

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MARK A. ALLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 78-1743
	:	
CENTRAL INTELLIGENCE AGENCY,	:	
<u>ET AL.</u> ,	:	
	:	
Defendants	:	
	:	
.....	:	


PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Mark A. Allen, and moves the Court to enter summary judgment in his favor with respect to the disclosure of the withheld portions of the CIA document which is at issue in this lawsuit.

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure.

A memorandum of points of authorities, a statement of material facts as to which there is no genuine issue, and affidavits by Mr. James H. Lesar and Mr. Harold Weisberg are attached hereto.

Respectfully submitted,

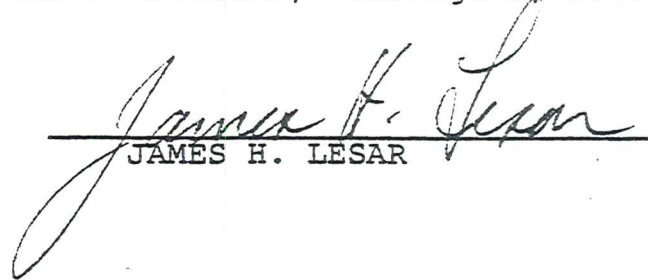


 JAMES H. LESAR
 910 16th Street, N.W., #600
 Washington, D.C. 20006
 Phone: 223-5587

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of February, 1980, hand-delivered a copy of the foregoing Cross Motion for Summary Judgment to the office of Assistant United States Attorney Dennis Dutterer, Room 3437, United States Courthouse, Washington, D.C.



JAMES H. LESAR

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 1-9(h), plaintiff states the following material facts as to which there is no genuine issue:

1. At the time CIA Document 509-803 originated the applicable Executive order governing national security classification was Executive Order 10501, as amended by Executive Order 10901 and Executive Order 10964.
2. Defendants have submitted no affidavit or other form of evidence to show that Document 509-803 was ever classified under Executive Order 10501, as amended.
3. Neither of the affidavits by Mr. Robert E. Owen submitted in this case states that Document 509-803 was classified in accordance with the procedures required by Executive Order 10501, as amended, or Executive Order 11652, or Executive Order 12065.
4. Under the authority of the January 9, 1979 affidavit of Mr. Robert E. Owen, the CIA initially withheld from plaintiff portions of Document No. 509-803 which contained information that had been made public in other documents which were released to the public before this lawsuit was instituted.

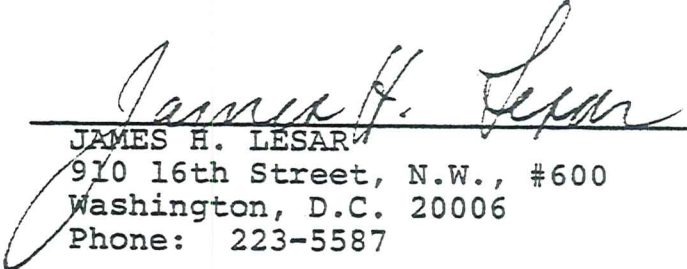
5. The CIA continues to withhold portions of Document 509-803 under Exemption 1 even though they contain information which already has been released to the public.

6. The CIA claims that certain handwritten entries on Document 509-803 which show its filing and distribution are protected by Exemption 2.

7. The CIA has excised classification and information control markings from Document 509-803 even though it makes no claim of exemption and cites no authority which requires that such excisions be made.

Plaintiff also adopts and incorporates herein the affidavits of James H. Lesar and Harold Weisberg which are submitted in support of his Cross Motion for Summary Judgment.

Respectfully submitted,



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Attorney for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

This suit arises under the Freedom of Information Act, 5 U.S.C. § 552, as amended. Plaintiff seeks disclosure of CIA Document No. 509-803. The CIA initially maintained that the entire document was exempt despite incontrovertible evidence that major portions consisted of information that was contained in other documents that had been publicly released before this lawsuit was instituted. Upon remand by the Court of Appeals the CIA has released most of the previously withheld information but continues to withhold much material on the ground that it continues to be classified in the interest of national security or is protected by Exemption 2. The CIA has filed a motion for summary judgment. In response, plaintiff now cross moves for summary judgment in his favor for the reasons stated below.

I. THE CIA HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING THAT IT IS ENTITLED TO EXEMPTION 1

It is well established that the government has the burden of establishing the correctness of any claimed exemption in a trial de novo in District Court. Founding Church of Scientology, Etc.

v. Bell, 603 F.2d 945, 949 (D.C.Cir. 1979) (per curiam). Where it invokes Exemption 1, the government has the burden of showing that the withheld material is classified in accordance with both the substantive and procedural requirements of the relevant Executive order. 5 U.S.C. § 552(b)(1). The Conference Report on the 1974 amendments explicitly states that material withheld under Exemption 1 must be properly classified "pursuant to both procedural and substantive criteria contained in such Executive order." H.Rep.No. 93-1200, 93d Cong., 2d Sess. 12 (1974). (Emphasis added)

The District of Columbia Circuit has held that where the withheld materials fail to qualify for Exemption 1 because of the agency's failure to follow proper procedures and the government alleges that disclosure would constitute grave danger to national security, the District Court should examine the materials in camera to determine whether they may be withheld according to the exacting standard employed in First Amendment cases involving prior restraint. Halperin v. Department of State, 185 U.S.App.D.C. 124, 131-132, 565 F.2d 699, 706-707; Ray v. Turner, 190 U.S.App.D.C. 290, 318, 587 F.2d 1187, 1215, note 62 (concurring opinion of Chief Judge Wright).

In this case the CIA has failed to show that the document at issue was ever classified pursuant to Executive Order 10501, as amended, the Executive order which governed the classification of national security information at the time this document originated. Nor has the CIA expressly stated that this document was classified in accordance with the procedural requirements specified by the subsequent Executive orders which superceded Executive Order 10501, Executive Orders 11652 and 12065.

It is apparent, therefore, that CIA has not sustained its burden of showing that Document 509-803 has been properly classified in accordance with the requisite procedures contained in the

applicable Executive orders. Because the CIA has not claimed that disclosure of the withheld information would constitute grave danger to the national security, the remainder of Document 509-803 must be released without the necessity of in camera inspection by the Court.

In addition to the CIA's failure to meet its burden of showing that Document 509-803 is properly classified according to the relevant procedural requirements, it is also incontrovertible that it continues to withhold information that is already in the public domain and which in fact was in the public domain long before this lawsuit was commenced. (See Lesar Affidavit, ¶10, and Attachment 1 thereto) Information which is already in the public domain cannot properly be withheld under the substantive criteria set forth in any relevant Executive order. Accordingly, even if Document 509-803 were properly classified procedurally, such information would still have to be released. Yet the CIA continues to withhold it unjustifiably.

II. INFORMATION WITHHELD BY CIA DOES NOT QUALIFY FOR PROTECTION UNDER EXEMPTION 3

To the extent that the CIA claims that the withheld materials are protected by Exemption and 50 U.S.C. §§ 403(d)(3) and 403g, these claims are simply unsupported where the information is not properly classified. 50 U.S.C. § 403(d)(3) provides:

[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. (Emphasis added)

Whether disclosure of intelligence sources and methods constitutes "unauthorized" disclosure is determined by reference to the applicable Executive order governing disclosure of classified information. Indeed, unless § 403(d)(3) is read in light of the

applicable Executive order it cannot qualify as an Exemption 3 statute because it then leaves withholding or disclosure at the discretion of the Director of Central Intelligence and does not establish particular criteria for his decision to withhold.

The legislative history of the 1974 Amendments to the Freedom of Information Act makes it clear that Congress intended that records for which an Exemption 3 claim was made based on § 403(d)(3) and 403g must be properly classified. Thus the Conference Report which accompanied the bill which amended Exemption 1 stated:

Restricted Data (43 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law. (Emphasis added)

(Conference Report No. 93-1380, 93rd Cong., 2d Sess. 12 (1974).

In a recent decision the United States Court of Appeals for the District of Columbia noted that it has, on occasion, interpreted the CIA's Exemption 3 statute (50 U.S.C. §§ 403(d)(3), 403g (1976)) "narrowly, so as to make it in effect no broader than Exemption 1." Thomas E. Hayden and Jane S. Fonda v. National Security Agency, et al., (Nos. 78-1728 and 18-1729, decided October 29, 1978) (citations omitted), slip op. at 16.

Because the CIA is unable to sustain its Exemption 1 claim, its Exemption 3 claim also must fail.

III. THE CIA HAS NOT MET ITS BURDEN UNDER EXEMPTION 2

The CIA has also claimed Exemption 2 to conceal distribution and filing information contained on Document 509-803. This is totally unwarranted. Exemption 2 pertains to information that is related solely to internal personnel rules and practices. The information which has been excised under this guise does not con-

stitute an internal personnel practice and would not be solely related to such a practice if it were one. Moreover, there is a genuine and significant public interest in knowing what parts of the CIA were involved in handling this particular document, as well as in ascertaining where additional copies of records pertaining to the assassination of President Kennedy may be located. (See January 23, 1980 affidavit of Harold Weisberg attached hereto) Under the decision of the United States Supreme Court in Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976), such materials cannot be withheld.

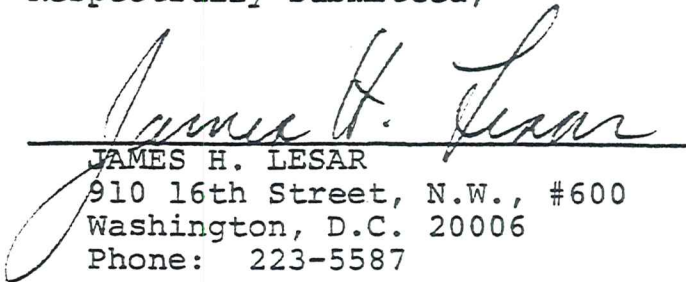
IV. MATERIAL FOR WHICH NOT EXEMPTION HAS BEEN CLAIMED CANNOT BE WITHHELD

The CIA continues to withhold classification markings and control information without claiming any exemption to justify its actions. This cannot be done. Unless the requested material is within a statutory exemption, FOIA requires that they be made available. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978).

CONCLUSION

For the foregoing reasons, plaintiff's cross motion for summary judgment should be granted.

Respectfully submitted,


JAMES H. LESAR
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Attorney for Plaintiff

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AFFIDAVIT OF JAMES H. LESAR

I, James H. Lesar, first having been duly sworn, depose and say as follows:

1. Plaintiff Mark A. Allen has retained me to represent him in this lawsuit.

2. Since the amended Freedom of Information Act went into effect on February 19, 1975, I have handled approximately twenty FOIA cases in the United States District Court and the United States Court of Appeals. Several of these cases have involved information that allegedly was classified in the interest of national security. In the two cases which were finally terminated by release of the allegedly classified records at issue, in case before an appeal was noted and in the other while the appeal was pending, the claim of "national security" was spuriously invoked. Upon release of the documents it was apparent that they had never been classified in accordance with either the procedural or substantive requirements of the appropriate Executive orders governing the classification of national security information. In each case the agency directly responsible for having falsely invoked the na-

tional security claim was the Central Intelligence Agency ("CIA"), which is also a defendant in this case.

3. The only document at issue in this lawsuit is the one that the CIA has identified as Document No. 509-803. Although the CIA has now released the major part of this record, it insists that portions of it that are still withheld continue to qualify for protection under Exemption 1 of the Freedom of Information Act.

4. The Freedom of Information Act provides that in order to justify nondisclosure under Exemption 1 the agency has the burden of showing that the withheld information is properly classified in accordance with both the procedural and substantive requirements of the applicable Executive order governing classification of national security information.

5. Document 509-803 is dated January 31, 1964. The Executive order governing national security classification which was in effect at that time was Executive Order 10501, as amended by Executive Orders 10901 and 10964.

6. Neither of the two affidavits by Mr. Robert E. Owen that have been submitted in this cause states that this document was ever properly classified pursuant to Executive Order 10501, as amended.

7. Among the pertinent provisions of Executive Order 10501, as amended, are the following:

Section 3 provides that:

Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified information shall not be classified.

Section 4(a) sets forth a downgrading-declassification schedule and requires that:

To the fullest extent practicable, the classifying authority shall indicate on the in-

formation or material at the time of original classification if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. (Emphasis added)

In accordance with this requirement, Section 5(a) specifically directs that:

At the time of origination, all classified information or material shall be marked to indicate the downgrading-declassification schedule to be followed in accordance with paragraph (a) of section 4 of this order. (Emphasis added)

Section 5(h) of Executive Order 10501 provides that:

Whenever classified material is declassified, downgraded, or upgraded, the material shall be marked or stamped in a prominent place to reflect the change in classification, the authority for the action, the date of action, and the identity of the person or unit taking the action. In addition, the old classification marking shall be cancelled and the new classification (if any) substituted therefore. Automatic change in classification shall be indicated by the appropriate classifying authority through marking or stamping in a prominent place to reflect information specified in subsection 4(a) hereof.

Section 5(i) of Executive Order 10501 requires that:

When classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the Executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law.

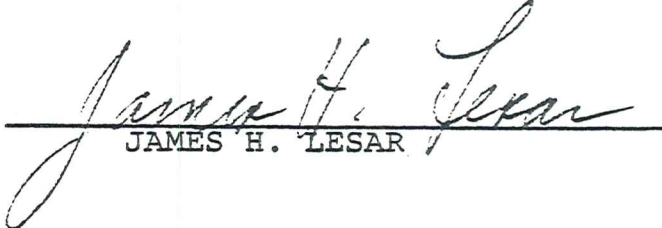
The January 9, 1979 and January 11, 1980 affidavits of Mr. Robert E. Owen fail to state that these procedures were followed in classifying Document 509-803, or even that this document was ever classified under Executive Order 10501, as amended.

8. In this case the CIA initially relied upon the January 9, 1979 affidavit of Mr. Robert E. Owen. In that affidavit Mr. Owen stated that Document 509-803 was properly classified under Executive Order 12065, which became effective on December 1, 1979. He not state, however, that the document was classified in accordance with the procedural requirements of E.O. 12065.

9. After the Court of Appeals remanded this case, Mr. Owen submitted a new affidavit, this one executed on January 11, 1980. While this Supplemental Affidavit continues to maintain that withheld portions of document 509-803 are properly classified pursuant to E.O. 12065, it fails to state that the classification was done in accordance with the procedural requirements of that or any other applicable Executive order. Moreover, the CIA has unnecessarily deleted the classification markings said to be placed on the document, so it is impossible to make a determination that such markings have been made in accordance with the requirements of an applicable Executive order. Excising these markings instead of simply cancelling them can be construed as an attempt to conceal the fact that the markings were not made in accordance with the applicable Executive order.

10. In reviewing the file in this case I have read the affidavit of plaintiff Mark A. Allen opposition the government's motion to dismiss which was filed on January 10, 1979. Affixed to that submission as Attachment B is a summary of information in other publicly-released government documents that describes the content of Document 509-803. I have compared the representations made in that summary against the now-released content of Document 509-803. I find that public source information contained in the Attachment B summary is in fact the same as that in the now-released Document No. 509-803. I also find that the CIA continues to withhold information from document 509-803 even though Attachment B makes it ap-

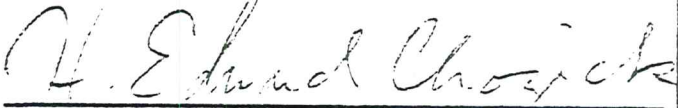
parent that the withheld information has been publicly released in other documents. For example, Allen's Attachment B summary (appended to this affidavit as Attachment 1) specifies information that has been deleted from pages 608 of CIA Document No. 509-803 even though it is contained in other public documents. Yet the CIA continues to withhold all of the informational content from pages 6-8 of Document No. 509-803.



JAMES H. LESAR

DISTRICT OF COLUMBIA

Subscribed and sworn to before me this 5th day of February, 1980.



NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires FEB. 14 1981.

INFORMATION ON THE CONTENTS OF CIA ITEM "509-803 GATHERED FROM AVAILABLE CIA AND WARREN COMMISSION DOCUMENTS

[Attachment

The following information is attributed to pages 1-3 of CIA item # 509-803: (assumed to be Warren Commission Document 347)

a) On October 9 "CIA station, Mexico City received information concerning visit of Oswald to Soviet Embassy. (347 p-1)" Oswald-Ruby Chronology and Summary of Chronology, page 710, Entry 45, Record Group 272, National Archives.

b) On October 10, 1963 "CIA Headquarters, Washington, advises FBI headquarters that an American named Lee Oswald had contacted the Soviet Embassy in Mexico City on October 1, 1963 and referred to an earlier visit on September 28, 1963. He asked about telegram that an Embassy official, probably Kostikov, a known Soviet State Security (KGB) Officer, had agreed to send to Soviet Embassy in Washington for him. CIA apparently indicated the possible identity between this Lee Oswald and the defector returnee Lee Harvey Oswald. CIA report also included a physical description of an individual who was believed to have been the Oswald involved. (It was subsequently established that this description did not fit Oswald.)

"Also on 10/10/63, CIA headquarters sent a summary of all background information in its files on Oswald to its Mexico City station and instructed the station to pass the substance of its October 9 report to Mexico City representatives of interested federal agencies, including the local FBI representative. This instruction was immediately carried out. According to CIA, there were no requests from recipients of the report for further information or for follow-up investigation. (Comm. No. 347, pp. 1-3)" Stern-Rankin Memorandum of February 17, 1964, page 24, Entry 25, Record Group 272, National Archives.

c) On December 9, 1960 the CIA opened its file on Oswald "to accommodate biographic information developed by CIA in response to an inquiry from the Department of State on a list of American defectors in Soviet Bloc countries... The Department of State inquiry was dated 25 October 1960. An interim reply was given by CIA on 3 November 1960; a final reply on 21 November 1960. Until early October, 1963 contents of Oswald file held by CIA consisted entirely of press materials and disseminations received from the Department of State, the Federal Bureau of Investigation, and the Navy Department. (Comm. No. 347, p. 2)" Stern-Rankin memorandum of 2/17/64, pages 33-4, supra A February 12, 1964 letter from J. Lee Rankin, General Counsel to the Warren Commission to John McCone, Director of the CIA, indicates that the above information appears in a footnote on page 2 of this document. The quotation above may well be a direct quote from CIA item 509-803.

The following information has been attributed to pages 6 and 7 of CIA item # 509-803:

a) On September 27, 1963 "Oswald visited Cuban Embassy, Mexico City, and requested visa to transit Cuba on his way to the Soviet Union. Sylvia Duran, Clerk at the Cuban Embassy states Cuban Consulate would only give him a visa if a Soviet visa were issued. Oswald advised he was a member of the FPCC and the Soviet Embassy confirmed that he had visited there and shown them a letter from the Soviet Consulate in Washington, D.C., indicating he was awaiting visa for him and his wife. (347 pp-6 and 7) Oswald-Ruby Chronology and Summary of Chronology, supra, page 685.

The following information has been attributed to page 8 of CIA item 509-803:

a) On November 23, 1963 the CIA sent a cable to the FBI "concerning activities of North American, possibly identical with Oswald, who visited Soviet and Cuban Embassies in Mexico on 28 September 1963" CIA item # 633-797, paragraph 2(g)

b) On September 28, 1963 "Oswald again visited Cuban Embassy", according to Sylvia Duran. "While there he talked on the phone with Soviets in Russian. (347 p-8)

The following information has been attributed to pages 8 and 9 of CIA item # 509-803:

a) October 1, 1963: "In midmorning (Oswald) contacted Soviet Embassy to determine if telegram to Soviet Embassy, Washington, had been answered. Believed to have dealt with VALERIY VLADOMIROVICH KOSTIKOV, senior officer of five Soviet consular representatives. (347 p-829((sic))) Oswald-Ruby Chronology and Summary of Chronology, supra, page 692.

According to a April 21, 1964 letter from Warren Commission General Counsel J. Lee Rankin to CIA Deputy Director of Plans Richard Helms, pages 11-14 of item # 509-803 deal with Gilberto Alvarado Ugarte, a young Nicaraguan who claimed to have witnessed a suspicious meeting between Oswald and several unknown individuals at the Cuban Embassy in Mexico City. This incident is described in some detail in publicly available Commission Document 1000 and Commission Exhibit 3152.

More extensive information on what is contained in CIA item 509-803 is found in a 2/14/64 Warren Commission internal memorandum from staff members William Coleman, Jr. and W. David Slawson to J. Lee Rankin. While this memo does not contain any specific cites to the document in question, it contains information which only could have been gathered from this document. Information concerning Oswald's activities in Mexico City was almost exclusively in the hands of the CIA, and the Agency's only report to the Commission on Oswald's activities in Mexico prior to the date of this memo is CIA item # 509-803. The relevant pages are 7 through 10.