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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14 LARRY BERMAN,

15
16 Plaintiff,

17 v.

18 CENTRAL INTELLIGENCE AGENCY,

19 Defendant.
20

) No.

) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF FOR**
) **VIOLATION OF THE FREEDOM OF**
) **INFORMATION ACT, 5 U.S.C. § 552**
) **et seq.**

21 **INTRODUCTION**

22 1. Plaintiff, Professor Larry Berman ("Berman" or "Plaintiff") brings this action under
23 the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, as amended, to enjoin the
24 Central Intelligence Agency ("CIA") from continuing to improperly withhold from Plaintiff and
25 the public Presidential Daily Briefs ("PDBs") prepared during President Lyndon Johnson's
26 Administration dated August 6, 1965, March 31, 1968 and April 2, 1968. Plaintiff is informed and
27 believes that the PDBs were and are created and maintained by Defendant CIA for review by the
28

1 President and other officials and that the PDBs provide summary factual information culled from
2 various sources about countries and regions of interest to the United States.

3 2. Plaintiff, a tenured professor of Political Science at the University of California,
4 Davis and a scholar of the Vietnam War, seeks access to three specific PDBs that were prepared
5 nearly four decades ago, when the United States was then engaged in the Vietnam War. Based on
6 a review of ten officially released and "sanitized" PDBs that were prepared during President
7 Johnson's Administration, including PDBs that were prepared for the day immediately before or
8 after (i.e., April 2, 1968 and August 7, 1965) those requested, Professor Berman is informed and
9 believes that the three requested PDBs largely consist of factual information that was publicly
10 available from news reports at the time, intelligence reports, and other information that nearly
11 four decades later can no longer reasonably be considered sensitive for national security concerns.
12 In addition, based on review of these ten officially released PDBs, Professor Berman is informed
13 and believes that the three requested PDBs do not include any material that could be considered
14 protected from disclosure as reflecting advice, recommendations or opinions, nor could they as the
15 CIA's stated policy shows that CIA analysts only report information through PDBs, they do not
16 make policy recommendations. *See* CIA Today-What We Do:, at
17 http://www.cia.gov/cia/publications/cia_today/ciatoday_03.shtml. Attached as Exhibit A is a
18 collection of ten previously released PDBs reflective of the content of PDBs of this period.

19 3. Professor Berman is also informed and believes that the matters reported in the
20 requested PDBs are also widely reported in other declassified intelligence reports disseminated by
21 Defendant CIA. Over 3,000 Central Intelligence Bulletins ("CIBs") have been declassified or
22 made public. Based on his review of the CIBs that have previously been publicly released by
23 Defendant CIA, Professor Berman is informed and believes that much of the information that is
24 reported in the requested PDBs has also been widely reported in other declassified intelligence
25 reports.

26 4. There have also been more recent disclosures of PDBs. In 2004, President George
27 W. Bush declassified and released to the National Commission on Terrorist Attacks Upon the
28 United States (the "9/11 Commission"), excerpts of the PDBs for December 4, 1998 and August 6,

1 2001. The PDBs released by the White House included brief references to intelligence sources,
2 which the White House protected when it released the documents in redacted form. Nevertheless,
3 large portions of the PDBs were declassified without harm to national security. Based upon
4 review of the PDBs released by the White House, Professor Berman is informed and believes that
5 PDBs do not include any material that could be considered protected from disclosure as reflecting
6 advice, recommendations or opinions. Attached as Exhibit B are true and correct copies of
7 excerpts of the referenced PDBs released by President Bush in 2004. Professor Berman is
8 informed and believes that the former Director of Central Intelligence Robert M. Gates received
9 CIA permission to characterize and to quote verbatim from two PDBs in his 1996 memoir "From
10 the Shadows," including the September 2, 1983 PDB on the Soviet shoot-down of KAL-007 (at
11 page 267) and a passage from the August 17, 1991 PDB on the impending break up of the USSR
12 (at page 521). As the documents sought by Professor Berman are now nearly four decades old,
13 Plaintiff is informed and believes that the potential risk to national security posed by the release of
14 the PDBs he seeks is even less than that posed by other publicly released PDBs.

15 5. Notwithstanding Plaintiff's willingness to allow Defendant CIA to maintain any
16 truly sensitive information on sources and methods that may be reflected by the requested PDBs,
17 Defendant CIA has steadfastly refused to allow these documents to be publicly released in any
18 form. Professor Berman seeks access to the requested PDBs for scholarly, historical purposes, and
19 not for any commercial purpose.

20 6. With the exception of the publicly released PDBs, the CIA has a policy and
21 practice against releasing PDBs regardless of their age or of their content.

22 7. This policy and practice is evidenced by the CIA's own statements. *See, e.g.*, John
23 Diamond, *Few PDBs Declassified for Public*, USA Today (April 11, 2004)(reporting that CIA
24 Director George Tenet said to a House-Senate investigative committee in 2002 that it is not the
25 content of the PDBs that make them sensitive but the fact that they are being briefed to the
26 President), at [http://www.usatoday.com/news/washington/executive/2004-04-11-public-](http://www.usatoday.com/news/washington/executive/2004-04-11-public-pbds_x.htm)
27 [pbds_x.htm](http://www.usatoday.com/news/washington/executive/2004-04-11-public-pbds_x.htm); Internal CIA memorandum released under FOIA (proposing redaction and release of
28 "specified NID/CIBs" [referring to the National Intelligence Daily and the Central Intelligence

1 Bulletin] while recommending that the Agency “deny the PDBs in accordance with our current
2 policy.”), May 6, 2002, at <http://www.fas.org/sgp/advisory/iscap/cia050602.pdf>.

3 8. Professor Berman is informed and believes that this policy and practice was, at
4 least in part, the basis of the denial.

5 JURISDICTION

6 9. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5
7 U.S.C. § 701-706, and 28 U.S.C. § 1331.

8 VENUE

9 10. Venue in the Eastern District of California is proper under 5 U.S.C. § 552(a)(4)(B)
10 and 28 U.S.C. § 1391.

11 PARTIES

12 11. Plaintiff Larry Berman is a U.S. citizen and a resident of El Macero, California. He
13 is a tenured professor in the Department of Political Science at the University of California, Davis.
14 Professor Berman has published extensively on the subject of the Vietnam War, most prominently,
15 *Planning a Tragedy: The Americanization of the Vietnam War* (1982), *Lyndon Johnson’s War:*
16 *The Road to Stalemate in Vietnam* (1989), and, most recently, *No Peace, No Honor: Nixon,*
17 *Kissinger and Betrayal in Vietnam* (2001), as well as numerous articles on the Vietnam War.

18 12. Defendant CIA is a federal agency within the meaning of 5 U.S.C. § 552(f). It has
19 possession of and control over the records sought by Professor Berman.

20 FACTS

21 13. On March 3, 2004, Professor Berman made a FOIA request addressed to Robert T.
22 Herman, FOIA and Privacy Coordinator for Defendant CIA in Washington, D.C. Professor
23 Berman’s FOIA request sought: “the President’s Daily Brief (PDB) from August 6, 1965, August
24 8, 1965, March 31, 1968, and April 2, 1968.”¹ Attached as Exhibit C to this Complaint is a true
25 and correct copy of Professor Berman’s FOIA request.

26 14. On March 17, 2004, on behalf of Defendant CIA, Mr. Herman acknowledged
27 receipt of Professor Berman’s FOIA request, which was assigned Reference No. F-2004-00962.

28 ¹ Since making his FOIA request, Professor Berman is informed and believes that no PDB
was apparently prepared by Defendant CIA on August 8, 1968.

1 Attached as Exhibit D to this Complaint is a true and correct copy of Defendant CIA's March 17,
2 2004 letter.

3 15. On April 15, 2004, in a letter sent by Alan W. Tate, Acting Information and
4 Privacy Coordinator for Defendant CIA, in response to Professor Berman's March 3, 2004 FOIA
5 request, he was informed: "the President's Daily Brief (PDB) contains inherently privileged,
6 predecisional and deliberative material for the President and also requires withholding on this
7 basis. Please note that such predecisional material may be protected regardless of whether it is
8 accepted, rejected, or otherwise incorporated by senior leadership. Therefore, your request is
9 denied under FOIA exemptions (b) (1), (b) (3) and (b) (5)." Attached as Exhibit E to this
10 Complaint is a true and correct copy of Defendant CIA's April 15, 2004 letter.

11 16. On May 6, 2004, by a letter addressed to Mr. Herman and Defendant CIA's
12 Agency Release Panel, Professor Berman appealed the decision to deny access to the requested
13 PDBs on the basis of FOIA exemptions (b)(1), (b)(3), and (b)(5). Among other things, Professor
14 Berman pointed out that the CIA has declassified and released portions of at least ten PDBs from
15 the Johnson administration in 1985, 1989 and again in 1989 without making any claim that they
16 were exempt from disclosure. Moreover, the matters reported in the PDBs are also widely
17 reported in other declassified intelligence reports disseminated by the CIA. Professor Berman
18 specifically requested that the CIA review and declassify "reasonably segregable portions of the
19 PDBs while protecting any truly sensitive information on sources and methods, etc. In that way,
20 the CIA could segregate whatever information is legitimately classified under the (b)(3) exemption
21 from any factual or analytical information whose disclosure would not disclose sources/methods
22 of information." Attached as Exhibit F is a true and correct copy of Professor Berman's May 6,
23 2004 letter.

24 17. On May 13, 2004, in a letter signed by Alan Tate, Acting Information and Privacy
25 Coordinator for Defendant CIA, Professor Berman was informed that his appeal was accepted and
26 arrangements were made for its consideration by the Agency Release Panel. Attached as Exhibit
27 G is a true and correct copy of this letter.

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1 18. On June 21, 2004, in a letter signed by Mr. Tate on behalf of Defendant CIA,
2 Professor Berman was informed that "the Agency Release Panel has considered your appeal and
3 determined that the records must continue to be withheld in their entirety on the basis of Freedom
4 of Information Act exemptions (b)(1), (b)(3), and (b)(5). Therefore, pursuant to subparagraph
5 1900.41 of title 32 of the C.F.R., the Agency Release Panel has denied your appeal. In accordance
6 with the provisions of the Freedom of Information Act, you have the right to seek judicial review
7 of this determination in a United States district court." Attached as Exhibit H is a true and correct
8 copy of this letter.

9 19. Plaintiff has exhausted his administrative remedies under FOIA.

10 **Violation of FOIA for Failure to Make**
11 **Publicly Available the Requested PDBs**

12 20. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 19
13 above, inclusive.

14 21. Plaintiff has a legal right under FOIA to obtain the specific agency records that he
15 requested on March 3, 2004 and there exists no legal basis for Defendant CIA's failure to make
16 available to Professor Berman and the public, the requested PDBs.

17 22. Defendant CIA's failure to make promptly available the records sought by
18 Plaintiff's request violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable
19 regulations promulgated thereunder.

20 23. Defendant CIA currently has possession, custody or control of the requested
21 records.

22 **WHEREFORE**, Plaintiff requests that the Court award him the following relief:

23 1. Declare that Defendant CIA violated FOIA by failing to disclose the requested
24 PDBs and by reliance on a policy or practice of non-disclosure with respect to PDBs that violates
25 FOIA;

26 2. An injunction preventing Defendant CIA from relying on its policy or practice of
27 withholding PDBs regardless of content or age in its future processing of FOIA requests;
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