UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN AFTERGOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-2524 (RMU)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION TO AMEND JUDGMENT

Preliminary Statement

Plaintiff commenced this action under the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (1996 & West Supp. 2004), seeking the disclosure of certain intelligence budget information. In the main, plaintiff's and defendant's respective positions have been set forth in plaintiff's Motion for Summary Judgment, filed on July 20, 2004, defendant's Cross-Motion for Summary Judgment, filed on September 15, 2004, and the parties' oppositions and replies thereto.

By Memorandum Opinion and Order dated February 9, 2005, the Court denied plaintiff's motion for summary judgment, denied plaintiff's motion to strike,[1] and granted defendant's cross-motion for summary judgment. Claiming deficiencies in the Court's Order of February 9, 2005, plaintiff submitted a Motion to Amend Judgment [hereinafter Mot. to Amend] on February 15,

[1] On September 22, 2004, plaintiff sought to strike the declaration of one of defendant's declarants, John E. McLaughlin, then-Acting Director of Central Intelligence.

2005, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, contending that by the terms of the Memorandum Opinion, he was entitled to a grant of partial summary judgment. To that end, plaintiff now seeks an amendment to the Court's Order of February 9, 2005, that would require defendant to release "the 1963 budget figure."[2] For the following reasons, defendant hereby opposes plaintiff's Motion to Amend.

Argument

Plaintiff puts forth two primary reasons in support of his post-judgment motion; both are premised on his strained view that the Court's failure to grant him partial summary judgment is "unjust." (Mot. to Amend at 3.) The first of plaintiff's reasons appears to be logistical -- plaintiff seeks to facilitate further filings; the second is clearly pecuniary -- plaintiff wants to seek recovery of his costs. (See id. at 3-4.) Neither is compelling.

As a first reason, plaintiff candidly proclaims that judicial recognition -- by amendment of the existing Order -- of his "significant achievement" would bolster and facilitate his future arguments on appeal of this case. (Id. at 3 & n.2.)

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[2] As is reflected in this Court's Memorandum Opinion, defendant conceded during the course of this litigation that it had inadvertently released the budget figure ($550 million) for 1963. See Aftergood v. CIA, No. 01-2524, 2005 WL 299983, at *4 (D.D.C. Feb. 9, 2005). The Court has upheld the protection of certain other budget figures in this case pursuant to Exemption 3, 5 U.S.C. § 552(b)(3). Id. at **4-5.

Plaintiff also argues that such recognition "would help lay the foundation for a further challenge to CIA's nondisclosure policies." (Id.) Plaintiff provides no authority, however, legal or otherwise, as to why the promotion of his "further challenge" is an appropriate basis for a Rule 59(e) motion.

Further, even a casual scrutiny of plaintiff's claim of "significant achievement in meeting the strict standard for compelling disclosure" of intelligence information (id. at 3), i.e., the 1963 CIA budget figure, reveals that it dramatically overstates the facts. That particular item of information, as plaintiff himself previously informed the Court, was obtained from the National Archives and Records Administration (NARA). (See Pl.'s Reply to Def.'s Opp'n & Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J., filed Sept. 27, 2004, at 3-4 & Ex. 1.) Likewise, as defendant informed the Court, this budget figure was found in a declassified CIA report that was approved for release, albeit inadvertently, and without claim of additional exemptions, through the CIA's Historical Review Program several years ago.[3] Thus, while NARA furnished the CIA report now in plaintiff's possession that contains the item of information here involved, that report initially was reviewed by and approved for release by the CIA. (See Def.'s Opp'n to Pl.'s Mot. to Strike the Decl. of

[3] A fulsome description of how this CIA report came to be approved for release can be found in Defendant's Opposition to Plaintiff's Motion to Strike the Declaration of John E. McLaughlin, filed October 20, 2004, at 8 n.4 and 14-16.

John E. McLaughlin & Reply in Further Support of Def.'s Cross-Mot. for Summ. J., filed Oct. 20, 2004, at 8 n.4 and 14-16.)

It is the rule, rather than the exception, that where the requested information has been produced, any disclosure issue as to that information is moot. See, e.g., Lepelletier v. FDIC, 23 Fed. Appx. 4, 6 (D.C. Cir. 2001); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987) (quoting Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982); see also Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986) (case became moot when documents were furnished). Accordingly, plaintiff's novel demand for "re-disclosure" of this same figure -- under judicial compulsion, no less -- certainly must be regarded as moot. See Ctr. for Auto Safety v. EPA, 731 F.2d 16, 20 (D.C. Cir. 1984) (finding case moot with regard to several withheld documents released by Congress). Most significantly, as it has been observed by the Court of Appeals for the District of Columbia Circuit, "[w]here the records have already been furnished, it is abusive and a dissipation of agency and court resources to make and process a second claim." Crooker v. United States State Dep't, 628 F.2d 9, 11 (D.C. Cir. 1980) (further holding that agency was not required to release same documents already held by plaintiff because they were received from another agency). Indisputably, plaintiff has in his possession the very budget figure that he now demands. (See Pl.'s Reply to Def.'s Opp'n & Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J., filed Sept. 27, 2004, at 3-4 & Ex. 1.) Indeed,

defendant has in the context of this litigation restated this figure and has acknowledged that it is accurate. (See Def.'s Opp'n to Pl.'s Mot. to Strike the Decl. of John E. McLaughlin & Reply in Further Support of Def.'s Cross-Mot. for Summ. J., filed Oct. 20, 2004, at 15-16.)

Throughout this litigation, until now, plaintiff's focal point has not been whether the CIA had waived its ability to protect a particular budget figure because of some prior disclosure but rather whether that disclosure itself waived defendant's ability to protect all intelligence budget information. (See, e.g., Pl.'s Reply to Def.'s Opp'n & Pl.'s Resp. to Def's Cross Mot. for Summ. J., filed Sept. 27, 2004, at 3-6.) Indeed, while the Court certainly took cognizance of defendant's inability to claim Exemption 3 protection for "the 1963 budget figure," a point that was not in dispute it emphatically stated that the "more important question is whether, as plaintiff argues, the disclosure of the 1963 intelligence budget information means that the defendant has waived its ability to withhold the rest of the information he seeks." Aftergood, 2005 WL 299983, at *5. (Emphasis added.)

Plaintiff's second reason fares no better than his first. In purely conclusory terms, plaintiff argues that "by withholding a favorable ruling from plaintiff, the Court unfairly deprives

him of the recovery of his costs." (Id. at 4.)[4] By curing what he claims to be a defect in the Order, plaintiff opines that "then it will be clear that plaintiff has 'substantially prevailed' on this point and may be entitled to costs." (Id.) For the reasons explained above, there was no defect in the Court's Order. See also 5 U.S.C. § 552(a)(4)(B) (establishing jurisdiction only to order the disclosure of information "improperly withheld").

[4] The sentiment expressed by plaintiff echoes his earlier statement that "[a]n adverse ruling [in this case] would mean that my work has been futile or even counterproductive." (Decl. of Steven Aftergood, filed in support of Pl.'s Mot. for Summ. J., Sept. 20, 2004.) Neither sentiment is a proper reason for the Court exercising its authority under Rule 59(e) and granting plaintiff's motion to amend.

Conclusion

For the foregoing reasons, and based on the entire record herein, defendant respectfully requests that plaintiff's Motion to Amend Judgment be denied.

Respectfully submitted,

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Dated: March 1, 2005

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