

436 F.Supp.3d 195
United States District Court, District of Columbia.

The JAMES MADISON
PROJECT, et al., Plaintiffs,
v.
U.S. DEPARTMENT OF
JUSTICE, et al., Defendants.

Case No. 1:16-cv-227-RCL
|
Signed 01/15/2020

Synopsis

Background: Requester brought action against Department of Justice (DOJ) and Central Intelligence Agency (CIA) under the Freedom of Information Act (FOIA), seeking information regarding former CIA officer who illegally disclosing identity of **covert** officer and officer's participation in CIA counter-**terrorism** program. Defendants moved for summary judgment.

Holdings: The District Court, [Royce C. Lamberth](#), Senior District Judge, held that:

[1] CIA and DOJ properly invoked FOIA exemption covering information authorized under executive order to be kept secret in interest of national defense or foreign policy;

[2] CIA properly withheld information under FOIA exemption covering material exempted from disclosure by federal statute, based on Central Intelligence Act;

[3] CIA properly withheld information under FOIA exemption covering material exempted from disclosure by federal statute, based on National Security Act;

[4] CIA properly withheld attorney work product under FOIA exemption covering information normally privileged in the civil discovery context;

[5] CIA properly invoked deliberative process privilege for purposes of withholding information under FOIA exemption covering documents normally privileged in the civil discovery context;

[6] CIA properly withheld attorney-client communications under FOIA exemption covering documents normally privileged in the civil discovery context; and

[7] FBI properly invoked FOIA exemption covering medical, personnel, and similar files, and FOIA exemption covering personal information contained in law enforcement records.

Motion granted.

West Headnotes (22)

[1] **Summary Judgment** 🔑 Freedom of information

Summary judgment may be granted on the basis of government declarations in a Freedom of Information Act (FOIA) case, provided that those declarations are sufficiently detailed and are not undermined by contrary evidence or evidence of bad faith. 5 U.S.C.A. § 552.

[2] **Records** 🔑 Classified information

In the context of Freedom of Information Act (FOIA) cases involving matters of national security, courts tend to afford the government a great deal of deference, though the ultimate responsibility of proving compliance with FOIA remains on the government. 5 U.S.C.A. § 552.

[3] **Records** 🔑 Classified information

The government has the burden to show application of the Freedom of Information Act (FOIA) exemption covering information that is specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy, but courts do tend to defer to agencies when that exemption is at issue because the executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of

public disclosure of a particular classified record. 5 U.S.C.A. § 552(b)(1).

1 Case that cites this headnote

[4] **Records** 🔑 Classified information

Little proof or explanation is required beyond a plausible assertion that information is properly classified, for purposes of an agency's withholding of information under the Freedom of Information Act (FOIA) exemption covering information that is specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy. 5 U.S.C.A. § 552(b)(1).

1 Case that cites this headnote

[5] **Records** 🔑 Classified information

Central Intelligence Agency (CIA) and Department of Justice (DOJ) properly invoked Freedom of Information Act (FOIA) exemption covering information specifically authorized under criteria established by executive order to be kept secret in interest of national defense or foreign policy, based on executive order governing classification of national security information, in withholding documents while responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, where documents at issue concerned CIA's identification and investigation of unauthorized disclosures of classified information, and withheld methods included information about still-classified CIA intelligence operations. 5 U.S.C.A. § 552(b)(1).

2 Cases that cite this headnote

[6] **Records** 🔑 Presumptions, inferences, and burden of proof

An agency's burden in defending its withholding of information under the Freedom of Information Act (FOIA) is merely to explain how the information being withheld logically falls within

the claimed FOIA exemption. 5 U.S.C.A. § 552(b).

[7] **Records** 🔑 Sufficiency and specificity

An agency's description is sufficient, for purposes of the agency meeting its burden to show how information being withheld in response to a Freedom of Information Act (FOIA) request logically falls within the claimed FOIA exemption, as long as it provides the information necessary to understand the context of its decisions regarding redaction or a functional description of the documents at issue. 5 U.S.C.A. § 552(b).

[8] **Records** 🔑 Employment Information; Personnel Practices and Files

Central Intelligence Agency (CIA) properly withheld information under Freedom of Information Act (FOIA) exemption covering material exempted from disclosure by federal statute, based on Central Intelligence Act, in responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, although requester asserted that Act did not cover information about how CIA employees carried out their responsibilities, where CIA only relied on Act to withhold titles, names, identification numbers, and organizational information of CIA employees, which fell squarely within Act's coverage. 5 U.S.C.A. § 552(b)(3); 50 U.S.C.A. § 403a et seq.

[9] **Records** 🔑 Classified information

The National Security Act (NSA) exempts from disclosure under the Freedom of Information Act (FOIA) any material that the agency shows can reasonably be expected to lead to unauthorized disclosure of intelligence sources or methods. 5 U.S.C.A. § 552.

[10] Records 🔑 Matters Exempted or Prohibited from Disclosure Under Other Laws

Central Intelligence Agency (CIA) properly withheld information under Freedom of Information Act (FOIA) exemption covering material exempted from disclosure by federal statute, based on National Security Act, which exempted from disclosure any material that could reasonably be expected to lead to unauthorized disclosure of intelligence sources or methods, in responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, where information that CIA withheld consisted of internal CIA and intra-agency communications regarding the investigation and prosecution of former CIA officer as well as CIA records that would reveal sensitive information regarding counterintelligence operations. 5 U.S.C.A. § 552(b)(1); 50 U.S.C.A. § 401 et seq.

1 Case that cites this headnote

[11] Records 🔑 Work product materials and privilege

Central Intelligence Agency (CIA) properly withheld attorney work product under Freedom of Information Act (FOIA) exemption covering documents normally privileged in the civil discovery context, in responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, where withheld documents consisted of investigatory and/or legal documents, including interview reports, emails reflecting legal advice, case updates, draft memoranda, and feedback on draft reports or recommendations, and CIA knew that any unauthorized disclosure of information was likely to be prosecuted, meaning that withheld documents were prepared in anticipation of litigation. 5 U.S.C.A. § 552(b)(5).

[12] Records 🔑 Work product materials and privilege

An agency may withhold documents responsive to a Freedom of Information Act (FOIA) request under the attorney work product doctrine, based on the FOIA exemption covering documents that are normally privileged in the civil discovery context, if the documents were prepared in anticipation of litigation. 5 U.S.C.A. § 552(b)(5).

[13] Records 🔑 Work product materials and privilege

Determining whether documents were prepared in anticipation of litigation, as required for an agency to withhold the documents in response to a Freedom of Information Act (FOIA) as attorney work product based on the FOIA exemption covering documents that are normally privileged in the civil discovery context, involves determining whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. 5 U.S.C.A. § 552(b)(5).

[14] Records 🔑 Work product materials and privilege

Even if a document serves multiple purposes, including purposes that are not limited to future litigation, it still qualifies as work product, making it eligible for withholding in response to a Freedom of Information Act (FOIA) request under the FOIA exemption covering documents that are normally privileged in the civil discovery context, so long as it was prepared because of the prospect of litigation. 5 U.S.C.A. § 552(b)(5).

[15] Records 🔑 Deliberative Process; Deliberative Privilege

For purposes of the Freedom of Information Act (FOIA) exemption covering documents normally privileged in the civil discovery context, the “deliberative process privilege” protects inter-agency and intra-agency documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental

decisions and policies are formulated. 5 U.S.C.A. § 552(b)(5).

[16] Records 🔑 [Deliberative Process; Deliberative Privilege](#)

Central Intelligence Agency (CIA) properly invoked deliberative process privilege for purposes of withholding information under Freedom of Information Act (FOIA) exemption covering documents normally privileged in the civil discovery context, in responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, where withheld information included pre-decisional communications that occurred within the CIA as well as between the CIA, FBI, and Department of Justice (DOJ), and CIA also withheld interview reports, case updates, investigative reports, and memoranda containing recommendations and other deliberations regarding the conduct of CIA's counterintelligence investigation. 5 U.S.C.A. § 552(b)(5).

[17] Records 🔑 [Deliberative Process; Deliberative Privilege](#)

A document containing a recommendation from one agency to another can fall within the deliberative process privilege, for purposes of the Freedom of Information Act (FOIA) exemption covering documents normally privileged in the civil discovery context. 5 U.S.C.A. § 552(b)(5).

[18] Records 🔑 [Attorney-client communications and privilege](#)

Central Intelligence Agency (CIA) properly withheld attorney-client communications under Freedom of Information Act (FOIA) exemption covering documents normally privileged in the civil discovery context, in responding to FOIA request for information regarding former CIA officer who disclosed identity of **covert** officer and officer's participation in CIA counter-**terrorism** program, where withheld

information included instances wherein CIA's Office of General Counsel (OGC) attorneys communicated in confidence with CIA, as their client, regarding investigation into and prosecution of former CIA officer. 5 U.S.C.A. § 552(b)(5).

[19] Records 🔑 [Work rules; discipline](#)
Records 🔑 [Discretion and balancing of interests in general](#)

FBI properly invoked Freedom of Information Act (FOIA) exemption covering medical, personnel, and similar files, and FOIA exemption covering personal information contained in law enforcement records the disclosure of which would constituted an unwarranted invasion of personal privacy, in withholding investigative file on former Central Intelligence Agency (CIA) officer, in response to FOIA request for information regarding former officer; former officer's privacy interests outweighed public interest in how FBI carried out its investigation, given that former officer was not the requester, had not waived his privacy rights, and was not a public figure, and requester provided nothing more than speculation that government impropriety occurred. 5 U.S.C.A. §§ 552(b)(6), 552(b)(7)(C).

1 Case that cites this headnote

[20] Records 🔑 [Grounds and justification; factors considered](#)

Central Intelligence Agency (CIA) and Executive Office of United States Attorneys (EOUSA) satisfied their burdens to release all non-exempt material segregable from exempt material in responding to Freedom of Information Act (FOIA) request for information about former CIA officer, where the agencies declared that they had conducted a line-by-line review of the responsive records and determined that all reasonably segregable nonexempt information was released, and the agencies were not required to provide so much detail that the exempt material would effectively be disclosed. 5 U.S.C.A. § 552.

[21] Records 🔑 Presumptions, inferences, and burden of proof

Courts must presume that an agency has complied with the obligation to disclose reasonably segregable non-exempt material in responding to a Freedom of Information Act (FOIA) request. 5 U.S.C.A. § 552.

[22] Records 🔑 Grounds and justification; factors considered

An agency is not required to provide so much detail that the exempt material would effectively be disclosed in showing that it has complied with the obligation to disclose reasonably segregable non-exempt material in responding to a Freedom of Information Act (FOIA) request. 5 U.S.C.A. § 552.

Attorneys and Law Firms

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Kathryn L. Wyer, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION

Royce C. Lamberth, United States District Court Judge

Plaintiffs James Madison Project and Ken Dilanian filed two Freedom of Information Act (“FOIA”) requests with defendants U.S. Department of Justice (“DOJ”) and Central Intelligence Agency (“CIA”) in 2015. Defendants believe that they have met their FOIA obligations and thus request that this Court grant summary judgment in their favor. Plaintiffs believe that defendants have failed to satisfy their FOIA obligations. Upon consideration of the Motion for Summary Judgment (ECF No. 46), opposition (ECF No. 52), and reply (ECF No. 58), the Court will grant summary judgment in favor of defendants.

BACKGROUND

In 2012, former CIA officer John Kiriakou was indicted in the Eastern District of Virginia on five criminal counts. The indictment alleged that he repeatedly disclosed classified information (including the names of **covert** CIA officers and their roles in classified overseas operations) to journalists and in a book that he sought to publish. The government believed that he disclosed information regarding the CIA's counterterrorism program known as the Rendition, Detention, and Interrogation Program (“RDI Program”). In exchange for all other charges being dropped, Mr. Kiriakou ultimately pled guilty to violating the Intelligence Identities Protection Act by illegally disclosing the identity of a **covert** officer and the officer's participation in the RDI Program. On January 25, 2013, Mr. Kiriakou was sentenced to two-and-a-half years in federal prison followed by three years of supervised release.

On December 31, 2015, plaintiffs submitted two FOIA requests to the DOJ Criminal Division, Executive Office of United States Attorneys (“EOUSA”), Federal Bureau of Investigation (“FBI”), and CIA. The first request sought the following categories of information:

- Records memorializing the entirety of the [addressee's] investigation into Mr. Kiriakou's actions, including but not limited to his disclosures of information *200 during his December 10, 2007 interview, as well as his later alleged disclosures of classified information to unauthorized third parties regarding the identities of certain CIA officers and alleged false statements during the pre-publication review process;
- Any “damage” or “harm” assessments made regarding the impact that Mr. Kiriakou's allegedly unauthorized disclosures of allegedly classified information has had upon the national security of the United States;
- Any records memorializing the extent to which, if at all, Mr. Kiriakou lawfully raised concerns within the CIA and/or to Congress prior to December 10, 2007, regarding the CIA's past use of waterboarding;
- Any documentation memorializing the extent to which Mr. Kiriakou was deemed by [the addressee] to qualify as a “whistleblower” under then-existing laws, rules and regulations with respect to any lawful disclosures of classified information encompassed by line item (3);

- Any documentation memorializing legal analyses of the viability of [taking or recommending that DOJ take] legal action against Mr. Kiriakou as a result of his allegedly unauthorized disclosures of allegedly classified information and alleged false statements, including civil and/or criminal litigation; and
- Any documentation memorializing legal analyses of the viability of [taking or recommending that DOJ take] legal action against Mr. Kiriakou for any lawful disclosures of classified information encompassed within line item (3).

ECF No. 5-3. The second request sought records “memorializing ‘crime reports’ ” filed or received by the recipient agency, seeking “potential criminal prosecution” of Mr. Kiriakou. ECF No. 5-4.

In response to these requests, the agencies in question searched their records to find the Kiriakou investigative files in their respective systems. The government released 12 records in full or in part as well as an additional 133 pages. All other records were withheld in full, including 205 records located in CIA files, the entire FBI investigative file (except for the publicly filed complaint from the criminal case), and DOJ records of grand jury proceedings. The declarations that the government submitted articulate the bases for the agencies' decisions to withhold certain information that they believe is exempt from disclosure under FOIA Exemptions 1, 3, 5, 6, and 7(C)-(E). The government believes it fully complied with its FOIA obligations and is entitled to summary judgment. Plaintiffs concede that the agencies' searches were adequate and that Exemptions 7(D) and 7(E) were properly invoked. Plaintiffs, however, do challenge the agencies' use of Exemptions 1, 3, and 5 as grounds for withholding certain documents as well as the FBI's use of Exemptions 6 and 7(C) as grounds for categorically withholding the entire investigative file.

LEGAL STANDARD

[1] [2] FOIA requires disclosure of all requested government records unless the information falls within one of FOIA's nine exemptions. 5 U.S.C. § 552; *Milner v. Dep't of the Navy*, 562 U.S. 562, 565, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). FOIA cases are typically resolved at the summary judgment stage, with the government bearing the burden to prove that its search for the requested information was adequate and that any information it is *201 choosing to

withhold falls within an enumerated exemption. 5 U.S.C. § 552(a)(4)(B); *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). Summary judgment may be granted on the basis of government declarations, provided that those declarations are sufficiently detailed and are not undermined by contrary evidence or evidence of bad faith. See *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). In the national security context, courts tend to afford the government a great deal of deference, though the ultimate responsibility of proving compliance with FOIA remains on the government. See *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003).

ANALYSIS

The Court will grant defendants' Motion for Summary Judgment. Plaintiffs do not dispute that the agencies' searches for the requested information were adequate, so that issue will not be discussed further in this Memorandum Opinion. The Court will not analyze Exemptions 7(D) or 7(E), as plaintiffs do not challenge the use of those exemptions. As explained below, the Court finds that Exemptions 1, 3, and 5 were properly invoked. Additionally, the Court finds that the FBI properly used Exemptions 6 and 7(C) as grounds for categorically withholding the entire investigative file. Finally, the Court has determined that the CIA and EOUSA satisfied their segregability obligations and will not conduct an *in camera* review.

I. The Government Properly Invoked Exemption 1.

[3] [4] Exemption 1 protects from disclosure information that is “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” so long as the information is “in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). The government has the burden to show that Exemption 1 applies, but courts do tend to defer to agencies when Exemption 1 is at issue because “the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse [e]ffects might occur as a result of public disclosure of a particular classified record.” *Larson v. U.S. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009). Exemption 1's text “suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified.” *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

Executive Order (“E.O.”) 13526 governs the classification of national security information. Agencies must meet E.O. 13526’s four classification requirements in order to invoke Exemption 1: (1) an original classification authority classifies the information; (2) the U.S. Government owns, produces, or controls the information; (3) the information pertains to one of eight protected categories listed in section 1.4 of E.O. 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damages. E.O. 13526 § 1.1(a), 75 Fed. Reg. 707, 707 (Dec. 29, 2009).

Plaintiffs challenge the CIA’s and DOJ’s invocation of Exemption 1. For the reasons explained below, the Court finds that both agencies’ validly invoked Exemption 1. The Court will therefore grant summary judgment for the defense on this issue.

***202 A. The CIA Properly Invoked Exemption 1.**

[5] To support its use of Exemption 1, the CIA provided a sworn declaration from Antoinette B. Shiner (“Shiner Declaration”). ECF No. 46-10. Plaintiffs challenge the invocation of Exemption 1 only in relation to intelligence activities and intelligence methods. Plaintiffs expressly waive their challenge to the invocation of Exemption 1 in relation to **covert** personnel, classified contracts, and locations of agency facilities.

[6] [7] Plaintiffs object to the CIA using Exemption 1 to withhold entire documents, claiming that such withholding is overbroad. The agency’s burden, however, is merely to explain how the information being withheld “logically falls within the claimed exemption.” *Casey*, 656 F.2d at 738. An agency’s description is sufficient as long as it provides the information necessary to understand the “context” of its decisions regarding redaction or a “functional description” of the documents at issue. *Brick v. U.S. Dep’t of Justice*, 293 F. Supp. 3d 9, 11 (D.D.C. 2017). Upon review of the Shiner Declaration, the CIA has provided sufficient information to justify its use of Exemption 1. The documents at issue concern the CIA’s identification and investigation of unauthorized disclosures of classified information by a former CIA officer as well as the CIA’s internal discussions and consultation with other agencies and agency components regarding the investigation and Mr. Kiriakou’s ultimate arrest and prosecution. The intelligence activities, sources, and

methods that the CIA withheld from these documents include counterintelligence investigation sources and techniques used to investigate the potential unauthorized disclosures, sensitive technical collection procedures used to conduct the investigation, and other information about CIA intelligence operations. Forcing the CIA to produce this information would mean forcing it to publicize details of certain CIA counterterrorism operations and other intelligence activities conducted abroad that are still classified. Therefore, this information is protected under Exemption 1.

B. DOJ Properly Invoked Exemption 1.

Three DOJ components—the FBI, EOUSA, and NSD—have invoked Exemption 1 in some capacity. To support their use of Exemption 1, each agency component submitted a sworn declaration. The FBI submitted the sworn declaration of David M. Hardy (ECF No. 46-9), EOUSA submitted the sworn declaration of Princina Stone (ECF No. 46-4), and NSD submitted the sworn declaration of Patrick N. Findlay (ECF No. 46-3). Plaintiffs claim that these declarations fail to clarify how each DOJ component is construing the concept of intelligence activities, sources, and methods. They accuse the declarants of using vague and conclusory language. The Court disagrees for the same reasons outlined above in explaining why the CIA properly invoked Exemption 1. Furthermore, even if Exemption 1 did not apply, additional exemptions analyzed below provide DOJ with an adequate basis for withholding this information, thus rendering further discussion of DOJ’s use of Exemption 1 unnecessary.

II. Exemption 3

Exemption 3 allows an agency to withhold information prohibited from disclosure under another federal statute so long as the federal statute either: (a) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld. *203 5 U.S.C. § 552(b)(3). In this case, the CIA withheld information under Exemption 3 in conjunction with two statutes. First, the CIA relied upon the Central Intelligence Act of 1949 (“the CIA Act”). Second, the CIA relied upon the National Security Act of 1947 (“the NSA Act”). Plaintiffs concede that as a threshold matter, both of these statutes work in conjunction with Exemption 3; however, plaintiffs argue that the CIA has failed to sufficiently explain its withholdings. For the reasons set forth below, the Court finds that the CIA properly invoked Exemption 3 and

will therefore grant summary judgment for the defense on this issue.

A. The CIA Properly Withheld Information Pursuant to the CIA Act.

[8] According to the Shiner Declaration, the CIA only used the CIA Act to withhold “titles, names, identification numbers, and organization information of CIA employees.” Shiner Decl. ¶ 33. It is true that information about *how* CIA employees carry out their responsibilities is not covered under the CIA Act, but it does not appear that the CIA used Exemption 3 to redact any such information. The CIA’s Vaughn Index and the Shiner Declaration both make it clear that the CIA limited its withholdings under the CIA Act to information about the identities and functions of CIA personnel, which falls squarely within the statute.

B. The CIA Properly Withheld Information Pursuant to the NSA Act.

[9] [10] The NSA Act exempts from disclosure any material that the agency shows “can reasonably be expected to lead to unauthorized disclosure” of intelligence sources or methods. *Wolf v. Central Intelligence Agency*, 473 F.3d 370, 377 (D.C. Cir. 2007). The Shiner Declaration sufficiently explains that the information withheld is of such a nature. The information that the CIA has withheld consists of internal CIA and intra-agency communications regarding the Kiriakou investigation and prosecution as well as CIA records that would reveal sensitive technical means of conducting counterintelligence operations. As previously noted, courts tend to give great deference to agencies when such interests are at stake, and the Court finds that the CIA has met its obligations here.

III. Exemption 5

Exemption 5 protects from disclosure documents that are normally privileged in the civil discovery context. 5 U.S.C. § 552(b)(5). Plaintiffs argue that the CIA’s explanations for its Exemption 5 withholdings are insufficient. The Court finds that the CIA properly invoked Exemption 5 and will therefore grant summary judgment for the defense on this issue.

A. The CIA Properly Withheld Attorney Work Product.

[11] [12] [13] [14] Exemption 5 permits an agency to withhold documents under the attorney work product doctrine

if the documents were prepared in anticipation of litigation. See *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 149 (D.C. Cir. 2015). This involves determining “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010). Even if a document “serves multiple purposes” (including purposes that are not limited to future litigation), it still qualifies as work product so long as it “was prepared because of the prospect of litigation.” *Id.* at 138.

*204 The CIA properly withheld attorney work product in this case. The documents that the CIA identified as responsive were found primarily in the CIA’s Office of Security and Office of General Counsel (“OGC”). These documents consist of investigatory and/or legal documents, portions of which were compiled by or at the request of OGC and include interview reports, emails reflecting legal advice, case updates, draft memoranda, and feedback on draft reports or recommendations. The CIA knew from the outset of its investigation that any unauthorized disclosure of information was likely to be prosecuted, meaning that the withheld documents were prepared in anticipation of litigation. In the FOIA context, this is sufficient to justify withholding the documents under Exemption 5.

B. The CIA Properly Invoked the Deliberative Process Privilege.

[15] [16] The deliberative process privilege protects inter-agency and intra-agency documents reflecting “advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Loving v. U.S. Dep’t of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (citing *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)). In this case, the CIA withheld pre-decisional communications that occurred within the CIA as well as between the CIA, FBI, and DOJ. As explained in the Shiner Declaration, the CIA also withheld interview reports, case updates, investigative reports, and memoranda containing recommendations and other deliberations regarding the conduct of the CIA’s counterintelligence investigation and whether disciplinary or legal action was warranted.

[17] Plaintiffs specifically challenge the CIA’s use of the deliberative process privilege to withhold crime reports from the CIA to DOJ, which contain the CIA’s position and recommendation with respect to a possible criminal

investigation or prosecution. The D.C. Circuit has held that a document containing a recommendation from one agency to another can fall within the deliberative process privilege. *See Wolfe v. U.S. Dep't of Health & Human Servs.*, 839 F.2d 768, 774-75 (D.C. Cir. 1988). As the CIA describes the intra-agency and inter-agency communications that were withheld, they were merely recommendations to the decisionmaker (in this case, DOJ) rather than a final or binding decision of its own, meaning that the deliberative process privilege applies. As explained in the Shiner Declaration, DOJ is not bound by the recommendations of the CIA regarding prosecution, meaning that the CIA's recommendations in this context were not final decisions and were merely advisory. Therefore, the CIA properly invoked the deliberative process privilege.

C. The CIA Properly Withheld Attorney-Client Communications.

[18] Plaintiffs are concerned that the CIA has conflated the attorney-client privilege with the attorney work product doctrine. As the CIA aptly points out, however, the mere fact that certain material was withheld on multiple grounds does not mean that the CIA conflated the two doctrines; rather, both doctrines apply to the same material, as there is often overlap between the attorney-client privilege and the work product doctrine. The Court also disagrees with plaintiffs' concern that the CIA has provided insufficient explanation for withholding material on the basis of attorney-client privilege. All three of the Vaughn Index entries that plaintiffs point to clearly involve instances wherein OGC attorneys communicated in confidence with *205 their client regarding the Kiriakou investigation or prosecution. The Court therefore finds that the CIA has met its burden to show that the attorney-client privilege applies to these documents.

IV. The FBI Properly Invoked Exemption 6 and Exemption 7(C).

[19] FOIA Exemption 6 permits the government to withhold information about individuals contained in personnel files, medical files, and other similar files. 5 U.S.C. § 552(b)(6). FOIA Exemption 7(C) protects personal information in law enforcement records if its disclosure could reasonably be expected to constitute an invasion of unwarranted personal privacy. 5 U.S.C. § 552(b)(7)(C). The FBI has invoked both Exemption 6 and Exemption 7(C) as grounds for categorically withholding the investigative file on Mr. Kiriakou. Both of these exemptions, however, are subject to a balancing test which renders the exemptions inapplicable if some public interest outweighs the privacy interest.

Mr. Kiriakou has repeatedly claimed that his prosecution was merely a cover allowing the government to retaliate against him for his whistleblowing activities. Plaintiffs concede that the FBI's investigative file was compiled for law enforcement purposes and thus meets the threshold of Exemption 7, but they argue that the public interest in learning more about how the FBI conducted its investigation and determining whether Mr. Kiriakou's claims are true outweighs any countervailing privacy interests that would permit the categorical withholding of responsive records. The government argues that even if there is some public interest in the requested records, it does not outweigh the privacy concerns at issue.

The Court believes that the balancing test in this case tips in favor of the government. Although the Court disagrees with the government's characterization of Mr. Kiriakou as a mere low-level employee (specifically during his time as the Chief of Counterterrorism Operations in Pakistan), his privacy interests still outweigh the public interest in the investigative file. The government is correct that the Chief of Counterterrorism Operations in Pakistan is not a public figure on par with the likes of House Majority Leader DeLay, former CIA Director General Patraeus, or former National Security Agency senior executive Drake (all of whom the plaintiffs argue are models for how Mr. Kiriakou's personal information should be treated in this case). The Court finds that Mr. Kiriakou still retains a significant privacy interest in the FBI's investigative file, and although plaintiffs argue that Mr. Kiriakou's interest is diminished because he claims his prosecution was a retaliatory act, that is not the case. Mr. Kiriakou is not the one submitting this FOIA request, nor has he submitted any formal waiver of his privacy rights. He is also not a public figure in the same way that the persons plaintiffs cite were deemed public figures. Therefore, his privacy interests remain intact despite having served as the Chief of Counterterrorism Operations in Pakistan.

Plaintiffs also fail to demonstrate how any public interest in the information outweighs the privacy rights at stake. The fact that the file would provide insight into how the FBI went about investigating the case is clearly insufficient to override the privacy interests at play here. Additionally, although people may be interested in Mr. Kiriakou's claims about government misconduct, plaintiffs need to produce "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred" before this Court can order the FBI to turn

over the investigative file. *206 *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004). Mere speculation is insufficient. As the government aptly points out, plaintiffs provide no evidence of government misconduct aside from Mr. Kiriakou's previous public statements, for which he, in turn, provided no concrete proof. The Court is in no way making a finding that the government did not commit any misconduct in its prosecution of Mr. Kiriakou; however, plaintiffs have not provided evidence of that misconduct sufficient to warrant release of the investigative file. Essentially, the government has established that disclosing the FBI's investigative file could reasonably be expected to constitute an unwarranted invasion of personal privacy, and plaintiffs have failed to prove that the public's interest in the information outweighs such privacy concerns. Therefore, the FBI need not turn over its investigative file on Mr. Kiriakou, and summary judgment will be granted for the defense on this issue.

V. The CIA and EOUSA Satisfied Their Segregability Obligations.

[20] [21] [22] The Court finds that the CIA and EOUSA have released all reasonably segregable nonexempt information. The Court must presume that an agency has “complied with the obligation to disclose reasonably segregable material.” *Talbot v. U.S. Dep't of State*, 315 F. Supp. 3d 355, 374 (D.D.C. 2018). In this case, plaintiffs have not rebutted that presumption with “contrary evidence.”

Id. The agencies' respective declarants conducted a line-by-line review of the responsive records and determined that all reasonably segregable nonexempt information was released. *See* Shiner Decl. ¶ 45; Stone Decl. ¶¶ 65-68. Courts frequently find that the government has met its segregability obligations based on these types of sworn statements alone, as an “agency is not required to provide so much detail that the exempt material would effectively be disclosed.” *See, e.g., Johnson v. Exec. Office for United States Attys.*, 310 F.3d 771, 776 (D.C. Cir. 2002) (affirming summary judgment based on agency declarant's affirmation that a line-by-line segregability analysis was conducted). The Court therefore finds it unnecessary to conduct an *in camera* review.

CONCLUSION

Based on the foregoing, the Court will **GRANT** defendants' Motion for Summary Judgment (ECF No. 46).

The Court will **ORDER** judgment in favor of defendants.

A separate Order accompanies this Memorandum Opinion.

All Citations

436 F.Supp.3d 195

Filings (3)

Title	PDF	Court	Date	Type
1. Defendants' Answer to Plaintiffs' First Amended Complaint THE JAMES MADISON PROJECT, et al., Plaintiffs, v. DEPARTMENT OF JUSTICE, et al., Defendants. 2016 WL 5957322	—	D.D.C.	Apr. 08, 2016	Pleading
2. First Amended Complaint THE JAMES MADISON PROJECT, and Ken DILANIAN, NBC News Washington Bureau, Plaintiffs, v. DEPARTMENT OF JUSTICE, and CENTRAL INTELLIGENCE AGENCY, Defendants. 2016 WL 5957320	—	D.D.C.	Mar. 14, 2016	Pleading
3. Complaint THE JAMES MADISON PROJECT, and Ken DILANIAN, NBC News Washington Bureau, Plaintiffs, v. DEPARTMENT OF JUSTICE, and CENTRAL INTELLIGENCE AGENCY, Defendants. 2016 WL 556635	—	D.D.C.	Feb. 11, 2016	Pleading

Citing References (16)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	<p> 1. Insider, Inc. v. U.S. General Services Administration 2022 WL 10449605, *2, D.D.C.</p> <p>GOVERNMENT — Records. Names of members to presidential and vice-presidential transition teams were exempt under FOIA as personnel and medical files and other similar files.</p>	Oct. 18, 2022	Case		<p>19</p> <p>F.Supp.3d</p>
Cited by	<p>2. American Civil Liberties Union v. Central Intelligence Agency </p> <p>2022 WL 306360, *4, D.D.C.</p> <p>The American Civil Liberties Union has sued to enforce a request under the Freedom of Information Act, 5 U.S.C. § 552, seeking documents relating to the nomination of Gina Haspel...</p>	Feb. 02, 2022	Case		<p>3</p> <p>4</p> <p>5</p> <p>F.Supp.3d</p>
Mentioned by	<p>3. Yagman v. Brennan 2020 WL 4341592, *9, C.D.Cal.</p> <p>Before the Court is Defendants Gina Haspel and the Central Intelligence Agency's ("Defendants" or the "CIA") motion for summary judgment. See Dkt. # 167 ("MSJ"). Plaintiff Stephen...</p>	June 09, 2020	Case		<p>5</p> <p>10</p> <p>F.Supp.3d</p>
—	<p>4. Deliberative Process Exemption from Freedom of Information Act, 5 U.S.C.A. s552(b)-- Investigative and Research Documents and Reports 77 A.L.R. Fed. 3d Art. 1</p> <p>Agencies may avoid disclosing records under the Freedom of Information Act (FOIA, 5 U.S.C.A. § 552(b)(5)) if they fall under the deliberative process privilege. In United States...</p>	2023	ALR	—	<p>16</p> <p>F.Supp.3d</p>
—	<p>5. What constitutes "unwarranted invasion of personal privacy" for purposes of law enforcement investigatory records exemption of Freedom of Information Act (5 U.S.C.A. sec. 552(b)(7)(C)) 52 A.L.R. Fed. 181</p> <p>This annotation collects and analyzes the federal cases in which the courts have discussed the meaning of the phrase "unwarranted invasion of personal privacy" within 5 U.S.C.A. §...</p>	1981	ALR	—	<p>19</p> <p>F.Supp.3d</p>
—	<p>6. Freedom of Information Act exemption (5 U.S.C.A. sec. 552(b)(5)) for inter-agency and intra-agency memorandums or letters as applicable to communications to or from attorneys for the government 54 A.L.R. Fed. 280</p> <p>This annotation collects the federal court cases which have applied the Freedom of Information Act exemption (5 U.S.C.A. § 552(b)(5)) for inter-agency and intra-agency memorandums...</p>	1981	ALR	—	<p>11</p> <p>16</p> <p>18</p> <p>F.Supp.3d</p>

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p>7. When are government records "similar files" exempt from disclosure under Freedom of Information Act provision (5 U.S.C.A. sec. 552(b)(6)) exempting, certain personnel, medical, and "similar" files</p> <p>106 A.L.R. Fed. 94</p> <p>This annotation collects and analyzes those federal cases in which the courts, in the context of an action under the Freedom of Information Act (FOIA) seeking disclosure of certain...</p>	1992	ALR	—	<p>19</p> <p>F.Supp.3d</p>
—	<p>8. What Are Interagency or Intra-agency Memorandums or Letters Exempt from Disclosure under Freedom of Information Act (5 U.S.C.A. s552(b)(5))</p> <p>168 A.L.R. Fed. 143</p> <p>The 1966 Freedom of Information Act (FOIA), 5 U.S.C.A. §§ 552 et seq., represented the culmination of years of congressional effort to amend the public information provisions of...</p>	2001	ALR	—	<p>11</p> <p>16</p> <p>18</p> <p>F.Supp.3d</p>
—	<p>9. What Matters Are Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. s552(b)(1)) as "Specifically Authorized Under Criteria Established by an Executive Order to be Kept Secret in the Interest of National Defense or Foreign Policy"</p> <p>169 A.L.R. Fed. 495</p> <p>In 1966, Congress enacted the Freedom of Information Act (5 U.S.C.A. §§ 552 et seq.) to secure for individuals the opportunity to request and receive information from the...</p>	2001	ALR	—	<p>3</p> <p>4</p> <p>5</p> <p>F.Supp.3d</p>
—	<p>10. Use of Affidavits To Substantiate Federal Agency's Claim of Exemption from Request for Documents Under Freedom of Information Act (5 U.S.C.A. s 552)</p> <p>187 A.L.R. Fed. 1</p> <p>Government agencies have consistently been permitted to submit affidavits to demonstrate that they have properly withheld records or portions thereof pursuant to one of the...</p>	2003	ALR	—	<p>1</p> <p>6</p> <p>7</p> <p>F.Supp.3d</p>
—	<p>11. Constitutionality, construction, and effect of statute or regulation relating specifically to divulgence of information acquired by public officers or employees</p> <p>165 A.L.R. 1302</p> <p>The reported case for this annotation is State ex rel. Haugland v. Smythe, 25 Wash. 2d 161, 169 P.2d 706, 165 A.L.R. 1295 (1946).</p>	1946	ALR	—	<p>19</p> <p>F.Supp.3d</p>
—	<p>12. Civ. Actions Against US, Agencies, Officers & Empl. s 7:13, § 7:13. Scope of exemption, generally</p> <p>The Freedom of Information Act protects from disclosure records that are specifically authorized under criteria established by an executive order to be kept secret in the interest...</p>	2023	Other Secondary Source	—	<p>5</p> <p>8</p> <p>10</p> <p>F.Supp.3d</p>

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<p>13. Federal Information Disclosure s 11:25, § 11:25. Challenges to exemption (b)(1) claims—Content of the agency presentation</p> <p>The nature of the security harm which the agency asserts must be explained to the court. Conclusory affidavits about generalized harm are not sufficient, since the court cannot...</p>	2022	Other Secondary Source	—	<p>1 4 5</p> <p>F.Supp.3d</p>
—	<p>14. Federal Procedure, Lawyers Edition s 38:493, § 38:493. Limited discovery in CIA FOIA case</p> <p>In an action to determine whether the Central Intelligence Agency has improperly withheld agency records because of the failure to comply with the procedure for exempting...</p>	2023	Other Secondary Source	—	<p>6</p> <p>F.Supp.3d</p>
—	<p>15. 39 Am. Jur. Proof of Facts 3d 1, Proof of Basis for, and Grounds for Lifting, Work Product Protection Against Discovery</p> <p>Am. Jur. Proof of Facts 3d</p> <p>It is well recognized that a lawyer must be able to work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel, and that proper...</p>	2023	Other Secondary Source	—	<p>11 16 18</p> <p>F.Supp.3d</p>
—	<p>16. 110 Am. Jur. Trials 367, Litigation Under Freedom of Information Act</p> <p>Am. Jur. Trials</p> <p>This article sets forth and examines the procedure for making a request under the Freedom of Information Act (FOIA), from the initial request through judicial review. Practical...</p>	2023	Other Secondary Source	—	<p>11 16 18</p> <p>F.Supp.3d</p>

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Cited	<p>2. Center for Nat. Sec. Studies v. U.S. Dept. of Justice 331 F.3d 918, D.C.Cir., 2003</p> <p>GOVERNMENT - Records. Names of persons detained during DOJ's 9/11 investigation were within FOIA's law enforcement exemption.</p>	Case			201
Mentioned	<p>3. Department of Interior v. Klamath Water Users Protective Ass'n 121 S.Ct. 1060, U.S., 2001</p> <p>GOVERNMENT - Records. There is no "Indian trust" exemption to disclosure requirements of Freedom of Information Act.</p>	Case			204
Cited	<p>4. F.T.C. v. Boehringer Ingelheim Pharmaceuticals, Inc. 778 F.3d 142, D.C.Cir., 2015</p> <p>PATENTS - Privileges. District Court improperly determined financial documents were wholly opinion work product.</p>	Case			203
Cited	<p>5. Johnson v. Executive Office for U.S. Attorneys 310 F.3d 771, D.C.Cir., 2002</p> <p>GOVERNMENT - Records. Agency satisfied its obligation to investigate privacy interests implicated by FOIA documents.</p>	Case		”	206
Mentioned	<p>6. King v. U.S. Dept. of Justice 830 F.2d 210, D.C.Cir., 1987</p> <p>Author brought action pursuant to Freedom of Information Act seeking access to all Federal Bureau of Investigation documents pertaining to her deceased mother-in-law. The United...</p>	Case			201
Cited	<p>7. Larson v. Department of State 565 F.3d 857, D.C.Cir., 2009</p> <p>GOVERNMENT - Records. In camera review of materials withheld by CIA and NSA pursuant to national security exemption was not warranted.</p>	Case			201

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Cited	<p> 8. Loving v. Department of Defense</p> <p>550 F.3d 32, D.C.Cir., 2008</p> <p>GOVERNMENT - Records. Standard analysis of FOIA exemption applied to Army private's request for documents relating to his death sentence.</p>	Case			204
Cited	<p> 9. Military Audit Project v. Casey</p> <p>656 F.2d 724, D.C.Cir., 1981</p> <p>Parties seeking information concerning project in which Central Intelligence Agency was involved appealed from judgment of the District Court granting government summary judgment,...</p>	Case			201+
Mentioned	<p> 10. Milner v. Department of Navy</p> <p>131 S.Ct. 1259, U.S., 2011</p> <p>GOVERNMENT - Records. Explosives maps and data requested from Department of the Navy did not qualify for withholding under second FOIA exemption.</p>	Case			200
Cited	<p> 11. Morley v. C.I.A.</p> <p>508 F.3d 1108, D.C.Cir., 2007</p> <p>GOVERNMENT - Records. Mere reference to other files does not establish the existence of documents that are relevant to FOIA request.</p>	Case			201
Cited	<p> 12. National Archives and Records Admin. v. Favish</p> <p>124 S.Ct. 1570, U.S., 2004</p> <p>GOVERNMENT - Records. Death-scene photographs were properly withheld.</p>	Case			205
Cited	<p>13. Talbot v. U.S. Department of State</p> <p>315 F.Supp.3d 355, D.D.C., 2018</p> <p>GOVERNMENT — Records. Central Intelligence Agency performed adequate search for CIA agent's personnel file, in response to requester's Freedom of Information Act request.</p>	Case			206+
Cited	<p> 14. U.S. v. Deloitte LLP</p> <p>610 F.3d 129, D.C.Cir., 2010</p> <p>TAXATION - Discovery. Corporation did not waive work-product protection of tax-related documents by disclosing documents to independent auditor.</p>	Case			203+
Cited	<p> 15. Wolf v. C.I.A.</p> <p>473 F.3d 370, D.C.Cir., 2007</p> <p>GOVERNMENT - Records. Existence or nonexistence of CIA records were exempt from disclosure under national security exemption to FOIA.</p>	Case			203

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Cited	 16. Wolfe v. Department of Health and Human Services 839 F.2d 768, D.C.Cir., 1988 Action was brought for access under Freedom of Information Act to records which indicated what actions had been completed by the Food and Drug Administration but which awaited...	Case			204

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