IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

/

OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND CLARIFICATION

The issues raised in this Freedom of Information Act (FOIA) action have been the subject of intense research, scrutiny and debate by both parties and by the Court. The record in this action totally supports the Court's opinion and order of January 4, 1979 granting summary judgment for defendants. No less than 15 affidavits were filed by defendants in support of their motion for summary judgment and five by plaintiff in opposition thereto. Extensive documentation accompanied the affidavits of both parties, not the least of which were the most detailed itemizations, indices and justifications conceivable that were submitted to facilitate the Court's findings that all exemption claims were proper. All expurgated documents were submitted on the public record with annotations identifying the basis for withholding each portion. In all, the Court has had under consideration a total of five exhaustive briefs from plaintiff and defendants addressing the legal issues to be considered and has had the benefit of a very thorough dialogue between the parties during oral argument probing at length the legal and factual issues in question.

Despite this extensive record, plaintiff has moved for a clarification and/or reconsideration of the Court's ruling of January 4, 1979. Plaintiff enumerates four points in challenging the Court's considered judgment in defendants' favor. These arguments have hardly gained merit with the passage of time. They raise neither factual nor legal issues that were not already available to plaintiff or before the Court during the course of its deliberations. In large part plaintiff's points merely repeat recurrent themes that prevailed throughout the plaintiff's opposition briefs, points that the Court could not help but have weighed before concluding this case in defendants' favor. That plaintiff insists on rearticulating the same theories anew only illustrates his total misapprehension of the Court's judgment and the law upon which it is soundly based.

I

ARGUMENT

The thrust of plaintiff's motion is his claim that he submitted "evidence" from which the Court should have inferred that some elusive factual issue remains to be resolved, if not on the thoroughness and scope of the CIA's search then on the exemptions claimed (points 1 and 2 of Plaintiff's Reconsideration Motion). In fact, plaintiff submitted no evidence on either point. Plaintiff merely introduced a string of disjunctive inferences and accusations drawn from prior experiences with various government agencies - accusations then and accusations now - which hardly warrant serious consideration or establish further inferential links in the

case under review.[1/] Nowhere in his reconsideration motion or in the record as a whole has plaintiff cited any evidence or persuasive arguments to contravene either the thoroughness of CIA's search or the exemption findings of the Court. The Court quite explicitly rejected plaintiff's inferences as to the reliability of the CIA search and held that the CIA met its burden in showing that all identifiable records had been located and that there was 'no reason to believe' to the contrary or to impugn the agency's good faith in this regard. Court Opinion, page 2.

Plaintiff's remaining arguments (points 3 and 4 of Plaintiff's Reconsideration Motion) reveal an apparent misreading or misapprehension of the bases for the Court's findings of exemption. It is readily apparent from the Opinion, that the Court found it unnecessary to make a

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1/ Plaintiff's basic approach of building inference upon inference is once again exposed by his very tenuous arguments based on Weisberg v. GSA, Civil No. 75-1448, Plaintiff's Reconsideration Brief, page 2. Neither defendants nor the Court relied upon this particular case to support any substantive issue in the current litigation. Plaintiff has continually made selected reference to that litigation, however, and rearticulated the unsubstantiated accusations raised in that proceeding in order and to draw dubious inferences in the present proceeding. Defendants thereupon referenced in a footnote to their Reply Memorandum and Supplemental Memorandum (p. 3), Judge Robinson's rejection of those inferences and his finding on the basis of the record in that case that no "new evidence" adduced by plaintiff substantiated his allegations of a "disinformation campaign" or "discrimination against plaintiff by government agencies relating to plaintiff's FOIA requests." The particular litigation in which this unrelated chain of events unfolded has since been dismissed as moot for reasons having absolutely no relation to the present action. In the process, the particular order was vacated on January 12, 1979. Even absent that order, absent the unrelated findings of Judge Robinson in that case, nothing has been presented to raise plaintiff's unsubstantiated inferences to the level of reliable evidence for purposes of that proceeding or the case at bar.

finding on Exemption 1 and explicitly rejected the plaintiff's recurrent and unsubstantiated endeavor to condition a finding of Exemption 3 on Exemption 1. Either exemption can be a legally sufficient basis for withholding information independent of the other. Court Opinion pp. 3-4.

It is likewise apparent that the Court granted defendant's motion for summary judgment on the basis of exemptions 3 and 6 alone. The affidavits in this case were of sufficient detail that the Court could easily find support for the withholding of all the deleted material at issue, on the basis of exemptions 3 and 6 without reference to Exemption 1. See First Banner Affidavit, paragraph 8; Supplemental Banner Affidavit, paragraph 3; Owen Affidavit, paragraph 6, incorporated by reference in Gambino Affidavit, paragraph 3; see also Document Disposition Indices attached to Owen Affidavit, Supplementary Owen Affidavit and Gambino Affidavit; compare Ray v. Turner, No. 77-1401 (D.C. Cir., August 24, 1978 and Marks v. CIA, et al., No. 77-1225 (D.C. Cir., August 24, 1978) (attached to Notice of Filing of September 12, 1979 as attachments A and B respectively).

Although the plaintiff has only now taken note of Executive Order 12065 for the first time in his Motion for Reconsideration, the defendants brought that order to his attention and to that of the Court by Report to the Court on December 5, 1978. That the Court chose not to decide on the basis of Exemption 1 and the new Executive Order was entirely permissible and proper. All classified information was independently exempt under Exemption 3. Consequently, the major portion of the plaintiff's motion addressing Exemption 1 is superfluous and can not alter the Court's judgment relying on Exemption 3.

Plaintiff apparently has no objection to the Court's finding that an unwarranted invasion of personal privacy would result from the disclosure of the information for which Exemption 6 was asserted. Plaintiff's only lingering contention is over the Court's brief reference to Judge Sirica's opinion in Fensterwald v. CIA, Civil No. 75-897 (D.D.C., July 12, 1978).[2/] This Court is apparently unpersuaded by plaintiff's speculation that certain information may be in the public domain in some form or another and therefore that defendants should have assumed the impossible burden of establishing that each piece of information is not otherwise publicly known. Finding no basis for such a burden, this Court posited the same hypothetical posed by Judge Sirica in Fensterwald, supra, i.e. even assuming the unauthorized disclosure of any information at issue in the litigation, the exemption would still be valid in order not to confirm officially the authenticity or accuracy of the released information. It is eminently reasonable that the harm that may result from

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2/ Plaintiff neglected to attach the Vacate Order to which he referred in his Reconsideration Motion (p. 2) or to provide the details surrounding that order. Defendants have since discovered that a subsequent order rendered on July 28, 1978 granting Mr. Fensterwald's Motion to Voluntarily Dismiss the case vacated the prior order in question. Subsequent order attached hereto as Appendix A. The sole ground for Mr. Fensterwald's voluntary motion was his professed desire to relieve the Government from the burden of having to supplement the record in accordance with the June 12 order. Mr. Fensterwald's Motion to Voluntarily Dismiss is attached hereto as Appendix B. The vacate order, was issued on nonsubstantive grounds and hardly vitiates the sound legal reasoning of Judge Sirica's memorandum in dismissing the major issues in the litigation prior to the plaintiff's voluntary dismissal of the remainder. Indeed it would be ludicious to suggest that a Court's sound reasoning could be so undermined by a plaintiff's voluntary withdrawal from a case in the face of a contrary opinion and judgment rendered. The effect of the order was vacated, the underlying reasoning remains sound.

unauthorized disclosure should not be compounded through authentication or confirmation. Since however sound reasoning does not appear to persuade plaintiff, I commend to his attention a line of authorities to support the incontrovertible premise that prior leaks do not constitute waivers or compromise exemption claims. Safeway Stores Incorporated v. FTC, 428 F. Supp. 347 (D.D.C., 1977) (Exemption 5); Halperin v. CIA, 446 F. Supp. 661, 666 (D.D.C., 1978) (Exemption 3); Aspin v. U.S. Department of Defense, Civil No. 77-C-219 (E.D. Wisc., June 23, 1978) (Exemption 1) (attached hereto as Exhibit C), slip opinion at 7.

In the foregoing cases, a particular leak had clearly been established. In the instant action, the plaintiff has only articulated unfounded suspicions that he may independently surmise the content of unspecified segments of the withheld material. He claims that he merely seeks an official imprimatur or confirmation of his independent speculations and theories, an additional remedy to which he is hardly entitled under the aegis of the Freedom of Information Act. Lesar v. Department of Justice, Civil No. 77-692 (D.D.C., July 28, 1978) (attached to Notice of Filing of August 11, 1978), slip opinion at 6.

CONCLUSION

Nothing raised in plaintiff's Motion or supporting papers supports a contrary ruling to that of the Court on January 4, 1979. For the foregoing reasons, defendants respectfully suggest that plaintiff's Motion for Reconsideration and Clarification should be denied.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

LYNNE K. ZUSMAN

JOANN DOLAN

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Attorneys for Defendants

Date: January 25, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY,
et al.,

Defendants.

_____/

ORDER

Upon consideration of plaintiff's "Motion For Reconsideration And Clarification Pursuant To Rules 52(b) And 59 Of The Federal Rules Of Civil Procedure," of the papers filed by the respective parties in support thereof and in opposition thereto, and of the entire record herein, and it appearing to the Court that the denial of plaintiff's motion would be just and proper, it is by the Court this ____ day of _____, 1979,

ORDERED that plaintiff's motion be, and it hereby is, denied.

_____

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Plaintiffs Motion for Reconsideration and Clarification was served upon plaintiff by mailing a copy thereof first class postage prepaid to:

James H. Lesar, Esquire
910 16th Street, N.W., #600
Washington, D.C. 20006

on this 25th day of January 1979.

JOANN DOLAN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 75-897
	)	
UNITED STATES CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	

FILED
JUL 28 1978
JAMES F. DAVEY, Clerk

ORDER

The Court's Order of July 12, 1978, is vacated.

The Court hereby grants plaintiff's Voluntary Motion that this case be and hereby is dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

7/25/78

CIVIL NO. 77-1997
APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERNARD FENSTERWALD, JR., Plaintiff,	)	
v.	)	Civil Action No. 75-897
UNITED STATES CENTRAL INTELLIGENCE AGENCY, Defendant.	)	

MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE

Plaintiff in this action hereby moves that the Court dismiss this suit with prejudice and relieve the Government from the duty of complying with its Order of July 12, 1978.

A Legal Memorandum in explanation of this motion is attached as well as a draft order.

Respectfully submitted,

B. A. Fensterwald, Jr.

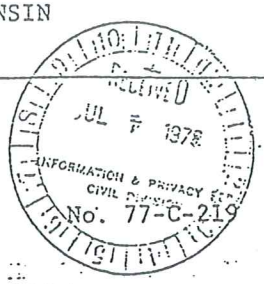
Bernard Fensterwald, Jr.
Fensterwald & Associates
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037
(202) 785-1636

Dated: July 18, 1978

CIVIL NO. 77-1997
APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN



LES ASPIN,

Plaintiff,

v.

No. 77-C-219

UNITED STATES DEPARTMENT OF DEFENSE,

Defendant.

DECISION and ORDER

This case is before me on cross-motions for summary judgment. The case stems from a request that had been made by the plaintiff on May 19, 1976, that pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the Department of Defense publicly disclose the best available intelligence estimates of Soviet naval force levels for 1975, 1979, 1980 and 1985 for (a) missile-equipped major surface ships, (b) major surface force combatants, (c) nuclear submarines, and (d) conventional submarines. Although the information requested was available to the plaintiff in his capacity as a member of Congress, under the rules of the House of Representatives the plaintiff could not publicly disclose the information. Mr. Aspin therefore invoked the FOIA to achieve public disclosure.

145-15-999

Subsequently, the defendant denied the plaintiff's request and alleged that the requested records fell within two exemptions to the public disclosure requirements of the FOIA, 5 U.S.C. §§ 552(b)(1) and (3). The plaintiff, having exhausted his administrative remedies under the FOIA, now seeks judicial review pursuant to 5 U.S.C. § 552 (a)(4)(B) of the defendant's refusal to release the information.

P-034-B

The United States Supreme Court has recently described the goal of the Act in these terms:

> "The basic purpose of FOIA is to insure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." National Labor Relations Board v. Robbins Tire and Rubber Company, 46 U.S.L.W. 4689, 4697 (June 13, 1978).

The Court also discussed the statutory exemptions and stated:

> "As we have repeatedly emphasized, 'the Act is broadly conceived.' EPA v. Mink, supra, at 80, and its 'basic policy' is in favor of disclosure. Dept. of Air Force v. Rose, supra, at 361. In 5 U.S.C. § 552(b), Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." Id. at 4691.

In determining whether the Act applies, the burden is upon the government to establish that the information falls within one or more of the exemptions. 5 U.S.C. § 552 (a)(4)(B). I believe that on the record before me the defendant has met such burden. I find that the information requested by the plaintiff falls squarely within the exemption of 5 U.S.C. § 552(b)(1), and the defendant is therefore entitled as a matter of law to summary judgment. Since I find that the information requested is exempt from public disclosure under § 552(b)(1), I need not reach the defendant's claim that the information is also exempt under § 552(b)(3).

The first exemption to the FOIA provides that the disclosure provisions of the Act do not apply to 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;" 5 U.S.C. § 552(b)(1).

Thus, once it is established that particular records are specifically authorized to be kept secret in the interest of national defense or foreign policy and that those records are in fact classified pursuant to the provisions of an appropriate executive order, those records are exempt from the mandatory disclosure provisions of the FOIA.

The Department of Defense claims that executive order 11652, 3 C.F.R. 339 (1974), authorizes it to classify the information on Soviet naval forces requested by the plaintiff as secret. Executive order 11652 provides:

> "Section 1. Security Classification Categories. Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed 'national security') shall be classified in one of three categories, namely 'Top Secret,' 'Secret,' or 'Confidential,' depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute."

Executive order 11652 further provides a standard which must be met in order for information to be classified as "secret," saying it:

> "...refers to that national security information or material which requires a substantial degree of protection. The test for assigning 'secret' classification shall be whether its unauthorized disclosure could reasonably be expected

> to cause serious damage to the national security. Examples of 'serious damage' include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligency operations; and compromise of significant scientific or technilogical developments relating to national security. The classification 'secret' shall be sparingly used." Executive Order 11652, § 1(B) (emphassis added).

The defendant claims, and it has not been disputed, that the source which contains the information requested by the plaintiff is a Department of Defense multi-volume publication entitled "Defense Intelligence Projections for Planning." First Affidavit of Harold R. Aaron, Lieutenant General, USA, Deputy Director, Defense Intelligence Agency, ¶3. Published originally in August, 1975, the document as a whole was first classified pursuant to executive order 11652 by the Defense Intelligence Agency as "top secret." Id. Those portions of the document required to fulfill the plaintiff's request were classified originally as "secret." Id. ¶ 4. Upon the plaintiff's request for information, Lieutenant General Aaron and the staff of the Defense Intelligence Agency reviewed the original classification of the requested information and concluded

> "...that the initial classification determinations were correct at the time they were made and that circumstances have not changed so as to warrant either downgrading or disclosure of the information today. Accordingly,...the records which contain the information which would be responsive to Plaintiff's request are currently properly classified as 'secret.'" Id.

The defendant in its affidavits provided several reasons why it believes that public disclosure of the government's best available intelligence estimates of

Soviet naval strenth would "cause serious damage to the national security," justifying the classification of the information as "secret." Such disclosure would reveal the judgment of the United States intelligence community as to the extent of Soviet naval strength. Id. ¶¶ 5, 6. This in turn would reveal the strengths or weaknesses of the United States' intelligence gathering effort as well as the effectiveness of the Soviet's own security and counterintelligence programs. Id. ¶¶ 10, 13; affidavit of Sayre Stevens, Deputy Director of the National Foreign Assessment Center, ¶¶ 4, 7.

Disclosure of intelligence estimates would reveal the naval threat the United States is seeking to meet, which in turn will assist the Soviets in determining the most effective manner for the allocation of their military budget and other resources. Aaron, ¶10; Stevens, ¶¶ 4, 5, 8. Finally, disclosure of this information might diminish the faith of allies in the United States' ability to protect classified information, thereby increasing their reluctance to provide this country with information garnered through their intelligence gathering efforts. Aaron, ¶ 10.

These statements in the defendant's affidavits support the conclusion that disclosure of the information requested would seriously damage national security. From such conclusion, it follows that the information was properly classified as "secret" under executive order 11652 and is therefore exempt from public disclosure under 5 U.S.C. § 552(b)(1). Where detailed affidavits are provided which demonstrate that the documentary material for which an exemption is claimed on grounds of national security have been conscientiously re-examined by a classification officer and

remains classified, and there is no showing of any lack of "good faith" on the part of the government, the court need go no further in its examination. Weissman v. Central Intelligence Agency, 565 F.2d 692 (D.C. Cir. 1977); Frank v. Central Intelligence Agency, No. 77-14-D, Slip Op. at 4 (S.D. Ia. 1977); Bennett v. U. S. Department of Defense, 419 F. Supp. 663 (S.D.N.Y. 1976).

For summary judgment to be granted under Rule 56, Federal Rules of Civil Procedure, the moving party must show that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. In opposition to the defendant's motion for summary judgment, the plaintiff claims that there are disputes over two different classes of material fact. First, the plaintiff claims that the character of the information requested is in issue because the parties disagree as to the accuracy of the estimates made of Soviet naval strength. The accuracy of these estimates, however, is not controlling in assessing the damage to national security that would follow from disclosure of the estimates. Accurate or not, disclosure of the estimates would reveal the basis on which American policymakers were acting.

Second, the plaintiff claims that whether disclosure of the intelligence estimates would cause damage to national security is a subject of factual dispute. He points to the fact that in 1972, then Chief of Naval Operations, Elmo Zumwalt, revealed in public hearings before the House Committee on Armed Services intelligence estimates of Soviet naval strength similar to those estimates requested by the plaintiff. As the defendant points out, however, the release of a second set of estimates would afford

Soviet intelligence analysts the opportunity to compare the two sets of figures to analyze where and how improvements in United States intelligence gathering had been made. Second Affidavit of Aaron, ¶ 11. The fact that prior releases had been made was weighed during the classification reviews done by the Defense Intelligence Agency. Id. Moreover, past release of confidential information should not bind the executive branch if at a later point in time it is determined that further release would jeopardize national security. Halperin v. Central Intelligence Agency, 446 F. Supp. 661, 665-66 (D.D.C. 1978).

Finally the plaintiff claims that because the requested intelligence estimates are of an aggregate nature and there are many undisclosed variables used in reaching them, their disclosure would not reveal anything which would be detrimental to the national defense. I am not persuaded, however, that the plaintiff's disagreement with the defendant over the impact of public disclosure on national security is sufficient to deny the defendant summary judgment. A court reviewing FOIA claims is not "to test the expertise of the agency or to question its veracity where nothing appears to raise the issue of good faith." Maroscia v. Levi, et. al., No. 76-2236, Slip Op. at 6 (7th Cir. 1977); Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C. Cir. 1977); Alfred E. Knopf, Inc. v. Colby, 509 F.2d 1326, 1369 (4th Cir.), cert. denied, 421 U.S. 992 (1975). This view is supported by the legislative history of this statutory exemption:

> "[T]he conferees recognize that the Executive Departments responsible for national defense and foreign policy matters have unique insights into what

> adverse affects [sic] may occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." [Conference Report No. 93-120, 93rd Cong., 2d Sess., U.S. Code Cong. and Admin. News at p. 6290.]

In this case, Mr. Aspin has made no claim that the defendant acted in bad faith nor has the plaintiff effectively refuted the defendant's claim that disclosure would damage national security. The defendant has followed the procedures prescribed by executive order 11652 for the classification of the information requested. The classification of the information as "secret" is supported by reasonable arguments in the defendant's affidavits. An in camera inspection of the documents would reveal the exact levels of United States intelligence estimates, but I doubt that it would add meaningful illumination on the extent of the damage to national security which might result from the release of those estimates. Accordingly, I am persuaded that the defendant is entitled to summary judgment.

Therefore, IT IS ORDERED that the defendant's motion for summary judgment be and hereby is granted.

IT IS ALSO ORDERED that the plaintiff's motion for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED that this action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 23 day of June, 1978.

U. S. District Judge

P-034-B

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