

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

<b>NATIONAL INSTITUTE OF</b>	)	
<b>MILITARY JUSTICE</b>	)	
	)	
	)	
<b>Plaintiff,</b>	)	<b>Civil Action No.: 04-0312 (RBW)</b>
	)	
<b>v.</b>	)	
	)	
<b>UNITED STATES</b>	)	
<b>DEPARTMENT OF DEFENSE</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**DEFENDANT’S RENEWED MOTION FOR SUMMARY JUDGMENT  
RELATING TO FREEDOM ON INFORMATION ACT EXEMPTION 3**

By order dated December 16, 2005, the Court granted defendant’s motion for summary judgment in connection with its withholding of records in this Freedom of Information Act (“FOIA”) case, except to the extent that it denied defendant’s motion addressing its FOIA Exemption 3 withholdings. See R. 51 & 52. Although the Court denied defendant’s motion, and granted plaintiff’s motion for summary judgment in connection with Exemption 3, it did not order release of documents. Instead, it afforded defendant the opportunity to correct the defects identified in its Memorandum Opinion. See R. 51 at n. 1.

In accordance with the briefing schedule established at the Court’s December 19, 2005, status conference, as modified by its minute order of February 22, 2006, defendant herein renews its motion for summary judgment on the Exemption 3 withholding. The Court is respectfully referred to the attached memorandum of points and authorities and supporting documents. A proposed order is also attached.

Respectfully submitted,

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KENNETH L. WAINSTEIN, D.C. BAR # 451058  
United States Attorney

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R. CRAIG LAWRENCE, D.C. BAR # 171538  
Assistant United States Attorney

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CLAIRE WHITAKER, Bar #354530  
Assistant United States Attorney  
555 4th St., N.W. Room E-4204  
Washington, D.C. 20530  
(202) 514-7137

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<b>UNITED STATES</b>	)	
<b>DEPARTMENT OF DEFENSE</b>	)	
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	)	
<b>Defendant.</b>	)	
_____	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
DEFENDANT’S RENEWED MOTION FOR SUMMARY JUDGMENT  
ON ITS FREEDOM ON INFORMATION ACT EXEMPTION 3 WITHHOLDINGS**

This Freedom of Information Act case involves Plaintiff National Institute of Military Justice’s October 3, 2003, request for all communications to and from Defendant Department of Defense relating to the conduct of military commissions established to try suspected terrorists under the President’s Order of November 13, 2001. The request included but was not limited to “suggestions or comments [from any source, which defendant determined including communications from representatives of foreign governments] on potential, proposed, or actual terms of any of [the President’s or Military Commission] those Orders or [Military Commission] Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.” R. 52 at 1.<sup>1</sup>

<sup>1</sup> For the Court’s convenience, plaintiff’s complete FOIA request is repeated here:

All written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or an employee of the United States acting in the course of his or her official duties) regarding the President’s November 13, 2001 Military Order, the Secretary’s Military

By Memorandum Opinion and Order dated December 16, 2005 [R. 51 & 52], this Court granted Defendant United States Department of Defense's summary judgment motion on all issues, except its Exemption 3 submission with regard to communications from representatives of foreign governments. With regard to that submission, the Court found that the provisions of the statute relied on, *i.e.*, 10 U.S.C. § 130c (2000), had not been met. Specifically, although the Court concluded § 130c(a) permitted the withholding of certain sensitive information of foreign governments, the language of "§ 130c(h)(1) requires the "national security official" of the agency (defined in the statute as the "Secretary of Defense" for the Department of Defense) to make the determination under the statute with regard to the withholding of sensitive information of foreign governments. R. 52 at 14. Because the declarant in defendant's supporting documents on this issue was Christine Ricci, an attorney authorized to make withholding under the FOIA, and not the Secretary of Defense, the Court determined that the requirements of Exemption 3 had not been met. As the Court noted: "[It] simply cannot make that leap to permit the Secretary to avoid the authority vested in him by statute, or to at least promulgate regulations for the delegation of that authority, which would trigger the notice and comment requirements that would likely accompany any rulemaking under § 130c(g)." R. 52 at 16. In its order, the Court afforded defendant the opportunity to address this matter, supplement the record and renew its motion for summary judgment on this exemption. *Id.* at 38; R. 52 at 2.

To correct the flaw identified by the Court, defendant now submits the February 17, 2006, Determination of Deputy Secretary of Defense Gordon England. See Exhibit 1, hereto. In

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Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed or actual terms of any of those Orders or Instructions and any similar, subsequent superseding or related Orders or Instructions, whether proposed or adopted.

this determination, Mr. England, acting with “full authority and power” of the Secretary of Defense, states as follows:

I designate the following documents to be withheld under Exemption 3 of the Freedom of Information Act pursuant to 10 USC §130c:

All documents identified as exempt under Exemption 3 of the Freedom of Information Act pursuant to 10 USC § 130c in the Second Index of Documents Withheld in this case (filed as Exhibit 11 to the Declaration of Christine S. Ricci.)

I am making this designation pursuant to my authority to exercise the powers of the Secretary of Defense in all matters unless expressly prohibited by law, as stated in Department of Defense Directive 5105.02.

Directive No. 5105.02, dated January 9, 2006, is attached as Exhibit 2. This longstanding Directive, reissued annually, may be found at [http://www.dtic.mil/whs/directives/corres/pdf/d510502\\_010906/d510502p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d510502_010906/d510502p.pdf). Under this Directive, Mr. England has full power and authority to exercise the powers of the Secretary of Defense under Title 10. Pursuant to this power, Mr. England made a determination on February 17, 2006, regarding the records at issue here. Exhibit 1. In light of this Determination, together with the Supplemental Declaration of Karen Hecker [Exhibit 3], defendant renews its motion for summary judgment on the Exemption 3 withholdings.

Because defendant renews its motion for summary judgment with respect to its Exemption 3 withholdings and as directed by the Court, it provides the Court with copies of the written representation from governmental officials of the Government of the United Kingdom regarding the confidentiality of the documents. Exhibit 3, attachments. However, as Canada has requested that its written representation not be made public, defendant is filing a motion for in camera inspection with respect to the Canadian communications under separate filing. See R. 51 at 2.

## **I. BACKGROUND**

Defendant respectfully directs the Court to the background statement filed with its Motion for Summary Judgment, found at R. 36, see also R. 38. A statement of material facts concerning the issue before the Court is attached. The records that are subject to the Exemption 3 withholding from officials of the United Kingdom and Canada are described in defendant's *Vaughn* index at R. 36, Exhibit 11 at Documents 1, 2, and 75-87. The only unresolved matter presently before the Court is whether defendant has now satisfied 10 U.S.C. § 130c with regard to these documents by providing the determination of the Deputy Secretary of Defense.

## **II. ARGUMENT**

### **A. Standard for Summary Judgment**

Summary judgment may be granted if the pleadings and evidence "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). See Celotex Corp. v. Catrett , 477 U.S. 317, 327 (1986); Wickwire Gaven, P.C. v. USPS, 356 F.3d 588, 591 (4<sup>th</sup> Cir. 2004); Cooper Cameron Corp. v. Dept. of Labor, 238 F.3d 539, 543 (5<sup>th</sup> Cir. 2002). Summary judgment is available to a defendant in a FOIA case if the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester. Miller v. Department of State, 779 F.2d 1378, 1382 (8th Cir.1985) (citing Weisberg v. Department of Justice, 705 F.2d 1344, 1350 (D.C. Cir.1983)).

To discharge its FOIA obligations, the agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir.1978), cert. denied, 445 U.S. 927 (1980), quoting National Cable Television Ass'n. Inc. v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973).

The agency may sustain its burden by submitting detailed affidavits that identify the documents at issue and explain why they fall under the claimed exemptions. See Summers v. Dept. of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998); Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (8th Cir. 1985); Perry v. Block, 684 F.2d 121 (D.C. Cir. 1982).

To support summary judgment on the withholding of records pursuant to Exemption 3, defendant submits the February 17, 2006, Determination of Gordon England, Deputy Secretary of Defense, who has full authority to act as the national security official under 10 U.S.C. §130c and to make the withholding determination with respect to the communications from representatives of the United Kingdom and Canada. See Exhibits 1 & 2. Defendant also submits the February 23, 2006, Supplemental declaration from Karen Hecker which authenticates the documents from the United Kingdom and Canada and provides descriptive information. As noted, all other matters in this case have been resolved. See R. 51 & 52.

C. With the Determination of Gordon England, Deputy Secretary of Defense, The Department of Defense Has Carried its Burden under 10 U.S.C. § 130c And Therefore Exemption 3 Has Been Properly Invoked to Withhold Documents.

Exemption 3 of the FOIA incorporates the nondisclosure provisions found in other federal statutes. Records in this category are protected if the statute either "(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); see also Essential Info., Inc. v. USIA, 134 F.3d 1165, 1168 (D.C. Cir. 1998).

1. Exemption 3(B) Protects From Disclosure Statutorily Protected Records

Exemption 3(B) of FOIA, as amended, states that the statute's disclosure provisions do not apply to matters that are "specifically exempted from disclosure by statute," provided that such statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5

U.S.C. § 552(b)(3)(B). Plaintiff has conceded that the statute at issue here, 10 U.S.C. § 130c, satisfies the requirements of Exemption 3. See Memorandum Opinion at p. 12-13.

2. The Requirements of 10 U.S.C. § 130c Have Been Satisfied Here.

In this case, the statute at issue is 10 U.S.C. § 130c, which is entitled "Nondisclosure of information: certain sensitive information of foreign governments and international organizations." Subsection 130c(a), entitled "Exemption from disclosure," provides that "[t]he national security official concerned (as defined in subsection (h)) may withhold from public disclosure otherwise required by law sensitive information of foreign governments in accordance with this section." The definition of "national security official concerned" in subsection (h) includes the Secretary of Defense. Id. §(h)(1)(A), as amended.

Subsection 130c(b), entitled "Information Eligible for Exemption," provides:

[f]or the purposes of this section, information is sensitive information of a foreign government only if the national security official concerned makes each of the following determinations with respect to the information:

(1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.

(2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).

(3) That any of the following conditions are met:

(A) The foreign government or international organization requests, in writing, that the information be withheld.

(B) The information was provided or made available to the United States Government on condition that it not be released to the public.

(C) The information is an item of information, or is in a category of information, that the national security official has specified in regulations prescribed under subsection [g] as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

See Memorandum Opinion at 13.

Although plaintiff raised several objections to defendant's assertion of Exemption 3 as it applies to 10 U.S.C. § 130c, in its Memorandum Opinion, the Court determined that the only issue preventing summary judgment in favor of the defendant involves the implied designation by defendant of Christine Ricci to act as the national security official under the language of the statute. See Memorandum Opinion at n. 8 and pp. 16-20. The Court noted that Ms. Ricci's power was given to her by the head of a Department of Defense Component; not by the Secretary since he is not a Department of Defense Component. *Id.* at 16, n. 7. The Court concluded that Ms. Ricci did not have the authority under the statute to make the determination as to whether documents could be withheld under 10 U.S.C. § 130c. The Court noted that "10 U.S.C. § 130c(h) clearly provides, at least in the context of this case, that only the Secretary of Defense may designate documents to be withheld under § 130c." *Id.* at 15. The Court concluded that because the Secretary of Defense is the "national security official concerned" in §130c(h)(1), he must make the withholding determinations. Accordingly, in light of the record before the Court, it determined that defendant failed to properly invoke the statute. See Id. at 15-16.

Defendant now submits the Determination of Gordon England, Deputy Secretary of Defense, who, acting with full power and authority of the Secretary of Defense, made the withholding determination on under 10 U.S.C. § 130c on February 17, 2006. Exhibit 1.

Mr. England's Determination states:

I designate the following documents to be withheld under Exemption 3 of the Freedom of Information Act pursuant to 10 USC §130c:

All documents identified as exempt under Exemption 3 of the Freedom of Information Act pursuant to 10 USC § 130c in the Second Index of Documents Withheld in this case (filed as Exhibit 11 to the Declaration of Christine S. Ricci.)

Id.

According to 10 U.S.C. § 132(b), the Deputy Secretary of Defense, the position Mr. England holds in the Department, "shall perform such duties and exercise such powers as the Secretary of Defense may prescribe." Furthermore, as the Deputy Secretary of Defense, Mr. England has full power and authority to act as the Secretary of Defense under Title 10 of the U.S. Code, including the provisions of 10 U.S.C. § 130c. See Exhibit 2. Through Department of Defense Directive 5105.02 [Exhibit 2], the Secretary of Defense has directed that Deputy Secretary of Defense England has "full power and authority to act for [him] and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law." Exhibit 2. This authority exists "except as expressly prohibited by law." Id. This authority is described as "all-inclusive." Id. Suffice it to say that Mr. England acts with the full authority of the Secretary in Title 10 matters.

The Court in its Memorandum Opinion determined that there was no support for the assumption that the Secretary of Defense could delegate his responsibility under 10 U.S.C. 130c, and even if there were, notice and comment would be necessary to implement the provisions of 10 U.S.C. § 130c. See Memorandum Opinion at 15. Defendant does not concede that such notice and comment is necessarily required, in light of 5 U.S.C. § 533's exception for certain military and foreign affairs. However, that situation does not exist here since the abovementioned Directive gives the Deputy Secretary the powers to act as the Secretary under

Title 10 of the U.S. Code. Notice and comment is not necessary for an existing directive. Moreover, in promulgating any regulations to implement the various provisions of Section 130c, the DoD could not proscribe the Deputy Secretary of Defense's authority to act as the Secretary derived from DoD Directive 5105.02 in Title 10 matters. As Mr. England has full authority to act as the Secretary under Title 10, he properly determined that the records at issue in this matter should be withheld pursuant to 10 U.S.C. § 130c and Exemption 3.

Plaintiff may argue that the statute requires the Secretary of Defense to act as the national security official for the Department of Defense and that Mr. England as Deputy Secretary of Defense is not the DoD official named in the act. Upon its initial review conducted in the absence of Directive 5105.02 and based on the record before it at that time, the Court had no basis to "look beyond the plain language of a statute" Memorandum Opinion at 15 (*citing Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966)). However, with the Determination of the Deputy Secretary [Exhibit 1] made with full power and authority of the Secretary [Exhibit 2], a further review is clearly appropriate.

Defendant submits that in light of its supplementation of the record [Exhibits 1 & 2], permitted by this Court at R. 51-52, an absurd result would be reached if the Deputy Secretary's Determination with regard to the subject records was rejected by the Court. Before said supplementation, defendant was relying on Ms. Ricci's authority as an Initial Denial Authority when responding to FOIA requests. See R. 52 at 14-15. In the context of this earlier stance, the Court appropriately determined that it would not be "unreasonable for the Secretary to be exclusively charged on behalf of the DoD with making a determination of whether documents containing sensitive information from foreign governments should be withheld from public disclosure." R. at 15. However, given defendant's actions of bringing the matter to the Deputy

Secretary's attention, having him review the documents and make the determination under the authority given by Directive 5105.02, the "plain language" of the act does not prohibit such delegation of authority to the Deputy Secretary. When he took that action, the Deputy Secretary of Defense was acting as the Secretary of Defense and thus the statute's terms were met.

The Directive is not a delegation of authority that requires notice and comment under the provisions of 10 U.S.C. ¶ 130c(g). This is a longstanding Directive affecting all authorities contained in Title 10, United States Code. Defendant avers that the Secretary of Defense acted within his statutory powers as set forth in 10 U.S.C. § 133 by issuing Directive 5105.02 and no separate delegation is required.

The impact of the Secretary's Directive conveying his full power to the Deputy Secretary of Defense has arisen within the context of the state secret privilege. To invoke the state secrets privilege, a formal claim must be lodged "by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 7-8 (1953). That person must have "seen and considered the contents of the documents" and formulated his own view that the information must be protected." Id. at 8. This privilege is not to be "lightly invoked." Id. at 7. Within this sensitive context, two district courts have had no disagreement with the Deputy Secretary of Defense invoking the state secret privilege, despite the Supreme Court's statement that the claim must be "lodged by the head of the department." In Barlow v. United States, 2000 WL 1141087 (Fed.Cl. 2000) (attached as Exhibit 4), the court found the privilege to be invoked by the unclassified affidavit of the Deputy Secretary of Defense, noting he had "full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning

which the Secretary of Defense is authorized to act pursuant to law. Department of Defense Directive No. 5105.2, § 12 (July 20, 1997)." The language in that directive is identical to that found Exhibit 2. Similarly, in Newsham v. Lockheed Missiles, No. C-88-20009-JW (D.Cal) Order of May 7 1997)(attached as Exhibit 5), the court found the privilege to be properly invoked by declarations from two successive Deputy Secretaries of Defense, John Deutch (1994-1995) and John White (1995-1997).

Therefore, the exercise of the Secretary's power under 10 U.S.C. §130c by the Deputy Secretary of Defense should be sufficient here.

Because defendant has renewed its motion for summary judgment with regard to Exemption 3, defendant also provides copies of the written representations from the foreign governments to the Court, as directed [R. 51 at 2] and, in an effort to be as open and forthcoming as possible, provides copies to plaintiff of the communications with the United Kingdom as well. Attachment A to Exhibit 3. However, because Canada has requested that its communications not be made public, defendant must seek that its representations are filed in camera and to that end has prepared a separate motion on that issue.

Defendant submits that the flaw identified by the Court has now been corrected and summary judgment is now appropriate with regard to its withholdings under Exemption 3

## **II. CONCLUSION**

WHEREFORE, for the foregoing reasons, defendant respectfully requests that the Court enter summary judgment in its favor on the FOIA Exemption 3 withholdings.

Respectfully submitted,

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KENNETH L. WAINSTEIN,  
D.C. BAR # 451058  
United States Attorney

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R. CRAIG LAWRENCE,  
D.C. BAR # 171538  
Assistant United States Attorney

---

CLAIRE WHITAKER, Bar #354530  
Assistant United States Attorney  
555 4th St., N.W. Room E-4204  
Washington, D.C. 20001  
(202) 514-7137