

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEVEN AFTERGOOD,	:		
	:		
Plaintiff,	:	Civil Action No.:	02-1146 (RMU)
	:		
v.	:	Document Nos.:	20, 22
	:		
CENTRAL INTELLIGENCE AGENCY,	:		
	:		
Defendant.	:		

MEMORANDUM OPINION

**GRANTING THE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
AND DENYING THE PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This matter comes before the court on the parties’ cross-motions for summary judgment. Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, the plaintiff seeks disclosure of the aggregate U.S. intelligence budget for Fiscal Year 2002 (“FY 2002”). Because the requested information is exempt under 5 U.S.C. § 552(b)(3) (“Exemption 3”), the court grants the defendant’s motion for summary judgment and denies the plaintiff’s cross-motion for summary judgment.

II. BACKGROUND

The *pro se* plaintiff is an analyst whose main research interest is promoting public access to government information. Aftergood Decl. ¶ 1. On December 18, 2001, the plaintiff sent a FOIA request to the defendant seeking disclosure of the defendant’s FY 2002 aggregate intelligence budget. Compl. ¶ 1. On May 6, 2002, the defendant denied this request, citing 5

U.S.C. § 552(b)(1) ("Exemption 1") and Exemption 3 as its reasons for non-disclosure. *Id.* ¶ 16. In response, on June 12, 2002, the plaintiff filed a complaint to compel the disclosure of the requested information. On April 4, 2003, the defendant filed a motion for summary judgment. On May 5, 2003, the plaintiff filed his own cross-motion for summary judgment. The court now turns to the motions for summary judgment.

III. ANALYSIS

1. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). In deciding whether there is a genuine issue of material fact, the court is to view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

FOIA affords the public access to virtually any federal government record that FOIA itself does not specifically exempt from disclosure. 5 U.S.C. § 552; *Vaughn v. Rosen*, 484 F.2d

820, 823 (D.C. Cir. 1973). FOIA confers jurisdiction on the federal district courts to order the release of improperly withheld or redacted information. 5 U.S.C. § 552(a)(4)(B). In a judicial review of an agency's response to a FOIA request, the defendant agency has the burden of justifying nondisclosure, and the court must ascertain whether the agency has sustained its burden of demonstrating that the documents requested are exempt from disclosure under FOIA. 5 U.S.C. § 552(a)(4)(B); *Al-Fayed v. CIA*, 254 F.3d 300, 305 (D.C. Cir. 2001); *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). An agency may meet this burden by providing the requester with a *Vaughn* index, adequately describing each withheld document and explaining the exemption's relevance. *Summers*, 140 F.3d at 1080; *Vaughn*, 484 F.2d 820 (fashioning what is now commonly referred to as a "*Vaughn* index").

The court may grant summary judgment to an agency on the basis of its affidavits if they:

[(a)] describe the documents and the justifications for nondisclosure with reasonably specific detail, [(b)] demonstrate that the information withheld logically falls within the claimed exemption, and [(c)] are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.

Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981). While an agency's affidavits are presumed to be in good faith, a plaintiff can rebut this presumption with evidence of bad faith. *SafeCard Servs., Inc. v. Sec. & Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citing *Ground Saucer Watch, Inc. v. Cent. Intelligence Agency*, 692 F.2d 770, 771 (D.C. Cir. 1981)). But such evidence cannot be comprised of "purely speculative claims about the existence and discoverability of other documents." *Id.*

2. The Defendant Demonstrates that the Requested Information Falls Within a Recognized FOIA Exemption¹

a. Exemption 3

In its motion for summary judgment, the defendant asserts that the requested information is exempt from disclosure by under Exemptions 1 and 3. Exemption 3 excludes from disclosure information that is “[s]pecifically exempted from disclosure by statute . . . provided that such statute (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.” 5 U.S.C. § 552(b)(3). Thus, to determine if the agency properly withheld information under Exemption 3, the court must ensure that first that the statute the agency asserts as the underlying basis for the exemption is recognized as a statute of exemption under FOIA, and second, that the withheld material satisfies the criteria for exemption under that statute. *Id.*; *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 167 (1985); *Fitzgibbon v. Cent. Intelligence Agency*, 911 F.2d 755, 761 (D.C. Cir. 1990).

b. 50 U.S.C. § 403-3(c)(7) is a Statute of Exemption under FOIA

In the instant case, the defendant’s invocation of Exemption 3 rests on 50 U.S.C. § 403-3(c)(7), which provides that the Director of Central Intelligence (“DCI”) shall “protect intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 403-3(c)(7). The

¹ Because the court concludes that the requested information is covered by Exemption 3, the court does not address the parties’ arguments regarding Exemption 1. In addition, FOIA mandates that “any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.” 5 U.S.C. § 552(b). Although neither party raises segregability as an issue, the court is required to address segregability *sua sponte*. *Isley v. Executive Office for U.S. Attorneys*, 1999 WL 1021934, at *7 (D.C. Cir. Oct. 21, 1999). In the instant case, the only information that the plaintiff seeks is the aggregate intelligence budget for FY 2002. Compl. ¶ 1. Because the plaintiff seeks the disclosure of a single number, the court concludes that it would be impossible to segregate information from this request.

Supreme Court has held that this statute qualifies as a basis for Exemption 3 purposes.² *Sims*, 471 U.S. at 167; accord *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003). Consequently, to determine if the withheld material satisfies the criteria for exemption under 50 U.S.C. § 403-3(c)(7), the court must decide whether the FY 2002 aggregate intelligence budget relates to intelligence sources or methods that the DCI must protect. *Fitzgibbon*, 911 F.2d at 761-62.

**c. The Aggregate Intelligence Budget
Relates to Intelligence Sources and Methods**

The DCI declares that “Congress provides funding for the various intelligence programs of the United States through separate appropriations acts enacted for several departments and agencies.” DCI Decl. ¶ 14. Further, the DCI states that “[t]he specific amount of intelligence appropriations inserted into those acts are not publicly identified, both to protect the classified nature of the intelligence programs themselves and to protect the classified intelligence methods used to transfer funds to and between intelligence agencies.” *Id.* The DCI concludes that “[d]isclosure of the [2002 aggregate intelligence budget] would threaten to reveal intelligence sources and methods because the disclosure would tend to reveal how and for what purposes intelligence appropriations are secretly transferred to and expended by intelligence agencies.” *Id.* ¶ 42.

When considering whether the CIA may withhold requested information under Exemption 3, the court must “accord substantial weight and due consideration to the CIA’s affidavits.” *Fitzgibbon*, 911 F.2d at 762. Despite this deferential standard, the plaintiff urges the

² At the time the Court decided *Sims*, the predecessor statute to 50 U.S.C. § 403-3(c)(7) was 50 U.S.C. § 403(d)(3).

court to give no weight to the DCI's declaration because of alleged bad faith on the part of the defendant. *SafeCard*, 926 F.2d at 1200. Specifically, the plaintiff claims that the DCI made a false and misleading statement when he declared:

Congress provides funding for the various intelligence programs of the United States through separate appropriations acts enacted for several departments and agencies. The specific amounts of purposes of the intelligence appropriations inserted into those acts are not publicly identified[.]

DCI Decl. ¶ 14; Pl.'s Mot. at 2-3. In support of this bad-faith allegation, the plaintiff points out that the Department of Energy publicly identifies its annual budget appropriation for intelligence programs each year. Pl.'s Mot. at 2-3. In response, the defendant notes that in the paragraphs preceding the statement at issue, the DCI specifically stated that "most," as opposed to all, specific budget numbers are secret and even goes so far as to name the precise sum of the 2002 intelligence budget supplemental. DCI Decl. ¶¶12-13. Because the DCI candidly disclosed that some intelligence budget information is public, the court concludes that, although paragraph 14 of the DCI's declaration was imprecise, the DCI did not act in bad faith. *Cf. Ellis v. United States*, 941 F. Supp. 1068, 1083 (D. Utah 1996) (concluding that the government did not act in bad faith when there was no evidence of deceit).

The D.C. Circuit has instructed that "[t]he assessment of harm to intelligence sources, methods and operations is entrusted to the Director of Central Intelligence, not the courts." *Fitzgibbon*, 911 F.2d at 766. In light of this direction, the court credits the DCI's declaration and concludes that the FY 2002 aggregate intelligence budget relates to intelligence methods, namely, the allocation, transfer and funding of intelligence programs. *Aftergood v. CIA*, Civ. No. 98-2107 slip op. at 9 (D.D.C. Nov. 15, 1999) (stating that "information tending to reveal the secret transfer and spending of intelligence funds is exempt from disclosure under FOIA as an

intelligence method”). Because the aggregate intelligence budget relates to intelligence methods, the DCI must protect the figure from unauthorized disclosure. 50 U.S.C. 403-3(c)(7). As a result, the court concludes that the defendant may withhold the FY 2002 aggregate intelligence budget pursuant to Exemption 3. 5 U.S.C. § 552(b)(3); *Fitzgibbon*, 911 F.2d at 766. Because the defendant has properly withheld the requested information, the court grants the defendant’s motion for summary judgment and denies the plaintiff’s cross-motion. *Casey*, 656 F.2d at 738.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendant’s motion for summary judgment and denies the plaintiff’s cross-motion for summary judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this _____ day of January, 2004.

RICARDO M. URBINA
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEVEN AFTERGOOD,	:		
	:		
Plaintiff,	:	Civil Action No.:	02-1146 (RMU)
	:		
v.	:	Document Nos.:	20, 22
	:		
CENTRAL INTELLIGENCE AGENCY,	:		
	:		
Defendant.	:		

ORDER

**GRANTING THE DEFENDANT’S MOTION FOR SUMMARY JUDGMENT AND DENYING THE
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

For the reasons stated in the accompanying Memorandum Opinion, it is this 6th day of February, 2003,

ORDERED that the defendant’s motion for summary judgment is **GRANTED**; and it is **FURTHER ORDERED** that the plaintiff’s cross-motion for summary judgment is **DENIED**.

SO ORDERED.

RICARDO M. URBINA
United States District Judge