

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,
Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE, et al.,
Defendants.

Civil Action Number 81-0023

DECLARATION OF F. HENRY HABICHT II

I, F. Henry Habicht II, hereby declare and say as follows:

(1) I am a Special Assistant to the Attorney General of the United States. The matters stated herein are based upon my knowledge and upon my personal review and consideration of information available to me in my official capacity. I have been designated by the Attorney General, United States Department of Justice, as an original Top Secret classification authority¹ and a declassification authority.²

(2) This affidavit addresses portions of Attorney General document number 33 discussed in the affidavit of Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, United States Department of Justice. My affidavit concerns only information classified and withheld from disclosure pursuant to 5 U.S.C. 552(b)(1).³ Unclassified information withheld from disclosure pursuant to other exemptions specified in 5 U.S.C. 552(b) is addressed by the affidavit of Mr. Shea.

¹ Executive Order (EO) 12065, §§ 1-201 and 1-204.

² Id., § 3-103.

³ 5 U.S.C. 552(b)(1) provides: "(The) section (compelling disclosure) does not apply to matters that are--(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) Prior to the preparation of this affidavit, I personally examined the classified information falling within the scope of plaintiff's FOIA request and addressed herein. As a result of this examination, I have determined that the document contains information meeting the substantive classification criteria as established by EO 12065. These substantive criteria are called "Classification Requirements" in EO 12065 and are as follows:

§ 1-301. Information may not be considered for classification unless it concerns: . . . (b) foreign government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States . . .;

§ 1-302. Even though information is determined to concern one or more of the (above) criteria . . ., it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

(4) Exercising my judgment as an original Top Secret classification authority, I have in fact determined that the unauthorized disclosure of the classified portions of the document addressed herein reasonably could be expected to cause at least identifiable damage to the national security⁴

⁴ EO 12065, § 6-104, defines national security as ". . . the national defense and foreign relations of the United States."

and, therefore, must be kept secret. I declare that this information is appropriately classified "Secret" pursuant to EO 12065.⁵

(5) In addition to my determination that the portions of the document addressed by my affidavit meet the substantive requirements of EO 12065, I have also determined that the document has been properly processed in compliance with the procedural requirements of EO 12065. The face of the document has been marked as required⁶ and is stamped with the proper

⁵ Id., § 1-1, Classification designation.

"§ 1-101. Except as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information. Information may be classified in one of the three designations listed below. If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified.

§ 1-102. 'Top Secret' shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

§ 1-103. 'Secret' shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

§ 1-104. 'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security."

⁶ Id., § 1-501. "At the time of original classification, the following shall be shown on the face of paper copies of all classified documents: (a) the identity of the original classification authority; (b) the office of origin; (c) the date of event for declassification or review; and (d) one of the three classification designations defined in § 1-1."

§ 1-502. "Documents classified for more than six years shall also be marked with the identity of the official who authorized the prolonged classification. Such documents shall be annotated with the reason the classification is expected to remain necessary, under the requirements of § 1-3, despite the passage of time. The reason for the prolonged classification may be stated by reference to criteria set forth in agency implementing regulations. These criteria shall explain in narrative form the reason the information needs to be protected beyond six years. If the individual who signs or otherwise authenticates a document also is authorized to classify it, no further annotation of identity is required;" and

classification designation.⁷ The document bears a reference to the pertinent agency implementing regulations setting forth the reasons for prolonged classification⁸ and is also

⁷ See footnote 5, supra.

⁸ Department of Justice Regulations concerning the implementation of Executive Order 12065, 28 CFR Part 17 provides:

§ 17.19 Duration of classification.

(a) Except as provided in § 17.19(b), dates or events on which automatic declassification or review for declassification should occur shall be as early as the national security will permit and shall be no more than six years from the date of original classification.

(b) Classification may be prolonged for more than six years only by officials designated as original Top Secret classification authorities. This authority shall be used sparingly. In such cases, a declassification date or event, or a date for review, shall be set. This date or event shall be as early as national security permits and shall be no more than 20 years after original classification, except that for Foreign Government Information, the date or event may be up to 30 years after original classification. Classification may be extended beyond six years for one or more of the following reasons:

(1) The information is Foreign Government Information as defined in Executive Order No. 12065.

(2) The information reveals intelligence sources or methods which, if lost, would cause identifiable damage to the intelligence operation or to the safety of the source(s) involved.

(3) The information reveals capability data, the unauthorized disclosure of which can reasonably be expected to result in negating or nullifying the effectiveness of a system, installation, project or plan important to the national security.

(4) The information reveals specific foreign relations matters.

(c) In every case that classification is continued for more than six years, the identity of the original Top Secret classification authority and the reason(s), as set forth above, for the extension of classification beyond six years will be recorded as prescribed by Subpart D of this regulation. A specific reference to the pertinent subparagraph(s) above will suffice to meet the requirement concerning the recording of the reason for extension of classification beyond six years on the document.

marked by section, part or paragraph as required by United States Department of Justice Regulations.⁹ Furthermore, the restrictive procedural criteria set forth in EO 12065, § 1-6, have been followed.¹⁰ Lastly, I have determined that the

⁹ 28 CFR 17.63(a). Paragraph or portion marking. "Each section, part or paragraph, of a classified document shall be marked to show the level of classification of the information contained in or revealed by it, or that it is unclassified. Portions of documents shall be marked in a manner that eliminates doubt as to which of its portions contains or reveals classified information. . . ;"

¹⁰ EO 12065, § 1-6, Prohibitions.

§ 1-601. Classification may not be used to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization or agency, or to restrain competition.

§ 1-602. Basic scientific research information not clearly related to the national security may not be classified.

§ 1-603. A product of non-government research and development that does not incorporate or reveal classified information to which the producer or developer was given prior access may not be classified under this Order until and unless the government acquires a proprietary interest in the product. This Order does not affect the provisions of the Patent Secrecy Act of 1952 (35 U.S.C. §§ 181-188).

§ 1-604. References to classified documents that do not disclose classified information may not be classified or used as a basis for classification.

§ 1-605. Classification may not be used to limit dissemination of information that is not classifiable under the provisions of this Order or to prevent or delay the public release of such information.

§ 1-606. No document originated on or after the effective date of this Order may be classified after an agency has received a request for the document under the Freedom of Information Act or the Mandatory Review provisions of this Order (§ 3-5), is authorized by the agency head or deputy agency head. Documents originated before the effective date of this Order and subject to such a request may not be classified unless such classification is consistent with this Order and is authorized by the senior official designated to oversee the agency information security program or by an official with Top Secret classification authority. Classification authority under this provision shall be exercised personally, on a document-by-document basis.

§ 1-607. Classification may not be restored to documents already declassified and released to the public under this Order or prior Orders."

classified material contained in the document addressed herein was processed in accordance with the guidelines established by Directive Number 1, Information Security Oversight Office.¹¹

(6) In my capacity as a declassification authority, I have determined that the classified portions of the document addressed by this affidavit continue to meet prescribed classification requirements at this time.¹² I have also determined that the public interest in this material does not outweigh the damage to national security that might reasonably be expected from disclosure pursuant to EO 12065, § 3-303.¹³

¹¹ Directive Number 1, Information Security Oversight Office (ISOO), is the implementing directive for EO 12065 and is published in 43 Federal Register 46280, October 5, 1978, effective December 1, 1978.

¹² EO 12065, § 3-302. "When information is reviewed for declassification pursuant to this Order or the Freedom of Information Act, it shall be declassified unless the declassification authority established pursuant to § 3-1 determines that the information continues to meet the classification requirements prescribed in § 1-3 despite the passing of time."

¹³ Id., § 3-303. "It is presumed that information which continues to meet the classification requirements in § 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in § 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure;" and

28 CFR 17.37(b). Balancing test. "When determining whether the public interest in disclosure outweighs the damage to the national security that might be reasonably expected from disclosure, the head of the Office, Board, Division or Bureau concerned should consider whether there exist any special circumstances so that the disclosure of the information would result in identifiable and significant benefit to the public. Such could include: (1) Savings of human life; (2) Avoidance of hostilities between sovereign powers; and (3) Accurate and appropriate public analysis of issues of national importance."

(7) In paragraph (13) of this affidavit will be found a description of the document and the withheld classified portions of the document. These portions are itemized and indexed to the appropriate classification requirement category of EO 12065, § 1-301. Also, factual descriptions of the contents of these portions that relate to an appropriate classification requirement are furnished. Lastly, the contents of these portions have been correlated to paragraphs (8), (9), (10) and (11), infra. These paragraphs describe the damage to the national security that could reasonably be expected to result from unauthorized disclosure of that particular category of classified information. In my judgment, any further specificity in the descriptions given in paragraph (13) would reveal the very information that must be kept secret in the interest of the security of the United States.

DEFINITION AND CONSEQUENCE OF DISCLOSURE OF INFORMATION
CONCERNING INTELLIGENCE SOURCES

(8) EO 12065, § 1-301, (c), recognizes that information concerning intelligence sources is classifiable provided that an original classification authority determines that the disclosure of this information could reasonably be expected to cause at least identifiable damage to the national security. I have considered information concerning intelligence sources to mean information that could reveal or identify a present, past or prospective live source of information in the foreign intelligence or foreign counterintelligence area.

(9) Disclosure of information concerning intelligence sources can result in damage to the national security in several ways. Intelligence source information generally consists not only of information reported by the source, but specific and descriptive data about the source. This data about the source may involve not only the source's true name or alias, but other background information as well.

(10) Exposure of an intelligence source's identity can result in termination of the source; discontinuance of the source's services; exposure of other ongoing intelligence gathering activities; modification or cancellation of future intelligence gathering activities; permitting hostile entities to evaluate the number and objectives of intelligence sources targeted against them, and take appropriate countermeasures; and an overall chilling effect on the climate of cooperativeness with respect to intelligence sources, both current and prospective, not willing to risk the probability of exposure with its potential effect of loss of life, jobs, friends, status, etc., all of which may reasonably be expected to hamper intelligence collection ability and result in identifiable damage to the national security.

(11) Disclosure of even the seemingly innocuous information reported by an intelligence source can lead to the exposure of the source's identity. Information provided by an intelligence source is often of a "unique" character. For example, the source's report may contain details obtained from a one-on-one conversation between the source and another individual. It may relate to facts known to only a small group of individuals of which the source is a member. It may be of such detail that it pinpoints a critical time frame or reflects a particular vantage point from which the source was reporting. The source's report may have been furnished in such a manner so as to reveal a reporting style peculiar to the source. An intelligence analyst can take this type of information and combine it with facts already in his possession to identify the source.

(12) As the investigations regarding foreign intelligence and foreign counterintelligence in the United States are among the most important missions of the FBI, I have classified this material at the "Secret" level. The type of damage discussed in paragraphs (9), (10) and (11) would, in these investigations,

cause serious damage to the national security in my judgment. The risks undertaken by such intelligence sources are much greater than in other national security investigations and, accordingly, it is much more difficult to recruit and maintain them. Therefore, the exposure of any of the sources in this area could effectively destroy the ability to obtain further sources.

(13) I was cognizant of the factors discussed above during my review of the material falling within the scope of plaintiff's request. I have sought to apply classification to the material strictly in keeping with the spirit of the FOIA, so as to release as much information as possible, while at the same time prevent damage to the national security through disclosure of information. Where portions of the document addressed by this affidavit were reasonably segregable and could be released without disclosing classified information, I endeavored to do so. Often times, however, I found it necessary and prudent to withhold from disclosure entire paragraphs of the document. In my judgment, to have done otherwise would have resulted in the release of classified information, the disclosure of which could reasonably be expected to damage national security.

ITEMIZATION, INDEXING AND DESCRIPTION OF CLASSIFIED
INFORMATION WITHHELD FROM PLAINTIFF
PURSUANT TO 5 U.S.C. § 552(b)(1)

(14) The document, consisting of twenty-six pages of handwritten notes of three meetings (December 1, 5 and 8, 1975) concerns a possible review of the Federal Bureau of Investigation's (FBI) handling of the investigation into the Martin Luther King assassination. It is discussed in the Shea affidavit as Attorney General #33, contains five portions withheld pursuant to 5 U.S.C. 552(b)(1). This document was classified "Secret" on

February 6, 1981, by my predecessor, Mr. Eric L. Richard, Special Assistant to the Attorney General and original Top Secret classification authority. These items are described as follows:

A. Page seven, paragraph four - contains information provided by and the identities of individuals who confidentially cooperated with the F.B.I. in connection with foreign counterintelligence investigations of persons in the United States believed to be acting at the direction of or on behalf of certain foreign governments. To disclose their identities would adversely impact the investigations, thus having a seriously damaging effect on the national security. A more detailed description of this material reasonably could be expected to identify the sources. See paragraphs (9), (10) and (11), supra.

B. Page seven, brackets in paragraph six - contains information concerning the identities of individuals who confidentially cooperated in a current and continuing investigation involving the national security of the United States. A more detailed description of this item reasonably could lead to the exposure of the identities of the sources and severely prejudice the national security. See paragraph (10), supra.

C. Page ten, paragraph seven - contains information furnished in confidence by individuals regarding foreign counterintelligence investigations in which they cooperated with the FBI. Disclosure of this information could lead to exposure of these sources, thus having a seriously damaging effect on the national security. See paragraph (11), supra.

D. Page seventeen, paragraph five - contains information provided by and the identities of individuals who confidentially cooperated with the F.B.I. in connection with foreign counterintelligence investigations of persons in the United States believed to be acting at the direction

of or on behalf of certain foreign governments. To disclose their identities would adversely impact the investigations, thus having a seriously damaging effect on the national security. A more detailed description of this material reasonably could be expected to identify the sources. See paragraphs (9), (10) and (11), supra.

E. Page eighteen, paragraph two - contains information concerning the identities of individuals who confidentially cooperated in a current and continuing investigation involving the national security of the United States. A more detailed description of this item reasonably could lead to the exposure of the identities of the sources and seriously prejudice the national security. See paragraph (10), supra.

This completes the itemization, indexing and description of classified material withheld under 5 U.S.C. 552(b)(1).

I declare under penalty of perjury that the foregoing is true and correct.



F. Henry Habicht II
Special Assistant to the Attorney General
United States Department of Justice
Washington, D. C. 20530


Executed on April 30, 1981 .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
)
 Plaintiff,)
)
 v.) Civil Action No. 81-0023
)
 U.S. DEPARTMENT OF JUSTICE,)
 et al.,)
)
 Defendants.)

NOTICE OF FILING

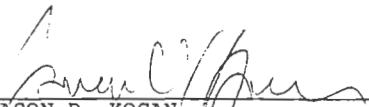
Defendant hereby gives notice, this 1st day of May, 1981,
that it is filing the affidavit of F. Henry Habicht, II.



JASON D. KOGAN
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of
Filing has been mailed this 1st day of May, 1981 to plaintiff's
counsel James H. Lesar, Esq., 2101 L Street, N.W., Suite 203,
Washington, D.C. 20037.



JASON D. KOGAN
Assistant U.S. Attorney
U.S. Courthouse - Rm. 2804D
3rd & Constitution Ave., N.W.
Washington, D.C. 20001
(202) 633-4977