

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
STEVEN AFTERGOD )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NATIONAL RECONNAISSANCE )  
OFFICE )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 05-1307 (RBW)

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rules of Civil Procedure 56, plaintiff *pro se* Steven Aftergood respectfully moves for summary judgment in this action. In support of this motion, plaintiff relies upon the accompanying memorandum, the declaration of Steven Aftergood, and the statement of undisputed material facts. A proposed order consistent with this motion is attached.

Dated: December 5, 2005

Respectfully submitted,

\_\_\_\_\_  
STEVEN AFTERGOD  
Plaintiff *pro se*

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**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**Introduction**

This is a Freedom of Information Act proceeding in which plaintiff *pro se* Steven Aftergood seeks disclosure of unclassified portions of the National Reconnaissance Office (NRO) Congressional Budget Justification Book for Fiscal Year 2006. The requested information has been withheld by defendant NRO on grounds that the requested record is an “operational file” that is exempt from FOIA processing under 50 U.S.C. § 403-5e.

But in this case defendant NRO has improperly invoked the operational files exemption and is in violation of the Freedom of Information Act.

As explained below, the designation of the requested record as an operational file is contrary to the language of the exemption statute, which excludes disseminated records such as the Congressional Budget Justification Book from the definition of operational files.

## The “Operational Files” Exemption Specifically Excludes Disseminated Files

The statutory exemption from the Freedom of Information Act for operational files of the National Reconnaissance Office, 50 U.S.C. § 403-5e, was enacted in the Fiscal Year 2003 Intelligence Authorization Act. There is little legislative history to explain this statute, nor has it previously been adjudicated.

But the NRO statute was closely modeled on the CIA Information Act of 1984, 50 U.S.C. § 431, which provided a similar FOIA exemption for CIA operational files. The CIA statute did entail a good deal of legislative history, and at least one recent interpretive ruling, *American Civil Liberties Union v. Department of Defense*, 351 F.Supp. 2d 265 (S.D.N.Y. 2005), which help to illuminate the meaning of the NRO exemption.

Both the CIA and the NRO statutes, using nearly identical language, exclude files that have been disseminated from the definition of “operational files.” Thus:

“Files which are the sole repository of disseminated intelligence are not operational files.”

See 50 U.S.C. § 403-5e(a)(2)(B) [the NRO exemption] and see 50 U.S.C. § 431(b) [the CIA exemption]. Likewise:

“Records from exempted operational files which have been disseminated to and referenced in files that are not exempted ... and which have been returned to exempted operational files for sole retention shall be subject to search and review.”

50 U.S.C. § 403-5e(a)(4)(D) and 50 U.S.C. § 431(d)(3).

The practical meaning of these provisions, which appear in both the CIA and the NRO exemption statutes, was explained by the court in *ACLU v. DoD* as follows:

“[E]ven ‘particularly sensitive records,’ by virtue of having been disseminated or identified beyond their originating operational files, become subject to FOIA search and review,

subject always to later proof of specifically available FOIA exemption.” 351 F.Supp. 2d 265, at 274.

As plaintiff will now show, the requested record has been disseminated beyond its originating file and is therefore subject to FOIA search and review.

#### The NRO Congressional Budget Justification Book Has Been Disseminated

The FY 2006 NRO Congressional Budget Justification Book has been disseminated in support of the agency’s budget request. *See* Declaration of Steven Aftergood, 12/05/05, at ¶ 3.

In particular, multiple copies have been produced and distributed within the NRO itself. *Id.* at ¶ 5.

The requested NRO Budget Justification Book has also been distributed to other executive branch agencies such as the Office of Management and Budget and the Office of the Director of National Intelligence. *Id.* at ¶ 5.

Finally, it has also been disseminated to Congress, a fact confirmed by Senator Ron Wyden, a member of the Senate Select Committee on Intelligence. *Id.* at ¶ 7.

Having been disseminated beyond its originating file, it follows that the requested record is subject to review under the FOIA. *ACLU v. DoD*, 351 F.Supp. 2d 265, 274.

**Conclusion**

For the foregoing reasons, the Court is respectfully asked to enter summary judgment for the plaintiff.

Dated: December 5, 2005

Respectfully submitted,

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Defendant.	)	
	)	

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS**  
**AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Federal Rule of Civil Procedure 56, and Local Civil Rules 7.1(h) and 56.1, plaintiff *pro se* Steven Aftergood respectfully submits the following statement of material facts as to which there is no genuine dispute:

1. More than one copy of the FY 2006 NRO Congressional Budget Justification Book has been produced and distributed. Aftergood Declaration, at ¶ 4.
2. The FY 2006 NRO Congressional Budget Justification Book has been disseminated to more than one location within the National Reconnaissance Office. Aftergood Declaration, at ¶ 5.
3. The FY 2006 NRO Congressional Budget Justification Book has been disseminated outside the National Reconnaissance Office to another executive branch agency. Aftergood Declaration, at ¶ 6.
4. The FY 2006 NRO Congressional Budget Justification Book has been disseminated to

the Senate Select Committee on Intelligence of the United States Congress. Aftergood Declaration, at ¶ 7.

Dated: December 5, 2005

Respectfully submitted,

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**ORDER**

UPON CONSIDERATION of the parties' motions for summary judgment, the opposition thereto, and the entire record in this case, it is this \_\_\_\_ day of \_\_\_\_\_, 2006,

ORDERED that Plaintiff's motion for summary judgment is hereby GRANTED and defendant's motion for summary judgment is hereby DENIED. Defendant shall process the requested record under the provisions of the Freedom of Information Act within 30 days.

Defendant shall release to the plaintiff all portions of the requested record that are not classified or otherwise exempt from disclosure under 5 U.S.C. §552.

\_\_\_\_\_  
United States District Judge