MEMORANDUM

May 17, 1996

To: Phil Golrick

From: Laura Denk

Subject: FOIA cases: effect of prior disclosures on FOIA responses

Phil -- here are quick summaries of the relevant portions of the FOIA cases I have been reading. I have attached the cases to this memorandum, along with several cases that are not as helpful, but that arise in the discussions of the cases summarized below.

1. Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982)

In this case, NSA, in trying to protect its information under Exemption 1 (national security/sources and methods) of the FOIA said that "little authoritative information exists in the public domain concerning its surveillance activities, and that revealing the fact of interception would jeopardize the national security." Plaintiff countered that substantial information was available in the public domain about the NSA's interceptions, including an admission by the Director of the NSA before Congress that NSA monitored communications between Hanoi and the U.S. Plaintiff argued that, to the extent that he sent messages to Hanoi, NSA could disclose that it intercepted his communications without causing any additional harm to the national security. The D.C. Circuit disagreed:

"The fact of disclosure of a similar type of information in a different case does not mean that the agency [NSA] must make its disclosure in every case. *** [T]he agency's admission that at one time it had monitored communications transmitted between the United States and Hanoi does not reveal, as might the information sought in this case, the particular channels monitored." *Id.* at 971.

2. Public Citizen v. Department of State, 787 F. Supp. 12 (D.D.C. 1992).

The State Department was trying to withhold information pursuant to Exemption 1 of the FOIA. Plaintiff argued that the State Department waived its right to invoke exemption 1 because it had already released some information discussed in the documents at issue.

The court held that, to the extent that the State Department had officially disclosed

information, it could not continue to withhold the information. Citing Fitzgibbon, the court defined an official disclosure as follows:

(1) the information at issue must be *as specific as* the information previously released;
(2) the information at issue must *match* the information previously disclosed; and
(3) the information at issue must have been made public through an official and documented disclosure.

The court continued, "[e]ven if the information sought is exactly the same as the information which was acknowledged, courts have recognized that 'the very fact that a known datum appears in a certain context or with a certain frequency may itself be information that the government is entitled to withhold.' [citation omitted.] Similarly, they have found that general discussions of topics cannot be equated with disclosure of specifics, and that partial disclosure of information does not require complete disclosure. [citations omitted.]" *Id. at 14.*

3. Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405 (D.D.C. 1983).

Plaintiff wanted to obtain a computer program used by the Department of Commerce for law enforcement. The Commerce Dept. said that the computer program was protected by Exemption 7(E) of the FOIA, which protects law enforcement techniques. Plaintiff said that the Commerce Dept. had waived the FOIA exemption because it had disclosed other investigative computer programs. The court held that the disclosed information was not the same as the information plaintiff sought:

"Even if the disclosed programs *were* similar to the program at issue here, the 'fact of disclosure of a similar type of information in a different case does not mean that the agency must make its disclosure in every case' [citations omitted]. The court therefore holds that plaintiff has not shown or even alleged that the information contained in the particular computer program at issue is available to the public so as to refute the Commerce Department's claim that disclosure would reveal *unknown* investigative procedures." *Id.* at 414.

4. Halkin v. Helms, 598 F.2d 1 (D.C.Cir. 1978).
Plaintiffs argued that NSA had admitted that it acquired the communications of similar types of plaintiffs in another case and that NSA had thereby waived its right to protect its acquisition of communications in the Halkin case. The court disagreed:

"The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not. As we have said, the identity of particular individuals whose communications have been acquired can be acquired can be useful information to a

sophisticated intelligence analyst. We see inconsistent the Secretary's assertion of privilege here and the disclosure that occurred in the Jabara case." *Id.* at 9.

5. Afshar v. Department of State, 702 F.2d 1125 (D.C. Cir. 1983).

Contains a long discussion of what plaintiffs must prove in order to show that agencies have already officially disclosed information or that information is already available in the public domain. *See* pages 1129-1135.

Plaintiff was an Iranian-born United States citizen who was the editor of the *Iran Free Press*, a newspaper published in the United States, and chairman of the Committee for Free Iran. Plaintiff was a prominent critic of the Shah of Iran. In 1975, plaintiff filed a FOIA request with the State Department, the CIA and DOJ for all documents pertaining to him. Plaintiff argued that "information fitting the [agencies'] descriptions of the withheld information [had] already been released to the public." *Id.* at 1129.

"In many cases, the very fact that a known datum appears in a certain context or with a certain frequency may itself be information that the government is entitled to withhold. For example, even if the CIA at one time acknowledged the existence of an intelligence relationship with SAVAK, which is information that fits into one of the categories of information withheld in this lawsuit, the release of a series of telegrams and cables recording particular contacts in the relationship might well provide new information regarding the extent and nature of the liaison." *Id.* at 1130.

Plaintiff's argument that the CIA had previously disclosed the information withheld failed in part because the information that already existed in the public domain did not specifically revealed a continuing relationship between the CIA and a foreign intelligence service after 1963, the date of the earliest dated document withheld in the case. *Id.* at 1133.