UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADAM JOHNSON,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant.

Case No. 17 Civ. 1928 (CM)

MEMORANDUM OF LAW IN SUPPORT OF THE CENTRAL INTELIGENCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This Freedom of Information Act ("FOIA") lawsuit concerns a request by plaintiff Adam Johnson ("Plaintiff") for "all correspondence between March 1, 2012 and August 17, 2012 between staffers in the CIA's Office of Public Affairs and" ten reporters.

The Court should grant summary judgment in favor of the CIA. Of the numerous documents processed and produced by the CIA in response to Plaintiff's FOIA request, only five documents remain at issue. These documents consist of emails between the CIA's Office of Public Affairs and three reporters, and they were produced to Plaintiff in redacted form. With respect to these five documents, Plaintiff challenges only the CIA's partial withholding of the substantive portions of the emails. Because those redactions (a) concerned classified information, and (b) were made to protect intelligence sources and methods under the National Security Act, 50 U.S.C. § 3024(i)(1), and/or to protect information that would reveal the "organization, functions, names, official titles, salaries, or numbers of personnel" of the CIA under the Central Intelligence Agency Act of 1949 ("CIA Act"), 50 U.S.C. § 3507, the redacted material was properly withheld under FOIA Exemptions 1 and 3.

BACKGROUND AND PROCEDURAL HISTORY

I. PLAINTIFF'S FOIA REQUEST AND CIA RESPONSES

Plaintiff submitted a FOIA request (the "Request") dated February 13, 2017, to the CIA. *See* Declaration of Anthony J. Sun dated August 25, 2017 ("Sun Decl."), ¶ 3 & Ex. A. In his request, Plaintiff sought "all correspondence between March 1, 2012 and August 17, 2012 between staffers in the CIA's Office of Public Affairs and" ten individuals identified as reporters for various news publications. *Id.* Ex. A, at 1. The CIA responded to the Request by letter dated February 22, 2017, requesting clarification of the Request. *Id.* ¶ 4 & Ex. B. The CIA sent its

response via First Class Mail to the address provided by Plaintiff in the Request, but it was marked "Return to Sender," "Not Deliverable as Addressed," and "Unable to Forward" by the United States Postal Service on or about March 8, 2017, and the return was received by CIA on or about March 31, 2017. *Id.* Ex. B, at 3.

Before CIA received the return of its letter requesting clarification, Plaintiff filed this action on March 16, 2017. *See* Compl., Docket No. 1. Following the initiation of litigation and discussions between counsel, Plaintiff clarified the Request, and the CIA began processing the Request. Sun Decl. ¶ 5. CIA made four productions to Plaintiff of documents responsive to Plaintiff's requests on May 16, 2017 (244 documents), May 18, 2017 (82 documents), June 13, 2017 (18 documents), and July 21, 2017 (5 documents). Sun Decl. ¶ 6.

II. THE DOCUMENTS AT ISSUE

Based on discussions with Plaintiff's counsel, the CIA understands that the only matters in dispute concern the final set of five documents, which may be identified by number: (1) C06012561; (2) C06012628; (3) C06013438; (4) C06013440; and (5) C06013627.[1] Sun Decl. ¶¶ 7–12 & Exs. C–G.

The five documents at issue consist of email correspondence sent between personnel at the CIA Office of Public Affairs and three journalists in May and July of 2012. Sun Decl. Exs. C–G. Within these documents, Plaintiff challenges only the CIA's partial withholding of the

[1] The government as a general matter bears the burden to show that it conducted a reasonable search for records responsive to the FOIA request at issue. *See, e.g.*, *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) ("In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate." (internal quotation marks omitted)). Here, however, the CIA understands that Plaintiff does not contest the adequacy of CIA's search, *see* Sun Decl. ¶ 13, and we therefore do not detail that search herein.

substantive portions of the emails.[2] As explained in the Declaration of Antoinette Shiner dated August 25, 2017 ("Shiner Declaration"), and the Classified Declaration of Antoinette Shiner dated August 25, 2017 ("Classified Shiner Declaration"), submitted for the Court's *ex parte*, *in camera* review, the withheld material is protected from disclosure by FOIA Exemptions 1 and 3.

LEGAL STANDARD

FOIA represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423). Thus, while FOIA generally requires disclosure of agency records, the statute recognizes "that public disclosure is not always in the public interest," *Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982); *accord ACLU v. DOJ*, 681 F.3d 61, 69 (2d Cir. 2012), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001).

A motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which FOIA cases are typically decided. *See, e.g.*, *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough

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[2] The CIA also withheld the email addresses and phone numbers of CIA employees, and the email addresses and phone numbers of the reporters. *See* Sun Decl. Exs. C–G. It is the CIA's understanding that Plaintiff does not challenge the CIA's withholding of that information. Sun Decl. ¶ 13.

search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden" on summary judgment. *Carney*, 19 F.3d at 812 (footnote omitted).[3] The agency's declarations in support of its determinations are "accorded a presumption of good faith." *Id*. (quotation marks omitted).

In the national security context, moreover, courts must accord "substantial weight" to agencies' declarations. *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009); *accord N.Y. Times Co. v. DOJ*, 756 F.3d 100, 112 (2d Cir. 2014); *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). In reviewing the agency's declarations regarding national security matters, "the court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the expert opinion of the agency." *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980); *see also ACLU v. DOJ*, 681 F.3d at 70–71 ("Recognizing the relative competencies of the executive and judiciary, we believe that it is bad law and bad policy to second-guess the predictive judgments made by the government's intelligence agencies regarding whether disclosure of the [withheld information] would pose a threat to national security." (quoting *Wilner*, 592 F.3d at 76) (internal quotation marks omitted)); *accord Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999); *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990).

In explaining the bases for its withholdings, the government has a clear and compelling interest in preventing public disclosure of sensitive and classified information. *See Hamdan v.*

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[3] Because agency affidavits alone will support a grant of summary judgment in a FOIA case, Local Rule 56.1 statements are unnecessary. *See Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995) (noting "the general rule in this Circuit"), *aff'd*, 83 F.3d 41 (2d Cir. 1996); *see also, e.g.*, *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

Rumsfeld, 548 U.S. 557, 634–35 (2006) ("That the Government has a compelling interest in denying [opposing party] access to certain sensitive information is not doubted."); *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (government has a "compelling interest in withholding national security information from unauthorized persons in the course of executive business"). Because that compelling interest overrides the public's interest in open proceedings and plaintiffs' interest in an adversarial process, courts have consistently recognized (and exercised) their "inherent authority to review classified material *ex parte*, *in camera* as part of [their] judicial review function." *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004).

Indeed, in sensitive national security cases, "it is simply not possible to provide for orderly and responsible decisionmaking about what is to be disclosed, without some sacrifice to the pure adversary process," and "Congress has acknowledged that judges must sometimes make these decisions without full benefit of adversary comment on a complete public record." *Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979). Accordingly, in FOIA cases implicating national security interests, it is well-established that a declaration justifying the withholding of information pursuant to Exemptions 1 and 3 may be submitted *ex parte*, for the Court's *in camera* review, where public filing of the declaration would reveal information that is itself classified or otherwise exempt from disclosure. *See, e.g.*, *Stillman v. CIA*, 319 F.3d 546, 548 (D.C. Cir. 2003); *Hayden*, 608 F.2d at 1385–86; *ACLU v. Office of the Dir. of Nat'l Intelligence*, No. 10 Civ. 4419 (RJS), 2011 WL 5563520, at *12 (S.D.N.Y. Nov. 15, 2011); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 507–08 (S.D.N.Y. 2010).

ARGUMENT

The Court should grant the CIA's motion for summary judgment because the CIA's declarations demonstrate that the information at issue was properly withheld pursuant to FOIA Exemptions 1 and 3.

Exemption 1 exempts from disclosure records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy," and "are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). Pursuant to Executive Order 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009), information is properly classified if (1) an original classifying authority classified the information; (2) the information is owned by, produced by or for, or is under the control of the United States Government; (3) the information "pertains to" one of eight categories of information specified in the Executive Order, including "intelligence activities (including covert action), sources and methods"; and (4) its "unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security." Executive Order 13,526, §§ 1.1, 1.4.

Under Exemption 3, matters "specifically exempted from disclosure by [a] statute" that "leave[s] no discretion on the issue" or "establishes particular criteria for withholding" need not be disclosed. 5 U.S.C. § 552(b)(3). When assessing whether Exemption 3 applies, a court must determine (1) whether there is an applicable withholding statute, and (2) if so, whether the material withheld is within the statute's coverage. *CIA v. Sims*, 471 U.S. 159, 167 (1985). Exemption 3 "differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Wilner*, 592

F.3d at 72 (quoting *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 336 (D.C. Cir. 1987)).

Section 102A(i)(1) of the National Security Act, as amended, states: "the Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). The National Security Act thus authorizes the Director of the CIA to "protect CIA sources and methods from unauthorized disclosure." Shiner Decl. ¶ 13. Courts have consistently held that the National Security Act qualifies as a FOIA Exemption 3 withholding statute. *See, e.g.*, *CIA v. Sims*, 471 U.S. at 167; *ACLU v. DOJ*, 681 F.3d at 72–75; *ACLU v. DOD*, 628 F.3d 612, 619, 626 (D.C. Cir. 2011); *Berman v. CIA*, 501 F.3d 1136, 1137–38, 1140 (9th Cir. 2007); *N.Y. Times Co. v. DOD*, 499 F. Supp. 2d 501, 512-13 (S.D.N.Y. 2007).

Moreover, the CIA Act provides that, in the interest of the security of the foreign intelligence activities of the United States, the CIA is exempt from the provisions of any law which requires the publication or disclosure of "the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency." 50 U.S.C. § 3507. Like the National Security Act, the CIA Act is a withholding statute under FOIA Exemption 3. *See ACLU v. DOJ*, 681 F.3d at 72–73 (relying on section 102A(i)(1) of the National Security Act and the CIA Act in upholding CIA's assertion of Exemption 3); *Larson v. Dep't of State*, 565 F.3d at 865 n.2; *Roman v. CIA*, No. 11 Civ. 2390 (JFB) (WDW), 2012 WL 6138487, at *5 (E.D.N.Y. Dec. 11, 2012) (relying on CIA Act in upholding assertion of FOIA Exemption 3).

The deference accorded to the CIA in national security cases extends to the agency's determinations whether information is protected under Exemption 3 and the National Security Act or CIA Act. *See, e.g.*, *ACLU v. DOJ*, 681 F.3d at 75 ("[a]ccording substantial weight" to agency's declarations, holding that records "relate[d] to an intelligence method within the

meaning of the NSA, and, accordingly, may be withheld"); *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) ("[g]iving due deference to the agency's determination," holding that redacted information was exempt from disclosure under National Security Act, 50 U.S.C. § 403(d)(3) (predecessor to 50 U.S.C. § 3024(i)(1)), and Exemption 3); *Fitzgibbon*, 911 F.2d at 762 (noting that in determining whether withheld information relates to intelligence sources and methods for purposes of § 403(d)(3) and Exemption 3, "we accord substantial weight and due consideration to the CIA's affidavits"); *Nat'l Security Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 216 (D.D.C. 2005) ("Courts evaluating Exemption 3 claims must accord the same substantial weight to the agency's judgment as with Exemption 1 claims." (citing *Sims*, 471 U.S. at 179)); *James Madison Project v. CIA*, 607 F. Supp. 2d 109, 126–27 (D.D.C. 2009) ("Bearing in mind its obligation to give 'substantial weight and deference' to the [CIA's] declaration, the court determines that all of the information withheld falls within the scope of the National Security Act and the CIA Act" (citing *Fitzgibbon*, 911 F.2d at 766)).

While the CIA regrets that a fuller explanation for its withholdings in the documents at issue cannot be offered on the public record, to do so in this case would disclose the very information that the CIA seeks to protect. Accordingly, the CIA respectfully directs the Court to the Classified Shiner Declaration for a more detailed explanation of the CIA's invocation of the asserted exemptions. *See Hayden*, 608 F.2d at 1385 (providing affidavit *in camera* appropriate "where the district court could reasonably find that public itemization and detailed justification would compromise legitimate secrecy interests"). The CIA's declarations articulate compelling reasons explaining why the information at issue was properly classified and withheld under Exemption 1 and/or is protected under the National Security Act and/or the CIA Act and thus

was properly withheld under Exemption 3. *See* Shiner Decl. ¶¶ 9, 11, 14, 15; Classified Shiner Decl.

Because the CIA's declarations, including the Classified Shiner Declaration, provide compelling reasons demonstrating that the withheld material is protected from disclosure by FOIA Exemptions 1 and 3, the Court should uphold the CIA's redactions.

I. THE CIA PROPERLY WITHHELD INFORMATION IN DOCUMENT C06012628 PURSUANT TO EXEMPTIONS 1 AND 3

The CIA properly withheld information in document C06012628 pursuant to FOIA Exemptions 1 and 3. The email consists of an exchange between the CIA and a single reporter in which the reporter sought the CIA's "guidance" on the anticipated publication of an article containing "more detail" on a "sensitive" story. *See* Sun Decl. Ex. D. As explained in the Shiner Declaration and Classified Shiner Declaration, the CIA properly withheld the redacted material because its release "could reasonably be expected to reveal intelligence sources, methods, and activities of the CIA and/or cause damage to foreign relations or foreign activities of the United States." Shiner Decl. ¶ 11; Classified Shiner Decl.

Under the National Security Act and Exemption 3, the CIA may properly withhold communications reflecting CIA communications with press regarding the potential publication of information that would harm national security by revealing intelligence sources and methods. *See Phillippi v. CIA*, 655 F.2d 1325, 1331–32 (D.C. Cir. 1981) (documents "regarding the CIA's effort to dissuade the American press from publishing stories regarding the Glomar Explorer mission" — which included transcripts and memoranda relating to contacts between CIA officials and members of the press — were properly withheld under Exemption 3). In *Phillippi*, for example, the D.C. Circuit upheld the CIA's withholding of documents relating to contacts between CIA officials and members of the press from a requester who was a reporter not privy to

those prior contacts. *Id.* at 1327, 1331–32. In particular, the court noted that there was "the possibility that the American press did not publish everything disclosed by the CIA at its confidential briefings" because the CIA's "entreaties may have been at least partially successful." *Id.* at 1331. Even if some "journalists who lacked security clearances and who did not promise to respect the secrecy of the information provided to them" were told information, because some of those journalists may have "voluntarily and patriotically abstained from publishing that information, disclosure of the documents requested by the appellant could lead a foreign intelligence analyst to information they would otherwise not have obtained." *Id.* at 1332. In upholding the withholding, the court concluded: "FOIA does not require the CIA to lighten the task of our adversaries around the world by providing them with documentary assistance from which to piece together the truth" of the CIA's intelligence sources and methods. *Id.*

With respect to document C06012628, because "no one who was not privy to th[is] [email with the] CIA . . . can know for sure which information [in any resulting article] came from CIA sources and which information originated elsewhere," *Phillippi*, 655 F.2d at 1332, disclosure of the contents of the CIA's communication with that reporter risks revealing previously undisclosed sources and methods. The Classified Shiner Declaration explains why the withheld information would reveal intelligence sources or methods, and the CIA's justification provided therein for the redactions in document C06012628 is at least as strong as the justification for the withholdings at issue in *Phillippi*.

Moreover, as explained in the Shiner Declaration and Classified Shiner Declaration, because release of the information at issue "could reasonably be expected to cause serious damage to national security," the information at issue was properly classified at the "Secret"

level pursuant to Executive Order 13,526, and the information therefore was also properly withheld pursuant to FOIA Exemption 1. *See* Shiner Decl. ¶ 11; Classified Shiner Decl.

II. THE CIA PROPERLY WITHHELD MATERIAL IN DOCUMENTS C06012561, C06013438, C06013440, AND C06013627 PURSUANT TO EXEMPTIONS 1 AND 3

The CIA's declarations further establish that the CIA properly withheld portions of documents C06012561, C06013438, C06013440, and C06013627 pursuant to FOIA Exemption 1, as well as FOIA Exemption 3 and both the National Security Act and the CIA Act.

The information at issue satisfies all of the criteria for proper classification at the "Secret" level, as explained in detail in the classified declaration submitted for the Court's review *ex parte* and *in camera*. The CIA has articulated compelling reasons supporting its judgment that release of this information "could reasonably be expected to reveal intelligence sources, methods and activities of the CIA and/or cause damage to foreign relations or foreign activities of the United States," "could reasonably be expected to cause serious damage to national security," and has otherwise met the requirements of Executive Order 13,526. *See* Shiner Decl. ¶ 11; Classified Shiner Decl. The CIA's declarations are entitled to substantial deference, *see ACLU v. DOJ*, 681 F.3d at 71, 76, and accordingly the Court should grant summary judgment to the government with respect to its assertion of Exemption 1 in documents C06012561, C06013438, C06013440, and C06013627.

Because the redacted information at issue in the four documents would reveal intelligence sources and methods, *see* Shiner Decl. ¶¶ 13–14, Classified Shiner Declaration, it is thus also categorically protected from disclosure under the National Security Act, 50 U.S.C. § 3024(i)(1), and exempt from disclosure under FOIA Exemption 3. In addition, as the Shiner Declaration attests, the redacted information would reveal the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency, Shiner Decl. ¶ 15, and therefore it is

also protected under the CIA Act, 50 U.S.C. § 3507, and Exemption 3. *See N.Y. Times Co. v. DOJ*, 756 F.3d at 109 (National Security Act protects from disclosure "intelligence sources and methods" and the CIA Act protects from disclosure information concerning the "functions" of the CIA).

The CIA's declarations articulate compelling reasons explaining why the information at issue in documents C06012561, C06013438, C06013440, and C06013627 was properly classified and withheld under Exemption 1 and/or is protected under the National Security Act and/or the CIA Act and thus was properly withheld under Exemption 3. *See* Shiner Decl. ¶¶ 9, 11, 14, 15; Classified Shiner Decl.

III. THE CIA DISCLOSED ALL REASONABLY SEGREGABLE MATERIAL

FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). With respect to this requirement, an agency is "entitled to a presumption that [it] complied with the obligation to disclose reasonably segregable material." *Hodge v. FBI*, 703 F.3d 575, 582 (D.C. Cir. 2013) (quotation marks omitted). Here, there is no basis to disturb the presumption that the CIA has disclosed all reasonably segregable material in the documents at issue. The CIA's declarant has affirmed that she conducted a segregability review and that no additional information can be released without jeopardizing classified material and/or statutorily protected information. Shiner Decl. ¶ 16. Accordingly, the CIA's withholdings are proper and should be upheld.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of the CIA.

Dated: New York, New York
August 25, 2017

Respectfully submitted,

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