

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ STEVEN AFTERGOOD)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-2524 (RMU)
)	
CENTRAL INTELLIGENCE AGENCY)	
)	
Defendant.)	
_____)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff *pro se* Steven Aftergood respectfully moves for summary judgment. In support of this motion, plaintiff relies upon the accompanying memorandum, declarations of Louis Fisher, David Barrett and Steven Aftergood, and statement of undisputed material facts. A proposed order consistent with this motion is attached.

Dated: July 20, 2004.

Respectfully submitted,

STEVEN AFTERGOOD
Plaintiff *pro se*

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FOR THE DISTRICT OF COLUMBIA

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**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Introduction

This is a Freedom of Information Act proceeding in which plaintiff *pro se* Steven Aftergood seeks declassification of certain historical intelligence budget records from Fiscal Year 1947 through FY 1970. The requested material has been withheld by defendant Central Intelligence Agency ("CIA"). Plaintiff moves for summary judgment on grounds that the records are no longer properly classified and are not otherwise exempt from the FOIA.

Two independent arguments are presented below: (1) The requested records can no longer be withheld because the eventual publication of their contents is constitutionally required; and (2) the records can no longer be withheld because the asserted justifications for withholding them have been empirically disproved by plaintiff's acquisition and publication of some of them.

I. Publication of the Requested Material is Constitutionally Mandated

The subject matter of this proceeding differs from that of other Freedom of Information Act requests because its eventual publication is guaranteed by the Statement and Account clause of the United States Constitution in Article I, Section 9, Clause 7:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. [emphasis added]

Significantly, this provision applies to “all” public money, without exception. In the only other explicit constitutional requirement for publication of information, which appears in Article I, Section 5, an exception is specified for materials in the Journal of Congress that “require Secrecy.” But no such exception is provided in the Statement and Account Clause. See Declaration of Louis Fisher, July 6, 2004, at ¶ 5.

Previous constitutional challenges to secret spending have admittedly been rebuffed by the courts. The Supreme Court ruled that a taxpayer lacks standing to dispute the constitutionality of the Central Intelligence Agency Act of 1949, which authorizes secret spending. *United States v. Richardson*, 418 U.S. 166 (1974). Nor does the Freedom of Information Act endow a requester with standing to challenge the constitutionality of the CIA Act. *Halperin v. Central Intelligence Agency*, 629 F.2d 144 (1980). The Statement and Account clause itself “is not self-defining and Congress has plenary power to give meaning to the provision.” *Harrington v. Bush*, 553 F.2d 190, 194 (1977).

But the present case is distinguishable from those precedents in significant ways: (1) Plaintiff does not dispute the constitutionality of secret spending *per se* or of the CIA Act of 1949 that authorizes it. See Fisher Decl., at ¶ 19. (2) The subject matter of this proceeding,

unlike previous cases, does not concern current or recent expenditures, but rather historical material that is more than three decades old. Amended Supplemental Complaint of July 2, 2003 (docketed January 20, 2004), at ¶ 1.

Thus, the new claim made by plaintiff in this proceeding is that secret appropriations, even when initially constitutional, cannot remain properly classified by executive order forever, because the U.S. Constitution requires their publication “from time to time” without exception. U.S. Const., Article I, Sect. 9, Cl. 7.

Open-ended, indefinite budget secrecy that is applied to an entire category of government expenditures such as intelligence cannot possibly be consistent with the Constitution’s Statement and Account clause. “From time to time” cannot mean “never.” Fisher Decl., at ¶ 17.

The fact that the clause “is not self-defining,” as per *Harrington v. Bush*, does not mean it is entirely devoid of content. Rather, it means that we cannot know, until Congress so determines, exactly *when* secret budget data must be published, how frequently or in how much depth and detail. Congress has never made such a determination with respect to secret intelligence spending.

But even in the absence of definitive legislative guidance, it is clear that the requested intelligence appropriations information is due for disclosure under *any* plausible definition. No known constitutional scholar subscribes to or defends the continued withholding of budget information that is several decades old. Fisher Decl., at ¶ 16.

While the courts have assigned to Congress the responsibility for defining the specific requirements of the Statement and Account clause, the failure of Congress to do so with respect to secret intelligence spending does not moot the issue or leave the judiciary helpless to act.

The guaranteed publication of budget appropriations data provides the public with a “check and balance” on Congress as well as on the Executive Branch. It cannot be the case that Congress can unilaterally erase a requirement imposed upon it by the Constitution.

Nor does the Director of Central Intelligence have the standing to cancel a constitutional requirement or to interpret it out of existence. National security classification authority cannot properly be invoked to permanently override the Constitution. Fisher Decl., at ¶ 18.

To be exempt from the Freedom of Information Act under exemption (b)(1), information must be “properly classified pursuant to... executive order.” 5 U.S.C. § 552(b)(1).

But the Executive Order on classification cannot and does not alter the status of constitutionally protected public access to budget information:

Nothing in this order limits the protection afforded any information by other provisions of law, including the Constitution....

Executive Order 12958, as amended (Exec. Order 13292), at sect. 6.2(c). Because budget information for an entire domain of government activity that is decades old must certainly be published pursuant to the Statement and Account clause, U.S. Const. Art. I, Sect. 9, it can no longer be “properly classified.”

II. Defendant’s Grounds for Withholding Have Been Empirically Refuted Through Publication of Some of the Requested Data

In response to plaintiff’s original 1995 FOIA request for historical intelligence budget information, defendant denied the request in 1995 and again in 2000 on the asserted grounds that its release would damage national security and compromise intelligence sources and methods.

Decl. of Steven Aftergood, July 20, 2004, at ¶ 3.

(Since the initial request was refiled in February 2002, CIA has not formally asserted any exemption to the FOIA; neither has it released the requested information, with one exception. Aftergood Decl., at ¶ 5.)

But as described below, some of the requested material has now been independently obtained and published to a global audience. Defendant's justifications for withholding the information have thus been empirically tested, and have been exposed as objectively false.

In the conduct of his professional research on the early cold war history of U.S. intelligence, Prof. David Barrett obtained copies of various historical intelligence budget documents in the archived papers of former congressional officials. Declaration of David Barrett, July 1, 2004, at ¶¶ 2-3.

These included documentation of appropriations for the Central Intelligence Agency for Fiscal Years 1953, 1954 and 1955, and budget data for the Defense Intelligence Agency and the National Security Agency for Fiscal Year 1972. Barrett Decl., at ¶¶ 4-6, and attachments thereto.

The Central Intelligence Agency data from the 1950s (but not the more recent data for the DIA and the NSA) fall squarely within the scope of Plaintiff's current request for historical intelligence budget records from FY 1947 through FY 1970. Amended Supplemental Complaint of July 2, 2003 (docketed January 20, 2004), at ¶ 1.

Plaintiff obtained these documents from Prof. Barrett and proceeded to publish them on the web site of the Federation of American Scientists beginning in October 2003. Aftergood Decl., at ¶ 7.

These historical budget documents were effectively propagated throughout the world wide web and they are prominently indexed in the leading internet search engine. Aftergood Decl., at ¶ 9.

No identifiable damage to national security or intelligence methods resulted from the global dissemination of this information. Aftergood Decl., at ¶ 10.

CONCLUSION

Since the documents were first requested under the FOIA nearly a decade ago, Defendant CIA has neither disclosed the requested records nor substantiated its claim that they are exempt from disclosure. This is a violation of the Freedom of Information Act, 5 U.S.C. § 552.

For the foregoing reasons, the Court is respectfully asked to enter summary judgment for the plaintiff and to order the release of the requested records.

Dated: July 20, 2004

Respectfully submitted,

STEVEN AFTERGOD
Plaintiff *pro se*

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**PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Federal Rule of Civil Procedure 56, and Local Civil Rules 7.1(h) and 56.1, plaintiff *pro se* Steven Aftergood respectfully submits the following statement of material facts as to which there is no genuine dispute:

1. A statement of the receipts of public money for intelligence from FY 1947 through FY 1970 has never been published. Aftergood Decl., at ¶¶ 3, 5.
2. The aggregate intelligence budgets for Fiscal Years 1997 and 1998 have been declassified and disclosed. Aftergood Decl., at ¶ 4.
3. During World War II, intelligence spending for the Office of Strategic Services, the predecessor of the CIA, was openly appropriated in the National War Agencies Appropriation Acts. Aftergood Decl., at ¶ 6.
4. Plaintiff independently obtained and published several historical intelligence budget documents that fall within the scope of the present request. Aftergood Decl., at ¶ 7.
5. Despite the unrestricted global dissemination of these documents on the world wide

web, no damage to national security nor compromise of intelligence methods resulted.

Aftergood Decl., at ¶¶ 8-10.

6. Since plaintiff's initial request in 1995, defendant has neither disclosed the requested documents nor substantiated a claim that they are exempt from disclosure. Aftergood Decl., at ¶ 5.

Dated: July 20, 2004.

Respectfully submitted,

STEVEN AFTERGOD
Plaintiff *pro se*