**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE THE DECLARATION OF JOHN E. McLAUGHLIN AND REPLY IN FURTHER SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff commenced this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1996 & West Supp. 2004), seeking the disclosure of certain intelligence budget information for fiscal years 1947 through 1970. On July 20, 2004, plaintiff filed a Motion for Summary Judgment. Defendant simultaneously opposed plaintiff's motion and filed a cross-motion for summary judgment on September 15, 2004. Accompanying defendant's cross-motion was the Declaration of John E. McLaughlin [hereinafter McLaughlin Decl.], who was at that time the Acting Director of Central Intelligence (DCI).[1] On September 22, 2004, plaintiff filed a motion to strike former Acting DCI McLaughlin's declaration [hereinafter "Motion to Strike"], and he subsequently filed a response to defendant's cross-motion for summary judgment on September 27, 2004. For the following reasons, defendant

[1] Porter J. Goss became DCI on September 24, 2004, replacing former Acting DCI McLaughlin.

hereby opposes plaintiff's Motion to Strike, and it also replies to plaintiff's opposition to defendant's cross-motion for summary judgment.

## I. Plaintiff's Motion to Strike is Wholly Without Merit and Should Be Denied.

Plaintiff's Motion to Strike former Acting DCI McLaughlin's declaration is entirely premised on what plaintiff purports to be two "material false statements" in that declaration.[2] Pl.'s Mot. to Strike at 3. Plaintiff claims that these two allegedly false statements are material because they "refute" former Acting DCI McLaughlin's conclusion that the intelligence budget figures at issue in this case must be withheld. See id. at 5. On that basis, plaintiff contends that former Acting DCI McLaughlin's declaration must be stricken. As discussed below, plaintiff has fallen far short of meeting "the formidable burden of prevailing on [his] motion to strike." Judicial Watch v. United States Dep't of Commerce, No. 95-133, 2004 WL 2203842, at *2 (D.D.C. Sept. 30, 2004) (copy attached as Attach. A). Therefore, defendant respectfully suggests that plaintiff's Motion to Strike should be denied.

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[2] The two purported "material false statements" are contained within a single sentence in former Acting DCI McLaughlin's declaration: "'The aggregate intelligence budgets and the total CIA budgets have never been publicly identified.'" Pl.'s Mot. to Strike at 3 (quoting McLaughlin Decl. ¶ 13).

A. Former Acting DCI McLaughlin's Averment That Congress Has Not Disclosed Aggregate Intelligence Budget Figures Is Not False.

First, plaintiff strains to argue that former Acting DCI McLaughlin's purportedly "categorical" averment that aggregate intelligence budget figures have "never been publicly identified" is "willfully misleading" because defendant has disclosed aggregate intelligence budget figures for Fiscal Years 1997 and 1998. See Pl.'s Mot. to Strike at 3-4 & n.2. However, plaintiff does not fully recognize the context in which former Acting DCI McLaughlin's averment appears.

Former Acting DCI McLaughlin's averment, which appears in the "Background" section of his declaration, is contained within a paragraph that describes how Congress, not the Executive branch, has historically treated aggregate and agency-specific intelligence budget figures as being secret. See McLaughlin Decl. ¶ 13. Indeed, not only has plaintiff conceded as much regarding this averment's context, see Pl.'s Mot. to Strike at 4 n.2 ("[d]efendant may reply that this false categorical statement is to be understood only with reference to Congress"), plaintiff has also conceded that the averrment, in its proper context, is true, see id. (noting that Congress "unlike the executive branch has not disclosed aggregate intelligence budget figures"). In light of his own concessions, plaintiff's objections to former Acting DCI McLaughlin's averment concerning past congressional

treatment of aggregate intelligence budget figures make no sense whatsoever.

Moreover, it is difficult to see how plaintiff, in light of this and other cases that he has filed against defendant concerning aggregate intelligence budget figures, could fairly interpret former Acting DCI McLaughlin's statement to mean that aggregate intelligence budget figures have "never" been disclosed by anyone -- including defendant. Pl.'s Mot. to Strike at 4. In previous cases brought by plaintiff, defendant has itself advised this very Court of defendant's disclosures of aggregate intelligence budget figures for Fiscal Years 1997 and 1998, see Decl. of George J. Tenet, Aftergood v. CIA, No. 02-1146-RMU (D.D.C.), ¶¶ 16, 17; Decl. of George J. Tenet, Aftergood v. CIA, No. 98-2107-TFH (D.D.C.), ¶¶ 7-8, and defendant has cited this Court's decisions in those previous cases as precedent that should control the outcome of this case, see Def.'s Mem. of P. & A. in Opp'n to Pl.'s Mot. for Summ. J. and in Support of Def.'s Cross-Mot. for Summ. J. at 9-11 [hereinafter Mem. of P. & A.]. Indeed, one of the decisions cited by defendant explicitly discusses defendant's prior disclosures of aggregate intelligence budget figures. See Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at **11-12 (D.D.C. Nov. 12, 1999); see also Aftergood v. CIA, No. 02-1146, slip op. at 3 (D.D.C. Sept. 29, 2004) (noting defendant's disclosure of aggregate intelligence budget figures for Fiscal Years 1997 and 1998) (copy attached as

Attach. B). Thus, it is disingenuous at best, and patently absurd in any event, for plaintiff to claim that former Acting DCI McLaughlin's statement concerning the nondisclosure of aggregate intelligence budget figures by Congress was intended to "willfully mislead[]" the Court into believing that these two previous disclosures by defendant did not exist.

B. Former Acting DCI McLaughlin's Averment That Congress Has Not Disclosed CIA Annual Budget Figures Is Not False.

Second, the veracity of former Acting DCI McLaughlin's statement is not undermined, as plaintiff erroneously claims, by the public availability of a CIA annual budget figure contained in records disclosed from the archives of former Senator Styles Bridges [hereinafter "Bridges records"]. See Pl.'s Mot. to Strike at 4; Decl. of David Barrett ¶ 5 & Attach. 2. Plaintiff contends that the public availability of the Bridges records -- which purportedly contain the CIA's budget figure for Fiscal Year 1955 -- is "evidence" that former Acting DCI McLaughlin's statement concerning congressional nondisclosure of CIA annual budget figures is "false." See Pl.'s Mot. to Strike at 3-4. However, an examination of the Bridges records themselves and the evident circumstances surrounding their public availability reveals that plaintiff's claim lacks any merit whatsoever.

A careful reading of the Bridges records shows that plaintiff has again contrived "falseness" by selectively quoting out of context. When the Bridges records are viewed as a whole,

it is clear that their single mention of the CIA's "budget for fiscal year 1955" is made in the context of a discussion about the CIA's "budget requirements" and "budget estimates" for that upcoming fiscal year. Barrett Decl. Attach. 2. At no point do those records discuss the actual amount that Congress appropriated to the CIA that year. Indeed, the Fiscal Year 1955 appropriation act discussed in the Bridges records was not even passed until two months after those records were written. See Dep't of Defense Appropriation Act of 1955, Pub. L. No. 83-458, 68 Stat. 337 (enacted June 30, 1954). Thus, plaintiff cannot credibly claim that the disclosure of CIA "budget estimates" contained in the publicly available Bridges records demonstrates that former Acting DCI McLaughlin's statement concerning congressional nondisclosure of actual CIA annual budget figures is false. Cf. Abbotts v. NRC, 766 F.2d 604, 607-08 (D.C. Cir. 1985) (recognizing that data can be properly withheld even where it "could be identical to an estimate in the public domain") (emphasis added).

Furthermore, in relying on the public availability of the Bridges records, plaintiff appears to be suggesting that the decision to release those records by their custodian should be imputed to Congress itself, and that former Acting DCI McLaughlin should have recognized and accepted that decision as such. See Pl.'s Mot. to Strike at 4. Defendant categorically rejects this suggestion, which has no basis in law or in fact. The disclosure

of the Bridges records by their custodian is entirely inconsistent with how Congress itself has protected -- and continues to protect -- agency-specific intelligence budget information, see, e.g., McLaughlin Decl. ¶ 13, and with the longstanding statutory authority that Congress has given to defendant to protect such information, see id. Moreover, plaintiff has cited no authority whatsoever to support his extraordinary proposition that a disclosure by an unnamed custodian of a deceased former senator's personal papers should be imputed to Congress itself. Cf. Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 421-22 (2d Cir. 1989) (rejecting plaintiff's contention that a disclosure by a former agency official constituted an official disclosure by the agency).

Lastly, given that the Bridges records are still marked "Secret" and bear no declassification markings whatsoever, see Barrett Decl. Attach. 2, it is not at all clear that those records were made publicly available under proper authority.[3] Indeed, the Barrett Declaration does not even identify the custodian of the Bridges records, let alone discuss that custodian's authority for disclosing them. Defendant therefore

[3] Defendant notes this not for the purpose of arguing that the information contained in the Bridges records remains properly classified, but simply to point out that whoever released the records apparently did so without first consulting a proper declassification authority.

suggests that the Bridges records' "provenance" is hardly, as plaintiff would have it, "uncontroverted." Pl.'s Mot. to Strike at 3.

In sum, plaintiff's claim concerning the supposed falsity of former Acting DCI's averment with respect to congressional nondisclosure of the CIA's budgets is premised on his misreading of the very documents upon which he relies and on his misapprehension of the import of the circumstances surrounding their public availability.

C. The Alleged Falsity of Former Acting DCI McLaughlin's Assertions Concerning Congress's Nondisclosure of Intelligence Budget Information Is Not Material.

Moreover, the alleged falsity of former Acting DCI McLaughlin's averments concerning Congress's nondisclosure of aggregate and agency-specific intelligence budget figures is simply immaterial to the issues in this case because, with one exception discussed below,[4] the public availability of certain intelligence budget information -- regardless of its source -- has no bearing whatsoever on whether all of the intelligence budget information at issue was properly withheld under the FOIA pursuant to Exemption 3 in conjunction with 50 U.S.C. 403-3(c)(7).

[4] As discussed more fully below and in the accompanying declarations of Cynthia Stockman, Deputy Chief Financial Officer, Central Intelligence Agency, and R. Bruce Burke, Associate Deputy General Counsel for Information, Central Intelligence Agency, defendant concedes that it has inadvertently disclosed its budget figure for Fiscal Year 1963.

Plaintiff claims that the alleged falsity of former Acting DCI McLaughlin's purportedly "categorical" assertions that aggregate and agency-specific intelligence budget figures have "never" been disclosed by anyone is "material" because the public availability of certain such information supposedly "refute[s]" former Acting DCI McLaughlin's stated basis for his decision to withhold the information at issue in this case. Pl.'s Mot. to Strike at 5. As he described in his declaration, former Acting DCI McLaughlin has determined that revealing agency-specific intelligence budget figures[5] would defeat the congressionally authorized intelligence methods used to clandestinely appropriate, transfer, and spend those funds for intelligence activities. See, e.g., McLaughlin Dec. ¶ 21. Plaintiff contends that this determination is "demonstrably false" because, he suggests, that "it is simply impossible to accomplish the analysis that Mr. McLaughlin warns against" and that as a result, any prior intelligence budget disclosures "did not and could not assist in finding the locations of secret intelligence appropriations" Pl.'s Mot. to Strike at 5-6. Thus, it seems that the basis for plaintiff's objection to former Acting DCI

[5] As described in former Acting DCI McLaughlin's declaration and in the declaration of Alan W. Tate, Information Review and Release Manager, CIA [hereinafter Tate Decl.], defendant does not maintain any records from which aggregate intelligence budget figures from Fiscal Year 1947 through Fiscal Year 1970 can be derived. See McLaughlin Decl. ¶ 7; Tate Decl. ¶ 14. Therefore, former Acting DCI McLaughlin's declaration does not address the consequences of disclosing such figures.

McLaughlin's determination is not that it is "demonstrably false," but rather that plaintiff simply disagrees with it.

Plaintiff's disagreement with former Acting DCI McLaughlin's determination is, to put it mildly, not well taken. In a previous case filed by plaintiff concerning intelligence budget information, this Court rejected plaintiff's attempt to show that the disclosure of intelligence budget figures could not assist in finding the locations of secret intelligence appropriations. See Aftergood v. CIA, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at **14-15 (D.D.C. Nov. 12, 1999) (concluding that inability of a private researcher to reconstruct "a hypothetical intelligence budget" using a previously disclosed intelligence budget figure was not "conclusive evidence" that the disclosure of such figures did not reveal intelligence methods). This Court recently reached a similar conclusion in yet another case filed by plaintiff concerning intelligence budget information, declaring that "plaintiff cannot know whether or not anyone was able to deduce from [previously disclosed aggregate intelligence budget figures] 'how and where intelligence funds are transferred.'" Aftergood, No. 02-1146, slip op. at 3 (D.D.C. Sept. 29, 2004) (citation omitted); see also, e.g., CIA v. Sims, 471 U.S. 159, 178 (1985) (holding that the DCI is empowered to withhold even "superficially innocuous information" under Exemption 3, because "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the

scene and may put the questioned item of information in its proper context.'" (quoting Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978))). Indeed, this Court has expressly recognized that "there is no logical support for the plaintiff's proposition that just because [former Director of Central Intelligence George J. Tenet] disclosed aggregate budget information in 1997 and 1998, disclosure of budget information from prior years could not compromise intelligence sources and methods." Aftergood, No. 02-1146, slip op. at 5 (D.D.C. Sept. 29, 2004). Thus, "it is irrelevant that the plaintiff subjectively believes that the disclosure of [certain publicly available intelligence budget information] would not tend to reveal the secret transfer and spending of intelligence funds." Id.

In sum, plaintiff's Motion to Strike is based on his erroneous characterizations of averments that are not false, and their alleged falsity is simply immaterial to whether defendant has properly withheld the intelligence budget information at issue in any event. Therefore, defendant respectfully suggests that plaintiff's Motion to Strike should be denied.

## II. Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment Fails to Present Any Meaningful Argument that Defendant Has Improperly Withheld the Intelligence Budget Information At Issue.

In his "Reply to Defendant's Opposition and Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment" [hereinafter "Reply and Response"], plaintiff sets forth numerous

objections to defendant's withholding of the intelligence budget figures at issue in this case. However, none of those objections directly refutes defendant's central argument -- that the intelligence budget figures withheld from plaintiff relate to intelligence methods protected by statute, and that defendant's withholding of those figures is consistent with, and fully supported by, applicable statutory authority and case law. See Def.'s Mem. of P. & A. at 5-11. Rather than attempting to refute that central argument, plaintiff instead presents a number of wholly unsupportable claims, many of which are centered on his misconception that the public availability of some intelligence budget information somehow inhibits defendant's obligation to withhold all of the intelligence budget figures remaining at issue in this case. For the following reasons, none of plaintiff's objections is sustainable.

First, plaintiff claims that by supposedly failing to controvert two material "facts" that he made in his Statement of Material Facts, defendant has "effectively admitted" those "facts" -- namely, that "[p]laintiff independently obtained and published several historical intelligence budget documents" and that "[d]espite the unrestricted global dissemination of these documents on the world wide web, no damage to national security nor compromise of intelligence methods resulted." Pl.'s Reply & Response at 2. To the contrary, defendant has not "effectively admitted" either of those purported material facts because, as

noted in defendant's Statement Of Material Facts As To Which There Is No Genuine Issue, see Def.'s Statement Of Material Facts As To Which There Is No Genuine Issue at 2 n.2, and discussed more fully below, the former is not a fact that is material to the issues in this case and the latter is neither a fact nor material.

With respect to the first purported material fact that defendant has supposedly admitted -- i.e., that records containing historical intelligence budget information were made publicly available from the archives of former members of Congress (including the Bridges records discussed above) -- that "fact" is simply not material to the issues in this case. As discussed throughout this memorandum and in defendant's Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment, the public availability of those records has absolutely no bearing on whether defendant properly can withhold the information at issue in this case. See supra at 5-7; infra at 17-19; Def.'s Mem. of P. & A. at 12-14 & n.6. Thus, the public availability and dissemination of those records is not a material fact in this case.

With respect to the second material "fact" that defendant purportedly has "effectively admitted" -- i.e., that the dissemination of those congressional records did not damage national security or compromise intelligence methods, see Pl.'s Reply & Response at 2 -- this is not a "fact" to be controverted

but rather a subjective conclusion, and an immaterial one at that. See Aftergood, No. 02-1146, slip op. at 5 (D.D.C. Sept. 29, 2004) ("[I]t is irrelevant that the plaintiff subjectively believes that the disclosure of [certain publicly available intelligence budget information] would not tend to reveal the secret transfer and spending of intelligence funds.").

Second, plaintiff claims that defendant has waived its ability to withhold all of the information at issue in this case because it has officially disclosed its budgets for Fiscal Years 1963 through 1966. See Pl.'s Reply & Response at 4. Though defendant concedes that it has inadvertently disclosed its budget for Fiscal Year 1963, in fact it has not done so for any other year. Moreover, the official disclosure of that single budget figure has in no way waived defendant's ability to withhold any of the intelligence budget figures remaining at issue in this case.

Attached to plaintiff's Reply and Response are certain pages of a 1965 CIA "Cost Reduction Program" report [hereinafter "Report"] that purportedly contains defendant's budgets for Fiscal Years 1963 through 1966. See Pl.'s Reply & Response at 3-4 & Ex. 1. The cover of the Report indicates that it was cleared for release under defendant's Historical Review Program and was made publicly available by the National Archives and Records Administration. See id. However, upon careful examination, defendant has determined that of the four budget figures listed

in the Report, only the budget figure for Fiscal Year 1963 is accurate.

As attested to by Cynthia Stockman, Deputy Chief Financial Officer of the CIA, defendant searched its Office of the Chief Financial Officer for CIA budget figures responsive to plaintiff's request. See Declaration of Cynthia Stockman, Deputy Chief Financial Officer, CIA [hereinafter Stockman Decl.] ¶ 7. Through that search, defendant located records that contain the actual amounts appropriated to the CIA by Congress in each fiscal year (with the exception of 1965, for which defendant could locate only an "estimate" of the amount appropriated to it). See id. ¶¶ 6-8. These records are the most authoritative ones in defendant's possession, because "[t]he most definitive source for the total CIA appropriation for any given year is the figure indicated in the classified annex to the intelligence authorization act for that year," and the figures contained in the records located by defendant's search were derived directly from those classified annexes. See id. ¶¶ 6-7. These figures for Fiscal Years 1964 and 1966 and the "estimate" located for Fiscal Year 1965 simply do not match the figures for those years that are contained in the Report.[6] See id. ¶ 8. Thus, only

[6] It appears that the Report was made publicly available as a result of an administrative error by defendant. On its face, the Report indicates that it was "approved for release through the Historical Review Program [of] the Central Intelligence Agency" in 1990. See Pl.'s Reply & Response Ex. 1. As attested (continued...)

defendant's actual $550 million budget for Fiscal Year 1963 has been disclosed through the Report. Id.

However, the disclosure of the Fiscal Year 1963 budget figure does not, as plaintiff would have it, waive defendant's ability to withhold all of the remaining intelligence budget figures at issue in this case. Plaintiff cites absolutely no authority for this radical proposition, nor can he. Indeed, the Court of Appeals for the District of Columbia Circuit has held that the disclosure of information regarding a particular time frame does not waive an agency's ability to withhold similar information regarding earlier and later periods. See, e.g., Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (concluding that the "prohibition for extending any waiver of protection to items concerning events later than the requested materials is equally applicable to items concerning events later than the requested materials"). Thus, with the exception of the CIA budget figure for Fiscal Year 1963, plaintiff's claim that the public availability of the Report has waived defendant's ability to withhold all of the intelligence budget figures remaining at

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[6](...continued)
to by R. Bruce Burke, Associate Deputy General Counsel for Information, CIA, at the time that the Historical Review Program declassified the Report and approved it for public release, the issue of whether portions of it were otherwise protected from disclosure under other FOIA exemptions, such as Exemption 3 in conjunction with 50 U.S.C. § 403-3(c)(7), was simply not considered. See Declaration of R. Bruce Burke, Associate Deputy General Counsel for Information, CIA ¶ 7.

issue in this case simply has no merit whatsoever. Cf. Aftergood, No. 02-1146, slip op. at 5 (D.D.C. Sept. 29, 2004) (recognizing that "there is no logical support for the plaintiff's proposition that just because [former Director of Central Intelligence George J. Tenet] disclosed aggregate budget information in 1997 and 1998, disclosure of budget information from prior years could not compromise intelligence sources and methods").

Third, plaintiff claims that because certain documents that have been obtained from the archives of former Members of Congress purportedly expose the congressionally enabled clandestine budgeting methods that were used to shield from public view the CIA's budget figures for Fiscal Years 1953 and 1955, defendant has waived its ability withhold any such budget figures in order to protect those intelligence methods.[7] See Pl.'s Reply & Response at 5; Barrett Decl. Attachs. 1 & 2.

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[7] Plaintiff attempts to support this waiver claim by arguing that the D.C. Circuit's decision in Frugone v. CIA, 169 F.3d 772, 774 (D.C. Cir. 1999), which held that a disclosure made by an employee of an agency other than the agency from which information is sought does not constitute waiver, is "not applicable" because he believes that the disclosure of those records was effected by Congress. Pl.'s Reply & Response at 5. Plaintiff's attempt to distinguish Frugone is puzzling, given that defendant has not relied upon that cases's holding in any way. Instead, as discussed below, defendant has relied upon the long line of cases in which the D.C. Circuit has held that congressional disclosures of information cannot be imputed to an agency).

Inasmuch as plaintiff misconstrues what the law concerning waiver is in this Circuit, his argument must fail.

As discussed above, plaintiff's suggestion that the disclosure of former congressmen's records by their current custodians can be imputed to Congress as a body has no merit whatsoever. Nevertheless, even if the disclosure of those records could somehow be imputed to Congress, that disclosure would not impair defendant's ability to withhold the all information remaining at issue in this case. The D.C. Circuit has repeatedly held that disclosures of information by Congress do not constitute disclosures by the agency itself. See, e.g., Salisbury v. United States, 690 F.2d 966, 971 (D.C. Cir. 1982) (holding that the inclusion of information in a Senate report "cannot be equated with disclosure by the agency itself"); Military Audit Project v. Casey, 656 F.2d 724, 744 (D.C. Cir. 1981) (finding that publication of Senate report does not constitute official release of agency information); see also Fitzgibbon, 911 F.2d at 766 (recognizing that "executive branch confirmation or denial of information contained in congressional reports could under some circumstances pose a danger to intelligence sources and methods"). Likewise, the D.C. Circuit has concluded that the disclosure of information from one time period does not prevent an agency from withholding similar information from earlier and later time periods. See, e.g., id.

Moreover, even if these shortcomings in plaintiff's argument could be cured, the public availability of these records still would not inhibit defendant's ability to withhold budget figures that would reveal the actual locations of the CIA's clandestine funding as ultimately appropriated by Congress for Fiscal Years 1953 and 1955. With respect to the document that purportedly reveals the clandestine locations of the CIA's funding for Fiscal Year 1953, that document is dated February 15, 1952. See Barrett Attach. 1. The appropriation act discussed within that document was discussed prospectively; it was not passed until July 10, 1952. See Department of Defense Appropriation Act of 1955, Pub. L. No. 82-488, 66 Stat. 517. Likewise, the appropriation act discussed in the April 27, 1954, document that plaintiff claims reveals the locations of the CIA's clandestine funding for Fiscal Year 1955, see Barrett Decl. Attach. 2, was not passed until June 30, 1955, see Dep't of Defense Appropriation Act of 1955, Pub. L. No. 83-458, 68 Stat. 337. Plaintiff has provided no evidence whatsoever that the prospectively indicated information in these documents were ultimately incorporated into appropriations acts that were passed months after these documents were drafted. Indeed, the document concerning the CIA's funding for Fiscal Year 1955, by its own explicit terms, discusses the location for "budget estimates relating to the Central Intelligence Agency." Barrett Decl. Attach. 2 (emphasis added). In light of this, plaintiff cannot fairly assert that the Bridges records reveal

the clandestine intelligence funding mechanisms that defendant has protected by withholding the intelligence budget figures that he seeks.

Fourth, plaintiff offers a nearly incoherent argument that because 50 U.S.C. § 403-3(c)(7) requires the DCI to protect intelligence sources and methods, "[i]t follows that the DCI can effectively waive the exemption merely by *acquiescing* in the disclosure of the information in other forums" by not "tak[ing] any remedial actions" to address those disclosures. Pl.'s Reply & Response at 6. Thus, to plaintiff, "[d]efendant has made a tacit decision that the requested information is not an intelligence method that is worth protecting," and that "[b]y so doing, defendant has waived the ability to withhold such information in this proceeding." Id. Given that defendant has consistently defended its withholding of intelligence budget figures in this case and others, and in light of plaintiff's own explicit recognition of the vigor with which defendant has argued against the disclosure of such figures, this argument makes no sense whatsoever.

Indeed, just as former DCI George J. Tenet did in two previous cases filed by plaintiff concerning the disclosure of intelligence budget figures, former Acting Acting DCI McLaughlin has in this case submitted a declaration that describes in detail why in his judgment it is important that the intelligence budget

figures remaining at issue in this case be protected from disclosure. See McLaughlin Decl. ¶¶ 12-21. Moreover, plaintiff himself has recognized that "[i]t has long been [defendant's] position that not even a single total intelligence spending figure can be routinely" disclosed, Steven Aftergood, Tenet Calls For Public Debate on Intelligence Budget, Secrecy News, Vol. 2004, No. 37, at http://www.fas.org/sgp/news/secrecy/2003/05/052703.html (copy attached as Attach. C), and he himself recently attested that "[n]o other single category of secret government information has been as fiercely defended by proponents of official secrecy for so long as the size of the intelligence budget," Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the House Comm. on Gov't Reform, 108th Cong. (Aug. 24, 2004) (prepared statement of Steven Aftergood), available at 2004 WL 84558381 (copy attached as Attach. D). Thus, plaintiff cannot now credibly claim that defendant somehow "has made a tacit decision" that the information remaining at issue in this case "is not worth protecting."

Finally, with respect to plaintiff's claim that defendant's withholding of the intelligence budget information remaining at issue in this case violates the Statement and Accounts Clause of the Constitution,[8] U.S. Const. art. I, § 9, cl. 7, it first must

[8] The final section of plaintiff's Reply and Opposition (continued...)

be noted that plaintiff concedes "that FOIA does not create standing to challenge budget secrecy per se, or to attempt to regulate precisely when appropriated funds must be reported." Pl.'s Reply & Response at 7. Recognizing this self-admitted, fatal infirmity, plaintiff attempts to recast his misplaced constitutional claim by asserting that he now seeks an answer to "the question of whether appropriated funds must ever be reported at all," which he suggests "raises more profound issues that are fairly placed before this court." Id.

Plaintiff's effort to recast the issue in this FOIA case in an effort to salvage his "more profound" claim that the Constitution requires the disclosure of intelligence budget information is unavailing. The issue before the Court is not, as plaintiff now claims, the abstract "question of whether appropriated [intelligence] funds must ever be reported," but whether defendant must disclose such information to plaintiff under the FOIA now.[9] See Pl.'s Amended Supplemental Compl. at 7

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[8](...continued)
contains not a legal argument, but rather a wholly gratuitous condemnation of defendant and its counsel for the vigorous defense that has been presented in this case. See Pl.'s Reply & Response at 8-9. In light of plaintiff's own concession that his concluding attack is based on something that "may not be legally dispositive," Pl.'s Reply & Response at 8, defendant does not think it necessary to respond to it.

[9] Even if plaintiff's abstract "question" were properly before the Court, his Statement and Accounts Clause claim would be no less infirm. Defendant respectfully suggests that the only way for the Court to answer plaintiff's the "question of whether
(continued...)

("[P]laintiff requests that the Court . . . order defendant to release to plaintiff documents that provide historical U.S. intelligence budget data from 1947 through 1970."). As such, plaintiff's Statement and Accounts Clause claim still runs afoul of the D.C. Circuit's unambiguous conclusion that "the FOIA does not create standing to challenge the constitutionality of the CIA's budget secrecy." Halperin v. CIA, 629 F.2d 144, 153 (D.C. Cir. 1980). Moreover, the D.C. Circuit has held that the relief that plaintiff seeks in this case -- the disclosure of intelligence budget information -- is simply not available under the Statement and Accounts Clause. See id. at 161 (holding, "as a ground additional and alternative to our holding that [a FOIA plaintiff] lacks standing," that courts "have no jurisdiction [under the Statement and Accounts Clause] to decide whether, when, and in what detail intelligence expenditures must be disclosed."). Thus, plaintiff's attempt to use this FOIA case to argue that defendant's withholding of intelligence budget figures violates the Constitution must be rejected. Cf. United States v. Richardson, 418 U.S. 166, 179 (1974) ("[T]hat the Constitution

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[9](...continued)
appropriated [intelligence] funds must ever be reported," Pl.'s Reply & Response at 7, would be to render a constitutionally impermissible advisory opinion. See, e.g., California v. San Pablo & Tulare R.R. Co., 149 U.S. 308, 314 (1893) (declaring that under the Constitution, a "court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it").

does not afford a judicial remedy does not, of course, completely disable [a plaintiff] who is not satisfied with the 'ground rules' established by the Congress for reporting [intelligence] expenditures of the Executive Branch. Lack of standing . . . does not impair [plaintiff's] right to assert his views in the political forum or at the polls.").

In sum, none of the arguments raised in plaintiff's Reply & Response even addresses -- let alone refutes -- defendant's showing that the information remaining at issue in this case relates to intelligence methods that are protected from disclosure by statute, and that defendant's withholding of that information is consistent with and fully supported by applicable statutory authority and case law. Therefore, defendant respectfully suggests that its Motion for Summary Judgment should be granted.

## Conclusion

Based on the foregoing, defendant respectfully requests that plaintiff's Motion to Strike the Declaration of John E.

McLaughlin be denied and that defendant's Cross-Motion for Summary Judgment 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

FRANK P. MENNA
Senior Attorney
Office of Information and Privacy
United States Department of Justice
Flag Building, Suite 570
Washington, DC 20530-0001
(202) 514-3642

Dated: October 20, 2004