UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

Plaintiff,

v. Civil Action No. 77-0692

DEPARTMENT OF JUSTICE,

Defendant.
_____/

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

This civil action arises from plaintiff's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as amended, for access to certain records pertaining to the assassination of Dr. Martin Luther King, Jr., which are maintained by two particular components of the Department of Justice. Although the vast bulk of these records have been made available to plaintiff, he seeks through this lawsuit complete access to all information pertinent to his FOIA request.[1/]

All portions of the requested records withheld from plaintiff have been identified and described in the affidavits of Michael E. Shaheen, Jr., James P. Turner (as supplemented), Salliann M. Dougherty, and Lewis L. Small,

1/ It bears repeating that plaintiff's FOIA request sought information concerning the assassination investigation only, yet substantial portions of the information at issue pertain to aspects of Dr. King's personal life which are totally unrelated to that subject matter. See Memorandum Of Points And Authorities In Support Of Defendants' Motion For Summary Judgment ("Defendant's Memorandum") at 1-2, nn. 1, 3.

14A

as filed with accompanying expurgated documents. Based upon this documentation, on May 11, 1978, defendant moved this Court for summary judgment in this action on the grounds that the unreleased information is properly withheld under applicable legal standards and that defendant is therefore entitled to judgment as a matter of law. By cross-motion filed the same date, plaintiff has attempted to challenge the exempt status of virtually all information withheld from him.[2/]

Defendant therefore files this reply memorandum to reaffirm its position where necessary on the issues raised in this litigation. In further support of its motion for summary judgment, defendant also files herewith the Affidavit Of Horace P. Beckwith, the Supplemental Affidavit Of Lewis L. Small, and the Affidavit Of Hugh W. Stanton, Jr., District Attorney General in and for the Fifteenth Judicial Circuit for the State of Tennessee.

Argument

I. Exemption 1 Has Been Properly Invoked To Authorize The Non-Disclosure Of Classified Information

As is demonstrated at pages 7-9 of Defendant's Memorandum, the classified information involved in this lawsuit meets

why should you address this?, unless they used the Army to make it? ... you have no right to what they withheld in Lee case

2/ It is noted that plaintiff's papers nowhere address the limited information withheld by defendant pursuant to 5 U.S.C. §552(b)(7)(E) or those segments which are barred from disclosure by Judge Smith's Court Order of January 31, 1977. See Defendant's Memorandum at 20-21. As to the former, defendant hereby reaffirms its position that such information revealing investigative techniques and procedures is properly withheld pursuant Exemption 7(E) of the FOIA. See also Church of Scientology v. Bush, Civil No. 75-1048 (D.D.C., June 8, 1977) (slip opinion at 2-3) (attached hereto as Defendant's Reply Exhibit A). As to the latter, defendant can regard plaintiff's silence on this withholding only as a gracious acquiescence thereto. See Defendant's Memorandum at 21 n.26.

is there any one not public? not in church report or FBI testimony? There is no "revealing" of the public domain.

every last requirement for non-disclosure pursuant to Exemption 1 of the FOIA. A duly authorized classification officer of the Federal Bureau of Investigation, Special Agent Lewis L. Small, has reviewed the classified documents at issue here and has determined that each such document, or portion thereof, is currently and properly classified in compliance with all substantive and procedural requirements of Executive Order 11652. See Affidavit Of Lewis L. Small ("Small Affidavit"), ¶¶6, 12, 17 & 18. Moreover, Special Agent Small has specified and described in detail the harm to the national security which could reasonably be expected to result from any disclosure of these classified materials. See id., ¶¶7, 9, 10, 11 & 17. Such a showing, of course, readily compels the conclusion that these documents are exempt from disclosure pursuant to 5 U.S.C. §552(b)(1). See, e.g., Klaus v. Blake, 428 F. Supp. 37, 38-39 (D.D.C. 1976); Bennett v. United States Department of Defense, 419 F. Supp. 663, 665-67 (S.D. N.Y. 1976).

Nevertheless, plaintiff insists that these documents are not "validly classified" and that, for a variety of reasons, this Court should order their immediate disclosure. As can readily be seen, however, plaintiff's "reasons" hardly bear close scrutiny and in no way contradict the conclusion that these classified documents are properly exempt pursuant to 5 U.S.C. §552(b)(1).

Typical of plaintiff's perspective on such matters, for example, is his view that the absence of appropriate classification markings on an expurgated copy of a classified document renders that document improperly classified. He argues:

> Indeed, many of the records withheld on this grounds on not classified [sic] even in the most minimal sense of bearing a classification stamp. For example, Exhibit 3 is a page of the OPR records which has a paragraph blanked out on exemption 1 grounds. Yet this page does not even bear a classification stamp showing the level of classification. Yet this is plainly required by §4(A) of Executive Order 11652. Even worse, the stamp at the bottom of the page which is designed to give the General Declassification Schedule category of the document has been crossed out. The import of these deficiencies alone makes this an unclassified document.

Memorandum Of Points And Authorities in support of Plaintiff's Cross Motion For Summary Judgment ("Plaintiff's Memorandum") at 14-15 (emphasis added).[3/]

What plaintiff misapprehends, of course, is the fact that the expurgated copies of documents provided to him in this lawsuit, including his "Exhibit 3," are certainly not classified documents since they do not display the classified information found in the originals. Indeed, for such expurgated copies to bear valid classification markings on their faces would be violative of the current Executive Order. See Executive Order 11652, Sections 4(A) and 6(B). The only "marking" consideration pertinent to a document's classified status under the Executive Order, of course, is the requirement that each original document bear the appropriate stamps and information. That the

How can they xerox a record with classification marking and not have the class marking show? And why not "expurgate" "originals" of the stamps. The [illegible] here he lies because his own affidavits give the date of first classification. Also what I gave you on months/ FBI

3/ Equally outlandish is plaintiff's assertion that " . . . It is utterly implausible that the release of these records could endanger the national defense or foreign policy of the United States under any sane definition of the concept." Plaintiff's Memorandum at 14. In the face of such pontification, defendant can only observe with scant regret that such determinations are by statute and our case law relegated to the sound judgment of those who are experienced in matters of national security (not to mention privy to the contents of the classified documents themselves). See also Halperin v. National Security Council, Civil No. 75-675 (D.D.C., May 18, 1978) (slip opinion at 8) (attached hereto as Defendant's Reply Exhibit C).

documents at issue fully meet this requirement is attested to in paragraphs twelve and eighteen of the Small Affidavit.[4/] See also Supplemental Small Affidavit, ¶5.

Next, plaintiff accurately observes that most of the classified documents involved in this lawsuit were in fact classified subsequent to the date of his FOIA request or, in most instances, subsequent to the time of their origination.[5/] This fact, he reasons, "clearly indicates an attempt to suppress information for reasons other than national security" and should compel, he obliquely suggests, the same conclusion of improper classification as was reached by the District Court in Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977). Plaintiff's Memorandum at 16.

Defendant respectfully disagrees. As can be readily gleaned from the expurgated copies of the classified documents on file with the Court,[6/] substantially all of

4/ In this same vein, plaintiff also points to a provision in a National Security Council directive which appears to create an additional administrative marking requirement with respect to "sensitive intelligence sources and methods" information. See Plaintiff's Memorandum at 15. While it is noted that plaintiff advances no authority for the proposition that the absence of such markings "invalidates" an otherwise proper classification, the matter is in any event resolved by the Supplemental Affidavit Of Lewis L. Small ("Supplemental Small Affidavit"), wherein it is attested and explained that this additional requirement is not applicable to any of the classified material involved in this lawsuit. See Supplemental Small Affidavit, ¶¶6-8.

5/ The Civil Rights Division documents, it should be noted, were subsequently reclassified after initial classification at the time of origination. See Affidavit Of Salliann Dougherty ("Dougherty Affidavit"), ¶¶5, 11; Small Affidavit, ¶¶14-17.

6/ With the exception of Exhibits 17 and 18 of Appendix A (which are classified in their entirety), expurgated copies of all classified documents can be found at Exhibit I to the Affidavit Of Michael E. Shaheen, Jr. ("Shaheen Affidavit"), Exhibit A to the Supplemental Affidavit Of James P. Turner ("Supplemental Turner Affidavit"), or Exhibits A, B, and C to the Small Affidavit. See also Small Affidavit, ¶¶3, 10.

these classified documents[7] originated pursuant to the Department of Justice's Martin Luther King, Jr. Task Force's ("Task Force") file-by-file review of the FBI's investigatory records pertaining to both the security investigation and assassination of Dr. King. C.f. Shaheen Affidavit, ¶3. It is not suprising that at the time at which these documents were generated, the members of the Task Force were primarily concerned with the task of preparing their final report and thus did not promptly perfect the classified status of certain portions of their working papers.[8] The fact that these materials were not reviewed for classification status until after the issue of their public disclosure was raised through plaintiff's FOIA request is simply not so irregular given such atypical circumstances. Certainly, plaintiff's bare allegation that it constitutes evidence of government "suppression" is out of order here.[9]

Similarly misplaced is plaintiff's tentative reliance upon Halperin v. Department of State, supra, in his attempt to challenge the classification status of the documents at issue here. In Halperin, the Court of Appeals for this Circuit did in fact decline to uphold the classified status of certain national security information, but it did so only because it could not conclude from the record that the proper substantive standards of Executive Order 11652 had ever been applied. The Court held as follows:

7/ The Civil Rights Division documents, of course, originated elsewhere. See note 5 supra.

8/ It should be noted that the classification resources of the FBI were not as readily at hand when these second-generation documents were generated by the Task Force as when the source materials were generated at the FBI.

9/ Plaintiff's spiritous allegation also flies in the face of the sworn statements of the classification officer charged with the responsibility of evaluating the national security import of these classified documents. See Small Affidavit, ¶¶6-9; see also note 3 supra.

> Certainly, the record affords no assurance that the governing standard of Executive Order 11652 was the basis of the belated classification made in this case. We are thus in no position to rule that the District Court erred in holding that, since the deleted transcript passages were not "properly classified" pursuant to Executive Order 11652, they were not entitled to the statutory exemption from FOIA claimed for them by appellants.

565 F.2d at 705 (emphasis added) (footnote omitted).[10/] In the instant case, on the other hand, there is no question but that the proper substantive criteria of Executive Order 11652 have been applied and that all necessary requirements for current and proper classification (and, in turn, Exemption 1 applicability) have been satisfied. See generally Small Affidavit; Supplemental Small Affidavit. It is suggested that nothing in the Halperin decision compels in any way to the contrary.[11/]

Lastly, plaintiff makes the now-defunct argument that defendant had failed to meet its burden under Exemption 1 through the classification affidavits originally filed. See Plaintiff's Memorandum at 16-17. Defendant effortlessly

10/ The district court below had found that because the classifying officer was unfamiliar with the altered substantive provisions of "new" Executive Order 11652, the classification had not been in accordance with the criteria of that Executive Order. See 565 F.2d at 705 n.10.

11/ In fact, the Court of Appeals' evident reluctance in Halperin to release improperly classified information (565 F.2d at 706-07) only serves to underscore the reality that national security information requires -- and should receive -- classification protection even if not properly classified until after receipt of a FOIA request. See also Cervase v. Department of State, Civil No. 76-2338 (D. N.J., April 1, 1977) (slip opinion at 16-19), aff'd, Civil No. 77-1627 (3rd Cir., March 15, 1978) (attached hereto as Defendant's Reply Exhibit B). Indeed, the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act counsels that, upon an agency's receipt of a FOIA request for national security information, "[t]he records should be reviewed for conformity with the procedural requirements of the [Executive] Order, and any irregularities should be corrected." AG's 1974 FOI Amdts. Mem. at 2 (emphasis added).

concedes the point,[12] respectfully suggests that all previous deficiencies have been amply remedied through the Small Affidavit (as supplemented) and the Supplemental Turner Affidavit, and reaffirms its position that the classified information at issue in this lawsuit is properly exempt pursuant to 5 U.S.C. §552(b)(1).

II. Exemption 2 Has Been Properly Invoked To Authorize Non-Disclosure Of Informant Symbol Numbers

As is indicated in the Affidavit Of Michael E. Shaheen, Jr., the only items of information deleted from the disputed records pursuant to Exemption 2 are the symbol numbers used by the FBI for anonymous administrative reference to its confidential sources. See Shaheen Affidavit, page 6, ¶2. Without citation to any precedent for their disclosure, plaintiff asserts an entitlement to these codes based upon his desire to use them "to judge whether a specific source is reliable or unreliable." Plaintiff's Memorandum at 17.

Putting aside the fact that plaintiff's anticipated use of these symbol numbers toward any significant end is entirely hypothetical, defendant respectfully suggests that these codes are not intended to be publicly scrutinized for analytical purposes and that the Court should not sanction such an enterprise at plaintiff's mere request. The very purpose of the symbol number mechanism is to ensure the unendangered anonymity of the FBI's confidential sources. Public disclosure and analysis of these codes could ultimately lead to their complete ineffectiveness and would

12/ See, e.g., Defendant's Memorandum at 8 n.13.

thus "significantly harm specific governmental interests." Department of the Air Force v. Rose, 425 U.S. 352, 365 (1976), quoting Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975), and Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971). Moreover, such analysis of particular informant symbol numbers, especially the type of analysis suggested by plaintiff as prompting his insistence upon disclosure, could readily jeopardize the anonymity of a confidential source's identity and hence egregiously violate the purpose of Exemption 7(D) of the FOIA. See Defendant's Memorandum at 10 n.16.

Thus, it is apparent that there exists no legitimate public interest in public analysis of this information sufficient to countervail the policy reasons compelling their non-disclosure. Defendant therefore respectfully suggests that this Court should align itself with established precedent on this issue and find the informant symbol numbers at issue here properly exempt pursuant to 5 U.S.C. §552(b)(2). See Defendant's Memorandum at 10.

III. Exemption 7(C) Has Been Properly Invoked To Authorize Non-Disclosure Of Privacy Information

As is indicated in the respective affidavits pertaining to each group of documents in this lawsuit, both the Civil Rights Division and the Office of Professional Responsibility have excised certain information from the documents released to plaintiff where the disclosure of such information would cause an unwarranted invasion of personal privacy. See Supplemental Turner Affidavit, ¶¶4, 6; Shaheen Affidavit at pages 6-7, ¶4. Such information, because its disclosure could cause serious damage to valued reputations or at the very least could lead

to embarrassment or other personal discomfort, is routinely shielded from public scrutiny pursuant to Exemption 7(C). See Defendant's Memorandum at 13-14 and authorities cited therein.

Nevertheless, plaintiff asserts an entitlement to this information and suggests that Exemption 7(C) has been improperly invoked by defendant. Plaintiff's position on this issue, however, appears to hinge upon his ostensibly telling observation that defendant has not expressly stated by way of affidavit that it balanced the privacy interests in withholding this information against any public interest in its disclosure. See Plaintiff's Memorandum at 11-13. Yet plaintiff cites no authority establishing that an agency is absolutely required to expressly articulate its public interest balancing on the face of its affidavit or that an agency's failure to do so constitutes, as plaintiff would have it, the agency's failure to meet its burden of proof on the applicability of Exemption 7(C).[13/] In fact, one of the very cases cited by plaintiff for a proposition of more general authority clearly states that, in Exemption 7(C) situations, the balancing task "is for the Court." Retail Credit Co. v. FTC, 1976-1 CCH Tr. Cas. ¶60,727, at 68,128 (D.D.C. 1976).

13/ On this issue, plaintiff places exclusive reliance upon a portion of the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, but for several reasons his reliance is misplaced. Firstly, it must be noted that the particular portion quoted by plaintiff applies only to those situations in which an agency harbors "substantial uncertainty" as to whether the privacy invasion is unwarranted. Secondly, the guideline states only that a "balancing process may be in order," which clearly signifies a measure of agency discretion which would be fatal to plaintiff's asserted standard of agency obligation under Exemption 7(C). C.f. Getman v. NLRB, 450 F.2d 670, 674 n.10 (D.C. Cir. 1971). Finally, there remains the fact that the guideline nowhere even comes close to suggesting, as does plaintiff, that an agency's failure to articulate a balancing process renders its invocation of Exemption 7(C) invalid.

Defendant respectfully suggests that plaintiff has completely failed in his attempt to demonstrate any inadequacy in defendant's application of Exemption 7(C).[14] Therefore, both the reasons and the authority previously cited by defendant on this issue pursuasively compel the conclusion that the withheld privacy information should be protected from public scrutiny.[15]

IV. Exemption 7(D) Has Been Properly Invoked To Authorize Non-Disclosure Of Confidential Source Information

Of evident primary concern to plaintiff in this lawsuit are five volumes of Memphis Police Department records which have been withheld as exempt from disclosure pursuant to 5 U.S.C. §552(b)(7)(D).[16] These records were obtained by the Task Force from the District Attorney General's Office in Shelby County, Tennessee, for the Task Force's review in preparation of its report. See Affidavit Of James F. Walker ("Walker Affidavit"), ¶¶3, 5; Shaheen Affidavit at page 7, ¶5(a).

14/ Defendant does not mean to ignore the fact that there is obviously a greater-than-usual public interest in (or at least public curiousity surrounding) much of the information involved in this lawsuit. Defendant simply contends that there exists no legitimate public interest sufficient to countervail the privacy interests involved here, particularly those of Dr. King's family. Indeed, given the nature of much of this information, coupled with plaintiff's professed interest in assassination material only, it is difficult to imagine why plaintiff has attempted to pursue this aspect of the lawsuit. See note 1 supra.

15/ It should be noted that plaintiff also presses his claim to the withheld identities of all FBI personnel below the rank of section chief. See Plaintiff's Memorandum at 13. Inasmuch as his brief argument on this issue not only lacks any supporting authority but also ignores clear authority to the contrary, defendant merely reaffirms its position that such information is properly withheld pursuant to Exemption 7(C). See Defendant's Memorandum at 14 n.20.

16/ Notwithstanding plaintiff's "suggested" estimation these documents number approximately 400 pages.

As is made absolutely clear in the Affidavit Of Hugh W. Stanton, Jr. ("Stanton Affidavit"), District Attorney General in and for the Fifteenth Judicial Circuit for the State of Tennessee, these records have been preserved in confidence since their use in the prosecution of James Earl Ray and continue to be maintained in confidence. See Stanton Affidavit at 2-3. Moreover, they were released to Task Force member James F. Walker, under subpoena, on the clear understanding that their confidentiality was not thereby being jeopardized. As District Attorney General Stanton has attested:

> Never has it been, nor never was it intended that the documents released to Mr. Walker be made public. In all due respect to the Department of Justice and their representative, I refused to release the requested documents to Mr. Walker without a Federal Court subpoena. Had there been no concern over the confidentiality of these documents, I would not have requested a Court subpoena.

Stanton Affidavit at 2. Thus, it was and still remains the position of the official custodian of these investigatory records that they should "be kept confidential and not [be] released." Id. at 3.

Plaintiff, however, insists that the documents must be released and attempts to argue to that conclusion through at-least two faulty avenues. First, he contends that a local law enforcement authority cannot be a confidential source within the meaning of Exemption 7(D) because it is not a "person" comparable to a "human" informer. See Plaintiff's Memorandum at 6-9. However, the courts which have been confronted with this question have ruled decidedly to the contrary. In Church of Scientology v. Department of Justice, 410 F. Supp. 1297 (C. D. Cal. 1976), it was squarely held that Exemption 7(C) is readily applicable to "law

enforcement agency sources." Id. at 1303. Subsequently, the Fourth Circuit relied upon Scientology to conclude that "certain records provided by sources within a non-federal law enforcement organization . . . were obtained in confidence and are fully protected by subsection (7)(D)." Nix v. United States, Civil No. 76-1898 (4th Cir., February 28, 1978) (slip opinion at 15-16) (attached to Defendant's Memorandum as Defendant's Exhibit L). See also Curry v. DEA, Civil No. 75-1416 (D.D.C., November 5, 1976) (slip opinion at 4) (attached to Defendant's Memorandum as Defendant's Exhibit J); c.f. Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977).

Second, plaintiff correctly points out that defendant must make a sufficient showing that there existed at least an implied assurance of confidentiality with respect to these records and he insists that this burden cannot be met. See Plaintiff's Memorandum at 9-10. To this argument, and to plaintiff's curious suggestion that such confidentiality is somehow negated by the existence of a subpoena, defendant can only respond once again with the sworn statement of District Attorney General Stanton:

> Never has it been, nor never was it intended that the documents . . . be made public. . . . Had there been no concern over the confidentiality of these documents, I would never have requested a Court subpoena.

Stanton Affidavit at 2; see also Walker Affidavit, ¶3.

Finally, plaintiff accurately observes that the identity of the local law enforcement agency source in this instance

has already been disclosed, the unspoken import of which being that the information provided by such a source should somehow lose its protected status. See Plaintiff's Memorandum at 10. Defendant respectfully disagrees, because in this case such a conclusion could lead to a serious impairment of the federal law enforcement community's ability to obtain the ready cooperation of state and local law enforcement agencies. See Curry v. DEA, supra, at 4; Church of Scientology, supra, at 1303. In this sense, the instant situation is functionally equivalent to that which confronted the Fourth Circuit in Nix:

> The FBI insists that these records were supplied to it in confidence, that such records are not generally available to the public, that they were obtained by FBI agents for official purposes and contain criminal records of individuals as well as candid remarks and observations of non-FBI law enforcement officials, and that release of this information would seriously inhibit the FBI's relationship with its confidential sources and with other law enforcement personnel. We agree with the court below that these materials were obtained in confidence and are fully protected by subsection (7)(D).

Nix v. United States, supra, at 16 (emphasis added). See also Church of Scientology, supra, at 1303 n. 18.

Accordingly, defendant respectfully urges that the Court should allow defendant to preserve the confidentiality of these local law enforcement records[17/] as was obviously

17/ Also at issue in this same general category are twenty-nine pages of Atlanta Police Department records presently maintained in duplicate form at the FBI's Atlanta Field Office. See Affidavit Of Horace P. Beckwith, ¶¶2-3; see also Defendant's Memorandum at 17 n.21.

intended by all parties to their transmittal. Any contrary result could have serious ramifications in the law enforcement community and would require the further processing of these documents in order to protect the interests of specific individuals mentioned therein. See Stanton Affidavit at 2-3; Defendant's Memorandum at 20 n.25.[18/]

Conclusion

For the foregoing reasons, and for such additional reasons as are set forth in the Memorandum Of Points And Authorities In Support Of Defendants' Motion For Summary Judgment, defendant respectfully suggests that its motion for summary judgment should be granted.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

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United States Attorney

LYNNE K. ZUSMAN

DANIEL J. METCALFE

Attorneys, Department of Justice
P.O. Box 7219
Washington, D.C. 20044
Tel: 739-4544

Dated: May 22, 1978

Attorneys for Defendant.

18/ As regards all "individual" Exemption 7(D) deletions at issue herein, defendant notes that such excisions are in large part co-extensive with those made pursuant to Exemption 7(C) and, in response to plaintiff's brief argument on this issue, stands on its previous discussion of the applicability of Exemption 7(D). See Defendant's Memorandum at 15-17.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendant's Reply Memorandum In Support Of Its Motion For Summary Judgment, together with the Affidavits of Horace P. Beckwith and Hugh W. Stanton, Jr., and the Supplemental Affidavit Of Lewis L. Small, was served upon plaintiff pro se by forwarding a copy thereof by hand delivery to James H. Lesar, Esq., 910 16th Street, N.W., Washington, D.C. 20006, on this 22nd day of May, 1978.

DANIEL J. METCALFE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA, :

Plaintiff :

v. : CIVIL ACTION No. 75-1048

GEORGE BUSH, et al., :

Defendants :

FILED

JUN 8 1977

JAMES F. DAVEY, CLERK

ORDER

Upon consideration of Plaintiff's Motion for Reconsideration or Clarification of this Court's Order entered March 14, 1977; it is by the Court this 8th day of June, 1977,

ORDERED, that the Order be amended to read as follows:

Defendants have withheld thirty (30) documents from Plaintiff claiming that Exemption 1 of the FOIA applies. Exemption 1 allows non-disclosure if the documents are:

> (1)(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy; and
>
> (B) are in fact properly classified pursuant to such executive order.

The Court's inquiry into the (B)(1) exemption requires that the Court be satisfied that proper procedures have been followed, that the claim is not unreasonable or pretextual and that by its sufficient description the contested document

Defendant's Reply Exhibit A

14B

logically falls within the category of the exemption. Weissman v. CIA, No. 75-1583 (D.C.Cir. January 6, 1977).

The Court cannot substitute its judgment for that of agency. The affidavits submitted by the agency in the instant action show that the contested material was properly classified and is entitled to the protection of the exemption claimed.

The Defendants have claimed exemption from disclosure of 16 documents by virtue of Exemption 3 of the FOIA. This exemption protects documents that are "specifically exempted by statute." Here the Agency relies on 50 U.S.C. §403(d) to [illegible].

Plaintiff's [illegible], but the statute is not a statute which [illegible] exempts from disclosure any information [illegible] Exemption 3 has been rejected. [illegible], citing Phillippi v. CIA, No. 76-1004 (D.C.Cir., November 16, 1976).

Plaintiff's second contention is that assuming the validity of Section 403(d) as an Exemption statute it cannot cover all of the documents withheld. However, the Court in Weissman noted that the Agency's directive that it protect its sources is "especially broad." Again reference to the affidavits filed in this action afford sufficient basis for holding that the Agency's claim is well founded and therefore summary judgment is appropriate.

Defendants have applied Exemption (b)(7)(E) to withhold information contained in two documents. This Exemption provides that the FOIA does not apply to matters that are:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .
>
> (E) disclose investigative techniques and procedures . . .

One of the documents on issue here is an investigative report compiled during the course of an internal security investigation by the CIA. The other document is described as related to a background investigation by an applicant for employment with the Agency.

While Plaintiff contends that such an investigation does not qualify as a law enforcement purpose under the Exemption it is clear to the Court that it does qualify. Further, the affidavits do aver that the release of the material will disclose investigative techniques and procedures. As there is little here to question the veracity of the Agency and therefore an in camera inspection is unnecessary. Weissman, (supra at 11). Summary Judgment is appropriate as to this Exemption.

Aubrey E. Robinson, Jr.
United States District Judge

76 5586

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN CERVASE, :

Plaintiff, : Honorable H. Curtis Meanor

v. : Civil Action No. 76-2338

DEPARTMENT OF STATE, :

Defendant. : JUDGMENT

This matter having been opened to the Court by the plaintiff's motion for in camera inspection pursuant to 5 U.S.C. § 552(a)(4)(B) and the defendant's cross-motion for summary judgment pursuant to Fed.R.Civ.P. 56, the Court having heard oral argument on March 28, 1977, and the Court having duly considered this matter and expressed its opinion on the record; it is on this 1 day of April, 1977;

ORDERED, that the plaintiff's motion for in camera inspection be, and hereby is, denied; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant's cross-motion for summary judgment be, and hereby is, granted.

s/H. Curtis Meanor
H. CURTIS MEANOR, Judge
United States District Court

ORIGINAL FILED
APR - 1 1977
ANGELO W. LOCASCIO, CLERK

Defendant's Reply Exhibit B

~~Civil No. 76-2338~~

~~Approved~~

JOHN CERVASE,

Plaintiff,

vs.

Civil No. 76-2338

DEPARTMENT OF STATE,

Defendant.

Newark, New Jersey
March 28, 1977

Before: The Honorable F. CURTIS MEANOR, U.S.D.J.

Appearances:

JOHN CERVASE, ESQ., Pro Se

JONATHAN L. GOLDSTEIN, ESQ.
UNITED STATES ATTORNEY
By: WILLIAM E. STAEHLE, ESQ.
Assistant U.S. Attorney

of Information Act and it wasn't in compliance with section one of the act.

Number two, it violated the Executive Order 11652.

Number three, it violated the defendant's own regulations; if you want me to point it out, I shall.

THE COURT: I have looked at all the papers and I am ready to rule.

Plaintiff, John Cervase, a member of the Bar, moves for an in camera inspection of a document he seeks under the Freedom of Information Act. The Government, i.e., the Department of State, cross-moves for summary judgment.

Mr. Cervase apparently read in the newspaper that in April, 1976, the United States State Department filed with the Union Of Soviet Socialist Republics a written protest about the harassment of the United States Embassy staff in Moscow.

Plaintiff, Cervase, filed with the Department of State a request for a copy of that written protest under the Freedom of Information Act.

The Department of State denied the request on the ground that the protest was exempt from disclosure under 5 United States Code, 552(b)(1), which excludes from the applicability of the statute, "matters that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such

executive order."

Plaintiff, Mr. Cervase, then filed an administrative appeal, which resulted in the affirmance of the decision to deny release of the document.

This action was then commenced as authorized by 5 United States Code, 552(a)(4), in which the plaintiff seeks to compel disclosure of this protest.

Plaintiff now moves for an in camera inspection by the Court of this document. 5 United States Code, 552(a)(4)(B) provides in cases such as this, "The Court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

The defendant, Department of State, cross-moves for summary judgment on the ground that the record as it now exists adequately demonstrates that Mr. Cervase is entitled to no relief as a matter of law.

As it now exists, the record is composed of an affidavit of one Richard D. Vine, a State Department Officer endowed with the title, "Deputy Assistant Secretary for European Affairs," and answers to interrogatories served on the Government by the plaintiff. These documents, read together, establish the following: Sometime in the springtime

of 1976, the United States Government sent a communication officially denominated as "Moscow telegram number 5935," to the Soviet Ministry of Foreign Affairs, protesting Soviet harassment of American Embassy staff members in Moscow.

The text of this communication has never been revealed to anyone outside of the Government. However, at the time of the communication, the State Department press officers were authorized to confirm that the American Embassy in Moscow protested the harassment of Embassy personnel, and that a protest note had been sent.

The practice of the State Department is that when harassment of Embassy personnel should occur, the incident is described in general terms and a statement is issued that the matter has been brought to the attention of the Soviet authorities.

Reports of these incidents originate at the American Embassy in Moscow, and in the American press corps stationed in Moscow.

Texts of correspondences with Soviet authorities are not published.

Apparently, plaintiff's notice of a press report that the communication in question had been sent prompted his request for a copy of the document.

Upon receipt of plaintiff's request, the communication

was identified and located by the State Department. At that time, the document was not marked "Confidential," but rather, "Limited official use."

This is an internal State Department designation which affords the document the same degree of physical safeguard, including encryption and limited distribution, as documents marked "Confidential."

The document and plaintiff's request were then referred to the Bureau of European Affairs for a mandatory review. In the course of this review, it became apparent to Bureau officers and legal advisers to the Bureau that the disclosure of the document could reasonably be expected to cause damage to national security, and that failure to classify the document with an appropriate national security designation had been through an administrative oversight.

Steps were then immediately taken to classify the communication as "Confidential," pursuant to Section 1(c) of Executive Order 11652. Once the document had been designated "Confidential," the Bureau notified plaintiff that the materia he sought was exempt from disclosure under 5 U.S.C. 552(b)(1) and therefore would not be revealed.

Plaintiff, Mr. Cervase, then sought an administrativ appeal. On receipt of plaintiff's letter of appeal, the Director of the Freedom of Information staff requested members of the Bureau of European Affairs to re-examine their official

-- their initial conclusions. The Bureau again concluded that the communication in question should be designated "Confidential," and so informed the chairman of the counsel on classification policy.

The counsel then undertook a de novo analysis of the propriety of the document's classification, and determined that the document was appropriately designated as "Confidential."

Plaintiff, Mr. Cervase, was so not fied.

Ultimately, this suit was commenced under the Freedom of Information Act to compel the Government to disclose the document which plaintiff seeks. Plaintiff has moved to have the Court inspect the document in camera in order to determine whether it is properly exempt from disclosure under 5 U.S.C. 552(b)(1). In resistance to plaintiff's motion, and in support of its own motion for summary judgment, the defendant has submitted the Vine affidavit, which states in part, paragraph six:

"The document in question, Moscow telegram number 5985, is a protest note regarding harassment of the Embassy staff in Moscow, which is a current and very sensitive issu in U.S.-U.S.S.R. relations. To release the contents of thi document would be tantamount to publishing it. In my opinion the Soviet Government would probably regard this as an escalation of the matter, which would require further action

on their part to the detriment of the professional career of the Embassy officer mentioned in the note. For example, the Soviet Government would feel impelled to engage in public polemics which would put an additional strain on U.S.-U.S.S.R. relations, and possibly lead to the consideration of the expulsion of the American Foreign Service officer mentioned in the protest note."

The statutory language authorizing this Court to make an in camera inspection of the materials alleged to be exempt from disclosure under the Freedom of Information Act clearly indicates that such inspections are not obligatory in every case.

To the contrary, a very recent decision of the Court of Appeals for the District of Columbia Circuit has stated that, "In camera proceedings are particularly a last resort in 'national security' situations."

Weissman vs. CIA, Number 76-1274 (District of Columbia Circuit, filed January 6, 1977).

This is for at least two very important reasons:

1) In camera inspections are burdensome and raise all the problems inherent to a non-adversary proceeding; and

2) Few Judges have the skill or experience to weigh the repercussions of disclosure of national security sensitive material.

The cases and legislative history amply set out

in the Government's brief, indicated that where the sworn statements of the Government indicate that the proper procedures have been followed in classifying a particular document, and that the classification is not pretextual and unreasonable, a Court need not, and indeed ought not, order an in camera inspection.

On the record before me, I am satisfied that the Government has made such a demonstration in this case.

Plaintiff's motion for an in camera inspection is therefore denied.

Moreover, I am satisfied that the document which plaintiff seeks properly falls within the scope of the (b)(1) exemption from disclosure.

Therefore, there is no legal basis on which I may grant plaintiff the relief he seeks.

Defendant's motion for summary judgment is granted.

I want the Government to submit an appropriate order to me within ten days.

MR. STAEHLE: I will, your Honor.

MR. CERVASE: We plan to appeal the decision. Will you instruct the Reporter to give us that transcript as soon as possible?

THE COURT: I will if you agree to pay for it.

Pursuant to Section 753, Title 28, United States Code, the foregoing transcript is certified to be an accurate record as taken stenographically in the afore-entitled proceeding.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 77-1627

CERVASE, JOHN,
APPELLANT

v.

DEPARTMENT OF STATE

(D. C. CIVIL NO. 76-2338 - D. of N. J.)

Submitted Under Third Circuit Rule 12(6)
February 15, 1978

Before SEITZ, Chief Judge, ROSENN and GARTH, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

Chief Judge

Attest:

Thomas F. Quinn, Clerk

DATED: MAR 15 1978

D.J. 145-2-229 - INFORMATION & PRIVACY F.A.ROSENFELD:LS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN,

Plaintiff,

v.

NATIONAL SECURITY COUNCIL, et al.,

Defendants.

Civil Action No. 75-0675

FILED

MAY 18 1978

JAMES F. DAVEY, CLERK

MEMORANDUM

Plaintiff, a former official of the National Security Council (NSC), brought this action under the Freedom of Information Act*/ against NSC and named defendants to compel public release of two lists of NSC documents.

One of the lists whose release is sought is a compilation of the number and exact title of each National Security Study Memoranda (NSSM) issued since January 20, 1969. The other is a similar compilation with respect to National Security Divisional Memoranda (NSDM).

The plaintiff served at NSC when it originated this system of Presidential decision-making by memorandum and had a major role in developing it. The primary function of these memoranda is to gather information and recommendations for the President of the United States on current foreign policy and national defense issues and to record and communicate the President's decision to responsible officials. Prior to filing this action plaintiff had requested defendants to furnish to him a list of the titles of memoranda prepared during and subsequent to his tenure at NSC. No lists had been prepared contemporaneously with the memoranda.

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*/ 5 U.S.C. §552 (1970 and Supp. V 1975). (Hereinafter FOIA.)

Defendant's Reply Exhibit C

In response to the request, however, NSC prepared such lists and, then, perceiving security considerations with respect to them, classified each as "Secret," pursuant to Executive Order number 11652, dated March 8, 1972. */ In addition, some of the individual titles on the lists were also classified as "Secret."

Defendants advised plaintiff that release of the lists, and especially the individually classified titles, would reveal sensitive information as to the timing and focus of United States foreign policy, which could "reasonably be expected to cause serious damage to the national security." Accordingly, defendants refused to release the lists so classified. Plaintiff appealed this decision administratively, which appeal was denied by Henry Kissinger, then Assistant to the President for National Security Affairs. Plaintiff then initiated this action. He seeks in this suit production of the two lists, but lists, and not the underlying memoranda.

Defendants have moved for summary judgment, asserting that there are no material facts in dispute and that the lists are specifically exempted in full from disclosure, unclassified titles included, by Sections 552(b)(1) and (b)(5) of FOIA. 5 U.S.C. §552(b) exempts from release matters that are:

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*/ Executive Order number 11652 states that:

> [t]he test for assigning 'Secret' classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security.

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> ....
>
> (5) 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 ....

Plaintiff in turn has moved for partial summary judgment, asserting that:

1. these titles are not part of the deliberative process, but rather represent final agency determinations on either the subject to be studied or the conclusions to be drawn from the studies, and thus are not within the scope of the (b)(5) exemption, and

2. the titles on the two lists which are not individually classified are not within the (b)(1) exemption and must be released pursuant to the directive of the last paragraph of §552(b):

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Plaintiff has also moved for a release of the lists to him under a protective order to enable him to frame his arguments regarding the releasability of the unclassified titles and the lack of proper classification of the titles which are individually classified. Plaintiff asserts that he is an expert in national security and suggests that the Court avail itself of his expertise as to whether disclosure of the disputed titles could reasonably be expected to cause damage to national security.

Plaintiff has further moved for an in camera hearing so that he can furnish to the Court his informed opinion thus developed about the effect of the release of the lists on United States foreign policy and defense interests, without violating the "Secret" classification of the lists.

The Court is of the opinion that both lists, including, as they do, references to both classified and unclassified titles, are within the (b)(1) exemption of FOIA and that the lists as such fully exempt from disclosure. Accordingly, only the (b)(1) exemption issue will be discussed.

In support of their summary judgment motion, filed in July 1976, defendants offered affidavits by Jeanne Davis, the Staff Secretary of the NSC, Philip Habib, the Under Secretary of State for Political AFfairs, and Richard Lehman, Deputy Director of Intelligence for the CIA. Each of these officials stated reasons for considering the lists to be sensitive and each expressed the opinion that disclosure of the lists would be harmful to the foreign policy and national defense interests of the United States.

For example, by affidavit of July 1975, Ms. Davis stated in support of her conclusion that release of the lists could reasonably be expected to cause serious damage to the national security that the lists would, inter alia:

1. reveal, at any given time, the flow of foreign policy thinking and areas of interest, concern, and attention at the very highest level of Government of the United States,

2. indicate those policy matters on which a difference of opinion existed at high levels, and

3. identify the individual documents which would be of greatest interest to a foreign government, thereby enabling it to concentrate its intelligence gathering process.

In addition, with respect to the individual unclassified titles included on the lists, Davis stated by affidavits of November 1975 and February 1976 that release of these titles "could reasonably be expected to damage our national security."*/ As justification for this conclusion, Davis stated in her November 13, 1975 affidavit that:

> Access to the unclassified titles in their totality would ... enable a foreign intelligence analyst to identify the kinds of issues of grave concern to the United States and the way in which this government reacts to world events, and also to gain unique insights into the method by which issues of this kind are identified, studied and resolved by the President.

Habib and Lehman later added several additional justifications for the withholding of the full contents of the two lists, including the unclassified titles. Habib stated by affidavit of July 1, 1976, that the timing and sequence

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*/ The Court notes that this representation would justify a "Confidential" but not a "Secret" classification under Executive Order number 11652.

of the titles would have significant intelligence value to foreign powers. Lehman stated by affidavit of June 30, 1976, that the lists would indicate to a foreign intelligence analyst that the United States had likely not formulated a position on a given issue, and that even an unclassified title on the list could lead to rumors, "whispering campaigns," and even fraudulent memoranda which, because of the classification of the memoranda themselves, would be almost impossible for the U. S. to refute.

More recently, on the suggestion of the Court, Dr. Zbigniew Brzezinski, Assistant to the President for National Security Affairs, has reviewed the two lists of titles to determine whether time and events had altered these earlier conclusions regarding classification of the lists in full. By affidavit of December 8, 1977, Dr. Brzezinski restated many of the points previously made by Davis, Habib, and Lehman in support of the classification decision. Dr. Brzezinski added that in his opinion:

> disclosure of these lists would provide other countries either ally or potential adversary, with valuable information and insight pertaining to the focus and timing of key U. S. foreign policy concerns. [Emphasis added.] Id. at p. 3.

Dr. Brzezinski concluded "after a thorough substantive re-examination of the two lists" that some of the previously classified titles could be (and were) declassified, that the lists as such meet the standard for "Secret" classification, that they are:

> properly classified at the appropriate classification level commensurate with the expected damage which would result should the two lists be disclosed,

and that

> even with the passage of time, the release of the lists of NSSM and NSDM titles still could, as of this date, reasonably be expected to cause serious damage to the national security. Brzezinski affidavit at p. 2, 4.

There is and can be no issue of material fact about the procedure used to classify the two lists, or about the expertise and responsibility of Ms. Davis and Messrs. Habib, Lehman, and Brzezinski with respect to United States foreign policy. Nor can there be any material issue of fact as to what their opinion is: The disclosure plaintiff requests may reasonably be expected to cause serious damage to the national security. That opinion, if reasonable, is a proper basis for a classification of "Secret." Documents so classified are exempt from the release requirements of FOIA.

Plaintiff contends, nevertheless, that there is an issue of material fact about the reasonableness of the conclusion of these responsible officials and therefore about the reasonableness and propriety of the classification of the lists and their exemption from release. In order to join issue plaintiff presses for an opportunity to examine the lists and the underlying documents in camera. After that examination plaintiff would furnish the Court with his expert opinion on the prospect of danger to United States foreign policy and national defense from the disclosure he seeks. In support of this request he offers his own impressive credentials as a scholar and actor in the field of foreign policy and national security

and offers, after examination of the documents, to show to the Court flaws in the reasons given by the several incumbents for their opinions and classifications. For example, he argues, a foreign power drawing conclusions from the information evident from the lists would be misleading itself because the President makes many relevant decisions outside the NSC memorandum system.

Plaintiff does not challenge the expertise of Dr. Brzezinski and his predecessors nor does plaintiff suggest that the incumbents who made the decisions did so corruptly, maliciously, or thoughtlessly. He does not draw an issue of specific fact but rather offers only his own opinion that the classification decisions at issue were mistaken as a matter of policy.

Although the Court is [illegible] the defendants' FOIA exemption claim de novo, their classification decision underlying that claim is entitled to substantial weight. Nothing in this record or plaintiff's submissions justifies the substitution of this Court's judgment or the informed judgment of plaintiff for that of the officials constitutionally responsible for the conduct of United States foreign policy as to the proper classification of the two lists. See New York Times Co. v. United States, 403 U.S. 713, 727-730 (1971) (Stewart, J., concurring). On the strength of defendants' sufficient description of the total effect of release of all of the titles that are not individually classified, as well as the description of the titles that are individually classified, this Court is of the opinion that there is more than sufficient [illegible] for the classification

of the lists to justify their exemption by operation of Section 552(b)(1). As Dr. Brzezinski has stated, the lists as such provide insight pertaining to the "focus and timing of key U. S. foreign policy concerns." Thus, the lists apparently show by number and by the sequence in which titles are listed the subject matter of significant U. S. foreign policy decisions at the Presidential level. Release of the lists, even after masking the classified titles and the numbers of the unclassified ones would still make available a document which would describe and list those decisions sequentially. It seems obvious that such a list would be a valuable instrument in the hands of unfriendly intelligence experts skilled in simple extrapolation and other analytical devices. Accordingly, the Court concludes that the concerns of the officials who oppose disclosure are plausible and fully justified by the face of the record.

This Court also concludes that no useful purpose would be served by an in camera review of the lists. The good faith of defendants is not questioned. The Court is "satisfied that proper procedures have been followed, and that by its sufficient description the contested document[s] logically [fall] into the category of the exemption indicated."*/ The pleadings and affidavits fully articulate the facts and considerations underlying defendants' classification decision. Accordingly, there is no occasion for the Court to exercise its discretion to examine the classified lists in camera.**/

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*/ Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977), as amended by order of April 4, 1977.

**/ See Weissman v. CIA, Id.; Bell v. United States, No. 77-1142 (1st Cir., Sept. 9, 1977).

In reaching this conclusion the Court has carefully considered plaintiff's claim that there is a reasonably segregable portion of these lists which can be released. However, although defendants have conceded that damage to the national security could not reasonably be expected if only a small number of certain individual titles were released, their claim for exemption under (b)(1) is based on the total effect of all of the unclassified titles and not the sensitivity of any one (or more) of them individually.

The affidavits of Ms. Davis and Mr. Lehman plausibly identify potential damage to the national security that could be caused by release of the unclassified titles "in their totality." Thus, Ms. Davis concluded that such release "could reasonably be expected to damage our national security." This conclusion is persuasively corroborated by Dr. Brzezinski's recent re-determination that the two lists (including, by necessary implication, the unclassified titles) would afford valuable information and insight pertaining to the timing and the focus of key United States foreign policy concerns.

The Court concludes that the defendants have framed their claimed exemption as narrowly as is required by FOIA. There is no reasonable way for the Court to slice the list thin enough to eliminate the national security hazard and still leave a "list" as such for production. The Court further concludes that it could not better perform this impossible task by examination of the lists in camera (with or without the advice of plaintiff). Accordingly, the

Court has determined that the lists are reasonably classified in full, unclassified titles included, and that they are therefore exempt from release. An order to this effect accompanies this memorandum. */

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Dated: May 17, 1978

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*/ This decision is, however, without prejudice to any future claim by plaintiff for access to any unclassified documents now in existence, or any unclassified documents that may come into existence, which list the unclassified titles of the NSSMs and NSDMs in "scrambled" sequence and in edited form, for which defendants could not justify a "Secret" or "Confidential" classification. Such editing and "scrambling" is, of course, beyond the function of the Court under FOIA. See 5 U.S.C. §552(a)(4)(B).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN,

Plaintiff,

v.

NATIONAL SECURITY COUNCIL, et al.,

Defendants.

Civil Action No. 75-0675

FILED

MAY 18 1978

JAMES F. DAVEY, CLERK

ORDER AND JUDGMENT

For the reasons stated in an accompanying Memorandum, it is this 17th day of May 1978, hereby

ORDERED: That plaintiff's motions for release of two lists under a protective order and for an in camera inspection and hearing are DENIED, and it is

FURTHER ORDERED: That defendants' Motion For Summary Judgment is GRANTED, and it is

FURTHER ORDERED: That JUDGMENT be and is hereby entered for defendants, without prejudice to any future claim or action by plaintiff for any unclassified documents now in existence, or any unclassified documents that might come into existence, listing some or all of the unclassified titles of National Security Study Memoranda (NSSM) and National Security Decisional Memoranda (NSDM) in "scrambled" sequence and in edited form.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE