INTELLIGENCE SOURCES & METHODS

I. ARCA: POSTPONEMENTS RELATING TO SOURCES/METHODS and NATIONAL SECURITY

A. TEXT: SOURCES/METHODS and NATIONAL SECURITY POSTPONEMENTS

1. The JFK Assassination Records Collection Act of 1992, §§ 6(1)(B) and 6(1)(C), permit the Board to postpone disclosure of assassination records in order to protect intelligence sources and methods and to protect national security.

2. Before the Board can postpone disclosure of information pursuant to § 6(1)(B) or (C), it must apply the following test.

   a. First, the Board must find "clear and convincing evidence that the threat to the military defense, intelligence operations or conduct of foreign relations of the U.S. posed by public disclosure of the assassination record is of such gravity that it outweighs the public interest".

   b. Second, the Board must find that public disclosure of the assassination record would reveal either i. or ii. below.

      i. § 6(1)(B): an <u>intelligence source or method</u>:

         A. which is currently utilized or is

reasonably expected to be utilized by the U.S. government

B. and, which has not been "officially disclosed"

C. and, disclosure would interfere with the conduct of intelligence activities.

ii. OR, § 6(1)(C): a matter <u>currently relating to</u> military defense, intelligence or foreign relations,

A. and, would <u>demonstrably impair the national security</u>.

B. LEGISLATIVE HISTORY on SOURCES/METHODS[1]

1. The Senate expressly considered the issue of how broadly the Board should construe the term "intelligence sources and methods" for purposes of ARCA. <u>See</u>, S. Rep. No. 328, 102nd Cong., 2nd Sess. 28 (1992), 1992 U.S.C.C.A.N. 2977. The

a. Given that "intelligence sources and methods" have previously included sources such as newspapers, libraries, photography and listening devices on telephones, Congress intended for the ARRB to

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[1]This outline does not contain a full analysis of the legislative history of ARCA, FOIA or the National Security Act of 1947. Eric Scheinkopf and Chris Barger have been reviewing the legislative history surrounding "sources and methods" questions. However, this outline does refer to some of the relevant legislative history.

consider a variety of factors in deciding the sources and methods question, including:

i. **age of the record** (See discussion below.)

ii. **whether the use of the particular source or method is already well-known to the public** (See discussion below.)

iii. **whether the source or method at issue is inherently secret or whether the information collected was what was secret.**

II. AGENCY POSITIONS ON DISCLOSURE OF SOURCES/METHODS

A. CIA

1. Public Sources of Information

a. The CIA gleans information from a number of publicly available sources, including libraries, telephone books and the like. The CIA takes the position that these sources are "intelligence sources and methods" and should be withheld from public disclosure. The agency's position, upheld by courts in the FOIA context, is that foreign governments can learn a lot about CIA activities simply by knowing the public sources of information that interest the agency. CIA v. Sims, 471 U.S. 159, 105 S.Ct. 1881, 1891-1892 (1985).

2. Seemingly Innocuous Information (The "mosaic" approach)

a. Although many of the CIA's "sources and methods" seem to be unmeaningful or nonsensitive in

themselves, the CIA protects these sources pursuant to the "mosaic" theory. In other words, each piece of information, when combined with other pieces of information, may be meaningful to hostile intelligence services. CIA v. Sims, 105 S.Ct. at 1892-1893; Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982).

b. In Sims, the Court held that the practical reality of intelligence work is that "it often involves seemingly innocuous sources as well as unsuspecting individuals who provide valuable intelligence information." CIA v. Sims, 105 S.Ct. at 1891. If the CIA were to identify the "innocuous" sources it uses, it could "tip-off" a foreign government as to "what areas the CIA is interested in and upon which it is focusing its resources." Allen v. Dept. of Defense, 658 F. Supp. 15, 19 (D.D.C. 1986) (court quoted the "Dube Declaration", prepared by an Information Review Officer for the Directorate of Operations, CIA).

3. Preserving the Appearance of Confidentiality

a. The CIA seeks to protect the "appearance of confidentiality", claiming that it is essential to effective gathering of intelligence and operating our foreign intelligence service. See, Fitzgibbon v. CIA, 911 F.2d 755, 763-764 (D.C. Cir. 1990); CIA v. Sims , 105 S.Ct. U.S. at 1891. "The CIA would find it difficult or impossible to recruit new intelligence sources absent such guarantees [of confidentiality], made and then kept by the CIA."

Allen v. Dept. of Defense, 658 F. Supp. at 19.

4. Non-Official Disclosures (Congressional disclosures, former agent publications, etc...):

   a. According to the CIA, even if reliable sources have disclosed certain information, an "official disclosure" by the CIA can cause great damage to national security. This outline covers the effect of information that the CIA has not "officially disclosed", but which exists in the "public domain". Even where a fact is obviously true or where the CIA has, for instance, preapproved a former agent's publication, the CIA takes the position that official disclosures are potentially dangerous. "[M]ost governments do not officially acknowledge the existence of their intelligence services," and even though certain relationships (such as those between U.S. and foreign intelligence) may be widely reported, "they are not officially acknowledged, since the government adversely affected would be forced to take some official action in retaliation." Afshar v. Dept. of State, 702 F.2d 1125, 1131 fn. 7 (D.C. Cir. 1983) (CIA filed affidavit with court explaining policies for non-disclosure).

5. Effect of Similar Prior Disclosures

   a. The CIA will sometimes release certain information in order to "send a message" to "allies or adversaries". The CIA takes the position that such decisions are strategic and that releases of such

information should not require the CIA to release similar information. CIA v. Sims, 105 S.Ct. at 1893.

6. "Keep Foreign Governments Guessing" Approach

a. The CIA seeks to protect its intelligence sources and methods, in part, to keep foreign governments uncertain as to which communications the CIA does, in fact, monitor.

b. In Fitzgibbon v. CIA, the DCI gave the following statement to the D.C. district court:

> [D]isclosure [of intelligence methods] would directly permit hostile governments to either neutralize [the disclosed methods] or utilize them as a vehicle for disinformation. Hostile intelligence services and governments are not omnipotent; they cannot watch all potential sources and guard against all possible methods of collection. For example, the procedure of monitoring international telecommunications is one of the most simple intelligence collection methods, but its superb utility stems from the sole fact that hostile powers do not know which communications are seized and which channels are open to compromise. Therefore, protection of the fact of CIA use of even the simplest methods in certain situations keeps this Nation's adversaries guessing as to the goals of U.S. intelligence activities and the means of carrying them out. 911 F.2d 755, 763 (D.C. Cir. 1990)

(DCI's statement to district court reprinted in D.C. Cir. opinion).

See also, Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981) (lack of official disclosure can leave foreign intelligence services guessing as to whether information is true.)

B. FBI

1. Generally, the FBI echoes the CIA's positions on protecting sources and methods. However, because the CIA deals with (and against) foreign governments in a more extensive manner than does the FBI, the CIA seems to have more latitude in protecting sources and methods than the FBI.

2. The "Mosaic Approach"

   a. The FBI seeks to protect intelligence sources and methods on the basis of the "mosaic" approach outlined above in the CIA section. In National Security Archive v. FBI, 759 F. Supp. 872 (D.D.C. 1991) (SW represented plaintiff), the FBI explained its "mosaic" analysis:

      Mosaic analysis is an elimination of common denominator deductive process ... whereby a trained hostile analyst, through review of innocuous type pieces of information within a document or series of documents, will draw accurate conclusions ... and

determine the identity of a specific intelligence source, method or activity. Id. at 877 (from FBI "Pruett Declaration").

The court supported the FBI's position and allowed the agency to withhold seemingly innocuous information based upon the "mosaic" analysis.

b. Not surprisingly, agencies often argue the mosaic theory of intelligence in trying to protect their cryptography. Id. at 877.

3. Targets of Investigations

a. The FBI maintains that it must withhold information regarding the type of target it pursues. If hostile intelligence services know what types of targets the FBI investigates, the hostile intelligence service might "determine the criteria utilized by the FBI to decide what actions by a specific individual warrant the commencement of an investigation." National Security Archive v. FBI, 759 F. Supp. at 877 (from FBI "Pruett Decl.").

III. FOIA

A. POLICIES/IMPORTANT DIFFERENCES FROM ARCA

1. FOIA mandates public disclosure of government information, as does ARCA. However, in FOIA cases addressing the national security exemption and the sources and methods exemption, courts accord great deference to agency determinations of what information

the agency must withhold. Under ARCA, the Board will not be according the same deference to agency determinations.

2. Because the statutory and regulatory language of FOIA and ARCA are similar, interpretations of FOIA law can guide the Board in its decision-making.

B. FOIA FRAMEWORK

1. FOIA mandates public disclosure of government information, but agencies may withhold documents from FOIA requests if they can prove that a particular statutory exemption covers the information requested.

2. "EXEMPTION 1"

a. FOIA exemption (b)(1) permits an agency to withhold materials that are:

(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(B) are in fact properly classified pursuant to such Executive Order. 5 U.S.C. § 552(a)(1).

b. The Executive Order currently in effect[2] expressly covers "sources and methods"

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[2] The current Executive Order was signed by President Reagan in 1982. President Clinton is currently considering a new Executive Order which could dramatically change the scope of FOIA's exemption 1.

i. Exec. Order No. 12, 356, 47 Fed. Reg. 14, 874 (1982), § 1.3(b), allows agencies to classify information that, "by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Particular categories include information concerning "intelligence sources or ... methods" and intelligence activities (§ 1.3(a)(4)) and foreign government information (§ 1.3(a)(3)).

c. As a historical note, at least one commentator has noted that FOIA exemption (b)(1) is the strongest and oldest of the grounds for nondisclosure of information. Military and state secrets have been considered confidential as a matter of the powers of the state for centuries. James T. O'Reilly, Federal Information Disclosure, § 11.01 at 11-2 (1990). On the other hand, O'Reilly recognizes that agencies have abused the exception by overclassifying information in order to avoid embarrassment to the agency.

3. "EXEMPTION 3" and §403(d)(3)

a. FOIA Exemption 3 allows agencies to withhold information that is "specifically exempted from disclosure by statute". 5 U.S.C. § 552(b)(3).

b. The National Security Act of 1947 is such a withholding statute, authorizing the DCI to protect records involving intelligence sources and methods. 50 U.S.C. § 403(d)(3) (1982). The vast majority

of case law interpreting the phrase "intelligence sources and methods", including CIA v. Sims and its progeny, arises out of disputes over the scope of § 403(d)(3).

4. "EXEMPTION 7"

a. The government may withhold "records compiled for law enforcement purposes", but only to the extent that the information fits into specific categories (A) through (F). 5 U.S.C. § 552(b)(7)(A)-(F) (1988).[3]

i. 7(E) allows agencies to withhold documents which "would disclose techniques and procedures for law enforcement investigations ...."

A. Exemption 7(E) is only available for techniques not generally known to the public. Nat'l Security Archive v. FBI, 759 F. Supp at 885.

C. ISSUES COMMON TO ARCA & FOIA

1. DEFINITION of "INTELLIGENCE SOURCE OR METHOD"; CIA v. SIMS

a. CIA v. Sims, 471 U.S. 159, 105 S.Ct 1881 (1985), is the controlling case in FOIA law on the

[3]Courts have rejected FBI attempts to withhold information concerning its counterintelligence activities using FOIA exemption 7(A), which allows agencies to withhold information which "could reasonably be expected to interfere with enforcement proceedings." Rather, the FBI must proceed under FOIA exemption 1. National Security Archive v. FBI, 759 F. Supp. 872, 883 (D.D.C. 1991).

definition of "intelligence source or method".

i. The Sims Court basically held that, under § 403(d)(3), the DCI has broad authority to protect all sources of intelligence information from disclosure. According to Justice Marshall's concurring opinion and evidenced by later federal district and circuit court interpretations of the decisions, the majority equated "intelligence source" with "information source". Thus, any source of information, including dictionaries, libraries, journals, television programs, etc... are "intelligence sources" that the DCI can withhold from FOIA requesters.

ii. As the concurring opinion and several law review articles[4] outline, the Court's broad definition of intelligence source severely limited the ability of FOIA requesters to obtain information about the CIA.

A. Fortunately, for purposes of ARCA, the Court relied heavily upon Congress'

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[4]See, Brent Filbert, "The CIA is Given Broad Powers to Withhold the Identities of Intelligence Sources", 54 U.M.K.C. L. Rev. 332 (1986); Mark Jordan, "Freedom of Information Act: CIA's Right to Nondisclosure Broadened by Liberal Definition of Intelligence Source", 25 Washburn L.J. 586 (1986); Jeffrey R. Godley, "Defining the CIA's 'Intelligence Sources' as an Exemption to the Freedom of Information Act", 9 W. New England L. Rev. 333 (1987).

intent in passing § 403(d)(3). The Sims decision rests upon the "plain meaning" of § 403(d)(3). In other words, the Court found that Congress vested very broad authority in the DCI to protect all sources of intelligence information from disclosure. Fortunately, ARCA supercedes all other statutes, including § 403(d)(3), and the Board can infer that Congress did not intend for the Board to defer to the DCI to the same extent as under § 403(d)(3).

B. The second half of the Sims decision, involving the "practical necessities of modern intelligence gathering", is more relevant for the Board's purposes. The majority agreed with the CIA's position that intelligence (information) sources are extremely diverse and include public and "innocuous" information. Id.

b. In Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990), the court accorded substantial deference to the agency determination of whether information needs to be protected as a source or method. The case is significant because it addressed a number of specific issues:

i. Previously disclosed material is still a source.

ii. "Nonsensitive" information from private citizens or other open contacts is still a source.

iii. "Basic & innocent" methods shall be protected

as sources, including physical surveillance, interviewing or examination of airline manifests.

iv. Station locations are protected, even where Congress previously disclosed the information.

A. Fitzgibbon left open the question as to whether legislative disclosures could bind the executive branch.

B. Later cases indicate that Congress cannot bind the executive branch in such situations.

c. In Weissman v. CIA , 565 F.2d 692 (D.C. Cir. 1977), the court held that the directive in § 403(b)(3) that the CIA protect its sources is especially broad, protecting not only the name of the source, but to the extent the Agency considers reasonable to protect the source, the nature and type of information supplied. Id. at 694.

2. AGE of RECORD

a. In the FOIA context, the age of the record in question is a relevant, but not determinative, factor for courts to consider in deciding whether to require disclosure of a document. If a document is quite old, an agency's argument that release of the information will harm national security is subject to more scrutiny than if the document is recent. Powell v. United State Dep't of Justice, 584 F. Supp. 1508, 1517 (N.D. Cal. 1984). However, the overwhelming majority of courts have held that agencies can withhold dated information. See, e.g.,

CIA v. Sims, 105 S.Ct. at 177; Fitzgibbon v. CIA, 911 F.2d at 764; McDonnell v. United States, 4 F.3d 1227, 1243-45 (3d Cir. 1993).

b. The CIA's position in FOIA cases has been that the legislative history of §403(d)(3) combined with the Sims decision allow the CIA to protect sources and methods no matter how old the information may be.

c. The Executive Order 12356 currently in effect, states that "information shall be classified as long as required by national security considerations" and time frames no longer trigger automatic declassication. § 1.4(a). President Clinton's Executive Order may change this and state a presumption that the government should release all documents over 25 years old.

d. The legislative history to ARCA indicates that the Board should consider the age of the record in question to determine whether it is appropriate for immediate release or postponement.

3. RELEVANCE of PUBLIC DISCLOSURE

a. The Board may not postpone information which has been "officially disclosed". ARCA § 6(1)(b). In the FOIA context, courts have defined "official disclosure" quite narrowly, so that under FOIA, unless an agency's current officials make "official disclosures", the agency may withhold the information. Some of these decisions are discussed below. The effect of these decisions is that agencies can withhold

information from FOIA requesters that is already quite public.

However, ARCA's legislative history seems to indicate that if the Board finds that an agency's use of a particular source or method is already well-known to the public, the information should not be postponed on the grounds that it is a source or method. See, S. Rep. No. 328, 102nd Cong., 2nd Sess. 28 (1992), 1992 U.S.C.C.A.N. 2977. The legislative history uses the following example: the public is now aware that the Mexico City Soviet Embassy was bugged during Oswald's visit. Presumably, the Board should release this information despite the fact that it has not been officially disclosed.

On the other hand, Congress used the phrase "official disclosure" in ARCA. The choice of this language may indicate that Congress intended for the Board to carefully scrutinize the effect of an agency's official disclosure, even where that information may be "well-known to the public".

Finally, Congress may have been attempting to adopt a middle ground, as reflected in the Washington Post v. Dept. of Defense decision. 766 F. Supp. 1, 8 (D.D.C. 1991). In this opinion, the court held that the existence of information in the public domain is **relevant to the continued classified**

status of the documents in that it calls into question the agency decision that release would damage national security.

b. FOIA: cases on "official disclosure"

i. D.C. Circuit's 3 part test for "official acknowledgements"

A. information requested must be as specific as information previously released;

B. information requested must match information previously disclosed;

C. information requested must already have been made public through an official and documented disclosure. Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990).

ii. Prior Official Release of Similar Information

A. Prior public disclosure of similar information is not an "official disclosure" for purposes of FOIA. Afshar v. Dept. of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

1. In Afshar, that court held that the CIA's prior acknowledgment of the existence of an intelligence relationship with SAVAK (Iranian intel. agency) did not require the

Agency to release additional information. The court found that even where the relationship was generally known, releasing records of particular contacts might provide new and damaging information regarding the extent and nature of the liaison. Id. at 1130.

B. But, government disclosures at an "off the record" press briefing probably qualifies as an "official disclosure". Lawyers' Committee for Human Rights v. INS, 721 F. Supp. 552, 569 (S.D.N.Y. 1989)., *reh'g denied*, ... (S.D.N.Y. 1990).

ii. Widespread Media and Public Speculation

A. Even if information is the subject of widespread media and public speculation, agencies do not waive their rights to withhold the information from FOIA requesters, as "new" official acknowledgement may damage the national security. For instance, foreign governments can ignore unofficial leaks and public surmise, but they may be harmed if the CIA officially discloses that they cooperated with the CIA. Afshar v. Dept. of State, 702 F.2d at 1131. In Phillippi v. CIA, 655 F.2d 1325 (D.C.

Cir. 1981), the court found that face-saving may be as important as substance in the world of international diplomacy. Finally, lack of official disclosure can leave foreign intelligence services guessing as to whether information is true. Military Audit Project v. Casey, 656 F.2d 724, 741-45 (D.C. Cir. 1981).

B. The fact that information is in the public domain does not eliminate the possibility that further disclosures can harm sources, methods and operations, especially given that foreign governments change. Fitzgibbon v. CIA, 911 F.2d at 766.

iii. Publications by Former Agents and Officials

A. Books authored by former CIA agents and officials, even if submitted to the CIA for prepublication review, are not generally held to be "official disclosures". Afshar v. Dept. of State, 702 F.2d at 1133.

B. The CIA seeks to avoid foreign government retaliation for CIA "conscious and official exposing of their intelligence services and the CIA's links therewith." Id. at 1134. Prepublication approval by the Agency is

not the same as an official disclosure.

iv. Library Archive Papers

A. In Holland v. CIA, need cite (D.D.C. 1992), library archive papers that were not acknowledged by the CIA were not "official and documented disclosure[s]".

v. Disclosure of CIA Station Locations

A. The public is often aware of the location of CIA stations. However, the CIA does not officially disclose the location of its stations. The CIA claims that officially acknowledging the existence of specific activities in specific foreign countries would lead to retaliation, with "obvious" effect upon the nation's foreign relations and national security. Afshar v. Dept. of State, 702 F.2d at 1133, fn. 12 (from CIA affidavit to court).

4. DEFINITION of "PUBLIC INTEREST" for use in balancing test

a. ARCA prioritizes the right of the public to be informed about U.S. government activities over the need to protect national security information from disclosure. This priority is reflected in the "clear and convincing" standard that Congress directed the Board to use in applying the balancing test of §6.

5. **SENSITIVE NATURE of INFORMATION RE: U.S. INTELLIGENCE AGENCY COOPERATION WITH FOREIGN GOVERNMENTS AND FOREIGN INTELLIGENCE**

   a. The Afshar case, discussed in the "official disclosure" section above, provides a good discussion of issues involved with disclosing the existence and nature of relationships b/t U.S. intelligence agencies and foreign governments and/or their intelligence services.

6. **EMBARRASSMENT TO AGENCY**

   a. In the FOIA context (and thus, certainly for purposes of ARCA), an agency may not invoke the national security exemption solely to avoid embarrassment to the agency. McDonnell v. U.S., 4 F.3d 1227, 1245 (3d Cir. 1993).

2. **FOIA**

a. CIA v. Sims, 471 U.S. 159, 105 S.Ct. 1881 (1985) (interpreting 50 U.S.C. § 403(b)(3)), granted the CIA broad authority to decide what qualifies as a source or method in responding to FOIA requests.

i. Sims broadly defined "intelligence source": to include all or virtually all information sources used by the CIA, including "innocuous" sources such as newspapers...public libraries, road maps and phone books. Id. at 191 (J. Marshall, concurring).

ii. not up to the judiciary to decide whether sources or methods should be disclosed. Sims

iii. CIA v. Sims, 471 U.S. 159 (1985) gives the Director of the CIA enormous authority to withhold information from FOIA requests

a. broadly defines "intelligence sources and methods"

b. CIA need not meet any of the substantive requirements of the first exemption in order to avoid disclosing allows the DCI to "protect intelligence sources and methods from unauthorized disclosure."

exemption (b)(1)

2. procedure:

a. agency has burden of showing requested document was classified according to the procedures set forth by the Executive Order.

i. proper classification, from Ray v. Turner, 468

F. Supp. 730 (D.D.C. 1978), *aff'd*, 587 F.2d 1187 (D.C. Cir. 1979).

A. proper official classified
B. classified at proper time
C. classified segments conspicuously marked
D. non-classified segments segregated, if possible.
E. must have procedures for review and declassification

b. agency must also show that disclosure could prejudice national security
   i. agency must indicate harm that would result from disclosure. See, Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977).
      A. could include:
         1. serious diplomatic reprisal from a foreign government
         2. loss of intelligence collection operation
         3. exposure of secret agent

b. Relevant cases include:

i. Meeropol v. Meese, 790 F.2d 942, 958 (D.C. Cir. 1986) (FBI)

ii. Assassination Archives & Research Center v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989).