U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

March 29, 2018

BY ECF AND HAND DELIVERY

The Honorable Colleen McMahon
Chief United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1640
New York, NY 10007

Re: Johnson v. Central Intelligence Agency, No. 17 Civ. 1928 (CM) (GWG)

Dear Chief Judge McMahon:

This Office represents Defendant the Central Intelligence Agency (the "CIA") in the above-referenced case brought by Adam Johnson ("Plaintiff") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I write respectfully in response to the submission of *amici curiae* filed on March 16, 2018 (the "Brief"). Docket No. 36.[1]

Amici curiae misunderstand the CIA's argument. The CIA does not contend that the National Security Act of 1947 (the "NSA"), as amended, creates an "exception" to FOIA or the court-created official acknowledgment (or public domain) doctrine that has been applied in some circumstances to determine whether the protections of FOIA's exemptions have been waived by virtue of a prior official disclosure to the public of the same information. Rather, the CIA's position is a straightforward application of the NSA and FOIA Exemption 3.

There is no question that the NSA qualifies as a withholding statute under FOIA Exemption 3. *See, e.g.*, *ACLU v. DOJ*, 681 F.3d 61, 72–75 (2d Cir. 2012) (National Security Act of 1947 "qualif[ies] as an exemption statute[] under Exemption 3") (citing *Larson v. Dep't of State*, 565 F.3d 857, 865 (D.C. Cir. 2009); *Baker v. CIA*, 580 F.2d 664, 667 (D.C. Cir. 1978)). That means that information within the scope of the NSA is exempt from public disclosure under FOIA. The withheld information at issue in this case pertains directly to intelligence sources and methods, and thus falls squarely within the scope of the NSA. *See id.*

The CIA's prior limited disclosure of the withheld information in emails to certain journalists did not vitiate the protections of the NSA and Exemption 3. The NSA requires the CIA

[1] The CIA consented to the filing of the *amici curiae* submission provided it had an opportunity to file a response within two weeks. Docket Nos. 31, 34. In its Order dated March 12, 2018, Docket No. 35, the Court granted *amici curiae* leave to file a brief, but moved up the requested filing date to March 16, noting that the Court intended to decide the pending cross-motions by March 31, 2018. The CIA understands the Court's Order as permitting the CIA to file a response to the submission of *amici curiae* within two weeks, or by March 30, 2018.

to protect intelligence sources and methods from unauthorized disclosure, grants the CIA broad authority and discretion to do so, and even permits the CIA to make affirmative disclosures to third parties in order to fulfill this statutory directive. *See CIA v. Sims*, 471 U.S. 159, 168–70 & n.13, 174–75, 180 (1985). The *limited* private disclosures to journalists reflected in the five emails at issue here were *authorized* by the CIA, in its discretion and in furtherance of the NSA's directive to *protect* sources and methods. By contrast, the *public* disclosures requested by Plaintiff under FOIA would result in a materially different disclosure of information—*not authorized* by the CIA—that would indisputably *harm* intelligence sources and methods. *See* Docket No. 28, at 9 (noting the "very real danger to" intelligence sources and methods if the withheld information is released pursuant to FOIA). FOIA does not nullify—and in fact reinforces—the CIA's obligations under the NSA. To interpret the CIA's prior limited and authorized disclosures made in furtherance of the NSA's directive to protect sources and methods as a waiver of FOIA's protections would turn Exemption 3 on its head.

Amici curiae are simply wrong in contending that an email exchanged between the CIA and a third party, which was not disseminated to the public, created a "permanent public record" of the information. The email is no more a permanent "public" record than the transcripts of conversations between the CIA and third parties in *Judicial Watch, Inc. v. U.S. DOD*, 963 F. Supp. 2d 6 (D.D.C. 2013), and *Phillippi v. CIA*, 655 F.2d 1325 (D.C. Cir. 1981). To focus on whether the recipient of a limited disclosure can prove facts given to them by the CIA is a red herring; the inquiry is whether the information has been disclosed to the general public. *See Klayman v. CIA*, 170 F. Supp. 3d 114, 123 (D.D.C. 2016) ("mere fact" that communications may have occurred between the CIA and third parties does not render the communications "public"). Moreover, it is irrelevant here whether the emails were sent over secured or unsecured systems because Plaintiff has not shown that the emails were ever revealed to the public.

Amici curiae further argue that "[a]n agreement not to share information is at best a contract, and an agency cannot avoid a statutory mandate by way of a contract with a private party." Br. at 11 n.6. But the Second Circuit has recognized that an agreement not to disseminate protected information can render a limited disclosure non-public. *See Wilson v. CIA*, 586 F.3d 171, 188 (2d Cir. 2009) (finding no public disclosure in part because employee to whom classified information was disclosed agreed to maintain its confidentiality).

Finally, the Court should reject *amici curiae*'s request to "immediately order all of CIA's *ex parte, in camera* filings—as well as its own 19 January 2018 Memorandum Order—to be published in full unredacted form on the public record." Br. at 13. Contrary to *amici curiae*'s suggestion, even if the Court were to rule that the information withheld from the five emails must be disclosed under FOIA, the materials submitted to the Court *ex parte* extend well beyond the withheld information and remain classified and statutorily protected.

I thank the Court for its consideration of this letter.

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: s/ Anthony J. Sun
ANTHONY J. SUN
Assistant United States Attorney
86 Chambers St., 3rd Floor
New York, New York 10007
(212) 637-2810

cc: All counsel of record (via ECF)