IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR, Plaintiff	
v.	Civil Action No. 77-692
DEPARTMENT OF JUSTICE, Defendant	

Washington, D. C.
June 9, 1978

The above-entitled cause came on for Arguments on Summary Judgment Motions before the HONORABLE GERHARD A. GESELL, United States District Judge, at 9:30 a.m.

APPEARANCES:

JAMES H. LESAR, Esq.,
Pro Se

DANIEL J. METCALFE, Esq.,
Department of Justice,
Counsel for Defendant

APPENDIX L
Civil Action No. 77-1997

IDA Z. WATSON
Official Reporter
U. S. Court House
Washington, D. C.

COPY FOR:
MR. METCLAFE

look at five. I reach in and pick out five and look at them. I find those five are all as you represent. In other words, that is another way.

MR. METCALFE: A spot check.

THE COURT: What we call a spot check. I don't want to do any of this, you understand, but I feel some obligation about it. I am trying to explore with you.

I suppose that kind of technique would be agreeable with you, Mr. Lesar.

MR. LESAR: I think so, as long as the sample is adequate.

It is possible that there may be another innovation that I might suggest. I really haven't thought it through. At times in connection with another case that we have pending for King assassination materials, we have suggested to the Department that really rather than going through all the time and expense of deleting under 7(c) and 7(d), that they just 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.

THE COURT: 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.

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.	]	

MEMORANDUM

By Memorandum and Order dated December 22, 1977, this Court invoked the authority of 5 U.S.C. § 552(a)(4)(B) to require the defendant in this case to offer a representative sample of withheld documents for in camera inspection. This procedure was thought to be appropriate because it appeared that an informed judgment on defendant's claims of exemption, particularly the agency's b(1) and b(3) claims, could not be made on the basis of the public record. Rather than require defendant to come forward with more particularized descriptions and justifications for the withheld items at the risk of compromising potentially exempt national security information, the Court felt that the better course to take was to review a representative number of documents to determine if defendant's claims were substantially overbroad. Then, from that review, it was felt, general conclusions could be reached regarding the exempt status of the remaining withheld materials.

This process has now been completed and the Court has determined, based on an inspection of each in camera document, that defendant's claims of exemption should be sustained in all but a few instances. It must be emphasized, however, that in reaching this conclusion the Court is not saying that if it had been the withholding authority it

would have been as selective as the agency in furnishing plaintiff with only parts of withheld items. Indeed, in some instances, the Court has encountered considerable difficulty in sustaining claims of exemption with respect to all segments of withheld documents. But as the Court made clear when it ordered in camera review, the purpose of inspection was to test defendant's general application of the statutory exemptions, particularly exemptions 1 and 3, not to cull out tidbits of seemingly non-exempt material. As the leading cases make clear, see, e.g., Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977), the courts lack the training and are not steeped in the pertinent learning to make evaluations of the precise effect that disclosing seemingly innocuous segments may have on national security interests. Similarly, courts are not in a position to determine definitively whether the disclosure of apparently non-exempt details will compromise protected agency sources, methods, components and operations. Thus the withholding agency in this case must be accorded a margin of safety in protecting even the outer perimeters of exempt materials. Were courts to apply a more exacting standard, they would run the distinct risk of permitting astute observers to infer with accuracy the contents of potentially exempt documents. In deciding this case, the Court has given defendant the measure of safety it believes justified because of the character of the documents involved.

1. Defendant has asserted the b(1) national security exemption to protect most of the items at issue in this lawsuit. That exemption, by incorporating Executive Order 11652, hinges disclosure upon whether withheld items have been classified according to proper procedures

and upon whether the nature of their contents is substantively classifiable. Plaintiff does not dispute that the materials in question have been properly given a classified designation. Instead, the point in controversy is whether the items contain classifiable information.

Under Executive Order 11652, the criterion to be used to determine whether a document is properly classifiable is whether its unauthorized release could reasonably be expected to cause damage to the national security. In this case, as in camera review has revealed, defendant has principally applied this test to withhold: (A) information received from foreign liaison services which confirms the existence of liaison arrangements with such services; (B) information that reveals CIA operations and facilities in foreign countries; (C) information which reflects intelligence techniques and methods whose disclosure would prejudice future intelligence prospects; (D) intelligence sources and confidential informants; (E) agency cryptonyms and pseudonyms whose disclosure could lead to the identification of intelligence sources and, from that, intelligence operations; and (F) agency employees and affiliates. Defendant, at great length, and persuasively, in the Court's judgment, explains how the release of these categories of information could cause damage to national security interests. See Affidavit of Charles A. Briggs, filed May 20, 1977. In most instances, it is quite clear how disclosure could undermine legitimate security interests, particularly the interest in keeping unimpaired the ability of defendant to discharge its intelligence functions as effectively as possible. In other instances, the harmful effects of disclosure are not so readily apparent. But as stated, defendant

is in a far better position to determine the effects of disclosure by assessing the many variables, of which the Court is unaware, that influence the impact revelation might have on the agency's future prospects. In such instances, so long as damage to security appears arguable, defendant should be given a margin of safety.

In opposition, plaintiff puts forward only one serious objection to the withholding of the above-mentioned categories of information. Plaintiff argues that since most of the items withheld were produced some fifteen years ago, any adverse effect on national security that might flow from disclosure now is largely conjectural. Moreover, plaintiff points out, it is likely that some of the withheld information has already been divulged in recent publications, so disclosure by defendant would merely confirm information already in the public domain. In the Court's view, plaintiff's points are not well taken. To begin with, the justifications offered by defendant plausibly relate to the present impact of disclosure even though much of the information involved is somewhat dated. 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, 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. In the Court's view b(1) authorizes agencies to withhold information of the sort that can reasonably be expected to damage national security if disclosed. That the same information has already been disclosed, in full or in part, accurately or inaccurately, in some unauthorized manner does not change its classifiable character.

2. Defendant has relied on the b(3) exemption in tandem with 50 U.S.C. §§ 403(d)(3) and 403g (1970) as a second basis for withholding much of the information assertedly protected under b(1). In particular, the agency invokes b(3) to protect information whose disclosure would reveal intelligence sources and methods, agency components and the functions, names and titles of CIA personnel. A review of defendant's justifications together with in camera inspection convinces the Court that defendant's b(3) claims are justified. Contrary to plaintiff's suggestion, the kinds of information withheld on the grounds of b(3) fit precisely into the categories laid out in sections 403(d)(3) and 403g. Moreover, the agency has not inflated the meaning of these protected

information categories so as to overwithhold. If the agency can be faulted at all, it is because, in a few instances, whole segments of documents have been held back in order to protect a core of clearly exempt material. This approach, however, does not invalidate defendant's claims because it is not implausible in these instances that the release of background facts could compromise the hard core of information that fits squarely within the exempt categories.

3. The CIA has also relied on the b(2) exemption. It pertains to:

> . . . matters that are --
>
> (2) related solely to the internal personnel rules and practices of an agency.

The agency invokes b(2) to protect filing instructions and file numbers that appear on withheld items. Plaintiff challenges this assertion on the grounds that these instructions and numbers, while perhaps qualifying as reflecting "internal rules and practices," do not amount to "internal personnel rules and practices." Plaintiff reads the word "personnel" as modifying both "rules" and "practices," so that, disclosure is required because the withheld filing instructions and file numbers clearly do not reflect agency "personnel" matters such as the "use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (October 4, 1965). This reading of the statute is not correct, however. As this Circuit's leading b(2) precedent makes clear, "the two phrases 'internal personnel rules' and 'practices of an agency' [were intended] to have some disjunctive intendment." Ginsburg, Feldman & Bress v. FEA, No. 76-1759, slip op. at 20 (D.C. Cir.

Feb. 14, 1978) (panel opinion). This means that the b(2) exemption covers "practices of an agency" as a category of protected information wholly independent of a "personnel" connection. In the Court's view, the filing information withheld by defendant under b(2) fits within this category. Cf., Ott v. Levi, 419 F. Supp. 750 (E.D. Mo. 1976).

4. The b(5) exemption that protects privileged "inter-agency or intra-agency communications" is also an issue in this case. The agency has invoked the exemption to withhold three documents in which government officials in communications to other government officers offered opinions and conclusions on matters that were the subject of agency inquiries, and later, final agency decisions. While these items clearly qualify under b(5) as protected inter-official communications, it should be pointed out that some portions of the disputed material appear to be largely factual. Ordinarily, this would mean that those portions are disclosable since the leading b(5) decisions distinguish the factual from the deliberative. See, e.g., Mead Data v. Department of the Air Force, 566 F.2d 242, 256-57 (D.C. Cir. 1977) and cases cited. However, in this instance, in camera review has shown that the factual statements contained in the disputed material cannot be meaningfully separated from the opinion-formulating and advisory segments. See, e.g., Montrose Chemical Corp. v. Train, 491 F.2d 63, 67-69 (D.C. Cir. 1974). No doubt because the subject of this material is an inquiry aimed at unraveling and giving meaning to a complex and loosely connected series of events, the factual reports themselves, by their selection and emphasis, embody nondisclosable opinions and advice. Hence the disclosure of even this fact-oriented material would mean in effect the disclosure of the implicit

inferences, conclusions and advice that form the substance of the agency's protected deliberative process.

5. Lastly, the agency has sought to protect the identities of federal law enforcement personnel and confidential informants on the basis of exemptions b(7)(D) and b(7)(F). The Court finds that the first of these provisions has been properly invoked since the agency's justifications adequately show that the party in question was a "confidential source" within the meaning of b(7)(D). As to the second claim, however, the Court has not been persuaded that requiring disclosure now of the officers' identities will likely bring about the consequences that b(7)(F) seeks to avoid.

The same is true with respect to defendant's b(6) claim. The Court has not been persuaded that under exemption 6's balancing test the disclosure of names that appear in requested material will constitute "a clearly unwarranted invasion of personal privacy." As the Court recently stated in a case parallel to this one in this respect, "it is by no means clear how disclosure could plausibly amount to an 'unwarranted' breach of privacy." Baez v. Central Intelligence Agency, No. 76-1920, slip op. at 7 (filed Nov. 3, 1977).

6. Aside from defendant's claims of exemption, one other matter requires mention. Throughout this litigation defendant has taken the position that because some of the requested materials originated in agencies other than the CIA, or because those agencies have a greater connection with the relevant information, they rather than the CIA should be called upon to offer justifications for nondisclosure even though the items are in the CIA's possession. To date, over three years from the filing of this

action a large number of these justifications have yet to be made part of the record herein. To expedite resolution of the exempt or nonexempt character of these materials, the Court will grant defendant sixty (60) days from the date hereof within which to obtain and file the yet unfiled justifications. Unless these justifications are timely filed, the items to which they pertain must be disclosed.

UNITED STATES DISTRICT JUDGE

July 12th, 1978