

HISTORY “HELD CAPTIVE”: CIA Claims Release of its History of the Bay of Pigs Debacle Would “Confuse the Public.”

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Confused anti-Castro forces captured during the Bay of Pigs invasion. History is being held captive, as well.

17 April 2012 UPDATE: Fifty-one years after the failed attempt to invade Cuba, the Central Intelligence Agency and Department of Justice continue to claim that releasing the final volume of a CIA history of the debacle would “confuse the public” and should therefore remain withheld. The National Security Archive originally requested the document in 2005. Last year, the Archive filed a FOIA lawsuit to commemorate the 50th Anniversary of Bay of Pigs debacle. That prompted the release of three volumes of the five volume history (one volume was already available at the Johnson Presidential Library); the CIA and DOJ have continued to fight the release of the fifth volume. Judge Kessler, of the US District Court in Washington DC, is expected to soon rule on the case.

In late 2011, the Central Intelligence Agency [explained](#) to Judge Kessler of the US District Court in Washington DC that releasing the final volume of its three-decade-old history of the 1961 Bay of Pigs debacle would “confuse the public,” and should be withheld because it is a “predecisional” document. Wow. And I thought that I had heard them all.

On the 50th anniversary of the Bay of Pigs invasion, the National Security Archive [filed a Freedom of Information Act lawsuit](#) for the release of a five-volume CIA history of the Bay of Pigs affair. In response to the lawsuit, the CIA negotiated to release three volumes of the history — the JFK Assassination Records Review Board had already released Volume III- with limited redaction, [currently available](#) on the National Security Archive’s website. At the

time, the Director of the National Security Archive's Cuba Documentation project, Peter Kornbluh, [quipped](#) that getting historic documents released from the CIA was "the bureaucratic equivalent of passing a kidney stone." He was right. The Agency refused to release the final volume of this history, and the National Security Archive is not giving up on the fight.

11. Additionally, the release of an unfinished draft CIA history risks placing inaccurate or incomplete information into the public domain. This could cause scholars, journalists, and others interested in the subject at hand to reach an erroneous or distorted view of the Agency's role in the events as described in a draft or otherwise lead to public confusion. Those misperceptions could, in turn, discredit the work of the CIA History Staff in the eyes of the public or, worse, in the eyes of the Agency officers who rely upon CIA histories for perspective and guidance in performing their duties. In short, the public release of inaccurate history benefits no one.

Keet it secret!

Volume five of the history, written by CIA historian Jack Pfeiffer -who sued the CIA himself to release the history in 1987, and lost- is [described by the CIA](#) as an "Internal Investigation document" that "is an uncritical defense of the CIA officers who planned and executed the Bay of Pigs operation... It offers a polemic of recriminations against CIA officers who later criticized the operation and against those U.S. officials who its author, Dr. Pfeiffer, contends were responsible for the failure of that operation."



David S. Robarge from roadrunnersinternationale.com

While Dr. Pfeiffer's conclusions may or may not be true, FOIA case law appears to be pretty clear that Americans –who funded the operation and Dr. Pfeiffer's histories– have the right to read this document and decide for themselves its merits. Despite [the claims](#) of the CIA's chief historian David Robarge, the document should not remain in the CIA vaults because its conclusions “could cause scholars, journalists, and others interested in the subject at hand to reach an erroneous or distorted view of the Agency's role.” Historians, after all, are well trained in treating documents –especially CIA hagiographies sources– skeptically.

To prevent the public from reading this volume, the CIA has argued that because it is a draft, it is a predecisional document and can be denied under exemption b(5) of the FOIA. Except –as David Sobel, counsel to the National Security Archive points out [in our motions](#)– the case law states otherwise.

President Obama [instructed every agency](#) (yes, even the CIA) to “usher in a new era of open government” and apply a “presumption of disclosure... to all decisions involving FOIA.” In response to this instruction, the Department of Justice Office of Information Policy –responsible for enforcing FOIA throughout the government– issued [its own guidance](#) to agencies (yes, even the CIA), explaining:

“A requested record might be a draft, or a memorandum containing a recommendation. Such records might be properly withheld under Exemption 5, but that should not be the end of the review. Rather, the content of that particular draft and that particular memorandum should be reviewed and a determination made as to whether the agency reasonably foresees that disclosing that particular document, given its age, content, and character, would harm an interest protected by Exemption 5. In making these determinations, agencies should keep in mind that mere “speculative or abstract fears” are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm...

For all records, the age of the document and the sensitivity of its content are universal factors that need to be evaluated in making a decision whether to make a discretionary release.” *

As the D.C. circuit recognized, “the Supreme Court has pointed out that the ‘expectation of the confidentiality of executive communications [] has always been limited and subject to erosion over time...’” (Judicial Watch, Inc. v. U.S. Dep't of Justice (D.C. Cir. 2004.)

Even presidential records are barred from being withheld under “predecisional pretenses” after a period of time. The [Presidential Records Act](#) expressly states that exemption b(5) cannot be invoked to withhold records once the president has been out of office twelve years. If the presidential communication and work process is not threatened by this provision, there is no reason that the CIA's history staff should be.

And there is a good chance that the history is not even a predecisional document. The burden rests on the CIA to point to the specific decision that the history is “decides” to make it a predecisional document. And so far they have not. Their case rests on the speculative and abstract fear of “discrediting[ing] the work of the CIA History Staff in the eyes of the public or, worse, in the eyes of the Agency officers who rely upon CIA histories.”

Even if parts of the document truly are predecisional, only they can be withheld, the facts leading up to that decision –and histories are (hopefully) based primarily on facts– must be

released.

To wit, draft histories have frequently been released under FOIA. In 2010, the Department of Justice [released](#) portions of pages of a candid history of Nazi-hunting (and Nazi-protecting) clearly marked DRAFT. (The unredacted version of the report was subsequently leaked- no prosecution by the Obama administration for that one... yet.) Moreover, the CIA previously disclosed Volume IV of this history in draft form (with a disclaimer)! This final volume to the CIA's history remains one of the few -perhaps the only- government produced product chronicling the doomed invasion which remains classified; the public should be allowed to see its contents.

to this document. Finally, the CIA has explained why the release of Volume V would have a chilling effect on internal agency deliberations and **confuse the public with inaccurate historical information.** Because no issues of material fact are in dispute, therefore, Defendant is entitled to judgment as a matter of law.

"Trust us. You don't need to read it for yourselves."

The National Security Archive's case is a strong one. I'm confident that Judge Kessler will require a *de novo* review of the document leading to its eventual release.

On the other hand, the CIA's "confuse the public" defense appears is as weak as it is insulting.

note

*It's certainly not clear why DOJ attorneys would agree to argue this case for the CIA, especially after Eric Holder sent a [government-wide memo](#) which promised to defend denials of FOIA requests only when disclosures would truly harm agency interests. What is more clear is the reason why many agencies have failed to implement the Obama FOIA reforms -the Department of Justice has done a poor job implementing them within its own divisions, and the DOJ Office of Information Policy has done a poorer job forcing other agencies to comply with the law.

As the Archive's counsel David Sobel put it, "This case is yet the latest example of the Obama administration failing to deliver on its promise of 'unprecedented' transparency. It's hard to understand how the release of this document, after all these years, could in any way harm legitimate government interests.""

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