NO. 79-1729

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

ALICE DANIEL,
Assistant Attorney General,

CHARLES F. C. RUFF,
United States Attorney,

LEONARD SCHAITMAN,
MARGARET E. CLARK,
Attorneys,
Civil Division,
Department of Justice,
Washington, D. C. 20530,
Phone: (202) 633-3395.

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STATEMENT OF ISSUES

1. Whether the Central Intelligence Agency conducted an adequate, good-faith search for records responsive to appellant's Freedom of Information Act request.

2. Whether CIA records required to be withheld from unauthorized disclosure under 50 U.S.C. § 403 are exempt from release under 5 U.S.C. § 552(b)(3) without regard to their classified nature.

3. Whether the district court correctly held that the CIA properly referred classified FBI documents to that agency and that the Bureau, as the originating agency, was the appropriate agency to make a decision concerning their release.

4. Whether the CIA's affidavits were adequate to support the award of summary judgment in its favor.

STATEMENT REQUIRED BY LOCAL RULE 8(b)

Counsel for appellees is not aware of any cases presently pending in this Court, or that may be presented to the Court in the future, which are related to this case.

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STATUTES AND REGULATIONS

Relevant provisions of the Freedom of Information Act, 5 U.S.C. § 552; 18 U.S.C. §§ 794, 798; 50 U.S.C. §§ 403(d)(3) and 403g; and Executive Orders 11652 and 12065 are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statement of Proceedings

This is an appeal in a civil action arising from appellant's request under the Freedom of Information Act, 5 U.S.C. § 552, as amended, for access to records maintained by the appellee Central Intelligence Agency (CIA) pertaining to James Earl Ray and Dr. Martin Luther King. Following his unsuccessful administrative appeal of the CIA's decision to withhold, in whole or in part, certain documents it had identified as responsive to his request, plaintiff instituted suit against the CIA. He thereafter amended his complaint to join as a party defendant the National Security Agency (NSA), to which the CIA had referred a number of classified NSA documents discovered in CIA files in the course of processing appellant's request. Following its review of those documents, NSA had declined to release any of them because they were exempt from disclosure under 5 U.S.C. §§ 552(b)(1) and (b)(3).

On May 26, 1978, appellees moved for summary judgment, based upon supporting affidavits, and appellant opposed the motion,

relying on a number of his own affidavits. Appellant thereafter sought unsuccessfully to obtain discovery from the CIA by way of depositions and interrogatories.

On January 4, 1979, the district court ruled in appellees' favor on all issues (App.), and thereafter denied appellant's motion to reconsider (R.). This appeal, pertaining only to documents withheld by the CIA and those not produced by the FBI, followed.

B. Statement of Facts

By letter dated June 11, 1976, filed pursuant to the Freedom of Information Act, appellant submitted to the CIA a seven-paragraph request for materials pertaining to Dr. Martin Luther King and James Earl Ray (App.). After advising appellant that processing of his request would be delayed because of its heavy FOIA request backlog and obtaining from appellant privacy waivers from James Earl Ray,[1/] the CIA searched its records and in April 1977 informed appellant that 286 documents had been retrieved from CIA records and that 243 of those documents were being released to him in their entirety or with portions deleted. May 26, 1978 Affidavit of Gene F. Wilson ("Wilson Affidavit"), ¶¶ 3, 7, 8 and Exhibits B, F and G thereto (App.).

In conducting this initial search, the CIA identified a number of documents that had originated with the National Security Agency

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1/ The Agency also notified appellant of the need for a privacy waiver from Mrs. Coretta Scott King, but never received such a waiver from appellant.

(NSA). Since all of those documents were classified, and a release of materials pursuant to FOIA requires that such documents first undergo a declassification review by the originating agency, these materials were referred to NSA for review and for direct response thereafter to appellant. Wilson Affidavit, ¶15 (App.).

After unsuccessfully appealing the CIA's decision not to release all of the documents it had identified to that point, appellant instituted this civil action on November 21, 1977 (App.). The following day, he was advised by NSA of its decision to withhold completely, pursuant to 5 U.S.C. §§ 552(b)(1) and (b)(3), the 22 classified documents that had been referred to it for review for possible declassification. May 16, 1978 Affidavit of Roy R. Banner, ¶ 3 (R.). Appellant thereafter amended his complaint to name NSA as a party defendant in order to challenge that determination (App.).

Following the filing of appellant's original complaint, the CIA, in keeping with its standard practice, commenced a de novo search of its records for documents responsive to appellant's FOIA request. Wilson Affidavit, ¶ 13 (App.). This second search resulted in the retrieval of a number of additional CIA documents. It also uncovered various other classified documents originated by other agencies.[2/] Those documents were referred to the originating agencies for review and direct response by each agency to appellant.

2/ These other agencies included the State Department, the Army, the Naval Investigative Service, the Agency for International Communications, and the Federal Bureau of Investigation (FBI).

Ultimately, 373 documents were located, of which 238 CIA documents were disclosed in their entirety. Major portions of 104 additional CIA documents were also released. Only 31 documents were withheld by the CIA in their entirety, and 27 by NSA.[3/] With respect to the non-party agencies to which the CIA referred documents for review, all but the FBI released the documents thus referred either in their entirety or with only minor deletions.[4/]

Of the documents referred to the FBI, two were found to be unclassified, one of which was released to appellant in its entirety and the other with only a minor deletion. July 12, 1978 Affidavit of Martin Wood ("Wood Affidavit"), ¶¶ 2, 3 (App.). By letter dated July 11, 1978, the FBI advised appellant that the remaining documents referred to it by the CIA were currently classified in their entirety and thus required review for possible declassification before a release determination could be made. Exhibit A to Wood Affidavit (App.). These remaining documents are also the subject of a FOIA request that appellant submitted directly to the FBI on July 8, 1977. Exhibit B to Wood Affidavit (App.).

3/ An additional five NSA classified documents were located by the CIA in its second search; these were also forwarded to NSA for review for possible declassification, but were ultimately claimed as exempt by NSA under 5 U.S.C. § 552(b)(1). July 10, 1978 Supplemental Affidavit of Roy R. Banner, ¶ 3 (R. 19). Appellant has not contested the grant of summary judgment as to appellee NSA, and accordingly the exemption of the NSA documents is not an issue in this appeal.

4/ See Affidavits of Messrs. Thomas F. Conley (Army), Gerard O. Forcier (State), William C. O'Riley (NIS), Charles Jones, Jr. (ICA) (R. 19). As with the NSA documents, appellant does not challenge in this appeal any of the exemptions claimed by these agencies with respect to their documents.

On January 4, 1979, the district court issued an opinion and order granting appellees' motion for summary judgment (App.). The court held that the CIA had demonstrated that all identifiable records pertaining to Dr. King and James Earl Ray had been located; that the Agency had acted properly in referring for processing certain of the documents found in its files to other non-party agencies that had originated them; that the validity of the CIA's Exemption 3 claims did not depend upon whether the information at issue was also exempt under 5 U.S.C. § 552(b)(1); and that material sought to be withheld by appellees had been shown to meet the relevant criteria. This appeal, in which appellant challenges only the district court's holdings in favor of appellee CIA, followed.

SUMMARY OF ARGUMENT

The CIA conducted an adequate and good-faith search of its records for materials responsive to appellant's FOIA request. The relevant affidavits establish that the agency searched every component of its records systems that could conceivably contain material responsive to the request, and that any more comprehensive searches would have been unduly burdensome. Appellant's affidavits are insufficient to impugn the good-faith showing made by the CIA, and accordingly the district court's grant of summary judgment without discovery was proper.

The district court correctly upheld the CIA's referral to the FBI of classified documents originating with that agency. Because only the FBI had the authority to declassify them for release, these

documents could not be considered "agency records" of the CIA in any meaningful sense. Accordingly, the district court properly abstained from making any ruling as to these documents and correctly ruled in the CIA's favor on this issue.

The affidavits supporting the CIA's Exemption 3 and Exemption 6 claims are adequately detailed and set out with particularity the information withheld and the exemptions claimed for each item or document withheld. By contrast, appellant's affidavits contain nothing more than bare assertions of bad faith or misrepresentation by the CIA. Under these circumstances, the relevant case law requires affirmance of the district court's decision that the documents are exempt as claimed.

ARGUMENT

I. THE CIA CONDUCTED AN ADEQUATE, GOOD-FAITH SEARCH FOR DOCUMENTS RESPONSIVE TO APPELLANT'S REQUEST.

In National Cable Television Ass'n, Inc. v. FCC, 156 U.S. App. D.C. 91, 94, 479 F.2d 183, 186 (1973), this Court held that an agency moving for summary judgment under FOIA must demonstrate "that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." A more recent decision, however, clarifies the precise extent of an agency's obligation to locate documents requested under FOIA. Goland v. Central Intelligence Agency, 197 U.S. App. D.C. ____, 607 F.2d 339 (1978), cert. denied, 48 U.S.L.W. 3602 (March 17, 1980). The record here establishes that the CIA fully complied with the pertinent standards.

In Goland, this Court established the following guidelines for judging the adequacy of an agency's search of its records:

> In determining whether an agency has met [National Cable's] burden of proof, the trial judge may rely on affidavits. Congress has instructed the courts to accord "substantial weight" to agency affidavits in national security cases, and these affidavits are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt. The agency's affidavits, naturally, must be "relatively detailed" and nonconclusory and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.

197 U.S. App. D.C. at ____, 607 F.2d at 352 (footnotes omitted).

In this case the district court held that the CIA had "met its burden in showing that all identifiable records pertaining to Dr. King and Mr. Ray have been located, and stated that, based on the affidavits filed, "there is no reason to believe that . . . additional documents could be located without an unreasonable search." (App. .) In doing, it relied expressly on this Court's decision in Goland. An examination of that decision as applied to the facts of this case readily demonstrates the correctness of the district court's conclusion.

In Goland, plaintiffs challenged the adequacy of the CIA's records search in response to their FOIA request for "all records concerning the legislative history" of the CIA's organic statutes. They alleged that there was reason to doubt the agency's good faith for a number of reasons: there were particular documents that

"presumably" existed but had not been produced; certain materials referred to in published Congressional reports appeared to be within the scope of the request and copies of those documents were "probably" in the CIA's possession but had not been produced; and the agency's "pattern of obfuscation and delay" in dealing with plaintiffs signaled bad faith. 197 U.S. App. D.C. at ____, 607 F.2d at 353-55.

In affirming the district court's ruling that the CIA had discharged its obligation to conduct an adequate, good-faith search, this Court first examined the affidavits submitted by the Agency and found them to be, in its own words, "relatively detailed and nonconclusory." Id. The affidavits included a statement that the agency had "searched and reviewed all files which might contain [responsive] documents," and gave "detailed descriptions of the searches undertaken, and a detailed explanation of why further searches would be unreasonably burdensome," making them "plainly adequate to demonstrate the thoroughness of the CIA's search . . . ." 197 U.S. App. D.C. at ____, 607 F.2d at 353.

A comparison of the affidavits offered by the CIA in this case shows that under Goland's standards they also are "plainly adequate" to establish the thoroughness of the agency's search of its records. Paragraph 1 of Mr. Gambino's July 19, 1978 Supplemental Affidavit ("Second Gambino Affidavit") describes the search undertaken in the Agency's Office of Security as well as the kind of indexing system used by that Office and the corresponding limitations

imposed by that system on retrieving information requested.[5/] (App. .) The July 19, 1978 Affidavit of Charles Savige ("Savige Affidavit"), describing the search that was made of the Directorate of Operations records systems, attests that although their classified nature prevents furnishing a description of how Operations records are indexed, a general description of how all searches of those records are conducted can be provided. Savige Affidavit, ¶ 3 (App.). The Affidavit then states that, in each component of the CIA's records systems, FOIA searches are routinely made "among all

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5/ Contrary to appellant's assertions, his FOIA request can be said reasonably to describe only such materials that are retrievable by reference to Dr. King or Mr. Ray, not documents on unspecified individuals such as authors identified by appellant only after summary judgment proceedings commenced. See October 3, 1978 letter from James H. Lesar to Mr. George Owens (App.). Since any records on such authors would have been retrievable only by their names, Second Gambino Affidavit, ¶ 1 (App.), Savige Affidavit, ¶ 9 (App.), and since appellant failed to supply such information at the time he submitted his request, the CIA cannot be faulted for failing to produce records for which an "unreasonably burdensome" search would have been required. Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d 353; cf. Fonda v. CIA, 434 F. Supp. 498, 501 (D.D.C. 1977).

Appellant's citations to CIA documents that allegedly fall within the scope of his request but that were not produced by the CIA in response thereto are similarly misleading. The March 31, 1971 CIA memorandum entitled "Book by Harold Weisberg Entitled 'Frame-Up'" (June 29, 1978 Affidavit of James Lesar, ¶ 4, Attachment 1, App.) was released to appellant pursuant to another FOIA request for all CIA records concerned with himself, and was indexed, for records purposes, under appellant's name, not under Dr. King's or Mr. Ray's name. Second Gambino Affidavit, ¶ 2 (App.). The other CIA document contended by appellant to be responsive to his request, but not produced in this case, is in fact totally unrelated to the subject matter of the instant FOIA request, since it concerns criticism directed at the Warren Commission's report on the Kennedy assassination. Attachment 2 to Supplemental Opposition to Defendants' Motion for Summary Judgment (App.).

indices that might logically relate to the substance of the FOIA request," and that in this case it is his belief that "all identifiable records have been retrieved from those CIA records systems that could conceivably contain responsive documents." Id., ¶¶ 4, 5 (App.). Both affidavits state that the only way to improve upon the searches that were conducted would be to undertake a page-by-page review of all CIA records, a process that would obviously be "unreasonably burdensome," Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 353, since it would be enormously expensive and time-consuming. Savige Affidavit, ¶ 5 (App.); Second Gambino Affidavit, ¶ 1 (App.).

Similarly, appellant's allegations that the CIA acted in bad faith in conducting its search are as unfounded as those raised in Goland. Claims that the agency failed to turn over documents that "presumably" exist in its files cannot prevail against affidavits showing that even if such hypothesized documents existed, the effort required to locate them would be unreasonable. Id., 197 U.S. App. D.C. at ____, 607 F.2d at 353-54. Moreover, in conducting two separate searches and reprocessing certain documents to release additional portions of them, the CIA dealt with appellant's request in a conscientious manner that belies his allegations of bad faith. Weissman v. CIA, 184 U.S. App. D.C. 117, 123, 565 F.2d 692, 698 (1977). Accordingly, appellant failed to make a showing of bad faith that could in any way impugn the Agency's affidavits, and consequently the district court's grant of summary

judgment without discovery should be affirmed. Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 355.

II. MATERIALS WITHHELD UNDER 50 U.S.C. § 403 NEED NOT BE CLASSIFIED PURSUANT TO EXECUTIVE ORDER IN ORDER TO QUALIFY FOR EXEMPTION UNDER 5 U.S.C. § 552(b)(3).

As he did below, appellant contends on appeal that information that is not properly classified pursuant to Executive Order may not be withheld from disclosure under 5 U.S.C. § 552(b)(3) on the basis of 50 U.S.C. § 403--in other words, that the validity of the CIA's Exemption 3 claims is totally dependent upon their meeting the requirements of Exemption 1 as well.[6/] Neither legal precedent nor logic support this theory, and the district court correctly rejected it.

6/ The CIA and NSA originally invoked both Exemption 1 and Exemption 3 to withhold much of the information at issue, because of its classified nature, and the Exemption 1 claims were fully briefed and argued in the course of summary judgment proceedings. Shortly after the district court took the motion under advisement, however, Executive Order 11652, which had governed the CIA's classification of documents, was revoked and Executive Order 12065 was issued, setting out new guidelines for classification. Executive Order 12065, 43 Fed. Reg. 28950 (July 3, 1978) (with an effective date of December 1, 1978).

To avoid the delay involved in reprocessing all CIA and NSA documents for which Exemption 1 had been claimed, and because they believed that all such documents were independently exempt under 5 U.S.C. § 552(b)(3) pursuant to 50 U.S.C. §§ 403(d)(3) and 403g, appellees suggested to the Court on December 5, 1978 that where both Exemptions 1 and 3 had been asserted, it could consider only the Exemption 3 claims, and in issuing the opinion, the district court did so.

In effect, appellant asserts that unless the availability of Exemption 3 in these circumstances is predicated upon a valid classification of the documents at issue, 50 U.S.C. § 403 does not constitute an Exemption 3 statute because it provides the Director of the CIA with no criteria to apply in determining whether disclosure of any given document is "authorized." This Court's prior decisions, however, expressly hold that 50 U.S.C. §§ 403(d)(3) and 403g are Exemption 3 statutes within the meaning of 5 U.S.C. § 552(b)(3) because they specify particular types of information to be withheld. Goland v. CIA, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 349-50; Ray v. Turner, 190 U.S. App. D.C. 290, 299, 587 F.2d 1187, 1196 (1978).[7/]

Furthermore, the argument advanced by appellant here was in effect squarely rejected by this Court in Goland:

> Although "inquiries into the applicability of the two exemptions may tend to merge," Phillippi v. CIA, 178 U.S. App. D.C. 243, 250, 546 F.2d 1009, 1016 n. 14 (1976), Exemption 3 may of course be invoked independently of Exemption 1. See Weissman v. CIA, 184 U.S. App. D.C. 117, 123, 565 F.2d 692, 698 (1977) . . . .

7/ These two statutory provisions, of course, have an independent effect of their own, without regard to classification constraints, on the Agency's handling of information gathered by it. A proviso to § 403(d)(3) states that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3) (1976). Section 403g provides that, "[i]n the interests of the foreign intelligence activities of the United States and in order further to implement" this proviso, "the Agency shall be exempted from . . . the provisions of any . . . law which require[s] the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g (1976).

Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 349 n. 50. See also, Marks v. CIA, 426 F. Supp. 708 (D.D.C. 1976), rev'd on other grounds, 191 U.S. App. D.C. 295, 590 F.2d 997 (1978).

In an implicit recognition that this first argument is without merit, appellant seeks to attack the district court's ruling by pointing out that its opinion fails expressly to state that release of the contested materials could in fact reasonably be expected to expose intelligence sources and methods. The record on appeal, however, readily demonstrates that there was ample support for the trial court's conclusion as to the validity of the CIA's Exemption 3 claims.

As this Court recently observed, Congress has instructed the courts to give "substantial weight" to agency affidavits in national security cases. Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 350 n. 64. While a court may conduct an in camera inspection under 5 U.S.C. § 552(a)(4)(B), it should do so only if the affidavits or other testimony proffered by the agency fail to establish that the documents are exempt from disclosure. Id. As shown below, the descriptions contained in the relevant affidavits filed by the CIA readily demonstrate that the materials are exempt under 50 U.S.C. §§ 403(d)(3) and 403g.[8/] Weissman v. CIA, 184 U.S. App. D.C. 117, 122, 565 F.2d 692, 697 (1977). The record thus shows that the district court was well within its discretion in granting appellees' motion for summary judgment without

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8/ See Part IV, infra.

conducting an in camera inspection of the documents or ordering discovery.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE FBI, AS THE ORIGINATING AGENCY OF CERTAIN CLASSIFIED DOCUMENTS LOCATED BY THE CIA, WAS THE APPROPRIATE AGENCY TO DECIDE WHETHER TO RELEASE SUCH DOCUMENTS TO APPELLANT.

In searching for information responsive to appellant's request, the CIA located a number of classified documents originated by the FBI, and referred them to that agency for a determination as to their releasability. Appellant contends that the CIA's failure to produce these documents in the course of this litigation is evidence of its "bad faith" and "obstructionist tactics," and that the district court erred in holding that with respect to those documents the FBI, and not the CIA, was the agency responsible for responding to appellant. This argument, however, ignores both important precedent from this Court and the restraints placed on an agency by Executive Order when dealing with classified documents originating outside the agency.

Under Executive Order 11652, which was in effect at the time the CIA retrieved from its files the FBI documents at issue here, classified material sought pursuant to a FOIA request had to be referred to the originating agency for declassification review, and only that agency possessed the authority to declassify such documents for release. Executive Order 11652, Sec. 3, 3 C.F.R. at pp. 681-82 (1971-75 Comp.). Executive Order 12065, which

replaced E.O. 11652 effective December 12, 1978, contains essentially the same provisions concerning the authority to declassify. E.O. 12065, §§ 3-102, 3-103, 3 C.F.R. p. 196 (1979).[9/]

Because of these constraints, the CIA, as well as other federal agencies in similar situations, has developed the practice of referring classified documents requested under FOIA to the agency that originated them and requesting it to respond directly to the person submitting the FOIA request.[10/] The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act describes the legal and policy reasons for requiring such referrals:

> Under Executive Order 11652, information originally classified by an agency ordinarily can be declassified only by the same agency. There is nothing in the amendments or their legislative history which displays any intent that this disposition be reversed--resulting in a requirement that HEW, for example, make the decision as to whether a document classified by the State Department is "properly" classified. To the contrary, the legislative history recognizes the primacy in this area of those agencies "responsible" for national defense and foreign policy matters. (Conf. Rept. p. 12) In order to reserve the decision to the classifying agency, it is necessary to consider documentary material contained in one agency's files which has been classified by another agency as being an "agency record" of the latter rather than the former. This seems

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9/ Congress' intent that unauthorized dissemination of classified materials carry with it serious consequences is evidenced in Title 18 of the U.S. Code, which provides for criminal penalties for such actions. 18 U.S.C. §§ 794, 798 (1976).

10/ In referring these documents to the FBI for direct handling by that agency, the CIA followed a well-established practice in this jurisdiction. See, e.g., Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Federal Bureau of Investigation, 458 F. Supp. 798, 800 (D.D.C. 1978).

> a permissible construction, since the phrase is nowhere defined and it is unrealistic to regard classified documentary material as "belonging" to one agency for the purposes here relevant when primary control over dissemination of its contents, even within the Government, rests with another agency. Thus, when records requested from one agency contain documentary material classified by another agency it would appear appropriate to refer those portions of the request to the originating agency for determination (as to all matters) under the Act.

The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, United States Department of Justice, February, 1975, at pp. 2-3. (Emphasis added.)

This reasoning is consistent with, and is supported by, the approach taken by this Court in a recent case involving Congressional documents in the possession of the CIA, wherein the Court held that whether a document is an agency record depends upon whether it is subject to the free disposition of the agency with which the document resides. Goland v. Central Intelligence Agency, 197 U.S. App. D.C. ____, ____, 607 F.2d 339, 346-47 (1978), cert. denied, 48 U.S.L.W. 3062 (March 17, 1980).

As discussed in Part I, supra, Goland involved a FOIA request for certain records in the CIA's possession relating to the legislative history of its organic statutes. The documents sought included, inter alia, a transcript of certain Congressional committee hearings conducted in Executive Session. A copy of the transcript, bearing the designation "Secret," had been transmitted to the CIA, for its internal reference purposes only. Relying on both the circumstances attending the transcript's generation and

the conditions attached to its possession by the CIA, this Court concluded that it was not an "agency record" of the CIA for purposes of plaintiff's FOIA request:

> . . . [T]he document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a "trustee" for Congress. Under these circumstances, the decision to make the transcript public should be made by the originating body, not by the recipient agency.

197 U.S. App. D.C. at ____, 607 F.2d at 347 (footnotes omitted).

Indeed, in reaching this conclusion, this Court cited with approval the following language from an earlier version of the Attorney General's FOIA memorandum:

> Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold . . . Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency.

Id. at ____, 607 F.2d at 347-48 n. 46, quoting from the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967), at 24.

The approach established in the 1974 Attorney General's FOIA Memorandum and used by the Court in Goland has also been utilized by other agencies and courts in determining whether a document in the possession of a non-originating agency is an "agency record" under FOIA so as to require the recipient agency to respond to the

request without referring it to the originating agency.[11] See, e.g., Cook v. Willingham, 400 F.2d 885 (10th Cir. 1968) (per curiam) (presentencing reports are not "agency records" since they remain in the exclusive control of the courts); United Broadcasting Co., Inc., 58 F.C.C.2d 1243, 1245 (1975) (FCC withheld probationary report because it, "like a presentencing report, properly belongs to the Court for which it was made, and is therefore not capable of release under FOIA"); Friendly Broadcasting Co., 55 F.C.C.2d 775 (1975) (FBI reports referred to that agency for processing because they had been provided to the FCC on the condition that their contents would not be distributed outside of the FCC).[12]

11/ This Court's dictum in Founding Church of Scientology v. Bell, 195 U.S. App. D.C. 363, 603 F.2d 945 (1979), in connection with the referral practice at issue here, does not compel a contrary result. There, this Court observed in passing that "the agency that received the initial FOIA request retains responsibility for producing the document." Id. at 371 n. 54, 603 F.2d at 953 n. 54. There is nothing in the Court's opinion, however, to suggest that the documents there referred by the FBI to other agencies that had "originally prepared" them were classified or were for any other reason not subject to the "free disposition" of the Bureau, Goland, supra, 607 F.2d at 347. Moreover, the Court in fact expressly premised its affirmance of the district court's ruling on the grounds that the documents at issue were also the subject of other FOIA litigation brought by the same plaintiff against the originating agencies themselves, making it more appropriate to defer to the other courts already dealing with the same issues. Founding Church, 195 U.S. App. D.C. at 371 n. 54, 603 F.2d at 953 n. 54.

12/ Cf. Forsham v. Harris, ____ U.S. ____, 48 U.S.L.W. 4232, 4236 (March 3, 1980) (finding that FOIA's structure reflects "a judgment that records which have never passed from private to agency control are not agency records . . ." (emphasis in original); Kissinger v. Reporters Committee for Freedom of the Press, ____ U.S. ____, 48 U.S.L.W. 4223, 4227 (March 3, 1980) (agency possession or control is prerequisite to triggering any duties under FOIA).

Contrary to appellant's assertions, moreover, the practice of referring classified agency documents to the originating agency is fully consistent with FOIA's purposes. As the Court of Appeals for the Ninth Circuit noted in SDC Development Corp. v. Mathews, 542 F.2d 1116, 1119 (9th Cir. 1976), FOIA was enacted to enable the public "to obtain information about the internal workings of their government." In this case, the CIA is not seeking to "mask its processes or functions from public scrutiny," SDC, supra, at 1120, but rather to channel access to sensitive classified information in a rational and efficient manner. Moreover, the referrals made here avoided the possibility, inter alia, that appellant's request might be afforded different treatment by two different agencies, or inadvertently different treatment in different contexts, since the documents at issue are also the subject of an independent FOIA request made by appellant directly to the Bureau. Wood Affidavit, ¶ 7 and Exhibit B thereto (App. 82-90. 7/12/78

Finally, the fact that the FBI is not a party to this action would have precluded the district court from fashioning any meaningful relief, since the Bureau is the only agency that possesses the legal authority to decide whether declassification of the documents is warranted. Executive Order 12065, §§ 3-102, 3-103, 3 C.F.R. p. 196 (1979). Appellant's failure to join the Bureau as a party defendant, as he did NSA, however, does not leave him completely remediless since he already has pending with the FBI a direct request for these same documents; should the Bureau fail to respond satisfactorily to that request, he may, of course, proceed with any of the legal remedies available to him under FOIA.

This Court should not, however, condone an approach that would in effect impose responsibility upon a non-originating agency for determining whether to release classified documents belonging to another agency. The district court's grant of summary judgment for the CIA without regard to the FBI documents was proper under the approach used in Goland, and should be affirmed.

IV. THE CIA'S AFFIDAVITS WERE EFFECTIVELY UNCONTROVERTED AND ADEQUATELY SUPPORTED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

A. The CIA's affidavits adequately supported its Exemption 3 and Exemption 6 claims.

1. Exemption 3.

This Court has held, on a number of occasions, that

> [i]f exemption [of documents under FOIA] is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.

Weissman v. CIA, supra, 184 U.S. App. D.C. at 122, 565 F.2d at 697. Although originally formulated in the context of an Exemption 1 case, these considerations have been held equally applicable to Exemption 3 when the statute providing the criteria for withholding is, as here, in furtherance of national security interests. Ray v. Turner, 190 U.S. App. D.C. 290, 298, 587 F.2d 1187, 1195 (1978). As the Ray Court observed: "Whether there is a 'sufficient description' to establish the exemptions is, of course, a key issue." Id. at n. 22.

The affidavits filed by the CIA in support of its motion for summary judgment demonstrate that the agency met its burden of establishing that the documents withheld in whole or in part contain information whose disclosure would reveal either "intelligence sources and methods" (50 U.S.C. § 403(d)(3)) or the "organization, functions, names, official titles, salaries, or number of personnel employed by" the CIA (50 U.S.C. § 403g). Paragraphs 7 through 18 of the May 25, 1978 Affidavit of Robert Owen ("First Owen Affidavit") (App.), set forth in detail the reasons for protecting certain kinds of information that the Agency has claimed as exempt in this case, ranging from the identity of its intelligence sources and the existence of foreign liaison arrangements to the locations of CIA installations abroad, the existence, application, and capabilities of its various intelligence methods, and the Agency's use of cryptograms and pseudonyms. Such types of information have been recognized by this Court as protected by 50 U.S.C. § 403. Goland, supra, 197 U.S. App. D.C. at ____, 607 F.2d at 351. The affidavit also explains why official confirmation by the Agency of any such information that may have previously been "leaked" or otherwise made known to the public in the form of rumors could result in retaliatory action directed at this country's intelligence operations.

The Document Disposition Index accompanying the First Owen Affidavit identifies each document withheld in whole or in part and, where applicable, identifies for each deletion the kind or category of information withheld and the precise exemption or exemptions

claimed, thus satisfying the specificity required by this Court for affidavits supporting Exemption 3 claims. First Owen Affidavit, Document Disposition Index (App.).[13/] A similar index accompanying Mr. Owen's Supplemental Affidavit, filed October 6, 1978, describes in even greater detail the documents withheld in toto. October 6, 1978 Affidavit of Robert Owen ("Second Owen Affidavit"), Document Disposition Index (App.). The document descriptions set out in the Zellmer Affidavit and the First Gambino Affidavit are similarly detailed (App.).

2. Exemption 6.

In order to prevail upon an Exemption 6 claim, it has been held in this jurisdiction that an agency's affidavit must contain

> [s]ufficiently detailed information that [the district court] may balance the identified individual's right to privacy against the public's right to the information, excluding information the disclosure of which would prove harmful.

Serbian Eastern Orthodox Diocese, supra n. 10, 458 F. Supp. at 803. The relevant portions of the affidavits filed by the CIA in support of its Exemption 6 claims demonstrate that the district court correctly concluded that the agency had met this burden.

Paragraph 20 of the First Owen Affidavit (App.) describes the basis for exempting pursuant to 5 U.S.C. § 552(b)(6) certain information pertaining to individuals named or otherwise identified therein:

13/ See Ray, supra, 190 U.S. App. D.C. at 299, 587 F.2d at 1196 (affidavit is glaringly defective if it "lumps the exemptions together and fails to identify whether different exemptions are claimed as to different parts of each document").

> . . . 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. In many instances, in which the private activity of individuals is described or referred to in CIA documents, it is only because those individuals were temporarily mistaken for Mr. James Earl Ray during a period when he was a fugitive from justice. . . . 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. 14/

Affidavits containing statements identical to these have consistently been held sufficiently specific to discharge the agency's obligation to demonstrate that disclosure would result in a clearly unwarranted invasion of privacy. Id. at 803; Cerveny v. CIA, 445 F. Supp. 772, 776 (D. Colo. 1978). Accordingly, the district court was correct in finding the CIA's affidavits plainly adequate to support its Exemption 6 claims, and its decision should be affirmed.

B. There were no genuine issues of material fact to preclude the district court from granting summary judgment for the CIA.

In addition to contending that the CIA's affidavits were facially inadequate, appellant asserts that the affidavits he filed

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14/ Examination of relevant portions of the Document Disposition Index accompanying Mr. Owen's affidavit and the corresponding documents confirms that the CIA attempted to balance these competing interests and to narrow the information withheld to the minimum necessary to protect privacy. In most instances, the single item deleted pursuant to Exemption 6 was the name (or other identifying information) of an individual who had been temporarily mistaken for Mr. Ray. See, e.g., the description of Documents 224, 227, 233, 235, 238, 245, 251 (App.). This juxtaposition of the deletions with the content of the information released enabled the district court to determine the propriety and contents of the deletions. Serbian Eastern Orthodox Diocese, supra n. 10, 458 F. Supp. at 802.

controverted those offered by the CIA, thereby raising genuine issues of material fact that rendered summary judgment inappropriate. Primarily appellant argues that factual issues exist concerning both the adequacy of the CIA's records search and the validity of its Exemption 3 claims for certain information concerning the CIA's operations that appellant asserts has become "public knowledge." As shown below, the relevant affidavits readily demonstrate that no such factual issues have been shown to exist.

The adequacy of the CIA's search for records responsive to appellant's request has been discussed at length in Part I, supra. To avoid unnecessary repetition, appellees would respectfully refer the Court to that portion of their brief for their position on the adequacy of the search and the weight to be accorded appellant's "claims of bad faith [and] misrepresentation." Ray, supra, 190 U.S. App. D.C. at 298, 587 F.2d at 1195.

Appellant also contends that summary judgment was inappropriate with respect to certain of the CIA's Exemption 3 claims because his affidavits controvert the Agency's assertion of the secret nature of the information at issue. Appellant argues, in effect, that any information withheld by the CIA that can be shown to be "already public knowledge" cannot qualify for exemption under 5 U.S.C. § 552(b)(3) as applied here.

First, it must be borne in mind that appellant's affidavits do not "establish" that any of the information denied to him by

the CIA in this case is in fact already in the public domain. Appellant's affidavits, vast segments of which describe other FOIA requests he has made that are not the subject of this appeal, consist primarily of highly generalized and completely unsubstantiated allegations pertaining to the CIA's "bad faith" and "obstructionist tactics."[15/] This Court has held that such bare assertions of wrongdoing are not to be accorded much deference when juxtaposed, as here, against Agency affidavits that are facially adequate and that are to be accorded substantial weight. Ray, supra, 190 U.S. App. D.C. at 298, 587 F.2d at 1195.

Second, appellant's argument is obviously oversimplistic given the nature of the particular statutes involved here. To prevent the CIA's intelligence functions from being jeopardized or compromised, the relevant portions of the CIA's organic statutes, 50 U.S.C. §§ 403(d)(3) and 403g, prohibit unauthorized disclosure of information concerning "intelligence sources and methods," including the "organization [and] functions" of Agency personnel. Regardless of whether such information may have already surfaced in the form of rumors or leaks, official confirmation by the CIA of particular information pertaining to intelligence methods or sources could potentially endanger the agency's intelligence functions. First Owen Affidavit, ¶¶

15/ Careful examination of appellant's allegations in this respect confirms the baselessness of his claims. Two of the three "examples" offered by appellant of the agency's alleged withholding of information in the public domain in fact do not pertain to information at issue in this case. In the third example, appellant claims the agency has withheld the name of a city, but does not identify in what document or documents the agency has allegedly withheld this information. See Appellant's Brief at 23-24.

10, 13, 15, 16 (App.). As the Fourth Circuit Court of Appeals observed, when presented with a similar argument:

> It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so.

Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 992 (1975).

Accordingly, even assuming arguendo that appellant's affidavits established that the CIA has refused to release documents containing identifiable information that is already in the public domain, that fact alone would not preclude a grant of summary judgment in the Agency's favor on those Exemption 3 claims. Accordingly, this Court should hold that the district court was correct in finding no genuine issues of material fact to preclude the entry of summary judgment in appellees' favor.

CONCLUSION

For the reasons stated above, appellees respectfully request that the decision of the district court be affirmed.

Respectfully submitted,

ALICE DANIEL,
Assistant Attorney General,

CHARLES F. C. RUFF,
United States Attorney,

LEONARD SCHAITMAN,
MARGARET E. CLARK,
Attorneys,
Civil Division,
Department of Justice,
Washington, D. C. 20530,
Phone: (202) 633-3395.

STATUTORY ADDENDUM

5 U.S.C. 552

The pertinent provisions of 5 U.S.C. 552 are as follows:

§552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does 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;

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

* * * * *

18 U.S.C. SECTION 794

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

18 U.S.C. SECTION 798

§ 798. Disclosure of Classified Information

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information--

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section--

The term "classified information" means information which, at the time of a 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;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

50 U.S.C. 403

The pertinent provisions of 50 U.S.C. 403 are as follows:

§ 403. Central Intelligence Agency

* * * * *

(d) Powers and duties

For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the 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, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: 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 Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

* * * * *

§ 403g. Protection of nature of Agency's functions

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 sections 1 and 2 of the Act of August 28, 1935 (49 Stat. 956, 957; 5 U.S.C. 654), 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: Provided, That in furtherance of this section, the Director of the Office of Management and Budget shall make no reports to the Congress in connection with the Agency under section 607 of the Act of June 30, 1945, as amended (5 U.S.C. 947(b)).

EXECUTIVE ORDER 11652
3 C.F.R. (1975), pages 681-682

The pertinent provisions of Executive Order 11652 are as follows:

SEC. 3. Authority to Downgrade and Declassify. The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

EXECUTIVE ORDER 12065
3 C.F.R. (1979), page 196

The pertinent provisions of Executive Order 12065 are as follows:

SECTION 3. DECLASSIFICATION AND DOWNGRADING.

3-1. Declassification Authority.

3-101. The authority to declassify or downgrade information classified under this or prior Orders shall be exercised only as specified in Section 3-1.

3-102. Classified information may be declassified or downgraded by the official who authorized the original classification if that official is still serving in the same position, by a successor, or by a supervisory official of either.

3-103. Agency heads named in Section 1-2 shall designate additional officials at the lowest practicable echelons to exercise declassification and downgrading authority.

3-104. If the Director of the Information Security Oversight Office determines that information is classified in violation of this Order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the National Security Council. The information shall remain classified until the appeal is decided or until one year from the date of the Director's decision, whichever occurs first.

3-105. The provisions of this Order relating to declassification shall also apply to agencies which, under the terms of this Order, do not have original classification authority but which had such authority under prior Orders.