

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL HOCH,)
)
Plaintiff,)
)
v.) Civil Action No. 82-0754
)
CENTRAL INTELLIGENCE AGENCY,)
)
Defendant.)
)

DEFENDANT'S MOTION FOR CLARIFICATION


Defendant, by its undersigned attorneys, hereby moves this Court, pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, for a clarification of its Order dated July 27, 1984, in which it denied Defendant's Motion For Summary Judgment with regard to Document 1648-452-C. In support of this Motion, Defendant respectfully refers the Court to the Affidavit of Louis J. Dube, Information Review Officer for the Directorate of Operations, Central Intelligence Agency, and the accompanying Document Description Index, filed July 22, 1982, and to the memorandum of points and authorities filed herewith.

Respectfully submitted,

JOSEPH E. DIGENOVA
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Dated: August 9, 1984



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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION FOR CLARIFICATION

Preliminary Statement

In this action arising under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as amended, plaintiff sought certain materials maintained by the Central Intelligence Agency ("CIA") pertaining to the investigation of the assassination of President Kennedy. Defendant moved for summary judgment on July 22, 1982, on the ground that plaintiff had received all of the records he was entitled to under the FOIA. Defendant further explained that other information responsive to plaintiff's request had been properly withheld from him pursuant to Exemptions 1, 3, 5, 6, 7(C) and 7(D) of the FOIA, 5 U.S.C. §552(b)(1), (3), (5), (6), (7)(C) and (7)(D).¹ In support of its motion, defendant

¹ Subsequently, defendant demonstrated that certain information in CIA files which had been provided by other agencies, was properly withheld pursuant to Exemptions 1, 3, 6, 7(C) and 7(D). See Memorandum Of Points And Authorities In Further Support Of Defendant's Motion For Summary Judgment, and accompanying affidavits and declarations, filed February 28, 1983.

submitted the Affidavit of Louis J. Dube, Information Review Officer for the Directorate of Operations, Central Intelligence Agency (hereinafter "Dube Affidavit"), and an accompanying Document Description Index ("DDI").

By Order dated July 27, 1984 (filed July 30, 1984), this Court granted defendant's motion for summary judgment with the exception of one document--document 1648-452-C. (Document 1648-452-C is described at page 108 of the DDI.) The Court found that the "Dube affidavit is not sufficient to support the invocation of Exemption 5 with respect to document numbered 1648-452-C." Slip op. at 32 (emphasis added). Accordingly, the Court denied the CIA's motion for summary judgment with regard to this document.

Defendant seeks a clarification of this Order because it did not address whether the other exemptions invoked to withhold document 1648-452-C--Exemptions 1 and 3--suffice to permit its continued withholding. Specifically, defendant is concerned that, as a result of an ambiguity in the document description, it was not clear to the Court that this document was also withheld in its entirety pursuant to Exemptions 1 and 3. The Court has not yet ordered disclosure of document 1648-452-C, but defendant cannot be sure that the Court does not intend to do so. Accordingly, for the reasons set forth below, defendant respectfully requests that the Court amend its Order so that it

will reflect that document 1648-452-C was properly withheld pursuant to Exemptions 1 and 3.

Argument

Not a word of this description

Document 1648-452-C is a fifteen-page draft memorandum which contains the "predecisional opinions and conclusions" of an "unidentified author," the release of which "could lead to the disclosure of intelligence sources and methods." Dube Affidavit, para. 32. In describing the contents of document 1648-452-C in the DDI, Mr. Dube explained that the document was withheld in its entirety because it consists of:

- B.* Circumstantial information which, in combination with other information, could lead to the identification of an intelligence source, exemptions (b)(1) and (b)(3), paragraphs 7-14 and 15-20.
- C.* Information disclosing an intelligence method used in intelligence collection and other intelligence activities abroad, exemptions (b)(1) and (b)(3), paragraphs 7-14 and 21-29.
- J. Classification and information control markings, paragraph 9.

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This document was withheld in its entirety as an inter-agency document exempt from disclosure pursuant to FOIA exemption (b)(5). No letter category was established for withholding information in this group since only one document was affected. The reasoning involved in withholding this document under (b)(5) is set forth in paragraph 32 above.

Dube Affidavit, DDI at 108.

In retrospect, defendant recognizes that it may have given the erroneous impression that document 1648-452-C was withheld in its entirety solely pursuant to Exemption 5. In fact, the

asterisks appearing in categories "B" and "C" of the document description were intended to denote that each of these deletion categories provides an independent basis for withholding the document in its entirety. As Mr. Dube explained,

When documents have been denied in entirety and one or more of the deletion category would justify, independently, withholding the whole document, that letter category has been identified by using an asterisk immediately beside the letter code. Deletion categories claimed without an accompanying asterisk denote additional exemption justifications for portions of the document being withheld.

Dube Affidavit, para. 35. The asterisks appearing in the document description indicate that the document was withheld in its entirety pursuant to Exemptions 1 and 3 as well as pursuant to Exemption 5. Thus, document 1648-452-C was withheld in its entirety for three independent reasons: the release of its contents could (1) lead to the identification of an intelligence source (Exemptions 1 and 3), as described in paragraphs 7-14 and 15-20 of the Dube Affidavit; (2) disclose an intelligence method used in intelligence collection and other intelligence activities abroad (Exemptions 1 and 3), as described in paragraphs 7-14 and 21-29 of the Dube Affidavit; and (3) disclose a draft inter-agency memorandum (Exemption 5), as described in paragraph 32 of the Dube Affidavit.

Killing?

Inasmuch as the Court granted defendant's motion for summary judgment with regard to its invocation of Exemptions 1 and 3 on all other documents at issue, see slip op. at 26-27, 29-30,

defendant respectfully submits that document 1648-452-C, too, was properly withheld pursuant to Exemptions 1 and 3. Accordingly, although the CIA's invocation of Exemption 5 was held to be insufficient, its invocation of Exemptions 1 and 3 fully justify the continued withholding of the document.

Conclusion


For the foregoing reasons, defendant respectfully requests that the Court amend its Order dated July 27, 1984, in which it denied defendant's motion for summary judgment with regard to the applicability of Exemption 5 to document 1648-452-C, to reflect that this document was properly withheld pursuant to Exemptions 1 and 3 and that defendant is therefore entitled to summary judgment as to the entirety of this action.

Respectfully submitted,

JOSEPH E. DIGENOVA
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Dated: August 9, 1984


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendant's Motion For Clarification and proposed Order was served upon plaintiff by deposit of a copy thereof in the U.S. mail, postage prepaid, first class mail, addressed to:

James H. Lesar, Esquire
Fensterwald & Associates
Suite 900
1000 Wilson Boulevard
Arlington, Virginia 22209

on this 9th day of August, 1984.


LAURA F. EINSTEIN