UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL L. STERN, Plaintiff, -v- ELLIOT L. RICHARDSON, Attorney General of the United States. Defendant.	Civil Action No. 179-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Statement

This is an action brought pursuant to the Public Information Section of the Administrative Procedure Act, 5 U.S.C. §552 (referred to herein at times as the "Freedom of Information Act"), in which plaintiff, Carl L. Stern, seeks an order of the Court compelling disclosure and release to him of documents belonging to the Department of Justice relating to the authorization, establishment, maintenance, scope, nature, and termination of a counter-intelligence program referred to as "Cointelpro-New Left." Plaintiff requested that the Attorney General, defendant herein, release these documents to him; said request has been finally denied.

The nature of the documents sought by plaintiff is set forth in the Affidavit of Special Agent Williamson of the Federal Bureau of Investigation (FBI), which is filed herewith. For the reasons that follow, defendant submits that the documents sought herein are exempt from release by virtue of the specific exemptions

contained in the provisions of the Freedom of Information Act, and that accordingly, the complaint should be dismissed, or summary judgment should be granted in defendant's favor.

Applicable Statute

The Freedom of Information Act provides for, inter alia, the following exemptions from the general rule of disclosure of agency records established by the Act, regarding matters that are --

(2) related solely to the internal personnel rules and practices of an agency.

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

5 U.S.C. §552(b)(2), (5), (7).

Argument

I

THE DOCUMENTS REQUESTED REVEAL INTERNAL PERSONNEL RULES AND PRACTICES AND ARE THEREFORE EXEMPT FROM RELEASE UNDER EXEMPTION (2) OF THE FREEDOM OF INFORMATION ACT

5 U.S.C. 552(b) provides:

"This section does not apply to matters that are-- ***

(2) related solely to the internal personnel rules and practices of an agency."

The facts set forth in Mr. Williamson's affidavit show that the material plaintiff seeks is used solely to provide instructions and guidelines to FBI personnel. Private persons are affected by laws, not by the procedure the Government uses to determine whether or not legal requirements have been satisfied, Congress intended to exempt information such as that contained in the documents plaintiff seeks from the purview of 5 U.S.C. 552, upon which plaintiff relies, when it enacted 5 U.S.C. 552(b)(2). The House Report on the Act gives these examples of materials within the Exemption: "Operating Rules, Guidelines and Manuals of Procedure For Government Investigators or Examiners would be exempt from disclosure . . . ." House Report No. 1497, 89th Cong., 2nd Sess. P. 10. (1966)

Surely, Mr. Williamson's affidavit brings into play the considerations outlined in the Attorney General's Memorandum in the course of its discussion of Exemption 2:

> [A]n agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed. [Attorney General's Memorandum on the Public Information section of the Administrative Procedure Act (1967), p. 31].

Thus, Courts have held that such material is exempt from compelled disclosure. Cuneo v. Laird, 338 F. Supp. 504 (D.D.C. 1972) (Defense Contract Audit Agency Auditing Manual); City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Calif. 1971). (texts used to train customs agents in surveillance techniques, etc.) What Judge Hart said in Cuneo v. Laird, applies with equal force here. Release of the documents "would be comparable to requiring one football team to give its 'play-book' to the opposing team before a game." (338 F.Supp. at 506.)

II

THE REQUESTED DOCUMENTS ARE INTER-AGENCY AND INTRA-AGENCY MEMORANDUMS EXEMPT FROM DISCLOSURE UNDER EXEMPTION (5)

The attached affidavit establishes that the documents plaintiff seeks constitute part of the process by which governmental decisions and policies are formulated and reflect this process. This brings the documents within 5 U.S.C. 552 (b)(5) which exempts from compelled disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The Courts have recognized that:

> "the Congress intended that Exemption 5 was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended.
>
> The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view--a process as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal establishment as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

Ackerly v. Ley, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969). See also, Freeman v. Seligson, 132 U.S.App.D.C. 56, 69, 405 F.2d 1326, 1339 (1968)(5 U.S.C. 552(b)(5) was enacted as "a clear expression of Congressional policy to hold the line on disclosure of materials of this sort.").

Since plaintiff seeks disclosure of items used in the Government's "deliberative processes", the disclosure he requests must be denied. International Paper Company v. Federal Power Commission, 438 F.2d 1349, 1359 (2nd Cir. 1971). A good review of the law is set forth in the Fifth Circuit's opinion in K.C. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 93 S.Ct. 1352 (1973).

The Wu opinion is particularly noteworthy because it squarely decided that:

> "We do not think the fact that one or more of the five [consultants who submitted memoranda] either included some factual material in his memorandum or stated to the Endowment that he was able to refute appellate's arguments transforms these opinions into factual matter within the meaning of the 'purely factual' rule," [460 F.2d at 1033].

Similarly, in Miller v. Smith, 292 F.Supp. 55, 59 (S.D. New York 1968), the Court held that staff memoranda were not publicly available because requiring release of such memoranda "would inhibit the free expression and inter-change of views within the [agency] * * * if staff memoranda were available to the public." Accord: Cuneo v. Laird, 338 F. Supp. 504 (D. D.C. 1971); Wellford v. Hardin, 330 F.Supp. 915 (D. Md. 1971).

The Supreme Court has recently confirmed this analysis. EPA v. Mink, 93 S.Ct. 827 (1973). The Court held that the District of Columbia Circuit Court of Appeals' decision in Mink, in the course of which it had followed its prior decisions, "is unnecessarily rigid." Id. at 838. The Supreme Court then went on to state: (Id. at 839)

> "An agency should be given the opportunity, by means of detailed affidavits or oral testimony to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material

> that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. §552(a)(3), and if it fails to meet its burden without in camera inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information."

The present case involves records which certainly fall within the rationale of Exemption 5. The Supreme Court plainly stated in Mink that this Exemption protects documents such as those involved here: (93 S.Ct. at 837-838)

> "The formulation [in drafts of the Information Act] was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that all factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data."

Therefore, defendant's reliance on Exemption 5 should be sustained.

III

THE DOCUMENTS SOUGHT ARE PART OF INVESTIGATORY FILES COMPILED FOR LAW ENFORCEMENT PURPOSES AND ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION (7)

In any event, the documents plaintiff seeks are clearly exempt from disclosure since they could only be part of "investigatory files complied for law enforcement purposes",

not available by law to a party other than an agency and therefore within the exclusion set forth at 5 U.S.C. §552(b)(7). Indeed, Mr. Williamson's affidavit details at great length the grave injury which would be done to the FBI's investigation processes if the records plaintiff seeks were required to be made available.

The Second Circuit in Frankel v. SEC, 460 F.2d 813, 817 (2d Cir. 1972), cert. denied, 93 S.Ct. 125, explained the reasons for the establishment of Exemption 7:

> Congress had a two-fold purpose in enacting the exemption for investigatory files: to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it obtained information. Both these forms of confidentiality are necessary for effective law enforcement.

The whole thrust of the seventh exemption is to protect from disclosure all files which the Government compiles in the course of law enforcement investigations, whether or not they lead to formal proceedings. As the Court held in Barceloneta Shoe Corp. v. Compton, 271 F.Supp. 591, 592-593 (D. P.R. 1967):

> "In general terms I agree with the Attorney General's analysis of the nature and scope of the exemption, in his Memorandum on the Public Information Section of the Administrative Procedure Act, dated June 1967, wherein he states at p. 38:
>
> > 'The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigatory by a witness who is testifying in a pending case; but since

such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the statement to be made available to the public. In addition, the House Report makes clear that litigants are not to obtain special benefits from this provision, stating that S.1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.' (H. Rept. 11).

"As I suggested before, Congress could not have intended to grant lesser rights of inspection and copying of witnesses' statements to persons who are faced with the deprivation of their life or liberty, than to persons faced only with remedial administrative orders under regulatory statutes."

Accord: Bristol-Myers Co. v. FTC, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938 (1970), cert. denied, 400 U.S. 824.

To like effect is the decision in Clement Brothers Co. v. NLRB, 282 F.Supp. 540 (N.D. Ga. 1968), with which the Fifth Circuit has stated it "fully concurs," NLRB v. Clement Brothers, Co., 407 F.2d 1027, 1031 (5th Cir. 1969). The District Court said: (282 F.Supp. at 542)

"Though the Court does not feel that it is necessary to reiterate an exhaustive documentation of the Act's legislative history, the following statement is exemplary of numerous others which make it clear that the plaintiff's interpretation must be rejected:

'This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings." H.R. Report #1497, 89th Cong., 2nd Sess., p. 11.'

"In sum, it is clear that the plaintiff could obtain the employees' statements taken by the Board if the employees had been called to testify - in fact, the plaintiff was given access to the statements of the employees who did so testify. However, the plaintiff is not entitled to employee statements absent such use."

Since the records plaintiff seeks have not been made part of the record in agency proceedings, plaintiff may not obtain them "absent such use."[1] Accord: Benson v. United States, 309 F.Supp. 1144 (D. Neb. 1970). Recent decisions confirm this analysis. Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918; Cowles Communications Inc. v. Department of Justice, 325 F.Supp. 726 (N.D. Calif. 1971); Frankel v. SEC, supra; Aspin v. Department of Defense, 348 F.Supp. 1081 (D. D.C. 1972).

Plainly, the material plaintiff seeks here is exempted from compelled disclosure if Exemption 7, the exemption for investigatory files, is to have the meaning Congress intended and which is mandated by the wording of the statute:

> "Harbolt's claim is grounded on his assertion that he has wrongfully been denied copies of the F.B.I. interrogation reports referred to by his complaint. However, 5 U.S.C.A. §552(b)(7) and 28 C.F.R. §§16.1(a) and 16.5 make clear that such documents of the Department of Justice are not subject to production as demanded by Harbolt. ***
>
> As employees of the Department of Justice the defendants were found (sic) to decline such disclosure. This statute and these valid regulations of the Department protect the confidentiality of investigatory files compiled for law enforcement purposes except to the extent available by law to a party.[2]

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[1] Insofar as dictum in Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D. Pa. 1968), which involved subpoena proceedings, not a suit pursuant to 5 U.S.C. 552, is to the contrary, it is plainly wrong for the reasons stated above. It is significant that the language Congress chose, "compiled for law enforcement purposes" was criticized at hearings on the proposed legislation as unduly restrictive. 89th Cong., 1st Session, Hearings on H.R. 5012 before the House Committee on Government Operations, pp. 245-247. Notwithstanding this criticism Congress enacted exemption 7 as referred to above because it thought the broad protection against disclosure contained therein necessary to effective operation of the agencies which compile investigation reports. Cf. Weisburg v. U.S. Department of Justice, ____U.S.App.D.C. ____, ____F.2d____ (No. 71-1026, February 28, 1973)(petition for rehearing pending).

[2] "The regulations are valid and within the authority granted for their promulgation, 5 U.S.C.A. §301, and they follow the exceptions from disclosure provided by 5 U.S.C.A §552(b)(7)." [footnote in opinion]

[Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir. 1972)] Thus, by enactment of 5 U.S.C. 552(b)(7) "[t]he public policy in favor of maintaining the secrecy of FBI investigative reports has been recognized by Congress." Black v. Sheraton Corp. of America, 50 F.R.D. 130, 132 (D. D.C. 1970).

Conclusion

WHEREFORE, by reason of the foregoing, defendant's motion to dismiss or in the alternative for summary judgment should be granted, and this action should be dismissed.

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