UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 179-73

CARL L. STERN

Plaintiff

v.

ELLIOT L. RICHARDSON, Attorney
General of the United States

Defendant

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR IN CAMERA INSPECTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Ronald L. Plesser
Attorney for Plaintiff

Suite 515
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

TABLE OF CONTENTS

Index	i
Statement of Facts	1
Argument	3
I. The Requested Documents are Not Exempt Under the Second Exemption.	4
II. The Requested Documents are Not Exempt Under the Fifth Exemption.	6
III. The Requested Documents are Not Exempt Under the Seventh Exemption.	9
Conclusion	13

Index

Cases

Ackerly v. Ley, 137 U.S. App. D.C. 133, 420 F.2d 1336	6
Barceloneta Shoe Corporation v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967)	10
*Bristol-Meyers v. F.T.C., 138 U.S. App. D.C. 22, 424 F.2d 935, cert. denied, 400 U.S. 824 (1970)	4
Concord v. Ambrose, 333 F. Supp. 948 (N.D. Calif. 1971)	6
Consumers Union of the United States v. Veterans Administration, 301 F. Supp. 796, appeal dismissed, 436 F.2d 1363 (2d Cir. 1970).	8
Cuneo v. Laird, 338 F. Supp. (D. D.C. 1972), appeal pending	5
Ditlow v. Volpe, No. 2370-72 (D. D.C. decided June 21, 1973) (a copy of which is attached)	7
*Environmental Protection Agency v. Mink, ___ U.S. ___, 35 L. Ed 2d 119 (1973)	4, 7, 8, 9

*Authorities principally relied upon

Cases, cont.

Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.) cert. denied, 398 U.S. 965 (1970) 3

Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971) 11

Fisher v. Renegotiation Board, ___ U.S. App. D.C. ___, 473 F.2d 109 (1972) 4

Frankel v. S.E.C., 336 F. Supp. 675, 460 F.2d 813 (2d Cir.), cert. denied, ___ U.S. ___, 34 L. Ed 2d 146 (1972) 10

Getman v. NLRB, 146 U.S. App. D.C. 209, 450 F.2d 670, 672, stay denied, 400 U.S. 824 (1970) 3

Marbolt v. Alldredge, 464 F.2d 1243 (10th Cir. 1972) 11

*Hawkes v. Internal Revenue Service, 467 F.2d 787 (1972) 5, 6, 12

K.C. Wu v. National Endowment for the Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 93 S. Ct. 1352 (1973) 7

M.A. Shapiro & Co., Inc. v. S.E.C., 339 F. Supp. 467, 469 (D. D.C. 1972) 3

N.L.R.B. v. Clement Brothers Co., 407 F.2d (1969) 11

Soucie v. David, 145 U.S. App. D.C. 22, 424 F.2d 935 (1970) 4

*Stokes v. Brennan, No. 72-2946 (Fifth Cir., April 13, 1973) (copy attached) 5, 6, 12

Tennessean Newspapers v. F.H.A., 464 F.2d 657 (6th Cir. 1972) 7

Statutes

5 U.S.C. § 552(a)(2)(B) 9

5 U.S.C. § 552(a)(3) 3

---

*Authorities principally relied upon

Statutes, cont.

5 U.S.C. § 552(b)(2) 4

5 U.S.C. § 552(b)(5) 6

5 U.S.C. § 552(b)(7) 9

Other Authorities

S. Rpt. 813, 89th Cong., 1st Sess., (1965) 4, 7

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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR IN CAMERA INSPECTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to obtain access to certain documents in the possession of the defendant which relate to the establishment, scope, purposes and possible disestablishment of a counter-intelligence program of the Federal Bureau of Investigation ("FBI") entitled "Cointelpro-New Left." The plaintiff is a professional broadcast journalist who during the past seven years has reported on events concerning the Department of Justice and the judiciary. The defendant has made a motion for summary judgment. We believe that there are no disputed issues of material facts and that the case is ripe for summary judgment.

STATEMENT OF FACTS

The Federal Bureau of Investigation has operated Cointelpro-New Left and has never described its function, purpose or scope.

The plaintiff in 1971 became aware of the existence of this program and began asking questions of various Department of Justice and FBI employees as to who established this program and under what authority and for what purpose was it established. Failing to receive any substantive responses, plaintiff beginning on March 20, 1972, formally requested under the Freedom of Information Act access to any document which (i) authorized the establishment and maintenance of Cointelpro-New Left, (ii) terminated such program, and (iii) ordered or authorized any change in the purpose, scope or nature of such program (the "Requested Documents").* The plaintiff has not requested access to any specific case file or internal deliberative memorandum or letter. Nor has plaintiff requested access to any document which could be considered to be solely related to internal personnel rules and practices of an agency. What is sought are the documents which relate to the establishment, scope and purpose of an officially established program of the FBI. Defendant, through Ralph E. Erickson, then Deputy Attorney General, on January 13, 1973, finally denied access to the Requested Documents.

The defendant has admitted to the existence of Cointelpro-New Left. (Answer, fourth defense, paragraph 5, and Exhibit F.) Also, defendant does not in the context of this action claim that the Requested Documents do not exist or that they are not identifiable for purposes of the Freedom of Information Act, 5 U.S.C. §552(a)(3). The government has claimed that the documents are exempt from disclosure on the basis of various exemptions to the Freedom of

*Plaintiff's letter of March 20, 1972, is attached to the complaint. The remainder of the correspondence is attached hereto as Exhibits A through I.

Information Act.

ARGUMENT

The purpose of the Freedom of Information Act is "to increase the citizen's access to government records.... The legislative plan creates a liberal disclosure requirement limited only by specific exemptions, which are to be narrowly construed." Getman v. N.L.R.B., 146 U.S. App. D.C. 209, 450 F.2d 670, 672, stay denied 400 U.S. 524 (1970); M.A. Shapiro & Co., Inc. v. S.E.C., 339 F. Supp. 467, 469 (D. D.C. 1972).

The primary question in this case is the proper characterization of the Requested Documents. The defendants claim that they are exempt as internal personnel rules and practices, intra agency memoranda and investigatory files. We contend that the Requested Documents cannot be so characterized and we will discuss the relevant case law under each exemption to show why such exemptions are not apposite. However, we have not seen the documents and cannot with certainty describe them. Therefore, this Court should conduct an in camera review of the Requested Documents to determine for itself whether or not these are the type of documents Congress intended to be exempt under the Freedom of Information Act. The Freedom of Information Act specifically states in § 552(a)(3) that where an agency has refused to produce any documents, "the court shall determine the matter de novo and the burden is on the agency to sustain its action." See Epstein v. Resor, 421 F.2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965 (1970). The Court of Appeals for this

Circuit has consistently remanded cases for in camera inspection to determine whether or not the documents sought fall within one of the claimed exemptions. Fisher v. Renegotiation Board, ___ U.S. App. D.C. ___, 473 F.2d 109 (1972), Bristol-Myers v. F.T.C., 138 U.S. App. D.C. 22, 424 F.2d 935 (1970); Soucie v. David, 145 U.S. App. D.C. 1442, 448 F.2d 1067 (1971). The Supreme Court in Environmental Protection Agency v. Mink, ___ U.S. ___, 35 L. Ed 2d 119, 135 (1973) stated, "Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. 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 . . . ."

The government has presented no such detailed affidavits or other material which indicates that this material is beyond that which must be available under the Freedom of Information Act. We will show that the government has not met its burden to show that the documents requested are exempt.

I. THE REQUESTED DOCUMENTS ARE NOT EXEMPT UNDER THE SECOND EXEMPTION.

The defendant has relied in part on the second exemption which exempts documents which are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (emphasis added). The Senate Report described its scope in this way:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or

> regulation of lunch hours, statements of policy as to sick leave, and the like.

S. Rep. No. 813, 89th Cong., 1st Sess. (1965).*

The Sixth Circuit Court of Appeals in Hawkes v. Internal Revenue Service, 467 F.2d 787, 797 (1972) stated that "the internal practices and policies referred to in section (b)(2) relate only to the employee-employer type concerns upon which the Senate Report focused." Certainly documents which deal with the establishment scope and purpose of an FBI counterintelligence program do not relate to things such as regulations of lunch hours and personnel's use of parking facilities. However, even if they do relate, they must solely relate to such matters. Stokes v. Brennan, No. 72-2946 (Fifth Cir., April 13, 1973), slip opinion p. 9. In camera inspection will ascertain the nature of the Requested Documents, but it is beyond speculation that the second exemption could be a valid basis for non-disclosure.

The government relies upon Cuneo v. Laird, 338 F. Supp. (D. D.C. 1972), appeal pending, in support of its position under the second exemption. However, that case dealt with audit manuals in connection with the auditing of government contractors which are considerably different from the type of documents sought here. Judge Hart's statement that release of the audit manual "would be comparable to requiring one football team to give its play-book to the opposing team before a game" is particularly inappropriate in this case 338 F. Supp. at 506. The relationship between the government and

---

*The Senate Report is the report accepted by the courts as showing Congress' intent as to the meaning of the second exemption, Stokes v. Brennan, No. 72-2946 slip opinion p. 8 (Fifth Cir. April 13, 1973), a copy of which is attached hereto.

its contractors may or may not be analogous to a football game, but certainly the activities of the government in counterintelligence activities against internal political segments of society is not analogous. In any event both the District Court opinions in the Cuneo case and in Concord v. Ambrose 333 F. Supp. 958 (N.D. Calif. 1971) should not be followed in light of the decisions of the Courts of Appeals for the Fifth and Sixth circuits in Stokes v. Brennan, supra and Hawkes v. IRS, supra.

II. THE REQUESTED DOCUMENTS ARE NOT EXEMPT UNDER THE FIFTH EXEMPTION.

The defendant also claims that the documents are exempt from public disclosure under the fifth exemption to the Freedom of Information Act which exempts "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." 5 U.S.C. § 552(b)(5).

The purpose of the fifth exemption as correctly cited by defendant is to protect from public disclosure "internal working papers in which opinions are expressed and policies formulated and recommended." Ackerly v. Ley 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969). In reporting the Freedom of Information Act, the Senate Committee stated:

> It was argued and with merit, that efficiency of government would be greatly hampered if with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fish bowl." The Committee

> is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly consistent with efficient Government operation. (emphasis added).

S. Rep. No. 813, 89th Cong., 1st Sess. p. 9 (1965).

The word "premature" seems to plaintiff, as it did to the Sixth Circuit in Tennessean Newspapers v. F.H.A., 464 F.2d 657 (6th Cir. 1972), to be the critical term which demonstrates that the purpose of the section is to protect opinions, recommendations and formulations in agency deliberations. Judge Robinson of this Court in Ditlow v. Volpe, No. 2370-72, (decided June 21, 1973) (a copy of which is attached) slip opinion p. 8, stated, "It is only where commentary or policy analysis is also involved . . . that Congressional concern for a full and frank exchange of views within the agency comes into play."

The material sought in this action is neither premature, analytical nor deliberative, but is the final policy decision of an agency. The cases cited by defendant concern such things as the opinions of scientific experts on the environmental hazards of a nuclear test as was the case in Environmental Protection Agency v. Mink, ___ U.S. ___, 35 L. Ed 119 (1973) and the opinions of scholars prior to an agency granting a research grant as was the case in K.C. Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied, 93 S. Ct. 1352 (1973). Those cases would be relevant if what we were seeking were the opinions and recommendations of the staff or leadership of the FBI as to whether

or not Cointelpro-New Left should be established or how it should be operated if established. However, all that is being sought here is the final directive establishing Cointelpro-New Left as a program of the FBI and any subsequent changes to its purpose and scope. Certainly the government is not contending that the purpose or scope of the establishment of a program of nuclear testing or of a research grant program could be kept secret.*

Moreover, the fifth exemption to the Freedom of Information Act only exempts memoranda "which would not be available by law to a party other than an agency in litigation with the agency." In order to determine whether or not material is exempt under the rules of discovery and therefore under the fifth exemption, courts have used hypotheticals where discovery rules are used in the context of litigation. Consumers Union of U.S., Inc. v. Veterans Admin., 301 F. Supp. 796, 804 (S.D. N.Y. 1969).

Such a hypothetical case exists in the possibility of a harassment or illegal wire-tap suit for actions rising out of the activities of Cointelpro-New Left. The existence, scope and purpose of this program would be material and relevant for the purposes of discovery in such a suit.

In addition to not being exempt as an internal memorandum, the Requested Documents are mandated to be made public by section (a) (2)(B) of the Freedom of Information Act as "those statements of policy and interpretation which have been adopted by the agency and

---

*Questions of national defense and foreign policy which were present in the Mink case are not claimed to be present here.

are not published in the Federal Register." 5 U.S.C. § 552(a)(2)(B). First, the establishment of a counterintelligence program certainly represents a policy which has been adopted by the agency. Second, there has been no reference to the adoption of this policy in the Federal Register, Congressional Record, Code of Federal Regulations or any other source. Surely a policy as far-reaching as the establishment of a counterintelligence program was intended by the Congress to be disseminated and not kept secret. The only possible exception to dissemination of policy would be if such policy affected national defense or foreign policy, and that has not been claimed to be present in this action.

This Court should view the documents in camera to determine whether or not this material relates final agency policy and therefore not exempt under the fifth exemption. Clearly, the government has not satisfied the standard of detailed affidavits set forth in Mink, supra at 135, and in camera inspection is warranted.

III. THE REQUESTED DOCUMENTS ARE NOT EXEMPT UNDER THE SEVENTH EXEMPTION.

The defendant finally claims that the documents sought are exempt as "investigatory files compiled for law enforcement purposes . . . ." 5 U.S.C. § 552(b)(7). We are not seeking anything that could remotely be considered "investigatory" or even anything that could be called a file. Again, what we are seeking are the agency directives which establish the program and describe its purposes and scope. That could hardly be considered a file

compiled for law enforcement purposes. We are not seeking the file on any particular case, nor are we seeking any material which relates to any investigative technique.*

All of the cases decided under the seventh exemption to the Freedom of Information Act concern files gathered for particular law enforcement actions and the questions presented have been (i) whether there is a concrete prospect of a law enforcement activity where disclosure would harm the government's case in court; or (ii) whether disclosure would create a concrete prospect of serious harm to its law enforcement efficiency. There has been no case yet decided under this exemption where all that is sought is the documents relating to the establishment of a program, be it for enforcement or counterintelligence, as is the instant case.

In Frankel v. SEC, 460 F.2d 813, 817 (2d Cir. 1972) cert. denied, 93 S. Ct. 125, plaintiffs sought all files of the Securities and Exchange Commission in connection with a settled SEC action against Occidental Petroleum Corporation. The Second Circuit denied access because the disclosure of the particular files would make public "the procedures by which the agency conducted its investigations and by which it obtained information." 460 F.2d at 817. In Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. P.R. 1967) the Court refused to make available to plaintiff the text of complaints filed against it with the National Labor Relations Board. In a similar case the Fifth Circuit in NLRB v. Clement

---

*Since the admitted name of the program is Counterintelligence Program-New Left, it is difficult to imagine how any of its activities could be considered investigative.

Brothers Co., 407 F.2d (1969) refused to make available employee statements concerning the activities of their employer, the plaintiff. The Fifth Circuit similarly in Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971) refused to provide an airline pilot with a letter sent to the FAA accusing him of improper conduct. Finally, in Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir. 1972), the plaintiff, an inmate in a federal reformatory, was refused access to FBI interrogation sheets concerning his particular case.

Unlike the cases cited, the material sought here relates to no particular case. This Circuit has stated

> The exemption prevents a litigant from using the statute to achieve indirectly any earlier or greater access to investigatory files than he would have directly . . . .* But the agency cannot, consistent with the broad disclosure mandate of the Act, protect all of its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date. Thus, the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files . . . .

Bristol-Myers Company v. FTC, 424 F.2d 935 (1970).

From the facts presented by defendant, meagre though they may be, the Requested Documents clearly are not related to an investigative file compiled for law enforcement purposes and cannot be exempt from disclosure under the seventh exemption. Also,

---

*H.R. Rep. Rep. No. 1497, note 5 at 11.

the government has presented no specific allegations as to how the disclosure of these particular documents as distinct from the disclosure of particular investigative files would be harmful to the FBI's law enforcement efficiency.

As a further indication that these documents should be public and not exempt as investigatory files, there is the decision of the Sixth Circuit Court of Appeals in Hawkes v. Internal Revenue Service, 467 F.2d 787 (1972). In that case the government opposed disclosure of an IRS agents manual on the basis that it contained investigative material and the disclosure of such material would be harmful to the agency's performance. In rejecting the government's claim and in holding that the manual must be available under section (a)(2)(C) of the Freedom of Information Act as an administrative staff manual that affects a member of the public, the Court said:

> Law enforcement is the process by which society secures compliance with its duly adopted rules. Enforcement is adversely affected *only* when information is made available which allows persons simultaneously to violate law and to avoid detection. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a)(2)(C).

467 F.2d at 787. (Emphasis in original) Accord: Stokes v. Brennan, (No. 72-2946, slip opinion pp. 3-7) (April 3, 1973) (5th Cir.).

This action seeks to ascertain what the program is and what its purposes are. Surely, that does not allow persons to simultaneously violate law and avoid detection. Therefore the Requested

Documents cannot be exempt from disclosure under the seventh exemption and should be made available to plaintiff.

CONCLUSION

We can posit of no more compelling a case in which the Freedom of Information Act should be applied than this one. The then Attorney General, Ramsey Clark, in the Foreword to the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967) which gives guidance to all agencies concerning the Act, stated:

> If government is to be truly of, by and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in many ways, that the right of the people to know the actions of their government be secure.

That statement, in light of recent events concerning other attorneys general and another administration is even more significant today than it was seven years ago. The plaintiff and the people to whom he reports, the American public, must have the right to know of the existence and the scope of a counterintelligence program being operated by the government within the boundaries of this country against domestic political groups. If such a right is not guaranteed in this instance, then to talk about a Freedom of Information Act is to signify nothing.

For the foregoing reasons plaintiff's cross-motion for summary judgment should be granted.

DATED: Washington, D.C.
June 26, 1973

Respectfully submitted,

Ronald L. Plesser
Attorney for Plaintiff

Suite 515
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704