2003—Pub. L. 108–136 substituted ''Operational files of the National Reconnaissance Office'' for ''Protection of operational files of the National Reconnaissance Office'' in section catchline.

EFFECTIVE DATE OF 2004 AMENDMENT

For Determination by President that amendment by Pub. L. 108–458 take effect on Apr. 21, 2005, see Memorandum of President of the United States, Apr. 21, 2005, 70 F.R. 23925, set out as a note under section 401 of this title.

Amendment by Pub. L. 108–458 effective not later than six months after Dec. 17, 2004, except as otherwise expressly provided, see section 1097(a) of Pub. L. 108–458, set out in an Effective Date of 2004 Amendment; Transition Provisions note under section 401 of this title.

§ 432b. Operational files of the National Security Agency

(a) Exemption of certain operational files from search, review, publication, or disclosure

The Director of the National Security Agency, in coordination with the Director of National Intelligence, may exempt operational files of the National Security Agency from the provisions of section 552 of title 5 which require publication, disclosure, search, or review in connection therewith.

(b) Operational files defined

(1) In this section, the term ''operational files'' means—

(A) files of the Signals Intelligence Directorate of the National Security Agency (and any successor organization of that directorate) that document the means by which foreign intelligence or counterintelligence is collected through technical systems; and

(B) files of the Research Associate Directorate of the National Security Agency (and any successor organization of that directorate) that document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems.

(2) Files that are the sole repository of disseminated intelligence, and files that have been accessioned into the National Security Agency Archives (or any successor organization) are not operational files.

(c) Search and review for information

Notwithstanding subsection (a) of this section, exempted operational files shall continue to be subject to search and review for information concerning 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 by any of the following for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity:

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

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

(C) The Intelligence Oversight Board.

(D) The Department of Justice.

(E) The Office of General Counsel of the National Security Agency.

(F) The Office of the Inspector General of the Department of Defense.

(G) The Office of the Director of the National Security Agency.

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

(d) Information derived or disseminated from exempted operational files

(1) Files that are not exempted under subsection (a) of this section that contain information derived or disseminated from exempted operational files shall be subject to search and review.

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

(3) The declassification of some of the information contained in exempted operational files shall not affect the status of the operational file as being exempt from search, review, publication, or disclosure.

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

(e) Supersedure of other laws

The provisions of subsection (a) of this section may not be superseded except by a provision of law that is enacted after November 24, 2003, 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 National Security Agency 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 National Security Agency, 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) When a complainant alleges that requested records are improperly withheld be-

cause of improper placement solely in exempted operational files, the complainant shall support such allegation with a sworn written submission based upon personal knowledge or otherwise admissible evidence.

(D)(i) When a complainant alleges that requested records were improperly withheld because of improper exemption of operational files, the National Security Agency shall meet its burden under section 552(a)(4)(B) of title 5 by demonstrating to the court by sworn written submission that exempted operational files likely to contain responsive records currently perform the functions set forth in subsection (b) of this section.

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

(E) In proceedings under subparagraphs (C) and (D), the parties 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.

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

(G) If at any time following the filing of a complaint pursuant to this paragraph the National Security Agency agrees to search the appropriate exempted operational file or files for the requested records, the court shall dismiss the claim based upon such complaint.

(H) Any information filed with, or produced for the court pursuant to subparagraphs (A) and (D) shall be coordinated with the Director of National Intelligence before submission to the court.

(g) Decennial review of exempted operational files

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

(2) The review required by paragraph (1) shall include consideration of the historical value or other public interest in the subject matter of a 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 National Security Agency 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 National Security Agency has conducted the review required by paragraph (1) before the expiration of the 10-year period beginning on November 24, 2003, or before the expiration of the 10-year period beginning on the date of the most recent review.

(B) Whether the National Security Agency, in fact, considered the criteria set forth in paragraph (2) in conducting the required review.

(July 26, 1947, ch. 343, title VII, § 704, as added Pub. L. 108–136, div. A, title IX, § 922(a), Nov. 24, 2003, 117 Stat. 1570; amended Pub. L. 108–375, div. A, title X, § 1084(j), Oct. 28, 2004, 118 Stat. 2064; Pub. L. 108–458, title I, § 1071(a)(1)(JJ)–(LL), Dec. 17, 2004, 118 Stat. 3689; Pub. L. 109–163, div. A, title IX, § 933(b)(3), Jan. 6, 2006, 119 Stat. 3416.)

REFERENCES IN TEXT

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

AMENDMENTS

2006—Subsec. (c)(3)(H). Pub. L. 109–163 added subpar. (H).

2004—Subsec. (a). Pub. L. 108–458, § 1071(a)(1)(JJ), which directed amendment of par. (1) of subsec. (a) by substituting ''Director of National Intelligence'' for ''Director of Central Intelligence'', was executed to text of subsec. (a), which does not contain any pars., to reflect the probable intent of Congress.

Subsec. (f)(2)(D)(i). Pub. L. 108–375 substituted ''responsive records'' for ''responsible records''.

Subsec. (f)(2)(H). Pub. L. 108–458, § 1071(a)(1)(KK), substituted ''Director of National Intelligence'' for ''Director of Central Intelligence''.

Subsec. (g)(1). Pub. L. 108–458, § 1071(a)(1)(LL), substituted ''Director of National Intelligence'' for ''Director of Central Intelligence'' in two places.

EFFECTIVE DATE OF 2004 AMENDMENT

For Determination by President that amendment by Pub. L. 108–458 take effect on Apr. 21, 2005, see Memorandum of President of the United States, Apr. 21, 2005, 70 F.R. 23925, set out as a note under section 401 of this title.

Amendment by Pub. L. 108–458 effective not later than six months after Dec. 17, 2004, except as otherwise expressly provided, see section 1097(a) of Pub. L. 108–458, set out in an Effective Date of 2004 Amendment; Transition Provisions note under section 401 of this title.

§ 432c. Omitted

Section, July 26, 1947, ch. 343, title VII, § 705, as added Pub. L. 109–163, div. A, title IX, § 933(a)(1), Jan. 6, 2006, 119 Stat. 3413, 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.