UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

_____/

REPLY MEMORANDUM AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

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 seven exhaustive categories of records pertaining to James Earl Ray and Dr. Martin Luther King, Jr., which are maintained by the defendant Central Intelligence Agency (CIA). The National Security Agency (NSA) was named as a party to defend 27 classified NSA documents referred to them by the CIA during the administrative processing of plaintiff's request. This memorandum is submitted in reply to the plaintiff's Memorandum in Opposition to the Defendants' Motion for Summary Judgment. Since their position has been stated fully in their earlier papers, defendants herein encorporate their previous statements. Defendants will not endeavor to respond to each and every allegation of plaintiff, only a few of which are even tangentially related to the issues in dispute. Moreover, defendants believe that those contentions of any arguable relevance have been adequately addressed in earlier submissions and in the papers filed herewith.

Defendants filed five affidavits on May 26, 1978 in support of their Motion For Summary Judgment.[1] Those affidavits fully identify and justify the withholding of the documents at issue herein. Filed herewith in further support of that motion are seven additional affidavits.[2] The Savige Affidavit attests to the completeness of the search conducted of CIA records in response to plaintiff's request and also provides additional details concerning certain documents located during that search that were referred to their originating agencies for direct response to plaintiff.[3] Although these agencies are not named as parties to this action (with the exception of the NSA), they have voluntarily elected to file affidavits apprising the Court of the status and disposition of those documents referred to them.

A vast bulk of the requested documents have been released to plaintiff: 238 CIA documents have been disclosed in their entirety as well as major portions of 104 additional documents. Only 31 documents were withheld by CIA in their entirety.[4] The NSA has withheld its 27 documents in their entirety. An additional 85 documents were referred to the originating non-party agencies who have now responded directly to plaintiff. Of those referrals, 20 documents have been released in their entirety. Three have been denied in part and 62 have been retained in their entirety pending declassification review. The 62 classified referrals are

1/ Wilson, Owen, Gambino and Zellmer Affidavits (CIA) and Banner Affidavit (NSA).

2/ Savige Affidavit (CIA), Second Gambino Affidavit (CIA), Second Banner Affidavit (NSA), Forcier Affidavit (State), O'Riley Affidavit (NIS), Wood Affidavit (FBI), Conley Affidavit (Army) and Jones Affidavit (ICA).

3/ Department of Defense, State Department, Agency for International Communication, National Security Agency, Department of the Army, Federal Bureau of Investigation.

4/ All but the 223 documents released in their entirety on April 27, 1977 were attached to the Owen, Gambino and Zellmer affidavits.

not the subject matter of this lawsuit as the classifying authority is not a party to this action. (discussion below)

Defendants have established that all identifiable information located pursuant to a complete and exhaustive search of the CIA files has either been released to plaintiff, has been properly withheld pursuant to Exemptions 1, 3, 6, 7(C) or 7(D) of the FOIA, or properly referred and otherwise accounted for by the originating agency. Plaintiff, however, will apparently not be satisfied until he has obtained total public access. Since plaintiff has been unable to introduce any genuine issue of material fact or to articulate any cogent argument that he has not already received all that he is entitled to under the FOIA, it is respectfully suggested that this Court should grant defendants' Motion For Summary Judgment.

Argument

I

ALL CIA RECORDS REASONABLY DESCRIBED BY PLAINTIFF'S REQUEST HAVE BEEN ACCOUNTED FOR IN THE DETAILED INDICES, ITEMIZATIONS AND JUSTIFICATIONS FILED IN THIS ACTION.

A. The Search Was Exhaustive

Plaintiff's primary contention in opposing defendants' Motion For Summary Judgment is that defendants somehow have not accounted for every document that could conceivably be maintained by the CIA which could arguably be responsive to plaintiff's request.

The CIA has amply demonstrated that all identifiable records pertaining to Dr. King and Mr. Ray have been located in this case. The Savige affidavit (para. 5) states:

> Based upon knowledge available to me in my official capacity, I believe all identifiable records have been retrieved from those CIA records

> systems that could conceivably contain responsive documents. The only likely way to improve upon the search would be to undertake a page-by-page review of all records in CIA. Such a search would obviously be enormously time consuming, expensive and beyond the scope of the intent of the FOIA. It is also unlikely that such a search would produce many, if any, additional documents responsive to the FOIA request.

Defendants cannot aver that every CIA document conceivably pertinent to plaintiff's request would be uncovered by the searches which have heretofor been conducted, nor could they do so without a search of every government file. However, such efforts are hardly required by the FOIA, as the Court of Appeals recently concluded in Goland, et al. v. CIA, et al., Civil No. 76-1800 (D.C. Cir., May 23, 1978) (attached to Defendants' First Brief as Appendix A):

> Even if we assume that the documents plaintiff's posit were created, there is no reason to believe that the documents . . . . still exist, or, if they exist, that they are in the possession of the CIA. Moreover, even if the documents do exist and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search. It is well established that an agency is not "required to reorganize [its] files in response to [a plaintiff's] request in the form in which it was made . . ." . . . and that if an agency has not previously segregated the requested class of records production be required only "where the agency [can] identify that material with reasonable effort . . . ." (emphasis added and citations omitted)

Id, at. 26-27 of slip opinion attached to Defendants' First Brief as Appendix A).

The Circuit Court therefore concluded:

> We think that Wilson's sworn affidavits on their face are plainly adequate to demonstrate the thoroughness of the CIA's search for responsive documents. The affidavits give detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome.

Id. at 26, Based on that conclusion the Court of Appeals held that:

> . . . the Wilson affidavit . . . on its face suffices to demonstrate that the CIA's search for responsive documents was complete. For this reason the district court's grant of summary judgment without discovery was within its descretion.

Id. at 31.

Plaintiff further argues that the production of additional documents after a long delay presents substantial issues of the completeness of an agency search. (Plaintiff's Opposition Brief, p. 3) In forwarding these arguments, however, plaintiff conveniently relies upon one district court decision[5/] in utter disregard of two subsequent D.C. Court of Appeals decisions both cited in defendants' First Brief which each held directly to the contrary. Weissman v. CIA, et al., 566 F.2d 695, 698 (D.C. Cir. 1977)[6/] and Goland v. CIA, et al., supra, at 30. (D.C. Cir. 1978)

To bolster his speculations that additional documents exist, plaintiff has curiously submitted a memorandum obtained

5/ Association of National Advertisers Inc. v. FTC, 38 Ad. L.2d 643 (D.D.C. 1976)

6/ The Court of Appeals stated:

> The CIA dealt with the instant request in a conscientious manner. It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. Agency documents have been released to plaintiff appellant on four separate occasions. . . . There is no reason, on this record, to presume bad faith on the part of the CIA.

566 F2d at 698

by him through a different FOIA request for CIA records (Second Gambino Affidavit, para. 2) in order to raise the implication that the search pursuant to the present request was defective in not locating the same document again. However, the memorandum in question speaks for itself.[7/] That memorandum is captioned "SUBJECT: Book by Harold Weisberg entitled 'Frame-up'." It is readily apparent that the subject of the Memorandum is not Dr. King or Mr. Ray but the plaintiff himself. It is therefore eminently reasonable that it would be indexed and filed by reference to plaintiff and therefore only retrievable through his name.[8/] Moreover, plaintiff has obtained this document pursuant to a prior request of documents pertaining to himself. Therefore, he cannot seriously argue that this document is now being withheld.

B. The CIA Has Retrieved All Documents Reasonably Described By Plaintiff's Request.

Plaintiff's request can be said to reasonably describe only such materials that are retrievable by reference to Dr. King or Mr. Ray, not documents on additional individuals such as the authors that plaintiff enumerates now for the first time.[9/] Inasmuch as defendants have established that any records on such authors would be retrieved with reference to their names,[10/] this Court should reject plaintiff's argument on the same grounds articulated by the Court of Appeals in Goland, supra:

7/ Lesar Affidavit, Attachment 1.

8/ Second Gambino Affidavit, paragraph 2

9/ Lesar Affidavit, paragraph 4.

10/ Second Gambino Affidavit, paragraph 1 . Savige Affidavit para. 9 .

> Since the CIA has no indices or compendium identifying records as . . .[described by plaintiff] . . . any additional records of these descriptions, if they exist, could be found only by "a page-by-page search" through the 84,000 cubic feet of documents in the . . .[CIA] Records Center."

Id. at p. 25.

It bears emphasis that the CIA has inventoried all documents reasonably described by plaintiff's request. The searches described in detail in the affidavits on file with this Court are sufficient to bring before the Court all records which plaintiff's request "reasonably describes". Therefore, no further searches are necessary. 5 U.S.C. §552(a)(3).

Logic and common sense are not the only factors that compel the conclusion that only those documents pertinent to Dr. King and Mr. Ray and indexed by those names are reasonably described in the request in question. The courts have consistently agreed with this position. Goland v. CIA, supra; Olum v. FBI, Civil No. 76M-1078 (D.D.C., September 12, 1977) (a copy is attached hereto as Appendix A); Linebarger v. FBI, Civil No. C76-1826-WWS (N.D. California, August 1, 1977) (slip opinion attached hereto as Appendix B); Fonda v. CIA, 434 F. Supp. 498, 501 (D.D.C. 1977).11/

11/ Thus information located during the search that pertains to an unrelated subject matter, (Fonda, supra) or in which the subject matter is only incidentally mentioned (Olum, supra and Linebarger, supra) would not be considered within the scope of a plaintiff's request or within the jurisdiction of the Court.

Thus the Department of State concluded in reviewing one of its documents retrieved during the search in this case that an investigative report on an unrelated prospective government employee need not be released to plaintiff or exempted except for that portion that cross-referred to the subject matter of the request. (Forcier Affidavit, para. 5).

C. Plaintiff May Not Now Broaden His Request.

Plaintiff challenges the search on the grounds that it failed to turn up CIA documents on the published works of certain authors identified for the first time by affidavit (Lesar Affidavit, paragraph 4). If plaintiff seriously intended such additional information to be within the scope of his request, he should have identified it with greater specificity in his request--not at this late stage in the proceedings. Fonda v. CIA, supra at 501. Indeed, plaintiff's own language (Weisberg Affidavit, para. 10) betrays his practice of withholding information from agencies and the courts that would facilitate the identification of information that he seeks. Plaintiff endeavors to explain.

> I do not attach this proof . . . (that further documents exist) . . . as an Exhibit because from prior experience I have learned that when I disclose what I know and can prove, if it leads to further compliance, it has never produced any records other than those relating to which I disclosed proof.

In withholding information that would "lead to further compliance," plaintiff in fact admits to the very lack of specificity in another context that would have reasonably defined the information sought. Having himself defined or failed to define the parameters of the scope of his request in this instance in a manner that would assist the agency in retrieving the maximum information and thereby facilitate maximum disclosure, plaintiff should not be permitted in the midst of litigation to expand that definition or to clarify what he intended to have been requested and searched. 12/

12/ As further example, plaintiff now suggests that category 5 and 6 of his original request for published materials in the "assassination of Dr. Martin Luther King" should have included materials on the life of Dr. King as well. Weisberg Affidavit, paragraph 25.

As the Court of Appeals for this Circuit recently articulated in Goland, supra,

> Nor do we think discovery was necessary to enable plaintiffs "to reformulate their requests to eliminate confusion and the possibility of future lawsuits. . . ." It would be bizarre indeed if a plaintiff, simply by employing ambiguous language in his FOIA request, could assure himself of potentially harassing discovery for the purpose of dispelling the confusion he had engendered.

Id., p. 31. Since defendants have satisfied all requirements of the FOIA, plaintiff's attempts to retroactively particularize his request in a manner which would require further wholly unreasonable and oppressive searches should be rejected.

D. All Referrals Have Been Accounted For

Plaintiff's next argument in forestalling the dismissal of this action is that he has not yet received certain records located in CIA files that were referred to other government agencies for direct response to him. Each referred document for which the CIA is responsible[13/] has either been released to plaintiff already or has been withheld pursuant to the appropriate FOIA exemptions.

The Affidavits of Gene Wilson, Charles E. Savige, Roy R. Banner, Thomas Conley, Gerard O. Forcier, Charles Jones, Jr., William C. O'Riley, and Martin Wood together account for each document that was so referred. In all, 112 documents were referred to their originating agencies for review

13/ Those documents classified by agencies other than the CIA or NSA are not "agency records" within the control of the defendants to this action and therefore not within the jurisdiction of this Court.

and direct response to plaintiff. Of those referred, 20 documents were released in their entirety to plaintiff. Three were released with only minor deletions by the originating agency pursuant to Exemption (C) & (D).

The remaining 62 documents classified by the orginating agency, FBI, require declassification review before they may be released to plaintiff. These documents are not the subject matter of this lawsuit. With regard to this category of information, the Attorney-General states:

> Under Executive Order 11652, information originally classified by an agency ordinarily can be declassified only by the agency. There is nothing in the amendments or their legislative history which displays any intent that this disposition be reversed--resulting in a requirement that HEW, for example, make the decision as to whether a document classified by the State Department is "properly" classified. To the contrary, the legislative history recognizes the primacy in this area of those agencies "responsible" for national defense and foreign policy matters. (Conf. Rept. p. 12.) In order to reserve the decision to the classifying agency, it is necessary to consider documentary material contained in one agency's files which has been classified by another agency as being an "agency record" of the latter rather than the former. This seems a permissible construction, since the phrase is nowhere defined and it is unrealistic to regard classified documentary material as "belonging" to one agency for the purposes here relevant when primary control over dissemination of its contents, even within the Government, rests with another agency. Thus, when records requested from one agency contain documentary material classified by another agency it would appear appropriate to refer those portions of the request to the originating agency for determination (as to all matters) under the Act. When such referral is made, the agency to which

> the request was directed retains its obligation to comply with the Act as to those portions of the request which have not been referred; and the agency receiving the referral has that obligation with respect to the remainder.

The Attorney-General's Memorandum on the 1974 Amendments to the Freedom of Information Act, United States Department of Justice, February, 1975, pp. 2-3.

The FOIA provides a right of public access only to non-exempt "agency records," 5 U.S.C. §552. Thus, the CIA is not in a position to defend the classified FBI records over which it has no control. As in Church of Scientology of California, Inc.. v. ERDA, Civil No. 76-0011-R (C.D. California, September , 1976)(p. 2 of slip opinion attached hereto as Appendix C), this Court should conclude that those documents are not defendants' documents and not the subject matter of this litigation.

This position on referrals is fully consistent with the purposes of the FOIA. As the Court of Appeals for the 9th Circuit noted in SDC Development Corp. v. Matthews, 542 F.2d 1116 (9th Cir. 1976), the purpose of the FOIA is to allow the American people "to obtain information about the internal workings of their government." Id. at 1119. Here, the CIA is not seeking "to mask its processes or functions from public scrutiny," SDC, supra at 1120, but rather to channel access to sensitive classified information in a rational and efficient manner that would defer to the originating and classifying agency's expertise in making decisions concerning public access to that information. If the information is not exempt, plaintiff will be granted access by the originating agency and the purpose of the FOIA will be fulfilled. Thus

the Court in Church v. ERDA, supra concluded:

> The defendant, government agency, processed the plaintiff's FOIA request promptly and correctly once they were able to locate documents responsive to the request. They were correct in referring copies of the FBI documents to the agency who had originated them. Such a procedure prevents the possibility of anomalous results if more than one agency has the same information, and tends to efficiency by leaving disclosure decisions with the originating agency, which knows most about the matter.

Id., slip opinion at p. 3.

Moreover, it would be an abusive waste of administrative and judicial resources to permit the same party to litigate the same issues as to identical documents in more than one agency and in more than one suit, merely because more than one agency had copies of documents originated by another. Therefore, even in cases involving unclassified documents originating with another agency, courts regularly abstain from making a determination regarding such documents when the originating agency is not a named party. Church of Scientology of California v. Department of the Army, Civil No. CV 753056-F (D.C. California, June 2, 1977) (p. 2 of slip opinion attached hereto as Appendix D); Founding Church of Scientology of Washington, D.C., Inc. v. Levi, Civil No. 75-1577 (D. D.C., January 24, 1978)(p. 7 of slip opinion attached hereto as Appendix E).[14/]

14/ In the Scientology v. Army, Scientology v. ERDA and Scientology v. Levi cases the courts were persuaded to abstain from a determination on such documents as they were the subject of a separate litigation in other district courts. The Affidavit of Martin Wood for the FBI indicates that the documents in question in the present action are also the subject of a request from our plaintiff to FBI directly. Should any documents be denied as a result of that administrative request, plaintiff would have an opportunity to litigate those denials with the proper agency interested in their defense. Plaintiff therefore may have the opportunity to relitigate the denials of the documents in question herein.

As the foregoing has clearly established, the CIA has dealt with plaintiff's request in a "conscientious manner." It has located all documents reasonably identifiably and retrievable by the broadest interpretations offered to the description that plaintiff provided. It has disclosed the vast majority of documents that it located with only minor deletions. Only 31 of the documents located were withheld by the CIA in their entirety. The CIA has gone beyond the requirements of the FOIA to trace and defend the few deletions of all those documents referred to other agencies and has addressed those documents with such detail that summary judgment in their favor is entirely warranted. The FOIA requires the defendants to do no more.

II

THE CIA AND NSA DOCUMENTS ARE EXEMPT FOR THE REASONS SET FORTH BY DEFENDANTS

Defendants reaffirm their position that the information withheld in this lawsuit is properly exempt from disclosure pursuant to Exemptions 1, 3 and 6 of the FOIA (5 U.S.C. §552(b)(1)(3) and (b)(6)).

A. Exemption 1

The defendants have met their burden of proof as required by Weissman v. CIA, et al., 565 F.2d 692 (D.C. Cir. 1978).[15/] (See thorough discussions in defendants' First Brief, pp. 10-16.) Plaintiff's challenge to the invocation

15/ The Weissman Rule of limited judicial review in matters of national security has been consistently applied in other Circuit Courts which have considered the issue. Bell v. United States, 568 F.2d 484, 487 (1st Cir. 1977); Maroscia v. Levi, 568 F.2d 1000, 1003 (7th Cir. 1977); Di Viaio v. Kelley, 571 F.2d 538, 543 (9th Cir. 1978); and Cervase v. Department of State, Civil No. 77-1627 (3rd Cir., March 15, 1978) (Transcript of district court decision from the bench and Judgment Order on appeal attached hereto as Appendixes F and G respectively); National Commission on Law Enforcement and Social Justice v. Central Intelligence Agency et. al., Civil No. 77-1366 (9th Cir. June 12, 1978) (slip opinion attached hereto as Appendix H)

of Exemption 1 in this lawsuit is his bare assertion that the proper procedures were not followed in the classification of the documents at issue. Apparently, plaintiff is not satisfied in this regard by the First Banner Affidavit (paragraph 7), the Owen Affidavit (paragraphs 1, 2 and 4) or the First Gambino Affidavit (paragraph 2), each of which states that he has personally reviewed the pertinent documents and that he has determined that each document or portion thereof for which Exemption 1 is claimed is classified in its original form pursuant to Executive Order 11652 and bears the appropriate classification markings on its face. Each affiant has determined that those portions of the documents for which Exemption 1 is asserted requires continued classification as release could reasonably be expected to cause damage to the national security.[16/] Although this comprehensive showing does not satisfy plaintiff, it should not trouble this Court, for it fully comports with the requirements of Weissman, supra. Moreover, the D.C. District Court recently determined that such a showing would be deemed as satisfying defendants' burden of demonstrating that the appropriate procedural steps were taken in classifying the documents in dispute. Hayden and Fonda v. NSA, et al., Civil Nos. 76-286 and 76-287 (D.D.C., April 27, 1978) (p. 6 of slip opinion attached to Defendants' First Brief as Appendix D).

Plaintiff asserts that defendant CIA must for some reason exceed its routine burden of proof by establishing that each document was classified at the time of origination.

16/ Moreover, each document has been reviewed for possible declassification. Indeed, major portions of CIA documents have, as a result of this review, been declassified and released to plaintiff (Owen Affidavit, para. 4). See also, Savige Affidavit, Para. 8.

Yet, plaintiff relies on no authority to support such a peculiar burden.

The issue before the Court relating to Exemption 1 is whether the documents may be classified and are in fact classified in accordance with the procedures of Executive Order 11652. In ruling on Exemption 1, the Court must make a de novo finding that the withheld material is classifiable, and is in fact classified under the appropriate standards. Halperin v. Department of State, 565 F. 2d 699 (D.C. Cir. 1977), Cervase v. Department of State, Civil No. 76-2338 (D. New Jersey, April 1, 1977)(judgment and portion of transcript containing ruling from the bench attached hereto as Appendix F); aff'd. without opinion, Civil No. 77-1627 (3rd Cir., March 15, 1978)(attached hereto as Appendix G); Serbian Eastern Orthodox Diocese for the United States of America and Canada, et. al., v. FBI et. al., Civil No 77-1404 (D.D.C. July 13, 1978)(p. 3 Slip Opinion attached hereto as Appendix I); see also Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1974), cert. denied, 421 U.S. 992 (1975).

A classification officer is presumed to have properly discharged his official duties in the absense of affirmative proof to the contrary. Alfred A. Knopf, Inc., supra, 509 F. 2d at 1368. Therefore this Court "need go no further to test the expertise of the agency or to question its veracity when nothing appears to raise the issue of good faith," Weissman, supra, 565 F. 2d at 697.

The affiants in the present action have fully articulated the considerations underlying their classification determinations establishing that both the procedual and substantive criteria of Executive Order 11652 have been met. They have

described the nature of the material withheld with as much detail as possible without compromising the classifications which they are obliged to protect. Accordingly, these documents are currently and properly classifed, and therefore exempt from disclosure pursuant to Exemption 1.

B. Exemption 3

Exemption 3 has been properly invoked to protect information, the disclosure of which is prohibited by statute. Plaintiff does not dispute that each of the statutes relied upon[17/] is, in fact, an Exemption 3 statute, nor could he as each has been recognized as such by Congress and courts. See Defendants' First Brief, at 3-10) Rather, plaintiff's only contention is that defendants' assertion of this exemption, at least with regard to the statutes relied upon, should somehow be contingent upon defendants' successful invocation of Exemption 1. Such an argument, however, is utterly devoid of any foundation and wholly lacking in authoritative support.

If plaintiff were correct that an Exemption 3 claim can add nothing to an Exemption 1 claim, both congressional and judicial statements in this area would constitute wasted effort. Plaintiff's argument, in essence that Exemption 3 has no applicability to national security cases, is based entirely on his interpretation of a footnoted comment that the two exemptions "may tend to merge" which appears in the D.C. Circuit decision, Phillippi v. CIA, 546 F.2d 1009 at 1015 n.14 (D.C. Cir. 1976). (Plaintiff's Brief at p. 5) However, the Court of Appeals in Phillippi referenced the relationship between these two national security exemptions

17/ 50 U.S.C. §§403(d)(3) and (g), Public Law 86-36 and 18 U.S.C. §798.

only to suggest that Exemption 1 may apply in addition to Exemption 3. The inference can hardly be drawn that the Court intended to place Exemption 3 in a subordinate or relegated position. Such a theory was expressly rejected in Marks v. CIA, 426, F Supp. 708 (D. D.C. 1976) in which the court concluded that the two exemptions are independent rather than interdependent. Id. at 710 n.5. Moreover, similar arguments have been consistently disregarded by this circuit by courts which expressly found it unnecessary to consider Exemption 1 where Exemption 3 was properly established. See, e.g., Goland v. CIA, supra, at 16; Baker v. CIA, Civil No. 77-1228 (D.C. Cir, May 24, 1978)(pp. 3-4, slip opinion attached to defendants' First Brief as Appendix B); Weissman v. CIA, supra, at 698; and National Commission on Law Enforcement, supra, (supra at p. 6).[18/]

Plaintiff's contention that the NSA's denial of its documents in their entirety is "suspect on its face" hardly warrants any more consideration than his other numerous ill-founded allegations that government officials are by nature dishonest. Plaintiff need only refer to the most recent Court of Appeal's decision in this Circuit in Halkin v. Helms, Civil Nos. 77-1922 and 77-1923 (D.C. Cir., June 16, 1978) (slip opinion attached hereto as Appendix J) to grasp a clearer understanding of the constraints placed upon

18/ Similarly, plaintiff's corollary argument that defendants' failure to address the language of plaintiff's hybrid test: whether the documents "can reasonab[ly] be expected to damage the national security by "disclosing" an intelligence source or method" also fails along with the theory of interdependence upon which it is based. His language is taken in part out of context from the Executive Order and in part out of context from §403(d)(3), an exemption 1 statute. (Plaintiff's Opposition Brief, p. 7.) Such semantic quibbling is totally unpersuasive. Defendants have more than adequately satisfied the independent standards governing the applicability of both Exemptions 1 and 3.

NSA to deny release of similar information.[19]

The Circuit Court in Halkin, supra, concluded that revelation, even of the fact that an individual's communications have been acquired by the NSA, "would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst," (Id. slip opinion, p. 17) and therefore such information is privileged from discovery as a state secret.[20]

Plaintiff's contention that he is entitled to know how many of the NSA documents "relate to Dr. King or how many related to James Earl Ray or one of the other categories of his request"[21] is analagous to that of the plaintiffs in Halkin to which the Court of Appeals responded:

> The plaintiffs' argument is naive. A number of inferences flow from the confirmation or denial of acquisition of a particular individual's international communications. Obviously the individual himself and any foreign organizations with which he has communicated would know what circuits were used. Further, any foreign government or organization that has dealt with a plaintiff whose communications are known to have been acquired would at the very least be alerted that its communications might have been compromised or that it

19/ Plaintiff argues that if information is withheld to protect from disclosure the means by which it was acquired, "it seems that there should in all likelihood be portions which could be released after deletions are made to protect sources and methods." (Plaintiff's Opposition Brief p. 9) However, plaintiff fails to perceive that because the content is not the basis for the exemption, rather the existence of the content, any notion of segregability is totally inapplicable. The NSA is "unable to provide additional information without revealing information which itself requires protection for the same reasons as the documents themselves require protection." (First Banner Affidavit, paragraph 9.)

20/ In the context of this civil action for damages, declaratory and injunctive relief from alleged NSA warrantless interceptions of plaintiff's communications, the Court refused plaintiff's plea for discovery of the documents at issue drawing analogies to FOIA precedents. (slip opinion, p. 8)

21/ Plaintiff's Opposition Brief, p. 8.

> might itself be a target. If a foreign government or organization has communicated with a number of the plaintiffs in this action, identification of which plaintiffs' communications were and which were not acquired could provide valuable information as to what circuits were monitored and what methods of acquisition were employed. Disclosure of the identities of senders or recipients of acquired messages would enable foreign governments or organizations to extrapolate the focus and concerns of our nation's intelligence agencies.

Id., slip opinion, pp. 13-14.

Likewise in the present action where the identity of a party to a communication may be surmised by the scope of plaintiff's request, to divulge any additional piece of information might tend to alert the other communicant to the facts of interception and in turn to the source. Thus the Court of Appeals recognized:

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate. As the Fourth Circuit Court of Appeals has observed:
>
> > The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

> United States v. Marchetti, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); cf. Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977).

The Court of Appeals therefore upheld the withholding of all information sought. 22/

In addition to the clear intent of the Court of Appeals in Halkin equating the activities of the NSA to state secrets, Judge Pratt of this District recently concluded in an FOIA decision that records of the NSA are statutorily protected from disclosure under the FOIA, quoting Public Law 86-36 which provides:

> [n]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or numbers of persons employed by such agency. 50 USCA §402 note (emphasis added) 23/

Judge Pratt concluded:

> We cannot conceive of any clearer expression of Congressional intent to protect material from disclosure, and thereby achieve the protections of exemption 3.

22/ Certainly if such information is not obtainable in the context of civil discovery where the particularized needs of the plaintiff for the information may weigh strongly in favor of release, it would not be available under the FOIA where the needs of the the plaintiff are irrelevant. NLRB v. Sears Roebuck and Co., 421 U.S. 132, 143 n. 10. Indeed, it was only because of the plaintiff's showing of necessity that the district court in Halkin took the additional precaution of reviewing in camera affidavits and testimony. (slip opinion, p. 15) However, the Court of Appeals determined upon review that the open affidavits were sufficient to support its conclusion withholding the information sought.

23/ See Defendants First Brief pp. 8-10.

Serbian Eastern Orthodox Diocese for the United States of America and Canada v. NSA, et al., Civil No. 78-03 (D.D.C. July 13, 1978) (p. 2, slip opinion attached hereto as Appendix K).

In view of the foregoing and the arguments set forth in Defendants' First Brief (pp. 2-11), Defendants respectfully submit that the Court in the present action has a more than adequate basis for supporting defendants in their application of 5 U.S.C. 552(b)(3) to the documents in question.

C. Exemption 6

Defendant CIA has properly and judiciously invoked Exemption 6 to protect the privacy of certain individuals other than the subjects of this request. See Defendant's First Brief at 16-19. The identity of individuals has been released, where it is apparent from the document that the information is published or otherwise a matter of public record. The CIA has no opportunity or reason to attempt to authenticates or verify "much of the information that has been withheld." (Owen Affidavit, paragraph 20) It therefore has wisely withheld such information under Exemption 6 particularly where, in its informed opinion, the information constituted derogatory or potentially embarrassing information. Id. Such caution in protecting the privacy of others is entirely consistent with the District Court in Cervany v. CIA, 445 F. Supp. 772 (D. Colorado, 1978) in which the Colorado District Court wisely opined:

> A moment's reflection upon recent political history and the excesses of the internal security investigations in the 1950's should be sufficient to signal caution in dealing with unverified derogatory material within the files of an intelligence gathering agency of government. Indiscriminate public disclosure of such material in response to a citizen's FOIA request would be as much an abuse of agency authority as an intentional release designed to damage persons. The impact on the individual is the same.

Id. at 776.

Plaintiff continually speculates, however, that the information contained in the document withheld by the CIA, whether pursuant to Exemptions 1, 3 or 6, is already publicly known and therefore no longer entitled to protection. Indeed, plaintiff suggests that defendants should engage in exhaustive research to corroborate whether each piece of information is in some form or another in the public domain. (Weisberg Affidavit, paragraph 27. See also Plaintiff's Brief, p. 6.) Despite plaintiffs reliance on this proposition here as well as in prior proceedings, no court has been persuaded of its merits.[24/] Moreover, the plaintiff cites nary an authority for such a requirement for indeed there is none.[25/]

24/ Indeed in a recent related proceeding plaintiff's attorney suggested that on each assertion of exemption the Department of Justice

> "ought to call Mr. Weisberg up and ask him what he knows about someone and whether or not it is public, what he knows is public."

However, Judge Gerhard Gesell was unimpressed with his suggestion and stated in reply:

> What he knows isn't public. I am not a bit impressed with that argument in your papers. The fact that he can make a very educated guess as to what somebody's name is has nothing to do with whether or not the document can be released.

Lesar v. Department of Justice, Civil No. 77-692 Hearing Transcript June 9, 1978, p. 42 (Attached hereto in pertinent part as Exhibit L).

25/ Even in the rare case in which a plaintiff is able to attach the subject matter document itself in order to claim a waiver of exemption, the only conclusion that can be drawn is the waiver of exemption of the particular document produced. As is stated in Exxon Corporation v. Federal Trade Commission, et al., 384 F. Supp. 755 at 762 n.16 (D.D.C. 1974).

> As for possible release to the public at large, Exxon's argument proves too much. If the report has in fact been

(contd. on next page)

Indeed Judge Sirica recently rejected categorically similar arguments by a plaintiff, seeking documents pertaining to the assassination of President Kennedy, stating:

> In the Court's view, plaintiff's points are not well taken . . . . Certainly, there can be little doubt that the disclosure of past liaison relationships with foreign intelligence services or of past agency operations in foreign nations could affect CIA's current or future intelligence prospects in those countries. As the Briggs affidavit illustrates, 26/ official confirmation of this information even now might adversely affect the attitude of those governments towards defendant's present operations and relationships with their intelligence services. Effective intelligence-gathering depends upon the cooperation of foreign intelligence services which might well be disturbed by such revelations. Similar impairment is not implausible with respect to the other categories of information withheld by defendant under b(1).
>
> Second, plaintiff's argument about independent disclosure is also unavailing. Even if it is assumed for the sake of discussion that some of the withheld information has already been disclosed through unauthorized publications, that does not detract from the fact that the agency has not officially confirmed the accuracy of these disclosures. Whatever harm might flow from the unauthorized disclosure of protected national security information, to be sure, that harm would be heightened if defendant were required to put its official imprimatur on it.

25/ (contd.)

> made public, then Exxon's Claim is moot--it already has access to the Report--If parts of the report have not been released, justification of other parts, does not waive the exemption of the entire report.

26/ And in the present case as the Owens Affidavit also fully explains, paras. 8-10, 13, 15-16.

Fensterwald v. CIA, Civil No. 75-897 (D.D.C. July 12, 1978) (pp. 4-5, Slip opinion attached hereto as Appendix M). (emphasis added)

Plaintiff has introduced no material fact or cogent argument to controvert the record clearly establishing that defendants have fully complied with the requirement of the FOIA and released all information to which plaintiff is legally entitled.

IV. THREE DOCUMENTS REFERRED TO ORIGINATING AGENCIES FOR DIRECT RESPONSE HAVE BEEN PROPERLY WITHHELD PURSUANT TO EXEMPTION 7 OF THE FREEDOM OF INFORMATION ACT.

Exemption 7 of the Freedom of Information Act provides in pertinent parts:

> (b) This section 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 . . .
>
> (C) constitute an unwarranted invasion of personal privacy,
>
> (D) disclose the identity of a confindential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

Three documents each referred to three different agencies for direct response to plaintiff have been released subject to minor deletions pursuant to 5 U.S.C. §552(b)(7)(C) and, in one instance, (b)(7)(D).

The FBI has deleted only the name of a candidate for federal employment who was the subject of an employment suitability investigation during which Martin Luther King

was interviewed. (Wood Affidavit, para. 2) Similarly the State Department has protected the identity of an employment candidate as well as of certain third parties and Security investigators whose names arose in connection with a similar suitability investigation. (Forcier Affidavit, para. 5) Defendants contend that the identifying information was properly withheld pursuant to 5 U.S.C. §552(b)(7)(C). Background investigations are conducted at the request of the President or his designee. 29/ Such investigations for federal employment clearly fall within the category of agency records compiled for law enforcement purposes. As stated in Koch v. Department of Justice, 376 F. Supp. 313, 315 (D. D.C. 1974):

> The . . . employment files . . . constitute "investigatory files compiled for law enforcement purposes" . . . in that they are maintained in aid of investigations into the possibility that applicants for government service have engaged in criminal activity or other conduct which would disqualify them for such employment.

Id. 376 F. Supp. at 315; see also Olum v. FBI, supra.; Linebarger v. FBI, supra.

In addition the NIS has relied on Exemption 7(C) to protect the identity of an individual, who mailed to a foreign military installation a copy of an anti-war propaganda newsletter that was ultimately turned over to the Naval Investigative Service by a confidential source. The NIS is a recognized law enforcement agency whose records are properly withheld under Exemption 7 of the FOIA as law enforcement records. Church of Scientology of California v. Department of Defense, Civil No. CV 75-4072-F (C.D. Calif., June 2, 1977, (slip

29/ Executive Order 10450 as amended (attached to Forcier Affidavit as Exhibit D).

opinion attached hereto as Appendix N).

Having established the law enforcement nature of the investigations in question, the privacy interests of the individuals whose names are withheld are cognizable under Exemption 7(C). The appropriate analysis is similar to that applied under Exemption 6 (See Defendants' Brief, pp. 16-19): that is a balancing of the public interest in disclosure against the individual's interest in privacy. Nix v. United States of America, 572 F.2d 998, (4th Cir. 1978) There is, however, a significant distinction in the weight to be given to such interests. While non-disclosure pursuant to Exemption 6 requires a "clearly unwarranted invasion of personal privacy," Exemption 7(C) may be invoked upon the lesser showing of an "unwarranted invasion of personal privacy" Department of the Air Force v. Rose, 425 U.S. 352, 379 n. 16 (1976). This distinction reflects a congressional concern that information amassed in the law enforcement context possesses a greater potential for harm(e.g., embarrassment, humiliation) should such information be revealed. Thus, Exemption 7(C) is intended to protect the privacy of any person who is mentioned in the requested files, not merely the person that was the subject of the investigation. 120 Cong. Rec. §9330 (daily ed. May 30, 1974) (Remarks of Sen. Hart).

The FBI and State Department have each relied on Exemption 7(C) to protect the identity of a candidate for federal employment who was the subject of a suitability investigation. Neither document indicates the results of the employment deliberations. An individual's candidacy for employment that may or may not have been secured as well as statements of one's associates and other factors considered of necessity contain private, and in some instances

intimate, details of one's personal life requiring protection.

The State Department also withheld the identities of third parties whose names arose incidentally in an employment suitability investigation. It is evident that the inclusion of a person's name in an investigatory file, either as a source of information or as a third party who was somehow connected with the subject of the investigation, strongly implicates privacy interest. Release of such personal details has been held to constitute an invasion of privacy. Church of Scientology v. Army, supra; Founding Church of Scientology v. Levi, supra; Serbian Eastern Orthodox Diocese v. FBI, supra at 6-8; Church of Scientology v. Defense, supra; and Linebarger v. FBI, et al., supra at p. 3.[31]

The names of State Department Security Investigators who were responsible for conducting these investigations have been withheld on the grounds that the public interest in disclosure does not outweigh their privacy interests in retaining anonymity. The withholding of investigators names under b(7)(C) was upheld most recently in Nix v. United States of America, supra.[32]

30/ Wood Affidavit, para. 2 (FBI); Forcier Affidavit, para. 5 (State).

31/ Moreover, the expurgated copy of the State Department document (Exhibit G, Forcier Affidavit) reveals the derogatory and potentially embarrassing nature of the information obtained which warrants maximum protection.

32/ So holding, the Fourth Circuit Court of Appeals stated:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives. (Id. at p. 1006)

The NIS has withheld the identity of an individual who mailed an anti-war news-letter to an enlisted marine stationed at a foreign military installation. That newsletter, that happened to contain an article on Martin Luther King, was released in its entirety. The protected individual has absolutely no relation to Dr. King, nor does he have any reason to believe that his name would surface in government files in association with a political group that aroused the investigative interest of the NIS. (See O'Riley Affidavit, paras. 4-5)

In all three instances, the protected individuals are not even remotely connected to the subject of this litigation. Neither plaintiff, nor the public, would have any interest in the identity of these individuals. Due to the nature of this information, it is doubtful that any presumed purpose in plaintiff's request could outweigh the harm to the individual whose privacy is in jeopardy. The FOIA clearly protects such information from public exposure.

Exemption 7(D) has been properly invoked on one occasion to withhold the name of a confidential source of information contained in the above-mentioned NIS document. The individual, an enlisted marine, turned over to his command a propaganda newsletter from a group of possible concern or interest to the NIS. The effectiveness of law enforcement agencies is, of necessity, dependant on citizen cooperation, regardless of the investigative value of the information obtained. Should they be unable to protect their confidential sources of information, that effectiveness would be seriously undermined. As the Court stated in Mitsubishi Corporation, et al. v. U.S. Department of Justice, et al., Civil No. 76-0813 (D. D.C., April 1, 1977)(attached hereto as Appendix O):

> The legislative history of Exemption 7(D) reveals Congress' desire to

> protect not only the "paid informer," but also the "simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential. . . ." Sources of information certainly would be reluctant to provide information to law enforcement agencies if they had reason to believe that their identities or the data they supplied in confidence would be subject of disclosure. . . . It is, therefore, essential that federal law enforcement authorities be able to give binding assurance, where necessary, that the identity of a confidential source supplying information for law enforcement purpose will not be publically disclosed. This is plainly the purpose of Exemption (7)(D).

The circumstances in the present case are not unlike those under review in the recent case of Nix v. United States of America, supra, in which the Court of Appeals held that inmates that addressed grievances to the FBI could be considered confidential sources warranting protection, stating:

> In applying the confidentiality exemption of subsection (7) (D), it is enough to show that the information was furnished under circumstances from which an assurance of confidentiality could be reasonably inferred.

Id. at 1003.

The government's interest in protecting sources of information goes beyond protecting the individual source to encouraging future sources to come forward without fear of exposure and reprisals. Any deterrant to public cooperation is clearly against the public interest. Therefore, strong public policy reasons compel the conclusion that deletions such as the one made in this instance pursuant to 5 U.S.C. 552 (b)(7)(D) are well founded and should be upheld.

CONCLUSION

In lieu of producing any material fact, plaintiff has injected into the record irrelevant assertions in an apparent

attempt to relitigate unrelated grievances against various government agencies, many of which have already been resolved or rejected in other court proceedings.[33/] Plaintiff continually persists in focusing on unsubstantiated allusions to wrongful government conduct[34/] in an apparent, but futile, attempt to

33/ Indeed many of plaintiff's arguments are so far afield of the present litigation that one must query if the affidavits submitted herein were perhaps intended for some other unrelated proceeding. The most perplexing example that comes to mind is plaintiff's continual attempts to impeach the credibility of an indivudual whom he mistakenly believes to be an affiant in this proceeding. Plaintiff curiously avers that:

> I have read the affidavits provided by the CIA in this instant cause. One is by the same Charles A. Briggs who falsely alleged "national security" and other exemptions in order to withhold record of the Warren Commission from me and who swore to falsity in the Nosenko matter. . . .

Weisberg Affidavit, para. 19. See also paragraphs 4 and 17.

However, in the proceeding to which plaintiff apparently refers, Judge Aubrey E. Robinson recently denied plaintiff's motion for a new trial concluding:

> The Court is satisfied that the Government has established a threat to intelligence sources and methods, and is not persuaded to the contrary by the "new evidence" which plaintiff has adduced.
>
> Nor does the Court find any "disinformation campaign" or discrimination against plaintiff by government agencies relating to plaintiff's FOIA requests which would warrent disclosure of the documents contested herein. . . .

Weisberg v. GSA, Civil No. 75-1448 (D. D.C., May 12, 1978)(p. 3, slip opinion attached hereto as Appendix P)

34/ Plaintiff also suggests without elaboration that discovery is necessary to determine whether defendants are engaged in illegal activity. This argument fails for two reasons. First, there is no evidence that defendants were engaged in illegal activity in the collection of the information in question. More importantly, the nature of the CIA and NSA's actions is irrelevant to any issue in this case. Bennett v. U.S. Department of Defense, 419 F. Supp. 663, 666 (1976) (footnote omitted).

add a semblance of credibility to his suspicions that government officials are notoriously dishonest.[35/] Yet his charges are based on idle speculation and innuendo and, as such, have no place in a court of law. There is no evidence whatsoever that affiants in the instant action have sworn to anything but the truth.

Plaintiff's failure to focus on the subject matter of the instant action may only be regarded as his unwilling acquiescence to the incontrovertability of the record established by defendants in this matter. The single issue, legal rather than factual, arises from the undisputed fact that the CIA and NSA have withheld certain information from the documents released to plaintiff. It is for the Court to determine whether those deletions are proper under 5 U.S.C. §552(b). The record is more than adequate for the Court to make such a determination. An FOIA action demonstrably lacking any genuine issue of material fact is appropriately resolved by summary judgment. Nolen v. Rumsfeld, 535 F.2d 890 (5th Cir. 1976), cert. denied, 429 U.S. 1104 (1977). Plaintiff therefore has no further recourse in this matter under the Freedom of Information Act. For the foregoing

35/ Weisberg Affidavit, paragraphs 1 and 34, Lesar Affidavit, paragraph 7 and Plaintiff's Opposition Brief, p. 6.

reasons, the defendants respectfully urge that their Motion for Summary Judgment be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Memorandum and Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment with accompanying affidavits has been served upon counsel for plaintiff by mailing, postage prepaid, to:

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on this 19th day of July, 1978.

Jo Ann Dolan

JO ANN DOLAN, Attorney