SOURCES & METHODS

I. ARCA: POSTPONEMENTS RELATING TO SOURCES/METHODS, NATIONAL SECURITY AND FOREIGN RELATIONS

A. SOURCES/METHODS and NATIONAL SECURITY POSTPONEMENTS

1. APPLY BALANCING TEST:
   - a. ARCA allows postponement if the threat posed by the disclosure outweighs the public interest in disclosure,
   - b. AND if there is:
     - i. § 6(1)(B): clear and convincing evidence that an intelligence source or method:
       - A. is currently used or is reasonably expected to be used
       - B. and, has not been "officially disclosed"
       - C. and, disclosure would interfere w/the conduct of intelligence activities.
     - ii. OR, § 6(1)(C): clear and convincing evidence that disclosure:
       - A. would reveal a matter currently relating to military defense, intelligence or foreign relations,
       - B. AND, would demonstrably impair the national security

B. FOREIGN RELATIONS

1. § 6(4): disclosure would:
   - a. compromise existence of confidentiality agreement b/t a government agent and a cooperating individual OR cooperating foreign government,
   - b. AND, cause harm that outweighs the public interest in the disclosure.

C. ARCA LEGISLATIVE HISTORY on SOURCES/METHODS

1. Senate Report (Governmental Affairs Committee), No. 102-328, July 22, 1992.
   - a. The Senate expressly considered the issue of how broadly intelligence "sources and methods" should be construed for purposes of ARCA.
     - i. Given that "sources and methods" have previously included newspapers, libraries, photography and listening devices on telephones, the ARRB should consider a variety of factors in deciding the sources and methods question, including:
       - **A. age of record**
         1. cf., FOIA exemption 1: generally okay to disclose after 20 years. Fitzgibbon
         2. cf., §403(d)(3): legis. history + Sims say to protect sources & methods no matter how old

B. whether the use of the particular source or method is already well-known to the public (e.g. that the Mexico City Soviet Embassy was bugged during Oswald's visit)

1. cf., this section may be at odds with the statutory language requiring an "official disclosure"

C. 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: protect all sources and methods, no matter how "nonsensitive" or public they may seem

1. public sources of information
   a. Foreign governments can learn a lot about the CIA's activities simply by knowing the public sources of information that interest the agency. See, CIA v. Sims, 471 U.S. 159, 105 S.Ct. 1881, 1891-1892 (1985).
2. seemingly innocuous information/"mosaic" approach
   a. The 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.
   b. The CIA adopts the "mosaic" approach. Each piece of information, when combined with other pieces of information, may be more meaningful and complete the puzzle. See, CIA v. Sims, 105 S.Ct. at 1892-1893; Gardels v. CIA, 689 F.2d 1100, 1106 (D.C. Cir. 1982), and Halperin, 629 F.2d at 150 (D.C. Cir. 1980).
   c. 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 quotes the "Dube Declaration", prepared by an Information Review Officer for the Directorate of Operations, CIA, for the litigation).
3. appearance of confidentiality
   a. CIA wants to protect the "appearance of confidentiality" as it is essential to effective operation of our foreign intelligence service. Fitzgibbon v. CIA, 911 F.2d 755, 763-764. CIA v. Sims , 105 S.Ct. U.S. at 1891.
   b. Unless the CIA is able to operate in secret, "[t]he 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. Dep't of Defense, 658 F. Supp. 15, 19 (D.D.C. 1986).
4. non-official disclosures: (e.g. Congressional disclosures, ex-agent disclosures, etc...)
   a. Foreign governments change. The fact that information is in the

public domain does not eliminate the possibility that further disclosures can harm sources, methods and operations. Fitzgibbon at 766.

b. "[M]ost governments do not officially acknowledge the existence of their intelligence services," and even though certain relationships (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 (CIA filed affidavit with court explaining policies for non-disclosure).

5. Effect of Similar Prior Disclosures

a. The CIA (and presumably the FBI) will sometimes release certain information in order to "send a message" to our "allies or adversaries". Releases of information do not require the agencies to release all like information. CIA v. Sims, 105 S.Ct. at 1893.

6. CIA testimony to Fitzgibbon District Court in Fitzgibbon:

[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. at 763.

B. FBI

1. "mosaic approach"

a. The FBI, like the CIA, adopts the "mosaic" approach outlined above. In National Security Archive v. FBI, 759 F. Supp. 872 (D.D.C. 1991) (SW representing 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 held that the FBI properly withheld even seemingly innocuous information on the above grounds.

b. The mosaic approach is particularly important in the context of **cryptography.** Id. at 877.

2. seemingly non-sensitive information

a. Like the CIA, the FBI maintains that it must withhold information regarding the type of target it pursues. If hostile intelligence services knew what types of targets the FBI investigated, the service could "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 POLICIES
   a. mandates public disclosure of government information
   b. already places burden on agencies for their non-exempt information
      i. agencies bear burden of justifying exemptions, although courts generally defer to agency determinations
      ii. agencies must then create a public record that is as complete as possible and release segregable portions
      iii. limited *in camera* review is available
2. CRUCIAL DIFFERENCES FROM ARCA
   a. In FOIA cases, courts generally accord great deference to agency determinations regarding whether information should be disclosed or postponed
3. UTILITY OF FOIA
   a. Because the statutory and regulatory language of FOIA and ARCA are similar, interpretations of FOIA law can guide ARRB in making decisions.
   b. FOIA establishes a floor, not a ceiling. (See, SW's memo on privacy for a discussion of how FOIA should be used.)

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 Exec. Order currently in effect expressly covers "sources and methods"
      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)).

3. "EXEMPTION 3" and §403(d)(3)

a. FOIA Exemption 3 allows agencies to withhold information that is "specifically exempted from disclosure by [withholding] statute"

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).

4. "EXEMPTION 7"

a. Law Enforcement Exemption. Government may withhold "records compiled for law enforcement purposes", but only to the extent that they fit intospecific categories (A) through (F). 5 U.S.C. § 552(b)(7)(A)-(F) (1988).[1]

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

A. ONLY AVAILABLE FOR TECHNIQUES NOT GENERALLY KNOWN TO THE PUBLIC! Natl Security Archive v. FBI, 759 F. Supp at 885.

C. ISSUES COMMON TO ARCA & FOIA

1. DEFINITION of "INTELLIGENCE SOURCE OR METHOD"

a. CIA v. Sims, 471 U.S. 159, 105 S.Ct 1881 (1985), is the controlling case in FOIA law on the definition of "intelligence source or method".

i. 2 grounds for decision

A. Congressional Intent

1. Court relies on the "plain meaning" of § 403(d)(3) to say that Congress vested in the DCI very broad authority to protect all sources of intelligence information from disclosure.

2. cf., ARCA. Plainly, ARCA supercedes all other statutes, including, presumably, §

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[1]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).

403(d)(3). Congress expressly did not vest the same broad authority in the DCI.

B. Practical Necessities of Modern Intelligence Gathering

ii. "intel. source or method" specifically not limited to confidential or nonpublic sources of information. Id. at 1888.

A. Congress could have included restrictions in the statute, but did not

b. Fitzgibbon

2. AGE of RECORD

3. RELEVANCE of PUBLIC DISCLOSURE

a. ARCA § 6(1)(b) states that information which has been "officially disclosed" may not be postponed. FOIA case law has defined "official disclosure" quite narrowly, so that under FOIA, unless an agency's current officials make "official disclosures", the agency need not release information. 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 the 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.

That Congress ultimately used the term of art, "official disclosure" in ARCA may mean that they rejected the approach suggested in the legislative history and that they decided that only "officially disclosed" information was outside the scope of the sources/methods postponement.

b. FOIA: cases on "official disclosure"

i. Prior Official Release of Similar Information: Afshar v. Dep't of State, 702 F.2d 1125 (D.C. Cir. 1983).

A. Prior public disclosure does not constitute "official disclosure" for purposes of FOIA. Id. at 1130.

1. e.g. If the CIA at one time acknowledged the existence of an intelligence relationship with SAVAK (Iranian intel. agency), releasing records of particular contacts may provide new information re: the extent and nature of the liaison. Id. at 1130.

ii. Widespread Media and Public Speculation

A. Even if information is the subject of widespread media and public speculation, official

acknowledgement may well damage the national security as new information. Foreign governments can ignore unofficial leaks and public surmise, but may be harmed by the CIA's official disclosure that they cooperated with the CIA. Afshar v. Dept. of State, 702 F.2d at 1131.

B. Face-saving may be as important as substance in the world of international diplomacy. Phillippi v. CIA, 655 F.2d 1325 (D.C. Cir. 1981).

C. 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).

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, do not constitute "official disclosures". Afshar v. Dept. of State, 702 F.2d at 1133.

1. The CIA wants 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 does not give rise to the same level of danger as does official disclosures.

iv. Disclosure of CIA Station Locations

A. Even though publicly known, the CIA claims that official acknowledgement of 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

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

a. The Afshar case, discussed at length 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.

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."

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 b/c it is 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, 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 whether legislative disclosures could bind the executive branch

B. later cases indicate that the answer is no. See, section on official disclosures.

b. Weissman: the directive in § 403(b)(3) that the CIA protect its sources is esp. 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.

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