UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON, :
:
Plaintiff, :
:
v. : Civil Action No. 86-1886
:
U.S. DEPARTMENT OF STATE, :
:
Defendant :

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR IN CAMERA INSEPCTION

Plaintiff Alan L. Fitzgibbon ("Fitzgibbon") submits herewith his opposition to defendant's motion for summary judgment. In addition, he moves this Court to inspect in camera the two withheld documents at issue.

Background

By letter dated March 25, 1986, Fitzgibbon submitted a Freedom of Information Act ("FOIA") request to the Department of State ("State") for twenty documents which deal with relations between Cuban and the Dominican Republic in the mid-1950s. His request was based on references gleaned from documents on this subject which State had previously released to him. Declaration of Alan L. Fitzgibbon ("Fitzgibbon Decl.", ¶¶1-2). On July 3, 1986, not having received any documents responsive to his request, he filed this action.

State has located nineteen of the twenty documents Fitzgibbon requested.[1/] It has released all of its information in these nineteen documents. Id., ¶1. The dispute now centers on two records: (1) Embassy Ciudad Trujillo telegram 141 (CT T141) of September 29, 1956, which is withheld in its entirety; and (2) Embassy Ciudad Trujillo telegram 256 (CT T 256) of December 13, 1956, which is withheld in part.

All of the suppressed information is being withheld at the behest of the Central Intelligence Agency ("the CIA"). In seeking to justify its withholdings, the CIA invokes Exemptions 1 and 3, 5 U.S.C. § 552(b)(1), (3).

The CIA claims that disclosure of this material reasonably could be expected to cause serious damage to the national security by revealing "the existence and identity of and information produced by an important intelligence source of the United States." Declaration of Louis J. Dube ("Dube Decl."), ¶¶7, 9. So limitless is the need for "absolute secrecy," id., ¶10, that the identities of intelligence sources must be kept "forever secret." Id., ¶12.

Taken at face value, the rationale for such secrecy is impressive. The CIA declares, for example, that the consequences of public identification as a CIA source may range from "economic reprisals to possible harassment, imprisonment, or even death." Id.,

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1/ Fitzgibbon does not seek a further search to locate the 20th document.

¶11. Unfortunately, computer produced affidavits have a disquieting tendency to relate only desultorily, if at all, to the materials to which they purportedly refer. Even the national security-fearing might be somewhat less than awe-struck with the dangers of disclosure upon learning that release of the withheld materials in this instance would do no more than identify a dead source and reveal information provided by him that is over thirty years old.

Yet these are the very circumstances presented by this case. The CIA, of course, has not encumbered its argument by providing such irrelevant details. Fitzgibbon provides what the CIA has neglected to supply. He asserts that the source that the CIA is trying to protect is Manuel de Moya, an intimate subordinate of former Domincan dictator Rafael Trujillo. Fitzgibbon Decl., ¶¶26-27. De Moya was the official contact in the Trujillo regime for Homer Brett, the CIA's chief of station in Ciudad Trujillo. Id., ¶27. Both men are dead. Id., ¶¶18-19.

It is these rather prosaic facts, rather than the CIA's more dramatic speculation about life-threatening reprisals, which frame the legal issues in this case. For the reasons set forth below, such facts undercut the CIA's claim that the materials at issue must be withheld, and defendant's motion for summary judgment should be denied.

ARGUMENT

I. DEFENDANT HAS FAILED TO ESTABLISH ITS ENTITLEMENT TO EXEMPTION 1

In Ray v. Turner, 587 F.2d 11987, 1194-1195 (D.C.Cir. 1978), the Court of Appeals set forth the principles regarding the judicial review of national security claims under the FOIA:

> The salient characteristics of de novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.' (4) Whether and how to conduct an in camera inspection of the documents rests in the sound discretion of the court, in national security cases as in all other cases.

Although defendant asserts that "substantial weight must be accorded the agency's attested explanations of the necessity for classification," Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Defendant's Memorandum") at 5, this is an expansive and misleading interpretation of what Congress instructed. The legislative history[2/] indicates, rather, that Congress expected the courts to accord substantial weight to

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2/ For a discussion of the legislative history regarding judicial review of executive security classifications and the 1974 amendments to the FOIA, see Commentary, "Freedom of Information: Judicial Review of Executive Security Classifications," University of Florida Law Review (Vol. XXVIII, No. 2)(Winter 1976)(hereafter cited as "Commenatary") at 551-568.

agency affidavits only insofar as they "concern[] the details of the classified status of the disputed records." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 10 (1974)("Conference Report"); Ray v. Turner, supra, at 1194. Substantial weight was to be accorded an agency's affidavit concerning such details because Congress recognized that "the Executive Departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." Conference Report at 10 (emphasis added).

Moreover, Congress did not suggest that the evidence of the party seeking disclosure should be afforded any less "substantial weight." To the contrary, "the legislative history indicates that it was Congress' intent that the evidence of both parties be accorded equal weight, commensurate with the degree of expertise, credibility, and persuasiveness underlying it."[3/] Commentary at 558-559. In keeping with the intent of Congress, the affidavit submitted by Fitzgibbon in this case is entitled to "substantial weight." Fitzgibbon is recognized by other historians and the CIA itself as the world's foremost expert on the Galindez case, a case

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3/ Thus, during the floor debate on the 1974 amendments, Senator Muskie, after expressing his hope that the courts would give "considerable weight" to the expertise of executive agencies such as the CIA or the Pentagon, went on to state: "I would also want the judges to be free to consult such experts in military affairs as (Senator Stennis) . . . or other experts, and give their testimony equal weight. Their expertise should also be given considerable weight." 120 Cong. Rec. 9,321 (daily ed. May 30, 1974), cited in Commentary at 558 n.63.

which involves, inter alia, the disappearance and assumed death of Jesus de Galindez, a Basque exile who was a public critic of the Trujillo regime. See Fitzgibbon v. C.I.A., 578 F. Supp. 704, 709 n.4 (D.D.C. 1983).

Taking cognizance of the circumstances under which agency affidavits on national security claims are entitled to substantial weight, the D.C. Circuit has enunciated the following standard for summary judgment in such cases:

> [T]he affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping. If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents.

Allen v. Central Intelligence Agency, 636 F.2d 1287, 1291 (D.C. Cir. 1980), quoting Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381, 1387 (D.C.Cir. 1979). And in ruling on an Exemption 1 claim the district court is required to conduct a de novo review to determine "'whether unauthorized disclosure of the materials reasonably could be expected to cause the requisite harm.'" Fitzgibbon v. C.I.A., 578 F. Supp. 704, 713 n.22 (D.D.C. 1983), quoting Lesar v. United States Department of Justice, 636 F.2d 472, 481 (D.C.Cir. 1980).

Here the CIA's attempt to show compliance with the substantive requirements of Exemption 1 consists solely of a conclusory assertion that disclosure reasonably could be expected to cause serious damage to the national security. Rather than demonstrating what adverse effects on national defense or foreign policy could reasonably be expected to result from disclosure of the particular materials withheld in this case, the CIA's allegation of harm rests entirely on a "presumption" that disclosure of information concerning intelligence sources will cause damage to the national security. Dube Decl., ¶7.

The "presumption" in Executive Order 12356 itself violates the FOIA. Congress emphatically rejected attempts to create such presumptions. The original Senate version of the bill to amend Exemption 1 stipulated that if an agency head submitted to the court an affidavit stating that, on the basis of his personal examination, a contested document is properly withheld under the appropriate executive order, "the court shall sustain such withholding unless . . . it find the withholding is without a reasonable basis. . . ." S. 2543, §(a)(4)(B)(ii), reprinted at 120 Cong. Rec. 9311 (daily ed. May 30, 1974). Senator Muskie argued that this created an "overwhelming" presumption of the validity of a classification. Id. at 9,319 (remarks of Senator Muskie). This provision would defeat the objective of independent judicial review by "shift[ing] the burden of proof away from the Government." Id. Since the purpose of the amendment was to force the government to persuade

the court that its withholding was justified, Senator Muskie insisted that: "We ought not to classify information by presumptions, but only on the basis of merit." Id. at 9,321.

To the extent that the CIA's showing of damage to national security rests on the "presumption" contained in Section 1.3(c) of E.O. 12356, this Court cannot accord it "substantial weight." Such a presumption does not elucidate "what adverse effects might occur as a result of public disclosure of a particular classified record." Conference Report at 10. In addition, to do so would be to frustrate the de novo review provision of the FOIA and to establish the very presumption in favor of validity of classification rejected by Congress.

This argument aside, whatever force the presumption in Section 1.3(c) might have in other circumstances is entirely vitiated here by the fact that the information at issue is over thirty years old. The CIA's declarant fails to address the impact of the passage of time on the sensitivity of this information, but Executive Order 12356 itself acknowledges that the need to protect against the disclosure of once sensitive matters declines with age. Thus, Section 3.1(a) provides that "[i]nformation shall be declassified as soon as national security considerations permit." The same section implies that passage of time will normally abate the sensitivity of material which was originally properly classified, stating: "Information that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time

will continue to be protected in accordance with this Order."

The withheld materials in this case concern

> information, gossip, and rumor fed to a now dead CIA operative by the now dead lieutenant of a long dead dictator about the three-decade-old conspiracy of that dictator's long vanished regime against another long dead dictator and his long vanished regime involving long dead plotters. . . .

Fitzgibbon Decl., ¶25. The passage of more than 30 years and the vast change in circumstances detailed by Fitzgibbon (and ignored by the CIA) make the CIA's claim that disclosure can reasonably be expected to result in "serious damage" to national security wholly untenable. As this Court has noted, the contention that time makes no difference "has, indeed, been rejected by those courts which have presided over FOIA cases involving requests for [antiquated] documents. . . ." Fitzgibbon v. C.I.A., 578 F. Supp. 704, 719-720 (D.D.C. 1983), citing Diamond v. FBI, 532 F. Supp. 216 (S.D.N.Y. 1981), aff'd 707 F.2d 75 (2d Cir. 1983); Times Newspapers of Great Britain v. CIA, 539 F. Supp. 678, 683 (S.D.N.Y. 1982); Dunaway v. Webster, 519 F. Supp. 1059 (N.D.Cal. 1981).

To the extent that the information which the CIA seeks to protect is so obvious or so well-known that it cannot plausibly be denied, further disclosure cannot harm the present national security. The Dube Declaration fails to indicate whether disclosure of the withheld material will hasten the eventual identification of the intelligence source sought to be protected. See Allen v. Central Intelligence Agency, supra, 636 F.2d at 1293 (CIA affidavit

affidavit held deficient because it failed to indicate "whether disclosure . . . will hasten the 'eventual identification of *** intelligence methods' that would likely occur even without disclosure of the document.") The Fitzgibbon Declaration and the research note appended to it as Attachment 1 clearly demonstrate that in this case release of the withheld materials will not hasten identification of the intelligence source implicated in them.

Defendant has not met its burden of proof with respect to Exemption 1. In addition, there are genuine issues of material fact in dispute, such as whether any harm to national security would result from disclosure of the withheld materials, which preclude summary judgment. Accordingly, defendant's motion for summary judgment should be denied.

II. DEFENDANT HAS ERRONEOUSLY INVOKED EXEMPTION 3 TO PROTECT A DEAD SOURCE FROM A DIFFERENT ERA

Defendant also invokes Exemption 3 as a ground for protecting the identity of the intelligence source and information provided by him. The Exemption 3 statute on which this claim is based is 50 U.S.C. § 403(d)(3), which provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure."

In the CIA's view, the need to protect its sources stretches beyond the end of the current geological epoch into eternity. Thus, in the context of this case Section 403(d)(3) raises questions as to whether the passage of time and/or the death of the intelli-

gence source affects his status as a source whose identity should be protected. On its face, the wording of the statute does not resolve these issues. Nor does the legislative history of this provision shed any light on these questions.

Without addressing these issues, defendant relies upon CIA v. Sims, 105 S.Ct. 1881 (1985) to argue that the intelligence source implicated in these materials is entitled to absolute protection forever more. Although Sims did broadly define "intelligence source" as used in § 403(d)(3), the Supreme Court had no occasion in that case to consider and rule upon the facts and legal issues presented by this case. Accordingly, Sims should not be relied upon to dispose of the issues raised by the facts of this case.

Because Section 403(d)(3), its legislative history and the case law are inadequate to answer the questions raised by this case, this Court must look to public policy and other relevant laws and regulations.

The FOIA is intended to make government accountable. In considering passage of S. 1324, "the Intelligence Information Act of 1983, Senators Durenberger, Huddleston, Inouye and Leahy stated their view that:

> We believe that excessive secrecy is an enemy of free government and that the FOIA is one of the most vital laws for preservation of our democracy. Censorship powers based on national security grounds are increasingly being asserted in countries throughout the world. In our country, however, the First Amendment firmly

> guarantees the freedom of the press, and laws such as the FOIA buttress that guarantee by ensuring that the government does not have unfettered power to control the release of information about its activities.

S. Rep. No. 98-305, 98th Cong., 1st Sess. 40 (1983). This view of what American public policy should be conflicts sharply with the CIA's insistence that its intelligence sources must be protected forever. If all intelligence sources are protectible in perpetuity under Exemption 3, then the CIA has "unfettered power to control the release of information about its activities" and cannot be held accountable to the people as the FOIA envisions.

In enacting the Central Intelligence Agency Information Act of 1984, Congress expressly recognized that as a matter of public policy historical access to information about the intelligence activities of the CIA is of prime importance to the discussion and evaluation of the performance of the American Government. Because of this, Congress included a requirement that at least every ten years the CIA must review exempted operational materials to determine whether they can be disclosed. 50 U.S.C. § 532(b). The CIA Information Act of 1984 also required the CIA to study and report to Congress on the feasibility of a systematic review of records "for declassification and release of Central Intelligence information of historical value." 50 U.S.C. § 432 note.

The CIA itself has acknowledged the public interest in access to historical materials:

> [The] CIA recognizes that it is accountable not only to Congress but also to the

> American public. Congress, historians, the media and the general public clearly expect us (after proper review) to release documents of historical significance that no longer require protection in the interest of national security. The Freedom of Information Act already makes this clear, and our exemption from searching certain designated operational records under the new CIA Information Act increases the pressure to declassify other records.

Report of the Director of Central Intelligence to the Committees of Congress on the Historical Review Program at 5-6 (May 29, 1984). See Attachment 1 hereto.

The legislative history of the CIA Information Act of 1984 indicates that Congress intended that the passage of time should have a pronounced effect upon the withholding of materials involving intelligence sources and methods. Summarizing testimony heard by the Senate Select Committee on Intelligence, Senator Durenberger stated:

> Historians made a strong case for a time limit on the designation of operational files. They correctly argued that such files lose their sensitivity over time and that historians need eventually to have access to the full range of information. I think all of us are sympathetic to that argument. . . .

Hearing Before the Select Committee on Intelligence of the United States Senate, 98th Cong., 1st Sess., on S. 1324, An Amendment to the National Security Act of 1947 (S. Hrg. 98-464) at 119 (prepared statement of Sen. Durenberger).

Recognizing that "the CIA also had a case when they said that some files might remain sensitive for a much longer time than one would predict[,]" (id., emphasis in original), the Sen-

ate committee refused to adopt a rigid time limit for de-designation of operational files. But the emphasis on early disclosure is undeniable. Noting that "[s]ome materials could lose their sensitivity even before the passage of ten years . . .," the committee expressed its hopes that "most files will be removed from designation by the time they are forty years old." S. Rep. No. 98-305, 98th Cong., 1st Sess. 30 (1983).

The importance of historical access to classified materials is recognized by Executive Order 12356. Section 4.3 provides for access to classified materials by historical researchers and former presidential appointees. Other provisions indicate that such access should be afforded sooner rather than later, and that even "intelligence sources and methods" are at some point to be disclosed to the public. Section 3.1 provides that "[i]nformation shall be declassified or downgraded as soon as national security considerations permit." (Emphasis added) Section 3.3(c) provides that the Director of Central Intelligence, after consultation with affected agencies, may establish special procedures "for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods." Continued secrecy is authorized only for "[i]nformation that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time" (Section 3.1) and if unauthorized disclosure "reasonably could be

expected to cause damage to the national security." (Sections 1.1(a), 1.3(b)) The CIA has promulgated regulations purporting to create a system for reviewing and declassifying historically significant materials. 32 C.F.R. §§ 1900.51 (a) and (e), and 1900.61.

In sum, the relevant laws and regulations uniformly weigh against the assertion that the CIA's intelligence sources are legally entitled to eternal protection.

Examination of the CIA's claimed reasons for seeking to protect the intelligence source and source information withheld in this case fails to turn up any justification for such withholding. Dube suggests, for example, that the public identification of a foreign intelligence source as a CIA "agent" often has "dramatic consequences--ranging from economic reprisals to possible harassment, imprisonment, or even death." Dube Decl., ¶11. Since the source is already dead, these fanciful reprisals range from impossible to impossible-and-redundant. See Fitzgibbon Decl., ¶26.

The CIA also asserts that:

> In the case of a foreign organization entity cooperating with the CIA, such as a group or intelligence service, public disclosure assures the termination of such cooperation. No country will stand still in the face of a public admission that its entities are cooperating with the CIA.

Dube Decl., ¶11. This justification is simply irrelevant because "the Trujillo regime collapsed with the dictator's assassination in May 1961 and the forced exile of the remnants of his family

remaining in the Dominican Republic the following November," and "[a]ll Dominican governments since then have repudiated Trujillo and all his works." Fitzgibbon Decl., ¶28.

As another justification for nondisclosure, the CIA suggests that release of information which would or could identify an intelligence source "most likely" would have a serious effect upon future recruitment because potential sources would perceive that the United States cannot protect their identities. Dube Decl., ¶12. However, the legislative history of the CIA Information Act of 1984 indicates that Congress places little or no credence in the CIA's speculation about the "perception" problem: "The Committee remains skeptical of the validity of the perception problem and does not consider it to be a major factor in its conclusion that H.R. 5164 should be adopted. In any event, it is assumed that enactment of H.R. 5164 will change whatever perceptions need changing." H. Rep. No. 98-276, 98th Cong., 2d Sess. 10 (1984).

Lastly, the CIA suggests that disclosure might enable an adversary to "concentrate its resources to prevent CIA utilization of that particular source." Dube Decl., ¶13. With a secret time warp technique and a dash of Caribbean voodoo thrown in for good measure, this might be possible. Nor can Fitzgibbon rule out the possibility that "the CIA truly believes that the KGB or Cuba's Direccion General de Inteligencia has set moles to burrowing relentlessly in this graveyard of moldering Caribbean secrets."

Fitzgibbon Decl., ¶29. All that Fitzgibbon can do is to plead the difficulty of proving a negative, and to point out that this Court is not required to believe as the CIA does.

III. THIS COURT SHOULD INSPECT THE WITHHELD MATERIALS IN CAMERA

In Allen v. Central Intelligence Agency, 636 F.2d 1287, 1297-1300 (D.C.Cir. 1980), the Court of Appeals set forth the standards which guide a district court's discretionary decision to grant or deny in camera inspection. The six criteria discussed in that opinion are: (1) judicial economy; (2) the conclusory nature of the agency affidavits; (3) bad faith on the part of the agency; (4) disputes concerning the contents of the document; (5) the agency proposes in camera inspection; and (6) strong public interest in disclosure.

Of these criteria, (1), (2), (4), and (6) favor in camera inspection in this case. That judicial economy will be served by in camera inspection is manifest. At issue are one document which is four pages in length and one paragraph of another document. The conclusory nature of the CIA's affidavit is equally obvious, as has been pointed out above. The documents' contents are in dispute. Indeed, the varying descriptions of the withheld information and its impact on national security given by the Dube and Fitzgibbon declarations could scarcely be greater. The public interest in disclosure lies in the fact that it will enable Fitz-

gibbon to write more authoritatively about a matter which this Court recognized as being of interest to the public when it granted him a fee waiver for materials relating to the Galindez case.

CONCLUSION

For the reasons set forth above, this Court should deny defendant's motion for summary judgment and grant plaintiff's motion for in camera inspection.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of November, 1986, mailed a copy of the foregoing Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Motion for In Camera Inspection to Mr. Richard M. Schwartz, Attorney-Advisor, Office of Information & Privacy, U.S. Department of Justice, 550 11th Street, N.W., Room 933, Washington, D.C. 20530.

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