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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

VIETNAM VETERANS OF AMERICA, *et al.*,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, *et al.*,

Defendants.

Case No. CV 09-0037-CW

DEFENDANTS' NOTICE OF FILING DECLARATION IN SUPPORT OF DEFENDANT CIA'S PRIVILEGE ASSERTIONS UNDER 50 U.S.C. § 403g

As requested by this Court, (Dkt. 178 at 13), Defendant Central Intelligence Agency ("CIA" or "Agency") submits this supplemental memorandum of law and the declaration of Martha M. Lutz, Information Review Officer, Director's Area, CIA ("Lutz Declaration"), to explain the basis for the CIA's assertion of privilege under 50 U.S.C. § 403g.[1] As discussed below, the CIA properly withheld information from the documents at issue concerning the organization and functions of the CIA and the names and titles of its employees.

INTRODUCTION

Section 6 of the Central Intelligence Agency Act of 1949 ("CIA Act"), codified at 50 U.S.C. § 403g, states that "the Agency shall be exempted from the . . . provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." It is an absolute privilege, not subject to a showing of need. *See Kronisch v. United States*, No. 83 CIV 2458, 1995 WL 303625, at *8 (S.D.N.Y May 18, 1995) ("[T]he privileges conferred by Sections 403-3(c)(5) and 403g are absolute. The court need only determine whether the privileges are properly asserted, not whether a weighing of the equities favors one side or the other."). Nor are the statute's protections subject to an inherent time limit. As this Circuit has stated, "there is nothing in § 403g to suggest that it should be construed to apply only to presently employed agents. . . . Use of the word 'employed' without qualification indicates that Congress intended the statute to apply to both current and former agents." *Minier v. CIA*, 88 F.3d 796, 802 n.9 (9th Cir. 1996); *see also Kronisch*, 1995 WL 303625, at *10 ("[W]hile we recognize that the documents at issue are approximately forty years old . . . we must ultimately defer to the CIA's considered judgment."). Accordingly, the CIA need only demonstrate that information to be protected pursuant to § 403g

[1] Defendants are submitting to chambers the unredacted documents *ex parte* and *in camera* for the Court's review.

describes the organization, function, names, official titles, salaries, or numbers of personnel employed by the Agency. By way of the attached Lutz Declaration, the CIA has made this showing.

I. WHEN DETERMINING THE APPLICATION OF § 403g, COURTS LOOK AT THE PLAIN MEANING OF THE STATUTE, REGARDLESS OF THE CONTEXT IN WHICH IT IS INVOKED.

Plaintiffs do not dispute that the CIA Act is a civil withholding statute. However, Plaintiffs seem to assert that the CIA must meet a higher standard when it invokes § 403g to protect information sought pursuant to the Federal Rules of Civil Procedure than in the context of the Freedom of Information Act ("FOIA"). (*See, e.g.*, Pls.' Mot. to Compel 30(b)(6) Deps. (Dkt. 125) at 7.) This argument is incorrect and has no support from the statute or the case law interpreting it. As an initial matter, the plain language of the statute makes no such distinction. Its protections apply notwithstanding the "provisions of any other law." 50 U.S.C. § 403g. This express and unambiguous language controls. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000) ("Statutory interpretation begins with the plain meaning of the statute's language. Where the statutory language is clear and consistent with the statutory scheme at issue, the plain language of the statute is conclusive and the judicial inquiry is at an end." (citation omitted)).

This argument has also been rejected by the courts interpreting it. For instance, in *Kronisch*, the court evaluated the applicability of § 403g in the context of discovery as compared to FOIA. *See Kronisch*, 1995 WL 303625, at *8-9. The court found that, while the "factor of need may in some contexts enter into the disclosure analysis," the CIA Act was not such a statute. *Id.* at *9. Given the Supreme Court's interpretation of the National Security Act in *Sims*, which relied on the "plain meaning" of the statute, the court found that that it was "impossible to reconcile *Sims* with an interpretation of the statutory privileges whereby their applicability merely depends on whether the suit is brought under FOIA or not." *Id.* If the privileges covered by the

CIA Act did not apply with equal force in discovery as in FOIA, it would "undermine the CIA's ability to rely on the statutory privilege as a means to guarantee" sensitive information. *Id.* The court also cited seven other published and unpublished cases that "upheld the CIA's assertion of its statutory privilege in the context of civil discovery." *Id.*

II. CONGRESS HAS MADE THE DETERMINATION THAT THE PROTECTION OF THIS INFORMATION IS IN THE NATIONAL INTEREST.

When it passed the CIA Act, Congress recognized that the names, functions, and "operation of the Central Intelligence Agency must of necessity be highly confidential." H.R. Rep. No. 1853, at 2 (1948). By providing a basis for the director of the CIA to withhold such information, Congress sought to preserve and "protect[] the confidential nature of the Agency's functions." *Id.*; *see also* S. Rep. No. 1570 (1956) (stating that the Act "gave protection to the confidential nature of the Agency's function"). Thus, Congress recognized that the names, functions, titles and operations of the CIA by themselves implicate the national security of the United States without requiring an additional showing from the Agency.

This Circuit has recognized Congress's judgment that disclosure of the names, functions, and operations of the CIA inherently implicates national security: "there is no question that the CIA may refuse to disclose the names of its agents under 50 U.S.C. § 403g . . . . We need simply read the statutes to arrive at this result . . . ." *Minier*, 88 F.3d at 803; *id.* at 801 ("Thus, the plain language of § . . . 403g expressly provides that the CIA is exempted from disclosing the names of its employees."); *cf. Wiener v. FBI*, 943 F.2d 972, 983 (9th Cir. 1991) ("[A] withholding [by the] agency relying upon section 403(d)(3) [of the CIA Act] to protect an intelligence source need not demonstrate disclosure of the source will damage national security."). Likewise, the D.C. Circuit has held that the "plain meaning" of 403g demonstrates that "[t]here is certainly no specific requirement that the CIA make a preliminary showing that the disclosure of the personnel information will in fact jeopardize the functioning of the Agency." *Baker v. CIA*, 580 F.2d 664,

668 (D.C. Cir. 1978). It further found that, "in section 403g, Congress has already made any required determinations concerning intelligence security." *Id.* As a result, "the CIA is not required under section 403g to make an independent showing of a nexus between the withholding of personnel data and the security of foreign intelligence activities or the protection of intelligence sources and methods." *Id.* at 669.

As demonstrated above, there is no support in either the statute or the case law for the proposition that a different standard should apply in non-FOIA civil cases. For instance, when dealing with a civil discovery dispute in *Neely v. CIA*, No. 79-3237 (D.D.C. Mar. 3, 1982), the court held that "as long as documents fall within the parameters of section 403g they are exempt from disclosure; the CIA does not have to make a threshold showing that the disclosure . . . will actually jeopardize the functioning of the Agency." Slip op. at 3. Similarly, when dealing with the National Security Agency's substantively identical statute in a non-FOIA civil case,[2] the D.C. Circuit held that the "NSA was not required to provide any information as to the particular security threats posed by the release of the documents." *Linder v. NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996). Quoting a prior opinion of the circuit, the court noted that "'[a] specific showing of potential harm to national security . . . is irrelevant to the language of [that statute]. Congress has already . . . decided that disclosure of NSA activities is potentially harmful.'" *Id.* (quoting *Hayden v. NSA*, 608 F.2d 1381, 1390 (D.C. Cir.1979)). Congress made that same determination when it provided the absolute protections in the CIA Act.

[2] *See* National Security Act of 1959, Pub.L. No. 86-36, § 6, 73 Stat. 63, 64, quoted in 50 U.S.C. § 402 note ("[N]othing in this Act or any other law ... shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.").

III. THE INFORMATION WITHHELD BY THE CIA IS PROPERLY PROTECTED UNDER § 403g.

Before the Court are currently forty-six entries on Defendants' privilege log.[3] The documents primarily fall into two categories (1) correspondence and other communications relating to requests by the individual plaintiffs to this suit under FOIA and the Privacy Act, and (2) correspondence among members of Congress, the individual plaintiffs, and the CIA. (Lutz Decl. ¶ 4.) The vast majority of the documents were released, with only a small amount of information withheld pursuant to the CIA Act. (*Id.* ¶ 5.) The Lutz Declaration explains in detail why type of information was redacted pursuant to the CIA Act, and it also provides numerous examples of where such information was redacted. For instance, the Lutz Declaration explains that the CIA withheld the names of CIA personnel, including employees who work on FOIA matters and in the Office of Congressional Affairs and the Office of General Counsel; it withheld these employees' phone and fax numbers as well. (*Id.* ¶¶ 8-10.) Additionally, the Lutz Declaration explains that the CIA redacted information reflecting its internal organization and functions, such as information about the organization of its offices and how correspondence is distributed and stored internally. (*Id.* ¶ 10.)

The CIA did, however, withhold a small portion of documents in full. (*Id.* ¶ 11.) As explained in the Lutz Declaration, these documents are replete with information on the internal organization and function of the Agency, including information about the organization and operation of the internal CIA computer databases and how the CIA conducts searches of those

[3] The privilege log sent to Plaintiffs in July 2010 contained twenty-one entries for documents protected pursuant to 50 U.S.C. § 403g. (*See* Ex. B to Lutz Decl.) Some of those entries contained several documents that were similar in nature. (Lutz Decl. p.3 n.1.) To aid the Court in reviewing redactions to the produced documents, Defendant CIA has produced a revised privilege log that now contains fifty-five entries that describe the documents in a more individualized manner (and as they are kept in the normal course of business). (*Id.*) This revision to the log, however, resulted in nine entries for documents that had been released in full. Thus, only 46 entries are actually contested in front of this Court.

databases. (*Id.*) While the CIA confirms that it released all reasonably segregable information from the documents described in the forty-six privilege log entries, it determined that release was not appropriate for this limited selection of documents. (*Id.* ¶¶ 11, 12.)

CONCLUSION

For the reasons stated above, this Court should uphold the CIA's assertions of statutory privilege over the forty-six privilege log entries currently before it.

Dated: December 20, 2010

Respectfully submitted,

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