

§804(7), Oct. 7, 2010, 124 Stat. 2747, which provided that the Director of the Defense Intelligence Agency could exempt operational files of the Defense Intelligence Agency from provisions of section 552 of title 5, defined “operational files”, authorized certain searches of exempted files and of information from exempted files, provided for judicial review of withholding of records and for decennial review of exempted files, ceased to be effective on Dec. 31, 2007, pursuant to subsec. (g) of section.

CODIFICATION

Section was formerly classified to section 432c of this title and omitted prior to editorial reclassification and renumbering as this section.

§ 3146. Protection of certain files of the Office of the Director of National Intelligence

(a) Inapplicability of FOIA to exempted operational files provided to ODNI

(1) Subject to paragraph (2), the provisions of section 552 of title 5 that require search, review, publication, or disclosure of a record shall not apply to a record provided to the Office of the Director of National Intelligence by an element of the intelligence community from the exempted operational files of such element.

(2) Paragraph (1) shall not apply with respect to a record of the Office that—

(A) contains information derived or disseminated from an exempted operational file, unless such record is created by the Office for the sole purpose of organizing such exempted operational file for use by the Office;

(B) is disseminated by the Office to a person other than an officer, employee, or contractor of the Office; or

(C) is no longer designated as an exempted operational file in accordance with this subchapter.

(b) Effect of providing files to ODNI

Notwithstanding any other provision of this subchapter, an exempted operational file that is provided to the Office by an element of the intelligence community shall not be subject to the provisions of section 552 of title 5 that require search, review, publication, or disclosure of a record solely because such element provides such exempted operational file to the Office.

(c) Search and review for certain purposes

Notwithstanding subsection (a) or (b), an exempted operational file shall continue to be subject to search and review for information concerning any of the following:

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

(2) Any special activity the existence of which is not exempt from disclosure under the provisions of section 552 of title 5.

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

(A) The Select Committee on Intelligence of the Senate.

(B) The Permanent Select Committee on Intelligence of the House of Representatives.

(C) The Intelligence Oversight Board.

(D) The Department of Justice.

(E) The Office of the Director of National Intelligence.

(F) The Office of the Inspector General of the Intelligence Community.

(d) Decennial review of exempted operational files

(1) Not less than once every 10 years, the Director of National Intelligence shall review the exemptions in force under subsection (a) to determine whether such exemptions may be removed from any category of exempted files or any portion thereof.

(2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of the particular category of files or portions thereof and the potential for declassifying a significant part of the information contained therein.

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

(A) Whether the Director has conducted the review required by paragraph (1) before the expiration of the 10-year period beginning on October 7, 2010, or before the expiration of the 10-year period beginning on the date of the most recent review.

(B) Whether the Director of National Intelligence, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

(e) Supersedure of other laws

The provisions of this section may not be superseded except by a provision of law that is enacted after October 7, 2010, and that specifically cites and repeals or modifies such provisions.

(f) Allegation; improper withholding of records; judicial review

(1) Except as provided in paragraph (2), whenever any person who has requested agency records under section 552 of title 5 alleges that the Office has withheld records improperly because of failure to comply with any provision of this section, judicial review shall be available under the terms set forth in section 552(a)(4)(B) of title 5.

(2) Judicial review shall not be available in the manner provided for under paragraph (1) as follows:

(A) In any case in which information specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign relations is filed with, or produced for, the court by the Office, such information shall be examined *ex parte*, *in camera* by the court.

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

(C)(i) When a complainant alleges that requested records were improperly withheld be-

cause of improper exemption of operational files, the Office may meet the burden of the Office under section 552(a)(4)(B) of title 5 by demonstrating to the court by sworn written submission that exempted files likely to contain responsive records are records provided to the Office by an element of the intelligence community from the exempted operational files of such element.

(ii) The court may not order the Office to review the content of any exempted file in order to make the demonstration required under clause (i), unless the complainant disputes the Office's showing with a sworn written submission based on personal knowledge or otherwise admissible evidence.

(D) In proceedings under subparagraph (C), a party may not obtain discovery pursuant to rules 26 through 36 of the Federal Rules of Civil Procedure, except that requests for admissions may be made pursuant to rules 26 and 36 of the Federal Rules of Civil Procedure.

(E) If the court finds under this subsection that the Office has improperly withheld requested records because of failure to comply with any provision of this section, the court shall order the Office to search and review each appropriate exempted file for the requested records and make such records, or portions thereof, available in accordance with the provisions of section 552 of title 5 (commonly referred to as the Freedom of Information Act), and such order shall be the exclusive remedy for failure to comply with this section.

(F) If at any time following the filing of a complaint pursuant to this paragraph the Office agrees to search each appropriate exempted file for the requested records, the court shall dismiss the claim based upon such complaint.

(g) Definitions

In this section:

(1) The term "exempted operational file" means a file of an element of the intelligence community that, in accordance with this subchapter, is exempted from the provisions of section 552 of title 5 that require search, review, publication, or disclosure of such file.

(2) Except as otherwise specifically provided, the term "Office" means the Office of the Director of National Intelligence.

(July 26, 1947, ch. 343, title VII, § 706, as added Pub. L. 111-259, title IV, § 408(a), Oct. 7, 2010, 124 Stat. 2722.)

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (f)(2)(D), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

CODIFICATION

Section was formerly classified to section 432d of this title prior to editorial reclassification and renumbering as this section.

SUBCHAPTER VI—ACCESS TO CLASSIFIED INFORMATION

§ 3161. Procedures

(a) Not later than 180 days after October 14, 1994, the President shall, by Executive order or

regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government. Such procedures shall, at a minimum—

(1) provide that, except as may be permitted by the President, no employee in the executive branch of Government may be given access to classified information by any department, agency, or office of the executive branch of Government unless, based upon an appropriate background investigation, such access is determined to be clearly consistent with the national security interests of the United States;

(2) establish uniform minimum requirements governing the scope and frequency of background investigations and reinvestigations for all employees in the executive branch of Government who require access to classified information as part of their official responsibilities;

(3) provide that all employees in the executive branch of Government who require access to classified information shall be required as a condition of such access to provide to the employing department or agency written consent which permits access by an authorized investigative agency to relevant financial records, other financial information, consumer reports, travel records, and computers used in the performance of Government duties, as determined by the President, in accordance with section 3162 of this title, during the period of access to classified information and for a period of three years thereafter;

(4) provide that all employees in the executive branch of Government who require access to particularly sensitive classified information, as determined by the President, shall be required, as a condition of maintaining access to such information, to submit to the employing department or agency, during the period of such access, relevant information concerning their financial condition and foreign travel, as determined by the President, as may be necessary to ensure appropriate security; and

(5) establish uniform minimum standards to ensure that employees in the executive branch of Government whose access to classified information is being denied or terminated under this subchapter are appropriately advised of the reasons for such denial or termination and are provided an adequate opportunity to respond to all adverse information which forms the basis for such denial or termination before final action by the department or agency concerned.

(b)(1) Subsection (a) shall not be deemed to limit or affect the responsibility and power of an agency head pursuant to other law or Executive order to deny or terminate access to classified information if the national security so requires. Such responsibility and power may be exercised only when the agency head determines that the procedures prescribed by subsection (a) cannot be invoked in a manner that is consistent with the national security.

(2) Upon the exercise of such responsibility, the agency head shall submit a report to the congressional intelligence committees.