

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN AFTERGGOOD)

Plaintiff,)

v.)

Case No. 01-2524 (RMU)

CENTRAL INTELLIGENCE AGENCY)

Defendant.)
_____)

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

In this Freedom of Information Act proceeding, plaintiff *pro se* Steven Aftergood seeks disclosure of historical intelligence budget information from 1947 through 1970. The court denied plaintiff's motion for summary judgment by Memorandum Opinion and Order of February 9, 2005.

On February 15, 2005 plaintiff moved the court pursuant to Rule 59(e) to amend its order and to grant partial summary judgment to plaintiff with respect to the 1963 CIA budget, which plaintiff had demonstrated was not exempt from disclosure. In a March 1, 2005 response, defendant CIA opposed plaintiff's motion for amended judgment, arguing that any remaining dispute is moot. As explained below, defendant misapprehends the facts and the law of this case.

1. Plaintiff proved his case with respect to the 1963 figure, not mooted it.

In the course of this proceeding, plaintiff met his burden under *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) to show that the 1963 CIA budget figure cannot be withheld under FOIA exemption 3. The court admitted as much in its February 9 Memorandum Opinion at p. 9.

Plaintiff did not moot his own case, as defendant would have it. To the contrary, he proved it by producing an officially acknowledged document containing the information that defendant had refused to disclose under FOIA. The accuracy of the 1963 figure produced by plaintiff is conceded by defendant.

The requested 1963 CIA budget figure has been officially acknowledged since 1990, when it was declassified and transferred under proper authority to the National Archives and Records Administration. Burke Declaration, at para. 7.

Yet beginning in 1995, when plaintiff initially filed his request, and ever since that time, defendant has refused to furnish the requested information under the FOIA. In its September 15, 2004 cross-motion for summary judgment, defendant persisted in opposing disclosure of the 1963 figure, as well as all other intelligence budget figures.

By demonstrating that the 1963 budget figure has been officially acknowledged, plaintiff invalidated defendant's refusal to respond to plaintiff's FOIA request on this point.

Under the circumstances, *Fitzgibbon v. CIA* authorizes and obliges this court to compel CIA to produce the requested record. *Fitzgibbon*, 911 F.2d at 765.

As the court explained in its February 9 memorandum opinion, the D.C. Circuit instructs that "when information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim."

Yet defendant is now asking the court to modify or ignore *Fitzgibbon* and to rule that

when information has been officially acknowledged, as in this case, a request for subsequent disclosure under FOIA becomes moot. That is an eccentric and unjust reading.

It is an eccentric reading because prior publication of the requested information is not disabling for plaintiff's case – it is specifically required by *Fitzgibbon* (“information requested must already have been made public through official and documented disclosure,” 911 F.2d 756).

Further, defendant's position is unjust because it precludes the possibility that plaintiff could ever prevail under any set of facts. If the contested information had not been officially acknowledged, then it would clearly be exempt under *Fitzgibbon*. But now that plaintiff has overcome defendant's denial and demonstrated that it has been officially acknowledged, defendant would declare the issue moot and demand summary judgment in its own favor!

This no-lose scenario is convenient for the government. But it would be a pity if anything like it were ever affirmed in an American court of law.

2. Summary judgment motions are not self-modifying in response to changing facts.

The summary judgment motions presented to the Court were predicated (among other things) on defendant's refusal to furnish the 1963 CIA budget figure to plaintiff.

Those motions were never amended to exclude the 1963 figure -- the official acknowledgment of which was demonstrated by plaintiff after the motions had been filed -- and the motions cannot modify themselves in response to a shifting factual record.

This means that the releasability of the 1963 CIA budget figure was among the questions placed before the Court.

By denying plaintiff's motion in its entirety (and granting defendant's cross-motion), the Court has ruled in effect that plaintiff has not met his burden to require disclosure of the 1963 budget figure.

This ruling is inconsistent with *Fitzgibbon*, and with the Court's own memorandum opinion. It also damages plaintiff's interests in other ways, as previously argued.

3. There is no FOIA exemption for information that is in the public domain.

Defendant contends that because the requested 1963 budget figure has come into plaintiff's possession through his own efforts, the court should forego enforcement of the FOIA and consider the matter moot. Defendant's Opposition, March 1, 2005, at page 4.

But it is perverse to claim that defendant should now be excused from producing the information that it illegally withheld under FOIA just because plaintiff successfully proved it was illegally withheld. Defendant should not be rewarded for having concealed the officially acknowledged status of the 1963 budget figure from plaintiff and from the court.

There is no FOIA exemption for information that is already in the public domain, or for information that may already be known by the requester.

The court should therefore compel defendant to comply with the Freedom of Information Act and grant plaintiff partial summary judgment.

Conclusion

Plaintiff respectfully reiterates his request that the court amend its ruling to conform to *Fitzgibbon* and that the court grant partial summary judgment to the plaintiff with respect to the 1963 CIA budget.

Dated: March 7, 2005

Respectfully submitted,

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