UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v. Civil No. 1:15-cv-00224 (TSC)

CENTRAL INTELLIGENCE AGENCY

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND AGAINST SUMMARY JUDGEMENT

Plaintiff in this Freedom of Information Act (FOIA) case, Grant F. Smith, respectfully wishes to bring some new information about this case to the court's attention, remind the Defendant of due process commits made to fully address the issues surrounding this matter, and to refute unsubstantiated claims advanced by the Defendant.

The Defendant claims its motion for summary judgement that evidence "establishes that the agency's search was reasonable and fully complied with FOIA." The Defendant asserts that in its wish to fully explore the applicability of the CIA Information Act the Plaintiff seeks to "fundamentally alter this case." The Defendant then presses the issue of time, that it "moved for summary judgment six weeks ago" and that deference to its rush for the exits should carry some great weight with the court.

The Plaintiff reminds the court that he was opposed to summary judgement, thinking it vastly premature with such large, overarching issues as the CIA Information Act

unresolved. However, he was assured by the court that the clock was not ticking, and that all issues influencing the adequacy of search, review and the CIA Information Act would be addressed. (Transcript, October 9, 2015, linked later) Since that time, the arch of unresolved issues has risen higher.

The Department of Justice response to a 2011 FOIA, that is now driving a timely request under well-established precedent for a first amended complaint motion, has direct bearing on this case. It is related to the CIA action. Indeed, it would make little sense at this stage to proceed without a *de novo* review of the Department of Justice documents on the NUMEC matter in general and facts (rather than evidence-free, self-serving conjecture) about the nature of the DOJ investigation of the CIA in particular. No "shoehorning" is necessary. Indeed, it is the Plaintiff that would suffer grave prejudice and harm if the CIA and Department of Justice are given leave to continue concealing documents of such importance, that have a great deal of relevance to public policy matters currently underway. Resolution would not, as the Defendant claims, be "delayed." It would, in fact, be accelerated if summary judgement is not given and the motion to file a first amended complaint is granted. This would be the epitome of judicial economy. This would not, as the defendant claims "fundamentally" alter this case. The action is not, as the Defendant alleges, "nearly-concluded" exempt in the mind of the Defendant and hopeful officials at the U.S. Department of Justice. The Department of Justice's inadequate, and harmful to the public interest, response to a 2011 FOIA, must be reviewed. It is demanded by public accountability.

The court should consider some additional information that has recently been

brought to the Plaintiff's attention with direct bearing on this case. On Tuesday, February 9, 2016 a reporter from the *Pittsburgh Post-Gazette* whom the Plaintiff knows and who has covered the tragic story of the toxic cleanup of the NUMEC sites in Apollo and Parks township for a number of years, referred to hereafter as the "smuggling sites," brought to the plaintiff's attention the following facts:

The smuggling sites will cost $412 million to clean up in this cleanup managed by the US Army Corps of Engineers USACE. The cleanup of the smuggling sites has been delayed over negotiations with the site owner, BWXT of Lynchburg, VA. Ten years ago, the US Department of Justice negotiated what the government's share (U.S. government, not the Israeli government) of a smuggling site plutonium plant would cost. The Department of Justice is now since September 2015 secretly negotiating with BWXT how much it must pay to clean up the remaining smuggling sites, and how much U.S. taxpayers also must pay. This fact was confirmed by the USACE, even though a DOJ spokesperson, Wyn Hornbuckle, would not confirm this fact. The reporter referred the plaintiff to a September 8, 2015 article about these timely and troubling facts. (Exhibit 1: Parks Township nuke cleanup months behind schedule)

The Plaintiff believes that the Department of Justice likely does not want additional files about CIA operational files, its acquisition of CIA files, or information from members of the DOJ investigative team that the Plaintiff solicited in 2011 to be released under FOIA. The release of such documents would likely raise questions about whether successor companies that acquired the smuggling sites were truly liable for damages. The files would raise questions about why the Department of Justice never used information in its

possession to prosecute those truly responsible for the damages caused by the smuggling sites, rather than pass them off to innocent parties. The release of such documents would likely raise questions about whether U.S. taxpayers and companies later acquiring the smuggling sites under false pretenses that they were the properties of a legitimate business, should pay for such cleanups rather than the Israeli government. The Plaintiff believes, given the Department of Justice role during the past decade in improperly passing cleanup costs onto parties that were not responsible for damages, that it likely suppressed release of the files sought by the Plaintiff in 2011 for improper motives. This is certainly related to his FOIA lawsuit, as asserted on February 16. (See Exhibit 2: Department of Justice Wears Many Hats in NUMEC Affair)

On January 29, 2016 based on an interview with a former high Department of Justice official with direct knowledge of the investigation, the Plaintiff discovered that the U.S. Department of Justice did indeed investigate the CIA over the NUMEC affair. The Plaintiff was advised that files he was denied by the Department of Justice in 2012 did, in fact, exist and would have direct bearing on his FOIA lawsuit against the CIA. The Plaintiff wishes to compare the alleged subject of these files to future releases by the DOJ under an upcoming *de novo* review.

Because the Department of Justice never searched the proper (and requested) locations for the information (as related in his request to file a first amended complaint), much less release the files, the Plaintiff believes that in 2012 the Department of Justice improperly withheld information that had the effect of degrading the Plaintiff's ability to fully exhaust his legal rights against the CIA. That it is related to the present action is not in

doubt. The Plaintiff suggests that closing down this FOIA action is therefore more than premature. The Defendant's rush for the courtroom exist is even more improper in light of this information.

The Plaintiff has not "failed to address Defendant's withholdings in his opposition to Defendant's motion for summary judgement." In fact, Plaintiff has accurately revealed Defendant's withholdings as frivolous and premature, beginning with the very first item in the list of "statement of facts as to which there is no genuine dispute" to the last. However, the Plaintiff rightfully focuses on exceptions within the CIA Information Act. In FOIA correspondence, the CIA edits down this Act, so that it appears to be substantiation that no operational files are ever releasable, in line with CIA's institutional bias against compliance with the law. The CIA Information Act is an overriding issue that must precede other issues in this action. The Defendants references to the processing of a handful of bureaucratic internal correspondence files released as a direct result of this lawsuit do not dispense with the issue of the "thousands" of unreleased operations files. In fact, the nature of the processing and their review should be delayed until after the larger, more important issue is fully exhausted. The Plaintiff notes that the Defendant does not refute that it released information as a direct result of his lawsuit, and in doing so, does not contest that he has "substantially prevailed" in this action and is now due court filing fees and miscellaneous expenses, payable by check, but not by cash, from the CIA.

Although the Defendant claims the "CIA's exempted operational files were subject to decennial review in April 2015, April 2005, and March 1995 after announcement in the Federal Register" it still cannot come up with actual dates or announcement so that the

Plaintiff may ascertain whether these were also as frivolous and out of compliance with the CIA Information Act as the rest of the Defendant representations. The Plaintiff notes that the Defendant does not bother to annex, as exhibits, these alleged Federatl Register announcements so that the Court may evaluate them. Until it produces them, the Court should assume that they do not exist, or are so out of compliance with the Act as to not exist.

The Defendant fails to counter the fundamental charge of bad faith: the precedent set by the CIA when it burned, rather than turn over to a court under order of a judge, information it was compelled by a court order to release under the Act. In failing to respond, the Defendant has therefore conceded that it acts in bad faith with regard to the CIA Information Act. Hence good faith should not, indeed cannot, be presumed in the face of all Defendant assertions of due administrative compliance, whether toward the CIA Information Act or even FOIA itself. Given this history, CIA affidavits in this case and reference to *Federal Register* articles, are no substitutes for actual evidence. Yet none is given.

It is clear from the evidence presented by the Plaintiff that the Defendant was investigated by three enumerated parties under the CIA Information Act. Any one of these investigations "penetrate the statutory operational files exemption." Together they provide indisputable evidence. Although the DOJ investigation may have produced the most information about what was found out about CIA, the DOJ has improperly suppressed its release. The Plaintiff asserts that the DOJ did look in fact into impropriety in the conduct of intelligence at CIA, and may solicit an affidavit by a former Department of Justice official on that matter and/or invite testimony *in camera* if so allowed, based on what the official

claimed.

With respect to the Defendant's claim that a national security staff advisor would not qualify as an enumerated party, the Plaintiff contests the idea that such a person "would not qualify under the plain language of the statute." The statute is broad. The GAO investigation also cannot be so easily dismissed by the Defendant. GAO is an agent of, and works only for, the entire U.S. Congress. The CIA Information Act is silent on the agents such bodies may use in their investigations. The Defendant cannot fill in these gaps with imaginary limitations.

It is particularly egregious that the Department of Justice claims, without submitting a shred of evidence from its own final NUMEC investigation report, which as already demonstrated by the Plaintiff was to have been submitted to the Congress, "does not trigger the exception." By improperly withholding information requested half a decade earlier, the Department of Justice now wishes to have its cake and eat it too. It is, through secrecy, thwarting public accountability by withholding the very information that could avert making US taxpayers pay for a crime that was perpetrated against them.

The investigation of the "three man task force" organized by the Criminal Division" which the DOJ is withholding along with other relevant documents, investigated whether a CIA intelligence operation illegally aided or abetted the diversion. The Defendant states "An investigation into potential violations of the Atomic Energy Act is not an investigation into potential violations in the conduct of an intelligence activity that would trigger the 50 U.S.C. § 3141(c)(3) exception." Not true. If, under the Atomic Energy Act, the CIA enabled the transfer of fissile material to Israel as part of an illegal covert operation, that would certainly be an

intelligence activity in violation of the Act. Other violations investigated by the Attorney General were:

42 U.S.C. 2077 - Unauthorized dealings in special nuclear material

42 U.S.C. 2273 - Violation of Atomic Energy Act generally, or of agency regulations

42 U.S.C. 2276 - Tampering with Restricted Data

42 U.S.C. 2275 Receipt of Restricted Data

42 U.S.C. 2277 - Disclosure of Restricted Data

18 U.S.C. 832-834 - Transportation of dangerous articles

18 U.S.C. 793-794 - Espionage: gathering or transmittal of defense information

18 U.S.C. 3 - Accessory after the fact

18 U.S.C. 4 - Misprision of felony

18 U.S.C. 371 - Conspiracy to commit offense

If the CIA violated any of these statutes in a rougue intelligence operation to divert U.S. weapons-grade uranium to Israel, it certainly would have been an "impropriety" under the CIA Information Act. All are possible improprieties that would trigger application of the Act.

The Department of Justice, without consulting or filing any of its own existing files, has bluntly characterized the Plaintiff's filings and analysis of circumstances as "conjecture." While the Plaintiff has provided a great deal of context about why the CIA Information Act applies, he also now urges the court to make space for actual testimony by a DOJ official involved in the NUMEC investigation. If the Department of Justice continues its obstinacy toward compliance with FOIA, such *in camera* testimony may soon be the only path toward the long-delayed public accountability the citizens of Apollo and Park Township—and Americans through their members of Congress—have been eagerly demanding since the 1970s.

The Plaintiff has already provided substantial evidence that the Defendant does not comply with the CIA Information Act, and the Defendant does directly not contest this. Even in its FOIA correspondence, CIA uses selective citation to give FOIA requesters the impression that it does not have to, and never will, search operational records. For example, in its September 10, 2010 denial (Dkt 1, Exhibit 7) the CIA neatly—and self servingly—trims down the statute: "The CIA Information Act, 50 U.S.C. § 431, as amended, exempts CIA operational files from the search, review, publication, and disclosure requirements of the FOIA. To the extent your request seeks information that is subject to the FOIA, we accept your request and will process it in accordance with the FOIA, 5U.S.C. § 552, as amended, and the CIA Information Act." Where is the subsection D? F? G? Nowhere to be found in FOIA correspondence, because to the CIA, administratively, the CIA Information Act sections conferring rights to the public to access operational information under certain circumstances, do not exist. When courts order operations information to be released, the CIA burns them if they are determined to be "bad news." The Defendant does not contest this.

The Plaintiff's attempts to use FOIA to better understand the functions of government have been met with two walls of bad faith, the first erected by the CIA, the second by the Department of Justice. The Plaintiff understands why the Defendant does not wish the complaint to be amended, particularly in light of the new information. However, the Plaintiff received assurances by this court, with respect to concerns about the CIA Information Act, discovery and other issues, that proceeding toward motions for summary judgement would not short-circuit a full review of how statutes apply to this action.

In particular, by its own action and the information it alone holds, and substantiated by a former employee, the DOJ is clearly a "logically related" party to this lawsuit. It is the

Department of Justice that failed to respond to a 2011 FOIA. It is the Department of Justice that conducted the investigation it now wishes to characterize in filings, without producing the actual files. It is the Department of Justice that attempts to exonerate CIA, without filing a shed of actual evidence, in the fact of an abundance of Plaintiff evidence.

Upon receipt of Plaintiff's 2011 FOIA, the Department of Justice immediately misrouted it. Numerous phone calls never secured a search of the departmental files most likely to obtain information. The request was fundamentally related to the Plaintiffs CIA FOIA in attempting to understand the functions of government, namely, "how could the Government allow an illegal diversion of its most precious military material, the creation of toxic smuggling sites, and then do nothing about it?" The Defendant states, "there has been no allegation of concerted action between the two agencies." This is not true. It has long been well-documented that the CIA alerted the Department of Justice to the diversion at the beginning of the affair. Rejoinder of DOJ in this case to relieve the quest for "better understanding the functions of government" is unavoidable. This information was filed in the original complaint.

The Plaintiff has not "unduly" delayed filing a motion to amend, causing undue delay and prejudice to "Defendant CIA" is an interesting proposition advanced by the Defendant in this particular case. The Plaintiff gave the Defendant *five years*, an amount of time substantially in excess of the 20 days it was statutorily allowed under FOIA, to respond to his administrative process. The idea that the *Plaintiff* is now causing undue delay, even as new facts raise troubling questions connecting the Department of Justice to the CIA cover-up of the NUMEC affair, is a bold assertion.

Given the CIA's misrepresentations of the CIA Information Act in correspondence, and failure to abide by it in administrative requests, any delay in the plaintiff's request to amend can

be understood as an almost inevitable outcome of the added burden imposed on FOIA filers by the agency. It is not the only justification. That the Defendant repeats the CIA's misrepresentations (Dkt 20, page 7) of the CIA Information Act as evidence in its filing reflects the shallow basis of its arguments against the timing of the first amended complaint.

The Plaintiff does not claim running the statute of limitations is a factor. Clearly, it is the only the related and interrelated nature of the CIA and DOJ actions and information both improperly retain from the public, a public that soon will be forced to pay up to a half billion dollars while the perpetrator remains protected by an iron wall of secrecy, that drives the need for an amended complaint.

If this action is prematurely ended, and the Plaintiff were to pursue a separate claim against the Department of Justice as it recommends, it will be entirely moot. The opportunity for disclosing what should have been given over in 2011, obtaining the CIA operational files, would have passed. The secret deals under negotiation to punish NUMEC smuggling site victims will have passed. Americans will pay twice for crimes committed a half-century ago. The Defendant's remedy proposes prejudice not only against the Plaintiff, but the American people.

The "slow trickle" of "additional claims" the Defendant frets over should be compared with the public interest: $412-$500 million in cleanup costs unjustly foisted upon residents of two toxic smuggling sites and American taxpayers. In this view, the Defendants claims, particularly given the Department of Justice's haste in secretly attempting to dole out the cleanup bill, to say the least, lack merit.

The Plaintiff notes that the DOJ attorney only recently joined this case and likely did not properly review the unique Plaintiff concerns and rights to be upheld in the conference before the Judge on October 29, 2015. The Plaintiff urges the Defendant to review and respect the concerns

expressed and assurances given during this important conference. The transcript may be reviewed online.[1] The Plaintiff asserts that these assurances carry more weight than the Defendant's citations of timelines and mostly unrelated cases. The Defendant's dispositive motion is far from ripe for "decision today" over a matter that has raised enormous concerns since 1968. If, as the Defendant alleges, court filing fees are of relevant concern, the Plaintiff is more than willing to donate another $600 (equivalent to a case filing fee) to the court on the Defendant's say-so. Of course, as with the Defendant's other objections, this is really no more a real issue than any other substantiating its rush for the exits.

The Defendant's sworn affidavits mean nothing to the Plaintiff and should carry no great weight with this court. The Plaintiff has demonstrated how, in the past, such "processes and procedures have not been followed."

The Plaintiff concedes nothing with regard to the appropriate processing of his request under FOIA or the CIA Information Act. The Plaintiff urges that his rights, and the rights of the public, not be prematurely ended by granting summary judgement to the Defendant or failing to allow him adequate time and due process to obtain files denied for entirely spurious reasons, against the public interest, by the Department of Justice and CIA. The Plaintiff urges that his motion to for a first amended complaint be granted.

[1] Transcript, Smith v. CIA http://irmep.org/cfp/numec/102915_SC.pdf