then quoted the only available statutory definition of the term for what it was worth. He would have been remiss in not doing so. Yet his citation of the definition does not give it any greater extrapolative force than it inherently possesses. The Attorney General surely did not focus on the words "or received by," which plaintiffs italicize and which are relevant to our case. Indeed, the Memorandum elsewhere suggests that an agency's possession of a document does not *per se* render the document an "agency record" which the possessing agency must release. *See* note 46 *infra*.

31. 400 F.2d 885 (10th Cir. 1968) (per curiam), *followed in United States v. Dingle*, 546 F.2d 1378, 1381 (10th Cir. 1976).

32. 400 F.2d at 885, *citing* 5 U.S.C. § 551(1)(B) (1976).

33. *Id.*

34. *Id.* at 886. *See United Broadcasting Co.*, 58 F.C.C.2d 1243, 1245 (1975) (FCC withheld probationary report because "probationary report, like a presentencing report, properly belongs to the Court for which it was made, and is therefore not capable of release under FOIA," *citing Cook*).

35. *See* 5 U.S.C. § 551(1)(A) & (B) (1976).

36. U.S.Const. art. I, § 5: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."

37. *See Nixon v. Sirica*, 159 U.S.App.D.C. 58, 130–31, 487 F.2d 700, 772–73 (1973) (Wilkey, J., dissenting).

38. *E. g.*, H.R. Rule XI(2)(k)(7), *reprinted in* H.R. Doc. No. 416, 93d Cong., 2 Sess. 427 (1975): "No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee."

39. *See* Letter from Deputy Att'y Gen. Harold R. Tyler, Jr. to Hon. Bella S. Abzug, 19 Feb. 1976, *quoted in* J.A. 60 (Justice Dept. declined to release confidential House report lest "communications and consultations between coequal branches" of government be stifled).

document, standing alone, dictate that it is not. Whether a congressionally generated document has become an agency record, rather, depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.

The document at issue here is a photostatic reproduction of a stenographic transcript of a hearing held before the House Committee on Expenditures in the Executive Departments on 27 June 1947, entitled "H.R. 2319—Unification of the Armed Forces." The Committee was sitting in Executive Session. As the first order of business, the Chairman swore the stenographer and typist to secrecy.[40] The transcript contains discussions of basic elements of intelligence methodology, both of this country and of friendly foreign governments, as well as detailed discussions of the CIA's structure and disposition of functions.[41] When received by the CIA, the Transcript bore the typewritten marking "Secret" on its interior cover page; this marking appears to have been appended at the time the Transcript was made.[42] The typewritten mark "Secret" appears again on the first page of the text of the Transcript. The CIA retains a copy of the Transcript for internal reference purposes only, to be used in conjunction with legislation concerning the Agency and its operations.[43]

Given these facts, we conclude that the Hearing Transcript remains under the control of and continues to be the property of the House of Representatives. We base our conclusion both on the circumstances attending the document's generation and the conditions attached to its possession by the CIA. The facts that the Committee met in executive session[44] and that the Transcript was denominated "Secret" plainly evidence a Congressional intent to maintain Congressional control over the document's confidentiality.[45] The fact that the CIA retains the Transcript solely for internal reference purposes indicates that the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a "trustee" for Congress. Under these circumstances, the decision to make the transcript public should be made by the originating body, not by the recipient agency.[46]

40. Cary Affidavit, *supra* note 30, J.A. 80.

41. J.A. 80–81. Because the CIA methodology and disposition of functions described in the Transcript are still operable, and because disclosure of the information could damage U.S. relations with friendly foreign governments, the CIA itself separately classified portions of the Transcript "Secret" pursuant to Executive Order 11652. *See* note 20 *supra*. We do not consider whether this classification was proper. See note 27 *supra*.

42. Cary Affidavit, *supra* note 30, J.A. 80.

43. *Id.* at 79–80.

44. *Cf.* S.Rep.No.5, 81st Cong., 1st Sess. ("First Annual Report of the Investigations Subcomm. of the Comm. on Expenditures in the Executive Departments") 3 (1949): "Executive hearings were . . . utilized in cases involving national security and in other instances when it was determined that public disclosure might be detrimental to the public interest."

45. Plaintiffs point out that the predecessor of current House Rule XI(2)(k)(7), *supra* note 38, governing secrecy of testimony taken in executive session, was not enacted until 1955. Brief at 41. *See* H.R.Doc. No. 416, *supra* note 38 at 427. It is clear, however, that the Rule simply formalized longstanding practice. *Cf., e. g.*, S.Rep.No.5, *supra* note 44 at 3–4: "The subcommittee calls attention to the following rules of procedure which it adopted and which it has uniformly followed: . . . (5) All testimony taken in executive hearings shall be secret and will not be released or used in public hearings without the approval of a majority of the subcommittee." Even without the benefit of a general Rule, moreover, the transcript on its face manifests the indicia of Congress' intent to maintain secrecy. Since it is Congress' intent to maintain secrecy, and not Congress' conformance with the procedural niceties of classification, that makes the Transcript a "Congressional document," plaintiffs' arguments that discovery is required as to the identity of the classifier, the date on which the document was classified, etc., are irrelevant in reaching a decision here.

46. *Cf.* Attorney General's FOIA Memorandum, *supra* note 24 at 24:

Where a record is requested which is of concern to more than one agency, the request

[4, 5] We hold, therefore, that the Hearing Transcript is not an "agency record" but a congressional document to which FOIA does not apply.[47] We reach this conclusion because we believe that on all the facts of the case Congress' intent to retain control of the document is clear. Other cases will arise where this intent is less plain. We leave those cases for another day.[48]

B. *The Hillenkoetter Statement.*

The Hillenkoetter Statement is concededly an "agency record." Although the entire 118-page document was originally classified "Secret," the CIA has declassified approximately 80% of it and released those portions to plaintiffs. The Agency contends that the deleted portions are exempt from disclosure under FOIA Exemptions 1[49] and 3. The district court held this material ex-

should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold . . . . Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency.

This rule was followed in *Friendly Broadcasting Co.*, 55 F.C.C.2d 775, 775–76 (1975) (where FBI Reports were loaned to FCC solely for internal reference purposes, Reports were "property of the Federal Bureau of Investigation" and FBI, "as the originator of the Reports, . . . is the agency to which the request should be addressed" under FOIA).

47. Plaintiffs argue that even if the Transcript as a whole is a "Congressional document," those portions originating with the CIA are producible as "'reasonably segregable portion[s]'" with the "comments of members of Congress . . . deleted if necessary as 'Congressional materials.'" Brief at 42 & n.15, *citing* 5 U.S.C. § 552(b) (last sentence) (1976). This argument is frivolous. Congress met in executive session, and marked the Transcript "Secret," not only to protect its members' questions, but to protect its witnesses' answers. The cited provision from § 552(b), in any event, requires segregation and disclosure of non-exempt portions of *agency records*; since we hold that the Hearing Transcript is not an agency record, this provision has no application here.

48. In ascertaining whether a record in the possession of an agency is nonetheless a congressional document, a court will of course accord due weight to the factors that influence us in this case, including (1) Congress' clear intent to exempt congressional documents from disclosure under FOIA; (2) Congress' clear prerogative to prevent disclosure of its own confidential materials; and (3) the danger of inhibiting the legislative and judicial branches from making their records available to the executive branch.

The dissent argues that this test, and the conclusion it produces, prove too much: if the Hearing Transcript is a Congressional document, so also must the Hillenkoetter Statement be, a *reductio* our colleague evidently views as *ad absurdum*. *See* diss. op. at —— of 197 U.S.App.D.C., at 361 of 607 F.2d. Since the CIA has never contended that the Hillenkoetter Statement is a Congressional document—since, indeed, the CIA has acted inconsistently with any such contention by declassifying and releasing 80% of the document—we see no need to consider this question. We might note, however, that between the Hillenkoetter Statement and the Hearing Transcript substantial differences lie. The former is a statement by a CIA official prepared by the CIA; we do not know the circumstances of its delivery in Congress, and it was classified "Secret," not by Congress, but by the CIA. The latter is a transcript of colloquy between Congressmen and CIA witnesses; it was created in Congress under circumstances manifesting a plain Congressional desire for secrecy, and it initially was labeled "Secret," not by the CIA, but by Congress. These distinctions are not, as our dissenting colleague says, a matter of paper and ink. The Transcript originated in Congress and remains a congressional document because it bears clear indicia of a congressional purpose to ensure secrecy; the Statement originated in the CIA and bears no indicia of any congressional purpose to ensure secrecy. It is these indicia of Congress' continuing *control* that are dispositive of a document's "congressional" status.

The dissent argues that "'[c]ontrol' in this sense goes to the question whether a document is *exempt* from disclosure—not to whether it is an 'agency record.'" Diss. op. at —— of 197 U.S.App.D.C., at 360 of 607 F.2d. This argument seems to mean that Congress can exercise "control" over secret documents that leave its possession only by enacting FOIA exemptions. We disagree. Congress has broad powers to keep its documents secret; when Congress transfers secret documents to an agency, for a limited purpose and on condition of secrecy, we see no reason to think it thereby waives its own prerogatives of confidentiality and resigns itself to the FOIA exemptions which bind the agency and not it.

49. The deleted portions of the Statement were classified "Secret" pursuant to Executive Order 11652 "in the interest of national defense or foreign policy." *See* p. —— of 197 U.S.App. D.C., p. 344 of 607 F.2d & note 20 *supra*.

empt, relying on Exemption 1. We agree, but base our holding instead on Exemption 3, without in any way impugning the correctness of Judge Hart's conclusion.[50]

As originally enacted, FOIA provided that the Act's disclosure requirements "[do] not apply to matters that are—. . . (3) specifically exempted from disclosure by statute."[51] Two statutes are relevant to an Exemption 3 claim by the CIA. A *proviso* to 50 U.S.C. § 403(d)(3) states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."[52] Section 403g of the same title provides that, "in order further to implement" this *proviso*, "the Agency shall be exempted from . . . the provisions of any . . . law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency."[53] In *Weissman v. CIA*,[54] this Court squarely held that "both § 403(d)(3) and § 403g are precisely the type of statutes comprehended by exemption (b)(3)."[55] This conclusion derived incontrovertible support from legislative history[56] and was unanimously adopted by other courts.[57]

In 1976 Congress amended Exemption 3 in order to "eliminate the gap created in [FOIA]" by the Supreme Court's decision in *FAA Administrator v. Robertson*.[58] *Robertson* held that a statute giving an agency broad discretion to withhold information "in the interest of the public"[59] qualified as an Exemption 3 statute. Congress amended Exemption 3 to provide that information shall be deemed *specifically* exempted from disclosure by statute only if such statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding

50. Although "inquiries into the applicability of the two exemptions may tend to merge," *Phillippi v. CIA*, 178 U.S.App.D.C. 243, 250, 546 F.2d 1009, 1016 n.14 (1976), Exemption 3 may of course be invoked independently of Exemption 1. *See Weissman v. CIA*, 184 U.S.App. D.C. 117, 123, 565 F.2d 692, 698 (1977); *Marks v. CIA*, 426 F.Supp. 708, 710-11 n.5 (D.D.C. 1977), *appeal docketed*, No. 77-1225 (D.C. Cir. 3 March 1977); J. T. O'Reilly, *supra* note 30, at ¶ 13.07. Whether the deleted portions of the Hillenkoetter Statement were properly withheld is perhaps more clearly and briefly stated under Exemption 3 than under Exemption 1, hence we reach Judge Hart's conclusion by a different path.

51. 5 U.S.C. § 552(b)(3) (1970).

52. National Security Act of 1947, ch. 343, tit. I, § 102, 61 Stat. 497 (presently codified at 50 U.S.C. § 403(d)(3) (1970)).

53. CIA Act of 1949, ch. 227, § 7, 63 Stat. 211 (presently codified at 50 U.S.C. § 403g (1970)).

54. 184 U.S.App.D.C. 117, 565 F.2d 692 (1977).

55. *Id.* at 119, 565 F.2d at 694. *See Phillippi v. CIA*, 178 U.S.App.D.C. 243, 249 n. 19, 546 F.2d 1009, 1015 n.14 (1976).

56. S.Rep.No.93–854, 93d Cong., 2d Sess. 16 (1974) ("Intelligence Sources and Methods (50 U.S.C. § 403(d)(3) and (g)) . . . have been exempted from public inspection under section 552(b)(3) . . . ."); S.Rep.No.93–1200, 93d Cong., 2d Sess. 12 (1974) (Conference Report) (same), U.S.Code Cong. & Admin.News 1974, p. 6267.

57. *E. g., Richardson v. Spahr*, 416 F.Supp. 752, 753 (W.D.Pa.), *aff'd*, 547 F.2d 1163 (3d Cir. 1976) (§§ 403(d)(3) & 403g are both Exemption 3 statutes); *Marks v. CIA*, 426 F.Supp. 708, 710–11 (D.D.C.1976), *appeal docketed*, No. 77–1225 (D.C. Cir. 3 March 1977) (same); *Baker v. CIA*, 425 F.Supp. 633, 635 (D.D.C.1977), *appeal docketed*, No. 77–1228, 188 U.S.App.D.C. 401, 580 F.2d 664 (D.C. Cir. 3 March 1977) (same).

58. H.R.Rep.No.94–880, pt. 1, 94th Cong., 2d Sess. 23 (1976), U.S.Code Cong. & Admin.News 1976, p. 2183, *citing* 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975). The revision in Exemption 3 represented a conforming amendment to 5 U.S.C. § 552b(c)(3) (1976), part of the Government in the Sunshine Act, Pub.L. No. 94–409, § 3(a), 90 Stat. 1241 (1976).

59. *Robertson* involved § 1104 of the Federal Aviation Act of 1958, 49 U.S.C. § 1504 (1970), which provides in pertinent part: "Whenever [any person objects to public disclosure of information received by the FAA], the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."

or refers to particular types of matters to be withheld."[60] There is nothing on the face of amended Exemption 3, or in its legislative history, to suggest that Congress in 1976 intended to upset the well-established Exemption 3 status of the CIA's protective statutes. Both § 403(d)(3) and § 403g "refer[ ] to particular types of matters to be withheld"—namely, information respecting intelligence sources and methods. Rep. Abzug, the amendment's primary sponsor in the House, explicitly stated on the floor that § 403g was one of the statutes intended to qualify under the new Exemption 3.[61] The only courts to consider the issue have held that the amendment left the Exemption 3 status of §§ 403(d)(3) and 403g unimpaired.[62] Scholarly commentators have reached the same conclusion.[63]

Having decided that § 403(d)(3) and § 403g remain qualifying statutes under amended Exemption 3, we must determine whether the deleted portions of the Hillenkoetter Statement fall within these statutes' protective compass. A court may be able to make such a determination on the basis of affidavits, without the need for discovery or *in camera* inspection.[64] Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage.[65]

60. Act of 13 Sept. 1976, Pub.L.No.94-409, § 5(b), 90 Stat. 1247 (presently codified at 5 U.S.C. § 552(b)(3) (1976)). The amendment became effective 12 March 1977, 180 days after its enactment. *See* Pub.L. No. 94-409, § 6.

61. 122 Cong. Rec. H9260 (daily ed. 31 Aug. 1976):

> I have been asked whether 50 U.S.C. [§] 403g, a statute relating to CIA exemption from laws such as the Sunshine Act and the Freedom of Information Act, comes within the third exemption as recommended by the conference. I have examined section 403g and believe that it does come within the exemption.

The legislative history cites, by way of example, in addition to the statute involved in *Robertson, supra* note 59, several statutes that would *not* qualify under amended Exemption 3. *See* H.R.Rep.No.94-880, pt. 1, 94th Cong., 2d Sess. 23 (1976), *citing* 18 U.S.C. § 1905 (1970); S.Rep.No.94-1178, 94th Cong., 2d Sess. 14 (1976) (Conference Report), *citing* 42 U.S.C. § 1306 (Supp. V 1975). These statutes are of the oceanic variety involved in *Robertson* and are in marked contrast to the CIA statutes involved here. 42 U.S.C. § 1306 provides that no disclosure of any information obtained at any time by or from the Departments of HEW or Labor shall be made except as relevant regulations prescribe. 18 U.S.C. § 1905 prohibits "[d]isclosure of confidential information generally" by any officer or employee of the United States "in any manner or to any extent not authorized by law."

62. *Fonda v. CIA*, 434 F.Supp. 498, 503-04 & n.6 (D.D.C.1977), *appeal docketed*, No. 77-1989 (D.C. Cir. 4 Nov. 1977); *Hayden v. CIA*, No. 76-284, slip op. at 3-4 (D.D.C. 15 Apr. 1977), *appeal docketed*, No. 77-1894 (D.C. Cir. 30 Sept. 1977).

63. *See* J. T. O'Reilly, *supra* note 30, at ¶ 13.07 ("mandatory" nature of CIA statutes "bars disclosure under either the original or revised versions of exemption (b)(3)"); Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum.L. Rev. 1029, 1044 n.91 (1976) (§ 403g qualifies under revised Exemption 3 because it specifies the "particular types of matters to be withheld").

64. Congress has instructed the courts to accord "substantial weight" to agency affidavits in national security cases. S.Rep.No.93-1200, 93d Cong., 2d Sess. 12 (1974) (Conference Report); 120 Cong.Rec. 36,870 (1974) (remarks of Sen. Muskie); *Weissman v. CIA*, 184 U.S.App.D.C. 117, 122 n.10, 565 F.2d 692, 697 n.10 (1977). A court has discretion to conduct *in camera* inspection under 5 U.S.C. § 552(a)(4)(B) (1976), but the legislative history makes clear that *in camera* inspection should be ordered only after an agency has been given "the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." S.Rep.No.93-1200, 93d Cong., 2d Sess. 9 (1974) (Conference Report), U.S.Code Cong. & Admin.News 1974, p. 6287. The description contained in the affidavits must be sufficiently detailed to show that the contested matter "logically falls into the category of the exemption indicated." *Weissman*, 184 U.S.App.D.C. at 122, 565 F.2d at 697.

65. *See EPA v. Mink*, 410 U.S. 73, 95 n.; 93 S.Ct. 827, 840, 35 L.Ed.2d 119 (1973) (Stewart, J., concurring) (under Exemption 3 "the only 'matter' to be determined in a district court's *de novo* inquiry is the factual existence of [a relevant] statute, regardless of how unwise, self-protective, or inadvertent the enactment might be"); J. T. O'Reilly, *supra* note 30, at ¶ 13.07.

[6] In this case, the issue for decision is whether the CIA has shown by affidavit that release of the Hillenkoetter Statement in its entirety would reveal "intelligence sources and methods," *e. g.*, by revealing the "organization" or "functions" of CIA personnel. According to an affidavit submitted by CIA Legislative Counsel George L. Cary, the deleted portions of the Hillenkoetter Statement contain detailed descriptions of (1) "intelligence collection and operational devices . . . still utilized"; (2) "methods of procurement and supply . . . unique to the Intelligence Community" which "are currently utilized"; (3) "basic concepts of intelligence methodology" of which "the essential elements remain viable"; (4) "specific clandestine intelligence operations," including the "names [of] the foreign countries involved"; and (5) "certain intelligence methodologies of a friendly foreign government." This affidavit has not been challenged. It demonstrates, in nonconclusory and detailed fashion,[66] that the deleted material describes "intelligence . . . methods," including the "functions" and "organization" of CIA personnel.[67] We hold, therefore, that the deleted portions of the Hillenkoetter Statement were properly withheld under FOIA Exemption 3.

The dissent would deny summary judgment on the Exemption 3 status of the Hillenkoetter Statement because the CIA did not furnish a *Vaughn v. Rosen* index of that document.[68] This argument exalts form over substance. *Vaughn* involved a request for numerous documents running to "many hundreds of pages," and the Government made a blanket claim that "the documents, as a whole, [were] exempt under three distinct exemptions."[69] We found it "preposterous to contend that all of the information [was] equally exempt under all of the alleged exemptions," and found "an adequate indexing system" necessary owing to our "inability to determine which exemptions appl[ied] to what portions of the information."[70] The present case involves 23 pages of deletions from one document. The CIA's affidavit lists the deletions; provides a "relatively detailed analysis"[71] of the material deleted; makes clear which exemptions are claimed for the deletions (Exemptions 1 & 3); and explains why the deleted material fits within the exemptions claimed (*i. e.*, how the deletions relate to "national security" and "intelligence sources and

In *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), we noted the need of techniques to test for the presence in a withheld document of segregable, nonexempt matter, lest an agency be able to "sweep[ ] disclosable material under a blanket allegation of exemption." *Id.*, at 347 n.21, 484 F.2d at 827 n.21. In this case, the need for discovery or *in camera* inspection to test for the presence of segregable, non-exempt material is considerably diminished: the CIA's claims of exemption are by no means "blanket" or "sweeping," and the Agency has already segregated and released 80% of the Hillenkoetter Statement to plaintiffs.

66. *See Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 346, 484 F.2d 820, 826 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

67. Section 403g does not of course license the Agency "to refuse to provide any information at all about anything it does." *Phillippi v. CIA*, 178 U.S.App.D.C. 243, 249 n.14, 546 F.2d 1009, 1015 n.14 (1976). In this case, disclosure of the "personnel" material at issue would lead to disclosure of intelligence sources and methods. *But see Baker v. CIA*, 425 F.Supp. 633, 635–36 (D.D.C.1977), *appeal pending*, No. 77–1228 (D.C. Cir. 1978) (§ 403g personnel matter exempt under Exemption 3 even absent proof that disclosure would in fact compromise intelligence sources and methods).

68. *See* diss. op. at ——— & ——— of 197 U.S.App.D.C., at 356–358 & 364–365 of 607 F.2d, *citing* 157 U.S.App.D.C. 340, 346–48, 484 F.2d 820, 826–28 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

69. *See* 157 U.S.App.D.C. at 345, 347, 484 F.2d at 825, 827.

70. *Id.* at 345–348, 347 n.22, 484 F.2d at 827–28, 827 n.22.

71. *Id.* at 346, 484 F.2d at 826. *See Maroscia v. Levi*, 569 F.2d 1000, 1003 (7th Cir. 1977) (per curiam) (upholding summary judgment on Exemption 1 status of CIA document, without *in camera* inspection, on basis of affidavit describing document "in some detail, indicating the circumstances and the sensitivity of the information," and explaining "[t]he potential harm resulting from disclosure of [the] document").

methods"). The CIA's justifications, we think, could not have been much more detailed without "compromis[ing] the secret nature of the information."[72] Although the Agency did not tender its analysis in the form of an "index," it satisfied the "detailed justification," "specificity," and "separation" requirements whose satisfaction the *Vaughn* index was meant to ensure. Although we do not retreat in the least from our belief that an index is of great assistance to requesters and courts in appropriate cases, common sense suggests that an index was unnecessary for the 23 pages that were so specifically described and justified here.

C. *The Thoroughness of the CIA's Search for Responsive Documents*

The CIA asserts that exhaustive searches of its files have succeeded in locating eight, and only eight, documents that are responsive to plaintiffs' FOIA request.[73] Plaintiffs contend that discovery is needed to test whether the CIA's search was complete. The district court awarded summary judgment in favor of the CIA, finding that "the CIA ha[d] made a full search in good faith and that no further discovery [was] justified."[74] We agree.

[7-9] In order to prevail on an FOIA motion for summary judgment, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements."[75] In determining whether an agency has met this burden of proof, the trial judge may rely on affidavits. Congress has instructed the courts to accord "substantial weight" to agency affidavits in national security cases,[76] and these affidavits are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt. The agency's affidavits, naturally, must be "relatively detailed" and nonconclusory[77] and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.[78]

In support of its motion for summary judgment, the CIA submitted affidavits executed by Gene F. Wilson, the Agency's Information and Privacy Coordinator. Wilson stated that in response to plaintiffs' initial request for "legislative history" he "caused a search to be made for all printed hearings, transcripts of hearings, [and] printed reports issued by Committees of the House, Committees of the Senate or Con-

72. *Vaughn v. Rosen*, 157 U.S.App.D.C. at 346–47, 484 F.2d at 826–27.

73. These documents are the five published hearings (released in full), the Vandenberg Statement (released in full), the Hillenkoetter Statement (withheld in part), and the Hearing Transcript (withheld in full). *See* pp. —— of 197 U.S.App.D.C., pp. 343–344 of 607 F.2d *supra*.

74. J.A. 190.

75. *National Cable Television Ass'n, Inc. v. FCC*, 156 U.S.App.D.C. 91, 94, 479 F.2d 183, 186 (1973).

76. S.Rep.No.93–1200, 93d Cong., 2d Sess. 12 (1974) (Conference Report); 120 Cong.Rec. 36,870 (1974) (remarks of Sen. Muskie). *See EPA v. Mink*, 410 U.S. 73, 93, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

77. *Vaughn v. Rosen*, 157 U.S.App.D.C. 340, 346, 484 F.2d 820, 826 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

78. *See Nolen v. Rumsfeld*, 535 F.2d 890, 891–92 (5th Cir. 1976) (granting summary judgment upon agency's representations "in candor and in good faith" that all responsive documents were made available to plaintiff); *Association of Nat'l Advertisers, Inc. v. FTC*, 38 Ad.L.2d 643, 644 (D.D.C. 1 April 1976) (where record indicates that agency search was "reasonably thorough," discovery may be limited by court; to justify discovery where FTC "has already stated under oath that the search was Commission-wide and complete, . . . [p]laintiff must demonstrate some substantial discrepancy between the defendants' actions and words . . ."); *Exxon Corp. v. FTC*, 384 F.Supp. 755, 759–60 (D.D.C.1974), *remanded*, 174 U.S. App.D.C. 77, 527 F.2d 1386 (1976), *dismissed*, No. 73–1928 (D.D.C. 28 Feb. 1977) (limiting discovery where affidavits demonstrated adequacy of search).

ference Committees."[79] This search produced five published reports and the Hearing Transcript. Subsequently, plaintiffs expanded their request to include all documents "which may have been used to prepare for Congressional testimony."[80] Wilson then conducted a "further exhaustive search" for "copies of prepared testimony or statements presented in response to congressional consideration of the legislation" cited by plaintiffs.[81] In this search, the CIA "interpreted [plaintiffs'] request broadly enough to ensure that [it] would locate all documents within the scope of the request," and "searched and reviewed all files which might contain [responsive] documents."[82] This search produced the Vandenberg and Hillenkoetter Statements, but "failed to locate any additional records which could be considered responsive to plaintiffs' request."[83] Since the CIA has no indices or compendiums identifying records as "preparatory documents for congressional testimony," any additional records of this description, if they exist, could be found only by "a page-by-page search" through the "84,000 cubic feet of documents in the [CIA] Records Center."[84] Even if such a page-by-page search were undertaken, it would be "impossible to determine which documents, if any, were in fact used to prepare for congressional testimony on the legislation cited by plaintiffs."[85]

We think that Wilson's sworn affidavits on their face are plainly adequate to demonstrate the thoroughness of the CIA's search for responsive documents. The affidavits give detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome. Plaintiffs argue, however, that even if Wilson's affidavits are otherwise sufficient to support summary judgment in favor of the CIA, discovery is required here because there is reason to doubt the Agency's good faith.

[10] First, plaintiffs note that hearings occurred on the CIA's enabling statutes for which no published transcripts exist, and argue that unpublished transcripts of these hearings, as well as CIA back-up documents prepared for use at these hearings, "*must* exist."[86] Although appeals to common sense are not altogether to be condemned, plaintiffs' argument is unpersuasive here. Even if we assume that the documents plaintiffs posit were *created*, there is no reason to believe that the documents, thirty years later, still exist, or, if they exist, that they are in the possession of the CIA. Moreover, even if the documents do exist and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search. It is well established that an agency is not "required to reorganize [its] files in response to [a plaintiff's] request in the form in which it was made,"[87] and that if an agency has not previously segregated the requested class of records production may be required only "where the agency [can] identify that material with reasonable effort."[88] Wilson's affidavits plainly show

79. J.A. 174.

80. J.A. 106. *See* pp. ——— of 197 U.S.App.D.C., pp. 343–344 of 607 F.2d *supra*.

81. J.A. 78, 174.

82. J.A. 78.

83. J.A. 174.

84. J.A. 175.

85. *Id.*

86. J.A. 110 (emphasis in original). *See* Brief of Appellants at 26–27.

87. *Irons v. Schuyler*, 151 U.S.App.D.C. 23, 30, 465 F.2d 608, 615, *cert. denied*, 409 U.S. 1076, 93 S.Ct. 682, 34 L.Ed.2d 664 (1972).

88. *National Cable Television Ass'n, Inc. v. FCC*, 156 U.S.App.D.C. 91, 100, 479 F.2d 183, 192 (1973). *See* H.R.Rep.No.93–876, 93d Cong., 2d Sess. 5–6 (1974), U.S.Code Cong. & Admin. News 1974, p. 6271 (description of records requested must enable "a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort").

that the effort required to locate the hypothesized "back-up" documents would be unreasonable here.

Second, plaintiffs argue that the Church Committee Report [89] refers to several documents that "appear to be within the scope of plaintiffs' FOIA request . . . , and copies of which could reasonably be expected to be in the possession of the CIA, but which defendants have neither identified or produced . . . ." [90] This argument is similarly unpersuasive. In their expanded request for "legislative history," plaintiffs sought access to Congressional reports and hearings on specific bills, and CIA materials that may have been "the basis for testimony at hearings" or "included in . . . reports" on those bills. Fifteen of the seventeen documents plaintiffs cite from the Church Committee Report lie unmistakably outside the scope of their FOIA request.[91] The two remaining documents are transcripts of Congressional hearings in executive session.[92] In his affidavit, Wilson stated that these documents, "if they exist, are not held by the [CIA]." [93] Since the transcripts are Congressional materials, and since there is no indication in the Church Committee Report that the transcripts were received from or returned to the CIA,[94]

89. Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S.Rep.No.94-755, book 1, 94th Cong., 2d Sess. (1976) [hereinafter "Church Committee Report" or "Report"].

90. J.A. 178.

91. In their Brief at 21-23 n.7, plaintiffs refer to the following documents:

(a) Two memoranda from Wm. J. Donovan to the President, dated 1941 and 1944 (cited in Report at 481 n.24 & 482 n.28). These documents antedate by at least three years the legislation cited by plaintiffs; neither memorandum discusses any legislation whatever, nor was either prepared for testimony on legislation. *See* Wilson Affidavit, J.A. 183.

(b) Three memoranda from the CIA General Counsel to the Director, dated 1947-49 (cited in Report, *e. g.*, at 132 n.19, 72 n.7 & 492 n.70). These documents are internal CIA memoranda which were not prepared for testimony on the cited legislation and were in no way used in the legislative process. *See* Wilson Affidavit, J.A. 183.

(c) Three transcripts of Congressional testimony, dated 1975 (cited in Report, *e. g.*, at 141 n.1, 133 n.27 & 483 n.32). These documents postdate by 26 years the legislation cited by plaintiffs; the testimony was not given in hearings on that legislation.

(d) Three internal CIA memoranda, dated 1961-74, and one memorandum prepared by the Justice Dept., dated 1962 (cited in Report, *e. g.*, at 128 n.1a, 133 n.25, 478 n.10 & 133 n.26). These documents postdate by 13 years the legislation cited by plaintiffs; none of the memoranda was prepared for testimony on that legislation. *See* Wilson Affidavit, J.A. 183.

(e) Three draft legislative histories of the CIA prepared by the CIA Legislative Counsel's Office, dated 1967 (cited in Report, *e. g.*, at 71 n.5 & 480 n.19). These documents postdate by 18 years the legislation cited by plaintiffs; none constitutes a report or hearings on that legislation and none was prepared for testimony on that legislation. *See* Wilson Affidavit, J.A. 183.

92. *Hearings before the Senate Armed Services Comm. on S. 758* (1947), *Hearings before the House Comm. on Expenditures in the Executive Departments on H.R. 2139* (1947) (cited in Report, *e. g.*, at 72 n.6). The Hearing Transcript identified by the CIA contains *some* of the testimony taken at the House hearings. Plaintiffs seek, and the CIA denies possession of, transcripts of the remainder of the testimony taken at those hearings.

93. J.A. 183.

94. The Church Committee Report cites only two documents that are said to be "on file at the CIA." The first is the "Statement of the Director of Central Intelligence [Hillenkoetter] Before the House Armed Services Committee [on] 8 April 1948" (cited in Report at 494 n.74). This is the "Hillenkoetter Statement" which the CIA identified and for the most part released. The second is so-called "Testimony of Gen. Hoyt S. Vandenberg before the House Armed Services Committee Hearing on H.R. 5871, 4/8/48" (cited in Report at 495 n.80). The CIA at oral argument denied possession of this document. We believe that the document in all probability does not exist. According to the Congressional Record Daily Digest, the only CIA officials to testify on H.R. 5871 before the House Armed Services Committee on 8 April 1948 were Hillenkoetter and Walter Pforzheimer. 94 Cong.Rec. D242 (1948). The error in the Church Committee Report seems easily explicable. The transcript of Hillenkoetter's 8 April 1948 testimony was entitled simply "Statement of the Director of Central Intelligence." Hillenkoetter was Director in 1948, and Vandenberg was Director in 1947. Apparently, the report wrongly attributed the 8 April 1948 statement of the unnamed CIA Director to Hillenkoetter's predecessor.

there is no reason to question the good faith of Wilson's asseveration.

Third, plaintiffs argue that the CIA's "pattern of obfuscation and delay" in dealing with them signals the Agency's *mala fides.* The Agency, they say, first denied having any responsive documents, then found some, then found some more: these "inconsistent positions" and this piecemeal disclosure are said to imply bad faith. We take a different view of the facts. Sara Holtz originally requested "legislative history," defined as Congressional hearings and reports; the CIA not unnaturally directed her to the Library of Congress. When Holtz replied that she wanted *unpublished* hearings and reports, the CIA identified the Hearing Transcript. When Goland and Skidmore said that they wanted not only hearings and reports, but Executive Branch back-up documents, the CIA identified the Vandenberg and Hillenkoetter Statements. The Agency's "piecemeal" pattern of disclosure followed faithfully the piecemeal pattern of requests, and thus here indicated, if anything, good faith rather than bad; indeed, this Court held as much in *Weissman v. CIA.*[95] The Agency's responses were not always timely; but in view of the well-publicized problems created by the statute's 10- and 20-day time limits for processing FOIA requests and appeals,[96] the CIA's delay alone cannot be said to indicate an absence of good faith.

The dissent, while not seriously questioning the CIA's good faith, says that discovery is needed in any event to ascertain whether the CIA personnel conducting the search used an "underinclusive" definition of "legislative history."[97] We disagree. The CIA personnel conducting the search evidently used the definition of "legislative history" that plaintiffs gave them, namely, "hearings, reports, and Executive Branch back-up documents." That this is so is suggested by the fact that the CIA's search produced hearings, reports, and Executive Branch backup documents. Nor do we think discovery was necessary to enable plaintiffs "to reformulate their request to eliminate confusion and the possibility of future lawsuits."[98] "Legislative history" admittedly is not a term whose meaning can be nicely cabined within bright lines; but it is the term plaintiffs used, and if any ambiguity was introduced thereby plaintiffs must reap what they have sown. It would be bizarre indeed if a plaintiff, simply by employing ambiguous language in his FOIA request, could assure himself of potentially harassing discovery for the purpose of dispelling the confusion he had engendered.

[11] We hold, therefore, that plaintiffs have made no showing of CIA bad faith sufficient to impugn the Wilson affidavit, which on its face suffices to demonstrate that the CIA's search for responsive documents was complete. For this reason, the district court's grant of summary judgment without discovery was within its discretion.

D. *The CIA's Definition of Agency "Records."*

Plaintiffs contend that the CIA's definition of agency "records" is unduly narrow,[99]

95. 184 U.S.App.D.C. at 123, 565 F.2d at 698 (footnote omitted):

> The CIA dealt with the instant request in a conscientious manner. It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. Agency documents have been released to plaintiff-appellant on four separate occasions.

See *Fonda v. CIA,* 434 F.Supp. at 502, *appeal docketed,* No. 77-1989 (D.C. Cir. 4 Nov. 1977): "The CIA dealt with plaintiff's request in a conscientious manner. It disclosed much material and it came forward with newly discovered documents as located. . . ."

96. *See* J. T. O'Reilly, *supra* note 30, at ¶ 7.02.

97. *See* diss. op. at —— of 197 U.S.App.D.C., at 366 of 607 F.2d.

98. *See id.* at ——, at 366 of 607 F.2d.

99. 32 C.F.R. § 1900.3(g) (1976) defined CIA "records" to exclude (1) certain indexing and filing documents; (2) certain routing and transmittal sheets; (3) books and periodicals; (4) documents prepared by an agency other than the CIA; and (5) documents furnished by foreign governments under promise of confidentiality. The definition was amended in 1977 and the latter two exclusions were removed.

and that they have been injured because the Agency relied on this definition in denying them records to which they are entitled. The CIA responds that plaintiffs lack standing to maintain this challenge, arguing that it did not rely on the definition's "exceptions" in processing plaintiffs' request. The district court did not reach this issue. We do not reach it either. We have held that the CIA made a full search in good faith for responsive documents, and that the withheld material was withheld properly. Since plaintiffs have received all documents to which they are entitled, no live controversy remains between them and the CIA on the definitional issue.

E. *Attorneys' Fees.*

The trial judge declined to award attorneys' fees to plaintiffs. The FOIA provides that attorneys' fees and costs may be assessed against the United States "in any case . . . in which the complainant has substantially prevailed." [100] Although a cursory reading of this opinion would not suggest that plaintiffs have passed this test, they argue that even if all relief should be denied them they have "substantially prevailed" because the CIA released the Vandenberg Statement and portions of the Hillenkoetter statement *after* they commenced suit. Even if plaintiffs could show some causal nexus between their litigation and the CIA's disclosure,[101] which they have not done,[102] we doubt that plaintiffs could be said to have "substantially prevailed" if they, like Pyrrhus, have won a battle but lost the war.[103]

The judgment of the district court accordingly is

Affirmed.

BAZELON, Circuit Judge, dissenting:

I respectfully submit that the court today departs from well-established principles in this circuit in order to sustain summary judgment for the Central Intelligence Agency (CIA). The court also adopts a restrictive definition of "agency records" that erodes the right to disclosure under the

See 42 Fed.Reg. 24,049 (12 May 1977) (codified at 32 C.F.R. § 1900.3(g) (1977)).

100. 5 U.S.C. § 552(a)(4)(E) (1976).

101. *See Vermont Low Income Advocacy Council, Inc. (VLIAC) v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976) (Friendly, J.):

> In order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information.

102. *Res ipsa loquitur*, as it were, is of no assistance to plaintiffs here. The CIA's release of the Statement, to all appearances, represents its good-faith efforts to come forward with newly-discovered documents as located. *See* p. —— of 197 U.S.App.D.C., p. 355 of 607 F.2d & note 95 *supra*. The fact that these documents were released after plaintiffs brought suit on 28 Jan. 1977, to all appearances, owes to the time-consuming nature of a search for materials "used to prepare for congressional testimony," p. —— of 197 U.S.App.D.C., p. 353 of 607 F.2d *supra*; and to the fact that plaintiffs did not request access to such materials until 16 Dec. 1976. *See* pp. ——–—— of 197 U.S.App.D.C., pp. 343–344 of 607 F.2d *supra*. Plaintiffs' argument, in fine, boils down to *post hoc, ergo propter hoc*, a fallacy that Congress wisely refrained from incorporating into the attorneys' fees provision of FOIA. *See VLIAC*, 546 F.2d at 514.

103. In order to win the war, plaintiffs need not obtain a judgment in court. *See Cuneo v. Rumsfeld*, 180 U.S.App.D.C. 184, 188–89, 553 F.2d 1360, 1364–65 (1977) (Tamm, J.) (citing cases); *VLIAC*, 546 F.2d at 513. They must, however, *substantially* prevail. *Cf. Cuneo*, 180 U.S.App.D.C. at 189, 553 F.2d at 1365 (plaintiffs substantially prevailed where, "[a]fter almost eight years of tedious, hard fought litigation, the government, faced with the appointment of a special master to review the case," supplied *all* the material requested). Even if the plaintiff is held to have substantially prevailed, the award of attorneys' fees lies within the district court's discretion. *See Cuneo*, 180 U.S.App.D.C. at 189–90, 553 F.2d at 1365–66; *VLIAC*, 546 F.2d at 512–13 (citing legislative history). An important factor in the exercise of this discretion is a determination whether the agency has been "recalcitrant in its opposition to a valid claim or [has] otherwise engaged in obdurate behavior." *Cuneo*, 180 U.S.App.D.C. at 190, 553 F.2d at 1366. The CIA's behavior was neither recalcitrant nor obdurate here.

Freedom of Information Act[1] (FOIA) and promotes secret law.

I. THE NEED FOR DISCOVERY IN FOIA CASES

Without discovery, a party to litigation may not have access to facts necessary to oppose a motion for summary judgment. This problem is especially acute for plaintiffs in FOIA cases. Indeed, recognition of this dilemma has shaped a number of our decisions. In *Vaughn v. Rosen*, 157 U.S. App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), summary judgment was granted to the government on the basis of an affidavit declaring that the documents sought were exempt from disclosure. We reversed, recognizing that a FOIA plaintiff "obviously cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure[,]" 157 U.S.App.D.C. at 343, 484 F.2d at 823; that "[t]his lack of knowledge . . . seriously distorts the traditional adversary nature of our legal system's form of dispute resolution[,]" *id.* 157 U.S.App. D.C. at 344, 484 F.2d at 824; and that, although "formal" discovery under the Federal Rules of Civil Procedure was not at issue,[2] procedures would have to be instituted to provide FOIA plaintiffs information roughly equivalent to what they would obtain through such discovery. "[C]ourts will simply no longer accept [from the defendant agency] conclusory and generalized allegations of exemptions . . . but will require a relatively detailed analysis in manageable segments [of the contents of documents the agency seeks to withhold]." *Id.* 157 U.S.App.D.C. at 346, 484 F.2d at 826. We held such a procedure necessary—*before* summary judgment could be granted to the government—to enable a FOIA plaintiff "to argue with desirable legal precision for the revelation of the concealed information." *Id.* 157 U.S.App.D.C. at 343, 484 F.2d at 823.

Subsequently, the problem of ensuring adversariness arose in a context similar in several respects to the case at bar. In *Schaffer v. Kissinger*, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974) (*per curiam*), before plaintiff was able successfully to pursue discovery, summary judgment was granted to the government on the basis of an affidavit stating that the documents plaintiff sought were classified "confidential" pursuant to Executive Order 11652, 3 C.F.R. 339 (1974), 50 U.S.C. § 401 (Supp. IV 1974). This court reversed, emphasizing that plaintiff had also filed an affidavit, as provided for by Rule 56(f), Fed.R.Civ.P.,[3] stating his belief that genuine issues existed as to whether the classification was properly effected and indicating that he could not verify that belief without discovery. The court based its holding on the language of Rule

1. 5 U.S.C. § 552 (1976).

2. The sole issue in *Vaughn* was whether the agency had demonstrated by affidavit that the documents sought were exempt from disclosure. Plaintiff simply contested the sufficiency of the affidavit. 157 U.S.App.D.C. at 343, 484 F.2d at 823. He did not attempt to bolster his case by serving interrogatories on agency officials, Rule 33, Fed.R.Civ.P., or by deposing them, Rules 30 and 31. Thus the question whether discovery under the rules should be permitted was not involved in the case.

In the present case, by contrast, plaintiffs urge that proper ventilation of the issues requires both discovery and more detailed affidavits. Plaintiffs seek to discover the circumstances surrounding the creation, and possession by the CIA, of the "hearing transcript," Part II, *infra*; the procedures and substantive criteria observed in classifying the "Hillenkoetter statement," Part III(A), *infra*; the breadth of the CIA's search for responsive documents and the reasons for delay, Part IV, *infra*; and whether the agency's decision to disclose certain materials was prompted by this lawsuit, Part V, *infra*. In addition, plaintiffs contend that the affidavits filed by the CIA fail adequately to describe specific materials withheld and the reasons for nondisclosure, Parts II n.8 and III(B), *infra*.

3. (f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

56(f),[4] the policies underlying the FOIA, and common sense:

> Facts respecting the classification of the reports in question are solely in the control of the [defendant agency]. [Plaintiff] should be allowed to undertake discovery for the purpose of uncovering facts which might prove his right of access to the documents which he seeks.

164 U.S.App.D.C. at 284, 505 F.2d at 391. It is significant that there was no evidence in *Schaffer* bolstering plaintiff's claim that the affidavit submitted by the defendant agency was either executed in bad faith or was somehow erroneous. Without discovery, plaintiff had no means of producing such evidence. Relying solely on his Rule 56(f) affidavit, the court remanded the case with instructions to permit plaintiff to undertake discovery relevant to whether the reports in question were properly classified "confidential."

Today the court ignores both *Schaffer* and the "overwhelming emphasis [the FOIA places] upon disclosure," which guided our analysis in *Vaughn*. 157 U.S.App.D.C. at 343, 484 F.2d at 823. It does so in its zeal to protect the CIA from the burden of processing meritless FOIA requests for vital security information. I believe that such protection is available without eroding the requirements of the FOIA. First of all, the CIA has made no claim that preparation of the index mandated by *Vaughn v. Rosen* would have been either overly burdensome or likely to disclose matters that should be kept secret. Moreover, the CIA offers neither evidence nor reason to find that a complete bar to discovery was necessary to protect its personnel from harassment. Proper supervision of the discovery process, as described in the margin,[5] could have avoided such problems. Through indexing and discovery the adversary system would have worked to maximize the probability that nonexempt information would be disclosed, thus fulfilling the central purpose of the FOIA.[6]

In sum, I submit that the grant of summary judgment to the CIA was premature. This position is reinforced by the factual ambiguity which pervades this record and which is exacerbated by the questionable legal standard on which the court distinguishes "agency records" from "congressional documents in an agency's possession."

II. THE MAJORITY'S "CONTROL/PROPERTY" TEST

The dispute in this case centers on two documents which the CIA admittedly possesses and on the scope of the CIA's search

4. *See* note 3 *supra*.

5. The Federal Rules leave discovery in the hands of the parties in the first instance. The district court is charged with supervising the process when disputes arise. Thus, if the CIA believed plaintiffs' requests for discovery to be burdensome or otherwise objectionable, it had several alternatives to a motion for summary judgment that were more consonant with the spirit of the FOIA. It could, for example, have served objections to specific interrogatories on plaintiffs, who then would have had to decide whether to move in district court to compel answers under Rule 37(a)(2). The CIA could itself have moved in district court to terminate or limit a deposition, Rule 30(d), or for a protective order, Rule 26(c). The grounds for such a protective order, like those for refusing to answer specific questions, are generous. The district court "may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. . . ." *Id.* The district court may also, of course, recognize any privilege asserted by a party seeking to resist discovery. Rule 26(c)(6). Thus discovery would neither have overly burdened the agency nor jeopardized its legitimate secrets, but would have provided both plaintiffs and the district court the information necessary to make the FOIA work.

6. *See generally* S.Rep.No.813, 89th Cong., 1st Sess. (1965); H.R.Rep.No.1497, 89th Cong., 2d Sess. (1966), U.S.Code Cong. & Admin.News 1966, p. 2418. The Senate Report states unequivocally that "[i]t is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . ." S.Rep.No.813, *supra*, at 3. *See also* H.R.Rep.No.1497, *supra*, at 3.

For a brief discussion of the history and purposes of the FOIA, see *EPA v. Mink*, 410 U.S. 73, 79–80, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

for additional documents responsive to plaintiffs' request for "legislative history." The first document is a photostatic copy of a transcript containing the minutes of hearings conducted by the House Committee on Expenditures in the Executive Department on June 27, 1947. (Hereinafter referred to as the "hearing transcript.") The second document is entitled "Statement of the Director of Central Intelligence before the House Armed Services Committee—8 April 1948." (Hereinafter referred to as the "Hillenkoetter statement.")

My brothers agree with the CIA's contention that the hearing transcript is simply unavailable to the public, whether or not specifically exempted from disclosure by the FOIA.[7] They find that the transcript is a "congressional document," not an "agency record," and is therefore wholly beyond the reach of the Act. The court reasons that "the circumstances attending [the transcript's] generation and the conditions attached to its possession by the CIA" plainly reveal that it "remains under the *control* and continues to be the *property* of the House of Representatives." Maj. op. at — of 197 U.S.App.D.C., at 347 of 607 F.2d (emphasis added). This conclusion is reached as a matter of law, thus eliminating any justification for discovery, on the basis of representations by CIA officials. The agency has stated by affidavit that the transcript contains testimony taken in Executive Session; typewritten on both the cover and first page of the transcript is the word "Secret"; the text reveals that the stenographer and typist were sworn to secrecy; the CIA retains a copy of the transcipt for "internal reference purposes" only. *Id.* at — of 197 U.S.App.D.C., at 347 of 607 F.2d, J.A. at 80.

In my view, the record in this case establishes as a matter of law that the hearing transcript *is* an "agency record," and the court is empowered to order it withheld only if it qualifies for nondisclosure under FOIA exemptions one or three.[8] First of all, the CIA claims to have had exclusive possession of this document for more than thirty years.[9] More importantly, the CIA acknowledges that it employs this information in interpreting its organic legislation [10] —*i. e.,* in making decisions with respect to

7. This is our first occasion to consider an agency's claim that the FOIA does not apply to information in its possession. *Compare, e. g., Soucie v. David,* 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971), in which the issue was whether the Office of Science and Technology is an "agency" for purposes of the FOIA.

The Court of Appeals for the Tenth Circuit, however, has considered a claim similar to that raised here by the CIA. In *Cook v. Willingham,* 400 F.2d 885 (10th Cir. 1968) (per curiam), the court decided that presentence reports are not "agency records" even though in the possession of prison authorities. I disagree. *See* note 13 *infra.*

8. 5 U.S.C. §§ 552(b)(1), (3) (1976). I submit that the exemption one issue cannot be resolved on this record since the CIA has failed to reveal whether the procedures it followed in classifying the transcript comport with the requirements of Executive Order No. 11652. The Affidavit of George L. Cary, Legislative Counsel of the CIA (hereinafter "Cary Affidavit"), J.A. at 81, states only that a "Secret" classification marking has been affixed on the face of the transcript. It does not mention the other requirements contained in the Executive Order. *See generally* Part III(A) *infra.* I suggest also that neither exemption one nor exemption three can be held applicable to the transcript until the CIA files an itemized description of its contents. *See generally id.*; Part III(B) *infra.*

9. Although no explanation of "agency records" is provided either in the FOIA itself or in the legislative history, the Justice Department has suggested that the Act requires disclosure of "records in being and in the possession *or* control of an agency." R. Clark, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23 (1967), *reprinted* in Freedom of Information Act Source Book, S.Rep.No.82, 93d Cong., 2d Sess. 222 (1974) (emphasis supplied) (hereinafter "Attorney General's Memorandum"). This interpretation supports plaintiffs' position that possession suffices and is consistent with the general view advanced here that any attempt by the courts to define "agency records" must be shaped primarily by the policy of full disclosure underlying the Act. *See* notes 6 *supra* and 12 *infra.*

10. The Cary Affidavit states that the agency uses the transcript "in conjunction with congressional action on legislation dealing with the establishment of the Office of the Director of Central Intelligence, the Central Intelligence Agency and its functions." J.A. at 80.

policy and operations. The Act does not define "agency records." But the House and Senate reports reveal that the fundamental purpose of the FOIA was to open administrative policy and operations to the light of public scrutiny.[11]

I also find the court's "control property" test unpersuasive. We are not told what it meant by congressional "control" over a document in an agency's possession; or in what sense such a document can be considered congressional "property." The fact that Congress is a non-agency does not preclude a document or copy of a document it has *created* from ever qualifying as an "agency record." Federal agencies regularly receive documents created by non-agencies that obviously become "agency records" in the ordinary course. *See, e. g., Washington Research Project, Inc. v. HEW,* 164 U.S.App.D.C. 169, 504 F.2d 238 (1974) (grant application submitted to National Institute of Mental Health by noncommercial research scientist); *Irons v. Gottschalk,* 369 F.Supp. 403 (D.D.C.1974) (patent applications). Nor can the court rely on the view that because Congress may have somehow forbidden the CIA to disclose the transcript, thus exercising "control" over its contents, the transcript cannot be considered an "agency record." "Control" in this sense goes to the question whether a document is *exempt* from disclosure—not to whether it is an "agency record."[12] In every exemp-

11. The reports indicate that the FOIA was intended to strengthen the Public Information section of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964), which was "drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance." H.R.Rep.No.1497, 89th Cong., 2d Sess. 3 (1966) (*quoting from* H.R.Rep.No.752, 79th Cong., 1st Sess. 198 (1945), U.S.Code Cong. & Admin.News 1966, pp. 2418, 2420. *See also* S.Rep.No.813, 89th Cong., 1st Sess. 8 (1965) ("[T]he very purpose for which [the Public Information Section] was intended [was to guarantee] the public's right to know the operations of its government."); *Dept. of the Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); *SOC Development Corp. v. Mathews,* 542 F.2d 1116 (9th Cir. 1976).

My brothers would facilitate the flow of information between Congress and the Executive branch, maj. op. at —— of 197 U.S.App.D.C., at 346 of 607 F.2d, at the prohibitive cost of perpetuating the "secret law" we have condemned so frequently. *See e. g., Tax Analysts & Advocates v. IRS,* 164 U.S.App.D.C. 243, 246, 505 F.2d 350, 353 (1974); *Cuneo v. Schlesinger,* 157 U.S.App.D.C. 368, 173, 484 F.2d 1086, 1091 n.13 (1973).

12. This view of congressional "control" derives from the history of the FOIA as well as its plain language. Before the FOIA was enacted, the disclosure provisions of the Administrative Procedure Act allowed agencies to withhold information "in the public interest," or "for good cause shown," or on the ground that the person seeking the record was not "properly and directly concerned." 5 U.S.C. § 1002 (1964). The FOIA was designed specifically to eliminate these discretionary standards. *Soucie v. David,* 145 U.S.App.D.C. 144, 153–54, 448 F.2d 1067, 1076–77 (1971); *Bristol-Myers Co. v. FTC,* 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938 (1970); *American Mail Line, Ltd. v. Gulick,* 133 U.S.App.D.C. 382, 385, 411 F.2d 696, 699 (1969); H.R.Rep.No.1497, 89th Cong., 2d Sess. 1–2, 5–6, 8–9, 11 (1966); S.Rep.No.813, 89th Cong., 1st Sess. 3–6, 8, 10 (1965). Congress replaced them with a general requirement that all "records" be disclosed, 5 U.S.C. § 552(a)(3) (1976), offset by nine—and only nine—categories of privileged material. *Id.* § 552(b)(1)–(9). To avoid the creation of new loopholes, Congress expressly limited the grounds for nondisclosure to those specified in the exemptions: "This section does not authorize withholding information or limit the availability of records to the public, *except as specifically stated in this section.*" *Id.* § 552(c) (emphasis supplied).

My colleagues justify their view of congressional "control" on the theory that "Congress has broad powers to keep its documents secret . . . [and does not] waive[ ] its . . . prerogatives of confidentiality" when it transfers a "secret" document to an agency. Maj. op. at n.48.

I think it is fair to say that the court creates a tenth exemption for documents subject to what it terms "congressional prerogatives of confidentiality." To be sure, there can be no doubt about the existence of congressional power to maintain the secrecy of congressional proceedings, *see* U.S.Const. art. I, § 5, and thus to preserve the secrecy of documents in which the minutes of those proceedings are transcribed. The question in this case, however, is not whether such a power exists, but whether Congress continues to exercise it after transferring a document to an agency on an ostensibly permanent basis.

I read the FOIA as an unequivocal declaration by Congress that documents which have become part of the administrative process are subject to full disclosure unless specifically exempted.

tion 3 case, for example, the ultimate question is whether Congress has forbidden the agency to disclose the records sought. To illustrate, 26 U.S.C. § 7213(a)(1) makes it unlawful "to divulge to any person the amount of income . . . set forth . . in any income return . . . ." This proscription does not mean that tax returns are not "agency records." Rather, tax returns are agency records that must be withheld under exemption 3. *See, e. g., Tax Analysts & Advocates v. Internal Revenue Service*, 164 U.S.App.D.C. 243, 505 F.2d 350 (1974).

It appears that the court would supplement the element of "control" with other concepts having to do with "property." The court's ultimate position, as I see it, would be that Congress has a property interest in, as well as control over, the *contents* of the transcript, the *paper* on which the contents are typed, and any *copy* of the transcript. But so sweeping a notion of congressional control and property is plainly at odds with the majority's concession that the Hillenkoetter statement is an "agency record." Maj. op. at — of 197 U.S.App.D.C., at 348 of 607 F.2d. Both the transcript and the Hillenkoetter statement contain testimony originally prepared by intelligence officials and subsequently delivered secretly before Congress. J.A. at 79–82. There is no logical reason to believe, and none has been suggested, that Congress would have an interest in controlling the testimony in one but not the other. The transcript contains, in addition to testimony, questions and comments by committee members. Perhaps, then, the testimony should be considered the property of the Executive branch, where it originated, and the comments the property of Congress. If so, to the extent the transcript consists of nonexempt testimony it should be disclosed under the majority's own rationale.[13] The only further difference between the two documents that is even arguably material is that the copy of the Hillenkoetter statement which the CIA possesses was apparently typed by agency employees, while the CIA's copy of the transcript was transcribed and typed by employees of Congress. As I have indicated, the origin of a piece of paper is simply not dispositive of the question whether it qualifies as an "agency record."

In any case, even assuming the "control/property" standard is the correct one, factual ambiguities in the record would preclude summary judgment. If Congress does, generally speaking, exert control over, and maintain property interests in, docu-

13. The majority asserts that this argument is "frivolous" because "the [h]earing [t]ranscript is not an agency record . . . ." Maj. op. at n.47. In so doing the majority not only overlooks the "property" element of its own test, but also assumes its conclusion. As I understand the legal standard the court proposes, the question whether a document is an "agency record" requires consideration of whether the document is the "property" of an agency. Surely, then, the majority must consider whether the testimony contained in the transcript is the "property" of the Executive branch.

14. That the majority fails to consider fully the perplexity of its "property" rationale is reflected also by its reliance on *Cook v. Willingham*, 400 F.2d 885 (10th Cir. 1968) (per curiam). In that case the court held that a presentence report in the hands of prison authorities was not an "agency record" because it "was made for the use of the sentencing court and thereafter remains in the exclusive control of that court despite any joint utility it may eventually serve." *Id.* Perhaps the sentencing court can be said to have a "property" interest in a presentence report since such reports are prepared for that court by an arm of that court—the United States Probation Office. *See* Rule 32(c)(1), Fed.R.Crim.P. Since the contents of a presentence report originate with the courts, however, not with the Executive branch, such reports would appear distinguishable under the majority's standard from the testimony contained in the hearing transcript at issue here.

In any event, I believe that *Cook* was wrongly decided. The brief opinion in that case fails to clarify exactly how the sentencing court exercises control over a document in the possession of prison authorities. Moreover, the opinion fails to envision the possibility that the sentencing court could ever relinquish such control. In my view, once the prison authorities had possession of the report for use in connection with administrative decisions (e. g., parole release), the report became a quintessential "agency record." *See* note 11 *supra* and accompanying text.

ments possessed by federal agencies, the majority's test generates a need to ascertain the methods by which such control is exercised and relinquished, and the means by which such property interests are created and extinguished. In this case discovery is necessary specifically to determine whether Congress or the committee that conducted the hearings ever instructed the CIA to preserve the secrecy of the transcript, and, if so, for how long. Apparently the transcript itself contains no such express instruction, and the CIA concedes that the source of the "Secret" classification is unknown. J.A. at 80. The fact that the committee met in Executive Session serves only to raise further questions concerning the nature of the "longstanding practice" governing secrecy of such sessions to which the majority refers. Maj. op. at n.45.[14] Also, discovery is necessary to determine whether, in the thirty years during which the CIA has possessed the transcript, it has ever acted inconsistently with congressional "control," as by disclosing the contents of the transcript to other agencies or individuals without seeking congressional authority. Finally, plaintiffs should be permitted to pursue further the question whether Congress itself has explicitly or implicitly indicated that it no longer considers preservation of the transcript's secrecy to be crucial. Even without discovery plaintiffs have demonstrated that the Church Committee has published portions of the transcript.[15]

III. THE CIA'S CLAIMS OF EXEMPTION

The majority adopts the CIA's declaration by affidavit that the withheld portions[16] of the Hillenkoetter statement are exempt from disclosure as a matter of law on grounds of national security. This result is reached by two separate paths—directly, under FOIA exemption one, 5 U.S.C. § 552(b)(1) (1976), and indirectly, by incorporating into FOIA exemption three, *id.*, § 552(b)(3), the nondisclosure provisions of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), and the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g. *See generally* Maj. op. at ——— of 197 U.S. App.D.C., at 348–352 of 607 F.2d. The majority may well be correct in concluding that disclosure of the withheld material would threaten our national security. Congress, however, has unambiguously expressed its intention that such determinations shall be made *de novo*. 5 U.S.C. § 552(a)(4)(B) (1976).[17] The affidavits submitted by the CIA are no substitute.

14. The majority acknowledges that H.R.Rule XI(1)(k)(7), which governs disclosure of testimony taken in Executive Session of the House of Representatives, did not exist in 1947, when the hearings in question were conducted. Maj. op. at n.45. The majority states, however, that "the Rule simply formalized long-standing practice . . . [requiring that] 'all testimony taken in executive hearings . . . be secret and . . . not be released . . . without the approval of a majority of the subcommittee.'" *Id.* (*quoting from* S.Rep.No.5, 81st Cong., 1st Sess., 3–4 (1949)).

The "practice" to which the court refers is ambiguous at best. For one thing, the court relies on practice in the Senate, and the House may have functioned differently. And the practice of either branch of Congress may have provided for disclosure without approval by committee after a specified duration. Moreover, assuming Senate practice is relevant, the court should consider whether disclosure of portions of the transcript by the Church Committee, *see* note 15 *infra*, might substitute for approval by the committee that originally conducted the hearings.

15. The Church Committee Report, *Foreign and Military Intelligence, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, S.Rep. No.94–755, 94th Cong., 1st Sess., pt. 1 (1976), refers to or quotes from the hearing transcript at 72n. 6; 129n. 2, 7; 136n. 32–34; 138n. 41a; 480n. 17, 487–488n. 53; and 488n. 56–57.

16. The CIA has deleted approximately 20%, or 23 pages, of the Hillenkoetter statement. Brief for the Government at 21.

17. Congress made its will clear in Pub.L.No.93–502, 88 Stat. 1561 (1974), which amended the FOIA in part to overrule the decision by the Supreme Court in *EPA v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). In *Mink* the Court had interpreted 5 U.S.C. § 552(b)(1), which exempted from disclosure those matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," not to allow judicial review of Executive security classifications and accordingly not to allow *in camera* inspection

A. *Exemption One* [18]

In the case of exemption one the district court must determine the propriety of a document's classification according to "both procedural and substantive criteria contained in the Executive Order under which it was classified." *Zweibon v. Mitchell*, 170 U.S.App.D.C. 1, 49, 516 F.2d 594, 642 (1975) (*quoting from* H.R.Rep.No.1380, 93d Cong., 2d Sess., 12 (1974)); *see also Halperin v. Department of State*, 184 U.S.App.D.C. 124 at 128, 565 F.2d 699 at 703 (1977). Such determinations could not have been made on the record in this case because the affidavit submitted by the CIA fails to reveal the date on which the Hillenkoetter statement was originally classified. J.A. at 81. Without discovery, the district court could merely speculate about which Executive Order, if any,[19] governed the original classification.

The district court apparently relied on an asserted reclassification of the Hillenkoetter statement in concluding that "the withheld portions . . . have been properly classified according to the provisions of Executive Order No. 11652," J.A. at 189, which is the Order presently in force. *See* 3 C.F.R. 339 (1974), 50 U.S.C. § 401 (Supp. IV 1974). Perhaps discovery pertaining to the validity of the original classification would be unnecessary if reclassification under Executive Order No. 11652 had been properly effected. The district court, however, was plainly in error. Section 4(A) of the Executive Order requires that classified material "show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and [the date of] classification . . . ." Excepting that the word "Secret" and the date of preparation appear on the face of the Hillenkoetter statement, J.A. at 80, there is no indication in the record that these procedures were followed.

We said recently in *Halperin v. Department of State*, 184 U.S.App.D.C. 124, 565 F.2d 699 (1977), that the government cannot claim a statutory exemption from the FOIA if it has failed to comply with the procedures necessary to give such exemption effect.[20]

of a contested document bearing a security classification so that nonsecret matter could be separated from secret matter and ordered disclosed. 410 U.S. at 81–84, 93 S.Ct. 827. Congress responded by amending the language of § 552(b)(1), *see* note 18 *infra*, to provide clearly for judicial review of both the procedural and substantive propriety of the classification. It also specified that where the documents sought are withheld on the basis of any of the nine exemptions, "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld . . . ." Pub.L.No.93–502, § 1(b)(2), 88 Stat. 1562 (1974); *see also* H.R. Rep.No.1380, 93d Cong., 2d Sess., 2, 12 (1974).

18. FOIA's first exemption immunizes from disclosure those matters that are

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1) (1976).

19. The record reveals only that the Hillenkoetter statement was prepared in April, 1948. At that time, there was no Executive Order in existence governing all security classifications. The first such Order was issued in 1950 by President Truman. See Executive Order No. 10290, 3 C.F.R. 789 (1953). The Office of War Information, however, had in 1942 issued a government-wide regulation dealing with security classification under the authority of Executive Orders 9103 and 9182. *See* Office of War Information Regulation No. 4, issued Sept. 28, 1942, *amended*, Nov. 13, 1942. *See generally* H.R.Rep.No.93–221, 93d Cong., 1st Sess., 4–14 (1973). This regulation established both substantive criteria and procedural requirements. *See id.* at 7. Thus, assuming the Hillenkoetter statement was classified originally in 1948, discovery was necessary to determine whether these substantive criteria and procedural requirements were followed.

20. *See also Schaffer v. Kissinger, supra.*

In *Halperin*, we did not hold that the document in question necessarily had to be disclosed to plaintiff. Rather, we remanded the case to the district court for a determination of whether disclosure would "do grave damage to the national security . . . ." *Id.*, 184 U.S. App.D.C. at 131, 565 F.2d at 706. The decision to remand was made reluctantly:

> Having failed to follow the procedures established by their own branch of government, appellants ask us in effect to save them from the consequences of that failure by providing

B. *Exemption Three*[21]

In the case of exemption three the district court must determine whether the material withheld is specifically exempted from disclosure by statute. I have no quarrel with the court's holding that 50 U.S.C. §§ 403(d) and 403g specifically require that "intelligence sources and methods" be kept secret. Maj. op. at ——— of 197 U.S. App.D.C., at 349–350 of 607 F.2d. I believe the court is mistaken, however, in eschewing "discovery or *in camera* inspection to test for the presence of segregable, non-exempt material" on what is essentially the ground that "the Agency has already segregated and released 80% of the Hillenkoetter statement to plaintiffs." *Id.* at n.65. This rationale violates the court's statutory responsibility to undertake *de novo* review for "reasonably segregable material," 5 U.S.C § 552(b) (1976); *Department of the Air Force v. Rose*, 425 U.S. 352, 374, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976), and places the disclosure decision squarely in the hands of the CIA.[22]

Our decisions establish that in national security cases as in all others, summary judgment is proper without discovery or *in camera* inspection *only if* the agency has submitted an itemized index that "subdivide[s] the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." *Vaughn v. Rosen, supra*, 157 U.S.App.D.C. at 347, 484 F.2d at 827. *See also Weissman v. CIA*, 184 U.S.App.D.C. 117, 123, 565 F.2d 692, 698 (1977) (*as amended*, April 4, 1977); *Phillippi v. CIA*, 178 U.S.App.D.C. 243 at 247, 546 F.2d 1009, at 1013 (1977). *Cf. Mead Data Central, Inc. v. Department of the Air Force*, 184 U.S.App. D.C. 350, at 358–360, 566 F.2d 242 at 250–

an exemption the Congress did not create. The power of a court to refuse to order the release of information that does not qualify for one of the nine statutory exemptions exists, if at all, only in "exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion." The need for this restriction on the power of the courts is apparent here. A broad judicial power to refuse to order disclosure of non-exempt information that a court feels would damage the national interest could obviously operate to frustrate the requirements of FOIA.

Id. 184 U.S.App.D.C. at 131, 565 F.2d at 706 (citations omitted). Narrowly circumscribing its discretion, we directed the district court to be "guided by an exacting standard similar to that suggested in *Near v. Minnesota*, [283 U.S. 697, 716, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)]." *Halperin*, 184 U.S.App.D.C. at 132, 565 F.2d at 707. *See also Tax Analysts & Advocates v. IRS*, 164 U.S.App.D.C. 243, 248, 505 F.2d 350, 355 (1974); *Getman v. NLRB*, 146 U.S.App. D.C. 209, 450 F.2d 670, 678 (1971); *Soucie v. David*, 145 U.S.App.D.C. 144, 154, 448 F.2d 1067, 1077 (1971).

In this case, as in *Halperin*, since the agency failed in reclassifying the Hillenkoetter statement to follow the procedures necessary to give exemption one effect, there is no need to address the question whether the reclassification satisfied the substantive criteria contained in Executive Order No. 11652. I should note, however, that for want of an itemized index of the contents of the Hillenkoetter statement, *see* Part III(B) *infra*, the district court could not possibly have given the requisite *de novo* consideration to the question of substantive classifiability.

21. FOIA's third exemption immunizes from disclosure those matters that are

> specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld . . . in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1976).

22. The court asserts that "[e]xemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents . . . ." Maj. op. at —— of 197 U.S.App.D.C., at 350 of 607 F.2d. On the contrary, the applicability of this exemption, like any other, depends entirely on whether the factual contents of the particular materials withheld are such that the statutory criteria for nondisclosure are satisfied. The sole difference between exemption three and other FOIA exemptions is that in the case of exemption three, these criteria are not provided by the FOIA itself but by other statutes. For example, in the present case the relevant criteria are established by the National Security Act of 1947, 50 U.S.C. § 403(d)(3), and the Central Intelligence Act of 1949, 50 U.S.C. § 403g. I should note that the court appears to realize as much, and later states that the "withheld material [must be included] within [the exempting] statute's coverage." Maj. op. at —— of —— U.S.App.D.C., at 350 of 607 F.2d.

252 (1977). Such an index, as I discussed earlier, "can . . . be subjected to criticism by the party seeking the document. If *in camera* examination of the document is still necessary, the court will at least have the benefit of being able to focus on the issues identified and clarified by the adversary process." *Phillippi v. CIA, supra,* 178 U.S.App.D.C. at 247, 546 F.2d at 1013; *Vaughn v. Rosen, supra,* 157 U.S.App.D.C. 346–48, 484 F.2d at 826–828. *See also* S.Rep.No.93–854, 93d Cong., 2d Sess., 14–15 (1974).

The affidavit filed here by the CIA, quoted in part in the court's opinion at 21, plainly fails to supply the information necessary to facilitate the adversary process and *de novo* review. First, the affidavit speaks for the most part only of intelligence "devices," "sources," "methods," and "operations." Essentially it parrots the language of the exempting statutes, 50 U.S.C. §§ 403(d)(3) ("intelligence sources and methods") and 403g (intelligence "functions"), rather than providing the detailed description the "requesting party [needs] to present its case effectively," *Mead Data Central, Inc. v. Dept. of the Air Force,* 184 U.S.App.D.C. 350 at 359, 566 F.2d 242 at 251 (1977); *Vaughn v. Rosen, supra,* 157 U.S. App.D.C. at 343–44, 484 F.2d at 823–24, 828, and a reviewing court requires to make an independent evaluation of an agency's exemption claims.[23] Second, as plaintiffs point out, the affidavit "makes no effort to match its assertions to given pages or paragraphs in the [Hillenkoetter] statement." Brief for Appellants at 33. For want of an itemized index, it is impossible to determine whether all nondisclosed portions of the statement have been described, much less properly withheld.

IV. THE CIA'S SEARCH FOR RESPONSIVE DOCUMENTS

The court refuses to permit plaintiffs to conduct discovery pertinent to the scope of the CIA's search for "legislative history" on the ground that affidavits submitted by the agency reveal as a matter of law that the search was thorough. The majority emphasizes the assertion by the agency's Information and Privacy Coordinator that the "CIA 'interpreted [plaintiffs'] request broadly enough to ensure that [it] would locate all documents within the scope of the request.'" Maj. op. at — of 197 U.S.App.D.C., at 353 of 607 F.2d; J.A. at 78. The majority states that "the Agency's good faith would not be impugned unless there were some reason to believe that [additional responsive] documents could be located without an unreasonably burdensome search." Maj. op. at — of 197 U.S.App.D.C., at 353 of 607 F.2d. Finding that the CIA did, in fact, act in good faith, the court refuses to reach plaintiffs' contention that the agency's definition of "agency records," 32 C.F.R. § 1900.3(g) (1976),[24] is unduly narrow and may have served as an impermissible basis for withholding otherwise responsive documents. Maj. op. at — — —

23. My colleagues find that the affidavit "could not have been much more detailed without 'compromis[ing] the secret nature of the information.'" Maj. op. at — of 197 U.S.App. D.C., 352 of 607 F.2d (*quoting from Vaughn v. Rosen, supra,* 157 U.S.App.D.C. at 346–47, 484 F.2d at 826–27). This may be true. An affidavit couched essentially in the language of the exempting statute, however, is plainly of no more usefulness to plaintiffs or the court than an affidavit simply declaring that the withheld material qualifies for a particular exemption. If for some reason agencies must be especially guarded in describing withheld material in so-called "national security" cases, the indexing requirement may not provide an adequate means in such cases of ensuring that the adversary process works and of facilitating *de novo* review. It may therefore be necessary, *especially* in national security cases, for the District Court to inspect withheld documents, or at least a reasonable sample thereof, *in camera. But compare Weissman v. CIA, supra,* 184 U.S. App.D.C. 122, 565 F.2d at 697 ("*in camera* proceedings are particularly a last resort in 'national security' situations.").

24. The CIA's definition excludes certain (1) "[i]ndex, filing, and museum documents;" (2) "[r]outing and transmittal sheets and notes;" (3) "[b]ooks, newspapers, magazines, and similar publications;" (4) "[d]ocuments and records prepared or originated by [other] agenc[ies];" and (5) "[d]ocuments and records furnished by foreign governments . . . on the understanding . . . [that they be] kept in confidence."

of 197 U.S.App.D.C., at 355–356 of 607 F.2d.

The court may well be correct in concluding that the CIA has acted in good faith, and that its search was thoroughly responsive to plaintiffs' request. My disagreement, again, concerns not the substance but the timing of the judgment in favor of the agency.

As I understand plaintiffs' position, although they do raise questions about the CIA's good faith,[25] the real issue here concerns the scope the agency attributed to the term "legislative history." Clearly, whether or not the CIA acted in good faith, its understanding of "legislative history" shaped its search for responsive documents. It is not enough for the CIA simply to state that it "interpreted the request broadly." Without discovery of the precise definition employed by the persons who conducted the search, plaintiffs were in no position to argue effectively that the search was under-inclusive.[26] Such discovery, of course, might have led the parties to agree on an appropriate search. At a minimum, such discovery would have enabled plaintiffs to reformulate their request to eliminate confusion and the possibility of future lawsuits. Also, such discovery would have revealed whether the persons conducting the search did in fact withhold otherwise responsive documents on the basis of the CIA's definition of "agency records." If so, the question would arise whether that definition is permitted by the FOIA.

V. ATTORNEY'S FEES

Plaintiffs claim to be entitled to an award of attorney's fees on the ground that the CIA produced several documents only after this litigation was instituted.[27] The court rejects this claim in part because plaintiffs have not shown the required "causal nexus between their litigation and the CIA's disclosure." Maj. op. at — of

25. Plaintiffs point out that on March 10, 1976, six weeks after their complaint had been filed in district court and nearly five months after their original FOIA request had been filed with the CIA, they received notification that the agency had conducted a subsequent search and "recently identified" additional responsive documents that "had not previously been located." Brief for Appellants at 4–7; John F. Blake letter, J.A. at 129. They contend that the CIA's delay in responding to their request raises an inference of bad faith that justifies discovery with respect to the scope of the search. Brief for Appellants at 20. At least one district court judge would apparently agree with them. *See Ass'n of National Advertisers, Inc. v. FTC*, 38 Ad.L.2d 643 (D.D.C. April 1, 1976) (production of additional documents after six-month delay "presents a substantial issue of the completeness of the agency search." *Id.* at 645).

26. The court rejects the need for discovery of the definition of "legislative history" employed by the agency in its search because this is the "term plaintiffs used, and if any ambiguity was introduced thereby plaintiffs must reap what they have sown." Maj. op. at — of 197 U.S. App.D.C., at 355 of 607 F.2d.

I submit that this view is at war with the purposes of the FOIA. A FOIA request may of necessity be based on imperfect information—or none at all—about the particular agency's methods of classifying and filing information. FOIA's legislative history acknowledges the problem, indicating that a request must supply only "a reasonable description enabling the Government employee to locate the requested records." S.Rep.No.813, 89th Cong., 1st Sess. 8 (1965). *See also Sears v. Gottschalk*, 357 F.Supp. 1327 (D.C.Va.1973). To require more specificity would be futile, particularly where, as here, the requestor does not know whether or to what extent responsive documents exist. Moreover, FOIA's legislative history reveals that the requirement that a request identify the records sought, 5 U.S.C. § 552(a)(3), is "not to be used as a method of withholding records." S.Rep.No.813, *supra*, at 8, *Accord, Bristol-Myers Co. v. FTC*, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938 (1970). *See also* Attorney General's Memorandum, *supra* note 9, at 24. It follows that ambiguity resulting from imperfect information should not be used as a justification for prohibiting the discovery necessary to make the FOIA work.

In this case I would not cripple plaintiffs' right to access to agency records because there is ambiguity in their request. What they apparently seek is any and all information in whatever form pertaining to the CIA's organic statutes. Yet a request so formulated would provide agency employees with scarcely any more guidance than one for "legislative history." The problem, quite simply, is that plaintiffs do not know what form such information will take, or where it might be located in the CIA's files. I would rely on the discovery process to eliminate such a problem.

27. J.A. at 129. *See* note 25 *supra*.

197 U.S.App.D.C. at 356 of 607 F.2d. I do not disagree with the court's legal standard. What concerns me, however, is that here again plaintiffs have had no opportunity to make their case. A showing of an agency's subjective reasons for producing documents is difficult to accomplish at all events. It is virtually impossible without discovery.

VI. CONCLUSION

In a recent FOIA case Judge Wilkey remarked that "[t]he data which plaintiff seeks to have produced . . . are matters of interest not only to him but to the nation." *Weisberg v. Department of Justice*, 177 U.S.App.D.C. 161 at 164, 543 F.2d 308 at 311 (1976). This observation applies with particular force to the legislative history underlying the creation of the CIA. I regret that an issue of such importance has not been resolved in accordance with principles of summary judgment.

On Appellants' Motion to Vacate and Petition for Rehearing

Opinion PER CURIAM.

Dissenting opinion filed by Circuit Judge BAZELON.

PER CURIAM.

This petition for rehearing was occasioned by an inexcusable lapse on the part of the Central Intelligence Agency (CIA). While litigating the appeal whose disposition is here questioned, the CIA discovered but failed to disclose within any reasonable time hundreds of documents which were arguably responsive to plaintiff-appellants' Freedom of Information Act request. The documents' existence was not revealed until after we issued our decision, affirming summary judgment for the CIA. The failure to make the disclosure plainly called for naturally casts a cloud over the entire proceeding. Nevertheless, and without the barest intention of countenancing the CIA's untimely disclosure, on analysis of the issues argued and decided, we decline to disturb our judgment, save on the question of attorneys' fees. With respect to that question, we remand to the district court to reconsider its ruling in light of the altered circumstances of this case.

I. FACTS

We issued our opinion on 23 May 1978, affirming the district court's grant of summary judgment to the CIA. On 30 May 1978, a week after the issuance of our opinion, the CIA informed the Justice Department that it had found hundreds of additional documents that might be responsive to plaintiffs' FOIA request. The Department promptly informed plaintiffs and this court of CIA's discovery. On 6 June 1978 plaintiffs filed a petition for rehearing and suggestions for rehearing en banc.[1]

On 14 June 1978 the CIA released to plaintiffs' counsel thirty of the additional documents. In an accompanying letter the Agency stated that, even though it did not believe that all of the documents fell within plaintiffs' FOIA request, it was releasing them anyway to assist plaintiffs' scholarly research. The letter explained further that:

> [m]ost of these documents were discovered late last fall, and additional documents earlier this year, by the librarian of the Office of General Counsel. She discovered all of these documents which were unindexed, in the course of her independent research on legal projects unrelated to the *Goland* case. Although a sampling of the documents last fall revealed their possible relevance to *Goland*, it was not until late May 1978, when a partial list of the documents was completed by the law librarian, that the extent of the documents, and the significance of some of the documents to the *Goland* FOIA request, were fully appreciated.

The following week, on 23 June 1978, the CIA released to plaintiffs' counsel an additional 291 documents. Also on that date CIA's associate general counsel, Ernest Mayerfeld, wrote the Justice Department to

1. The effect of this timely petition has been to suspend issuance of our mandate.

explain the circumstances surrounding the Agency's discovery and release of additional documents:

Most of these documents were discovered last fall by the Office of General Counsel librarian in the course of extensive research on two projects unrelated to the *Goland* litigation. Many of these documents were found in a CIA installation outside of Washington where inactive records are kept, only after great diligence and persistence by the librarian in connection with her research. She became aware of the existence of these documents, which had been stored in cardboard boxes and had not been organized in any fashion, as a result of several interviews with current and former CIA employees conducted in connection with her research projects. These documents were not indexed and could not have been found under normal FOIA search procedures.

I can state most emphatically that there was no intent within the CIA to conceal the fact that these documents had been found. The librarian, who had some personal familiarity with the *Goland* case and thus recognized that some of the documents which she had found might have some bearing on the *Goland* litigation, immediately (i. e. in late November or early December 1977), informed the General Counsel, the Deputy General Counsel and the undersigned. Because at that time the documents had not been organized or analyzed, and because it was not immediately apparent which if any were within the scope of the FOIA request in *Goland*, the General Counsel instructed the librarian to begin to organize these documents and segregate from among them those documents which qualified for designation as "legislative history."

The law librarian proceeded with her assigned task, but her extensive involvement in other routine duties prevented her completing this task as expeditiously as might have been desired. It should be noted that during this period she was engaged in a major reorganization of the law library which incidentally also entailed a physical move from one location to another. Also, although the Table of Organization of the Office of General Counsel called for an assistant law librarian, no one was appointed to that position until March 1978. The law librarian first completed a partial inventory of the additional documents on May 19, 1978 and shortly thereafter it was decided that all the newly-found documents would be released, subject to FOI[A] deletions, and you were immediately informed.

This, then, appears to be the sequence of events: (1) The district court granted summary judgment to the CIA on 26 May 1976. (2) Plaintiffs filed their notice of appeal on 23 July 1976. (3) In November or December 1977—while this appeal was still pending *but more than a year-and-a-half after the district court's decision*—the CIA discovered additional documents, some of which arguably fell within the scope of plaintiffs' FOIA request. (4) Failing to inform plaintiffs, the Justice Department, or this court of the discovery, the CIA undertook a sluggish four-month examination of the documents. (5) It was not until a week after we issued our 23 May 1978 decision that CIA finally revealed its discovery and began releasing the documents.

Contending that this sequence of events completely undermines the basis of our 23 May decision, plaintiffs have now filed a motion summarily to vacate that decision.[2] Plaintiffs' motion states in pertinent part:

The majority opinion affirmed the district court decision based on CIA affidavits. It appears that these affidavits are incorrect. . . . [T]he CIA has now produced . . . additional documents "discovered late last fall and additional documents earlier this year." Moreover, [the CIA] concedes that "a sampling of the documents last fall revealed their possible relevance to *Goland* . . . ."

2. The motion was filed 16 June 1978—between the CIA's release of 30 documents on 14 June 1978 and its release of 291 documents on 23 June 1978.

No explanation has been offered by the CIA or the Justice Department for the CIA's strategy decision to stand mute as to the status of the affidavits relied upon by the Court until *after* the decision was handed down on May 23. Indeed, it appears the CIA chose to withhold this crucial information from the Justice Department until after such decision was handed down.

Based on these admissions and concessions . . . it should now be abundantly clear that discovery is appropriate in this case and in any event, attorneys' fees should be awarded because of the manner in which the CIA has chosen to conduct itself in this litigation.

Plaintiffs' contention seems to be grounded on three distinct facts or occurrences: first, the fact that additional responsive documents were found to exist; second, the fact that CIA delayed informing this court of the documents until the court had already issued its decision; and third, the fact that CIA ultimately released the documents to plaintiffs. Plaintiffs believe that these three facts warrant vacating the decision of 23 May 1978, at least in part.

II. DISCUSSION

In our 23 May decision we resolved five separate issues. We held: (1) that the CIA was not required under the FOIA to release a congressional hearing transcript that remained under the control of Congress; (2) that the CIA had properly deleted portions of the so-called "Hillenkoetter Statement" pursuant to Exemption 3 of the FOIA; (3) that, on the record, the CIA's search for documents responsive to plaintiffs' FOIA request was adequate and that the district court's grant of summary judgment without discovery was within its discretion; (4) that the CIA's definition of "agency records" was not in controversy; and (5) that plaintiffs' counsel were not entitled to attorneys' fees.

After carefully reviewing plaintiffs' contentions and the circumstances surrounding the discovery and belated disclosure of the documents, we find no occasion to disturb our affirmance as to issues (1) through (4), but we do vacate that part of our decision affirming the denial of attorneys' fees and remand to the district court for reconsideration of that issue.

A. *Thoroughness of Search Issue*

We based our determination of the "search" issue, as did the district court, on three affidavits of Gene F. Wilson, the CIA's Information and Privacy Coordinator. We concluded "that Wilson's sworn affidavits on their face are plainly adequate to demonstrate the thoroughness of the CIA's search for responsive documents. The affidavits give detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome." [3]

1. Plaintiff's Theory

Plaintiffs contend that the discovery of additional documents indicates that the CIA affidavits in this case, relied upon by both the district court and this court, "are incorrect." Therefore, they argue that we should vacate our decision, or at least that portion of the decision dealing with the "search" issue, because it was predicated on inaccurate affidavits. We disagree.

[12, 13] As a substantive matter, the mere fact that additional documents have been discovered does not impugn the accuracy of the Wilson affidavits. *The issue was not whether any further documents might conceivably exist but whether CIA's search for responsive documents was adequate.* The Wilson affidavits never stated that no further documents existed; they merely described the scope of the searches that had been undertaken and stated that no additional documents could be located absent an extraordinary effort not required by the FOIA. As we indicated in our opinion, an agency is required only to make

3. Maj. opin. at — of 197 U.S.App.D.C., at 353 of 607 F.2d.

reasonable efforts to find responsive materials;[4] it is not required to reorganize its filing system in response to each FOIA request. The circumstances surrounding the discovery of additional documents as described in CIA's letters of 14 and 23 June do not contradict the statements made in the Wilson affidavits. According to CIA, the discovery of these documents was entirely adventitious. They were found by the law librarian in the course of independent research on projects unrelated to the *Goland* litigation. The documents were not indexed; they were found, only after extraordinary effort, stored in cardboard boxes primarily among the 84,000 cubic feet of documents at CIA's retired-records center outside of Washington. According to CIA, the documents "could not have been found under normal FOIA procedures." Thus, it would appear that the new facts before us now do not really conflict with the facts as presented to the district court and reflected in the record upon which our decision was based, and would not, as a substantive matter, prompt us to vacate our affirmance.

[14] Concededly, the discovery of additional documents is more probative that the search was not thorough than if no other documents were found to exist. Moreover, the delay in disclosing the documents at least arguably evidences a lack of vigor, if not candor, in responding to FOIA requests. However, a disappointed litigant may not avail herself of every imaginable inference from newly disclosed facts in order to upset a final judgment. The occasions when newly discovered evidence or changed circumstances will warrant setting aside a final judgment are limited procedurally as well as substantively.

2. Applicable Principles of Appellate Review

[15, 16] A final district court judgment may be altered on direct review only through two procedures.[5] One, of course, is the present appeal. The other is a motion in district court for relief from the judgment under federal rule 60(b).[6] Appellate review is ordinarily unaffected by matters not contained in the record.[7] This we think is the case with the facts disclosed here, whether characterized as "newly-discovered evidence" or "changed circumstances." In neither event do the disclosures warrant vacating our judgment.

[17] The fact that additional documents exist, insofar as it is probative of the thoroughness *vel non* of the search, is rather plainly "newly discovered evidence." We have found no case in which the Supreme Court or a court of appeals has granted a rehearing or vacated its opinion based on newly discovered evidence. The reason for this should be self-evident: an appellate opinion is based on the record before it, and hence cannot be set aside on the basis of newly discovered facts outside the record.[8] This rule is clear in the Supreme Court's cases, dating from those in the last centu-

4. Maj. opin. at —— of 197 U.S.App.D.C., at 352 of 607 F.2d.

5. *See Carr v. District of Columbia*, 177 U.S. App.D.C. 432, 439, 543 F.2d 917, 924 (1976).

6. Fed.R.Civ.P. 60(b).

7. There are a number of settled exceptions to this general principle of appellate review; as, for example, where there is an intervening change in a pertinent law, *e. g., Gomez v. Wilson*, 155 U.S.App.D.C. 242, 247–48, 477 F.2d 411, 416–17 (1973); changed circumstances which render the controversy moot, *e. g., Wirtz v. Local Union 410*, 366 F.2d 438, 442 (2d Cir. 1966); changed circumstances which alter the appropriateness of injunctive relief, *e. g., Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 & n.3 (2d Cir. 1972); *In re Gulf Aerospace Corp.*, 449 F.2d 733, 734 (5th Cir. 1971); and, in limited cases, facts which may be judicially noticed, *e. g., Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139, 150–51 (3d Cir. 1973), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974).

8. *See, e. g., Carr v. District of Columbia*, 177 U.S.App.D.C. 432, 436, 543 F.2d 917, 921 (1976); *AG Pro, Inc. v. Sakraida*, 481 F.2d 668, 669 (5th Cir. 1973), *rev'd on other grounds*, 425 U.S. 273, 96 S.Ct. 1532, 47 L.Ed.2d 784 (1976); *Davis v. Casey*, 70 App.D.C. 27, 34–35, 103 F.2d 529, 536–37 (1939).

ry[9] to the recent *Standard Oil* case[10] where the Court refused to recall its mandate and vacate its opinion on the basis of newly discovered facts, stating that its opinion was confined to the record.

[18–20] An appellate court has no factfinding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination. Factfinding and the creation of a record are the functions of the district court; therefore, the consideration of newly-discovered evidence is a matter for the district court. The proper procedure for dealing with newly discovered evidence is for the party to move for relief from the judgment in the district court under rule 60(b) of the Federal Rules of Civil Procedure.

Insofar as plaintiffs rely on the facts surrounding the documents' discovery and release by the CIA, their argument is more nearly dependent on "changed circumstances." To be sure, there are occasional cases in which altered circumstances are properly noticed on appeal.[11] Invariably in such cases, however, events have altered the essential nature of the controversy, as, for example, where there has been an intervening change in the law or where the controversy has become moot. But in this case the distinction between new evidence and altered circumstances is largely a matter of technical usage rather than substance.[12] Here the intervening events are allegedly probative of the same contentions as arose from the mere existence of the documents (*i. e.*, that the search was not conducted thoroughly or in good faith). Consequently, for purposes of appellate review of these allegations, we think nothing turns on the arguable distinction between newly discovered evidence and altered circumstances. Under either theory the proper course ordinarily would be to proceed in the first instance in district court under rule 60(b).

[21] Finally, inasmuch as relief in district court may be foreclosed,[13] it might be thought that this court, in the exercise of our appellate jurisdiction, should remand for further proceedings in light of the new facts without regard to the strictures of rule 60(b). Some support may be found for the proposition in the broad language of 28 U.S.C. § 2106, which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[14]

This court recently reserved the question whether section 2106 afforded an alternate way of reopening a final judgment in light of new facts.[15] Although our research has

9. *E. g.*, *Maxwell Land-Grant Case*, 122 U.S. 365, 7 S.Ct. 1271, 30 L.Ed. 1211 (1887); *Roemer v. Simon*, 91 U.S. 149, 23 L.Ed. 267 (1875).

10. *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

11. *See* note 7 *supra*.

12. The distinction is ordinarily made between these two grounds of relief for purposes of applying the timing rules for filing motions under Fed.R.Civ.P. 60(b). To be "newly discovered," evidence must have been in existence at the time of the trial, *see* C. Wright & A. Miller, Federal Practice and Procedure § 2859 & n.35 (cases cited) (1973). However, in this case, the alleged substantive effect of the disclosures is independent of their characterization for purposes of rule 60(b). Moreover, the exercise of our discretion is likewise unconfined by the "correct" rule 60(b) characterization of these facts.

13. See pp. ——— of 197 U.S.App.D.C., 372–373 of 607 F.2d *infra*.

14. 28 U.S.C. § 2106 (1976).

15. *Carr v. District of Columbia*, 177 U.S.App. D.C. 432, 444 & n.96, 543 F.2d 917, 929 & n.96 (1976) (if it appeared relief were not otherwise available, court would consider "whether the interests of justice would not require [it] to remand to the District Court to consider the claim").

disclosed no case which has so held, we may suppose *arguendo* that we do have ample revisory power under section 2106 *in appropriate cases*. We are nevertheless thoroughly convinced that this would not be a proper occasion for such extraordinary relief. Nothing in the circumstances which plaintiffs raise suggests to us that the district court judgment was incorrect. We are satisfied by the submissions to this court that the original failure to uncover the documents was wholly understandable and not inconsistent with the district court's finding that the search was thorough.

Moreover, although the delay in releasing the materials may not be excused, we do not think that that misconduct vitiates the district court's finding either. Only were we to indulge a fairly harsh inference as to the *bona fides* of the CIA would we be inclined to upset the judgment. The instant facts fall quite short of supporting any such conclusion. Consequently, whether or not there is any possibility of relief from the judgment in district court, we decline to disturb our affirmance respecting the thoroughness of the search. We reach this conclusion fully aware that we deal here with a summary judgment whose factual basis derives from affidavits and without discovery.

3. Relief in the District Court

Relief from a final judgment may be sought in district court through a rule 60(b) motion;[16] our decision not to vacate our affirmance is, of course, without prejudice to plaintiffs' proceeding under that rule. However, as we have noted, that approach may be difficult or wholly unavailable.

Insofar as the additional documents are new evidence, recourse to rule 60(b) is governed (and apparently precluded) by the rule's strict timing requirements. There is an ironclad one-year limit on the filing of a rule 60(b) motion based on newly discovered evidence. Such motions must be filed within one year from the date the judgment was entered in the district court, which in this case was 26 May 1976—two years ago and more. The one-year period is not tolled by a pending appeal,[17] and under the federal rules no court has power to extend the deadline.

The one-year time limit in rule 60(b) applies only to motions under clauses (1), (2), and (3), covering fraud between the parties, newly discovered facts, and misconduct of a party. There is also a catch-all clause (6), covering "any *other* reason justifying relief from the operation of the judgment." There is no time limit for motions brought under this clause; however, relief under this clause is not available unless the other

16. Fed.R.Civ.P. 60(b) provides as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

17. *Greater Boston Television Corp. v. FCC*, 149 U.S.App.D.C. 322, 334, 463 F.2d 268, 280 (1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972); C. Wright & A. Miller, Federal Practice and Procedure § 2866, at 233 (1973).

clauses, (1) through (5), are inapplicable.[18] It may be that a showing of changed circumstances would bring plaintiffs within the residual 60(b)(6), although it is far from certain either that the allegations are not covered by clauses (1) through (3) (in which case they would be time barred) or that they present the "extraordinary" circumstances for which relief under 60(b)(6) is reserved.[19]

[22, 23] In any case, rule 60(b) contains a saving clause which states that the rule "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding . . . ." Thus the rule does not extinguish the historical authority of equity courts to reform judgments in appropriate cases.[20] The one-year limit on certain of the rule 60(b) motions is not applicable to the independent action, leaving it, apart from collateral attack, as the only manner of obtaining relief from a judgment in those cases where the 60(b) motion has become time barred. We recently recalled that " 'the exception for equitable interposition by independent suit rests on "stringent" rules limited to circumstances "which render it manifestly unconscionable that a judgment be given effect".' "[21] Although such circumstances may sometimes appear from evidence disclosed after the judgment, such extraordinary review is not to be indulged loosely. We have observed:

> in an independent action seeking relief from a judgment on the basis of newly-discovered evidence and asking for a new trial the plaintiff must meet the same substantive requirements as govern a motion for like relief under Rule 60(b): he must show that the evidence was not and could not by due diligence have been discovered in time to produce it at trial; that it would not be merely cumulative; and that it would probably lead to a judgment in his favor.[22]

We merely note the difficulty of satisfying the "stringent" rules which circumscribe the trial court's discretion in such matters; our disposition does not, of course, foreclose plaintiffs' bringing an independent suit for relief.

B. *The Hearing Transcript, the Hillenkoetter Statement, and the Definition of "Agency Records" Issues*

With respect to the congressional hearing transcript issue, we held in our 23 May decision that, given the circumstances of the transcript's creation, it "remains under the control of and continues to be the property of the House of Representatives."[23] Thus, we concluded that "the Hearing Transcript is not an 'agency record' but a Congressional document to which the FOIA does not apply."[24]

With respect to the Hillenkoetter Statement issue, we held that the deleted portions of the Statement could properly be withheld pursuant to FOIA Exemption 3, which was determined to encompass 50 U.S.C. § 403(d)(3) and 50 U.S.C. § 403g. Our analysis involved a two-step inquiry: (1) whether the CIA's nondisclosure stat-

18. *Klapprott v. United States,* 335 U.S. 601, 613, 69 S.Ct. 384, 93 L.Ed. 266 (1949); C. Wright & A. Miller, Federal Practice and Procedure § 2864, at 217 (1973).

19. *See, e. g., Ackermann v. United States,* 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207 (1950); C. Wright & A. Miller, Federal Practice and Procedure § 2864 at 219–20 (1973).

20. *See* Advisory Committee Note to 1946 Amendment to Rule 60(b); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.,* 213 F.2d 702, 706 (5th Cir. 1954). The independent action is, of course, to be distinguished from the ancillary common law and equitable remedies specifically abolished by rule 60(b).

21. *Carr v. District of Columbia,* 177 U.S.App. D.C. 432, 442, 543 F.2d 917, 927 (1976) (quoting *Greater Boston Television Corp. v. FCC,* 149 U.S.App.D.C. 322, 333, 463 F.2d 268, 279 (1971), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972)).

22. *Philippine Nat'l Bank v. Kennedy,* 111 U.S. App.D.C. 199, 200, 295 F.2d 544, 545 (1961) (footnotes omitted).

23. Maj. opin. at —— of 197 U.S.App.D.C., at 347 of 607 F.2d.

24. Maj. Opin. at —— of 197 U.S.App.D.C., at 348 of 607 F.2d.

utes—sections 403(d)(3) and 403g—are Exemption 3 statutes; and (2) whether the withheld materials, as described by CIA's affidavit, fall within the nondisclosure statutes.

Finally, we refrained from reaching the definition of "agency records" issue because no live and genuine controversy remained on this matter between plaintiffs and CIA.

[24] Neither the discovery of additional documents, nor CIA's delayed disclosure of this discovery, nor CIA's ultimate release of the documents in any way undermines our holdings on these three issues. The discovery and release of new documents obviously does not change the character of the Congressional Hearing Transcript. It remains a congressional record for the reasons stated in our opinion, and as such was properly withheld by CIA. Similarly, the discovery and release of additional documents clearly has no bearing on whether, as a matter of law, sections 403(d)(3) and 403g are Exemption 3 statutes or on whether portions of the Statement fall within those nondisclosure statutes. Finally, the circumstances of the discovery and release of new documents do not give rise to a controversy between the parties as to CIA's definition of "agency records."

Nevertheless, plaintiffs argue that the CIA's discovery of additional documents does, in a very remote sense, bear upon the validity of our holdings on the Transcript, Statement, and Definition issues. They point out that our conclusions on these three issues were, to varying extents, based partially upon assertions in CIA's affidavits. Thus, they argue that, since the discovery of new documents suggests that CIA's affidavits may have been inaccurate in one respect, namely, the thoroughness of search issue, they may also have been inaccurate in other respects, namely on these other three issues. Therefore, plaintiffs argue, our decision on these points may have rested on incorrect affidavits. In other words, plaintiffs' contention is that the CIA's discovery of new documents is circumstantial evidence that the Agency's affidavits generally may not have been accurate.

Our reasoning with respect to the issue of the search's thoroughness is fully applicable here.[25] We will not vacate our judgment on the basis of such a tenuous theory. The allegations raise no serious doubt as to the correctness of the district court's findings. Plaintiffs may nevertheless wish to seek relief from the district court under rule 60(b) or otherwise. In the meanwhile, our resolution of the Transcript, Statement, and Definition issues must stand as originally stated in our 23 May decision.

C. *Attorneys' Fees Issue*

[25] In our 23 May decision we declined to award attorney's fees to plaintiffs, holding that plaintiffs had not "substantially prevailed" even though the CIA had released the Vandenberg Statement and portions of the Hillenkoetter Statement *after* they commenced suit. We stated: "Even if plaintiffs could show some causal nexus between their litigation and the CIA's disclosure, which they have not done, we doubt that plaintiffs could be said to have 'substantially prevailed' if they, like Pyrrhus, have won a battle but lost the war."[26]

Plaintiffs now contend that this aspect of our decision has been undermined by subsequent events. They point *not* to the CIA's discovery of additional documents or to the Agency's delay in revealing this discovery, but rather to the fact that CIA ultimately released these additional documents. Plaintiffs' argument seems to be that there is the requisite causal connection between their prosecution of the action and CIA's ultimate release of further documents such as they may *now* be said to have "substantially prevailed" in the litigation. The Agency's release of documents occurred *after* the decision in this case. Thus, this part of plaintiffs' argument relies on a *post-judgment change in factual circumstances.*

25. *See* pp. ——— of 197 U.S.App.D.C., pp. 369–374 of 607 F.2d *supra*.

26. Maj. opin. at —— of 197 U.S.App.D.C., at 356 of 607 F.2d. *See* 5 U.S.C. § 552a(4)(E) (1976).

Of course, plaintiffs might move to reopen this particular issue in district court by means of a rule 60(b)(6) motion. The one-year limit in rule 60(b) applies only to clauses (1) through (3); it does not apply to clause (6) which authorizes relief from judgment for "any other reason justifying relief from the operation of the judgment." As we have observed, one of the grounds for relief that has been recognized under this broad rubric is post-judgment change in circumstances.[27]

However, in the interest of expediting this matter and because we entertain little doubt that the merits of the attorneys' fees argument should be reheard in light of the new facts, we vacate that portion of our affirmance and the District Court judgment pertaining to fees and remand for the District Court's reconsideration.

So ordered.

BAZELON, Circuit Judge, dissenting from the denial of the motion to vacate, the denial of rehearing, and the denial of rehearing en banc.

In November or December, 1977, while this case was pending before our panel, the General Counsel of the CIA learned that documents known to be relevant to plaintiffs' FOIA request had been discovered within the agency. Not until May 30, 1978, one week after our opinion issued, and some six months after the documents were "discovered," did the General Counsel inform the Justice Department that these documents had been found.[1] We must now determine the effect of these events on our previous disposition of this case. I believe that both the disclosure of 321 additional documents and the circumstances surrounding their discovery cast serious doubt on the original disposition of this case. I therefore dissent from the majority's decision to leave that opinion undisturbed.[2] I concur, however, in the decision to remand for consideration of plaintiffs' right to attorney fees.

I.

I begin my examination with a simple question—had the CIA seasonably revealed to us, *prior to our decision*, that it had "discovered" 321 documents arguably within the scope of plaintiffs' request, would we nonetheless have issued the opinion of May 23? I have no difficulty in concluding that we would not.[3]

27. *See Scott v. Young*, 307 F.Supp. 1005, 1007 (E.D.Va.1969), *aff'd*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929, 90 S.Ct. 1820, 26 L.Ed.2d 91 (1970); *American Employers Ins. Co. v. Sybil Realty*, 270 F.Supp. 566, 569–70 (E.D.La.1967).

1. The Justice Department, acting with commendable dispatch, appears to have informed both plaintiffs *and this court* of the existence of additional documents on the same day that the CIA informed Justice. There is thus no suggestion that the attorneys for the Justice Department departed in any way from their duties as officers of this court.

2. I express no opinion herein concerning the significance of these disclosures on the "hearing transcript," the "Hillenkoetter statement" and the definition of agency records. I adhere to the views expressed in my dissenting opinion. *See Goland v. CIA*, 197 U.S.App.D.C. ——, 607 F.2d 339 (D.C.Cir. 1978) (Bazelon, J., dissenting) at —–—— of 197 U.S.App.D.C., at 358–362 of 607 F.2d (hearing transcript), —— –—— of 197 U.S.App.D.C., 362–365 of 607 F.2d (Hillenkoetter statement).

For the purposes of this discussion I confine my remarks to the impact of these disclosures on the majority's previous discussion of the adequacy of the CIA's search.

3. We may assume, arguendo that an appellate court would be more reluctant to consider new evidence brought to its attention after its opinion issued rather than before. *Compare Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (denying motion to recall mandate after decision on the basis of alleged misconduct by government counsel and new evidence) *with United States v. Shotwell (I)*, 355 U.S. 233, 241, 78 S.Ct. 245, 251, 2 L.Ed.2d 234 (1957) (remanding for consideration of a "challenge to the integrity of the record based on newly discovered evidence"). But where, as here, the evidence was withheld by the agency with full knowledge of its relevance, the concern for finality is overridden by a need to prevent the agency from profitting by its misdeed. Therefore, I believe it is appropriate to analyze the motion to vacate in terms of the effect that the CIA's revelations would have had on this court, had that information been seasonably tendered before our decision.

Accordingly, this case comes in a different posture than *Realty Acceptance Corp. v. Mont-*

The jurisdiction of the federal courts is limited to cases or controversies.[4] Central to that provision is the requirement that the federal courts do not sit to give advisory opinions,[5] nor to render decisions which can offer no relief to any party.[6] Here the plaintiffs sought all CIA records concerning the legislative history of the agency's governing statute. As a result of the belated release of some 321 documents to plaintiffs by the CIA, it may well be that plaintiffs are fully satisfied that their request has been honored[7] and no longer require further relief from this court on that issue.

If the plaintiffs are in fact satisfied, then any appeal from the denial of discovery is clearly moot. Because mootness would deprive this court of jurisdiction, we would be obliged to note it, regardless of when during the course of the litigation the controversy became moot.[8] I therefore find it difficult to believe that we would not have inquired further into the issue of mootness, either by remanding to the district court for a determination of that issue,[9] or at least requiring further submission from the parties.

II.

Even assuming that there remained a live controversy between the parties over the existence of additional documents, it is inconceivable to me that we would have been indifferent to the significance of the CIA's admissions in assessing the adequacy of the original search. The majority rests its decision on the observation that "the mere fact that additional documents have been discovered does not impugn the accuracy of the Wilson affidavits." Maj. op. at —— of 197 U.S.App.D.C., at 369 of 607 F.2d. To my mind, this is a question of fact that cannot possibly be decided on the record before us. The majority notes, "[a]ccording to CIA, the discovery of these documents was entirely adventitious. They were found . . . only after extraordinary effort . . . ." *Id.* at —— of 197 U.S.App.D.C., at 370 of 607 F.2d. These representations may well be true. But the fact is that at this stage of the litigation they are simply *ex parte* representations. Plaintiffs have had no opportunity to test these assertions under circumstances that would admit of appropriate findings of fact.

The majority's extreme reluctance to permit plaintiffs to explore the factual basis of the CIA's assertions thus repeats the basic error of the original panel opinion. The majority again prematurely forecloses plaintiffs' inquiry into the nature of the CIA's search in response to the FOIA re-

gomery, 284 U.S. 547, 52 S.Ct. 215, 76 L.Ed. 476 (1932), where the Court of Appeals' order remanding to the District Court to consider new evidence was entered *after* the Court of Appeals lost jurisdiction of the case (by virtue of its earlier order dismissing the appeal). *See id.* at 551–52, 52 S.Ct. 215.

4. U.S.Const., Art. III, Sec. 2.

5. *See e. g., Golden v. Zwickler*, 394 U. S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

6. *See, e. g., Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975).

> [A] federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " (Citations omitted.)

7. Of course, plaintiffs have not conceded the propriety of the CIA's decision to withhold certain documents or portions of documents pursuant to FOIA. *See* note 2, *supra*.

8. *See*, e. g. *Allee v. Medrano*, 416 U.S. 802, 818 n.12, 94 S.Ct. 2191, 2202, 40 L.Ed.2d 566 (1974): "In the federal system an appellate court determines mootness as of the time it considers the case, not as of the time it was filed." *See also Steffel v. Thompson*, 415 U.S. 452, 459–60 & n.10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

9. "There would certainly be no doubt of the need for a court remand if the change of circumstances were such as to make the case moot." *Greater Boston Television Corp. v. F. C. C.*, 149 U.S.App.D.C. 322, 337 n.25, 463 F.2d 268, 283 n.25 (1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972). Although Judge Leventhal there referred to review of agency proceedings, the same jurisdictional considerations apply to appellate review of a district court decision.

quest.[10] But the error is even more serious in this case, for we do not have the benefit of a trial court judgment, entered after appropriate inquiry, that these revelations do not undermine the validity of the CIA's original affidavits. The majority correctly notes that "[a]n appellate court has no fact-finding function." Maj. op. at — of 197 U.S.App.D.C., at 371 of 607 F.2d. I submit that the majority denies the motion to vacate precisely because it has found the facts against plaintiffs.

Both the volume of documents discovered by the CIA and the circumstances surrounding the initial withholding and later disclosure of the documents raise serious questions that can only be resolved by a full factual inquiry. The majority finds the "original failure to uncover the documents was wholly understandable." Perhaps I would too, on a proper record. Under our supervisory power, invested in this court by virtue of 28 U.S.C. § 2106 (1976), I would remand this case to the district court to determine the effect of these disclosures on the district court's prior decision upholding the adequacy of the CIA's initial search.[11]

III.

I wish to make explicit the seriousness with which I regard the CIA's dereliction in this case. I do not suggest that the CIA failed to inform this court that it had discovered the documents simply to procure a favorable decision (though this possibility certainly cannot be rejected without a fuller factual inquiry into the circumstances surrounding these events). I do believe firmly, however, that the CIA had a strict obligation to report this information to the court *at the moment its arguable relevance became known.*[12] This is central to the "unqualified duty of scrupulous candor that rests upon government counsel in all dealings" with the courts.[13] The CIA's "excuse" for this delay, that the matter was

10. As I noted in my earlier dissent, "[m]y disagreement, again, concerns not the substance but the timing of the judgment in favor of the agency." Dissenting op. at — of 197 U.S. App.D.C., at 366 of 607 F.2d.

11. I entertain no doubt that we have the power to consider the impact of these disclosures pursuant to § 2106, whether they are characterized as "newly discovered evidence" or "changed circumstances." *See Patterson v. Alabama,* 294 U.S. 600, 607, 55 S.Ct. 575, 79 L.Ed. 1082 (1935); *Gomez v. Wilson,* 155 U.S.App.D.C. 242, 247–248, 477 F.2d 411, 416–17 (1973). Although typically this evidence should be considered through a motion for a new trial, compelling circumstances justify this court considering such developments. *Cf. Carr v. District of Columbia,* 177 U.S.App.D.C. 432, 444 & n.96, 543 F.2d 917, 929 & n.96 (1976) (where consideration of new evidence time-barred under Rule 60(b) and no other forum available to consider such evidence, court "would consider whether the interests of justice would not require" remand to district court pursuant to 28 U.S.C. § 2106).

The possibility that the CIA has disregarded its responsibilities under the Freedom of Information Act presents a particularly appropriate occasion for the exercise of our § 2106 authority to require further proceedings. Under FOIA, as with any litigation, we adhere to "the fundamental precept that issues on appeal are to be confined to those duly presented to the trial court", *Jordan v. Department of Justice,* 192 U.S.App.D.C. 144, 591 F.2d 753 (1978). However, in *Jordan* we recognized that in unusual circumstances we might remand to the trial court (pursuant to § 2106) to permit consideration of a FOIA exemption raised by the government for the first time on appeal. In so observing, we recognized that the policies of FOIA might outweigh the generalized interest in finality that normally confines our review to the issues as presented in the trial court. If the government, under some circumstances, is to be permitted to expand its arguments on appeal to protect legitimate interests in non-disclosure, surely it is equally consonant with the principles of FOIA to permit one who requests information to enlarge the record, especially where there is disturbing evidence of impropriety by the government.

12. Had the CIA mistakenly failed to recognize the relevance of these documents, or had the librarian failed to inform the General Counsel of her discovery, different, and more difficult issues would be posed. Here, however, *the three top legal officers* of the CIA withheld the fact that documents had been discovered which *they knew to be relevant to this litigation.* I can imagine no clearer breach of duty to this court.

13. *Shotwell Mfg. Co. v. United States (Shotwell II),* 371 U.S. 341, 358, 83 S.Ct. 448, 459, 9 L.Ed.2d 357 (1963).

given "insufficient priority," [14] is nothing short of a confession that it has been derelict in its duty to this court. Such behavior is worthy only of censure.[15]

MONTGOMERY ENVIRONMENTAL COALITION CITIZENS COORDINATING COMMITTEE ON FRIENDSHIP HEIGHTS et al., Appellants,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION et al.

No. 78-1730.

United States Court of Appeals, District of Columbia Circuit.

Argued Jan. 3, 1979.

Decided May 30, 1979.

Citizens' environmental groups brought suit to enjoin a sanitary commission from exceeding its allotted share of the sewage treatment capacity at a sewage treatment plant. The United States District Court for the District of Columbia, John Lewis Smith, Jr., J., dismissed the action, and plaintiffs appealed. The Court of Appeals, Bazelon, Senior Circuit Judge, held that primary jurisdiction over the issue was vested in the Environmental Protection Agency where proceedings had been commenced to issue the sewage treatment plant a National Pollution Discharge Elimination System permit.

Affirmed.

Navigable Waters ⇐35

Where Environmental Protection Agency had commenced proceedings to issue National Pollution Discharge Elimination System permit to sewage treatment plant, EPA was vested with primary jurisdiction over issue whether sanitary commission had exceeded its allotted share of sewage treatment capacity of such plant, resulting in violation of promulgated water quality standards, and suit by citizens' environmental groups to enjoin sanitary commission from exceeding its share of sewage treatment capacity would therefore be dismissed. Federal Water Pollution Control Act Amendments of 1972, §§ 101 et seq., 301, 301(a), (b)(1)(C), 303, 505(a)(1), (c)(1), 33 U.S.C.A. §§ 1251 et seq., 1311, 1311(a), (b)(1)(C), 1313, 1365(a)(1), (c)(1).

Appeal from the United States District Court for the District of Columbia. (D.C. Civil Action No. 1307-73).

14. The full text of the CIA's explanation is as follows:

> To be sure, there is one regrettable aspect to the CIA's recent disclosures. Apparently the Agency became aware of the existence of documents possibly relevant to *Goland* in the late fall of 1977. See Exhibits C and E. Despite the pendency of this case before this Court and plaintiffs' outstanding FOIA request, the documents were not compiled speedily, and Justice Department counsel were not informed of their existence. However, this was not a "strategy decision to stand mute," as claimed in plaintiffs' motion to vacate. As explained in the attached letter from the CIA's Office of General Counsel to Justice Department counsel (Exhibit E), insufficient priority was given to these additional documents because there was uncertainty to what extent the documents found by the law librarian were relevant to this litigation and because of the press of other business. Moreover, as is clear from the attached CIA letters (Exhibits C, D, and E), the number of additional documents turned out to be very great. The law librarian did not complete her first partial inventory of the additional documents until May 19, 1978. *Id.*

Opp. to Mot. to Vacate at ——— of 197 U.S.App.D.C., at 369-370 of 607 F.2d.

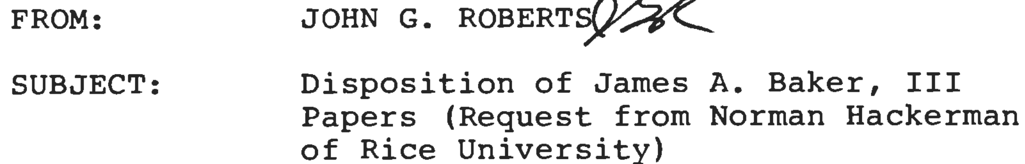
15. The CIA seeks to refute any suggestion of bad faith by pointing to its disclosure, albeit belated, of the documents after our opinion issued. Opp. to Mot. to Vacate at —— n.3 of 197 U.S.App.D.C., at 369 n.3 of 607 F.2d. I confess I am unable to find grounds for applause in the agency's tardy recognition of long-neglected legal and moral duty.

THE WHITE HOUSE

WASHINGTON

September 18, 1984

MEMORANDUM FOR FRED F. FIELDING



FROM: JOHN G. ROBERTS

SUBJECT: Disposition of James A. Baker, III Papers (Request from Norman Hackerman of Rice University)

Some time ago Kathy Camalier asked for our advice concerning the disposition of Mr. Baker's White House papers. Mr. Baker had received a letter from the President of Rice University, asking that he agree to deposit the papers at Rice. Mr. Baker's office informed Rice officials that the request was premature, but asked us to look into the matter, noting that it "is not a top priority inquiry."

The vast majority of Mr. Baker's papers are, of course, covered by the Presidential Records Act, 44 U.S.C. §§ 2201-2207, since they were "created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President." 44 U.S.C. § 2201(2). The only papers from his White House tenure that Mr. Baker could consider donating to Rice are, accordingly, "personal records," defined in the Act to include "diaries, journals, or other personal notes" not used in transacting Government business, private political materials having no relation to the President's duties, and materials relating solely to the President's own election. Id. § 2201(3).

With respect to such "personal records" of Administration officials, however, Mr. Meese's office has been working with the Archivist to secure them for possible inclusion in the Reagan Presidential Library. Mr. Meese's office asked us earlier this year to review a letter they prepared with the Archivist, asking Administration officials to donate personal materials to the National Archives for placement in the Reagan Presidential Library. (We have been holding the letter in abeyance because of our many disputes with the Archivist and the unresolved status of the Reagan Library.) Any decision by Mr. Baker to donate his personal papers to Rice would be inconsistent with the proposal to house those papers in the Reagan Library.

The attached memorandum for Mr. Baker advises him that (1) he can only consider donating his personal papers (as defined in the Presidential Records Act) to Rice, and (2) it has been proposed that such personal papers of staff members and Cabinet officials be donated to the National Archives for inclusion in the Reagan Presidential Library.

Attachment

THE WHITE HOUSE

WASHINGTON

September 19, 1984

MEMORANDUM FOR JAMES A. BAKER, III
ASSISTANT TO THE PRESIDENT
CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

Orig. signed by FFF

SUBJECT: Disposition of Your White House Papers

Your office has requested guidance on inquiries you have received concerning the possible donation of your White House papers to Rice University. The vast bulk of your White House papers are covered by the Presidential Records Act, 44 U.S.C. §§ 2201-2207. That Act defines "Presidential records" broadly to include:

> documentary materials, or any reasonably segregable portion thereof, created or received by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President. Id. § 2201(2).

Pursuant to 44 U.S.C. § 2202, the Government retains "complete ownership, possession, and control of Presidential records." At the end of a President's last term, the Archivist assumes custody and control of the Presidential records. Id. § 2203(f)(1). Accordingly, you are not in a position to consider donating those of your papers defined as Presidential records -- the vast majority -- to Rice or any other institution.

You do retain control over "personal records...of a purely private or nonpublic character," including "diaries, journals, or other personal notes" not used to transact Government business, "materials relating to private political associations," and "materials relating exclusively to the President's own election." Id. § 2201(3). With respect to such materials of White House staff members and Cabinet officials, however, you should be aware that Ed Meese's office has been working with the Archivist on a proposal to secure their donation to the National Archives for inclusion in the Reagan Presidential Library. It is the Archivist's view that the Reagan Presidential

Library would be considerably enriched by the inclusion of the personal records of key Administration officials. Meese's office and the Archivist have prepared a draft letter to Administration officials, asking them to consider donating their personal papers for inclusion along with their official papers in the Reagan Presidential Library. That letter has not yet been sent because of certain outstanding issues involving the Archivist and the Reagan Library. Thus, you may wish to consider that option as well.

FFF:JGR:aea 9/19/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # 222895 CU

FG006-01

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

(JR,) This is an intention issue that needs developing.

- ☐ O - OUTGOING
- ☐ H - INTERNAL
- ☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Katherine Camalier

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Disposition of James A. Baker, III Papers (request from Norman Hackerman, Rice Univ.)

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CW Holland	ORIGINATOR	DD 84/04/18			/ /
	Referral Note:				
CWAT18	D	DD 84/04/19		S	84/04/29
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

DDJ

Comments: See ID 151469

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

April 17, 1984

223895 cu

MEMORANDUM TO: FRED FIELDING

FROM: KATHERINE CAMALIER KC

SUBJECT: Disposition of James A. Baker, III Papers

Sometime ago, Rice University contacted Jim Baker to inquire regarding the disposition of his White House and related papers at the conclusion of this term. We contacted Rice University to advise them that any such request was premature and then set their letter aside. I have attached a copy of their letter for your further information.

Would you, or a member of your staff, please let us know what, if any, papers, documents, etc. Mr. Baker can give to Rice University? We are aware of the strict requirements outlined in the "Presidential Records Act," but would appreciate any clarification of this. For example, we have kept extensive "scrapbooks" of newspaper articles, etc. that mention Jim Baker. We are assuming that this is "personal property" and that Mr. Baker can, if he chooses, give these to Rice University.

This is not a top priority inquiry at this time, but it is something that we will need to be aware of at some point down the road. Thank you, in advance, for providing any pertinent information or explanation.

DISCUSS LATER

RICE UNIVERSITY
HOUSTON, TEXAS 77001

NORMAN HACKERMAN
PRESIDENT

May 23, 1983

Mr. James A. Baker, III
Chief of Staff and Assistant
to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

SERIOUSLY CONSIDERING YOUR GRACIOUS OFFER — WOULD LIKE TO DISCUSS AT A LATER DATE

Dear Jim:

I wonder if you have considered what disposition you will ultimately make of your White House and related papers. It occurs to me that it might be mutually advantageous for them to be housed and catalogued here at Rice. We are committed to strengthening our special holdings in the social sciences and humanities and believe that the James A. Baker, III, Papers will be an important resource for scholars of the future to draw upon; and, of course, they would be conveniently located for you to monitor and use.

If you are receptive to this suggestion perhaps I could visit with you on one of my trips to Washington in the near future; or, if you prefer, we would be happy to have you come on campus the next time you are in Houston to discuss this in more detail.

I look forward to hearing from you.

Sincerely,

[signature]

NH:jb

IT'S WHAT I SUGGESTED ALL ALONG —

FINALLY A PLACE FOR YOUR — A HOME "SCRAPS"

DO IT!!

(Hand-written notes by Margaret Tutwiler)