UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, *et al.*, Defendants.	Civil Action No. 02-0063 (CKK)

MEMORANDUM OPINION
(August 23, 2004)

Currently pending before the Court is Defendant's motion to exclude classified documents from Plaintiff's Freedom of Information Act ("FOIA") request, or in the alternative, to either depart from standard procedure in processing the request in order to reduce the estimated time needed to respond to Plaintiff's request or to obtain an extension. Plaintiff opposes the motion. After reviewing Defendant's motion, Plaintiff's opposition, and Defendant's reply, together with the submitted exhibits and the relevant law, the Court shall deny Defendant's motion.

I: BACKGROUND

Plaintiff originally filed a complaint with this Court on January 14, 2002, seeking injunctive relief pursuant to a June 22, 2001, FOIA request to the Federal Bureau of Investigation ("FBI") of the United States Department of Justice ("DOJ"). Public Declaration of J. Stephen

Tidwell[1] ("Tidwell Decl.") ¶ 7. Plaintiff sought documents pertaining to businesses, including ChoicePoint, Inc., that sell individuals' personal information to the FBI. *Id.* On January 31, 2003, pursuant to this request, the FBI released 193 pages of documents to Plaintiff. Def.'s Mem. of P. & A. in Supp. of Mot. ("Def.'s Mem.") at 5. During the next several months, the FBI became aware that its January 31, 2003, release had mistakenly included documents regarding a classified contract with ChoicePoint. *Id.* At the time, the very fact that this contract existed was classified. *Id*. at 9. The FBI sought from Plaintiff all copies of the pages referencing this contract, and Plaintiff returned one copy of those pages promptly, but FBI subsequently learned that this information had been disseminated to the Associated Press. *Id.* at 6. Deciding that "any attempted containment would be futile," the FBI returned that copy to Plaintiff on May 16, 2003. *Id.* at 6-7.

During its initial FOIA search, the FBI had planned to exclude the classified ChoicePoint contract and related documents from Plaintiff's FOIA request pursuant to 5 U.S.C. § 552(c)(3), which permits the FBI to remove highly sensitive documents from the FOIA process when the existence of the documents is itself classified information.[2] Def.'s Mem. at 4. Defendant states:

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[1] As of December 30, 2003, when this declaration was executed, Mr. Tidwell was Deputy Assistant Director for the Criminal Investigative Division of the FBI at FBI Headquarters. Tidwell Decl. ¶ 1.

[2] This provision states:

> Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

5 U.S.C. § 552(c)(3).

"Due to the fact that some documents relating to the contract had been released to plaintiff, the very existence of the contract was no longer classified, and the FBI realized that it could no longer exclude the documents from the FOIA request altogether under 5 U.S.C. § 552(c)(3)."[3] *Id.* at 7. The FBI estimated that more than 5,000 pages related to this contract would now need to be processed to evaluate whether they should be released pursuant to Plaintiff's FOIA request. *Id.* Defendant, representing the FBI, began discussions with Plaintiff in April 2003 to reduce the scope of work involved in processing these documents, since the sensitive nature of the material would necessitate a careful and lengthy review. *Id.* at 7-8. Defendant first sought Plaintiff's consent to exclude the classified contract and related documents from the FOIA response altogether, contending that they were "not consistent with the spirit of Plaintiff's FOIA request." *Id.* Then Defendant asked Plaintiff's permission to be able to first analyze the withholding of information solely under Exemption 1 of FOIA and move for summary judgment on that basis alone, with the right to invoke other FOIA exemptions should Defendant lose the first summary judgment motion. *Id.* at 8-9. However, Plaintiff rejected both proposals, the first on May 28, 2003, and the second on October 27, 2003. *Id.* at 8-9.

On December 31, 2003, Defendant filed with this Court a Motion to Exclude Classified

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[3] It is not clear to the Court whether and at what point the FBI declassified the fact that this contract existed. FOIA's exclusion at 5 U.S.C. § 552(c)(3) is available to the FBI when the existence of the requested information is itself a classified fact. Courts have found that sometimes classified information can be disclosed without resulting in declassification or forcing a federal agency to abandon its reliance on FOIA's exemption for classified information (Exemption 1). *See, e.g., Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 59-60 (D.C. Cir. 2003); *Afshar v. Dep't of State*, 702 F.2d 1125, 1130, 1133 (D.C. Cir. 1983). However, even if the existence of the contract is still classified, Defendant has acted on the assumption that the exclusion provision at (c)(3), *see infra*, is no longer available due to the disclosure to Plaintiff and a media organization. The Court therefore will also assume, without deciding the issue, that exclusion (c)(3) no longer applies to these documents.

Documents from Plaintiff's FOIA Request, or in the Alternative, to Brief FOIA Exemption B(1) Issues First, or in the Alternative, for an Extension of Time. Defendant requests that the Court entertain the same three proposals that Plaintiff rejected in negotiations between May 2003 through October 2003.

II: DISCUSSION

When a federal agency, in responding to a Freedom of Information Act (FOIA) request, plans to withhold requested records under designated FOIA exemptions, the agency still must analyze the records in full and document to Plaintiff and the Court which exemption it is asserting and the basis for the exemption. *See Vaughn v. Rosen,* 484 F.2d 820, 826-28 (D.C. Cir. 1973). This evaluation and documentation must occur even when the records in question are classified, as is the case in asserting Exemption 1.[4] *See, e.g., Hayden v. Nat'l Sec. Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (outlining the criteria for ascertaining whether an agency has justified its application of Exemption 1 to classified documents); *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) (demanding from the agency a justification with "sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed").

However, in certain circumstances FOIA permits an agency responding to a FOIA request to exclude documents that would otherwise be responsive to that request. These exclusions, including the provisions at 5 U.S.C. § 552(c)(3), are intended for situations in which the mere

[4] Exemption 1 permits agencies to withhold from release "matters that are [] specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

acknowledgment that a certain document exists would divulge to the requestor highly sensitive information. When a document qualifies for the (c)(3) exclusion under FOIA, the agency need not process the document for release, nor inform the requestor that information was withheld. 5 U.S.C. § 552(c)(3).

The first question before the Court is whether the documents initially believed to be excluded from FOIA's requirements under subsection (c)(3) can now be designated as "not responsive" to Plaintiff's FOIA request. The Court concludes that the answer to that question is no. The Court then moves to the question of whether it should waive the usual requirement that agencies assert at the outset of a summary judgment motion all applicable exemptions for withholding information. The Court declines to deviate from established precedent, and instead requires Defendant to fully process the documents in question, invoking all exemptions that may be relevant. Finally, the Court considers Defendant's request for an extension of time to complete the processing of these documents, and finds that, because Defendant did not provide the specific information needed for the Court to evaluate the propriety of granting this request, the request shall be denied without prejudice at this time.

I. Defendant's Request to Declare the Documents "Not Responsive"

Defendant initially had planned to exclude the documents related to the classified ChoicePoint contract under subsection (c)(3), since the existence of the contract was itself classified information. Def.'s Mem. at 9. Since Defendant inadvertently disclosed to Plaintiff that the contract indeed exists, Defendant now argues that although the documents "may be technically responsive to plaintiff's FOIA request, the FBI continues to believe that they do not contain the type of information plaintiff is seeking." *Id.* at 10. Defendant acknowledges that

Plaintiff's actual FOIA request "sought information concerning businesses, including ChoicePoint, that sell information about individuals to the FBI;" however, Defendant contends that a newspaper article accompanying Plaintiff's FOIA request reveals the true nature of the information sought, in that the article deals with "*potential violations of individual privacy* that could occur as a result of [] arrangements between the FBI and private companies." *Id.* (emphasis added). Defendant provides that the documents related to the classified contract "contain no such information." *Id.* Therefore, Defendant asks the Court to find that these documents are "not responsive" to the FOIA request "as a matter of fact and law" such that the "review and processing of the remaining pages by the FBI will be unnecessary."[5] *Id.*

Plaintiff argues that the documents related to the classified contract are "clearly

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[5] Defendant states that an *in camera, ex parte* declaration is available to the Court to give more detail as to why the classified contract is not responsive to Plaintiff's FOIA request. However, the Court declines Defendant's invitation to examine the declaration at this time.

This Circuit has deemed that the use of *in camera, ex parte* affidavits in FOIA cases should be avoided unless truly necessary. *See, e.g., Phillippi v. Cent. Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (stating that district courts must strive to "to create as complete a public record as possible" before electing to examine affidavits *in camera*, in order to obtain "the benefit of criticism and illumination" that is gained through participation by the opposing party's counsel) (internal citation omitted); *Lykins v. United States Dep't of Justice*, 725 F.2d 1455, 1465 (D.C. Cir. 1984) (expressing concern about the "legitimacy of accepting in camera affidavits," and stating "we have held that a trial court should not use *in camera* affidavits unless necessary.").

Defendant's *in camera, ex parte* declaration is not necessary to rule on Defendant's present motion. However, consideration of *in camera, ex parte* affidavits may be appropriate in the future, such as at the summary judgment stage, to evaluate the applicability of Exemption 1 to the documents at issue. *See Hayden*, 608 F.2d at 1384. Defendant asserts that the *in camera, ex parte* declaration explains "the harm that would result should these documents have to be processed and any portion be ordered released to plaintiff." Tidwell Decl. ¶ 3. However, Defendant's fears are not implicated by the pending procedural motion, since the Court is not asked to rule on whether any information should be released. As such, the Court will not address Defendant's request that it be permitted to provide a supplemental declaration justifying the need for an *in camera, ex parte* declaration. *See* Def.'s Reply at 3 n.1.

responsive" to its FOIA request, and reiterates its position that it is not willing to exclude the material from its request. Pl.'s Resp. and Opp'n to Def. DOJ's Mot. ("Pl.'s Opp'n") at 4; Def. Ex. C (Plaintiff's May 28, 2003, letter to Defendant rejecting Defendant's proposal to exclude the documents from FOIA processing).

The Court finds no validity to Defendant's assertion that the classified contract documents are not responsive to Plaintiff's FOIA request. Plaintiff filed its initial FOIA request more than three years ago. The FBI has had ample time and opportunity to ask Plaintiff to clarify its request if the FBI was uncertain about its scope.[6] The record shows that, until the FBI's mistaken disclosure regarding the classified contract, it did not seek to narrow its interpretation of Plaintiff's FOIA request to one targeting only documents about "potential violations" of privacy, as opposed to a broader request for records on "businesses that sell individuals' personal information" to federal agencies. Agencies must respond to the actual language of a plaintiff's FOIA request, rather than inferring the scope of the request based on other information. *See, e.g., Miller v. Casey,* 730 F.2d 773, 777 (D.C. Cir. 1984) (finding that the Central Intelligence Agency "was bound to read [the FOIA request] as drafted, not as either agency officials or [the requestor] might wish it was drafted."); *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (stating that "the agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files . . . To conclude otherwise would frustrate the central purpose of the Act.").

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[6] The FBI initially closed Plaintiff's June 22, 2001, FOIA request as "too vague." However, Plaintiff clarified the request by an August 8, 2001, letter, which was acknowledged by the FBI as requesting information "concerning only ChoicePoint" (rather than any and all businesses that sell personal information to the government), and which formed the basis of the FBI's subsequent records search and response. Tidwell Decl. ¶ 7.

Defendant concedes that the documents relating to the classified contract are "technically responsive" to Plaintiff's FOIA request. Def.'s Mem. at 10. When the FBI started to respond to Plaintiff's FOIA request in February 2002, the FBI identified two categories of documents potentially responsive to Plaintiff's request: those related to a public contract with ChoicePoint, and those related to the classified contract. *Id.* at 4. This fact demonstrates that from the beginning the FBI acknowledged that the documents related to the classified contract were responsive, but planned to exclude them pursuant to the (c)(3) exclusion. Moreover, the fact that Defendant included documents related to the classified contract in the release of other material responsive to Plaintiff's FOIA request is evidence that those documents were viewed as responsive at the time of its release. Defendant cannot now reverse its judgment and decide that the documents are not responsive merely to avoid the repercussions of an administrative accident.

Accordingly, the Court rejects Defendant's proposal to construe Plaintiff's FOIA request as excluding documents related to the classified contract with ChoicePoint.

II. Defendant's Request to Litigate the Applicability of Exemption 1 Before Any Other Relevant Exemptions

In the alternative, Defendant proposes that the Court permit Defendant to first process and brief summary judgment for documents relating to the classified contract under FOIA's Exemption 1, and then argue the applicability of other exemptions only if this Court rules for Plaintiff on that summary judgment motion. Def.'s Mem. at 12. Defendant requests this accommodation in the name of expediency. *Id.* Defendant states that "many of the documents withheld in full under Exemption (b)(1) would also be withheld in full or in part under other

FOIA exemptions as well." *Id.* However, Defendant estimates that it will take approximately 18 months just to process the documents at issue under Exemption 1, but that if it must concurrently review them for other exemptions before moving for summary judgment, it would take an estimated 24 months to complete the review. *Id.* at 12-13.

Plaintiff urges the Court to reject Defendant's proposal. Plaintiff argues that the law of this Circuit, as articulated in *Maydak v. United States Dep't of Justice*, 218 F.3d 760, 764-65 (D.C. Cir. 2000), requires agencies to assert all applicable FOIA exemptions at once. Pl.'s Opp'n at 6. Defendant counters that its proposal is "a logical application" of the law in this Circuit, citing *August v. Federal Bureau of Investigation*, 328 F.3d 697 (D.C. Cir. 2003) and *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 589 (D.C. Cir. 1987) as examples where the Circuit has endorsed a certain amount of district court discretion in allowing agencies to invoke an applicable exemption after the original FOIA exemption had been litigated. Def.'s Mem. at 12.

This Circuit requires an agency to analyze the applicability of all FOIA exemptions at the time of the initial proceeding before the district court. *Maydak*, 218 F.3d at 764-66. The policies behind this rule, and the extensive case law supporting it, are worth quoting in full:

> [T]he delay caused by permitting the government to raise its FOIA exemption claims one at a time interferes both with the statutory goals of "efficient, *prompt*, and full disclosure of information," *Senate of Puerto Rico v. United States Dep't of Justice*, 262 U.S. App. D.C. 166, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Jordan v. United States Dep't of Justice,* 591 F.2d 753, 755 (D.C. Cir. 1978)), and with "interests of judicial finality and economy." *Id*. (quoting *Holy Spirit Ass'n v. Cent. Intelligence Agency*, 205 U.S. App. D.C. 91, 636 F.2d 838, 846 (D.C. Cir. 1980)). Requiring the simultaneous invocation of exemptions also respects the general principle that appellate courts do not normally consider issues that were neither raised nor decided below. *See Ryan v. Dep't of Justice*, 617 F.2d 781 at 789 (D.C. Cir. 1980); *Jordan*, 591 F.2d at 779. We note that other circuits also require the

> government to assert all exemptions in the original district court proceedings. *See, e.g.*, *Crooker v. United States Parole Comm'n*, 760 F.2d 1, 2 (1st Cir. 1985); *Fendler v. United States Parole Comm'n*, 774 F.2d 975, 978 (9th Cir. 1985).

Id. at 765 (full internal citations added). The Court in *Maydak* recognized only two exceptions to the rule prohibiting belated assertions, "for unusual situations, largely beyond the government's control": human error in failing to invoke the correct exemption at the initial proceeding, or "where a substantial change in the factual context of the case or an interim development in the applicable law forces the government to invoke an exemption after the original district court proceedings have concluded." *Id.* at 767.

Because no district court proceedings have concluded with respect to the newly-revealed set of documents, Defendant's argument focuses on the "human error" exception, saying it applies to the erroneous release of the classified contract information that led to the collapse of its reliance on a (c)(3) exclusion. Def.'s Mem. at 13. Defendant argues that *Senate of the Commonwealth of Puerto Rico* and *August* demonstrate that district courts can exercise discretion in this type of situation and permit an agency to modify its legal bases for withholding requested documents. Def.'s Mem. at 12. However, those cases merely restate the principle that an agency is responsible for invoking all exemptions early, as soon as they become applicable. In both cases, the government agency was relying on FOIA Exemption 7(A), which permits an agency to withhold information related to prospective or ongoing law enforcement proceedings, but the FOIA case was still being litigated when the underlying law enforcement proceedings ended. The *Senate of the Commonwealth of Puerto Rico* court upheld the district court's ruling that had permitted an agency to re-submit a FOIA motion for summary judgment after a criminal law enforcement proceeding came to a close while the first motion for summary judgment was

pending. *Senate of the Commonwealth of Puerto Rico,* 823 F.2d at 580-81. The district court had not made an initial ruling on the FOIA action, so neither the court nor the plaintiff were disadvantaged by the revised motion. *Id.* The D.C. Circuit in *August* found that the defendant agency had made a "human error" in failing to understand that it needed to invoke all of the applicable exemptions at the outset, and therefore the Court permitted the belated assertion of new exemptions.[7] *August,* 328 F.3d at 701. That case was also unique in the potential severity of the consequences of denying the agency's request to consider the newly-added exemptions, since an order to disclose the withheld information "would endanger the safety and privacy of third parties." *Id.*

The motion at bar presents no circumstances that would motivate this Court to deviate from the long-established rule that all applicable exemptions must be raised with the Court during the initial proceeding. The allowance for "mistakes" described *supra* is designed to give an agency a second chance when it has accidentally failed to invoke one or more exemptions during an earlier motion for summary judgment, and is trying to avoid the immediate release of information that it believes needs to be withheld. In contrast, Defendant has not yet erred in failing to invoke a FOIA exemption before the Court, nor does it face an impending mandate to release the documents in question. Instead, Defendant's mistake was in releasing requested

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[7] Specifically, the Court stated:

> The Government's behavior in this case . . . is far more consistent with simple human error than with the kind of tactical maneuvering we disapproved in *Maydak* . . . [A]t the time this litigation commenced, *Maydak* had not yet been decided, and under then governing law, the Government might quite plausibly have believed that it could rely solely on Exemption 7(A) without reviewing its voluminous investigative file on August to determine whether other exemptions might apply.

August, 328 F.3d at 701.

documents to Plaintiff, and now it attempts to streamline its workload before it has even moved for final judgment. There is no precedent cited whereby the government may consciously ignore available exemptions without waiving its right to raise them. While Defendant may be confident that Exemption 1 applies to all of the documents concerning the classified contract, possibly allowing Defendant to withhold them in their entirety, the Court has a duty to review Defendant's FOIA decision to exempt material from disclosure. *See* 5 U.S.C. § 552(a)(4)(B) (stating that the trial court shall review an agency's FOIA decision "*de novo*"). The Court therefore finds no basis to grant Defendant's request and finds the request to be contrary to the "interests of judicial finality and economy."

III. Defendant's Request for Additional Time

Finally, Defendant requests an additional 24 months "in which to review and process the documents related to the classified contract between ChoicePoint and the FBI for all exemptions" and to prepare a *Vaughn* index to justify withholding the documents in whole or in part pursuant to Exemption (1) and any other applicable FOIA exemptions. Def.'s Mem. at 13-14. Defendant makes no specific argument to explain why it should be granted an extension, other than to state that the additional time is needed. Plaintiff contends that "the FBI has engaged in a pattern of repeated and continuing delay" and opposes the stay. Pl.'s Opp'n at 8.

FOIA permits courts to stay proceedings and allow an agency more time to process a plaintiff's FOIA request if an agency shows that "exceptional circumstances exist" and that the agency is "exercising due diligence in responding to the request." 5 U.S.C. § 552(a)(6)(C)(i)-(iii). This Circuit has provided guidance on how an agency must establish that such circumstances are present and to demonstrate its due diligence. *Open America v. Watergate*

Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976). However Defendant does not specifically allege that "exceptional circumstances" exist, nor does it assert that it has exercised due diligence with regard to this portion of Plaintiff's FOIA request. *See, e.g.,* Def.'s Reply at 5-6. As such, the Court lacks the required foundation to evaluate the FBI's need for an additional 24 months to process the documents.

Although Defendant has previously sought and been granted an *Open America* stay with respect to the release of other documents in this action, Defendant does not articulate any specific *Open America* arguments in the motion before the Court. Defendant's briefing as a whole suggests that exceptional circumstances may apply (given that the 5,000 pages related to the classified contract "had not been accounted for in the FBI's prior calculation of the time necessary to respond to plaintiff's request"). Def.'s Mem. at 2. Moreover, Defendant provides evidence of good faith and due diligence, stating that is "not standing idly by" in waiting for a ruling on this motion, but instead has already started processing at least some documents related to the classified contract. Tidwell Decl. ¶ 21. However, the law of the Circuit is clear on what a defendant agency must do to justify a stay in FOIA proceedings, and this Court requires such a defendant to meet its burden explicitly. Accordingly, Defendant's motion requesting an additional 24 months to process the 5,000 pages is denied without prejudice at this time, and Defendant is invited to move for a stay that meets the *Open America* standard.[8]

[8] The Court observes that roughly 14 months have passed since Plaintiff informed Defendant that it would not agree to exclude from its request the documents related to the classified contract, which provided notice to Defendant that it would need to process the 5,000 pages of documents. Def.'s Mem. Ex. C at 1. It is hard to envision a set of circumstances that would warrant granting an additional 24 months to Defendant.

IV: CONCLUSION

After considering the parties' briefings, submitted exhibits, and the relevant law, the Court shall deny Defendant's Motion and order Defendant to continue processing the documents at issue under Plaintiff's FOIA request. The Court's denial of Defendant's *Open America* stay request shall be denied without prejudice. An Order accompanies this Memorandum Opinion.

Date: August 23, 2004

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge