UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

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ADAM JOHNSON,	:	No. 17 Civ. 1928 (CM)
Plaintiff,	:	
- against -	:	
CENTRAL INTELLIGENCE AGENCY,	:	
Defendant.	:	

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is a Freedom of Information Act ("FOIA") action concerning email correspondence between the Central Intelligence Agency's ("CIA") Office of Public Affairs ("OPA") and members of the media. Plaintiff Adam Johnson, an independent journalist and media analyst, requested roughly six months of email correspondence between the OPA and ten prominent national security journalists.

As a result of this litigation, the CIA released the vast majority of the redacted material. The only remaining issue involves five documents, consisting of emails between OPA spokespersons and three journalists. The CIA asserts that the redactions relate to classified information and are therefore properly withheld, despite the fact that the information in question was freely turned over to members of the media.

In support, it has provided one public affidavit and one *ex parte* submission to the Court. While Plaintiff cannot rebut evidence that is not before him, the CIA's public declaration offers only vague, conclusory assertions and threadbare recitals of the relevant legal standards.

Because the CIA's public declaration fails to offer a credible rationale to satisfy its burden of proof, the Court should deny the Government's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

STATEMENT OF FACTS

In February 2017, Plaintiff submitted a FOIA request (the "Request") to the CIA seeking all correspondence between March 1, 2012 and August 17, 2012 between staffers in the CIA's o Office of Public Affairs and ten prominent national security journalists. *See* Declaration of Anthony J. Sun dated August 25, 2017 ("Sun Decl."), ¶ 3. This information had previously been requested by then-Gawker Media Editor John Cook and produced to him with virtually all of the

CIA's side of the correspondence redacted. Essentially, Plaintiff requested that the CIA re-process the production with the redactions removed.

After FOIA's twenty working-day deadline passed without hearing back from the agency, Plaintiff filed suit[1]. Upon negotiation between the parties concerning the scope of the CIA's invocation of various exemptions, the CIA produced the vast majority of the documents with the redactions removed, leaving only five documents with substantive redactions. The CIA justifies these redactions on the basis of two FOIA exemptions relating to national security. Plaintiff only challenges these five documents.[2]

LEGAL STANDARD

"In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994).

In order to grant summary judgment to an agency on the basis of affidavits, a court must find that the affidavits: (1) describe the documents and the justifications for nondisclosure with reasonably specific detail; (2) demonstrate that the information withheld logically falls within the claimed exemption, and (3) are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. *Amnesty Intl. USA v. C.I.A.*, 728 F. Supp. 2d 479, 496 (S.D.N.Y. 2010) (citing *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir.1981)).

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[1] After the agency was served with the Complaint, it asserted that it had mailed a letter to Plaintiff requesting clarification (despite Plaintiff submitting his request electronically). The parties resolved this issue consensually.

[2] Plaintiff does not challenge the withholding of email addresses and phone numbers of CIA employees or journalists.

ARGUMENT

I. RELEASE OF THE PRESS OFFICE'S CORRESPONDENCE WOULD NOT DAMAGE NATIONAL SECURITY

Everything requested by Plaintiff was previously disclosed by the CIA's press office to professional journalists. When information has been officially acknowledged, its disclosure "may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C.Cir.1990). To be officially acknowledged, the information requested (1) must be as specific as the information previously released; (2) must match the information previously disclosed; and (3) must already have been made public through an official and documented disclosure. *See ACLU v. DOD*, 628 F.3d 612, 620–21 (D.C.Cir.2011).

This principle applies fully here. First, there is no dispute that the information requested – the contents of email conversations between the CIA and journalists – is as specific as previously released. Second, there is no dispute that the information requested is the exact same information previously released. Third, there is no dispute that the information was released through an official, documented disclosure.

At bottom, Defendant CIA seeks to deny Plaintiff, a professional journalist, the very same information freely, voluntarily, and proactively provided to other members of the media by a designated **public spokesperson** of the agency. This type of selective disclosure is inconsistent with FOIA, which recognizes that Government information belongs to all citizens:

> FOIA "is often explained as a means for citizens to know "what their Government is up to." This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. . . As a general rule, if the information is subject to disclosure, it belongs to all.

Nat'l Archives & Records v. Favish, 541 U.S. 157, 172 (2004) (citing *Favish v. Off. of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000)).

II. PHILLIPPI IS INCORRECT AND INAPPOSITE

Defendant CIA nonetheless justifies its redactions based on a D.C. Circuit decision in *Phillippi v. CIA*, 655 F.2d 1325 (D.C. Cir. 1981). There, the D.C. Circuit permitted the CIA to withhold documents related to discussions with the press. *Phillippi* should not control here for two reasons.

First, the decision is wrong. There is no logical basis for national security to somehow override – after the fact -- information that was already acknowledged through official channels. Permitting this exception would threaten to swallow the rule, allowing the government to hypocritically release sensitive national security information when it suits its public relations interests without fear of being held to its own standard later. There is no logical limit.

Second, the decision is inapposite. *Phillippi* involved "a classified CIA program supposedly undertaken to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts." *Id.* The operation's cover was blown following a mysterious burglary, after which "somewhat garbled information" about the project "somehow ended up in the Los Angeles Times." *Id.* When news of the leak reached the CIA, officials, including CIA Director William Colby "scrambled to suppress further publicity about the project. They met with temporary success by briefing editors about the project in exchange for the promises of the editors not to publish accounts of the operation at least until someone else broke the story." *Id.* Facing a request for material related to the information disclosed by the CIA, the D.C. Circuit upheld national security exemptions. It reasoned that release of the documents could serve to confirm – or undercut – the CIA's cover story and the "cat [was] not out of the bag" because there was still undisclosed information "and, if there [was] not, that itself may be worth hiding." *Id.*

Here, there is no leak defensively being plugged by the highest levels of the CIA. Rather, each of the five e-mails at issue appears to be the CIA spokesperson affirmatively and proactively feeding information into the public domain.

Document C06013440 is illustrative. That document contains correspondence between Washington Post reporter David Ignatius and CIA spokesperson Preston Golson. It reflects a back and forth between Ignatius and the CIA on an op-ed Ignatius was writing concerning the revelations that the CIA recruited Dr. Shakil Afridi, a Pakistani doctor, to collect blood samples that could identify Osama bin Laden's family, under cover of an ongoing vaccination program.[3]

Ignatius's article criticized the CIA's "vaccination gambit" for putting at risk "something very precious — the integrity of public health programs in Pakistan and around the globe. It also added to the dangers facing nongovernmental organizations (NGOs) in a world that's increasingly hostile to U.S. aid organizations." It is apparent that Ignatius provided the agency with an opportunity to defend its actions prior to publishing. The CIA offered the following quote on the record:

> I cannot comment on, or confirm possible operational activity. However, I would not that the CIA certainly respects the great work of medical NGOs in difficult places around the world. The Agency is receptive to the views of the NGO community, and met with community representatives for a full and frank exchange on their concerns. Decisions are not made in a vacuum, and the Agency welcomes the opportunity to hear directly from them.

Sun Decl. Ex. F. The above quote was sandwiched between two (still redacted) paragraphs which

[3] The date of the emails corresponds to a column released later that day. *See* Ignatius, David, "A CIA gambit in Pakistan threatens a global vaccination program," *Washington Post*, May 29, 2012, available at: https://www.washingtonpost.com/opinions/a-cia-gambit-in-pakistan-threatens-a-global-vaccination-program/2012/05/29/gJQAW6W1zU_story.html. As noted in the article, then-Secretary of Defense Leon Panetta and then-Secretary of State Hillary Clinton both publicly acknowledged Afridi's cooperation with the United States and criticized Pakistan for sentencing him to 33 years in prison for treason.

apparently disclosed sensitive national security information to Mr. Ignatius.

On the face of these documents, there is no logical rationale for the CIA to have disclosed sensitive national security information that could harm the United States. Unlike *Phillippi*, where the Director himself mobilized the weight of the agency to prevent disclosure of tradecraft, here we have a CIA spokesperson voluntarily offering classified, sensitive information to **supplement** an on-the-record response. The agency's prior disclosure flies in the face of the very interest it asserts to deny Plaintiff's request. In *Phillippi*, the CIA disclosed **some** information to prevent further harmful disclosure. Here, the only apparent flow of sensitive information emanates from the CIA. *Phillippi*, 655 F.2d 1325.

Even if Ignatius possessed sensitive information (though there is no indication he did), the OPA was not without options. It could have declined to comment and allowed the agency to suffer Ignatius's critique, requested non-disclosure **without** confirming or denying, or simply picked up a phone and avoided creating a permanent record of the interaction. No exigent circumstances necessitated creating a government record, let alone transmitting purportedly highly sensitive national security information over unsecure email

In light of this context, it is plain that the CIA was not trying to plug a leak, but instead attempting to influence reporting by selectively disclosing purportedly sensitive information. The same distinction holds true for the remaining documents. The CIA cites no law that entitles it to disclose its tradecraft in service of public relations through one official channel, only to shut the door to others.

In short, the CIA cannot put the toothpaste back in the tube.

III. THE CIA FAILED TO REASONABLY SEGREGATE NON-EXEMPT MATERIAL

Finally, FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). The question of segregability is "subjective based on the nature of the document in question, and an agency must provide a reasonably detailed justification rather than conclusory statements to support its claim that the non-exempt material in a document is not reasonably segregable." *Mead Data Cent. Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 261 (D.C.Cir.1977). Defendant's use of block redactions limits the public's ability to understand the context for the CIA's disclosure. Further, there is one quote in Ignatius's op-ed that is sourced to an anonymous "senior U.S. official." Should the Court undertake *in camera* review, Plaintiff respectfully requests it examines whether it can be found within the redacted material:

> The Afridi case is an example of what the CIA calls "cover for action." The doctor was running a real vaccination program that gave him a reason to visit the areas where al-Qaeda operatives were hiding. A senior U.S. official explains: "Dr. Afridi was asked only to continue his program. . . . The vaccinations were real, and he never harmed a soul in the course of this campaign."

Ignatius, *supra.* If this quote is in fact among the redacted material, it would undermine the agency's claims of sensitivity, its justification for continued secrecy, and its assertion that no material from the block redactions can be reasonably segregated.

V. CONCLUSION

For these reasons, Plaintiff requests this Court deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

Dated: September 22, 2017

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