

Senate Select Committee on Intelligence's (SSCI) report [hereafter "SSCI Report" or "Report"] on the Central Intelligence Agency's former detention and interrogation program. Declaration of Vanessa Brinkmann, Senior Counsel, OIP ("Brinkmann Decl.") ¶ 3 (Jan. 24, 2014); Ex. A to Declaration. Plaintiff also sought expedited consideration of his request. Ex. A to Brinkmann Decl. On September 2, 2013, plaintiff filed this lawsuit.

The SSCI Report is the classified result of a study conducted by the Senate Select Committee on Intelligence of the CIA's now-discontinued detention and interrogation program. It was prepared by SSCI, and provided to the President and a few executive agencies for review and comment prior to finalization of the Report by SSCI for public release. SSCI's Chairman has described the 6000-page Report as "the most comprehensive intelligence oversight activity ever conducted by this Committee." Letter from Dianne Feinstein, Chairman of SSCI, to The President (Dec. 14, 2012) ("Feinstein Letter") (Ex. B to Brinkmann Decl.)

Prior to receiving plaintiff's FOIA request, and in connection with the handling of another FOIA request for the SSCI Report, OIP had made a determination that the SSCI Report is not an agency record subject to FOIA. Brinkmann Decl. ¶¶ 5, 10. Upon receipt of plaintiff's FOIA request, OIP revisited and confirmed the factors that led to its prior determination that that the SSCI Report is not an agency record subject to the FOIA, and determined that the SSCI Report, and in particular, the Executive Summary of the SSCI Report, is still a Congressional record that is not subject to the FOIA. Brinkmann Decl. ¶ 10.

By letter dated November 6, 2013, OIP responded to plaintiff's request, advising that the document plaintiff sought is a congressional record, not an agency record, and therefore not subject to FOIA. Brinkmann Decl. ¶ 11; Ex. D to Declaration. Plaintiff filed his First Amended

Complaint on November 14, 2013, seeking that the defendant be ordered to process the document under FOIA for release. Because whether the SSCI Report is an agency record is jurisdictional, this Court ordered briefing to proceed on this issue first.

ARGUMENT

I. THE SSCI EXECUTIVE SUMMARY IS A CONGRESSIONAL RECORD, NOT SUBJECT TO FOIA.

A. Whether the Document is an “Agency Record” Presents a Jurisdictional Question.

Under FOIA, an agency need only disclose “agency records.” 5 U.S.C. § 552(a)(4)(B). A court has jurisdiction to “enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B). The question of whether a document is an “agency record” is, therefore, jurisdictional. *See Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150 (1980) (federal jurisdiction in a FOIA case is dependent upon a showing that an agency has (1) “improperly,” (2) “withheld,” (3) “agency records”). The SSCI Report at issue in this case is not an “agency record,” but a congressional document. Because FOIA does not cover congressional documents or records, this Court lacks subject matter jurisdiction over plaintiff’s FOIA case, and it should be dismissed. *See United We Stand America, Inc.*, 359 F.3d at 597.

In a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), “the plaintiff[] bear[s] the burden of proving by a preponderance of the evidence that the Court has subject matter jurisdiction.” *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 176 (D.D.C. 2004). Because subject matter jurisdiction focuses on a court’s power to hear the plaintiff’s claim, a Rule 12(b)(1) motion imposes on the court an affirmative obligation to ensure

that it is acting within the scope of its jurisdictional authority. *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). In deciding a Rule 12(b)(1) motion, a Court need not limit itself to the allegations of the Complaint. *See Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, it may “consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case.” *Scolaro v. D.C. Board of Elections and Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing *Herbert v. Nat’l Acad. of Sciences*, 974 F.2d 192, 197 (D.C.Cir.1992)).

B. An Analysis of the Relevant Factors Indicate that Congress Retains Control of the Executive Summary of the SSCI Report.

In *United States Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989), the Supreme Court concluded that two requirements must be met in order for materials to qualify as “agency records.” First, the agency must have either created or obtained the requested materials. *Id.* Second, “the agency must be in control of the requested materials at the time the FOIA request is made.” *Id.* at 145. While the Department of Justice did not create the SSCI Report, it does not dispute that it obtained it. Because the SSCI Report is not under the Department’s control, however, it is not an agency record.

The D.C. Circuit analyzes four factors to determine whether an agency exercises sufficient control over requested documents to render them agency records:

- (1) the intent of the document’s creator to retain or relinquish control over the records;
- (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency’s record system or files.

United We Stand America, Inc., 359 F.3d at 599 (citing *Burka v. United States Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (other citations omitted)).¹

In this case, all four factors favor a determination that the SSCI Report remains a congressional record. First, SSCI has indicated its intent to retain control over the copies of the Report that it provided to the Department of Justice. SSCI provided the Report to the Department for the specific and limited purpose of soliciting edits and comments for SSCI to consider in making changes to the Report before finalizing it. *See* Feinstein Letter (Ex. B to Brinkmann Decl.). That SSCI intended to review the comments provided and use them to perhaps amend the Report makes it clear that while SSCI viewed this as a process of the Executive Branch providing input for a congressional decision, it did not intend to relinquish control over the Report or the final work product that would emerge after review and comment by the agencies and the President. Senator Feinstein's letter also underscores the fact that the version of the SSCI Report that was circulated to the President and Executive Branch agencies (and which is at issue in this case) was not a final document; rather, it was preliminary, with SSCI wholly in control both of the final, and as yet undecided, content, of the Report.

In addition, SSCI has retained tight control over the number of individuals who are allowed to review the Report within the Department. Before providing any copies of the SSCI Report to the Department of Justice, for example, SSCI required the Department to submit the names of individuals who would review the report for authorization by SSCI's Chairman.

¹ When determining whether a document generated by Congress and in possession of an agency constitutes a congressional record or an agency record, the D.C. Circuit has considered two factors: (1) Congressional intent at the time the record was created, and (2) the circumstances surrounding the document's transfer to the agency. *See Goland v. CIA*, 607 F.2d 339, 347-48 (D.C. Cir. 1978). Because discussion of these two factors is subsumed in the discussion of the four factors set forth above, the two *Goland* factors will not be discussed separately.

Brinkmann Decl. ¶ 6. SSCI Staff Director David Grannis, in an e-mail to OLA the day before Chairman Feinstein's letter was sent, detailed the explicit instruction of the Chairman, as specified in a motion adopted by the Committee, that SSCI would only provide copies of its Report to specific individuals identified to the Chairman herself – noting, by way of reference, that another agency had a mere two names on its list of cleared individuals. *See Ex. C to Brinkmann Decl. (Email from Staff Director Grannis to OLA (Dec. 13, 2012) (stating, “by explicit instruction of the Chairman, and as specified in the motion, we will only provide copies of the report to specific individuals who are identified in advance to the Chairman (through me)”)*. These contemporaneous instructions provide strong evidence of the Committee's intent to retain full control over the distribution, dissemination, and ultimate disposition of the Report. *See, e.g., Center for National Security Studies v. CIA*, 577 F. Supp. 584, 588-89 (D.D.C. 1983) (noting importance of contemporaneous and specific instructions from Congress to agency limiting either use or disclosure of documents) (citing *Paisley v. CIA*, 712 F.2d 686, 694 (D.C. Cir. 1983) (*vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984))).

Moreover, SSCI continued to assert control over access to the document throughout the process of approving individuals from the Department to review the Report. The first list of names submitted was deemed by SSCI to be too broad; a more limited list was subsequently agreed to by the Committee; and a few additional names were later added to the list, and ultimately approved by the SSCI Chairman. Brinkmann Decl. ¶ 8. In all, SSCI approved eleven individuals from the entire Department of Justice to access the Report for this review. *Id.*

A further indication of the control SSCI retains over the Report is the fact that SSCI marked each paragraph individually with appropriate classification markings, evidencing SSCI's

desire to restrict access. Brinkmann Decl. ¶ 8; *see Goland*, 607 F.2d at 347 (citing “Secret” marking on stenographic transcript of hearing as “evidence [of] Congressional intent to maintain Congressional control over the document’s confidentiality”); *cf. Paisley*, 712 F.2d at 694 (finding that documents transferred from SSCI to the FBI and CIA were “agency records” where the Committee “affixed no external indicia of control of confidentiality on the faces of the documents”); *Holy Spirit Association for the Unification of World Christianity v. CIA*, 636 F.2d 838, 841 (D.C. Cir. 1980) (“the circumstances surrounding Congress’ creation of the documents requested by the Church do not demonstrate any intent that they be kept secret”) (*vacated in part on other grounds*, 455 U.S. 997 (1982)). The document is classified at the Top Secret/Sensitive Compartmented Information (“SCPI”) level, and its sensitivity requires that it be protected in a much more controlled environment than other classified information. Brinkmann Decl. ¶ 8. Indeed, the highly classified nature of the document indicates that SSCI did not intend for it to have wide distribution or review.

The second factor, the ability of the agency to use and dispose of the record as it sees fit, also leads to a finding that SSCI retains control of the document. The Department cannot use the Report freely; rather, SSCI has strictly limited its use. As set forth above, only eleven individuals within the entire Department have been authorized by the SSCI Chairman to have access to the Report, in order to review and provide comments upon it to SSCI for possible inclusion in any revision that the SSCI might issue prior to finalizing the Report. Brinkmann Decl. ¶¶ 6, 8. Further, the copies of the Report that SSCI provided to the Department were provided with the understanding that they would not be reproduced. *Id.* ¶ 8. And, because of the highly classified nature of the Report, any copies remain stored within the Department in a

Sensitive Compartmented Information Facility (“SCIF”), to be retrieved only by those individuals whom SSCI has authorized to review the Report, and who possess the requisite security clearances. *Id.* Indeed, the very necessity of storing and reviewing the Report in a SCIF – a locked facility for storing and reviewing classified information – naturally limits the ability of those within the Department to use the SSCI Report. *See, e.g.*, http://www.dni.gov/files/documents/ICD/ICD_705_SCIFs.pdf. These access controls put on the SSCI Report serve to restrict the Department’s ability to use the Report as it sees fit. *Accord Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 208, 218-19 (D.C. Cir. 2013) (concluding that Secret Service did not have ability to use records “as it sees fit” when the Service could use records for only two limited purposes: “to perform background checks to determine whether and under what conditions to authorize [a] visitor’s temporary admittance to the White House Complex,” and “to verify the visitor’s admissibility at the time of the visit”).

In *Judicial Watch*, the D.C. Circuit noted that “the standard, four-factor control test does not apply to documents that an agency has . . . obtained from . . . a governmental entity not covered by FOIA: the United States Congress.” *Judicial Watch*, 726 F.3d at 221. Although that case did not concern documents obtained by an agency from Congress, the court nonetheless suggested that in such a case “the first two factors of the standard test [are] effectively dispositive.” *Id.* Should the Court wish to consider the final two factors of the test, however, these final two factors – the extent to which agency personnel have read or relied upon the document, and the degree to which the document was integrated into DOJ’s record system or files – also weigh in favor of a finding that the SSCI Report is not an agency document. Because of the limited grant of access to Department personnel to review the Report, review of or reliance

upon the Report was not widespread. *McErlean v. Dep't of Justice*, 1999 WL 791680, *11 (S.D.N.Y. Sept. 30, 1999) (use of records by only two attorneys handling case weighed against “agency record” finding). And the limited use of the SSCI Report by individuals within the Department, contrasted against the vast scope and purpose of the Report itself, weighs against a finding that the SSCI Report is an agency record. *Cf. Washington Post v. Dep't of Homeland Security*, 459 F. Supp. 2d 61, 71 (D.D.C. 2006) (tying purpose of records to their actual use by Secret Service; concluding that where use of records encompassed entire scope of their purpose, analysis of factor favored finding of agency control). Finally, because all copies of the Report are stored in Department SCIFs with limited access, the Report has not been generally integrated into the Department’s records systems. *Accord Dow Jones & Co. v. GSA*, 714 F. Supp. 35, 39 (D.D.C. 1989) (discussing the use of a safe to restrict access: “In fact, Mr. Golden’s maintenance of the list in a locked safe and his granting of very limited access are indicative of his intention to retain close personal control over the list at all times”).

Thus, the circumstances under which SSCI, the congressional committee that prepared the Report, provided the document to the Department demonstrate a clear intent to retain control over access to and dissemination of the SSCI Report, precluding the Department’s ability to use the document “as it sees fit.” The Department of Justice, in turn, has placed close hold restrictions on Department employees’ use of and access to the document in consideration of this congressional intent (as well as its high level of classification), and the document therefore has not been widely read, relied upon in the course of Department business, or integrated into Department records systems.

CONCLUSION

The Executive Summary of the SSCI Report is precisely the type of document that should not be subject to FOIA. It is a classified document that was created by SSCI, a committee of Congress, in furtherance of its oversight function. *See* Feinstein Letter (Ex. B to Brinkmann Decl.) As the D.C. Circuit stated in *Goland*, “Congress exercises oversight authority over the various agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress’ originating intent.” *Goland*, 607 F.2d at 346. Subjecting such a document to FOIA would require Congress “either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role.” *Id.* Here, even to retrieve the SSCI Report for processing and review under the FOIA, much less to disclose it, would be contrary to FOIA itself as well as to the terms and conditions under which Congress shared the document with the Department of Justice, and would undermine the prerogative of the legislative branch to control its own record.

The access provision of FOIA provides the public with a right of access to information which is not only in the possession of federal agencies, but which is also under their control – i.e., agency records. For the foregoing reasons, the SSCI Report remains within the control of SSCI, and is a congressional record, not an agency record. The Court therefore lacks subject matter over plaintiff’s claim, and it should be dismissed.

Dated: January 24, 2014

Respectfully submitted,

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