

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION TO AMEND DEFENDANT'S
MOTION FOR CLARIFICATION


Defendant, by its undersigned attorneys, hereby moves to amend its pending motion for clarification filed August 9, 1984. In support, defendant respectfully directs the Court's attention to the attached memorandum of points and authorities, the supplemental Declaration of Louis J. Dube, Information Review Officer for the Directorate of Operations, Central Intelligence Agency and the Declaration of Lee S. Strickland, Assistant General Counsel, Central Intelligence Agency, all filed herewith.

Respectfully submitted,

JOSEPH E. DIGENOVA
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

Dated: September 10, 1984.



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

Preliminary Statement

On August 9, 1984, defendant moved this Court to clarify the portion of its Order denying defendant's summary judgment motion with respect to document 1648-452-C. The Court had found that defendant failed to demonstrate adequately that this document was properly withheld pursuant to Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(5). See Hoch v. CIA, Civil No. 82-0754, slip op. at 32-33 (D.D.C. July 30, 1984). However, because the document had also been withheld in its entirety pursuant to Exemptions 1 and 3 of the FOIA--exemptions the application of which the Court upheld for all other documents at issue--defendant sought to verify that the Court did not intend to order disclosure of this document.

The Central Intelligence Agency ("CIA") has now discovered that in 1976 it released document 1648-452-C, with limited redactions, to John H. F. Shattuck of the American Civil

Liberties Union, counsel for plaintiff in Borosage v. CIA, Civil No. 75-0994 (D.D.C.). This disclosure, however, does not entirely alleviate the concerns expressed in defendant's motion for clarification because the CIA continues to seek protection of a limited amount of information in document 1648-452-C. Accordingly, defendant submits herewith a supplemental Declaration of Louis J. Dube, Information Review Officer for the Directorate of Operations, CIA (hereinafter "Dube Declaration"), and the Declaration of Lee S. Strickland, Assistant General Counsel, CIA (hereinafter "Strickland Declaration"), in order to justify the continued withholding of certain limited information in document 1648-452-C and to explain the circumstances of the earlier release.

Argument

1. In Defendant's Motion For Clarification ("Def. Motion") defendant sought to ensure that document 1648-452-C would not be ordered disclosed. In support, defendant explained to the Court that the document had been withheld in its entirety pursuant to Exemptions 1 and 3, as well as Exemption 5. See Def. Motion at 3-4. After preparing and filing this motion, the CIA discovered that document 1648-452-C had been released in part during the course of a civil action entitled Borosage v. CIA, Civil No. 75-0944 (D.D.C.), which involved records made available by the CIA to the President's Commission To Investigate Domestic CIA Activities ("Rockefeller Commission"). See Dube Declaration,

para. 3. Mr. Dube thereupon reviewed this document again and determined that, in view of the previous disclosure, the document should be released to plaintiff to the extent it had been disclosed in Borosage. Id. at para. 7.¹ Counsel for defendant immediately forwarded a copy of document 1648-452-C to Counsel for plaintiff. (A copy of the letter accompanying document 1648-452-C is attached hereto as Exhibit A.)

A copy of the redacted document is attached to the Dube Declaration as Exhibit A. In each instance where information has been withheld, Mr. Dube has noted the exemption category which describes the information. (These exemption categories are set forth in the first Dube Affidavit, filed July 22, 1982, at 32-33.) All of this information falls within three of the eleven deletion categories:

- 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.

¹ Subsequently, Mr. Dube determined that certain information appearing on page two of document 1648-452-C, which was withheld when the document was released during Borosage, could be disclosed. See Dube Declaration, para. 7.

The information which continues to be withheld is precisely the same type of information that the Court has already held to be properly exempt. Compare with slip op. at 26-27, 29. It consists of information the release of which would reveal intelligence sources and methods. Dube Declaration, para. 7. As the Court recognized, "Executive Order 12356 provides that the unauthorized disclosure of foreign government information, the identity of a confidential source, or intelligence sources or methods is presumed to cause damage to the national security, §1.3." Slip op. at 24. Thus, the Court has already found that the CIA had properly invoked Exemptions 1 and 3 to withhold information falling within these categories. Id. at 26-27, 29. In view of the Court's findings, defendant thus seeks clarification that the limited amount of information which the CIA continues to withhold from document 1648-452-C is properly exempt. For this reason, defendant respectfully requests the Court to grant its amended motion for clarification.

2. Throughout this litigation, plaintiff has attempted to attack the Affidavit of Louis J. Dube, filed July 22, 1982. Because of this history, defendant is fully aware that plaintiff may renew this attack by questioning why the CIA withheld document 1648-452-C in its entirety pursuant to Exemptions 1 and 3 of the FOIA. In anticipation of this, Mr. Dube and Mr. Strickland have submitted declarations which describe in detail why the document was initially withheld in this litigation.

Although document 1648-452-C was ultimately released in Borosage, with limited redactions, this disclosure followed an initial determination that it was exempt pursuant to Exemptions 1 and 3. See Strickland Declaration, para. 2. As Mr. Strickland explains, in the affidavits filed in Borosage on October 24, 1975, senior officers of the CIA attested that the release of document 1648-452-C would disclose details of covert intelligence activities and intelligence sources and methods. Id. at para. 3. (See Affidavits of Eloise Page and E. H. Knoche, attached as Exhibits A and B to the Strickland Declaration.) It was only later, after discussions with the Senate Select Committee To Study Governmental Operations With Respect To Intelligence Activities, that the CIA decided to disclose certain documents, including most of document 1648-452-C. Id.

When Mr. Dube first reviewed document 1648-452-C in the course of this litigation, he was unaware of the prior release. Dube Declaration, paras. 2, 3. He reached the same conclusion reached initially by Ms. Page and Mr. Knoche: that the document was exempt in its entirety pursuant to Exemptions 1 and 3. Id. Moreover, after Mr. Dube was informed that the document had been disclosed previously, he reviewed the document yet again. Id. at para. 6. He concluded that the document consisted of information which is typically withholdable pursuant to Exemptions 1 and 3. Id. Thus, everyone who has reviewed this document--Ms. Page, Mr. Knoche and Mr. Dube--agrees that it consists of the type of

information (intelligence sources and methods) which properly qualifies for exemption. See Page Affidavit at paras. 2-6; Knoche Affidavit at paras. 2-3 (attached as Exhibits A and B, respectively, to the Strickland Declaration); Strickland Declaration, para. 3.

Moreover, as Mr. Dube explains, it was only because of an unlikely set of circumstances that he was unaware of the prior release of document 1648-452-C. Typically, after records are released pursuant to FOIA requests, the fact of their release is entered into the CIA's computer system. Dube Declaration, para. 4. This enables the CIA to verify whether a document has been the subject of a prior release. Id. Up until several months ago, however, documents related to the Kennedy assassination were not entered into this system. Id. Thus, the CIA personnel who reviewed the documents in this case assumed that they could not use the system to verify whether there had been prior disclosures of any of the documents at issue in this case. Instead, they relied upon their expertise and broad institutional knowledge of the assassination investigation. While their knowledge was considerable, it regrettably was not foolproof in this one respect.²

² As it turned out, document 1648-452-C had in fact been entered into the computer system because it had been released during the
(footnote cont'd)

Now, all of the records released in response to FOIA requests for documents concerning the investigation of Kennedy's assassination have been entered into the computer system. Dube Declaration, para. 4. In light of what happened with document 1648-452-C, Mr. Dube has employed this retrieval system to conduct a second review of all of the records at issue in this action to ensure that the redactions he has made are consistent with any previous disclosures. Id. at para. 5. As he attests, this recent review revealed that none of the other records at issue were previously disclosed to a greater extent than they were in this action. Id.

In sum, defendant respectfully submits that the reliability of Mr. Dube's affidavit is still intact. The previous disclosure of document 1648-452-C was an isolated exception to the accuracy of the affidavit and index. The CIA failed to detect the previous release only because it reasonably assumed that none of the records pertaining to the Kennedy assassination had been entered into the retrieval system. Therefore, it never employed this system to check for prior disclosures. Moreover, now that

(footnote cont'd)

Borosage litigation. Dube Declaration, para. 4. Borosage did not, however, involve documents which pertained to the JFK assassination, per se. Id. at para. 2. Thus, although the CIA now realizes that it could, in fact, have ascertained that document 1648-452-C had been previously released, the point remains that at that time a check through the system appeared to be a futile effort. Id. at para. 4.

such a search is possible, and has in fact been conducted, the CIA is able to verify its initial exemption determinations. Document 1648-452-C is the only example of inconsistency.

Conclusion


For the foregoing reasons, and based upon the entire record herein, defendant respectfully requests that its amended motion for clarification be granted.

Respectfully submitted,

JOSEPH E. DIGENOVA
United States Attorney

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Dated: September 10, 1984


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ORDER

Upon consideration of Defendant's Motion For Clarification, its subsequent motion to amend, the memoranda of points and authorities and declarations filed in support thereof, and the entire record herein, and it appearing to the Court that the granting of defendant's motions would be just and proper, it is by the Court this ____ day of _____ 1984,

ORDERED that defendant's Motion To Amend Defendant's Motion For Clarification be, and it hereby is, granted; and it is further

ORDERED that defendant's amended Motion For Clarification be, and it hereby is, granted; and it is further

ORDERED that defendant's Motion For Summary Judgment be, and it hereby is, granted with regard to the redacted portions of document 1648-452-C.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

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

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

on this 10th day of September 1984.


LAURA F. EINSTEIN