UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY SHAW,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 80-1056
	)	
DEPARTMENT OF STATE, et al.,	)	
	)	
Defendants.	)	
	)	

MOTION OF DEFENDANT CENTRAL
INTELLIGENCE AGENCY FOR SUMMARY JUDGMENT

Defendant Central Intelligence Agency (CIA), respectfully moves the Court to grant summary judgment in its favor on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law.

In support of this motion, defendants file affidavits of the following persons:

Gerald L. Liebenau, Information Review Officer for the Directorate of Operations, CIA

John E. Bacon, Information and Privacy Coordinator, CIA

Alfred G. Scholle, Acting Director, Office of Regulations and Rulings, United States Customs Service

James P. Collier, Drug Enforcement Administration Special Agent

Thomas W. Ainsworth, Acting Deputy Assistant Secretary for the Classification/Declassification Center of the Department of State

Defendants are also filing copies of the requested documents as released by the CIA.[1/]

A statement of material facts and a memorandum of points and

1/ The release to plaintiff is by means of the service copy of this motion and accompanying papers.

authorities are filed as well, and defendant submits a proposed order.

Respectfully submitted,

CHARLES F. C. RUFF
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

NATHAN DODELL
Assistant United States Attorney
United States District Courthouse
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the request of James H. Lesar, Esq., one of plaintiff's counsel, of the office of Bernard Fensterwald, Jr., Esq., Fensterwald & Associates, 2101 L Street, N.W., Suite 203, Washington, D.C. 20037, I have telephoned the office of plaintiff's counsel this 3rd day of December, 1980 to advise that the foregoing motion of defendant Central Intelligence Agency for summary judgment, statement of material facts, memorandum of points and authorities, Liebenau, Bacon, Scholle, Collier and Ainsworth affidavits, documents as released by CIA to plaintiff, and proposed order, are available to be called for at my office.

NATHAN DODELL
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	)	

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

1. When plaintiff's Freedom of Information Act (FOIA) requests were received in the Central Intelligence Agency's (CIA's) Information and Privacy Division, a determination was made as to which components of the Agency might logically possess records which might be responsive to plaintiff's request. Copies of plaintiff's requesting letters were forwarded to each such component with instructions that a search be made for any responsive documents. Bacon affidavit, ¶6.

2. In response to the searches conducted for plaintiff's FOIA request, a total of 207 CIA records were retrieved. The disposition of all of the CIA records retrieved is dealt with in the Liebenau affidavit. Bacon affidavit, ¶7.[1/] A document-by-document index is included with the Liebenau affidavit, together with a copy of the documents as released to plaintiff.

3. The documents retrieved in response to plaintiff's FOIA request generally concern the suspected criminal activities of several individuals. Although CIA has no police powers, the Agency provides intelligence assistance to various law enforcement agencies, including the Drug Enforcement Agency (DEA) and the Customs Service, in foreign countries. The records in this case reflect the efforts of the CIA in collaboration with U.S. law enforcement agencies and with a number of foreign intelligence

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1/ There were certain records, originating with other U.S. government agencies, which were referred to those agencies for direct response to plaintiff. Bacon affidavit, ¶7. In other instances, some information in CIA documents originated with other U.S. government agencies. In the latter instances, there has been coordination with the originating agencies and the documents are dealt with in detail in the index and affidavits filed herewith. Liebenau affidavit, ¶24.

and security services to establish the location of several foreign nationals in foreign countries and to confirm the identities of such persons. The individuals were of interest because of their alleged involvement in bringing narcotics into the United States illegally. Liebenau affidavit, ¶4.

4. The review of an intelligence agency's records for possible release under the FOIA is typically a difficult and troubled endeavor. A major responsibility of the CIA is to protect against the unauthorized disclosure of United States secrets. The secrets the CIA is responsible for are generally those which relate directly to the nation's security. While the review of such documents in response to an FOIA request must ensure that all possibly releasable information is disclosed, the review must also ensure that all information requiring continued protection is not disclosed. The reviewer must, therefore, be able to recognize any secret information contained in each document. This entails a substantive familiarity with the circumstances in which a document was originated. Moreover, the document cannot be reviewed in isolation. It must also be examined in terms of the sequence of communications of which it is a part. The review must also encompass related information which may not be contained in the sequence of communications but which may have become part of the public record concerning the same events and circumstances. The unintentional disclosure of secrets is frequently the consequence of piecemeal disclosures, many of which might have been individually innocent of real meaning, but which cumulatively may disclose the real secret. Each document is, thus, capable of making a disclosure of much greater significance than is evident from the face of the individual document.

5. In every case in which a record was found to have a mixture of exempt and releasable information, the exempt information was deleted and the intelligible portion of the remainder of the document was released. Liebenau affidavit, ¶6.

Exemption 1--Classified Information

6. The documents which have been withheld, in part or in entirety, because of the classified information contained in them, were reviewed under the criteria established in Executive Order 12065. The kinds of classified information contained in the various pertinent documents fall in one or more of the following categories provided in Executive Order 12065:

a. foreign government information; 1-301(b),

b. intelligence activities, sources and methods, 1-301(c),

c. foreign relations or foreign activities of the United States, 1-301(d).

Liebenau affidavit, #7. See Ainsworth affidavit, pages 1-3.

Intelligence Sources

7. Intelligence sources can be expected to furnish information only so long as they feel secure in the knowledge that they are protected from retribution or embarrassment by the pledge of confidentiality that surrounds the information transaction. Libenau affidavit, ¶10. The pledge of secrecy, as a condition precedent to cooperation with American intelligence, is absolute in its terms and goes beyond a mere assurance that some discretion will be exercised in determining how or when information is publicly released. Such a guarantee must go beyond arbitrarily established time limits. Liebenau affidavit, ¶11.

8. Intelligence sources who provide intelligence on the activities of narcotics traffickers are particularly vulnerable to exposure. Narcotics traffickers take great pains to insure that the smallest possible number of people know enough about their activities to be able to damage them by exposing them to law enforcement authorities. Thus anyone who does inform on them is immediately vulnerable to retaliation when action is taken by law enforcement agencies based on such reporting. The retaliation is usually violent and sometimes lethal. Libenau affidavit, ¶12.

Foreign Intelligence and Security Services

9. Foreign intelligence and security services frequently collaborate with the CIA. To the extent that such services share their intelligence information with the CIA, they are intelligence sources of the CIA. Liaison arrangements between CIA and foreign government services usually include a reciprocal understanding of confidentiality. Such arrangements include provisions to protect shared intelligence information against unauthorized disclosure. Failure to abide by such arrangements can cause a disruption of a productive liaison arrangement and in fact can produce the termination of such arrangements. On principle such arrangements warrant protection. Some of the most significant sources of foreign intelligence information for the United States are foreign intelligence services. In many areas of the world in which United States citizens are not welcome, intelligence sources available to friendly foreign intelligence services have proven an invaluable substitute. Such services frequently constitute an effective arm of United States intelligence when they can accomplish the objectives of United States intelligence in a manner or an area in which United States intelligence cannot function. Documents which contain information supplied by a foreign intelligence service, or which reveal the existence and possibly the nature of an intelligence liaison arrangement with an identified foreign government component, must remain classified in accordance with the liaison arrangements with the foreign service and any arrangement established with that government or service. Any unauthorized release or other incident that suggested or proved to the foreign service that the CIA was unwilling or unable to provide the kind of protection that service expected with regard to its intelligence information could cause potentially serious damage to the liaison relationship and, consequently, to the United States national security interests. The intelligence operations and the intelligence sources of the foreign service

that produced the information would be put in hazard and the willingness of that service to trust CIA with further intelligence secrets would also be put in hazard. Liebenau affidavit, ¶13. See also, ¶14-16

Intelligence Methods

Secret intelligence methods are not likely to work once known to those against whom they are used. This is true whether the intelligence methods are those used in the collection of intelligence information or in the analysis and evaluation of intelligence information for the purpose of preparing intelligence studies or estimates. Secret information collection techniques or devices can be as vital to intelligence agencies as secret weapons can be to military forces. In some situations, intelligence methods which may no longer in themselves be secret are used in circumstances which require secrecy. Then it is the fact of their use that must be protected. For example, it is no secret that CIA maintains liaison with foreign intelligence and security services. To acknowledge, however, that CIA maintains a liaison arrangement with a specific intelligence or security service is to acknowledge an intelligence method which the CIA may not do without risking damage to the arrangement. The fact that CIA uses "cover" arrangements for many of its personnel abroad is no longer a secret. However, which officers are under cover, or in what countries CIA uses a specific cover, are intelligence methods requiring continued protection. The cover provides the protection of a camouflage which enables the officers to pursue their official duties with less chance of discovery by hostile intelligence and security services. Liebenau affidavit, ¶17.

CIA Stations Abroad

Information which reveals the existence of a CIA station in a specific country or city abroad or which discloses the fact that CIA conducts intelligence operations in any given

country abroad must also be withheld to protect against unauthorized disclosure. A CIA presence abroad, even in a friendly country, is likely to be condoned only as long as it does not have to be officially acknowledged. While it is generally known and widely accepted that nations conduct secret intelligence operations against other nations, traditionally, and for practical reasons in the conduct of foreign affairs, nations rarely officially acknowledge engaging in such activities against specific foreign countries. While all nations are, of course, aware that they may be the targets of clandestine intelligence operations and may even unofficially acknowledge this fact, no government is likely to be willing to tolerate an official acknowledgement by another government that intelligence operations have been conducted against it. When such official acknowledgment does, however, occur, the nation that has been the target of such an operation will probably take some appropriate action in its defense. The nature of the action taken by the offended nation will be in proportion to the perceived offense. Liebenau affidavit, ¶18.

Cryptonyms and Pseudonyms

12. Cryptonyms and pseudonyms are intelligence methods used to protect against the unauthorized disclosure of intelligence activities and identities of intelligence sources. Cryptonyms and pseudonyms are code words or pen names used to conceal the true identity of some thing or some person. Such devices are used in intelligence documents as an additional measure of security against the unintended event of an intelligence document coming into the possession of a hostile foreign power. A cryptonym or a pseudonym carries a great deal of meaning for those who are able to fit it into the proper cognitive framework. For example, knowing that a particular foreign government official stands behind the mask of a cryptonym permits the reader not only to assess the significance of the information but also to take action to negate the continued ability of the official as an intelligence source. Thus if a

document is lost or stolen, the use of cryptonyms and pseudonyms prevents the breach of security from being more serious than it mightotherwise be. The release of cryptonyms and pseudonyms in the aggregate could make it possible to fit disparate pieces together and discover the source's identity or the nature and purpose of the project. In some such circumstances, the accumulation of data in the factual settings within which the cryptonyms and pseudonyms appear is of such a descriptive nature that a collection of such documents could reveal to the knowledgeable reader the true identify of the persons and activities protected. Consequently, cryptonyms and pseudonyms are exempt from release to protect against unauthorized disclosure of intelligence sources and methods. Liebenau affidavit, ¶19.

Exemption 3--Intelligence Sources and Methods

13. The categories of information described in paragraphs 6 through 12, above, relate to intelligence sources and methods and are, thus, withheld pursuant to FOIA exemption (b)(3) which relates to matters that are:

> (3) specifically exempted from disclosure by statute (other than 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

50 U.S.C. § 402(d)(3) provides that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. This statute, thus, invokes FOIA exemption (b)(3) when such information is found in responsive documents. In those instances when the nature of the information is such that the unauthorized disclosure could reasonably be expected to cause at least identifiable damage to national security interests pursuant to Executive Order 12065, the information is also withheld pursuant to FOIA exemption (b)(1). Libenau affidavit, ¶20.

Exemption 3--CIA Staff Employees and Organizational Components

14. As a further measure taken to protect intelligence

sources and methods pursuant to section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 403g, provides that the CIA is exempt from the provisions of any other law requiring the disclosure of information regarding the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency. Consequently, a numer of CIA staff employees' names and other personal identifiers of individuals, who have not been previously acknowledged as CIA staff employees, have been deleted. Additionally, the titles or other organizational identifiers of a number of organizational components which have not been publicly acknowledged previously have also been deleted. In those instances in which the disclosure of such information could also result in identifiable damage to the national security, the information is also withheld pursuant to FOIA exemption (b)(1). Liebenau affidavit, ¶21.

Exemption 5--Interagency Deliberations

15. In one instance, assessments made by U.S. government officials on aspects of negotiations with a foreign country were withheld under exemption 5. Ainsworth affidavit, page 2. The two paragraphs containing the assessments were also withheld under exemption 1. Ibid.

Privacy, Exemptions 6, 7(C)

16. Certain information has been withheld to protect against a clearly unwarranted invasion of personal privacy that would occur if the information were publicly disclosed. The predictable damage to the individuals' privacy, including the potential damage to the individuals' reputation and livelihood was weighed and balanced against the benefit to the general public that would flow from the release of the information. Liebenau affidavit, ¶22; see Ainsworth affidavit, page 2; Scholleaffidavit, ¶4; Collier affidavit, ¶6a. In the case of the Liebenau affidavit, Exemption 6 was invoked. In the case of the other three affidavits, Exemption 7(c) was invoked.

Exemption 7--Confidential Source

17. Title 5, United States Code, Section 552(b)(7)(D), sets forth an exemption for information the disclosure of which would reveal the identity of confidential sources and confidential information furnished by confidential sources. Such information was received in the course of criminal investigations. Members of foreign law enforcement authorities in their official and private capacities supply information to DEA on a routine basis. That information is supplied with the understanding that such information will be kept in confidence. If DEA is compelled to disclose information that is provided to it in confidence by foreign authorities, who are not statutorily subject to the provisions of the Freedom of Information Act (5 USC 552), there is a danger that the free exchange of information between those sources and DEA would be diminished and DEA's ability to accomplish its mission would be jeopardized. Police agencies, officials, and police associations have expressed concern to DEA about the integrity of the information they furnish to DEA. They have also indicated to DEA that their identities and interest in cooperative investigative matters must be protected and not disclosed to requesters pursuant to 5 USC 552. Confidential enforcement information details received from foreign law enforcement agencies were specifically withheld from the plaintiff in this case. Collier affidavit, ¶6b.

18. The identities and information supplied by persons who offered to cooperate with DEA were withheld from disclosure. These were individuals who knowingly offered information to agents of the Drug Enforcement Administration with the assurance, either implied or otherwise, that their identities and the information they supplied would be held in confidence. Any release of information that could identify these individuals would not only invade their privacy, but could subject them to personal harm, and would impede DEA's ability to obtain future information regarding violators of the federal drug laws. The identities of cooperating informants and the information they supplied were withheld from the plaintiff in this action. Collier affidavit, ¶6b; see Scholle affidavit, ¶4.

Exemption 7F--Safety of Law Enforcement Personnel

19. The names and identities of DEA Special Agents, Supervisory Special Agents, and foreign law enforcement officers have been deleted in accordance with Title 5, United States Code, Section 552(b)(7)(F), which sets forth an exemption for material the disclosure of which would endanger thelife or physical safety of law enforcement personnel. DEA Special Agents and Supervisory Special Agents, as well as members of other law enforcement entities, are frequently called upon to conduct a wide variety of investigations, including sensitive and dangerous undercover operations. Special Agents routinely approach and associate with violators in a covert capacity. Many of those violators are armed and many have known violent tendencies. It has been the experience of DEA that the release of Special Agents' identities has, in the past, resulted in several instances of physical attacks, threats, harassment, and actual murder of undercover and other DEA Special Agents. If the deleted names of Special Agents were released pursuant to the Freedom of Information Act, DEA would be consequently releasing this data to the public realm. DEA does not consider it to be in the public interest to release the identity of its Special Agents. To the contrary, DEA considers public interest to be best served through the nondisclosure of the identity of Special Agents so that they may effectively pursue their undercover and investigatory assignments. These assignments are a necessary element in support of DEA's objective--the suppression of the illicit traffic of narcotics and dangerous drugs. Public disclosure of the identities of investigatory personnel would have a detrimental effect on the successful operation of DEA. Collier affidavit, ¶6c.

General Information

20. Plaintiff basically made three FOIA requests. He requested CIA records on Jean Souetre, also known as Michal Roux and also known as Michal Hertz. The responsive records retrieved

are those numbered 176 through 188. He requested CIA records on Michael Victor Mertz and Christian David. The responsive records are those numbered 1 through 175 and 189 through 207. He requested CIA records on Thomas Davis III, deceased. No records were found. The documents concerning Souetre fall in a time period of 1961 through 1963. The documents concerning Christian David fall in a time period of 1972 and 1973 with a few additional documents in 1975.

The Index

2. As part of the Liebenau affidavit, there is included a Document Disposition Index. In it, the documents retrieved in response to the FOIA requests of the plaintiff are identified. The disposition of the documents pursuant to the FOIA is described. The nature of the substance withheld is identified, and the relevant paragraphs of the Liebenau affidavit are cited to identify the rationale of the various withholdings in each document.[2/] The index consists of a four-page explanatory preface and subsequent pages dealing with the deletions and withholding document-by-document. In almost all instances, there is a separate page for each document.

Respectfully submitted,

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2/ Where applicable, the index refers to the affidavits of DEA, Customs and State (which are filed herewith).

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF CENTRAL
INTELLIGENCE AGENCY FOR SUMMARY JUDGMENT

Introduction

The facts are stated in detail in the Statement of Material Facts, filed herewith.[1/] To avoid repetition, we respectfully refer the Court to that narrative.

Discussion

I. Exemption 1

The Liebenau affidavit explains the invocation of Exemption 1. ¶7-19.[2/] Mr. Liebenau also states that, in reviewing the documents, he has determined that the disclosure of the classified portions would at least cause identifiable damage to the national security interests of the United States. ¶7.

Our Court of Appeals recently made a thorough analysis of Exemption 1 in Lesar v. United States Department of Justice,* ____ F.2d ____, C.A.D.C. No. 78-2305, July 15, 1980. The Court recounts

1/ A specific and detailed statement of material facts has been filed as called for in Gardels v. Central Intelligence Agency, ____ F.2d ____, C.A.D.C. No. 80-1253, October 30, 1980, slip opinion at 9.

2/ In the case of four CIA documents, the classification of information that originated with the State Department has been explained by Mr. Ainsworth of that Department. Ainsworth affidavit, pages 1-3.

*/ Case principally relied upon are marked by an asterisk.

the averments of the affidavit filed there, Slip opinion, at 17, and concludes:

> We are persuaded that the affidavit of Agent Small provided the district court with a sufficient basis to make a reasoned de novo decision. Contrary to appellant's contention, this is not an instance in which the description of the documents provided in the Department's affidavit is too vague. The affidavit provides with reasonable specificity the nature of the documents at issue and the potential harm that would follow from disclosure of the information. A more particularized description of the type of intelligence source involved, i.e., a businessman or a foreign diplomat, could in itself reveal the sensitive nature of the information at issue. Likewise, a more precise indication of the type of intelligence cooperation between foreign governmental agencies and the FBI would not only violate the agreement to maintain this information in confidence, and thus disclose the sensitive nature of the materials, but also reasonably could be expected to impair future intelligence exchanges as a result. Slip opinion, at 18 (Emphasis added).

In Ray v. Turner, 587 F.2d 1187, 1194 (C.A.D.C., 1978), the Court had referred to the legislative history citing the executive's "unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." The Court quoted S. Rep. No. 93-1200, 93d Cong. 2d Sess. 12 (1974). See also Weissman v. C.I.A.,* 565 F.2d 692, 697 (C.A.D.C., 1977); Baez v. United States Department of Justice,* _____ F.2d _____, C.A.D.C. No. 79-1881, August 25, 1980, Slip opinion, at 13-18.

Thus, while the FOIA requires the trial court to make a de novo review of the agency's classification decision with the burden to justify nondisclosure, 5 U.S.C. §552(a)(4)(B), the agency's classification decision is entitled to "substantial weight." See Goland v. CIA,* 607 F.2d 339, 353 (D.C.Cir. 1978), cert. denied, 100 S.Ct. 1312; Hayden v. National Security Agency,* 608 F.2d 1381 (D.C.Cir. 1979), cert. denied, 100 S.Ct. 2156; Ray v. Turner, 587 F.2d 1187, 1194-15 (D.C. Cir. 1978); Conference Report, S.Rep. No. 93-1200, 93d Cong, 2d Sess. 12 (1974). See 120 Cong. Rec. 36870 (1974)

(remarks of Sen. Muskie), quoted in Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977).[3/]

Further, the courts have consistently protected the type of classified material withheld here. In Snepp v. United States, 100 S.Ct. 763 (1980), the Supreme Court stated, in reference to foreign intelligence sources, that the "continued availablity of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents." 100 S.Ct. at 767.[4/] In Lamont v. Department of Justice, 475 F.Supp. 761, 770 (S.D.N.Y. 1979) the material withheld related to secret intelligence methods and sources, the FBI's cooperation with a foreign police agency that asked that its cooperation be kept confidential, the FBI's interest in a specific foreign relations matter and information classified by a foreign intelligence agency. The court found that the FBI's rationale for nondisclosure pursuant to the (b)(1) Exemption was valid and noted as follows:

> the Government's ability to gather intelligence information essential to national defense and security could be undermined if its secret sources and investigatory methods--whether used in domestic or foreign intelligence operations--were disclosed to the public, and the disclosure of the FBI's interest in a foreign relations matter or cooperation with a foreign police agency could not only damage the Bureau's ability to gather information but could also impair diplomatic relations.

In Raven v. Panama Canal Co., 583 F.2d 169 (1st Cir. 1978), the court noted that the release of documents containing information pertaining to intelligence sources and methods "could reasonably be expected to cause damage to the national security." 583 F.2d at 172. See also Bennett v. United States Department of Defense,

3/ While in Allen v. Central Intelligence Agency, ____ F.2d ____, C.A.D.C. 80-1380, November 12, 1980, the Court found fault with the affidavits there (Slip Opinion at 8), the specific, detailed affidavits here, and in particular the Liebenau affidavit, plainly satisfy the government's burden under Lesar, Baez, Weissman, Goland and Hayden.

4/ Indeed, section 1-303 of Executive Order 12065 provides that

> "[u]nauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security. (emphasis added).

419 F.Supp. 663 (S.D.N.Y. 1976).[5/]

In Halperin v. National Security Council, 452 F.Supp. 47 (D.D.C. 1978), aff'd, 612 F.2d 586 (D.C. Cir. 1980), plaintiff, a former official of the National Security Council, sought the disclosure of classified documents. There plaintiff contended that there was an issue of fact regarding the reasonableness of the classification decision and proposed the following procedures to the district court:

> plaintiff presses for an opportunity to examine the lists and the underlying documents in camera. After that examination plaintiff would furnish the court with his expert opinion on the prospect of danger to United States foreign policy and national defense from the disclosure he seeks. In support of this request he offers his own impressive credentials as a scholar and actor in the field of foreign policy and national security and offers, after examination of the documents, to show to the Court flaws in the reasons given by several incumbents for their opinions and classifications.

452 F.Supp. at 51. The Court refused to follow plaintiff's approach and in upholding the validity of the Government's nondisclosure stated that "(n)othing in this record or plaintiff's submission justifies the substitution of this Court's judgment or the informed judgment of plaintiff for that of the officials constitutionally responsibile for the conduct of United States foreign policy as to the proper classification of the two lists." Id.

In this case, the government has demonstrated that the material withheld logically falls into a classifiable category and that the agencies have conscientiously assessed the potential harm to the national security. Accordingly, the defendants are entitled to summary judgment with respect to the documents or portions thereof withheld under exemption (b)(1).

5/ Other cases include: DeViaio v. Kelley, 571 F.2d 538 (10th Cir. 1978) (documents identifying foreign country in which CIA station located, intelligence sources and methods); Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977) (material revealed clandestine intelligence operation and identified foreign intelligence source); Bell v. United States, 563 F.2d 484 (1st Cir. 1977) (protection of cryptographic and communications intelligence systems, methods and sources); Klaus v. Blake, 428 F.Supp. 37 (D.D.C., 1976).

II. Exemption 3--Materials Specifically Exempted From Disclosure By Statute

Exemption (b)(3) of the FOIA, 5 U.S.C. §552(b)(3), exempts from disclosure matters that are:

> (3) specifically exempted from disclosure by statute... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

This provision of the FOIA thus recognizes the existence of collateral statutes limiting the disclosure of information held by the government, and incorporates such statutes within the exemptions of the FOIA, provided that they meet specified criteria. In this case, the CIA has withheld information from the plaintiff because it falls within the provisions of 50 U.S.C. §§403(d)(3) and 403g.

Section 403(d)(3) was enacted as section 102(d)(3) of the National Security Act of 1947. It provides, in pertinent part:

> 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 [CIA], under the direction of the National Security Counsel --
>
> (3) to correlate and evaluate intelligence relating to the national security, provide for the appropriate dissemination of such intelligence within the Government ... And providedfurther, that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure. [Emphasis added].

Section 403g was enacted as section 6 of the Central Intelligence Agency Act of 1949, and provides, in pertinent part:

> In the interest of the security of the foreign intelligence activities of the United States and in order further to implement the provision 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 exempt from the provisions of [any law] which requires the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency... [Emphasis added].

In Halperin v. Central Intelligence Agency, * _ F.2d _, C.A.D.C. No. 79-1849, July 11, 1980, the Court held that:

> [T]he CIA has submitted reasonably detailed, nonconclusory statements showing the applicability of Section 403(d)(3),... these statements are plausible on their face, and ...the record contains no contrary evidence or evidence of Agency bad faith. Once substantial weight is given to these statements, there remain no substantial and material facts in dispute. The district court's grant of summary judgment is therefore entirely appropriate on the issue of disclosing names of attorneys. Slip opinion at 11, footnote omitted.

As to another issue in the same case (legal fees), the Court resolved the matter the same way holding:

> We must take into account...that each individual piece of intelligence information, much like a piece of a jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction. Viewed in this light, the Agency's statements offer sufficient plausible detail for a court to accord substantial weight to the statements and accept the Agency's expert judgment on the potential effects of disclosing legal fees. We therefore affirm the district court's application of section 403(d)(3) to this matter. Slip opinion at 12-13.

In addition, the court found the legal fees protected by Section

403g of Title 50. 6/

Without exception, courts have held that both the final provision of §403(d)(3) and §403g are statutes which qualify under exemption (b)(3) of the FOIA. E.g. Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978), cert. denied, 100 S. Ct. 1312; Baker v. CIA, 580 F.2d 664, 667, 668 (D.C. Cir. 1978); National Commission on Law Enforcement and Social Justice v. CIA, 576 F.2d 1373, 1376 (9th Cir. 1978); Weissman v. CIA, 565 F.2d 692, 694 (D.C. Cir. 1977).

Since §403(d)(3) and 403g are statutes within exemption (b)(3), the only remaining question is whether the information withheld is included within the statutes' protective compass. In Goland, the Court observed:

> Exemption 3 differs from the FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within that statute's coverage. 607 F.2d at 350.

See, Baker v. Central Intelligence Agency, supra, 580 F.2d at 669; National Commission on Law Enforcement v. Central Intelligence Agency, supra, 576 F.2d at 1376.

With particular reference to 50 U.S.C. §403(d)(3), the relevant inquiry is whether the information withheld could "reasonably

6/ It is respectfully submitted that Halperin ineluctably governs the result here. Cf. Sims v. Central Intelligence Agency, _ F.2d _, C.A.D.C. No. 79-2203, September 29, 1980, citing Halperin at 20, 22, 23. Halperin, which embodies the law in this Circuit, is especially significant because of the rich historical perspective it brings to the issues discussed.

be expected to lead to unauthorized disclosure of intelligence sources and methods." National Commission on Law Enforcement v. CIA, supra, 576 F.2d at 1377; Halperin v. CIA, 446 F. Supp. 661, 666 (D.D.C. 1978). In such an inquiry the agency's decisions are subject to de novo review under the FOIA, and the agency has the burden of establishing its claim to the exemption. Ray v. Turner, 587 F.2d 1187, 1195-95 (D.C. Cir. 1978). At the same time, since national security considerations are inherent in §403(d)(3), courts should accord "substantial weight" to the agency's judgment with respect to the national security considerations at issue. Hayden v. National Security Agency, supra; Ray v. Turner, supra, 587 F.2d at 1194-95. See discussion of Exemption (b)(1), above.

Looking, therefore, at whether the material which the CIA has withheld under §403(d)(3) could "reasonably be expected to lead to disclosure of intelligence sources and methods," National Commission on Law Enforcement v. CIA, 576 F.2d at 1377, and according substantial weight to the judgment of the agency in that regard, it is evident that the CIA has established its claim of exemption under (b)(3). Mr. Liebenau's affidavit demonstrates in detail that specific documents within plaintiff's request would identify foreign governmental and individual sources of foreign intelligence, disclose covert CIA installations abroad, cryptonyms and pseudonyms which must be kept secret to protect intelligence sources, and the CIA's intelligence methods.

Such information is squarely within the statutory provisions of §403(d)(3).

The CIA has also demonstrated that it has properly invoked exemption (b)(3) for material protected from disclosure by 50 U.S.C. §403g. This statute, as mentioned previously, specifically exempts the CIA from any law which would require disclosure of "the organization, functions, names, official titles, salaries,

or numbers of personnel employed by the Agency. . ." This provision expressly states that it was enacted "in order further to implement the provision of section 403(d)(3)" providing for protection of intelligence sources and methods. As a result, it represents a Congressional judgment that the CIA's need for secrecy is entitled to broad protection:

> The introductory clause of [§ 403g]. . . represents a legislative determination that the withholding of information concerning the CIA's internal structure will serve to protect the security of intelligence activities, sources and methods. Baker v. Central Intelligence Agency, supra, 580 F.2d at 667.

The Baker case holds, however, that despite the reference to § 403(d)(3), the CIA does not have to show any specific nexus to intelligence sources and methods in order to withhold information under § 403g. 580 F.2d at 667-68. It thus affirmed the denial of the information sought in that case even though it agreed that the information arguably did not involve intelligence sources and methods. 580 F.2d at 667. Section 403g thus provides an independent sphere of protection for the information specifically enumerated therein. In this case, the Liebenau affidavit fully explains the rationale for nondisclosure of the information within the protection of §403g.

It is submitted that defendants are entitled to summary judgment with regard to Exemption 3.

III. EXEMPTION 5

In the case of one document involved in this motion, Exemption 5 was invoked. Ainsworth affidavit, page 2. The passages deleted include assessments by U.S. government officials on how aspects of U.S. negotiations with a foreign country should take place with respect to certain extraditions. Ibid.[7/] The deletions that have been based on Exemption 5 are correct. Renegotiation Board v. Grumman Aircraft Engineering Corporation, 421 U.S. 168, 186-188 (1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); EPA v. Mink, 410 U.S. 73 (1973); Brinton v. Department of State,* ____ F.2d ___, C.A.D.C. No. 79-2032, September 3, 1980; Soucie v. David, 448 F.2d 1067, 1077 (C.A.D.C., 1971).

IV. PRIVACY -- EXEMPTIONS 6 AND 7(C)

In the case of the Ainsworth, Scholle and Collier affidavits, Exemption 7(C) is the basis of withholding information to protect against an unwarranted invasion of privacy. Such withholding is plainly authorized under Baez v. United States Department of Justice,* ____ F.2d ____, C.A.D.C. No. 79-1881; Lesar v. United States Department of Justice,* ___ F.2d ___, C.A.D.C. No. 78-2305, slip opinion at 29-31; Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir., 1978), cert. denied, 440 U.S. 964 (1979); Malloy v. United States Department of Justice, 457 F. Supp. 543, 546 (D.D.C. 1978).

The Liebenau affidavit invokes Exemption 6 to protect against clearly unwarranted invasions of privacy. Such withholdings under that exemption were limited to information concerning people other than those named as the subject of plaintiff's FOIA requests; and were further limited to information alleging participation in or awareness of unlawful activity which was not proven in the text of the document. In such cases, the predictable damage to the individuals' reputation and livelihood was weighed and balanced

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7/ Exemption 1 was also invoked with regard to the two paragraphs involved.

against the benefit to the general public that would flow from the release of the information. In the cases in which such information was withheld, it was because of a determination that the damage to the individuals outweighed the benefit to the public. Liebenau affidavit, ¶ 22.

Based on these considerations, Exemption 6 was properly invoked by the CIA. Rural Housing Alliance v. Department of Agriculture,* 498 F.2d 73 (C.A.D.C., 1974); Getman v. N.L.R.B., 450 F.2d 670 (C.A.D.C., 1971); Wine Hobby, Inc. v. United States Internal Revenue Service, 502 F.2d 133 (3rd Cir., 1974); Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3rd Cir., 1977); see Department of Air Force v. Rose, 425 U.S. 352 (1976).[8/]

V. EXEMPTION 7(D)

This Exemption was invoked in the Collier and Scholle[9/] affidavits to protect confidential sources and information received solely from a confidential source. Lesar v. United States Department of Justice,* ___ F.2d ___, C.A.D.C. No. 78-2305, July 15, 1980, slip opinion at 31 to 39 is the definitive authority on this issue, and shows that the invocation of Exemption 7(D) is valid. See also Nix v. United States, 572 F.2d 998 (4th Cir., 1978); Scherer v. Kelley, 584 F.2d 170 (7th Cir., 1978).

VI. EXEMPTION 7(F)

The Collier affidavit invokes Exemption 7(F) to protect the lives and safety of law enforcement personnel. In view of the nature of the criminal activities dealt with in the documents, it was correct to invoke Exemption 7(F) for this purpose. Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir., 1977); Shaver v. Bell, 433 F. Supp. 438, 441 (N.D. Ga., 1977).

8/ Because Exemption 6 was invoked to protect individuals against "embarrassing disclosures" which deserve protection, its invocation here is consistent with Smith Simpson v. Vance, ___ F.2d ___, C.A.D.C. No. 79-1889, September 25, 1980; see slip opinion, page 9.

9/ Exemption 7(D) was invoked as to only one document in the Scholle affidavit. ¶ 4.

CONCLUSION

For these reasons, it is submitted that the Motion of the Central Intelligence Agency for summary judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY SHAW, Plaintiff, v. DEPARTMENT OF STATE, ET AL., Defendants.	)	Civil Action No. 80-1056

O R D E R

This matter has come before the Court on the motion of the Central Intelligence Agency for summary judgment. The Court has considered the memoranda supporting and opposing the motion, and the entire record. It appears to the Court that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law. Accordingly, it is by the Court this ____ day of _____, 1981,

ORDERED that summary judgment is granted in favor of defendant Central Intelligence Agency, and this action is dismissed as to it with prejudice.

_____
JOYCE HENS GREEN
United States District Judge