

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE JAMES MADISON PROJECT

Plaintiff,

v.

Civil Action No. 07-01154 (RMU)

CENTRAL INTELLIGENCE AGENCY

Defendant.

* * * * *

**RULE 56(f) DECLARATION OF
EXECUTIVE DIRECTOR MARK S. ZAID, ESQ.**

I, MARK S. ZAID, pursuant to 28 U.S.C. § 1746, hereby declares as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (filed April 25, 2008).

2. I am the Executive Director of the plaintiff James Madison Project (“JMP”) and have served in that position since I founded the organization in 1998. JMP is a Washington, D.C.-based non-profit organization created for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under disclosure acts such as the Freedom of Information Act (“FOIA”). The principles underlying the objectives of the JMP are derived from the 1997 findings of The Commission on Protecting and Reducing Government Secrecy. Our website, which contains further information and examples of JMP’s activities, can be viewed at *www.JamesMadisonProject.org*.

3. I am also an attorney of record in this litigation for JMP. I am admitted to practice law in the States of New York, Connecticut, Maryland and the District of Columbia, as well as the D.C. Circuit, Second Circuit and Fourth Circuit Court of Appeals, and the United States District Courts for the District of Columbia, Maryland, Eastern District of New York, Northern District of New York and the Southern District of New York. I have been litigating FOIA cases since 1993. I have been teaching the D.C. Bar Associations CLE courses on FOIA since 2003, and I have been the co-editor of LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS since 2002.

Procedural Background

4. By letter dated May 18, 2000, I submitted to the Central Intelligence Agency (“CIA”) on behalf of JMP a FOIA request which sought copies of all internal CIA regulations on or pertaining to (1) personnel issues; (2) the granting or revocation of security clearances; (3) grievance procedures; (4) disciplinary procedures; (5) the Prepublication Review Board; (6) declassification of information; (7) the Historical Advisory Board; and (8) the implementation of the Freedom of Information and Privacy Acts. The request also required the CIA to reprocess those regulations it had previously released through an earlier FOIA lawsuit, as published in 58 Fed.Reg. 65964 (December 17, 1993), to the extent any information within these regulations was redacted.

5. After more than two years elapsed with no response, by letter dated July 26, 2002, the CIA acknowledged receipt of the request and assigned it Request No. F-2000-01097.

6. In the same letter the CIA also denied JMP’s request in its entirety on the basis of FOIA Exemption (b)(3). Despite the fact that earlier litigation had resulted in the release

of internal CIA regulations, thus placing the CIA on notice that the contents were susceptible to release, the CIA continued to promote its attitude towards excessive secrecy. Additionally, the CIA refused to even reprocess those regulations that had been previously released but remained redacted claiming that it was not required to do so. No statutory or regulatory authority was provided as the basis for this position.

7. By letter dated August 8, 2002, I informed the CIA of JMP's decision to appeal the denial of the request. The CIA acknowledged receipt of the appeal by letter dated August 20, 2002.

8. No further responses were ever received by the CIA. Therefore, after nearly five years of patiently waiting for the CIA to fulfill its legal obligations, and coming up on the eve of the expiration of the six year statute of limitation period, on June 27, 2007, JMP filed suit in this Court.

9. On September 21, 2007, I spoke with Vesper Mei, the Department of Justice attorney representing the CIA, and we negotiated the following: (1) the parties agree to treat plaintiff's FOIA request as a request for copies of the versions of the CIA regulations that it seeks that were current as of June 27, 2007, and for no other documents; (2) the CIA will complete processing of the documents responsive to plaintiff's request and release to plaintiff any non-exempt documents or portions of documents by January 11, 2008; (3) the parties will confer with respect to the CIA's release (if any) of documents by January 25, 2008; and (4) if, after conferring, the parties do not agree that the CIA's release of any non-exempt documents or portions of documents resolves the issues in this case, the CIA will move for summary judgment on or before March 25, 2008.

10. By letter dated January 10, 2008, the CIA released 53 documents that had been previously withheld in their entirety in segregable form. An additional unknown number of records continued to be withheld in their entirety.

11. From the CIA's filing of its Motion for Summary Judgment, the CIA claims it identified 76 responsive documents, of which 53 were partially released and 23 withheld in full. Upon review of released records I determined that JMP would challenge the withholdings in 25 of the 53 documents partially released, and all of the 23 records withheld in full.

12. The CIA subsequently released, as part of its Motion for Summary Judgment, a redacted version one of the documents initially withheld in full.

Substantive Response

13. The CIA relies on the Declaration of Joseph W. Lambert, Director, Information Management Services, Office of the Chief Information Officer (dated April 24, 2008)("Lambert Decl.") to support its withholding determinations.

14. In my private capacity as an attorney I have been representing federal employees in internal matters for over 15 years. This includes employees within the Intelligence Community as a whole and the CIA specifically. The CIA is required, just like any other federal agency, to adopt and implement a host of federal statutes. Many of its regulations, as evidenced by those records released as part of this very lawsuit, reveal that not only are they oftentimes mere regurgitations of sections of federal statutes (such as, for example, FOIA), but are also quite similar to those in existence at other federal agencies.

15. As both a private attorney and as the Executive Director of JMP, I have litigated dozens of FOIA lawsuits. In fact, many of these cases have been against the CIA. Mr.

Lambert's declaration is likely one of the most hyped and exaggerated documents I have seen in litigating FOIA cases during the last 15 years. And as many of agency FOIA declarations tend to be, Mr. Lambert's document is no exception in that it contains pages upon pages of generalized boiler-plate descriptions of the process by which the CIA coordinates FOIA requests, how generic classification determinations are rendered and the differing levels, descriptions of FOIA exemptions and, of course, the typical bells and whistles concerning the alleged dangers posed by the "mosaic theory".¹

16. Mr. Lambert's declaration contains bold propositions that a "wholesale request for the public release of internal CIA regulations--particularly where such a request could be repeated over time to develop an evolving picture of CIA organizational behavior priorities, systems, procedures, and methods--presents unique risks to the CIA's operational effectiveness which *Congress anticipated and against which it explicitly protected the CIA by statute.*" *Id.* at ¶9 (emphasis added). Mr. Lambert provides absolutely no evidence to support the notion that the withholding of regulations, such as special death benefits and medical leave, was what Congress in 1947 anticipated should be withheld in order to protect the "secrecy" of the CIA. The burden to demonstrate that

¹ Why, for example, does Mr. Lambert comment upon the "risk that there may be a spy within its ranks" so that appropriate precautions are required to be taken, and that "[o]ne way to minimize such damage is to limit the amount of information to which any particular employee has access." Lambert Decl. at ¶24. For one thing, this lawsuit addresses the extent to which the CIA is statutorily required to release records to the public. It has nothing to do with employee access to information. Moreover, should the CIA actually have a spy currently in its midst, that "employee" would likely have legitimate access to the majority, if not all, of the regulations at issue in this lawsuit – given that they primarily pertain to personnel matters – simply by virtue of their employment status.

Congressional intent supports its premise, which JMP challenges, falls upon the CIA and it has not met that burden.

17. As stated above, many federal agencies post their internal regulations online including some that possess intelligence functions. For example, the following agencies' regulations can easily be compared to the contents of the CIA regulations at issue here to determine exactly what is and is not "classified" and how release could grant our enemies tactical advantage:

- Department of Defense
http://www.access.gpo.gov/nara/cfr/waisidx_04/32cfrv1_04.html
- Department of Homeland Security (Aliens and Nationality)
http://www.access.gpo.gov/nara/cfr/waisidx_08/8cfrv1_08.html
- Department of Homeland Security (Domestic Security)
http://www.access.gpo.gov/nara/cfr/waisidx_08/6cfrv1_08.html
- Department of State
http://www.access.gpo.gov/nara/cfr/waisidx_08/22cfrv1_08.html
- Department of Justice
http://www.access.gpo.gov/nara/cfr/waisidx_07/28cfrv1_07.html and
http://www.access.gpo.gov/nara/cfr/waisidx_07/28cfrv2_07.html#43
- Bureau of Alcohol, Tobacco, Firearms & Explosives
http://www.access.gpo.gov/nara/cfr/waisidx_08/27cfrv3_08.html
- Federal Emergency Management Administration
http://www.access.gpo.gov/nara/cfr/waisidx_07/44cfrv1_07.html

18. Even the Defense Intelligence Agency, a sister intelligence agency to that of the CIA, has declassified many of its internal regulations. Several, including pertaining to personnel security, are listed on JMP's website at *http://www.jamesmadisonproject.org/documents.php?organization_id=3&category_id=6*.

19. More specifically, while the CIA may arguably have some legitimate claims to “secrecy”, those claims are no more so relevant than in relation to the Department of Justice, the Department of Defense, or the Department of the Navy, among others. All three such agencies have publicly released internal regulations encompassing matters whose scope arguably falls within some of the very regulations that the CIA has chosen to withhold in their entirety. For example:

- Exemption One

MORI 1511372 – Subject: Financial Regulation
28 C.F.R. 47 (Right to Financial Privacy Act) – Department of Justice regulation authorizing ability to request financial records from a financial institution if relevant to a law enforcement inquiry.

- Exemption Three

MORI 1511380 – Subject: Dependent Children
32 C.F.R. 54 (Allotments for Child and Spousal Support) – Department of Defense regulation providing policy on statutorily required child and/or spousal support allotments.
32 C.F.R. 734 (Garnishment of Pay and Naval Military and Civilian Personnel for Collection of Child Support and Alimony) – Department of the Navy regulation detailing procedures pertaining to enforcement of legal obligations to provide child support.

- Exemption Two (high)

MORI 1511385 – Subject: Dispute Resolution
32 C.F.R. 70 (Discharge Review Board Procedures and Standards) – Department of Defense regulation establishing policies and procedures for review of discharges or dismissals.

- Exemption Two (low)

MORI 1511384 – Subject: Information Management Regulation
28 C.F.R. 25 (Information Systems) – Department of Justice regulation establishing policies and procedures implementing the Brady Handgun Violence Prevention Act.

20. Mr. Lambert claims that “every CIA regulation is a piece of a mosaic of information reflecting the CIA’s overall organization and function.” Lambert Decl. at ¶63. He further notes that “[a]s a result, CIA regulations provide a framework for any

‘mosaic’ that a hostile entity might assemble to use against the United States.” *Id.* at ¶64. Not surprisingly, no effort is made to attach the application of the “mosaic theory” to specific documents, likely because it simply could not be done. For example, MORI DocId: 1511295 which is AR 70-5: Declassification and Release is, ironically, one of the most redacted of the partially released records. Almost half of the document is redacted. Exactly how does the “mosaic theory” apply, thereby according some potential benefit to a foreign intelligence service, to a regulation that merely implements how records are to be “officially declassified” and publicly released? In order to attain dismissal of this lawsuit on the basis of summary judgment, the burden is upon the CIA to articulate the application of any relevant FOIA exemptions and potential dangers that would ascribe were records to be released. It has failed to do so in this case.

21. With respect to the issue of adequacy of search, the CIA has failed to demonstrate it has acted reasonably and processed all responsive records. First, there is no way to determine exactly whether the CIA’s search was adequate when it does not cooperate to provide an unclassified list of its’ regulations to review. This information is only in the possession of the CIA. By e-mail dated January 31, 2008, I requested the CIA, through the Department of Justice attorney handling this case, Vesper Mei, each regulation’s numerical identifier and subject heading in an attempt to eliminate the need to challenge the CIA’s adequacy of its search. See Exhibit “2”. The CIA declined to provide the information. Second, the Lambert Declaration and the CIA’s Vaughn Index singularly fail to demonstrate that the CIA conducted a diligent search that was both reasonable and adequate. The existence of applicable Executive Orders and federal statutes that require agencies to implement regulations not identified in the CIA’s affidavits, as well as the

absence in either document of even the most boilerplate index of regulations, significantly undercuts the CIA's argument that there remains no genuine issue of material fact concerning the adequacy of the search. The CIA's affidavits provide little to no specific context concerning the manner in which the search was conducted, failing to detail search terms used, leads investigated, or offices searched. The insufficiency of the CIA's affidavits deprives JMP as a requestor, and this Court, of an adequate context in which to assess the reasonableness of the CIA's search.

22. Because material facts, such as described above, still remain at issue, JMP should be permitted to undertake limited discovery in order to address the disputes surrounding the CIA's adequacy of search and the appropriateness of its Exemption invocations. Discovery need not be overly burdensome or excessive in scope. At a minimum, supplemental CIA affidavits – possibly including the previously-requested comprehensive index of responsive regulations – could fill at least some of the evidentiary gaps identified by JMP. In addition, a limited number of interrogatories and depositions will be necessary to identify the full scope of responsive regulations that exist and assess whether the CIA's search methodology was reasonably calculated to uncover all responsive documents in light of that information

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: July 1, 2008

/s/

Mark S. Zaid