UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE JAMES MADISON PROJECT,

Plaintiff,

v. C.A. 98-2737

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,

Defendant.

MEMORANDUM AND ORDER

The James Madison Project ("JMP") is a non-profit corporation whose avowed mission is to educate the public on issues relating to abuses of government intelligence operations, including secrecy policies inappropriately invoked in the name of national security, and similar mischief. In this case it seeks to address what it considers the misuse of classification authority by challenging the "classification of records for which the national security interest has long since passed." Complaint, p.3. It sues the National Archives and Records Administration ("NARA") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, et seq., as amended, for production of what it believes to be the six oldest classified records within the United States archives, which apparently date from 1917 and 1918 and pertain to the composition and detection of "secret inks," including German secret ink that may have been used during World War I.

JMP submitted its FOIA request to NARA in October, 1998. NARA referred it to a declassification unit which, in turn, forwarded it to the Central Intelligence Agency ("CIA").

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NARA thus vicariously invokes the two exemptions claimed for the documents by the CIA, namely exemptions (b)(1) and (b)(3), to prevent their disclosure. NARA has moved to dismiss the complaint, or in the alternative for summary judgment, on jurisdictional grounds.[1]

The first exemption claimed under 5 U.S.C. §552(b)(1), known as a "(b)(1) exemption," allows agencies to withhold information that has been "properly classified" according to criteria established in an executive order that protects such information as being in the interest of "national defense" or "foreign policy." 5 U.S.C. §552(b)(1). Executive Order 12,958, issued in 1995, governs the classification of national security information. This Executive Order provides for the protection of "intelligence sources or methods, or cryptology" if an "original classification authority" has classified the information and determined that the unauthorized disclosure of such information "could be expected to result in damage to the national security and . . . identif[ies] or describe[s] that damage." 5 C.F.R. §1312.3. The second exemption, claimed under 5 U.S.C. § 552(b)(3), a "(b)(3) exemption," addresses information "specifically exempted from disclosure

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[1] FOIA grants federal district courts jurisdiction over claims that agency records have been "improperly withheld." Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150 (1980). The withholding agency bears the burden of showing that it properly withheld the documents pursuant to an exemption from the FOIA. See 5 U.S.C. § 552(a)(4)(B); Beck v. Department of Justice, 997 F.2d. 1489, 1491 (D.C. Cir. 1993). It may do so through a "Vaughn Index," which explains how each withholding is justified through a particular exemption. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). When the agency succeeds in carrying out this burden, the plaintiff has failed to state a claim, the court lacks subject matter jurisdiction, and the agency is entitled to summary judgment as a matter of law. See Weisberg v. Department of Justice, 705 F.2d 1344, 1350 (D.C. Cir. 1983). Summary judgment may be granted on the basis of agency affidavits, if "(1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency." King v. U.S. Dep't of Justice, 830 F. 2d 210, 217 (D.C. Cir. 1987).

by [a] statute" that leaves either no discretion on disclosure or "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). NARA contends that Section 103 of the National Security Act of 1947, 50 U.S.C. 403-3(c)(6), serves as statutory authority for a (b)(3) exemption. Section 103 provides that, in his capacity "as the head of the intelligence community, the Director [of Central Intelligence] shall – . . . protect intelligence sources and methods from unauthorized disclosure." The Supreme Court has held that Section 103 qualifies as a withholding statute under exemption (b)(3). See CIA v. Sims, 471 U.S. 159, 167 (1985).

NARA contends that the documents in question relate to an intelligence method – secret writing – and that with or without the formality of classification, the Director of Central Intelligence must by statute prevent their disclosure by invoking a (b)(3) exemption. Moreover, the declarations of Teresa Wilcox, who is an "original classification authority" as an Information Review Officer for the CIA (and as such determines the classification status of documents for the Director of Central Intelligence), appear to support their classified status for a (b)(1) exemption.

In her original declaration. Wilcox accounts for each document with identifying information and a description of its contents. In a supplemental declaration, Wilcox explains that some of the methods described in the documents in question are still used by the CIA, and that third parties inimical to the interests of the United States may not know which of the formulas are still considered reliable by the CIA and approved for use by its agents. Wilcox Supp. Decl. at 2-3. Further, she explains, some of the formulas included in these documents serve as building blocks in the development of future covert communication methods. Wilcox Supp. Decl. at 3-4. For these reasons, Wilcox states the documents must remain classified. Their release could harm

national security. Wilcox Decl. at 25-26.

JMP's opposition to NARA's motion proceeds on several fronts. It questions whether the CIA ever had or still retains any authority over the dispositions of the documents. It contends that Ms. Wilcox is not a qualified affiant under Fed. R. Civ. P. 56 because she has no personal knowledge regarding secret inks, and provides no evidence beyond her say-so of her authority to make classification decisions for the CIA. JMP also pleads for a Vaughan index of greater specificity, a further effort at segregation of disclosable from still-sensitive matter, and an opportunity to conduct discovery.

But the principal thrust of its opposition is the inherent incredulity of the notion that eighty-odd-year old memoranda having to do with secret inks could possibly compromise U.S. intelligence methods of the 21st century. JMP states that it has "no interest in revealing legitimate intelligence sources or methods that are currently utilized to protect our national security." Opp., p. 3. Instead, it attempts to demonstrate the fatuity of perpetuating the government's hold on the documents by a showing of the public availability of information about secret ink methods generally, ranging from ancient works on plant inks to cryptology manuals written in the 1960s to "cookbooks with 130 + formulas available for $14.95." It concludes that "the documents at issue in this litigation detail German secret ink formulas that have already been exposed, and are widely available to any member of the public who chooses to visit a local bookstore or conduct searches on the Internet." Opp., p.11.

The CIA's plenary power over these documents derives from Executive Order No. 12,958 itself, which states that "[c]lassified information shall remain under the control of the originating agency or its successor in function." The CIA was not the "originating agency" of these ancient

documents, and in fact was not in existence at the time of their creation. NARA explains, however, that the CIA is the "successor in function" of the originating agency. See 50 U.S.C. § 403-3(c)(6). Executive Order No. 12,958 also provides that classified information at NARA shall be declassified pursuant to, inter alia, agency declassification guides "and any existing procedural agreement between the Archivist and the relevant agency head." Id. at Section 3.3(c). Steven Tilley, the Chief of Special Access/FOIA for NARA's Office of Records Services, states in his declaration that "the CIA had advised NARA as long ago as 1973 that any government documents dealing with the subject of secret writing should be handled in accordance with CIA guidance and instructions." Tilley Decl., pp. 2-3. He then submits the letter agreement between the CIA and NARA which specifies that the CIA has classification authority over all documents pertaining to secret writing "regardless of where the documents might be located in the various agency records accessioned in to the National Archives." Tilley Supp. Decl., p. 5. Secret ink writings that may require continued protection "must be reviewed by OSS [Office of Strategic Services] reviewers or specialists of the CIA." Tilley Supp. Decl., Attach. 1(A). Thus, each of the six documents in question, being classified, can be declassified only by the CIA. Wilcox Decl., pp. 21-28.

Wilcox's declarations, moreover, are precisely of the sort that this Court is expected to rely upon in ruling upon motions for summary judgment for the government in FOIA cases.[2] To meet the requirements for a (b)(1) exemption, a declarant need not have personal knowledge of the substance of the request, merely classification authority for the documents in question.

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[2] JMP offers no basis whatsoever to question Wilcox's avowal that she is, indeed, an "original classification authority."

Holland v. CIA, No. 01-1233, 1992 U.S. Dist. LEXIS 13196, at *24-25, (D.D.C. Aug. 31, 1992) (deference to the government when a claim to withhold is asserted under the national security exemption includes deference about who is qualified to classify and discuss such materials), citing Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980); McTigue v. United States Dep't of Justice, No 84-3583, slip op. at 8-9, Exhibit F (D.D.C. Dec. 3, 1985), aff'd 808 F.2d 137 (D.C. Cir. 1987). The Court should defer to the CIA's decision regarding the "magnitude of the national security interests and potential risks" because of the CIA's institutional expertise in this area. See Sims, 471 U.S. at 179; Fitzgerald v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (Director of Central Intelligence has responsibility for assessing threats to intelligence sources.).

JMP suggests that the documents may include subject matter specifically declared non-sensitive in the letter agreement. The letter agreement does make reference to sorts of information about secret inks that are not sensitive and do not require protection. Tilley Supp. Decl., Attach. 1(B). Plaintiff claims that the requested documents should be disclosed to the extent that they contain segregable, non-sensitive subject matter.[3] However, Wilcox's description of the contents of the six documents provides no reason to suppose that any portion of the requested documents might fall within the categories listed in the agreement as non-sensitive; thus, there is no need to for this Court to consider segregability standards or application, or to

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[3] The following are listed as being non-sensitive subject matter: "(aa) Preparation, use, and detection of such writing fluids as blood, lemon juice, milk, urine, saliva, or vinegar. (bb) Positioning of secret writing; e.g., between lines of a page, on the flap of an envelope, or elsewhere on a document. (cc) Use of ultraviolet or infrared light for detection." Tilley Supp. Decl., Attach. 1(B).

conduct an in camera inspection.[4]

In short, all that JMP says about the public availability of a wealth of information regarding secret ink may be true, but it is also irrelevant. Numerous decisions of other courts have consistently held that district courts should defer to the CIA's judgment regarding what disclosures could potentially threaten national security, even when the same information may be publicly available.[5] Although it may seem implausible that documents nearly a century old should remain classified to this day, the age of the documents alone does not render their

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[4] For a (b)(3) exemption the Court need not scrutinize the substance of a disputed document, but instead merely determine if there is a relevant statute and if the statute pertains to the document. See Goland v. CIA, 607 F.2d 339, 350 (D.C. Cir. 1978).

[5] For information to be deemed public warranting disclosure despite a valid exemption under FOIA, a plaintiff must establish that the information requested is as specific as that previously disclosed, that the information requested is identical to that previously disclosed, and that the information requested has been made public through an official and documented disclosure. See Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990) ("the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations." Id. at 766); Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)("even if a fact . . . is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security." Id. at 1130); Billington v. Department of Justice, 11 F. Supp.2d 45, 56 (D.D.C. 1998). The requirement that the requested material be identical to that previously disclosed is stringent. See Davis v. United States Dep't of Justice, 968 F.2d 1276, 1279-80 (D.C. Cir. 1992) (despite plentiful newspaper accounts, plaintiff could not identify specific information in the public domain that duplicated the protected information); Schlesinger v. CIA, 591 F. Supp. 60, 68 (D.D.C. 1984) (exemption upheld when requested information had not been disclosed and plaintiff produced no evidence that it was duplicative of information in the public sphere.) Further, the requirement that the information requested have been made public through an official disclosure precludes all non-CIA disclosures, including disclosures by former CIA agents, Afshar, 702 F.2d at 1133, or other government bodies. See Frugone v. Central Intelligence Agency, 169 F.3d 772, 775 (D.C. Cir. 1999) (OPM cannot, through disclosure, waive CIA's right to assert FOIA exemption for national security); Fitzgibbon, 911 F.2d 755 (publication of requested information in a congressional committee report does not constitute official disclosure).

classification obsolete when disclosure may, in the contemporaneous judgment of those whose job it is to know, adversely affect intelligence techniques still in use. See Canning v. U.S. Dep't of Justice, 848 F. Supp. 1037, 1045-6 (D.D.C. 1994). Now that the CIA has reviewed these documents and determined that their disclosure, antiquated as they are, could nevertheless harm national security today, their age is immaterial. See Schlesinger v. CIA, 591 F. Supp. 60 (D.D.C. 1984) (age of documents in question was "rendered inconsequential since the CIA recently reviewed them and determined that despite their age, harm could still flow from their release." Id. at 68.)

Given the exemptions claimed for them – exemptions (b)(1) and (b)(3) – further inquiry is neither warranted nor permissible. It is undisputed on this record that the documents pertain to an "intelligence method or cryptology," and they were and are classified by an "original classification authority." They are also of a nature that the Director of Central Intelligence is by statute directed to protect from disclosure.

In accordance with the proceedings at the motions hearing of February 14, 2002, upon consideration of the government's motion to dismiss or for summary judgment, the plaintiff's opposition and motion to strike Wilcox's declaration, the defendant's reply, and all other filings related thereto, for the foregoing reasons, it is, this 5th day of March, 2002,

ORDERED, that defendant's motion to dismiss or for summary judgment [8] is granted, and the complaint is dismissed with prejudice; and it is

FURTHER ORDERED, that all other pending motions in this case are hereby denied as moot.

Thomas Penfield Jackson
U.S. District Judge