IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL INSTITUTE OF MILITARY JUSTICE, Plaintiff, v. UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	Civil Action No. 04-0312 (RBW)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
RENEWED MOTION FOR SUMMARY JUDGMENT

Yet again defendant has failed to do what the relevant statute requires. This time defendant has also ignored a specific warning from the Court that further non-compliance would result in an order requiring disclosure of the disputed documents. The time has come for the Court to take that step.

Currently at issue in this FOIA case are unclassified communications between the Department of Defense and the British and Canadian governments. In its Order of December 16, 2005, the Court ***granted*** plaintiffs' motion for summary judgment on these letters because defendant had not complied with the requirements of 10 U.S.C. § 130c, the statute defendant invokes under FOIA exemption 3. *See* Memorandum Opinion of Dec. 16, 2005 ("Mem. Op."), at 14-16. However, the Court did not require the release of the documents, but afforded defendant an opportunity "to cure the defects" in its assertion of § 130c. Order at 1 n.1; Mem. Op. at 16 n.8.

Defendant now renews its motion for summary judgment without fixing the flaws this Court previously found fatal. Instead of showing that the Secretary of Defense has made the specific determinations required by § 130c(b), defendant has filed a document signed by the Deputy Secretary of Defense in which he merely "designates" the documents to be exempt. Thus, the Secretary still has not done what he is required to do, and what the Deputy Secretary has done would not satisfy the statute even if he were the appropriate official (which he is not). In its Memorandum Opinion, the Court warned defendant that "[f]ailure to [correct the defects in its assertion of § 130c] will result in this Court ordering the documents released." Mem. Op. at 16 n.8. Because defendant still has not properly asserted the statute, the Court should enforce the summary judgment it previously entered in plaintiff's favor on exemption 3 and order the release of the documents.

This Court previously noted its concern with several aspects of defendant's handling of this FOIA case. First, the Court said it was "troubled by the government's failure to timely and adequately respond to the plaintiff's FOIA request." Mem. Op. at 37. As the Court noted, "the DoD acted only with the prodding brought about by this litigation." *Id.* at 38. Second, the Court held that "it is clear that the defendant has failed to comply with the requirements of 10 U.S.C. § 130c" when it attempted to substitute a FOIA official for the Secretary of Defense. Mem. Op. at 16. Third, the Court found it "curious . . . why the defendant would even attempt to assert § 130c" when no foreign government had yet requested in writing that the letters be withheld. Mem. Op. at 19.

With its renewed summary judgment motion, defendant continues to flout the requirements of FOIA and § 130c. Though this Court could not have been clearer that § 130c requires the Secretary to make specific determinations, Mem. Op. at 14-16, the

Secretary still has not made them, nor has his proxy. Accordingly, this Court should deny defendant's motion and order the documents disclosed.

I. DEFENDANT STILL HAS NOT SATISFIED THE § 130c REQUIREMENT THAT THE SECRETARY OF DEFENSE DETERMINE THAT THE FOREIGN INFORMATION MERITS WITHHOLDING.

10 U.S.C. § 130c permits the government to withhold from disclosure non-classified information of a foreign government, but only if three specific determinations have been made by a "national security official." 10 U.S.C. § 130c(b). A "national security official" is defined for purposes relevant to this case as the Secretary of Defense. *Id.* § 130c(h)(1)(A).

In its previous opinion in this case, this Court rejected defendant's argument that this requirement was met when Christine Ricci, an Associate Deputy General Counsel at the Department of Defense, purported to make the required determinations. *See* Mem. Op. at 14-16. Instead, this Court noted that "§ 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 (emphasis added). Accordingly, because defendant had not provided a designation made by the Secretary of Defense, it was "clear that the defendant has failed to comply with the requirements of 10 U.S.C. § 130c." *Id.* at 16.

Defendant bases its renewed motion for summary judgment on a document signed by Gordon England, the Deputy Secretary of Defense. Defendant's Memorandum of Points and Authorities in Support of Defendant's Renewed Motion for Summary Judgment On Its Freedom of Information Act Exemption 3 Withholdings ("Def. Memo.") at 2-3, Ex. 1. Defendant's renewed motion, however, suffers from the same fundamental flaw its original motion did: the Secretary of Defense has not made the determinations that § 130c requires the Secretary of Defense to make. As this Court previously recognized, this

requirement is clear and unambiguous in the text of the statute. *See* Mem. Op. at 15; *see also* 10 U.S.C. § 130c(b), (h). There is accordingly no basis to ignore the plain statutory requirement that defendant has failed to satisfy.

Defendant has now failed to cure the defect the Court discussed and twice failed to comply with the requirements of the statute. Accordingly, defendant's renewed motion for summary judgment should be denied, and defendant should be ordered to produce the documents at issue.

A. The Plain Language of Section 130c Requires the Secretary of Defense to Determine that the Information At Issue Should be Withheld From Disclosure.

"The starting point in any case involving construction of a statute is the language itself." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978). "Where, as here, the plain language of the statute is clear, the court generally will not inquire further into its meaning." *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995).

In this case, the statutory requirement that the Secretary make the requisite determinations is clear and unambiguous. Section 130c(a) permits the "national security official concerned" to withhold "sensitive information of foreign governments." 10 U.S.C. § 130c(a). "[S]ensitive information of a foreign government" is defined as information for which the "national security official concerned" has made three specific determinations. *Id.* § 130c(b). The "national security official concerned" is in turn defined as, for relevant purposes, "[t]he Secretary of Defense, with respect to information of concern to the Department of Defense, as determined by the Secretary." *Id.* § 130c(h)(1)(A). Accordingly, documents fall within the scope of § 130c and may be withheld from disclosure ***only*** if the Secretary of Defense makes the determinations required by § 130c(b). *See* Mem. Op. at 15.

Courts sometimes look beyond the plain language of the statute, when applying the statute as written would lead to an absurd result. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). As this Court recognized, however, application of the statute as written would not lead to an absurd result in this case: "It is clearly not 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." Mem. Op. at 15. This is true both because (1) of the foreign policy implications of withholding or releasing information from foreign governments, and (2) it was reasonable for Congress to require cabinet-level accountability to withhold foreign government information that is unclassified. When, as here, the information to be withheld is ***not*** classified, Congress rightfully sought to place limits on agencies' ability to withhold that information, which is consistent with FOIA's "general philosophy of full agency disclosure." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001). Requiring the Secretary of Defense to approve personally each time information is withheld under § 130c is one such reasonable limitation.

Even were there doubt about the meaning of § 130c, the best interpretation would be to strictly construe the statute to require that the Secretary must make personally the determinations required by § 130c(b). Because "disclosure, not secrecy, is the dominant objective of" FOIA, the exemptions from disclosure "have been consistently given a narrow compass." *Klamath Water Users*, 532 U.S. at 8. In this case, where defendant seeks to withhold non-classified information, it would be inconsistent with the "dominant objective" of FOIA to interpret § 130c broadly and permit subordinates to make the determinations that the statute assigns to the Secretary.

B. Defense Directive 5105.02 Does Not Excuse Defendant's Failure to Fulfill the Requirements of Section 130c.

To support the substitution of the Deputy Secretary of Defense for the Secretary, defendant cites Department of Defense Directive No. 5105.02 (Jan. 9, 2006) (the "Defense Directive" or "Def. Dir."), which purports to give the Deputy Secretary "full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense." Def. Memo., Ex. 2. As authority to make such a delegation, defendant cites 10 U.S.C. § 132(b), which authorizes the Deputy Secretary to "perform such duties and exercise such powers as the Secretary of Defense may prescribe." Defendant's citation of § 132(b) is incomplete in an important respect. The statute in full provides:

> The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. The Deputy Secretary shall act for, and exercise the powers of, the Secretary when the Secretary is disabled or there is no Secretary of Defense.

10 U.S.C. § 132(b).

Thus, while the Secretary ***may*** prescribe duties for the Deputy to perform and powers for the Deputy to exercise, the Deputy ***shall*** act for and exercise the powers of the Secretary ***only*** when there is no Secretary or he is disabled. The power to withhold unclassified foreign government information specifically vested by § 130c in the Secretary is one of those non-delegable powers that the Deputy may exercise only when the Secretary is disabled or there is no Secretary. There is no suggestion of any disability, vacancy or any other exigent circumstance in this case. Accordingly, § 132(b)'s grant of authority to act for the Secretary, limited to circumstances not present here, cannot support the Deputy Secretary's action.

Apparently conceding that it has not complied with the statutory language, defendant argues that the Court should "look beyond the plain language of [the] statute." Def. Memo. at 9. Defendant argues that rejecting the Deputy Secretary's determination would be "an absurd result" because in making the determination the Deputy Secretary "was acting as the Secretary of Defense and thus the statute's terms were met." *Id.* This Court, however, previously rejected the argument that reading the statute literally would lead to an absurd result. Mem. Op. at 15. As demonstrated above, it is plainly not unreasonable for Congress to vest the authority granted by § 130c in the Secretary alone. *Id.* There is accordingly no basis to "look beyond the plain language of [the] statute."

C. Courts Require the Head of the Department to Personally Assert the State Secret Privilege.

Defendant cites two cases involving the state secret privilege to argue that a determination by the Deputy Secretary of Defense is sufficient. Def. Memo. at 10–11. As a preliminary matter, the state secret privilege is entirely a judge-made, common law evidentiary doctrine, *see United States v. Reynolds*, 345 U.S. 1, 7 (1953), and accordingly cannot change the statutory requirements of § 130c. But even apart from that caveat, the cases defendant cites merely reinforce the plain reading of § 130c that the required determinations must be made by the Secretary, not by the Deputy Secretary.

As defendant acknowledges, to invoke the state secret privilege, a formal claim must be made "by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 8 (footnote omitted); *see also* Def. Memo. at 10. Courts routinely and strictly enforce the requirement that the claim be lodged by the head of the relevant department. *See, e.g.*, *Crater Corp. v. Lucent Techs., Inc.*, 423 F.2d 1260, 1266 (Fed. Cir. 2005) (Secretary of the Navy, the relevant

department head, personally considered and made policy decision to invoke the privilege); *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (CIA Director personally considered privilege); *Molerio v. Fed. Bureau of Investigation*, 749 F.2d 815, 821 (D.C. Cir. 1984) (Acting Attorney General reviewed pertinent files); *see also Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1136 (D.C. Cir. 2000) (noting that "decisions involving the more sensitive and absolute privilege for state and military secrets have been more insistent on assertion at the highest level.").

In each of the cases defendant cites, the declaration of the Deputy Secretary accompanied another determination made by the head of a relevant agency. In *Barlow v. United States*, 2000 WL 1141087 (Fed. Cl. 2000), Def. Memo. at Ex. 4, the government's assertion of the state secret privilege was supported by five affidavits, filed by Lt. Gen. Michael Hayden, Director of the National Security Agency; George Tenet, Director of Central Intelligence; and John J. Hamre, Deputy Secretary of Defense. *See id.* at *3. The CIA and NSA affidavits in that case were made by the heads of those agencies, and the Deputy Secretary's declaration "supported" those affidavits. *Id.* at *6 n.9. Similarly, in *Newsham v. Lockheed Missiles*, No. C-88-20009-JW (N.D. Cal.) Order of May 7, 1997, Def. Memo. at Ex. 5, the declaration of Deputy Secretary of Defense John P. White accompanied the declaration of CIA Director John M. Deutch. *Id.* at 4. An agency head counts as the department head required by *Reynolds*. *See, e.g.*, *Sterling*, 416 F.3d at 345. The Deputy Secretary does not.

In this case, defendant has provided the determination of Gordon England, the Deputy Secretary of Defense, and the declaration of Karen Hecker, an Associate Deputy General Counsel in the Department of Defense. Because neither Hecker nor England is the

head of a department, they could not assert state secret privilege, nor should they be permitted to assert § 130c.

II. THE DEPUTY SECRETARY HAS NOT MADE THE SPECIFIC FINDINGS REQUIRED BY § 130c.

Even were the Deputy Secretary permitted to assert § 130c, he has nevertheless failed to satisfy the requirements of § 130c. The statute requires the Secretary to "make 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 the 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 concerned 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.

10 U.S.C. § 130c(b).

The Deputy Secretary's statement makes none of those statutorily required determinations. His statement reads, in relevant part, 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.

Def. Memo. Ex. 1.

The Deputy Secretary's "designation" clearly is not what the statute requires. Indeed, his statement does not even indicate that he personally reviewed the statute, the documents at issue, the written representations of the British and Canadian governments, or any other facts relevant to the required determination. Such a conclusory "designation" does not comply with the requirement that "the national security official concerned make[] each of the [three] determinations." 10 U.S.C. § 130c(b).

The sole evidence defendant cites that the documents at issue satisfy the § 130c(b) requirements is the Supplemental Declaration of Karen L. Hecker, an Associate Deputy General Counsel at the Department of Defense. Def. Memo. at Ex. 3. But just as the declaration of Christine Ricci was insufficient to satisfy the requirements of § 130c(b), Mem. Op. at 14-16, the declaration of Ms. Hecker – who has the same job title and, apparently, responsibilities as Ms. Ricci – cannot substitute for the Secretary's consideration of the three factors required by § 130c(b).

CONCLUSION

Addressing the Roman Senate in 63 B.C. in his First Oration Against Catiline, Cicero asked: "How long, O Catiline, will you abuse our patience?" Plaintiff and the Court can fairly address the same question to defendant in this case. Hopefully, the Court's answer will be: "No longer."

In its previous opinion in this case, this Court stated 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." Mem. Op. at 15. This Court also stated that failure to remedy this problem "will result in this Court ordering the documents released." *Id.* at 16 n.8. Defendant has now failed to remedy its prior deficiency and twice failed to follow the requirements of § 130c. For these reasons and the reasons discussed above, DoD's summary judgment motion should be denied, and the Court should order the release of the documents withheld under Exemption 3.

Respectfully submitted,

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