UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE FUND, INC.	)	
Plaintiff,	)	
v.	)	**Civil Action No. 04-1821 (RMC)**
THE CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S MOTION TO FOR SUMMARY JUDGMENT

Defendant, through counsel, the United States Attorney for the District of Columbia, respectfully moves under Fed. R. Civ. P. 56, for summary judgment. Defendant asserts that it is entitled to judgment as a matter of law. A memorandum of points and authorities, a statement of genuine issues of material fact not in dispute, an exhibit and a proposed order are attached hereto.

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

R. CRAIG LAWRENCE, D.C. BAR # 171538
Assistant United States Attorney

OLIVER W. McDANIEL, D.C. Bar #377360
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE FUND, INC.	)	
Plaintiff,	)	
v.	)	**Civil Action No. 04-1821 (RMC)**
THE CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Defendant, the United States Central Intelligence Agency ("CIA"), through counsel, the United States Attorney for the District of Columbia, respectfully moves this Court for summary judgment, as there are no genuine issues as to any material fact and as Defendant is entitled to judgment as a matter of law. Exemptions 1, 3 and 5 of the Freedom of Information Act (FOIA) protect from disclosure the July 2004 National Intelligence Estimate ("NIE") related to the war in Iraq requested by Plaintiff.

I. Factual and Procedural Background

By letter dated September 16, 2004, National Security Archive Fund, Inc. ("NSAF") submitted to the Agency a FOIA request seeking "the National Intelligence Estimate (NIE) prepared in July 2004 on Iraq." Declaration of Martha M. Lutz (Attached as Exhibit 1) (hereinafter "Lutz Dec") at ¶ 7. Further, the request sought expedited processing under the FOIA at 5 U.S.C. § 552(a)(e). Finally, NSAF requested a waiver of search and review fees based on NSAF's status "as a representative of the news media." Id. By letter dated September 28, 2004, the Agency acknowledged receipt of the September 16th request, notified NSAF of its decision to place it in the

"representative of the news media" fee category and denied NSAF's request for expedited processing. Id. at ¶ 8.

By letter dated October 4, 2004, given the passage of ten business days since the original FOIA request was submitted, NSAF reiterated its request for expedited processing and alleged additional facts in support of its FOIA request. Lutz Dec at ¶ 9. Subsequently, on October 5, 2004, an Agency representative spoke with a representative of the NSAF. In that conversation, the NSAF representative requested that the Agency provide a status update. Id. The Agency representative informed the NSAF representative that, in the letter of September 28, the Agency had denied NSAF's request for expedited treatment, but that the Agency had accepted the request for the Estimate and was considering it under standard, non-expedited processing. Id. The Agency reiterated this oral response to NSAF by letter dated October 6, 2004. Id.

On October 20, 2004, NSAF filed a Complaint for Injunctive and Declaratory Relief, along with a motion requesting that this Court enter a temporary restraining order enjoining the Agency from continuing to deny NSAF expedited processing of its September 16, 2004 FOIA request (as supplemented by NSAF's letter of October 4, 2004). Lutz Dec at ¶ 10; Plaintiff's Memorandum in Support of Its Motion for a Temporary Restraining Order and Preliminary Injunction ("TRO/PI Memo") at 3-4.

By letter dated October 22, 2004, the Agency provided NSAF with a final response to its September 16, 2004, FOIA request (as supplemented by NSAF's letter of October 4, 2004). Lutz Dec at ¶ 11. The Agency informed NSAF that its request was processed according to the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431. Id. The Agency informed NSAF that it had located the Estimate and that the Estimate constituted properly classified material that

must be withheld from disclosure in its entirety based on FOIA exemptions (b)(1) and (b)(3). Id. In light of the Agency's final decision of October 22, 2004, Plaintiff filed the current amended complaint on November 3, 2004, which forms the basis for this preceding. Id. at ¶ 12.

II. DISCUSSION

A. Standards For Evaluation Of Motion

Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show 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). Material facts are those that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In FOIA cases, the courts may, and often do, grant summary judgment in favor of the government on the basis of government affidavits or declarations that explain how requested information falls within a claimed exemption, as long as the affidavits or declarations are sufficiently detailed, non-conclusory, and submitted in good faith, and as long a plaintiff has no significant basis for questioning their reliability. Goland v. CIA, 607 F.2d 339, 352 (D.C.Cir.1978). For the government to win summary judgment in a FOIA case, the government must prove "that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements." National Cable Television Ass'n Inc. v. Federal Communications Commission, 479 F.2d 183, 186 (D.C.Cir.1973).

B. Defendant Properly Invoked FOIA Exemption 1

Exemption 1 of the FOIA allows for the withholding of material which are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> (B) are in fact properly classified pursuant to such Executive order . . . .

5 U.S.C. § 552(b)(1). The executive order in effect at the time the classification decisions were made in this case was Executive Order ("EO") 12958, as amended. Lutz Dec at ¶¶ 17 & 18.

For information to be properly classified and thus to be properly withheld from disclosure pursuant to Exemption 1, the information must meet the requirements set forth in E.O. 12958, § 1.1:

> (1) an original classification authority is classifying 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 falls within one or more of the categories of information in § 1.5; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

In reviewing classification determinations under Exemption 1, this Court repeatedly has stressed that "substantial weight" must be accorded agency affidavits concerning the classified status of the records at issue. See, e.g., Krikorian v. Department of State, 984 F.2d 461, 464 (D.C. Cir. 1993); Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). As the United States Court of Appeals for the District of Columbia Circuit has stated: "Judges . . . lack the necessary expertise to second-guess such national security opinions in the typical national security case." Halperin, 629 F.2d at 148. Clear precedent has established that courts should be reluctant to substitute their own judgment in place of the agency's in the areas of national defense and foreign

relations. See Miller v. United States Dep't of State, 779 F.2d 1378, 1387 (8th Cir. 1985); see also McDonnell v. United States, 4 F.2d 1227, 1242-44 (3d Cir. 1993); Maynard v. CIA, 986 F.2d 547, 556 n.9 (1st Cir. 1993); Bowers v. United States Dep't of Justice, 930 F.2d 350, 357 (4th Cir. 1991); Doherty v. United States Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985).

The Declaration of Ms. Lutz fully supports the application of Exemption 1 here, as it "describe[s] the withheld information and the justification for withholding with reasonable specificity" and demonstrates "a logical connection between the information and the claimed exemption." Goldberg v. Department of State, 818 F.2d 71, 77-78 (D.C. Cir. 1987).

Section 6.1(h) of Executive Order No. 12,958, as amended, defines classified national security information as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." Ms. Lutz determined that the classified information being withheld from NSAF continues to meet the standards for classification under E.O. 12,958, as amended. Lutz Dec at ¶¶ 6 & 18. Section 3.1(b) of E.O. 12,958, as amended, states, "[i]t is presumed that information that continues to meet the classification requirements under this order requires continued protection." Ms. Lutz determined that the Agency information being withheld falls within at least two of the seven broad categories for classified information listed in Section 1.5 of E.O. 12,958, as amended:

intelligence activities . . . intelligence sources or methods (§ 1.5(c)); and

foreign relations or foreign activities of the United States, including confidential sources (§ 1.5(d)).

Id. "The classified information withheld includes . . . information that could lead to the identification of individual human sources, intelligence methods, and intelligence activities." Id.

"Finally, and indeed by its very nature, the Estimate is comprised of classified information concerning foreign relations and foreign activities of the United States." Id. Ms.Lutz has determined that "all of the information withheld on the basis of FOIA Exemption (b)(1) is within one of the two aforementioned § 1.5 categories for classified information." Id.

With the above requirements in mind, Ms. Lutz personally and independently conducted a line-by-line review of the NIE withheld from disclosure to Plaintiff. Lutz Dec at ¶ 6. As a result of this examination, she determined that "no reasonably segregable, non-exempt portion of the document exists." Id. at ¶ 6; see also, id. at ¶ 18.

1. **Intelligence Activities** (1.5(c))

One area of FOIA Exemption (b)(1) information withheld involves Agency intelligence activities. Ms. Lutz advises that "information at issue in this case would tend to reveal past and ongoing U.S. intelligence activities." Lutz Dec at ¶ 19. As explained by Ms. Lutz, the Estimate contains explicit assessments of current U.S. intelligence capabilities and how those capabilities might be allocated to best assist U.S. and Coalition activities in Iraq. Id. Critically, warns Ms. Lutz, "[t]he target may then be in a position to take countermeasures and allocate its resources and plans more effectively to frustrate the Agency's efforts against them. Similarly, if hostile forces were able to gather information on how the Agency might allocate its resources and efforts in furtherance of broader U.S. policy goals, those hostile forces may be enabled to better frustrate U.S. policy in a given region." Id. at 20.

Specifically, Ms. Lutz points out that since the NIE contains a discussion and analysis of current and potential conditions in Iraq, this information could be used to permit hostile forces "to determine where and how U.S. intelligence activities are being managed and allocated[,] . . . [to]

thwart the Agency's intelligence activities, impair the Agency's collection abilities and endanger lives." Lutz Dec at ¶ 21. Accordingly, Ms. Lutz determined that "unauthorized disclosure of responsive to NSAF's FOIA request that "could reveal past and present intelligence activities could reasonably be expected to cause serious damage to the national security of the United States." Id. at 22. Such information, in her estimation, "is currently and properly classified and is exempt from disclosure pursuant to FOIA Exemption (b) (1)." Id.

2. Intelligence Sources (1.5(d))

FOIA Exemption (b)(1) information involves Agency intelligence sources; this area is also exempt under Exemption (b)(3) as set forth *infra*. Ms. Lutz affirms that " information at issue in this case would tend to reveal the identity of various intelligence sources of the Agency." Lutz Dec at ¶ 23. Such information is exempt from disclosure under FOIA exemptions (b)(1).

Further by way of background, Ms. Lutz advises that "[t]he Agency relies on a variety of types of intelligence sources to collect foreign intelligence critical to our national security. Intelligence sources include individual human sources, foreign or American; foreign entities; and the intelligence and security services of foreign countries." Lutz Dec at ¶ 24. "Intelligence sources can be expected to furnish information only when confident that they are protected from revelation, retribution, or embarrassment by the absolute secrecy surrounding the source-CIA relationship. In other words, intelligence sources must be certain that the Agency can and will do everything in its power to prevent the public disclosure of their association with the Agency." Id.

Indeed, as Ms. Lutz explains, if a source's cooperation is revealed, "this person's very life could be placed at risk. The consequences of public disclosure are often swift and far-ranging, from economic reprisals to possible harassment, imprisonment, or even death." Lutz Dec at ¶ 25.

"Finally, if the cooperation of this individual is revealed, the future value of the individual to the U.S. Government as an ongoing source of intelligence is at best severely degraded or, most likely, destroyed altogether and access to information is withdrawn." Id.

According to Ms. Lutz, "[i]n light of the probable consequences of disclosure, individuals and entities are understandably reluctant to cooperate with the Agency unless they can be absolutely certain that the fact of their cooperation will forever remain secret. Intelligence sources are . . . vulnerable to retribution if and when they are identified or, indeed, merely suspected of being Agency collaborators . . .." Lutz Dec at ¶ 26. In many cases, says Ms. Lutz, "even if the sources[']identity is not revealed, the very nature of the information communicated necessarily tends to reveal the source because of the limited number of individuals who have access to the information. If such information is disclosed, the source may be perpetually vulnerable to discovery and the ensuing consequences." Id.

Ms. Lutz advises that one of the most critical factors is, moreover, that "the release of information that would tend to reveal the identity of various intelligence sources of the Agency most likely would have a serious effect upon the Agency's ability to recruit other potential sources in the future." Lutz Dec at ¶ 27. "If future potential sources know that others have had their identities revealed, those individuals will be less willing to cooperate with the agency." Id. Thus, explains Ms. Lutz, "the Agency itself has a primary interest in keeping these identities secret, not only to protect the sources, but also to demonstrate to other sources, and potential future sources, that the Agency can be trusted to preserve the secrecy of the relationship." Id.

The dynamic, according to Ms. Lutz, is that "[i]f a potential source has any doubts about the ability of the Agency to preserve secrecy, that is, if he even learns that the identity of another source

was disclosed by the Agency, his willingness and desire to cooperate with the Agency likely will be impaired." Lutz Dec at ¶ 28. "This is because sources, be they present or future, usually will not work for the Agency if they believe or even suspect that the Agency will not or cannot protect their identities. The loss of such intelligence sources, and the accompanying loss of the critical intelligence which they provide, will reasonably have **serious adverse effects upon the national security**." Id. (emphasis added).

For these reasons, Ms. Lutz has determined that "unauthorized disclosure of information responsive to NSAF's FOIA request that could reveal intelligence sources could reasonably be expected to cause serious damage to the national security of the United States." Lutz Dec at 29. Accordingly, Ms. Lutz concluded, "such information is currently and properly classified and is exempt from disclosure pursuant to FOIA exemption (b)(1) and, as discussed below, FOIA exemption (b) (3)." Id.

3. Intelligence Methods (1.5(c))

A third area of Exemption (b)(1) information withheld concerns intelligence methods; this information is also exempt under Exemption (b)(3) as set forth *infra*. Ms. Lutz has concluded reasonably that "information at issue in the case would tend to reveal intelligence methods." Lutz Dec at ¶ 30. Such information is thus exempt from disclosure pursuant to FOIA exemption (b)(1).

Ms. Lutz reveals that the NIE "contains information that concerns foreign intelligence relationships of the United States[, which relationships are] methods for the collection of intelligence[, the] mere fact of the use of [which] relationships must be protected . . . [to avoid] compromis[ing] that collection method's future value." Lutz Dec at ¶ 30. Ms. Lutz also advises that

the NIE contains information about "technical collection methods," the use of which can be deduced from the revelation of the fact that the U.S. has acquired specific information. See Id. at 31.

Ms. Lutz advises that, "[g]enerally, intelligence methods are the means by which, and the manner in which, an intelligence agency accomplishes its mission. Most organized professions or businesses employ methods that are common to and, in some cases, unique to that business or profession, to accomplish their goals and objectives. Certain methods used in intelligence activities imbue any resulting records with a special character that necessitates protecting the fact of their use, as well as the details of their use, from unauthorized disclosure." Lutz Dec at ¶ 32.

In discussing the value of insuring that intelligence gathering operations remain covert, Ms. Lutz advises that "[i]ntelligence methods must be protected in situations where a certain capability or technique, or the application thereof, is unknown to those individuals or entities that would otherwise take countermeasures. Secret information-collection techniques, capabilities, or technological devices are valuable from an intelligence-gathering perspective only so long as they remain unknown." Lutz Dec at ¶ 33. "Once the nature of an intelligence method or the fact of its use in a certain situation is discovered, its continued successful use is in serious jeopardy." Id. In fact, once an intelligence method or its use is discovered, the method may be neutralized by hostile intelligence services or terrorist organizations, and eventually even turned against the United States." Id.

Critically, "[d]etailed knowledge of the methods and practices of an intelligence agency must be protected from disclosure because such knowledge would be of material assistance to those who would seek to penetrate, detect, prevent, or damage the intelligence operations of the United States. The disclosure of a particular method leads to the neutralization of that method, whether the method

is used for the collection of intelligence information, the conduct of clandestine activities, or the analysis and evaluation of intelligence information." Lutz Dec at ¶ 34. As Ms. Lutz explains further, "[t]he disclosure of a particular method leads to the neutralization of that method, whether the method is used for the collection of intelligence information, the conduct of clandestine activities, or the analysis and evaluation of intelligence information. Id. "Knowledge of or insights into specific intelligence collection methods would be of invaluable assistance to those who wish to detect, penetrate, counter, or evaluate the activities of the Agency. In summary, it is the fact of the use of a particular intelligence method in a particular situation, in addition to the methodology itself, which must be protected." Id. at ¶ 45.

To provide a complete picture of the complexity of the challenge, Ms. Lutz reports further that, in exercising authority granted by Congress, "the DCI must do more than protect the name of an intelligence source or a mere reference to an intelligence method." Id. at ¶ 36. "Foreign intelligence services have as one of their primary defensive missions the discovery of the particular methodologies Agency utilizes. A primary vehicle for that effort is scouring the public sector for officially released intelligence information. Even from disparate and seemingly unimportant details, foreign intelligence services can learn how to thwart the Agency's intelligence gathering capabilities. What may seem trivial to the uninformed may in fact be of great significance and may put a questioned item of information in its proper context." Id.

Accordingly, Ms. Lutz concluded reasonably, "the DCI in exercising his authority has the power to withhold a full spectrum of information concerning particular intelligence methods if it is determined that such information could reasonably be expected to assist foreign intelligence services to the detriment of the United States." Lutz Dec at ¶ 37. As Ms. Lutz explains, "[t]hese decisions

are made by the senior government official entrusted with national security and most familiar with the entire intelligence environment." Id. Thus, Ms. Lutz has concluded reasonably that "[s]uch relationships constitute specific methods for the collection of intelligence, and the fact of the use of these relationships under certain circumstances must be protected. Divulging information concerning the collection method used under specific circumstances could compromise that collection method's future value." Id.

These considerations have led the Agency, according to Ms. Lutz, to conclude reasonably that "unauthorized disclosure of information responsive to NSAF's FOIA request that could reveal intelligence methods could reasonably be expected to cause serious damage to the national security of the United States." Lutz Dec at ¶ 38. The Agency, therefore, properly classified this information and withheld it from disclosure under FOIA Exemption (b)(1). Id.

4. Foreign Relations and Activities (1.5(d))

Information concerning U.S. foreign relations is a another area eligible for classification. Executive Order 12958, as amended, at § 1.5(d). Ms. Lutz has determined that "information at issue in this case could reveal matters concerning potential foreign relations or foreign activities of the United States." Lutz Dec at ¶ 39. Ms. Lutz explains further, anecdotally, that "[t]he Estimate contains candid descriptions, judgments and analyses of various elements of the fledgling Iraqi government and institutions . . . and analysis and other material directly relevant to ongoing foreign activities of the United States" Id.

As Ms. Lutz recognizes, "[r]elease of such information from the [NIE] could, when viewed through third-party eyes, provoke resentment, anger, or offense, thereby complicating U.S. foreign relations." Lutz Dec at ¶ 40. Ms. Lutz further reports that "[r]elease of information contained within

the Estimate could also complicate relationships with our Coalition partners, and make it harder to further recruit allies to our cause." Id. Further, "[t]he release of such information from the Estimate would permit hostile forces within and outside Iraq to gain insights [into] U.S. activities and thwart U.S. and Coalition policies in Iraq." Id.

Accordingly, Ms. Lutz concludes reasonably that "unauthorized disclosure of information responsive to NSAF's FOIA request that pertains to U.S. foreign relations and foreign activities of the United States could reasonably be expected to cause serious damage to the national security." Lutz Dec at ¶ 41. Such information is, therefore, currently and properly classified and is exempt from disclosure pursuant to FOIA exemption (b)(1). Id.

C. The CIA Properly Invoked FOIA Exemption (b)(3)

Exemption (b)(3) of the FOIA exempts from mandatory disclosure matters that are:

> [s]pecifically exempted from disclosure by statute 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 only issues presented in an exemption (b)(3) claim are the existence of a qualifying disclosure-prohibiting statute, and the logical inclusion of the withheld information within the scope and coverage of that statute. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1284 (D.C. Cir. 1983). As with exemption (b)(1) claims, courts evaluating exemption (b)(3) claims must accord substantial weight to the CIA's judgment with respect to the national security considerations at issue. CIA v. Sims, 471 U.S. 159, 179 (1985) ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.");

Gardels v. CIA, 689 F.2d at 1104-05 ("substantial weight" must be accorded to an Agency's determinations on exemption (b)(3) claims); Phillippi v. CIA, 655 F.2d 1325, 1332 (D.C. Cir. 1981) (CIA affidavits on exemption (b)(3) claims are to be accorded "substantial weight"); Halperin v. CIA, 629 F.2d at 147-48. Accord Ferry v. CIA, 458 F. Supp. 644 (S.D.N.Y. 1978) ("The CIA has greater expertise as to what kind of intelligence-gathering disclosures would reveal intelligence sources and methods.").

In the instant case, two (b)(3) withholding statutes exempt the CIA information at issue: Section 103(c)(7) of the National Security Act of 1947, as amended, codified at 50 U.S.C. § 403-3(c)(7), which requires the DCI to protect intelligence sources and methods from unauthorized disclosure; and Section 6 of the Central Intelligence Agency Act of 1949, as amended, codified at 50 U.S.C. § 403g, which provides that the CIA shall be exempt from the provision of any other law requiring the publication or disclosure of the organization, function, names, official titles, salaries, or numbers of personnel employed by the CIA. See Lutz Dec at ¶¶ 44-45. Thus, information falling within the scope of either of these two statutes is exempt from disclosure pursuant to FOIA Exemption (b)(3). Further, Ms. Lutz reviewed NIE carefully to determine if any of the information withheld could be segregated and released. As described in the attached declaration of Ms. Lutz, the Agency has carefully reviewed each line of the requested NIE and determined that there is no reasonably segregable information that can be released.

Certain Agency-specific information was withheld from disclosure pursuant to FOIA Exemption (b)(3), in conjunction with the Central Intelligence Agency Act of 1949. Section 6 of this Act exempts the CIA from the provisions of any other law requiring the disclosure of information regarding the organization, functions, names, official titles, salaries, filing instructions, or numbers

of personnel employed by the Agency (50 U.S.C. § 403g). On the basis of this statute, certain CIA employees' names and personal identifiers (e.g., employee signatures or initials), titles, file numbers, and internal organizational data, are exempt from release.

In addition, the disclosure of the names of various CIA employees who work, have worked, or may in the future work undercover, could jeopardize the life or physical safety of the employee, his family, and intelligence sources and innocent individuals with whom he has had contact and impair the usefulness of such employees to the Agency. Compromise of an officer's cover not only reveals his intelligence officer status, but also allows an easy way for hostile interests to find out precisely the location in which that person works. Since such information is covered by 50 U.S.C. § 403g, it is properly exempt from disclosure pursuant to FOIA Exemption (b)(3).

In the instant case, as discussed in detail in the Lutz Declaration, disclosure of the documents at issue would reveal intelligence sources and methods protected under 50 U.S.C. § 403-3(c)(7). Lutz Dec at ¶ 44. Specifically, the documents could reasonably be expected to reveal the identity of intelligence sources of the CIA and could reasonably be expected to cause serious damage to the national security of the United States. Id. This type of information pertaining to intelligence sources has been properly withheld from Plaintiff under 50 U.S.C.§ 403-3(c)(7) and, therefore, falls within the ambit of FOIA exemption (b)(3).

1. Agency Sources and Methods

Section 103(c)(7) of the National Security Act of 1947, as amended, codified at 50 U.S.C. § 403-3(c)(7), requires the DCI to protect intelligence sources and methods from unauthorized disclosure. The Agency cannot release information within the Estimate concerning sources and methods, because the Agency must continue to protect intelligence sources and methods from

unauthorized disclosure. Accordingly, the Agency has concluded that it must, for the reasons previously discussed and explained by Ms. Lutz, withhold information in the document that would otherwise indicate the use or existence of specific intelligence sources or methods. Lutz Dec at ¶ 44. Since release of the above categories of information could lead to unauthorized disclosures of intelligence sources and methods, such information falls within the ambit of 50 U.S.C. § 403-3(c)(7), and is thus exempt from disclosure pursuant to FOIA Exemption (b)(3).

2. Agency-Specific Information

Certain Agency-specific information was withheld from disclosure pursuant to FOIA Exemption (b)(3), in conjunction with the Central Intelligence Agency Act of 1949. Lutz Dec at ¶ 45. Section 6 of this Act exempts the Agency from the provisions of any other law requiring the disclosure of information regarding, inter alia, the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency (50 U.S.C. § 403g). On the basis of this statute, internal Agency filing information has been withheld since it tends to reveal information pertaining to the organization of the Agency's record systems. See Id.

Ms. Lutz advises as well that "[t]he Estimate contains certain Agency-specific information pertaining to titles, other organizational identifiers, and filing instructions of Agency internal organizational components that falls within the scope of Section 6 of the CIA Act of 1949 and that has protected from disclosure pursuant to FOIA exemption (b) (3)." Lutz Dec at ¶ 45. Since such information is covered by 50 U.S.C. § 403g, it is properly exempt from disclosure pursuant to FOIA Exemption (b)(3).

D. FOIA Exemption (b)(5) – the Deliberative Process Privilege[1]

Section 552(b)(5) of Title 5 ("exemption 5") exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). Accordingly, Exemption 5 ensures that the public cannot obtain, through the FOIA, documents "which a private party could not discover in litigation with the agency." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975) (hereinafter "Sears"), citing EPA v. Mink, 410 U.S. 73, 85-86 (1973). The exemption incorporates the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" privilege that protects candid internal discussion of legal or policy matters[.]" Maricopa Audubon Society v. United States Forest Serv., 108 F.3d 1082, 1084 n.1 (9th Cir. 1997).

"The deliberative process privilege, also known as the 'executive' or 'governmental' privilege serves many purposes." Eugene Burger Management Corp. v. United States Dep't of Housing & Urban Dev., 192 F.R.D. 1, 4 (D.C.C. 1999).[2] The main purpose of this privilege "which is well established in the law, is...to 'prevent injury to the quality of agency decisions.'" Cofield, et al. v. City of LaGrange, Georgia, 913 F. Supp. 608, 615 (D.D.C. 1996) (quoting Sears, 421 U.S. 132, 151 (1975)). The deliberative process privilege prevents harm to the quality of agency decisions by

---

[1] The Agency is asserting exemption 5 for the first time in this motion, which it is permitted to do in order to preserve its right to assert the exemption. See Smith v. Department of Justice, 251 F.3d 1047, 1050-51 D.C. Cir. (2001). Defendant submits that the Court need not reach this argument if it accepts Defendant's arguments on exemptions 1 or 3.

[2] The deliberative process privilege serves: "'to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's actions.'" Eugene Burger Management Corp., 192 F.R.D. at 4 (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

shielding the opinions, conclusions and reasoning used in the administrative and decision making process of the Government. See United States v. Morgan, 313 U.S. 40, 422 (1941); Petroleum Info Corp. v. Department of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992); Access Reports v. Department of Justice, 926 F.2d 1192, 1194-1195 (D.C. Cir. 1991); United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993).

The privilege is designed to encourage frank and uninhibited communication among government officials in the course of creating public policy. Sears, 421 U.S. at 149-51; Petroleum Info Corp., 976 F.2d at 1434; Access Reports, 926 F.2d at 1194-95; Farley, 11 F.3d at 1389. The deliberative process privilege remains even after a final decision has been made, because "disclosure at any time could inhibit the free flow of advice." Federal Open Market Comm. v. Merrill, 443 U.S. 340, 360 (1979). The privilege protects the consultative functions of the Government by preserving the confidentiality of opinions, recommendations, and deliberations which constitute part of the process by which government decisions are made and Government policies are formulated. Jordan v. United States Dep't of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (en banc).

Since "Exemption 5 'was intended to protect not simply the deliberative material, but also the deliberative process of agencies,'" National Wildlife Federation v. United States Forest Serv., 861 F.2d 1114, 1118 (9th Cir. 1988) (quoting Montrose Chemical Corp. v. Train, 491 F.2d 63, 71 (D.C. Cir. 1974)) courts have found that even factual material may be encompassed within the privilege.

For a document to be covered by the deliberative process privilege, two requirements must be satisfied. First, the document must qualify as being in a "predecisional" phase of agency action,[3] i.e., "antecedent to the adoption of agency policy." Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc). In determining whether a document is predecisional, the Supreme Court has held that an agency need not identify a specific decision in connection with which a document is prepared. Sears, 421 U.S. at 151 n.18. Rather, it is sufficient for the agency to establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). The Court recognized that agency deliberations do not always ripen into agency decisions, and that ultimately the privilege is meant to protect the decisional process, rather than any particular document or decision. Sears, 421 U.S. at 151 n.18.; see also Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials.").

Secondly, the document must be deliberative in nature, i.e., it must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1135, 1143-44 (D.C. Cir. 1975). Deliberative documents

---

[3] "A 'predecisional document' is one 'prepared in order to assist an agency decision maker in arriving at his decision' and may include 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.' A predecisional document is part of the 'deliberative process' if 'disclosure of [the] materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" Formaldehyde Inst. v. Department of Health & Human Servs., 889 F.2d 1118, 1122 (D.C. Cir. 1989). "In other words, the document is considered to be part of the 'deliberative process' as long as it is 'actually . . . related to the process by which policies are formulated.' Jordan v. United States Dep't of Justice, 591 F.2d 753] at 774 [D.C.Cir. 1978]." National Wildlife Fed'n, supra, 861 F.2d at 1118 (emphasis added).

frequently consist of "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Sears, 421 U.S. at 150. Thus, the exemption covers recommendations, draft documents, proposals, analyzes, suggestions, discussions, and other subjective documents that reflect the give-and-take of the consultative process. Coastal States, 617 F.2d at 866.

Documents are part of the deliberative process when they are "actually related to the process by which policies are formulated," and "antecedent to the adoption of an agency policy." Jordan v. United States Dep't of Justice, 591 F.2d 753, 775 (D.C. Cir. 1978). Moreover, documents reflecting an "agency's group thinking in the process of working out its policy and determining what its law shall be," are exempt under the FOIA Exemption 5. Id. (quoting Sears, 421 U.S. at 153).[4]

While courts over the years have relied heavily on the fact / opinion distinction as a method of categorizing and deciding a large number of Exemption 5 cases, see EPA v. Mink, 410 U.S. 72, 87-91, 93 S.Ct. 827, 836-38 (1973); Quarles v. Dept. of the Navy, 893 F.2d 390, 392 (D.C. Cir. 1990) (see cases cited herein following fact / opinion analysis), more recent decisions have begun to eschew this analysis as "reflexive." Petroleum Information Corp. v. Dept. of Interior, 976 F.2d 1429, 1435 (D.C. Cir. 1992). "Our recent decisions on the 'deliberativeness' inquiry have focused

---

[4] The courts have held that staff evaluations of factual circumstances and the conclusions drawn from such submissions form "the essence of the deliberative process." National Wildlife Federation v. United States Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988). Additionally, reports or other documents that summarize issues and advise superiors are protectable under the deliberative process privilege. See Access Reports v. Department of Justice, 926 F.2d at 1196-97; Williams v. Department of Justice, 556 F. Supp. 63, 654 (D.D.C. 1982). Courts consistently have held staff analysis and advice -- whether supportive or critical of the position finally adopted by the agency -- to be protected under the deliberative process privilege. See, e.g., Long Beach Container Terminal, Inc. v. Occupational Safety & Health Review Comm'n, 811 F.2d 477, 479 (9th Cir. 1987) ("because courts are usually prohibited from inquiring into an administrator's decision making mental process, it follows that the mental processes of staff members are totally irrelevant"); Nat'l Wildlife Fed'n v. Burford, 677 F. Supp. 1445, 1457-58 (D. Mont. 1985).

on whether disclosure of the required material would tend to ' discourage candid discussion within an agency.'" Id. 976 F.2d at 1434, quoting Access Reports v. Dept. of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991) (quoting Dudman Communications v. Dept. of the Air Force, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987)). As the court in Petroleum Info. explains further, "[t]he fact/opinion distinction, however, is not always dispositive; in some instances, 'the disclosure of even purely factual material may so expose the deliberative process within an agency' that the material is appropriately held privileged." Id., citing Mead Data Centrial, Inc. v. Dept. of Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

While courts have not completely abandoned the fact/opinion distinction when this general rule makes resolution of a case more ready, see Quarles, 893 F.2d at 392, quoting Wolfe v. Dept, of Health & Human Services, 839 F.23d 768, 774 (D.C. Cir. 1988) (*en banc*), see also, Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 39 (D.C. Cir. 2002), the focus of attention is clearly on the integrity of agency deliberations and promoting the candid exchange of information within that process. Accordingly, no clear pattern or rule has emerged from cases as to what circumstances involving factual material clearly trigger coverage by Exemption 5 and which do not. After the following summary of the relevant cases, nonetheless, we submit that the court should agree that the circumstances in this case clearly trigger Exemption 5 coverage.

In Quarles, 893 F.2d at 391, the court reviews several decisions in this area: In Wolfe, the court protected from disclosure a log showing routing information concerning recommendations of the Food & Drug Administration (FDA). 839 F.2d at 774. In Dudman, the court protected early drafts of an official history on the grounds that disclosure would unduly reveal editorial judgments. 815 F.2d at 1568. In a number of other decisions, courts have protected factual summaries prepared

by decision makers. See Lead Industries Ass'n v. OHSA, 610 F.2d 70, 85 (2d Cir. 1979); Washington Research Project v. Dept. of Health, Education & Welfare, 504 F.2d 238, 250-51 (D.C. Cir. 1974); Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974). In the Quarles decision itself, the court decided whether cost estimates of selecting home ports for ships in a new battleship group should be disclosed under the FOIA. Finding that the cost estimates "derive from a complex set of judgments – projecting needs, studying prior endeavors and assessing possible suppliers . . . [and] partake of just that elasticity that has persuaded courts to provide shelter for opinions generally," the court held that the estimates were protected by Exemption 5. 893 F.2d at 392-93. The court reasoned, in essence, that forcing disclosure would undermine the level of candor in the deliberation process, a result that would benefit neither the agency nor the public generally. Id. at 393.

In Petroleum Info. the court elaborates further on evaluating factual material against Exemption 5. The court states: "To the extent that predecisional materials, even if "factual" in form, reflect an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5." 976 F.2d at 1435. Like the court in Quarles, the court in Petroleum Info. reviews relevant cases and reaches a conclusion about the standard it will use to judge whether allegedly "factual" material will receive coverage under Exemption 5. On that point, the court stated,

> "[o]ur decisions recognize that the process of selecting among alternative policies can be delicate and audience-sensitive, susceptible to distortions and vulnerable to fudging when the deliberators fear or expect public reaction. [Footnote omitted.] Inquiring whether the requested materials can reasonable be said to embody an agency's policy-informed or -informing judmental process therefore helps us answer the "key question" in these cases: whether disclosure would tend to diminish candor within an agency.

976 F.2d at 1435, citing Access Reports, 926 F.2d at 1195; Dudman Communications, 815 F.2d at 1568. With this standard in mind, the court went about deciding whether to protect from disclosure information from a newly created computer data base that tracked public land holdings by the Bureau of Land Management. The court ultimately decided not to protect the information because the information sought to be protected was not connected to a policy judgment requiring deliberation.

Following this line of reasoning about the analysis and focusing on a similar set of circumstances, the Ninth Circuit's decision in National Wildlife Federation v. U.S. Forest Service, 861 F.2d 1114 (9th Cir. 1988), is a more appropriate fit in resolving the issues in this case. In that decision, the court explicitly rejected a fact/opinion analysis. Id. at 1117, citing Ryan v. Dept. of Justice 617 F.2d 781 (D.C. Cir. 1980). The Court pointed out that Congress "had rejected an early version of exemption 5 that would have required disclosure of '[a]ll factual material on Government records.'" Id. at 118, quoting Mink, 410 U.S. at 90, 93 S.Ct. at 837. The court further did not accept the notion that in deciding whether to protect documents, it would have to "distinguish between deliberative documents which do and do not contain 'non-binding recommendations regarding law or policy.'" Id., quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The court went on to adopt a "process-oriented" or "functional" test, in which "documents containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure." Id. at 1119. The court reasoned that "[c]ategorically excluding 'opinions and recommendations regarding facts or consequences of facts' from exemption 5, as National Wildlife urges, is inconsistent with Supreme Court and Court of Appeals precedent." Id. at 1120. The court explained further as follows:

> Opinions on facts and their consequences of those facts form the grist for the policymaker's mill. Each opinion as to which of the great constellation of facts are relevant and important and each assessment of the implications of those facts suggests a different course of action by the agency. Before arriving at a final decision, the policymaker may alter his or her opinion regarding which facts are relevant or the likely consequences of these facts, or both. Tentative policies may undergo massive revisions based on a reassessment of these variables, during which the agency may decide that certain initial projections are not reasonable or that the likely consequences of a given course of action have been over- or underestimated. Subjecting a policymaker to public criticism on the basis of such tentative assessments is precisely what the deliberative process privilege is intended to prevent.

Id.

In terms of its role in the government's decision-making process, Ms. Lutz describes the NIE as document that, "by its very nature[, is] designed to provide the President and senior policy-makers the best, most clear and complete analysis and assessment from which to create and implement policy. Indeed, the specific factual information presented, along with the analysis and policy guidance, forms the heart of the deliberative process." Lutz Dec at ¶ 72.

Ms. Lutz correctly recognizes that "the Estimate, by its very nature, is designed to provide the President and senior policy makers the best, most clear and complete analysis and assessment from which to create and implement policy." Lutz Dec at ¶ 49. Further, as Ms. Lutz finds, participants' concerns about the public disclosure of such analyses "could lead them to refrain from providing the unvarnished truth in their analyses to policy makers, who would then be left with an incomplete and, therefore, flawed foundation on to which to base their ultimate decisions." Id. at ¶ 51. This concern applies not only to opinions offered, but also to "specific facts contained in the Estimate [that] were selected and highlighted out of a wide body of other potentially relevant factual and background material." Id. "The Estimate contains various factual descriptions considered to be

key elements of Iraq's social, political, and economic condition." Critically, Ms. Lutz finds, [g]iven the NIC's role as the DCI's primary instrument for coordinating the substantive finished intelligence output of the Intelligence Community as a whole, it is critical that it be able to formulate and provide unfiltered information, policy analysis and guidance through the most unfettered, unbiased process possible, free of external influences and concerns." Id. at 52.

Again, after a careful review of the entire Estimate, Ms. Lutz "determined that its disclosure would have a "'chilling' affect on the quality and level of candor" and ultimately "would cause harm to the Agency's and the Government's internal deliberative process regarding U.S. policy generally." Lutz Dec at ¶ 52.

E. The Requested Documents Contains No Reasonably Segregable Information

Further, as demonstrated in the declaration of Ms. Lutz, no reasonably segregable, non-exempt portion of the document exists." Lutz Dec at ¶ 53. The information withheld concerns intelligence sources and/or methods, and, to a lesser extent, CIA organizational or functional information. Were the Estimate to be redacted to exclude protected information, the resulting non-exempt information, if any, would be effectively meaningless, if not unintelligible, and would have no informational value. Mead Data Central, Inc. v. Dep't of Air Force, 566 F.2d 242 261 & n. 55 (D.C. Cir. 1977) (holding that "a court may decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content"); see also Local 3, Internat'l Brotherhood of Electric Workers v. NLRB, 845 F.2d 1177, 1180 (2nd Cir. 1988) (upholding district court's exemption of entire documents where stripping them of non-exempt information would render them "nonsensical"). Therefore, because the non-exempt information in the document at

issue, if any, is not reasonably segregable, summary judgment should be granted the Defendant in this matter.

III. Conclusion

WHEREFORE, Defendant's motion for summary judgment should be granted.

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

R. CRAIG LAWRENCE, D.C. BAR # 171538
Assistant United States Attorney

OLIVER W. McDANIEL, D.C. Bar #377360
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 616-0739

January 18, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL SECURITY ARCHIVE FUND, INC.	)	
Plaintiff,	)	
v.	)	**Civil Action No. 04-1821 (RMC)**
THE CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Defendant, through counsel, the United States Attorney for the District of Columbia, respectfully submits the following statement of material facts not in genuine dispute in support of its motion for summary judgment.

1. By letter dated September 16, 2004, National Security Archive Fund, Inc. ("NSAF") submitted to the Agency a FOIA request seeking "the National Intelligence Estimate (NIE) prepared in July 2004 on Iraq." Declaration of Martha M. Lutz (Attached as Exhibit 1) (hereinafter "Lutz Dec") at ¶ 7. Further, the request sought expedited processing under the FOIA, 5 U.S.C. § 552(a)(e). Finally, NSAF requested a waiver of search and review fees based on NSAF's status "as a representative of the news media." Id.

2. By letter dated September 28, 2004, the Agency acknowledged receipt of the September 16th request, notified NSAF of its decision to place it in the "representative of the news media" fee category and denied NSAF's request for expedited processing. Id. at ¶ 8.

3. By letter dated October 4, 2004, given the passage of ten business days since the original FOIA request was submitted, NSAF reiterated its request for expedited processing and alleged additional facts in support of its FOIA request. Lutz Dec at ¶ 9.

4. Subsequently, on October 5, 2004, an Agency representative spoke with a representative of the NSAF. In that conversation, the NSAF representative requested that the Agency provide a status update. Id. The Agency representative informed the NSAF representative that, in the letter of September 28, the Agency had denied NSAF's request for expedited treatment, but that the Agency had accepted the request for the Estimate and was considering it under standard, non-expedited processing. Id. The Agency reiterated this oral response to NSAF by letter dated October 6, 2004. Id.

5. On October 20, 2004, NSAF filed a Complaint for Injunctive and Declaratory Relief, along with a motion requesting that this Court enter a temporary restraining order enjoining the Agency from continuing to deny NSAF expedited processing of its September 16, 2004 FOIA request (as supplemented by NSAF's letter of October 4, 2004). Lutz Dec at ¶ 10; Plaintiff's Memorandum in Support of Its Motion for a Temporary Restraining Order and Preliminary Injunction ("TRO/PI Memo") at 3-4.

6. By letter dated October 22, 2004, the Agency provided NSAF with a final response to its September 16, 2004, FOIA request (as supplemented by NSAF's letter of October 4, 2004). Lutz Dec at ¶ 11. The Agency informed NSAF that its request was processed according to the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 431. Id. The Agency informed NSAF that it had located the Estimate and that the Estimate constituted properly classified material that must be withheld from disclosure in its entirety based on FOIA exemptions (b)(1) and (b)(3). Id.

7. In light of the Agency's final decision of October 22, 2004, Plaintiff filed the current amended complaint on November 3, 2004, which forms the basis for this preceding. Id. at ¶ 12.

8. The NIE is a record of the Central Intelligence Agency (hereinafter "CIA" or "Agency") that had been properly classified at the time of the NSAF FOIA request. Lutz Dec at ¶¶ 23-24. The Agency properly determined that the classified information being withheld from NSAF, which is the entire NIE, continues to meet the standards for classification under E.O. 12,958, as amended. Id.

Respectfully submitted,

KENNETH L. WAINSTEIN, D.C. BAR # 451058
United States Attorney

R. CRAIG LAWRENCE, D.C. BAR # 171538
Assistant United States Attorney

OLIVER W. McDANIEL, D.C. Bar #377360
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 616-0739

January 18, 2005