

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY FULLER,)
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 Plaintiff,)
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 v.) Civil Action No. 04-253 (RWR)
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 CENTRAL INTELLIGENCE AGENCY,)
)
 Defendant.)
)

MEMORANDUM OPINION AND ORDER

Plaintiff Gary Fuller sued defendant Central Intelligence Agency ("CIA") for information withheld in response to Fuller's request for documents under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"). The CIA filed a motion for summary judgment, which Fuller opposes with respect to 31 specific documents only. An *in camera* review of ten of the 31 disputed documents revealed that the CIA's asserted exemptions were justified as to five of them, but that the other five documents reviewed contained withheld information that should have been disclosed. Accordingly, the CIA's motion for summary judgment will be granted in part and denied in part, and the CIA will be required to reconsider its claims of exempt information, submit a new index and declaration specific to the documents that remain in dispute, and submit those documents for *in camera* review.

BACKGROUND

Fuller, a professor of geography, was an independent contractor with the CIA for more than a decade in the 1980s and 1990s. In December 1998, after his contractual relationship with the CIA had ended, Fuller made a request for documents under the FOIA and the Privacy Act, codified at 5 U.S.C. §§ 552a *et seq.* ("PA"). He filed this suit to enforce his rights under the FOIA in February 2004.

The CIA located more than 800 responsive documents, of which 287 were released in full, 455 were released in part, 77 were denied in full, and three were referred to other agencies for a release determination and direct response to Fuller. (See Def.'s Mem. in Supp. of Def.'s Mot. for Summ. J. at 2.) The CIA claimed either FOIA or PA exemptions, or both, for all information not released, supplied Fuller with an index and declaration designed to demonstrate that the exemptions were justified as applied, and moved for summary judgment. Fuller opposed the CIA's motion with respect to 31 specific documents only, 28 of which were withheld in their entirety and 3 of which were partially released.¹ (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 2 & n.2 ("Opp'n"))

¹ The 31 documents are identified by the following CIA internal numbers: 1189714, 1189723, 1189745, 1192009, 1192010, 1192011, 1192012, 1192013, 1192014, 1192015, 1192017, 1192018, 1192019, 1192023, 1192024, 1192025, 1192027, 1192031, 1192033, 1192034, 1192038, 1192039, 1192040, 1192041, 1192044, 1192045, 1192046, 1192047, 1192048, 1192447, 1192480.

("All other challenges to any other records can be deemed waived.") Because the CIA's statements on the record in this case left room to doubt that the CIA was justified in withholding all the information it withheld, the CIA was ordered to submit ten documents for an *in camera* review.²

DISCUSSION

Summary judgment is appropriate only when the pleadings and record evidence demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 252 (1986). To obtain summary judgment in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978); Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001). Thus, if the agency locates records but withholds all or part pursuant to an exemption, it must assert one or more of the statutory exemptions codified at 5 U.S.C. § 552(b) as justification and, if challenged, must prove that the exemption is valid.

² The ten documents submitted for *in camera* review are identified by the following numbers: 1189723, 1192013, 1192017, 1192019, 1192031, 1192040, 1192041, 1192044, 1192045, 1192048.

A challenge to an agency's FOIA exemption assertions requires a court to conduct a *de novo* review of the application of the exemptions. 5 U.S.C. § 552(a)(4)(B). In its discretion, a court "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions." Id. *In camera* reviews are unnecessary when an agency affidavit or other showing is reasonably specific and demonstrates that the withheld information is exempt. Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978). An *in camera* review is appropriate when something leads the district court to believe "that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption." Id. This may be the case where the affidavit is "insufficiently detailed to permit meaningful review of exemption claims," Quiñon v. FBI, 86 F.3d 1222, 1228 (D.C. Cir. 1996), where there is evidence of bad faith on the part of the agency, or where the judge wishes to resolve an uneasiness about the government's "inherent tendency to resist disclosure." Ray, 587 F.2d at 1195. An *in camera* inspection for "segregable non-exempt matter" is appropriate if the agency's justification "merely recit[es] statutory standards," or is either "conclusory," "vague" or "too sweeping." Weissman v. CIA, 565 F.2d 692, 698 (D.C. Cir. 1977) ; Mead Data Cent., Inc. v. Dep't

of the Air Force, 566 F.2d 242, 261-62 (D.C. Cir. 1977); Quiñon, 86 F.3d at 1228.

I. FOIA EXEMPTIONS

Congress passed the FOIA in 1966 "to permit access by the citizenry to most forms of government records." Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973). There can be no dispute that "[t]he mandate of the FOIA calls for broad disclosure of Government records. Congress recognized, however, that public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. §552(b)." CIA v. Sims, 471 U.S. 159, 166-67 (1985). The nine statutory exemptions "were plainly intended to set up concrete, workable standards for determining whether particular material may be withheld." EPA v. Mink, 410 U.S. 73, 79 (1973). The documents submitted for *in camera* review in this case implicate only three of the nine FOIA exemptions.

The FOIA provides that information may be withheld if it is "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]" 5 U.S.C.

§ 552(b)(3). The CIA used the (b)(3) exemption to withhold information which, if released, reasonably could be expected to lead to the unauthorized disclosure of intelligence sources and methods that the Director of the CIA was responsible for protecting under 50 U.S.C. § 403-3(c)(7) (2000) (the law in effect prior to enactment of the Intelligence Reform and Terrorism Prevention Act of 2004). (See Decl. of Terry N. Buroker at 4-5, Oct. 31, 2005 ("Buroker Decl.")). In addition, the CIA used the (b)(3) exemption to withhold information concerning the organization, functions, names, official titles or numbers of personnel employed by the CIA, none of which is subject to disclosure by mandate of 50 U.S.C. § 403g. (See Buroker Decl. at 5.)

The FOIA also exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This provision has been interpreted to include the attorney-client privilege, the work product doctrine, and the deliberative process privilege. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (citing cases). The CIA has invoked the (b)(5) exemption to withhold information that is either attorney work product, an attorney-client communication, or a deliberative and predecisional record.

(See Buroker Decl. at 5.) The deliberative process privilege³ "protects the decisionmaking processes of government agencies and encourages frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fishbowl." Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (alterations, citations and quotation marks omitted). The privilege "'shelters documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Nat'l Ass'n of Home Bldrs. v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2003) (quoting Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1433 (D.C. Cir. 1992)). "Information is exempt only if it is both 'predecisional' and 'deliberative.' A document is predecisional if it was prepared in order to assist an agency decisionmaker in arriving at his decision rather than to support a decision already made." Id. (citation and quotation marks omitted). In addition, an agency decision or policy must be in contemplation. A document that is merely part of an ongoing process, such as an audit process, but that does not anticipate an agency "'decision'" or "'policy'" is not predecisional for purposes of the (b) (5) exemption. Coastal

³ The attorney-client communication privilege and the attorney work product doctrine are not discussed here because the *in camera* review revealed that the CIA was justified in asserting the (b) (5) exemption with respect to those two privileges as applied to the ten documents submitted.

States, 617 F.3d at 868. "Material is deliberative if it reflects the give-and-take of the consultative process." Home Bldrs., 309 F.3d at 39 (quotation marks and citation omitted). Documents that "contain subjective, personal thoughts on a subject," that "discuss the wisdom or merits of a particular agency policy, or recommend new agency policy" are among the type of documents that may qualify as deliberative. Coastal States, 617 F.3d at 869.

The FOIA also provides an exemption for "personnel or medical or similar files the disclosure of which constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).⁴ The CIA used this exemption only for "third-party names and/or identifying information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." (Buroker Decl. at 5-6.) "To establish that release of information contained in government files would result in a clearly unwarranted invasion of [personal] privacy, the court first asks whether disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest." Home Bldrs., 309

⁴ Fuller waived his challenges to FOIA (b)(6) exemptions. (Opp'n at 2 n.2.) However, because the CIA withheld entire documents asserting the (b)(6) exemption as one of multiple bases for withholding all information, and because a court is obligated to examine the segregability of non-exempt information even where the parties do not raise the issue, Billington v. Dep't of Justice, 233 F.3d 581, 586 (D.C. Cir. 2000), the (b)(6) exemption must necessarily be scrutinized in this case to determine whether it justifies withholding otherwise non-exempt information.

F.3d at 33 (citation and quotation marks omitted); Sims v. CIA, 642 F.2d 562, 573 (D.C. Cir. 1980) (stating that an agency invoking this exemption "must demonstrate that release of the information would violate substantial privacy interests of the person or persons involved"). If a substantial privacy interest is shown, "the statute prescribes a balancing test on which the agency must also prevail." Sims, 642 F.2d at 573. "Exemption 6 was intended by Congress to protect individuals from public disclosure of intimate details of their lives" Id. (citation and quotation marks omitted). "By contrast, . . . information connected with professional relationships does not qualify for the exemption." Id. at 574. In short, "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships." Id. at 575.

The intent of Congress in enacting the FOIA was that "the disclosure requirement be construed broadly, [and] the exemptions narrowly." Vaughn v. Rosen, 523 F.2d 1136, 1142 (D.C. Cir. 1975); see also Coastal States, 617 F.2d at 868 ("We reemphasize the narrow scope of [FOIA's (b) (5) exemption] and the strong policy of the FOIA that the public is entitled to know what its government is doing and why. The exemption is to be applied as narrowly as consistent with efficient Government operation."). Accordingly, a document that contains exempt material cannot be withheld in its entirety if non-exempt material in that document

may be segregated and disclosed. “[T]o withhold an entire document, all units of information in that document must fall within a statutory exemption.” Billington v. Dep’t of Justice, 233 F.3d 581, 586 (D.C. Cir. 2000) (citing Trans-Pacific Policing Agreement v. U.S. Customs Serv., 177 F.3d 1022, 1027 (D.C. Cir. 1999)). “It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.” Mead Data, 566 F.2d at 260. Where parties have not raised the issue of segregability, a court is nonetheless obligated to address it *sua sponte*. Billington, 233 F.3d at 586.

II. THE CIA’S ASSERTED EXEMPTIONS

In this case, *in camera* review of the ten documents showed that the CIA’s assertion of the (b) (5) exemption for the deliberative process privilege was not justified as applied to documents 1192031 and 1192040. Document 1192031 is not predecisional. It is a directive to deliver a message and a statement of a recent event. In addition, it contains no material reflecting “the give-and-take of the consultative process.” Coastal States, 617 F.2d at 866. Similarly, document 1192040 is not predecisional as it does not contemplate anything rising to the level of an agency decision. See Coastal States, 617 F.2d at 868 (“Characterizing . . . documents as ‘predecisional’ simply because they play into an ongoing . . .

process would be a serious warping of the meaning of the word. No 'decision' is being made or 'policy' being considered.")⁵

The CIA's assertion of FOIA's exemption for "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), was not justified as applied to documents 1192019, 1192041, and 1192044, the three instances in which it was asserted in the documents reviewed *in camera*. These documents simply do not contain information of a "personal, intimate nature," Sims, 642 F.2d at 574, and the CIA has not demonstrated that a "substantial, as opposed to a *de minimis*, privacy interest" is threatened by the disclosure of the third-party names contained in the documents. Home Bldrs., 309 F.3d at 33. In document 1192019, a third party is mentioned by name and position at a university, but in this Circuit, FOIA exemption (b)(6) does not reach business judgments and relationships. See Sims, 642 F.2d at 575. Document 1192041 contains individuals' names presumed to be third parties because they are not identified as CIA personnel. Here, too, however, the name itself is the only personal information in the entire document, and

⁵ In addition, document 1192040 appears to lack facial integrity as a document, throwing into question the validity of the description provided in the index. Rather, it appears to be a collection of three pages, with the first and last page comprising one document (at best) and the middle page belonging to some other document.

because the name appears in connection with a professional or business relationship, it cannot fairly be characterized as personal information that exemption (b) (6) was meant to protect. The same is true of document 1192044. While that document contains names of third parties, the information contained in document 1192044 reflects only business judgments and relationships, information that does not qualify for exemption under FOIA's (b) (6) exemption. Sims, 642 F.2d at 575.

The CIA asserts FOIA exemption (b) (3) as to documents 1192019, 1192031, 1192040, 1192041, and 1192044. While some information in each of these documents may be exempt from disclosure under (b) (3), not all information in each document is exempt under (b) (3). Fuller is entitled under the FOIA to all non-exempt information in these documents. The CIA has not met its obligation to segregate and disclose the non-exempt information in these documents.

CONCLUSION

Because *in camera* review of the ten documents submitted showed that the CIA was justified in its assertion of statutory exemptions with respect to five of them, but was not justified in its assertion of the (b) (5) or (b) (6) exemptions and had failed to segregate and disclose non-exempt information with respect to the other five, the CIA's motion for summary judgment will be granted in part and denied in part. Accordingly, it is hereby

