

FILED

OCT 16 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAY PETERZELL, et al.)

Plaintiffs)

v.)

DEPARTMENT OF STATE, et al.)

Defendants)

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

Civil Action No. 82-2853

MEMORANDUM ORDER

This matter is before the Court on plaintiffs' motion for reconsideration and alteration of the Court's entry of summary judgment for defendants, defendant Central Intelligence Agency's ("CIA") opposition thereto, plaintiffs' reply and supplemental declarations, and the entire record herein. For the reasons stated below, the Court grants plaintiffs' motion in part.

On April 3, 1984, the Court granted summary judgment in favor of defendants and denied plaintiffs' cross-motion for partial summary judgment regarding plaintiffs' request for numerous documents under the Freedom of Information Act ("FOIA"). Plaintiffs now seek reconsideration of that judgment as to 15 documents requested in Count VII of their complaint. Documents 6-20 described or authorized CIA "covert operations in Central America which were approved by President

Reagan" between August 6, 1981 and August 6, 1982. Complaint for Injunctive Relief at ¶ 59. The CIA withheld these documents under FOIA Exemptions 1 and 3 to protect against unauthorized disclosure of information concerning "special activities." Affidavit of Louis J. Dube, ¶¶ 10-14 (executed Feb. 18, 1983). In addition, some of the documents contained the names of CIA agents and all of the documents contained filing instructions and security and classification markings. Id. at ¶¶ 28-31.

Plaintiffs contended that the covert operations of the CIA against the Government of Nicaragua were both apparent and publicly acknowledged. In support, plaintiffs cited numerous newspaper accounts, statements by President Reagan and members of Congress, and a speech by Undersecretary of Defense for Policy. The Court found to the contrary and determined that the cited sources failed to constitute the necessary "official acknowledgment" of covert Government activities in Nicaragua. Peterzell v. Department of State, No. 82-2853 at 20-21, 24 (D.D.C. April 3, 1984).

The additional sources cited by plaintiffs in their motion for reconsideration have placed Documents 6-20 in a different light. FOIA Exemption 1 exempts from disclosure information classified "in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1). Classified documents

must comply with Executive Order 12356, which requires, inter alia, that release of the undisclosed information, either by itself or in the context of other information, "reasonably could be expected to cause damage to national security."

Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

Publicly known information cannot "reasonably" be expected to damage national security, particularly when the Government has officially acknowledged the information in other sources. "The 'sunshine' purposes of the FOIA would be thwarted if information remained classified after it became part of the public domain." Lamont v. Department of Justice, 475 F. Supp. 761, 772 (S.D.N.Y. 1979). See also Founding Church of Scientology v. NSA, 610 F.2d 824, 831-32 (D.C. Cir. 1979) (suppression of "well publicized" information would frustrate policies of Act without advancing countervailing interests).

Plaintiffs contend that, since the filing of the Court's opinion, numerous official and unofficial sources have unequivocally acknowledged the existence of CIA covert activity in Nicaragua. "[S]o much authoritative information in the public domain, about this operation . . . make[s] the classification of these documents meaningless." Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Reconsideration and Alteration of the Court's Entry of Summary

Judgment for Defendants ("Plaintiffs' Reply") at 5. To buttress their argument, plaintiffs submitted 18 documents, including excerpts from the Congressional Record, a news release of the Senate Select Committee on Intelligence and statements by committee members, excerpts from a presidential news conference and a press briefing by White House Deputy Press Secretary Larry Speakes, statements by the CIA and CIA Director William Casey, and several newspaper articles.

Defendant CIA contends that none of the submitted documents constitute official acknowledgment, which must be "a deliberate, conscious decision by an authorized Executive Branch official." Points and Authorities in Opposition to Plaintiffs' Motion for Reconsideration and Alteration of the Court's Entry of Summary Judgment for Defendants at 3 (emphasis in original). In addition, defendant CIA argues that any recent official acknowledgment of covert activities in Nicaragua could not support the release of documents concerning events that occurred more than two years ago. Id. at 5-6.

The Court finds that the additional sources cited by plaintiffs are sufficient evidence of "official acknowledgment" of covert action in Nicaragua to warrant release of Documents 6-20 withheld under FOIA Exemption 1.

Among the information plaintiff submitted was the transcript of a news conference by President Reagan on May 22, 1984, and reported in the New York Times on May 23, 1984. During the conference, President Reagan responded to reporters' questions on United States assistance to the Nicaraguan "freedom fighters" without hesitation. Attachment A to Second Supplemental Declaration of Jay Peterzell (filed May 24, 1984) at 2. The President also referred to the United States' support of "the Contras" fighting the Nicaraguan Government in an interview in the New York Times on March 29, 1984, and reported in the Congressional Record. Attachment B to Plaintiffs' Motion for Reconsideration and Alteration of the Court's Findings and Conclusions and the Court's Entry of Summary Judgment for Defendants and Memorandum of Points and Authorities in Support Thereof at 2-3.

The CIA and CIA Director William Casey also admitted to the bombing of Nicaraguan ports, Attachments G-H to Supplemental Declaration of Jay Peterzell (filed May 4, 1984), and White House Deputy Press Secretary Larry Speakes in a press briefing confirmed the Administration's request of "\$21 million for the Contras" in Nicaragua and the Administration's vow to "work for the covert aid." Attachment A to Third Supplemental Declaration of Jay Peterzell (filed June 13, 1984) at 7.

These acknowledgments by congressional and executive officials are sufficiently "deliberate" and "conscious" to bring the requested information into the public domain and preclude protection by FOIA Exemption 1. Recent statements acknowledge general, as well as specific, covert activity in Nicaragua, and cover activities during the period in question in the instant case. The Congressional Record in several places refers to the continuation and escalation of CIA covert action during the last two to three years. Attachment A to Plaintiffs' Reply at 2, 4, 7.

In their motion to reconsider, plaintiffs do not seek information concerning events that occurred after the Court's opinion. Rather, they seek only the documents previously requested from the CIA. A new FOIA request is unnecessary when past information is later acknowledged.

In addition, Documents 6-20 may not be withheld entirely under FOIA Exemption 3, which authorizes the Government to withhold records or portions of records that are "specifically exempted from disclosure by statute. . . ." 5 U.S.C. § 552(b)(3). An applicable statute, 50 U.S.C. § 403(d)(3), requires the CIA Director to protect "intelligence sources and methods from unauthorized disclosure." Release of the documents in question cannot "reasonably be expected to lead to unauthorized disclosure of

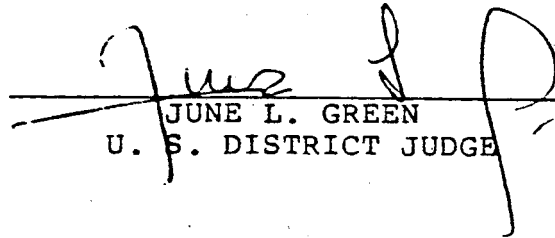
intelligence sources and methods" when information of CIA covert activities has been officially acknowledged. See Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982).

Limited nondisclosure, however, is appropriate in the instant case under 50 U.S.C. § 403g. This statute protects the CIA from the "publication or disclosure, of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." 50 U.S.C. § 403g. The names, official titles, and other identifying references to CIA employees, along with information regarding CIA functions or organizational components, pseudonyms and cryptonyms, and security and classification markings have been withheld properly in Documents 6-20 and may remain classified.

For the foregoing reasons, it is by the Court this 16th day of October 1984,

ORDERED that plaintiffs' motion for reconsideration be and hereby is granted in part; and it is further

ORDERED that defendants shall release to plaintiffs
Documents 6-20, except for information withheld properly
pursuant to 50 U.S.C. § 403g.


JUNE L. GREEN
U. S. DISTRICT JUDGE