UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, hereby move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in their favor. The ground for this motion is that there is no genuine issue of material fact and the defendants are entitled to judgment as a matter of law.

In support of this motion the Court is respectfully referred to the affidavits of Gene F. Wilson, Information and Privacy Coordinator for the Central Intelligence Agency, Robert E. Owen, Information Review Officer of the Directorate of Operations of the Central Intelligence Agency, Robert W. Gambino, Director of the Office of Security of the Central Intelligence Agency, Ernest J. Zellmer, Associate Deputy Director of the Directorate of Science and Technology of the Central Intelligence Agency, and Roy R. Banner, Chief of the Policy Staff of the National Security Agency, and to the

Statement of Points and Authorities in Support of Defendants' Motion for Summary Judgment, filed herewith.

Respectfully submitted,

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STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE
PURSUANT TO LOCAL RULE 1-9(h)

Defendants adopt and incorporate by reference herein as their Statement of Material Facts as to which there is No Genuine Issue the affidavits of Gene F. Wilson, Information and Privacy Coordinator for the Central Intelligence Agency, Robert E. Owen, Information Review Officer for the Directorate of Operations of the Central Intelligence Agency, Robert W. Gambino, Directorate of the Office of Security of the Central Intelligence Agency, Ernest J. Zellmer, Associate Deputy Director of the Directorate of Science and Technology of the Central Intelligence Agency, and Roy R. Banner, Chief of the Policy Staff of the National Security Agency.

Respectfully submitted,

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STATEMENT OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Plaintiff originally brought this action pursuant to the Freedom of Information Act (hereinafter FOIA), 5 USC §552, seeking public disclosure of seven categories of records contained in the files of the Central Intelligence Agency (hereinafter CIA) pertaining to Dr. Martin Luther King and James Earl Ray.[1/]

While processing plaintiff's FOIA request, the CIA located documents of the National Security Agency which were forwarded to that agency for direct response to plaintiff. The National Security Agency (hereinafter NSA) informed plaintiff directly that the documents forwarded to them were being withheld in their entirety pursuant to various provisions of FOIA. Plaintiff thereupon amended his Complaint to join the NSA.

The affidavits of Gene F. Wilson of the CIA and of Roy R. Banner of the NSA describe in detail the chronology of events leading to the institution of this lawsuit. With respect to the CIA documents that were located pursuant to

1/ See Wilson Affidavit, paragraph 2, which is filed herewith.

plaintiff's request, the affidavits of Robert E. Owen, Robert W. Gambino and Ernest J. Zellmer provide a detailed description of CIA documents and a justification for each portion of the documents that has been withheld. In all, 373 CIA documents were located, the major portions of which (238) have been released in their entirety. Of the remaining documents, portions of 104 are released with deletions and 31 are withheld in their entirety. A complete set of the documents have been attached to the affidavits and thereby released to plaintiff.[2/] With respect to the NSA documents (22 in number) that are withheld in their entirety, the affidavit of Roy R. Banner describes the documents and the justifications for their withholding with as much detail as is consistent with the national security.

The CIA relies on Exemptions 1, 3 and 6 of the FOIA to withhold the limited portions of the documents in question (5 USC §552 (b)(1), (3) and (6)). The NSA relies on Exemptions 1 and 3 as well in withholding its documents in their entirety.

Based on the record now before this Court, it is clear that defendants have fully justified the withholding of these documents. Accordingly, defendants are entitled to summary judgment as a matter of law.

ARGUMENT

I.

DEFENDANTS CIA AND NSA HAVE PROPERLY INVOKED EXEMPTION THREE OF THE FREEDOM OF INFORMATION ACT

The third exemption of the Freedom of Information Act, 5 USC §552 (b)(3) provides that:

> (b) This section does not apply to matters that are -- (3) specifically exempted

2/ The documents that were released on April 27, 1977 have been reprocessed and additional portions are now released as well.

> from disclosure by statute (other than section 552 (b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

By this exemption, the Freedom of Information Act incorporates by reference information that Congress has determined by other statutes should not be subject to mandatory disclosure.

The NSA and the CIA have invoked Exemption 3 to withhold certain documents, or portions thereof, at issue in this proceeding. The CIA has invoked 50 USC 403 (d)(3) and (g) which require that certain categories of information be withheld. The NSA has invoked Public Law 86-36, 18 USC §798 and 50 USC 403 (d)(3) as well. As will be shown below, each statute relied upon by defendants has already been recognized by Congress and the courts to be an Exemption 3 statute. Once the Court determines that the requested information satisfies the criteria of an Exemption 3 statute, its inquiry is at an end.[3/]

A. 50 USC 403(d)(3) Mandates The Withholding Of Certain Documents Or Portions Thereof At Issue In This Proceeding

Section 103(d)(3) of the National Security Act of 1947 (50 USC 403(d)(3) provides:

> (d) For the purpose of coordinating the intelligence activities of the several

3/ Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975). Although the 1977 Amendment to FOIA (Section 5 of the Sunshine Act (90 Stat 1247) changed the result of Administrator, FAA v. Robertson, the analysis followed in Robertson remains valid. That is, once it is established that a matter comes within Exemption 3, as amended, the FOIA litigation should be at an end. This is confirmed by discussions on the floor of the House of Representatives. See Congressional Record (House), July 28, 1976, pp. H. 7871 and H. 7897 (daily edition); The Conference Report, S. Rep. 94-1178, discusses the third exemption as "incorporating by reference exemptions contained in other statutes . . . Conf. Rep. at p. 14).

> Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under direction of the National Security Council
>
> (3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities. . . Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of the Central Intelligence Agency shall be responsible for projecting intelligence sources and methods from unauthorized disclosure.

During the debates on the 1974 amendments to the Freedom of Information Act, Congress focused directly on these national defense and foreign policy concerns. The Senate Report specifically stated:

> By statute certain special categories of sensitive information--Restricted Data (42 U.S.C. §2162), Communication Intelligence (18 U.S.C. §798), and Intelligence Sources and Methods (50 U.S.C. §403(d)(3) and (g)--must be given special protection from unauthorized disclosure. These categories of information have been exempted from public inspection under section 552(b)(3), "specifically exempted from disclosure by statute. . . " [Senate Report No. 93-854 93rd Congress, 2nd Session, pp. 16-17 (1974)(emphasis added) 4/

When Congress amended Exemption 3 in 1976, it did so to limit what it considered a broader interpretation 5/ of subsection (b)(3) than had originally been intended. It did not overrule its considered decisions to protect the categories of national security information enumerated in 1974.

4/ The Conference Report also enumerated these statutes as examples of (b)(3) statutes S. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974) (Conference Report)

5/ See Administrator, FAA v. Robertson, supra.

Based in part on this explicit legislative history the courts have uniformly held 403(d)(3), as well as the other statutes expressly mentioned in the legislative history to be an Exemption 3 statute. Only this week the Court of Appeals for the D.C. Circuit concluded:

> There is nothing on the face of amended Exemption 3, or in its legislative history to suggest that Congress in 1976 intended to upset the well-established Exemption 3 status of the CIA's protective statutes. Both §403(d)(3) and 403(g) "refer[] to particular types of matters to be withheld" -- namely information respecting intelligence sources and methods. . . . The only courts to consider the issue have held that the amendment left the Exemption 3 status of §403(d)(3) and 403(g) unimpaired. Scholarly commentators have reached the same conclusion. Goland and Skidmore v. CIA, et al., (Civil No. 76-1800 (D.C. Cir. May 23, 1978) (p.18, slip opinion attached hereto as Appendix A) (footnotes omitted)

See also Weissman v. CIA, et al., 565 F.2d 692, 694 (D.C. Cir. 1977) and Marks v. CIA, et al., 426 F. Supp. 708, 710-711 (D.D.C. 1976).

The detailed indices and justifying affidavits of Mr. Owen and Mr. Gambino[6/] all establish that the deletions from CIA documents, for which 50 U.S.C. 403(d)3 has been invoked, contain details on intelligence sources, foreign liaison sources, CIA installations abroad, intelligence methods, and cryptonyms and pseudonyms, all of which are categories of information which 50 U.S.C. 403(d)(3) requires to be withheld.

The Circuit Court in Goland, supra (slip op. at 12-13) was satisfied with a similar showing:

6/ The detailed justifications contained in paragraphs 4, 5,7,8,16,18-20 of the Owen Affidavit were inter alia incorporated by reference in the Gambino Affidavit as substantially the same description applies to the same categories of information withheld in each set of documents described by separate affidavits.

> The CIA's affidavit lists the deletions; provides a "relatively detailed analysis" of the material deleted; makes clear which exemptions are claimed for the deletions (Exemptions 1 & 3); and explains why the deleted materials fit within the exemptions claimed. (i.e. how the deletions relate to national security" and "intelligence sources and methods"). The CIA's justifications, we think, could not have been much more detailed without "compromis[ing] the secret nature of the information." [Vaughn v. Rosen, 484 F.2d at 826-27.]

With respect to the 22 NSA documents withheld, inter alia, pursuant to 50 U.S.C. 403(d)(3), the Banner Affidavit describes in detail the nature of the information that must be protected:

> The release of any record or portion thereof located in response to plaintiff's request and denied by the NSA and sought in this civil action would disclose information about the nature of NSA's communications intelligence activities and functions . . . . Because these records would reveal communications collection and analysis capabilities, the disclosure of any portion of them would compromise classified information pertaining to intelligence sources and methods protected from disclosure by section 103(d)(3) of the National Security Act of 1947 (50 U.S.C. 403(d)(3) (Banner Affidavit, paragraph 8).

Mr. Banner further attests:

> It is not possible to describe the material in and reveal the data of the documents held by NSA without enabling a knowledgeable person to determine the nature of the documents in the context of the Agency's mission, thus disclosing intelligence sources and methods. In short, any further factual public description of the material would compromise the secret nature of the information and would compromise intelligence sources and methods. (Id. para. 9)

Each agency's decision to withhold information in this case in reliance on 50 U.S.C. 403(d)(3), has met the legal test established by cases interpreting Exemption 3. Defendants' claim should therefore be upheld.

B. 50 U.S.C. 403(g) Mandates The Withholding Of Certain CIA Documents Or Portions Thereof At Issue In This Proceeding

Section 6 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403(g)) provides:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of Section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency. . .

For the reasons stated above with regard to 5 U.S.C. 403(d)(3), the legislative history of Exemption (3) leaves no question or doubt that 50 U.S.C. 403(g) was intended to be an Exemption 3 statute. Baker, et al. v. Central Intelligence Agency, et al., No. 77-1228 (D.C. Cir. May 24, 1978) (p. 4-5 slip opinion attached hereto as Appendix B). See also Goland v. CIA, No. 76-1800, supra, slip op. at 18-19, (D.C. Cir. May 23, 1978); Weissman v. CIA, supra. 565 F.2d at 694 (D.C. Cir. 1977).

The detailed justifying affidavit of Mr. Owen of the CIA states:

> As a further measure taken to protect intelligence sources and methods and pursuant to §6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. §403g, which provides that the CIA is exempt from the provision of any law requiring the disclosure of organizational data or the names and titles of its personnel, identities of organizational components of the CIA were deleted in certain documents.

> Such data was deleted to prevent detailed knowledge of CIA structure and procedures from being available as a tool for hostile penetration or manipulation. (Owen Affidavit, para. 18).

Mr. Owen goes on to describe in detail the harm to the security and intelligence interests of the CIA that could result from the disclosure of such data. However the government does not carry the burden of explaining the harm to national security which would result from disclosure. That determination has already been made by Congress in enacting 403(g). As stated in Baker v. CIA, No. 77-1228, supra (D.C. Cir. May 24, 1978):

> There is certainly no specific requirement that the CIA make a preliminary showing that the disclosure of the personnel information will in fact jeopardize the functioning of the Agency. . . . The unqualified nature of this exemption becomes particularly clear when the introductory language of section 403g is compared with that of 50 U.S.C. §403h (1970). . . . . . .[which leaves to agency officials the discretion to make the initial determination] . . . . From a comparison of these two statutes it seems clear that, in section 403g, Congress has already made any required determination concerning intelligence security. . . Id. at 6-7.

The detailed indices and justifications contained in the Owens, Gambino and Zellmer Affidavits, clearly establish that 403(g) has been properly invoked by the CIA.

C. Public Law 86-36 Mandates The Withholding Of Each Portion Of Each NSA Document At Issue In This Proceeding

Section 6 of Public Law 86-36 (50 U.S.C.A. §402 note) provides:

> [n]othing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) 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 number of persons employed by such agency. [Public L. No. 86-36, Section 6, 73 Stat. 63 (1959)]

The Courts have uniformly recognized Public L. 86-36 to be an exemption 3 statute. Founding Church of Scientology of Washington, Inc. v. National Security Agency, et al., Civil No. 76-1494 (D.D.C. July 21, 1977) (slip opinion attached hereto as Appendix C); Hayden and Fonda v. NSA, et al., Civil No. 76-286/76-287 (D.D.C. April 27, 1978). (slip opinion attached hereto as Appendix D). In so concluding, the Courts have generally relied on Kruh v. General Services Administration, 421 F. Supp. 965 (E.D. N.Y. 1976) which states:

> The government unfortunately for plaintiff, has pointed to just such a statute, one which by its terms negates any requirements to make disclosure of information about the National Security Agency. . . . Although the specific aim of P.L. 86-36 was to exempt the National Security Agency from the U.S. Civil Service Commission's requirements of disclosure of personnel data and other information, it is manifest that this was in aid of a broader, overriding purpose; i.e. that no law shall require disclosure of the highly sensitive organizational and functional matters or activities of that Agency. This would necessarily include such a law as FOIA. [Id. at 967] [emphasis court's]

The National Security Agency has explained in detail how each portion of each of the 22 documents "which were acquired in the course of conducting lawful signals intelligence activities" (para. 4 Banner affidavit) could divulge details which would reveal

and thereby jeopardize the effectiveness of the current signals intelligence capabilities of the United States. (Para. 5-6 Banner Affidavit).

The foregoing has shown that Public Law 86-36 is an Exemption 3 statute. Each portion of each document at issue contains information which would reveal the functions and activities of the National Security Agency. Such revelations would violate Public Law 86-36. Therefore, the documents are exempt from mandatory disclosure pursuant to Exemption 3. 5 U.S.C. §552(b)(3).

D. 18 USC §798 Mandates The Withholding Of Each Portion Of Each NSA Document At Issue In This Proceeding

Subsection (a) of 18 U.S.C. §798 provides in relevant part, that:

> Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person . . . any classified information . . . concerning the communication intelligence activities of the United States or any foreign government [shall be subject to fine or imprisonment]. 7/

Congress specifically recognized this statute to be an Exemption 3 statute when it enacted the 1974 amendment to the FOIA. 8/ The 1977 amendment was merely intended to assist the Courts in distinguishing those statutes in which the decision to withhold was congressionally mandated from those leaving the determination to the discretion of the agency itself. It did not alter the Exemption 3 Status of those statutes so recognized in 1974.

The rationale of the Court of Appeals in the recent

7/ It should be noted that 18 USC §798(b) defines 'calssified information' as 'information which, at the time of the violation of this section is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.

8/ S. Rept. No. 93-854, 93d Cong. 2d. Sess. 16 (1974); S. Rep. No. 93-1200, 93d Cong., 2d Sess 12 (1974). See discussion on 50 USC 403(d) above.

case of Goland v. CIA, No. 76-1800, supra, (slip op. at p. 18) has equal application to 18 U.S.C. §798. There is nothing on the face of amended Exemption 3, or in its legislative history to suggest that Congress intended to upset the well-established Exemption 3 status of those statutes enumerated in 1974, particularly statutes designed to protect national security. See also Weissman v. CIA, 565 F.2d 692 supra at 694.

It is readily apparent that the language of this provision, the violation of which is punishable by criminal sanctions, leaves no discretion to the agency or the individual contemplating public disclosure. Indeed it enumerates the specific categories of classified information that must be protected.

The Banner Affidavit states that the disclosure of any portion of the 22 NSA documents or of any information about them would result in:

> The disclosure of the classified records or of specific information about them would reveal information concerning communications intelligence activities of the United States Government and the manner in which communications intelligence is obtained. These records are protected in their entirety by 18 U.S.C. 798(a)(3) and (4) prohibiting the unauthorized disclosure of classified information concerning the communications intelligence activities of the United States or obtained by the processes of communications intelligence from the communications of foreign governments. (Banner Affidavit, paragraph 8)

Based on the foregoing anlysis, it is apparent both that 18 USC §798 is an Exemption 3 statute and that the kind of information which Mr. Banner describes in detail in paragraphs 4-9 of his affidavit falls within the specific categories of that statute and is therefore exempt from disclosure by virtue of 5 USC §552 (b)(3).

II.

DEFENDANTS HAVE PROPERLY INVOKED EXEMPTION 1 OF THE FREEDOM OF INFORMATION ACT TO WITHHOLD CLASSIFIED DOCUMENTS.

The first exemption of the Freedom of Information Act, 5 U.S.C. §552(b)(1), provides that the disclosure provisions of the Act do not apply to matters that are:

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

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, these records are exempt from the mandatory disclosure provisions of the FOIA. This two step analysis has been consistently applied by the courts. In applying this approach the Courts generally rely on Weissman, v. CIA, supra, (D.C. Cir. January 6, 1977).

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of exemption indicated. It need not go 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.

E.g., Maroscia v. Levi, et al., 569 F.2d 1000 (7th Cir. December 20, 1977); Bell v. USA, et al., 563 F.2d 484 (1st Cir. 1977); Klaus v. Blake, 478 F. Supp. 37 (D.D.C. 1976); Bennett v. U.S. Department of Defense, et al., 419 F. Supp. 663 (S.D. N.Y. 1976) and most recentlyin Hayden and Fonda v. NSA, supra (D.D.C. April 27, 1978). This Court, applying

the Weissman approach, proceeded to consider whether the documents had been properly classified under EO 11652 and whether the affidavits submitted by defendants established that the documents logically fell within the (b)(1) Exemption.

A. The Documents Are Properly Classified

Both the Central Intelligence Agency and the National Security Agency have asserted Exemption 1 to protect from disclosure certain classified documents or portions thereof. The information withheld on the basis of Exemption 1 is currently properly classified in order to protect the national security. With respect to the 22 NSA documents described in paragraph 7 of the Banner Affidavit:

> Each portion of each record when originated was classified . . . in accordance with established classification categories . . ., is appropriately marked and is exempt from automatic declassification or down grading . . . . [E]ach continues to require classification pursuant to E.O. 11652 Section 1, because of the damage its unauthorized disclosure would reasonably be expected to cause to communications intelligence activities of the United States Governments. Each record was marked with its appropriate classification when it was originated and has continued to be so marked. (Banner Affidavit, para. 7)

Mr. Banner states that he has the requisite classification and declassification authority to make such a determination and that he bases that determination on a personal review of each portion of each document being withheld by the NSA. (Banner Affidavit, paragraph 7)

With regard to each CIA document or portion thereof for which Exemption 1 has been asserted, each affiant, having the requisite classification authority, has personally reviewed the documents and has determined that each document, in its original form, "bears the appropriate reclassification markings on its face to evidence its classification status." (paragraph 4, Owen Affidavit; see also paragraphs 1 and 2, Owen Affidavit and paragraph 2, Gambino Affidavit)

Moreover, each affiant has determined on the basis of their review that release could reasonably be expected to cause damage to national security in terms of describing foreign relations and revelations of sensitive intelligence operations (Owen Affidavit, paragraph 4). Thus, with regard to the procedures of EO 11652 each of the documents withheld on the basis of Exemption 1 is properly classified.

B. The Documents Logically Fall Within Exemption 1

Following the Weissman analysis described above, the classification decisions underlying the agency's Exemption 1 claim are entitled to substantial weight. In the recent case of Halperin v. National Security Council, et al., Civil No. 75-0675 (D.D.C. May 13, 1978) (p. 8, slip opinion attached hereto as Appendix E) the Court relied not only on Weissman, supra but also on the concurring opinion of Justice Potter Stewart in New York Times Co. v. United States, 403 U.S. 713, 727-730 (1970) which states in pertinent part:

> ". . . it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense, the frequent need for absolute secrecy is, of course, self-evident . . . it is clear to me that it is the constitutional duty of the Executive -- as a matter of sovereign preorgative and not as a matter of law as the courts know law -- through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." [New York Times v. United States, 403 U.S. 713, 728-730 (1971).]

Congress recognized this function of the Executive Branch in inacting both Exemption 1 and Exemption 3.[9/]

The Courts, in reviewing the applicability of Exemption 1, have generally given the agency's classification decision substantial weight. Weissman v. CIA, supra at 697 (D.C. Cir. 1977)

The documents in this case, as they are described in the affidavits submitted by both the NSA and CIA, contain information which if released would inevitably compromise national defense and foreign relations of the United States. The revelation of intelligence sources, foreign liaison service, intelligence methods, CIA installations abroad, cryptonyms and pseudonyms and, in the case of the NSA, communications security activities and signals intelligence activities of the United States could paralyze the intelligence network on which our national security and foreign relations depend.

Defendants in their respective affidavits have articulated fully the underlying facts and considerations underlying their classification determinations. They have described the nature of the material withheld with as much detail as possible without compromising the classifications which the attesting officers are obliged to protect.

Accordingly, these documents are currently properly classified and, therefore, are exempt from disclosure pursuant to Exemption 1.

9/ The conferees recognized that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosures 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. [93d Cong., 2d Sess., Senate Report No. 93-1200, p. 12 (The Conference Report)]

III

DEFENDANT CIA HAS PROPERLY INVOKED EXEMPTION SIX OF THE FREEDOM OF INFORMATION ACT

The sixth exemption of the Freedom of Information Act 5 USC §552 (b)(6) states:

> (b) This section does not apply to matters that are--(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . .

"The threshold issue in applying Exemption 6 is to define what constitues "similar files." In Wine Hobby USA Inc. v. IRS, 502 F.2d 133 (3rd Cir. 1974) the Court stated:

> Since the thrust of the exemption is to avoid unwarranted invasions of privacy, the term "files" should not be given an interpretation that would often preclude inquiry into this more crucial question. Id. at 135 (footnote omitted)

The Court went on to point out "the common denominator in 'personnel and medical and similar files' is the personal quality of the information in the file, the disclosure of which may constitute a clearly unwarranted invasion of personal privacy."

CIA files have specifically been held to be "similar files" within the meaning of 5 U.S.C. §552 (b)(6). See Fensterwald v. CIA, Civil No. 75-282-A (E.D. Va., October 22, 1975)(slip opinion attached hereto as Appendix F). Thus, the Central Intelligence Agency has concluded (paragraph 20, Owen Affidavit):

> . . . . Individuals have every right to expect that private information about themselves in government records will be protected from unwarranted disclosure to the public. When CIA becomes the recipient of such information through its routine intelligence collection activities, it must take

> precautions to protect against its misuse and resulting injury.

It is clear from the Owen Affidavit, that the CIA has not asserted a privacy exemption whenever an individual's name appears incidentally in the documents. Rather, the CIA has judiciously restricted the invocation of Exemption 6 to instances in which personal and often embarrassing information is withheld.

> Certain information has been withheld inasmuch as the release of the informaton would result in a clearly unwarranted invasion of the personal privacy of
>
> the individual named or otherwise identified in the documents. Much of such information concerns or refers to individuals in a manner which is derogatory or potentially embarrassing and which, in most instances, the CIA had no opportunity or reason to attempt to authenticate or verify. (Owen Affidavit, paragraph 20)

In the recent case of Cerveny v. CIA, Civil No. 76-M-690 (445 F. Supp. 772 (D. Col. 1978) the Court upheld the decision of the CIA to withhold

> unsubstantiated information which is derogatory and which concerns persons not connected with the . . . [subject of the request]. Id. at p. 776

The Court went on to find it

> realistic to recognize that the mere mention of the names of individuals as being the subjects of CIA files could be damaging to their reputations. Id.

A similar conclusion was reached in Fensterwald v. CIA, supra, p. 4, in which the Court stated:

> Clearly the release of information to the plaintiff that the CIA had a file or that a named third party was the subject of an FBI report or of an investigation because of alleged subversive activity would be an invasion of the personal privacy of that third party.

By the same reasoning the information has been withheld in this case to avoid similar invasions of personel privacy.

Once it is established, as here, that a potential invasion of personal privacy is involved in a given case, the Court's inquiry is not at an end. The phrase 'clearly unwarranted' suggests a balancing of interests between the protections of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to government information. S. Rept. No. 813, 89th Cong., 1st Sess. (1965) at 9. See also H.R. Rept. No. 1497, 89th Cong. 2nd Sess. (1966) at 11.

The Supreme Court has concluded:

> . . . Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency actions to the right of public scrutiny." Department of Air Force v. Rose, 425 U.S. 352, (1976)

In most cases reviewing the assertion of Exemption 6, the Courts have applied such a balancing of interests. See Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, (3rd Cir. 1974); Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971). In the present case plaintiff sought information about Dr. Martin Luther King and James Earl Ray, information which would conceivably be in the public interest. That information has been provided with only minor deletions. In addition, Exemption 6 has not been invoked to protect either's privacy. Rather, it has only been invoked to protect the privacy of other individuals whose names appear incidentally in the requested documents. The public interest in these third parties is minimal.

In addition, the Central Intelligence Agency affidavits specifically state:

> the determinations to withhold such information were based on an effort to balance the right of the individual to privacy as against the right of the public to know. (Owen Affidavit, para. 20)

In balancing similar interest in the case of Cerveny v. CIA, supra, the Court analyzed;

> The particularized need of Mr. Cerveny . . . is not a factor in the balance. "The plaintiff here is no different from any other seeking public disclosure of the information." 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)

As the CIA has scrupulously evaluated the harm to the individual of public disclosure, the minimal public interest in identifying the protected individuals and indeed the public interest against such indiscriminate exposure, defendants respectfully submit that the invocation of Exemption 6 is proper and should be sustained.

CONCLUSION

For the foregoing reasons, the defendants respectfully request the Court to enter summary judgment in their favor.

Respectfully submitted,

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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 defendants' Motion for Summary Judgement, the papers filed in support thereof and in opposition thereto, and the entire record herein, it is by the Court on this_____day of_____, 1978

ORDERED that defendants' Motion for Summary Judgement should be, and hereby is granted, and it is

FURTHER ORDERED that this action should be, and hereby is, dismissed with prejudice.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Summary Judgement, Statement of points and authorities in support thereof, proposed order and affidavits of Gene F. Wilson, Robert E. Owen, Robert W. Gambino, Ernest J. Zellmer and Roy R. Banner have been served upon plaintiff's counsel, by forwarding a copy thereof by mail postage prepaid to:

James H. Lesar, Esq.
910 Sixteenth Street, N.W.
Washington, D.C. 20006

on this 26th day of May, 1978

JO ANN DOLAN