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United States General Accounting Office
Washington, DC 20548

March 6, 2001

The Honorable Henry J. Hyde
Chairman, Committee on International Relations

The Honorable Benjamin Gilman
Chairman, Subcommittee on the Middle East and South Asia
House of Representatives

Subject: U.N. Peacekeeping: GAO's Access to Records on Executive Branch
Decision-making

This letter provides you information about the status of our efforts, as of March 5, 2001, to obtain access to executive branch records needed to complete the study requested by your committee. On November 18, 1999, as prior Chairman of the Committee, Congressman Benjamin Gilman requested a study of the process used by the executive branch to approve several U.N. peacekeeping operations and of its consultation with Congress about these decisions. In requesting this study, Congressman Gilman expressed concern about U.S. decisions to support new or expanded U.N. operations in the Democratic Republic of the Congo, East Timor, Kosovo, and Sierra Leone. His view was that these operations did not have clear end points and, over several years, could result in billions of dollars of U.N. peacekeeping assessments for the United States.

As agreed with the prior Chairman's office, we began our study in March 2000.¹ We immediately sought access to records that documented the decision-making process for these operations from Departments of State and Defense and the National Security Council. These agencies have primary responsibility for making U.S. decisions about whether or not to support peacekeeping operations, and each agency has a critical role in the decision process, with either State or Defense taking the lead role in the decisions depending on the type of proposed peacekeeping operation.

To provide a framework for the decision process, Presidential Decision Directive 25 requires executive branch officials to consider several factors when deciding whether to support new, expanded, or extended peacekeeping operations, such as whether proposed operations advance U.S. interests and have clear objectives and endpoints.² Using this framework, State, Defense, and the National Security Council work through an interagency process and generate analyses and other records documenting their individual and joint consideration of

¹ In his November 1999 letter, the prior Chairman also requested a study of U.N. peacekeeping costs and we agreed with his office to focus first on conducting the cost study. We finished the cost study and issued our report in August 2000. See United Nations: Cost of Peacekeeping Is Likely to Exceed Current Estimate (GAO/NSIAD-00-228BR, Aug. 31, 2000).

² This directive, entitled Clinton Administration Policy on Reforming Multilateral Peace Operations, is a classified document. An unclassified summary also was issued in May 1994.

Directive 25 factors. Accordingly, based on our statutory authority, we sought access to these types of records for the decisions about the operations in our study. However, as we testified before the Committee in October and November 2000,³ we have been unable to complete the study because of difficulties in getting access to some of these records. Enclosure I describes of our access authority and enclosure II describes in detail our lengthy effort to obtain access to records from each of these agencies.

SUMMARY AND OBSERVATIONS

Since the Departments of State and Defense and the National Security Council had failed to provide us access to all the records we requested and needed, the Comptroller General issued demand letters to the head of each agency on November 9, 2000, under our enforcement authority in 31 U.S.C. § 716. On December 13, 2000—after almost 9 months of sustained effort on the part of both agencies and the efforts of the Committee—we obtained from State reasonable access to records documenting State’s role in the Directive 25 decision-making process for the operations in our study.

On November 28, the Department of Defense responded to our demand letter by stating that it was committed to cooperating fully with us (see enc. III). However, as of February 27, 2001, we had obtained access to only about one quarter of the Defense records we had requested, and many of these were heavily redacted. Despite two calls to Secretary of Defense Rumsfeld and a meeting with Acting Deputy Secretary of Defense De Leon on February 28 and March 1, respectively, the access issue remains unresolved. Specifically, on March 1, the Comptroller General met with the acting Deputy Secretary of Defense to discuss ways to provide us satisfactory access to the Defense records. At the conclusion of this meeting, it appeared to us that an accommodation was forthcoming that would have provided us the access we needed. However, on March 2, Defense informed us that the National Security Council, coordinating with the White House Counsel’s office, directed Defense not to provide us access to the records until the National Security Council had completed its review. Since these records are necessary for preparing a report that is responsive to the Committee’s request, we advised the Defense Department officials that we would proceed with enforcement action under section 716(b) to obtain these records, unless we have reasonable and responsive access to the records by March 9, 2001.

On November 29, the National Security Council responded to our demand letter by formally denying us full and complete access to the records we had requested. Consequently, the Comptroller General took the next step under our enforcement authority in section 716(b) by issuing a report to the President, the Congress, the Director of the Office of Management and Budget (OMB), and other specified officials. (See enc. IV, V, and VI, respectively, for our demand letter, the National Security Council’s response, and our report.) After filing this report GAO can bring an action in court to require an agency to produce a record. However, section 716(d) indicates that we can not bring such an action if the President or the Director of OMB certifies that the requested records contain certain privileged material whose disclosure to GAO “reasonably could be expected to impair substantially the operations of the Government.” The Director of OMB certified that these conditions had been met and that the records could be withheld from GAO. At the same time, the Director of OMB did not provide adequate substantive support that the statutory standard for his certification had been met. (See enc. VII.) However, the language of section 716 and its legislative history suggest that GAO can not judicially challenge the certification.

³ Preliminary Observations about the U.S. Process for Deciding to Support U.N. Peace Operations, (GAO-01-100T, Oct. 4, 2000); U.N. Peacekeeping: Access to Records Concerning the U.S. Decision-making Process, (GAO-01-180T, Nov. 1, 2000).

Our experience in trying to obtain access to executive branch records concerning U.S. decisions to support new or expanded U.N. peacekeeping operations has impaired our ability to conduct meaningful oversight work for Congress that is timely, independent, objective, fact-based, accurate, and complete. Specifically,

- Unreasonable delays in obtaining access to the executive branch records have prevented us from sending a timely report to the Committee. After 11 months, we have not yet obtained access to many of the records critical to our analysis of how executive branch officials applied Presidential Decision Directive 25 in deciding to approve new or expanded U.N. peacekeeping operations. In particular, we have obtained access to only about a quarter of the Defense Department records directly related to the decision-making process.
- We do not have reasonable assurance that we have had independent access to all executive branch records that may have a material bearing on our study. Generally accepted government auditing standards state that external interference that limits or modifies the scope of our audit—or interferes with the selection of information we examine—threatens our ability to form independent and objective opinions and conclusions.⁴ In the case of the State Department, we agreed to a process that provides us with reasonable assurance. However, we do not know whether the National Security Council has identified all relevant records that it controls, and Defense has not provided us access to all the records it has identified as relevant to our study.
- Denying us access to records has impaired our ability to conduct a complete and accurate assessment. Specifically, the National Security Council has denied us full and complete access to 26 documents related to the decision-making process on U.N. peacekeeping. These documents cover discussions about Presidential Decision Directive 25 factors relevant to peacekeeping decisions. As of March 5, 2001 Defense has not provided us full and complete access to 111 specific documents.

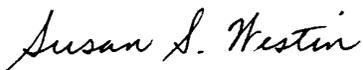
We continue to work with executive branch agencies to obtain access to the records we need to analyze the decision-making process for supporting peacekeeping operations. In this regard, Defense's role is crucial to the decision process and we cannot prepare a report that fully assesses the process or responds to the Committee's request without the information in Defense's records. As stated above, we have been unable to satisfactorily resolve this matter with Defense, and therefore we intend to take the next step under our enforcement authority unless we have reasonable and responsive access to the records by March 9, 2001. If we ultimately obtain access to these records, we will complete the study requested by your Committee and prepare a report that is fully responsive to your request, although some scope limitations will be noted in the report. If we do not obtain access to these records, we will prepare a report based on the records provided to us; however, the report will not be fully responsive to your request and will note the serious scope limitations placed on our work.

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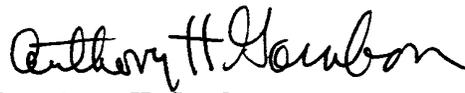
We are sending copies of this letter to interested congressional Committees and to the Honorable Colin Powell, Secretary of State; the Honorable Donald H. Rumsfeld, Secretary of Defense; and the Special Advisor to the President for National Security Affairs, Condoleezza Rice. The letter is also available on GAO's home page at <http://www.gao.gov>.

⁴Government Auditing Standards (1994 Revision, Comptroller General of the United States, June 1994). The publication discusses general standards for conducting audits, such as qualifications of the staff and independence of the work.

If you or your staff have any questions about this letter, please contact me at (202) 512-4128. Key contributors to this letter were Harold J. Johnson, Tet Miyabara, Zina Merritt, Michael Rohrback, and Richard Seldin.



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Enclosures

ENCLOSURE I

GENERAL ACCOUNTING OFFICE ACCESS ENFORCEMENT AUTHORITY

Under section 716 of title 31 of the United States Code, federal agencies are required to give the Comptroller General information about agency duties, powers, activities, organization, and financial transactions that the Comptroller General needs. The Comptroller General is authorized to inspect agency records to obtain this information.

If GAO and the agency cannot agree on the release of information, section 716(b) establishes a procedure for enforcement to compel the production of a record. First, the Comptroller General sends a written request to the agency head for a record that has not been made available to GAO within a reasonable time after an initial request. The agency then has 20 calendar days to respond, either by providing the record for inspection or by explaining why it is being withheld. If the agency does not provide the record, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget (OMB), the Attorney General, the head of the agency, and the Congress. If the agency does not provide the record within 20 calendar days of the report's filing, section 716(b) authorizes the Comptroller General to institute judicial proceedings to enforce GAO's access rights.

Under section 716(d), there are three exceptions to the Comptroller General's authority to bring a civil enforcement action to compel access to a record:

- The record relates to activities the President designates as foreign intelligence or counterintelligence activities;
- The record is specifically exempted from disclosure to the Comptroller General by statute, provided certain conditions are met; or
- The President or the Director of OMB certify that (1) the record could be withheld under Freedom of Information Act exemptions in 5 U.S.C. § 552(b)(5)(certain privileged information) or (b)(7) (law enforcement investigatory records) and (2) disclosure reasonably could be expected to impair substantially the operations of the government.

With regard to the last exception, section 716(d) states that the President or the Director of OMB cannot delegate the authority to certify and that the certification must include a complete explanation of the reasons for the certification. The principal legislative history explaining this provision states that the explanation should indicate the specific federal government operations that might reasonably be expected to suffer substantial impairment by disclosure of records to GAO and include evidence to support this expectation. When read together, both section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification. Nevertheless, the legislative history also states that the certification was not intended to be binding on the Congress.¹

Although the listed exceptions preclude GAO from bringing an enforcement action to compel access, they do not diminish GAO's right of access to agency records. Furthermore, should the certification authority be properly invoked, GAO can still seek the assistance of the Congress to obtain access. In this regard, nothing in section 716 authorizes withholding of information from the Congress.

¹ S. Rep. No. 96-570, at 8 (1980).

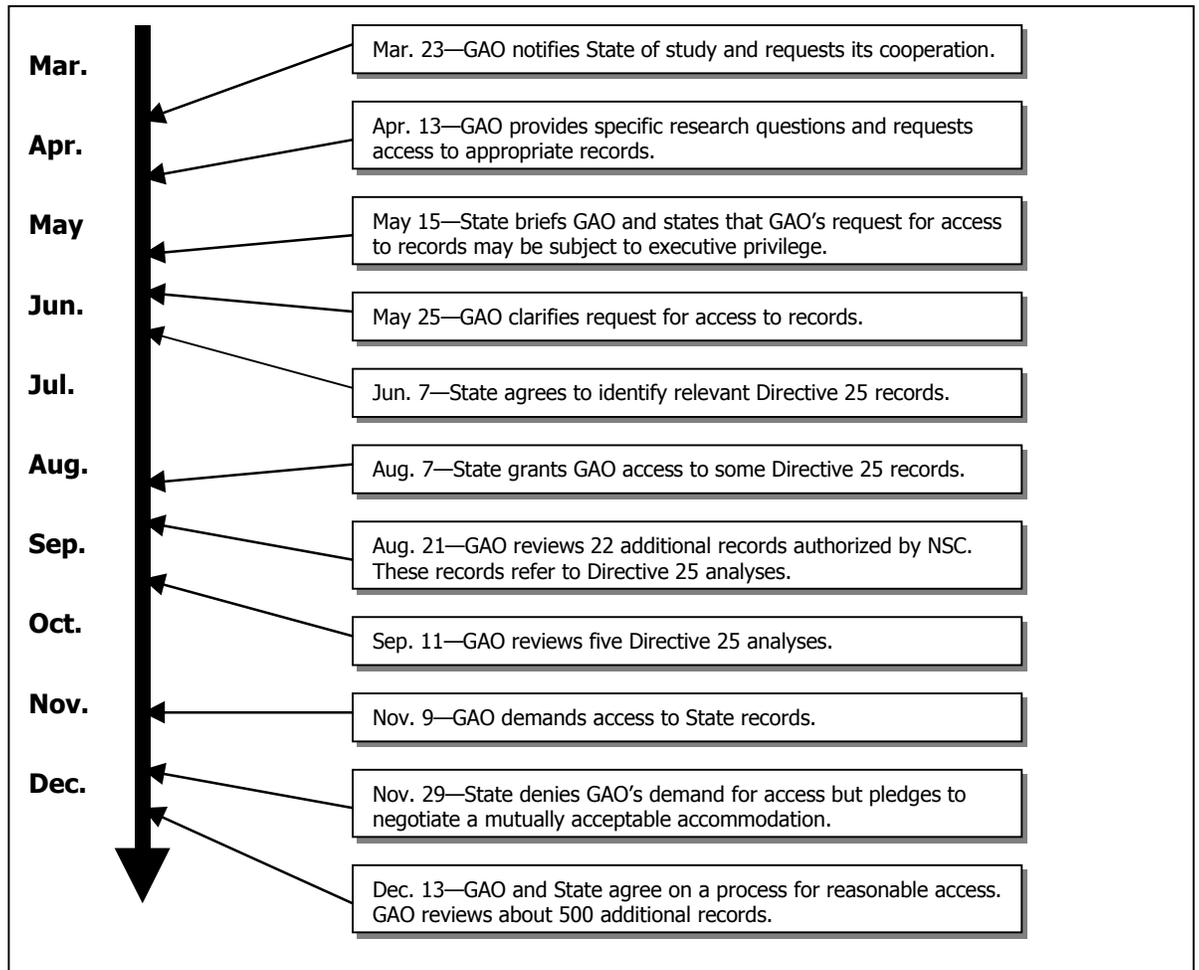
ENCLOSURE II

STATUS OF OUR ACCESS TO RECORDS

**STATE DEPARTMENT PROVIDED GAO
ACCESS TO REQUESTED RECORDS**

After approximately 9 months of effort, we obtained access to all requested State Department records about the decision-making process for the U.N. operations in our study. Additionally, after considerable effort by both agencies, we have obtained sufficient access to other Department records for us to have reasonable assurance we can form independent and objective opinions and conclusions about State's role in applying Directive 25. Figure 1 shows the key events in our pursuit of access to State Department records.

Figure 1: Key Events in Gaining Access to State Department Records, March through December 2000



On March 23, 2000, we wrote the Secretary of State to notify the Department of our study and request its cooperation in conducting our study. On April 13, at State's request, we wrote the Secretary of State to provide specific research questions and again requested access to all State records relevant to our study. At a May 15 meeting, State officials told us that National Security Council (NSC) officials had instructed State to seek further clarification of our request for records and not to provide us access to any records that the NSC had an interest

ENCLOSURE II

in without prior clearance from the NSC because the records might contain information protected by executive privilege. On May 25, we again wrote the Secretary of State clarifying our request for access to State records and citing our statutory right of access to these records under 31 U.S.C. § 716. On May 26, Chairman Gilman wrote the Secretary of State to ask for her cooperation in arranging access to requested records for our study.

In early June, after repeated discussions, State initiated a process to provide us access to Directive 25 records.¹ Under this process, we specified the types of records—such as decision memoranda—to which we needed access to conduct our study. State officials searched their files to identify records of these types that they judged to be relevant to our study. After collecting these records, State officials screened these records to determine whether granting us access was appropriate.

Using this process, State officials identified numerous records.² State selected 46 of these records that it believed were most relevant to our review and, on July 19, following NSC's guidance, forwarded them to NSC for its review and clearance because they might contain privileged information. On August 3, NSC authorized State to provide us with access to 22 of these records, but denied us access to the remaining 24 records. On August 7, State's Chief Financial Officer informed us that State would grant us access to 13 records directly related to the Directive 25 process.³ However, these 13 records did not include any of the 22 records that NSC had authorized us to review, nor did State's letter disclose NSC's decision to deny us access to the remaining 24 records. We were unaware of NSC's decision about these 46 records until an August 14 meeting with a State legal advisor. After that meeting, we immediately requested access to the 22 records cleared by NSC.

After some discussion, State granted us access to the 22 records on August 18 and we reviewed them on August 21. These records referred to additional records that documented the application of Directive 25 to U.S. decisions to support the U.N. operations in our study. These records—known as Directive 25 analyses—were materially relevant to our study. We immediately requested access to all such records related to our study, and obtained access to five of them on September 11. We have found these records to be among the most significant for analyzing how Directive 25 was applied in U.S. decisions to support the U.N. operations in our study. As of September 11, including the five Directive 25 analyses, we were aware of only about 60 State records relevant to the application of Directive 25. At that time, we were not made aware of, nor were we provided access to, the remainder of the over 500 records that we later learned State had identified during its record search.⁴

As a result of the access problems we had experienced during this study, we were concerned about our lack of independent access to State records. In this regard, government auditing standards recognize that external interference that limits the scope of an audit or interferes with the selection of information to be examined may threaten our ability to form

¹ At this time, State also provided access to records documenting the Department's consultations with Congress about U.N. peacekeeping, such as congressional notification letters and summaries of legislative contacts.

² As noted below, we later learned that State had identified over 500 records.

³ State's August 7 letter also said the Department had identified an undisclosed number of intelligence assessments relevant to our study. We eventually reviewed over 70 such records.

⁴ On September 18, 2000, we obtained access to four political military plans from State.

ENCLOSURE II

independent and objective opinions and conclusions.⁵ To address our concerns, on November 9, under our enforcement authority in 31 U.S.C. § 716(b), the Comptroller General wrote the Secretary of State to demand (1) full and complete access to specific State records and (2) the establishment of a procedure that would allow us to independently identify relevant State records. We noted that the existing procedure allowed State Department officials rather than our analysts to determine whether specific records were relevant to our study. In at least two cases, this had resulted in the exclusion of key records.

In a November 29 letter, State responded that it had provided us access to all records that we had specifically requested. Moreover, State said, "it has never been official Department policy to allow GAO unrestricted access to conduct its own searches of Departmental records." Nevertheless, State pledged to negotiate a constructive, cooperative process to provide additional access to Department records.

On December 13, we concluded an agreement with State that provided us greater access to records for this study. Under this agreement, we obtained full access to 38 additional State records. Department officials, using broader criteria, identified these records from the over 500 records identified during State's original search. Additionally, we obtained partial access to the remaining records identified during State's original search for the purpose of determining whether they appeared relevant to our study.

In late December, under this agreement, we reviewed the 38 additional State records in detail. Additionally, we briefly reviewed the remaining records identified during State's original search to assess their relevancy to our study. All of these records (1) contributed substantially to our understanding of State's role in applying Directive 25 in the decision-making process and (2) provided us reasonable assurance that State had identified—and we had obtained access to—sufficient records for us to form reasonable conclusions about State's role in applying Directive 25.

DEFENSE DEPARTMENT HAS PROVIDED GAO ACCESS TO A LIMITED NUMBER OF DIRECTIVE 25 RECORDS

On February 7, 2001, we obtained access to 29 of 121 records that we had requested related to the Defense Department's role in applying Directive 25 in U.S. decisions to support the U.N. peacekeeping operations in our study.⁶ Of the 29 records, 20 were redacted such that we could obtain only limited information about the Department's role in applying Directive 25. On February 27, Defense provided us two additional documents and informed us that it planned to forward the remaining documents to NSC and State for their review and possible clearance. GAO attempted to reach a further accommodation on these remaining documents and the redacted documents and believed an accommodation was reached on March 1. However, on March 2, Defense informed us that the National Security Council,

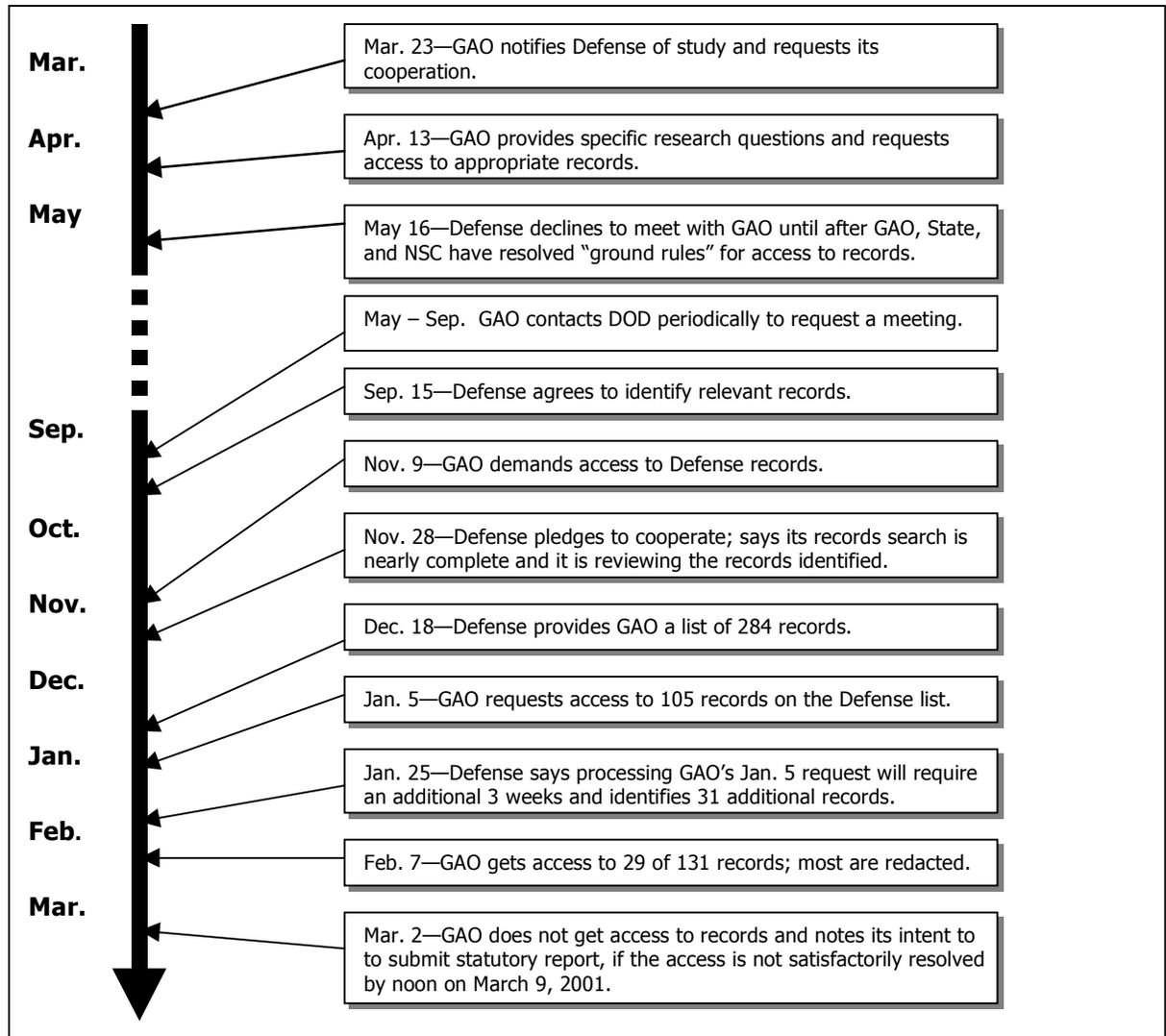
⁵ Government Auditing Standards (1994 Revision, Comptroller General of the United States, June 1994). This publication discusses general standards for conducting audits, such as qualifications of the staff and independence of the work. "These standards, often referred to as generally accepted government auditing standards (GAGAS), are to be followed by auditors and audit organizations when required by law, regulation, agreement, contract, or policy."

⁶ In addition, in early December 2000, we obtained access to over 300 intelligence assessments prepared by the Defense Intelligence Agency. Defense officials noted that they made a considerable effort to review and release these records to us as quickly as possible. These records provide us background information about the operations, but do not contain information about DOD's role in applying Directive 25, which is the focus of our study.

ENCLOSURE II

coordinating with the White House Counsel's office, directed Defense not to provide us access to the records until the National Security Council had completed its review. We have set a deadline of March 9, 2001 for this to occur. If we do not have reasonable and responsive access to the records by the deadline, GAO will take the next step under its enforcement authority and issue the report provided for by 31 U.S.C. § 716(b). Figure 2 shows the key events in our pursuit of access to Defense Department records.

Figure 2: Key Events in Pursuing Access to Defense Department Records, March 2000 through March 2001.



On March 23, 2000, we wrote the Secretary of Defense to notify the Department of our study and request its cooperation in conducting our study. On April 13, at Defense's request, we wrote the Secretary of Defense to provide specific research questions and again requested access to all Defense records relevant to our study.

On April 24, Defense officials informed us that the White House and the State Department were taking the lead in developing "ground rules" for responding to our access requests for this study. On May 16, the Deputy Assistant Secretary of Defense for Peacekeeping and

ENCLOSURE II

Humanitarian Affairs told us Defense would not meet with us to discuss our study and access to Defense records until after we had resolved our access to State records. After May 16, we periodically contacted Defense officials to reiterate our request for a meeting. On September 6, Defense officials contacted us to schedule an initial meeting to discuss our study and access to appropriate Defense records. At that meeting, which took place on September 15, Defense officials agreed to (1) search Department files for all records potentially relevant to our study and (2) review the search results to identify relevant records. Defense officials agreed to expedite this process. Defense also noted that, following the process employed to provide GAO access to State and NSC records, it would have to obtain clearance from NSC, State, and possibly other executive branch agencies to release some records.

On October 27, Defense informed us that November 6 was the target date for completing its record search. On November 1, we told Defense officials that, unless we obtained access, or satisfactory assurances that we would soon obtain access, to relevant Defense records by November 9, we planned to write the Secretary of Defense to demand such access. On that date, not having obtained access to any Defense records, the Comptroller General wrote the Secretary of Defense to demand (1) full and complete access to records and (2) sufficiently independent access to provide reasonable assurance that Defense had identified—and we had obtained access to—sufficient records to form reasonable opinions and conclusions about Defense’s role in applying Directive 25 to decisions about the operations in our study.

In a November 28 letter, the Defense Department responded that it was committed to cooperating fully with us and that it intended to finish its record search and review by December 15, 2000. It also pledged that before December 15, it would provide GAO with as many documents as possible dealing with its decision-making processes. Moreover, in its letter, Defense noted that it had not denied GAO access to any records but needed a reasonable time to identify and review relevant records. Defense also said that it would not grant us independent access to Department records.

On December 1, 2000, in an effort to provide us greater access to Defense records relevant to our study, Defense officials agreed to provide us a list of all records it had identified during its search, showing their date, subject, originator, and recipient. After reviewing that list, we would identify those records we judged most relevant to our study and Defense would review them to determine whether Defense could provide us access to these records. It was our understanding—both from Defense’s November 28 letter and conversations with Defense officials—that Defense would prescreen the records on this list to expedite our access to some records. On December 18, Defense provided us a list of 284 records concerning U.S. decisions to support U.N. operations in the Congo, East Timor, and Sierra Leone.

On January 5, 2001, after a careful review of Defense’s list, we requested access to 105 of these records. On January 12, Defense informed us that our request required further review, which “could take some time.” On January 25, we met with Defense officials to discuss this delay. At that meeting, Defense informed us that we could not obtain access to any of the 105 records until Defense counsel and others had reviewed them, in part to determine whether some should be withheld to protect Defense’s internal deliberative processes. Defense officials said that this additional review would require at least 3 weeks, after which Defense estimated that we could obtain access to about one-quarter of the records. The remaining records would have to be sent to the NSC, State, or other agencies for review and clearance. At the January 25 meeting, Defense also provided us with a list of 34 additional records identified after the completion of the list provided on December 18. On January 26, we requested access to 16 of these additional records, increasing our total request to 121 Defense records. On January 31, Defense officials informed us they were expediting the

ENCLOSURE II

review of the requested documents and would provide us access to some of the documents within about a week.

Nonetheless, on February 6 the Comptroller General wrote the newly confirmed Secretary of Defense to inform him about our access problems on this study. In that letter, he described our 11-month effort to obtain access to Defense records relevant to our study and asked for his assistance in providing GAO immediate access to these records. He also informed the Secretary that he was prepared to proceed with the next stage of enforcement under 31 U.S.C. 716(b)—a GAO report filed with the President, the Congress, and other specified officials—if we did not obtain access to the records requested. (After filing this report GAO can bring an action in court to compel an agency to produce a record.) However, since the Secretary and other high-level Defense officials had just moved into their positions and might be unfamiliar with the access issues, he informed the Secretary that we would wait 3 weeks before proceeding with the report.

On February 7, at a meeting scheduled some days before the Comptroller General's February 6 letter, we obtained access to 29 of the total of 121 Defense records we had requested on January 5 and 26. Many of these documents were so heavily redacted that we could obtain limited information from them about the Department's role in applying Directive 25. On February 27, Defense officials (1) provided us access to 2 additional, heavily redacted records and (2) informed us that the Department planned to forward 89 records by March 2 to NSC and State for their review and possible clearance.⁷

On February 28, the Comptroller General spoke twice by telephone with the Secretary of Defense about this matter, and arranged a March 1 meeting with the acting Deputy Secretary of Defense to discuss a possible accommodation on our access to Defense records relevant to this study. At this meeting, we proposed an accommodation for access to records similar to the one we had reached with the Department of State, whereby Defense would provide us access to the records after redacting recommendations made by officials and the names, titles, and other information that identified specific officials. We would then analyze these documents using a separate data collection sheet to note only whether Directive 25 factors were considered in the records. Defense could then review our data sheets. We emphasized that the focus of our study was on whether executive branch officials considered Directive 25 factors in deciding to support particular peacekeeping operations, rather than on the substance of the discussions and the judgments that were made. It appeared to us that an accommodation was forthcoming. However, on March 2, 2001, Defense officials informed us, that, based on direction from NSC, coordinating with the White House Counsel, it could not provide us further access to its records until NSC had completed its review. We informed Defense officials that unless we got reasonable and responsive access to the documents by noon on March 9, 2001, we would take the next step under our enforcement authority and issue the report called for in section 716(b).

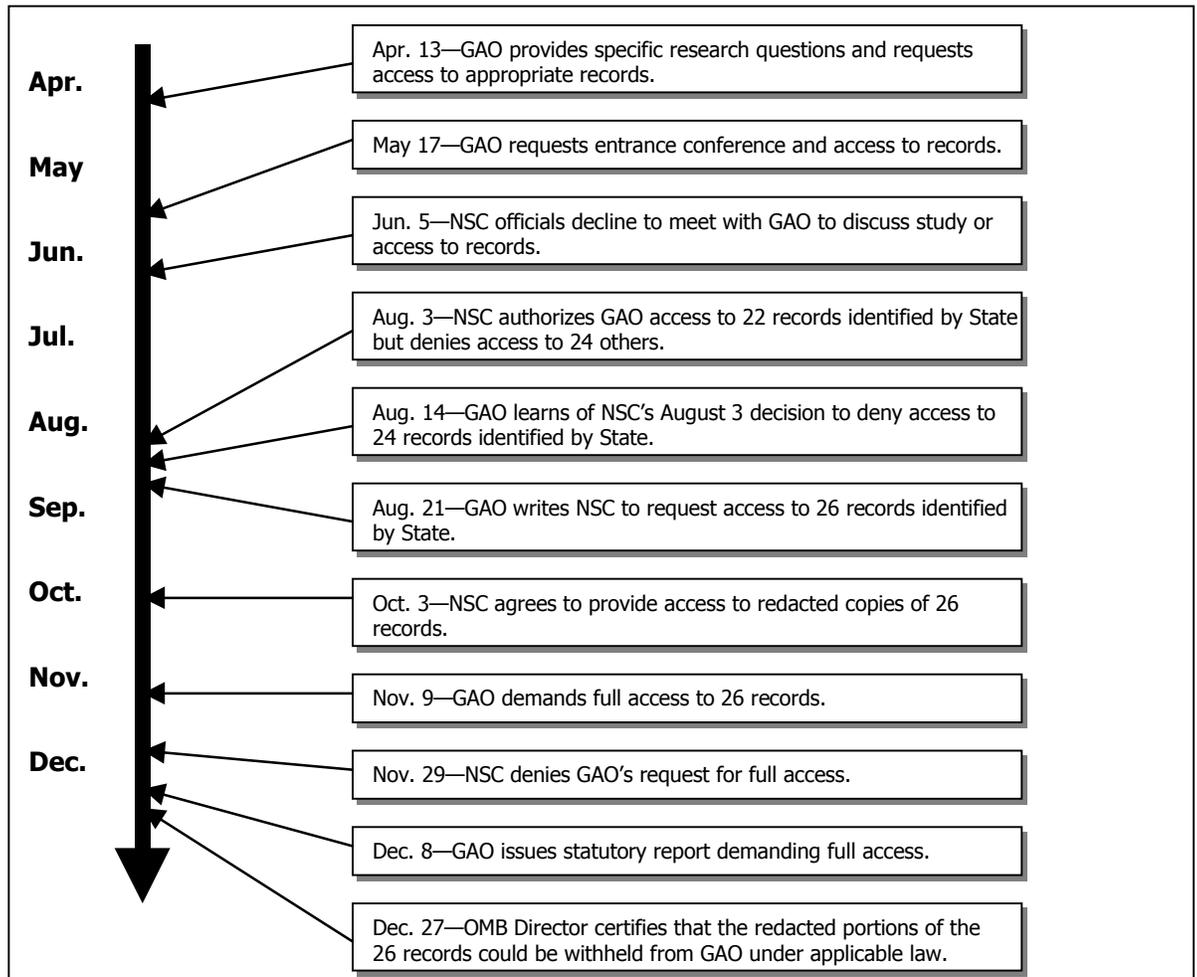
NATIONAL SECURITY COUNCIL DENIED GAO FULL AND COMPLETE ACCESS TO NEEDED RECORDS

We were unable to obtain full and complete access from the NSC to over half of the records that State submitted for NSC's review and clearance. NSC also declined to search for records relevant to our study. Figure 3 shows the key events in our pursuit of access to these records.

⁷ Defense officials informed us that one of the records we had requested was an early draft of portions of two other records we had requested and, consequently, had been eliminated from our request.

ENCLOSURE II

Figure 3: Key Events in Pursuing Access to Records at the National Security Council, March through December 2000.



On April 13, 2000, we notified the NSC legislative affairs office of our study and requested a meeting with appropriate NSC officials to discuss our work. A NSC legislative affairs official told us that an appropriate official would contact us to discuss our request. On May 17, we again asked to meet with NSC officials to discuss access to records relevant to our study. The NSC's Director for Multilateral and Humanitarian Affairs contacted us to say that he would be unable to meet with us until after he had consulted with NSC's legal counsel and others. On June 5, he contacted us again to say that he had been advised not to meet with us at this time.

On August 14, we learned that, on August 3, NSC had (1) authorized State to provide us access to 22 of 46 records forwarded to NSC for its review and clearance but (2) denied us access to the 24 remaining records. However, NSC's memorandum said that it would try to meet our access needs consistent with a 1994 memorandum from the White House Counsel that governed executive branch responses to legislative branch requests for information.⁸

⁸The September 28, 1994, memorandum from the White House Counsel was addressed to all department and agency general counsels and agency heads. It directed these officials to (1)

ENCLOSURE II

On August 21, we wrote the Assistant to the President for National Security Affairs to request access to (1) the 24 records State had submitted to NSC on July 19; (2) 2 additional records that State had subsequently submitted to NSC; and (3) other NSC records relevant to our study. On October 3, after several weeks of discussion, NSC agreed to provide us access to redacted copies of the 26 records we were seeking and a briefing about NSC's role in the decision-making process. On October 26, we reviewed redacted copies of these 26 records. These records include issue and discussion papers, action memoranda, and summaries of conclusions for interagency meetings—precisely the information needed to examine the application of Directive 25 in the U.S. decision process. However, the copies were so heavily redacted that we were unable to obtain much useful information from them.

After additional requests for full access to these records proved fruitless, the Comptroller General wrote the Assistant to the President for National Security Affairs on November 9 to demand full and complete access to the 26 records pursuant to 31 U.S.C. § 716.

NSC Denied GAO Access to Requested Records Citing National Security and Foreign Policy Considerations

In a November 29 letter, the NSC responded to our demand letter by denying us full and complete access to the 26 records. In its letter, NSC stated that the disclosure of confidential information contained in the records could negatively impact the candid exchange of views important to providing the President with sound advice on critical national security and foreign policy matters. It further asserted that the executive had no obligation to grant us access to NSC records involving internal policies concerning foreign policymaking. Nevertheless, on this same date NSC agreed to (1) allow us to review less heavily redacted copies of several records (we reviewed them on November 30) and (2) brief us about the general content of the redacted sections of all 26 records (NSC provided this briefing on December 12). However, we judged these measures insufficient to meet our needs.

On December 8, as provided in 31 U.S.C. § 716(b), the Comptroller General submitted a report to the President, the Speaker of the House of Representatives, the Director of the Office of Management and Budget (OMB), and other designated officials regarding the NSC's failure to provide access to the records we demanded. On December 27, pursuant to 31 U.S.C. § 716(d), the Director of OMB certified that the redacted portions of these records could be withheld from us because they contained privileged information that could reasonably be expected to substantially impair the operations of the government if disclosed to GAO. The privileges cited by the OMB Director were deliberative process and presidential communications.

GAO Disagrees With NSC's Position

Although GAO believes that its access authority covers the records involved, section 716(d) precludes the Comptroller General from bringing a civil action for a record, if the President or the Director of OMB certifies that (1) the record can be withheld under a Freedom of

presumptively treat any document created in the White House or a department or agency that entertains deliberations or advice from the White House as covered by executive privilege; and (2) promptly notify the White House Counsel's office of requests for such documents so the Counsel's Office and the department could try to work out an appropriate accommodation with the requestor. If efforts to reach an accommodation were unsuccessful and release would raise a substantial question of executive privilege, the Counsel to the President and the affected agencies would determine whether to recommend that the President invoke executive privilege.

ENCLOSURE II

Information Act provision,⁹ which includes the deliberative process and presidential communications privileges, and (2) its disclosure to GAO reasonably could be expected to substantially impair government operations. The section also requires that the certification include a complete explanation of the reasons for the certification. With regard to the substantial impairment finding, a Senate Report on the subject states that the explanation (1) must indicate what specific federal government operations might reasonably be expected to suffer substantial impairment by disclosure of the records and (2) should include evidence to back up this expectation.¹⁰

Consistent with the language of section 716(d) and its legislative history, we do not think that the OMB Director's December 27 certification provided a sufficient justification for the substantial impairment finding. The Director based this finding on the following two conclusory statements: (1) protecting the confidentiality of the 26 records is essential to enabling the government to function in the public interest and to conduct a foreign policy that serves national security interests, and, (2) disclosure could have a negative or chilling impact on the candid exchange of ideas and views that is important to providing the President with sound advice concerning critical national security and foreign policy matters. In our view, these statements restate general policy supporting the deliberative and presidential communications privileges, but do not specify what federal operations might reasonably be expected to suffer substantial impairment if the 26 records were given to the Comptroller General. Furthermore, the additional portions of the 26 records that NSC made available to us after we had sent our November 9 demand letter did not appear to contain information that fell within either of the privileges cited by the OMB Director. This circumstance raises questions about (1) why NSC initially had redacted this information and (2) whether the still redacted portions of the 26 documents contain privileged information that could meet the substantial impairment requirement.

Although we do not think the justification for the certification was sufficient, the language of section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification. As mentioned, section 716(b) allows us to enforce our access right in court, if GAO is not provided access to agency records within 20 days after filing a report, as we did for NSC on December 8, 2000. Nevertheless, section 716(d) states that the Comptroller General may not bring a civil action for a record if the President or the Director of OMB certifies that disclosure of privileged information to GAO reasonably could be expected to substantially impair government operations. The Director of OMB made this certification for the unredacted versions of the 26 records we sought from NSC. Furthermore, the principal legislative history interpreting section 716(d) states that "it is not intended that the exercise of the certification authority by the President or the Director of OMB shall be subject to judicial review." Although the language of section 716(d) and its legislative history suggest that GAO can not judicially challenge the certification, a related provision¹¹ states that section 716 does not authorize information to be withheld from the Congress. Thus, if it chose to do so the Congress could invoke its own authorities to attempt to gain access.

In the OMB Director's December 27 certification letter, the Director also suggested that our review of the executive branch process for deciding to support U.N. peacekeeping operations did not fall within our authority under 31 U.S.C. § 717(b) to "evaluate the results of a program

⁹ 5 U.S.C. § 552(b)(5).

¹⁰ S. Rep. No. 96-570, at 8 (1980).

¹¹ 31 U.S.C. § 716(e)(3).

ENCLOSURE II

or activity the Government carries out under existing law.”¹² The Director stated that our review instead involved assessing how the President discharged his constitutional authority in foreign policymaking, which GAO could not review.

We disagree with this overly narrow interpretation of section 717(b). With certain limited mandated exceptions, section 717(b) extends to any activity of the U.S. government carried out under the U.S. Constitution or U.S. statute. The authority provided is not restricted to limited groups of programs and activities that are created by particular statutes. We also note that a number of statutes do provide for U.S. participation in U.N. peacekeeping activities. For example, the U.N. Participation Act of 1945, as amended, authorizes U.S. participation in U.N. peacekeeping activities.¹³ Moreover, in recent years Congress has passed additional legislation dealing specifically with these activities.¹⁴

¹² In support of this position, the Director relied on a Justice Department opinion issued in 1988. See 12 Op. Off. Legal Counsel 171 (1988).

¹³ Generally, 22 U.S.C. §§ 287 and following, and specifically, 22 U.S.C. §§ 287d, 287d-1 and 287-e-2.

¹⁴ Public law 103-236, §§ 404(b) and 407(a), 108 stat. 447-48 (1994); Public law 106-113, app. G, § 911(b), 113 stat. 1501A-476 (1999).



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

NOV 28 2000

The Honorable David M. Walker
Comptroller General
of the United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Walker:

I am responding on behalf of Secretary Cohen to your letter, dated November 9, 2000, in which you demand, pursuant to 31 U.S.C. § 716, access to all Department of Defense documents relating to the Administration's process for deciding to support IN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo.

The Department of Defense (DoD) is committed to cooperating fully with the General Accounting Office in this inquiry. We began a comprehensive search for documents once we received the final clarification of the desired scope of the inquiry from GAO evaluators on September 27, 2000. Our search is nearing conclusion and we are now in the process of reviewing the documents that have been collected. Given the breadth of the request and volume of documents at issue, this process is not taking an unreasonably long period of time.

We intend to complete our initial review of DoD documents responsive to your request on or before December 15, 2000. We will provide you with as many documents as possible before that date. However, because your inquiry is directed to DoD's internal deliberative process, these documents will necessarily require our close review to determine whether they are exempt from disclosure. In addition, because the documents requested relate to an Executive Branch decision-making process led by the National Security Council (NSC), release of certain documents will require concurrence of the NSC and/or other Executive Branch agencies. Thus, we may not be able to make certain documents available to you or have information on their releasability by December 15. We will work with the NSC and others, however, to resolve access questions on these documents as quickly as possible.

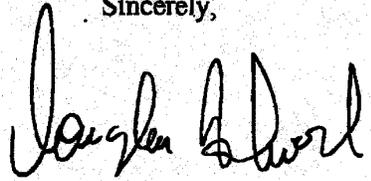
The statute you cite as authority for your demand for immediate access to records clearly contemplates a reasonable time for an agency to collect records. It also presupposes that specific agency records have been withheld. Because we have not yet had a reasonable time to complete the search and review process and because we have not taken official action to withhold any documents at this time, your demand request under 31 U.S.C. § 716(b)(1) is unjustified.

ENCLOSURE III

You also seek unrestricted and independent access to Department of Defense records. We cannot agree to this request. The controlling statute, 31 U.S.C. § 716, does not grant the GAO unfettered access to agency files, but rather provides that GAO "may inspect an agency record to get information" and provides GAO a remedy when "an agency record is not made available." Furthermore, the procedure you suggest would preclude our ability to assert executive privilege or the statutory provision, 31 U.S.C. 716(d), that exempts certain records from GAO review-

We look forward to working further with GAO evaluators during this inquiry- In the meantime, if you have any questions, you or your staff should feel free to contact Christopher Ryder at (703) 695-1943.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas A. Dworkin". The signature is written in a cursive style with a large initial "D".

Douglas A. Dworkin



United States General Accounting Office
Washington, DC 20548

November 9, 2000

The Honorable William S. Cohen
The Secretary of Defense

Dear Mr. Secretary:

The purpose of this letter is to demand full and complete access, under 31 U.S.C. § 716(b), to all Department of Defense documents relating to the administration's process for deciding to support UN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo. Our study is focused on decisions made between January 1999 and June 2000. As of this date, Department of Defense officials have not provided GAO with any of these DOD documents. We also request sufficiently independent access to Department of Defense records to assure ourselves that we have identified all the information relevant to our study, consistent with government auditing standards. Chairman Benjamin A. Gilman of the House Committee on International Relations requested this study.

On March 23 and again on April 13, GAO sent letters to the Department of Defense requesting its cooperation in arranging access to: Defense Department records relevant to the described study. As the State Department has lead responsibility for the process of approving UN peacekeeping operations, Defense officials declined to meet with GAO to discuss our study until State had resolved how it would handle our access to records. We finally met with Defense officials on September 15, 2000, at which time they informed us that they would begin searching their records to identify documents relevant to our study. These records would include but not be limited to decision memoranda, briefing memoranda, discussion or options papers, summaries of conclusions of deputies committee and peacekeeping core group meetings and political-military or similar plans. At the September 15 meeting, Defense officials established a target date of November 6 to complete its search; however, the Department did not provide a target date for when GAO would have access to these documents. Defense officials also informed GAO that there could be documents that the Department could not provide to GAO, mainly due to deliberative process concerns. As of the date of this letter, the Department has not collected all records applicable to GAO's record request, nor made any records available to GAO.

Aside from the above, we also request independent access to Department of Defense records for the described peacekeeping operations. In response to our access request, the Department established a procedure by which its Office of Peacekeeping and Humanitarian Affairs tasked various Defense bureaus, offices and other locations to identify potentially relevant documents and forward them to it. Once these

ENCLOSURE IV

documents are provided to that office, it will determine which of the collected documents can be provided to GAO.

This process raises a number of audit problems. First, it allows Defense officials rather than GAO evaluators to determine what particular records are relevant to our study. Second, Defense officials have told us that searching for records for this study will place a considerable burden on already over-worked staffs. As such, GAO cannot be assured that these searches will be as thorough and exhaustive as our standards and policies require. In this regard, generally accepted government audit standards state that external interference that limits or modifies the scope of an audit-or interferes with the selection of information to be examined-may threaten an auditor's ability to form independent and objective opinions and conclusions. For these reasons, GAO needs independent access to Defense Department records to assure us that we have identified and obtained all the information that has a material bearing on our study. The fact that the Defense Department has not provided GAO access to relevant records for the nearly eight month period since GAO first provided the Department notification of our study, further emphasizes the importance of independent access.

Our statutory right of access to agency records, set out in 31 U.S. C. § 716(a), and the authority to evaluate the programs and activities of the U.S. Government, set out in 31 U.S.C. § 717, covers the documents and records described above. In this regard, we note that GAO has had access to these types of information during past reviews. For example, GAO had independent access to State and Defense Department records for work on an April 1997 report regarding the factors and interests U.S. officials considered in deciding to support reauthorizing long-standing UN operations.¹

We appreciate the sensitivity of the information requested and will safeguard it in accordance with the legal and policy restrictions that apply to our disclosure of records obtained pursuant to our statutory authority. In this regard, our access statute requires us to maintain the same level of confidentiality for a record as is required of the head of the agency from which it is obtained. We also emphasize that our review of these documents is not for the purpose of assessing the propriety of executive branch decisions about the described peacekeeping operations but rather to fully understand the process that the administration used in deciding to support them.

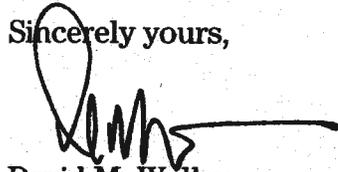
Pursuant to 31 U.S.C. § 716(b), you are required to respond to this request within 20 days. If full access to the requested information is not granted, you are required to furnish a description of any information withheld and to state the reasons for withholding the information.

¹ U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).

ENCLOSURE IV

If you have any questions or need further information about this matter, please contact me at (202) 512-5500 or Henry L. Hinton, Jr., at (202) 512-4300. Thank you for your assistance.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Walker', with a long horizontal flourish extending to the right.

**David M. Walker
Comptroller General
of the United States**

ENCLOSURE V

NATIONAL SECURITY COUNCIL.
WASHINGTON, D.C. 20504

November 29, 2000

Dear Mr. Walker:

The National Security Adviser has asked me to respond to your, November 9 letter seeking access to twenty-six documents requested in an ongoing GAO review of the executive branch's decisionmaking process on various peacekeeping operations.

It is our policy to comply with GAO requests for information to the fullest extent consistent with the constitutional and statutory obligations of the executive branch. In applying this policy to specific requests, we examine whether the documents requested contain material that may be subject to claims of privilege. Also, we consider both the needs of the executive branch to protect its confidentiality interests, and the heed of Congress to obtain information in the course of its oversight function.

In this case, the Department of State referred 59 documents to the National Security Council for review because they could reflect the deliberations of, or advice to or from, the White House. Following our review, we authorized the Department of State to provide the GAO access to 33 of these documents. We did not authorize the Department of State to provide the GAO access to the remaining 26 documents, however, because these documents contain confidential information concerning the internal deliberations and discussions of National Security Council committees on peacekeeping matters.

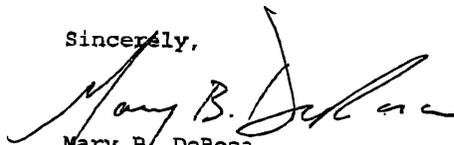
The documents in question include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. There is also one document that contains a summary of a confidential meeting between a U.N. official and a high-level adviser to the President. In our view, protecting the confidentiality of documents like these is essential to enabling our government to function in the public interest, and to conduct a foreign policy that serves national security interests. To release these documents could have a negative impact on the candid exchange of ideas and advice that is so important to providing the President with sound advice concerning critical national security and foreign policy matters. We also note that where, as here, the GAO's inquiry concerns the executive branch's internal policies on foreign

policymaking, the executive branch has no obligation to grant GAO access to its records. See "Investigative Authority of the General Accounting Office," 12 Op. O.L.C. 171 (August 16, 1988).

Following our decision, and at the request of your staff, we took further steps to accommodate the GAO's request. We redacted deliberative material from the 26 documents that had been withheld, and made these redacted documents available to your staff in an effort to provide as much information as possible without jeopardizing the important confidentiality interests identified above. We also offered to provide your staff with briefings on the substance of these documents, including those portions that had been redacted, and more generally on the process by which decisions are made on peacekeeping operations. Your staff declined our offer of briefings. In response to your letter, we have again reviewed the redacted documents, and have offered to make available to your staff additional portions of the documents that we believe can be released without threatening our need for confidentiality. We continue to believe, however, that the remainder of these documents cannot be released for the reasons discussed above.

We understand the need of the Congress to have information concerning U.S. participation in or support for peacekeeping operations. Executive branch officials regularly consult with Members of Congress and their staffs about the scope and purpose of these operations, and the factors underlying our decisions in this area, and will continue to do so. While we are still hopeful that we can achieve a resolution of this issue that will satisfy your need for information, we must do so in a way that preserves the President's ability to obtain frank advice on important national security matters.

Sincerely,



Mary B. DeRosa
Special Assistant to the President
and Legal Adviser

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548



United States General Accounting Office
Washington, DC 20548

December 8, 2000

The President
The White House

Dear Mr. President:

I am submitting this report to you, pursuant to 31 U.S.C. § 716(b)(1), regarding the failure of the National Security Council (NSC) to provide the General Accounting Office (GAO) with full and complete access to 26 unredacted documents that GAO formally requested through a demand letter issued on November 9, 2000. GAO needs this access for a Congressionally requested study of the administration's process for deciding to support UN peacekeeping operations in Kosovo, East Timor, Sierra Leone and the Democratic Republic of the Congo. . Chairman Benjamin A. Gilman of the House Committee on International Relations requested this study.

The access issue regarding the 26 documents arose as follows. GAO issued letters on April 13 and May 25, 2000 to the Secretary of State setting forth the kinds of information it would need for its study of the executive branch's decision-making process in supporting UN peacekeeping operations. A copy of the May 25 letter was sent to the NSC. On July 19, 2000, David Welch, the Assistant Secretary of State for International Organization Affairs, forwarded 46 documents to the NSC for review and clearance. These were documents that the State Department had identified as being potentially responsive to the GAO document requests regarding the described study. An August 3, 2000 NSC memorandum to Assistant Secretary Welch authorized the State Department to provide GAO access to 22 of these documents, but denied GAO access to the other 24. GAO also was denied access to two other documents a decision memorandum and an attachment to another decision memorandum-that State forwarded to NSC for review and clearance after July 19.¹

Section 716(b) of Title 31 of the United States Code authorizes GAO to enforce its access rights to federal agency records. Subsection 716(b)(1) provides that when federal agency records are not made available to GAO within a reasonable time, the Comptroller General may issue a written demand letter to obtain such records to the

¹ Although a number of these are State Department documents, NSC has asserted control over them, and the State Department has indicated that it is not in a position to decide on their release.

ENCLOSURE VI

agency head. We issued such a letter to NSC on November 9, 2000 after numerous attempts to obtain full and complete access to the 26 documents from NSC staff.

In NSC's November 29, 2000 response to our November 9 access request, NSC set forth its reasons for continuing to deny GAO access to the 26 documents. NSC stated that the documents contain confidential information concerning the internal deliberations and discussions of NSC committees on peacekeeping matters, and that their release could negatively impact the candid exchange of ideas that is important to providing the President with sound advice on critical national security and foreign policy matters. In this regard, NSC asserted that the executive branch has no obligation to grant GAO access to NSC records when GAO's request concerns the executive branch's internal policies on foreign policymaking. NSC also stated that to accommodate GAO's access request, it had made available to GAO redacted versions of the 26 documents and would make available additional portions of documents that can be released without threatening NSC's need for confidentiality. Finally, NSC maintained that GAO declined its offer to brief GAO staff on the substance of the 26 documents and more generally on the process by which decisions are made on peacekeeping operations.

Section 716(b)(1) provides that if access is not provided to GAO within 20 days from receipt of a written access request, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General; the head of the agency involved, and the Congress. Although NSC's November 29 letter raises a number of arguments supporting its denial of GAO access to the 26 documents; we believe that GAO access is authorized for this study. Section 716 gives GAO broad access to agency records dealing with the duties, powers, and activities of U.S. government agencies. As a program or activity of the United States Government, decisions about U.S. involvement in the described UN peacekeeping operations are subject to Congressional appropriations and oversight. In addition, Presidential Decision Directive 25, the executive branch document that describes in some detail the factors which the executive branch should consider in making decisions about supporting UN peacekeeping operations, calls for the Congress to play an important role in this process.

As a practical matter, we believe that the information contained in the 26 documents would describe the factors the executive branch considered in making its decisions about supporting U.S. participation in each of the UN peacekeeping operations mentioned above. As this is the central question of our study, it is very important for GAO to review these documents. We emphasize that for this study GAO needs to review the documents for the purpose of fully understanding the process the

ENCLOSURE VI

administration used in deciding to support the described UN peacekeeping operations rather than for assessing the propriety of the decisions.

Notwithstanding our filing of this report, GAO will continue to fully cooperate with NSC, and other executive branch agencies, to obtain the information we need. As part of this process, on November 30 GAO (1) reviewed additional portions of 6 NSC controlled documents that NSC recently made available to us, (2) will soon review a final version of one of the 26 documents that NSC has pledged to provide us, (3) and

will soon participate in one or more briefings² that NSC will give GAO to try and fill in the information that we need for our study. Nevertheless, we still believe that full and unredacted access to all 26 documents is necessary. The versions of the 26 documents that NSC allowed GAO to view on October 26, 2000 were so extensively redacted that they provided very little useful information. Moreover, the additional portions of the 6 documents that NSC made available on November 30 contained factual information that appeared to be publicly available and did not seem particularly sensitive. This raises questions about the criteria that were used to redact the 26 documents. Furthermore, when we met to review the additional material, it appeared that NSC staff referred to but did not allow GAO to review another document that may have been related to our study. Although this report is limited to the 26 documents described above, we note that in our August 21, 2000 letter to NSC, aside from the 26 documents, we also requested access to any other documents held or controlled by NSC that would show how executive branch officials applied U.S. policies in arriving at recent decisions to support the described UN peacekeeping operations. NSC has not provided GAO any additional documents, and to learn, at this late date, that they may exist further complicates our work.

Regarding the sensitivity of the information in the 26 documents and any possibility of inappropriate disclosure, we emphasize that GAO frequently reviews sensitive information and safeguards it in accordance with the legal and policy restrictions that apply to our disclosure of records obtained under our statutory authority. In this regard, our access statute requires us to maintain the same level of confidentiality for a record as is required of the head of the agency from which it is obtained. Furthermore, all GAO staff working on the described UN peacekeeping study have the requisite clearances for handling classified and otherwise sensitive information.

² GAO did not refuse to receive an NSC briefing as NSC stated in its response to our November 9 demand letter. GAO did want such a briefing, but believed that it would have more value after we had an opportunity to review the 26 documents. Although NSC had indicated to GAO that it would not allow GAO access to unredacted versions of the 26 documents, it only did so in writing to GAO on November 29 in its response to our access demand letter. Immediately after receiving the letter, we informed NSC that we would participate in any briefings it would provide to us. Furthermore, although we think briefings could be helpful, we still think the best source of information about the factors the United States considered in supporting the described UN peacekeeping operations would be the documents themselves.

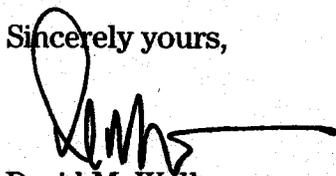
ENCLOSURE VI

We point out that in prior work on UN Peacekeeping³ GAO reviewed, without incident, the kind of highly sensitive information to which we seek access here. Finally, to further accommodate NSC, as we suggested to NSC staff, GAO would agree to designate only one GAO official to review the 26 documents.

Since GAO has a legal right of access to the requested 26 documents, and since full access was not provided within 20 days following our November 9 request, pursuant to 31 U.S.C. § 716(b)(1), I now submit my report to you and the other designated officials. Subject to section 716, I am authorized to apply for judicial enforcement of our access request if full and complete disclosure is not provided to GAO within 20 days following the filing of this report.

I would appreciate your assistance in resolving this matter in a timely fashion. Should you have any questions or need further information about this report, please contact me at (202) 512-5500 or Susan Westin at (202) 512-3655.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Walker', with a long horizontal line extending to the right.

**David M. Walker
Comptroller General
of the United States**

³ See U.N. Peacekeeping: Status of Long-Standing Operations and U.S. Interests in Supporting Them (GAO/NSIAD-97-59, Apr. 9, 1997).



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D. C. 20503

December 27, 2000

THE DIRECTOR

The Honorable David M. Walker
Comptroller General of the United States
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Walker:

This responds to your report dated December 8, 2000 (which OMB received on December 12, 2000), regarding the formal request by the General Accounting Office (GAO) to the National Security Council (NSC) for full and complete access by the GAO to 26 unredacted documents concerning peacekeeping policy decision-making. This letter constitutes a certification, pursuant to 31 U.S.C. § 716(d), that the redacted portions of the 26 documents could be withheld under 5 U.S.C. § 552(b)(5), and that disclosure of the redacted portions reasonably could be expected to impair substantially the operations of the Government.

Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), authorizes the withholding of all "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." The exemption covers all common law privileges available in civil discovery including, among others, the deliberative process privilege and the presidential communications privilege. See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). In that context, the deliberative process privilege allows the government to withhold documents that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. See *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997). The courts have also explained that the presidential communications privilege protects documents that reflect presidential decision-making and deliberations. See *id.* Communications by Presidential advisers in the course of preparing advice for the President are subject to the presidential communications privilege even when the communications are not made directly to the President. See *id.* at 746-53.

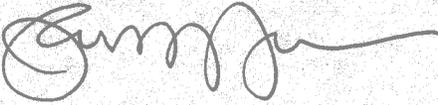
In this case, the redacted portions of all 26 documents withheld by the NSC are subject to the deliberative process privilege, and many of them are subject to the presidential communications privilege as well. These documents include issue papers, discussion papers, talking points, recommendations, and summaries of conclusions that were prepared for, or contain information about, meetings of the NSC-chaired Deputies Committee or Peacekeeping Core Group. These are the senior inter-agency committees that are charged with formulating advice for the President on peacekeeping matters. Because the redacted portions of these documents reflect recommendations and deliberations that are part of a Presidential decisionmaking process, they are covered by the deliberative process privilege and the presidential communications privilege. Accordingly, the redacted portions could be withheld under 5 U.S.C. § 552(b)(5).

ENCLOSURE VII

In addition, the Assistant to the President for National Security Affairs has determined that disclosure of the redacted portions of the 26 documents to the GAO reasonably could be expected to impair substantially the operations of the government. He has found that protecting the confidentiality of deliberative documents like these is essential to enabling our government to function in the public interest and to conduct a foreign policy that serves national security interests. Disclosing these documents could have a negative (chilling) impact on the candid exchange of ideas and views that is important to providing the President with sound advice concerning critical national security and foreign policy matters!

I agree with the Assistant to the President for National Security Affairs' determination and hereby make the certification required by 31 U.S.C. § 716(d). Since all certifications under this section must be provided to Congress as well as the Comptroller General, this certification is being submitted to you, the President of the Senate and the Speaker of the House of Representatives.

Sincerely,



Jacob J. Lew
Director

-2-