

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,)
)
Plaintiff,)
)
v.) Civil Action No. 78-1743
)
CENTRAL INTELLIGENCE)
AGENCY, et al.,)
)
Defendants.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move this Court for summary judgment in their favor on the grounds that there is no issue as to any material fact and they are entitled to judgment as a matter of law, Rule 56, Federal Rules of Civil Procedure. In support of this motion, defendants file herewith a statement of material facts as to which there is no genuine issue. Defendants also rely on: (1) their memorandum of points and authorities in support of their motion for summary judgment and affidavits in support thereof which were filed on January 17, 1980; (2) the affidavit of Gerald L. Liebenau with attachments which were filed on February 9, 1981; and (3) the unexpurgated copy of the document previously filed with the Court. A proposed order is also submitted.

Respectfully submitted,

CHARLES F. C. RUFF
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Dennis A. Dutterer
DENNIS A. DUTTERER
Assistant United States Attorney

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

Pursuant to local rule 1-9(h), defendants submit the following statement of material facts as to which there is no genuine issue.

1. On July 24, 1978, plaintiff, Mark A. Allen, requested the Central Intelligence Agency to disclose a single CIA document identified as document no. 509-803. By letter dated August 8, 1978, the CIA denied plaintiff's request. The document was withheld in its entirety pursuant to exemptions 1, 2, and 3 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (1), (2), (3). (Affidavit of Robert E. Owen, dated January 9, 1979. Exhibit E thereto.) (Hereinafter referred to as Owen I Affidavit)

2. Plaintiff not having received a response to his request of July 24, 1978, within ten working days, treated his request as denied and by letter dated August 9, 1978 appealed this initial decision. (Owen I Affidavit, Exhibit F.)

3. On September 18, 1978, plaintiff filed this civil action seeking to compel release of the document.

4. The document involved in this action is a 15-page document consisting of a one-page cover memorandum and a 14 page attachment thereto dated July 31, 1964. This memorandum contains information developed by the CIA concerning Lee Harvey Oswald's activities in Mexico City during the period of September 28 to October 3, 1963.

5. This document had been previously requested pursuant to the Freedom of Information Act and was the subject of another Freedom of Information Act civil action styled as Fensterwald v. CIA, Civil No. 75-1897 (D.D.C.). (Affidavit of Robert E. Owen, dated January 11, 1980, paragraphs 1 and 2). (hereinafter Owen II Affidavit).

6. In Fensterwald v. CIA, 443, F. Supp. 667 (D.D.C. 1977), the Court found the entire document to be protected from disclosure pursuant to the Freedom of Information Act. Further, the Fensterwald Court found that the CIA had reviewed the document in light of the new, more stringent criteria set forth in Executive Order 12065 effective December 1, 1978 and had determined that the material should be classified at the secret level and therefore withheld from disclosure.

7. On January 12, 1979 the District Court in this action entered an order dismissing this action with prejudice, finding that not only had disclosure of this document been prohibited in Fensterwald v. CIA, supra, but that the CIA had determined, pursuant to the new Executive Order, that the document was classified at the secret level and should be withheld from disclosure.

8. On March 26, 1979, plaintiff filed a notice of appeal from the judgment entered by this Court.

9. On October 31, 1979, the United States Court of Appeals for the District of Columbia granted the CIA's motion for remand to file a more particularized affidavit and directed that the remand proceedings be consistent with the Founding Church of Scientology of Washington, D.C., Inc. v. Bell, no. 78-1391 (D.C. Cir. June 25, 1979).

10. On January 17, 1980 defendants filed a motion for the entry of summary judgment in their favor.

11. On February 6, 1980, the Court entered summary judgment for the defendants and dismissed this action with prejudice.

12. On November 12, 1980, the United States Court of Appeals for the District of Columbia reversed the judgment of the District Court, and held that exemption two was not applicable to the filing

and routing instructions contained in the document. The Court also vacated that portion of the judgment which had held that exemptions 1 and 3 were applicable to other portions of the document. The Court of Appeals remanded for an in camera inspection to determine the applicability of exemptions one and three. Allen v. CIA, No. 80-1380 (D.C. Cir. Nov. 12, 1980).

13. On February 9, 1981, defendants filed in camera the classified affidavit of Gerald L. Liebenau with attachments and a copy of the unexpurgated copy of the document.

14. The information contained in the document that has not been released to the plaintiff is properly exempt from disclosure pursuant to exemption one of the Freedom of Information Act, 5 U.S.C. 552(b)(1). (Affidavit of Gerald L. Liebenau filed in camera with the Court on February 9, 1981,) (hereinafter referred to as the Liebenau Affidavit).

15. The information contained in the document that has not been released to the plaintiff is properly exempt from disclosure pursuant to exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3). (Liebenau Affidavit).

16. The most recent classification of the information contained in the requested document is in conformity with both the procedural and substantive criteria of Executive Order 12065.

17. The document which contains the classified information contains the identity of the classification reviewing official with original top secret classification authority and the date or event for declassification or review. This reviewing official is Gerald L. Liebenau who reviewed the document to determine whether it could be declassified and released in this action. (Unexpurgated document submitted for in camera review and Liebenau affidavit).

18. Unauthorized disclosure of the withheld information would reveal intelligence sources and methods. (Liebenau Affidavit).

19. Unauthorized disclosure of the information withheld pursuant to Exemption 1 could reasonably be expected to cause identifiable damage to the National Security. (Liebenau Affidavit.)

20. All reasonably segregable non-exempt portions of the document have been released. (Unexpurgated document submitted for in camera review and Liebenau Affidavit).

21. The withheld information reveals facts about CIA organization, functions, names, official titles or numbers of personnel employed. (Liebenau Affidavit).

22. Defendants incorporate herein by reference the Owen II Affidavit and the Affidavit of Liebenau filed on February 9, 1981.

Respectfully submitted,

CHARLES F. C. RUFF
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O R D E R

Upon consideration of Defendants' Motion for Summary Judgment, their Memorandum of Points and Authorities in support thereof, and the entire record, herein, it is this _____ day of _____, 1980;


ORDERED that Defendants' Motion for Summary Judgment be, and it hereby is, granted, and it is,

FURTHER ORDERED that this action be, and it hereby is, dismissed.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendants' Motion for Summary Judgment, Statement of Material Facts as to Which There Is no Genuine Issue, and proposed Order has been made upon plaintiff by mailing postage prepaid copies thereof to plaintiff's counsel, James H. Lesar, 2101 L Street, N.W., Suite 203, Washington, D.C. 20006 on this the 4th day of March, 1981.



DENNIS A. DUTTERER
Assistant United States Attorney
U.S. District Courthouse
Room 2846
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

Telephone: (202) 633-4925