

In the
Supreme Court of the United States.

Assassination Archives and Research Center,

Petitioner,

-v-

Central Intelligence Agency,

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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RULE 29.6 STATEMENT

Petitioner Assassination Archives and Research Center, Inc. (“AARC”) is a non-stock, non-profit Virginia corporation dedicated to the collection and dissemination of research materials related to political assassinations. AARC has no parent or subsidiary entities. As a non-stock, non-profit entity, AARC does not issue stock or other form of ownership.

SUPPLEMENTAL BRIEF

On November 2, 2020, after petitioner filed its Reply Brief, this Court held oral argument in Supreme Court case No. 19-547, *Fish and Wildlife Serv., et al. v. Sierra Club, Inc.*, a case concerning the scope and application of the deliberative process privilege under Exemption 5, 5 U.S.C. Section 552(B)(5).

Justice Sotomayor elicited from government counsel the admission that even if the government prevailed on its claim that the documents were exempt as pre-decisional deliberative process records, the case must be remanded so that segregable information could be released to requesters and the general public under FOIA. Transcript of oral argument, attached, S.Ct. 19-547, p. 19.

The government asserts in this case that FOIA does not require it to disclose nonexempt segregable portions of withheld materials. This is contrary to the government's position at oral argument in the *Fish and Wildlife Serv.* case. The government's position at oral argument is correct and applies to the records and information withheld from the AARC in this case. Here too the government is required to release any and all nonexempt segregable material.

CIA argues that in appealing the denial of its request, the AARC did not challenge CIA's segregability determination required by the FOIA statute. However, AARC specifically argued segregability in its brief filed in the case in the Court of Appeals (Case no. 18-5280, Doc. 1799186, p. 31), and reiterated segregability in its reply brief (Doc. 1799187, p. 22). In any event, the D.C. Circuit has held that a court must consider the segregability issue *sua sponte* regardless of the state of the record. *Morley v. CIA* ("*Morley II*"), 508 F.3d 1108,1123 (D.C.Cir.

2007). The FOIA text requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b)(emphasis added). "[T]he District Court had an affirmative duty to consider the segregability issue *sua sponte*." *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022,1028 (D.C.Cir. 1999) Thus, "a district court clearly errs when it approves the government's withholding of information under the FOIA without making an express finding on segregability." *PHE, Inc. v. Dep't. of Justice*, 983 F.2d 248,252 (D.C.Cir. 1993). The district court's failure to fulfill this responsibility requires a remand. *Morley II*, 508 F.3d at 1123.

Further, at the November 2, 2020 oral argument, counsel for Sierra Club explained that *in camera* review is available under the FOIA statute. Transcript p. 62, attached. The FOIA explicitly empowers the district court to make a *de novo* review of the agency's handling of a FOIA request, and authorizes the court to review the content of all agency records *in camera*. 5 U.S.C. Section 552(a)(4)(B). *Allen v. CIA*, 636 F.2d 1287,1300 (D.C.Cir. 1980). Given the amount of material withheld under Exemption 5 in this case, this Court should undertake an *in camera* review of the withholdings and order release of the material, or remand the case to the lower court for such *in camera* review. The test which Judge Skelly Wright set forth in detail in *Allen* at 636 F.2d 1294-1300 apply here, and, in sum "To accept the CIA's argument would constitute an abandonment of the trial court's obligation under the FOIA to conduct an *in camera* review." *Id.* at 1293.

CONCLUSION

Petitioner continues to rely on all arguments and assertions of its petition for a writ of Certiorari and reply. For all these reasons, this Court should grant the petition.

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