UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, et al., Defendants	Civil Action No. 77-1997

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OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

This suit arises under the Freedom of Information Act, 5 U.S.C. §552. Plaintiff seeks seven categories of records contained in the files of the Central Intelligence Agency pertaining to Dr. Martin Luther King, Jr. and his alleged assassin, James Earl Ray.

Defendants have moved for summary judgment on the grounds that the information withheld from plaintiff is exempt from disclosure under one or more of the exceptions to the Freedom of Information Act. For the reasons set forth below and in the attached affidavits of Harold Weisberg and James H. Lesar, plaintiff opposes the defendants' motion for summary judgment.

I. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE CENTRAL INTELLIGENCE AGENCY HAS NOT SWORN THAT IT HAS CONDUCTED A THOROUGH SEARCH OF ALL RELEVANT FILES AND THE RECORD SHOWS THAT DOCUMENTS WITHIN THE SCOPE OF PLAINTIFF'S REQUEST HAVE NOT BEEN PRODUCED

The first impediment to defendants' summary judgment motion is that plaintiff has not received all records contained in CIA files which are within the scope of his request. The CIA has referred a number of records which it did locate to other agencies.

For example, the affidavit of Gene Wilson states that the CIA referred 64 documents to the FBI. Plaintiff has not yet received these records. Summary judgment in favor of the defendants is inappropriate until these records have been provided or their nondisclosure justified.

Secondly, even leaving aside these referrals, the evidence clearly shows that the CIA has not provided all the records in its files which are pertinent to plaintiff's request. For example, item 6 of plaintiff's FOIA request asks for: "All analyses, commentaries, reports, or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr. or the authors of said materials." [Complaint, Exhibit 1] Attachment 1 to the Lesar affidavit which accompanies this Opposition is a March 31, 1971 memorandum on plaintiff's book Frame-Up: The Martin Luther King/James Earl Ray Case. This is a CIA document which clearly should have been provided to plaintiff in response to his June 11, 1976 request, but it was not. The reference in the first paragraph of the first memorandum to books on the assassinations of President John F. Kennedy and Senator Robert F. Kennedy indicate an interest of the CIA in those books and suggests that other books on the assassination of Dr. King must also have received the scrutiny of the CIA.

The existence of this memorandum and other factors show that the CIA did not make a thorough search of all relevant files which might contain records pertinent to plaintiff's FOIA request. Indeed, the affidavits submitted by the CIA do not swear that a thorough search of all relevant files was made.

In order to prevail on a motion for summary judgment in a Freedom of Information Act lawsuit, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt

from the Act's inspection requirements." National Cable Television Ass'n Inc. v. FCC, 479 F. 2d 183, 186 (D.C.Cir. 1973). To show that all documents which fall within the scope of the request have been produced an agency must, at a minimum, submit an affidavit by an employee stating that he has personal knowledge that all files which might contain requested material have been searched. Exxon Corp. v. FTC, 384 F. Supp. 755, 759-61 (D.D.C. 1974), remanded, 527 F. 2d 1386 (D.C.Cir. 1976). In this case, however, no CIA agent has stated under oath (or otherwise) that all relevant files have been searched.

At least one district court has held that production of additional documents in response to a Freedom of Information Act request after a six-month delay "presents a substantial issue of the completeness of the agency search." Ass'n of National Advertisers, Inc. v. FTC, 38 Ad.L.2d 643 (D.D.C. April 1, 1976). In this case the CIA produced additional records after an even longer delay and only after plaintiff filed suit. Moreover, there are other circumstances in this suit which also justify an inference of bad faith on the part of the CIA in conducting its search, including the fact that plaintiff has documentary evidence that it failed to produce all the records pertinent to his request even after it assertedly made a second search. (See Lesar Affidavit, ¶¶ 4, 9; Weisberg Affidavit, ¶¶ 9-10)

II. THE CIA HAS NOT MET ITS BURDEN OF SHOWING THAT THE WITHHELD INFORMATION IS PROPERLY CLASSIFIED PURSUANT TO EXEMPTIONS 1, 3, and 6

A. Exemption 1

The CIA repeatedly claims that the information that it has withheld is is nondisclosable by virtue of 5 U.S.C. §552(b)(1).

Exemption 1 authorizes nondisclosure of matters that are:

> *(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* (emphasis added)

This clearly provides that in order to qualify for nondisclosure under Exemption 1, the material withheld must be classified in accordance with both the substantive and procedural requirements of the relevant Executive order. The Conference Report also makes this explicit by stating that material may be withheld under Exemption 1 only if it is properly classified "pursuant to both procedural and substantive criteria contained in such Executive Order" (House Report, 93-1380, at p. 12).

The case law in this circuit also holds that an agency must show that proper classification procedures were followed in order to demonstrate entitlement to Exemption 1. Halperin v. Department of State, 565 F. 2d 699 (1977); Shaffer v. Kissinger, 505 F. 2d 389 (1974); Weisberg v. General Serivices Administration, Civil Action No. 2052-73 (D.D.C. May 3, 1971) (attached as Attachment 3 to Lesar Affidavit).

In this case the affidavits submitted by the CIA do not demonstrate that the proper procedures have been followed. For example, they do not state that the records withheld under the exemption 1 claim were classified at the time of origination. Yet this is a requirement of Executive Order 11652. Whether classification, "including the timing thereof," was in accordance with Executive order is a question on which an FOIA plaintiff should be allowed to undertake discovery. Shaffer, supra, at 391.

B. Exemption 3

The CIA also seeks to protect against the disclosure of withheld information by asserting that it is exempt under 5 U.S.C. §552(b)(3) by virtue of two statutory provisions, 50 U.S.C. §503(d)

(3) and 50 U.S.C. §403(g). The first of these provides:

> *[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.*

Plaintiff contends that whether or not disclosure of intelligence sources and methods constitutes unauthorized disclosure is determined by reference to the applicable Executive order governing disclosure of classified information. He further contends that unless 50 U.S.C. §403(d)(3) is read in light of the applicable Executive order it cannot qualify as a (b)(3) statute because it then leaves withholding or disclosure at the discretion of the Director of Central Intelligence and does not establish particular criteria for his decision to withhold.

That this was the intent of Congress is clear from the passage referring to this statute in the Conference Report which accompanied the bill which amended Exemption 1:

> *Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Emphasis added)(Conference Report No. 93-1380, 93rd Cong., 2d Sess., p. 12)*

In Phillippi v. Central Intelligence Agency, 546 F. 2d 1009, 1015-1016, 178 U.S.App.D.C. 243, 249-250 (D.C.Cir. 1976), the Court of Appeals noted this relationship in its footnote 14:

> *On remand the District Court may also consider the applicability of the FOIA's first exemption, which applies to classified information. The Agency claimed this exemption in its first response to appellant and at all subsequent stages of this proceeding. Since information which could reasonably be expected to reveal intelligence sources would appear to be classifiable, see*

> *Executive Order 11652 . . . and since the Agency has consistently claimed that the requested information has been properly classified, inquiries into the applicability of the two exemptions may tend to merge.*

It seems apparent, therefore, that the CIA cannot sustain its Exemption 3 claim until an inquiry has been made into the classification of the withheld information, including a determination of whether the information was classified as of the time of origination.

In addition, the history of the CIA's claims to exemption 3 entitlement based on 50 U.S.C. §403(d)(3) in plaintiff's other cases shows overwhelming that the CIA often spuriously invokes this exemption to protect material which is already publicly known or never qualified for national security protection in the first place. For example, the January 27, 1964 Warren Commission executive session transcript is now known to have been withheld at the insistence of the CIA to protect intelligence sources and methods. Yet the transcript was never properly classified pursuant to any executive order, contains no information which should have been classified, and revealed no intelligence sources and methods. (See Lesar Affidavit, ¶8. The January 27 transcript is reproduced here as Attachment 5 to the Lesar Affidavit) In fact, the affidavit of plaintiff Harold Weisberg establishes that the CIA has even deceived and misled a congressional committee, the Senate Select Committee on Intelligence into withholding names on the spurious grounds that it had to protect intelligence wources and methods, even though the information concealed was already publicly known. (See Weisberg Affidavit, ¶6)

These examples show that the CIA has a history of bad faith withholding of information on the grounds that it is protecting intelligence sources and methods. For this reason alone, discovery must be taken to discover whether or not the CIA is once again using this statute in conjunction with exemption 3 to keep secret

what has already been disclosed or what does not qualify for national security protection.

The need for discovery with respect to this claim of exemption is further emphasized by the differing descriptions of the nature of the information withheld under this rubric. With respect to many documents, the affidavits assert that information "pertaining to intelligence methods" has been withheld. Other documents contain excisions or are withheld because the information "could identify an intelligence source" or "would identify an intelligence source." None of the descriptions meets the strict requirements of the law. The question is not whether the information "pertains" to intelligence methods or whether it "could" or "would" identify an intelligence source. The question is whether it can reasonable be expected to damage the national security by "disclosing" an intelligence source or method. The careful use of the word "identify" rather than "disclose" or "reveal" suggests that while the information presently withheld would or could result in an identification of an intelligence source if it were released, it would not reveal or disclose an intelligence source not already known. Discovery is required to clarify the CIA's use of terminology and determine why it departs from the statutory prescription.

With respect to the other statutory provision upon which the CIA asserts a (b)(3) claim, 50 U.S.C. §403(g), plaintiff's affidavit raises a question of fact by controverting the CIA's affidavits which assert that information about the organizational components of the CIA was deleted in certain documents "to prevent detailed knowledge of CIA structure and procedure from being available as a tool for hostile penetration or manipulation." (Owen Affidavit, ¶18) Plaintiff asserts, and produces documentary evidence in support of his assertion, that such information is in fact published and has been provided him by the CIA. (Weisberg Affidavit, ¶17)

Thus, discovery is required to determine whether here, too, the CIA is withholding nonsecret information from plaintiff.

C. Exemption 6

The CIA has also frequently withheld information under Exemption 6. For example, the names of several persons who were considered suspects because they allegedly resembled the alleged assassin of Dr. King have been deleted. Again, there is reasons to doubt whether this information is in fact private. The names of some persons who were considered suspects or look-alikes have been published in newspapers or released in FBI records. It would seem likely that this may be true of some of the names withheld by the CIA. In addition, exemption 6 requires that there be a "clearly unwarranted invasion of privacy" before information can be withheld. The affidavits submitted by the CIA are conclusory on this point. There are no facts describing the kind of invasion of privacy or the degree of embarrassment or discomfort which would result from release of the information. Consequently, there are no facts upon which to base a conclusion that the invasion of privacy would be unwarranted. Plaintiff should also be allowed to pursue the nature and parameters of this exemption through discovery.

III. THE NSA'S CLAIM THAT ALL RECORDS REFERRED TO IT ARE EXEMPT IN TOTO LACKS CREDIBILITY

The CIA has referred a number of records in its files to the NSA. The NSA claims that all are exempt in toto. The only information disclosed is that there are 22 such documents. Plaintiff has not even been informed how many of these documents relate to Dr. King, or how many relate to James Earl Ray or one of the other categories of his request.

The Freedom of information Act provides:

> *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.*

The NSA's claim that these records must be withheld in their entirety seems to be suspect on its face. The Banner affidavit asserts that this claim is made to protect intelligence sources and methods. Aside from the fact that the affidavit makes no claim that the specific sources and methods used in connection with these 22 documents are not already known, it also appears to make no claim that the information contained in these documents is classified because of its content. Rather the information is only classified to protect against disclosure of the means by which it was acquired. Under these circumstances, it seems highly unlikely that there are no segregable portions. Rather it would seem that there should in all liklihood be portions which could be released after deletions are made which protect the sources and methods. The credibility of the NSA's claim is further weakened by the fact that plaintiff's own personal experience has proved that the NSA has not been honest with him in responding to other Freedom of Information Act requests. (See Weisberg Affidavit, ¶34) Until plaintiff has had an opportunity to test these claims through discovery or the court has subjected these documents to in camera inspection, defendants' motion for summary judgment must be denied.

CONCLUSION

For the reasons stated above, defendants have not met their burden of proof with respect to any claim of exemption. Moreover, it is apparent that the CIA has not conducted a thorough search of all relevant files which might contain information responsive to plaintiff's request. Accordingly, until plaintiff has exercised his discovery, defendants' motion for summary judgment must be

denied.

Respectfully submitted,

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