UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLEN WEINSTEIN,

Plaintiff,

v.

RICHARD KLEINDIENST, et al.,

Defendants.

Civil Action
No. 2278-72

Filed 3/6/73

PLAINTIFF'S
MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT

Statement of Facts

The complaint in this action alleges that the defendants have unlawfully and discriminatorily denied plaintiff access to certain identifiable agency documents in their possession and control, which he has requested under the terms of 5 U.S.C. § 552(a).

Specifically, plaintiff alleges that defendants Kleindienst and Gray have arbitrarily refused to grant him access, as a scholar engaged in a historical research project concerning certain events in the post World War II and Cold War era, to five groups of records in their custody. These documents relate to the investigation of Alger Hiss and Whittaker Chambers during the period 1933-52, conducted by the Federal Bureau of Investigation. The documents plaintiff is seeking have in fact been specifically identified by the defendants in their files [Mintz Affidavit, ¶4], and were clearly identified as follows in plaintiff's correspondence with the defendants

[Complaint, Exhibit D] and in the Complaint [¶6]:

> (a) each report made by FBI field investigators on the Hiss-Chambers controversy during the period 1948-50 inclusive;
> (b) all correspondence between and among FBI agents working on the controversy and other FBI officials during the period 1948-50 inclusive;
> (c) all records, including correspondence and reports in the possession of the FBI connected with its search during the period 1948-52 inclusive, for a Woodstock typewriter purportedly owned by Alger Hiss, and any other typewriter sought in connection with that controversy;
> (d) all correspondence, reports, and attachments relating to any cooperation between the FBI and the Un-American Activities Committee of the House of Representatives in the Hiss-Chambers case, particularly between 1948 and 1950;
> (e) reports made by FBI agents concerning either Hiss or Chambers during the period 1913-50.

In his initial request to the late FBI Director J. Edgar Hoover for access to these documents, plaintiff inquired whether they were available for use by scholars and indicated that he "would be willing to use any materials that are available under whatever conditions and restrictions the Bureau feels [are] necessary." [Complaint, Exhibit B]. His request was denied by Helen W. Gandy, Secretary to Mr. Hoover, on the ground that the documents are "confidential" [Complaint, Exhibit C]. In a renewed request on March 22, 1972, plaintiff again stated his qualifications as an historian and a scholar, indicated his awareness that certain persons other than himself who were engaged in historical research had publicly stated that they had been given access to confidential FBI files, and asserted his right of access pursuant to 5 U.S.C. §552(a) [Complaint, Exhibit D]. On May 15, 1972, plaintiff's request for access was finally denied by defendant Kleindienst on the ground that the documents sought were "investigatory files compiled for

law enforcement purposes," exempt from disclosure under 5 U.S.C. §552 (b)(7), and records the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy," also exempt under 5 U.S.C. §552 (b)(6) [Complaint, Exhibit F]. The defendants in their correspondence neither admitted nor denied plaintiff's claim that other persons had been given access to some of the files he sought, and to similar files.

Plaintiff filed his complaint in November 1972, alleging that the defendants were acting in violation of the Freedom of Information Act, were discriminating against him, and were depriving him of his First Amendment right to conduct research in documents made available to other scholars. The defendants have not answered but have moved to dismiss the complaint or, in the alternative, for summary judgment. Their motion papers raise for the first time a claim that the documents sought "were classified . . . in the interests of national defense or foreign policy" and are therefore exempt from disclosure under 5 U.S.C. §552(b)(1).

The record in the case, amplified by defendants' motion papers, bristles with fact issues which must be litigated: (1) plaintiff alleges and is prepared to prove that "the FBI . . . has selectively and arbitrarily allowed persons other than plaintiff access to at least some of the items" which he seeks [Complaint, ¶13; Weinstein Affidavit], but the defendants deny this allegation [Mintz Affidavit, ¶7]; (2) defendants assert that the documents sought "were classified . . . in the interests of national defense or foreign policy" [Mintz Affidavit, ¶5A],

but the plaintiff disputes that they are currently classified, or that a proper classification appears on the face of each document; (3) defendants assert that "[u]pon receipt of the complaint in this suit we undertook a review of certain of these matters and concluded that they should continue to be kept secret . . ." [Mintz Affidavit, ¶5A], but the plaintiff disputes that the defendants have complied with the applicable requirements for declassifying and downgrading documents more than thirty years old; (4) plaintiff disputes that he has been given consideration by the defendants as a "person outside the executive branch . . .engaged in [a] historical research project," "as required by Section 12 of Executive Order 11652 (March 8, 1972), which the defendants assert they have followed in weighing his request [Mintz Affidavit, ¶5A]; and (5) plaintiff disputes that the documents he is seeking cannot be sanitized so as to protect the privacy of living persons who may be the subjects of "unfounded statements and allegations later found to be false," as well as the identities of informants who continue to be active, as claimed by the defendants [Mintz Affidavit, ¶¶5B, 5C, and 6].

Argument

I. PLAINTIFF IS SEEKING IDENTIFIABLE RECORDS WITHIN THE TERMS OF 5 U.S.C. § 552(a)(3).

Defendants argue that the documents plaintiff is seeking are not "identifiable records" within the terms of 5 U.S.C. § 552 (a)(3), and therefore need not be produced. This argument is inconsistent both with the meaning of the statute and with the Mintz Affidavit which itself describes in detail the documents at issue.

It is well settled that the "identifiable records" requirement of the Freedom of Information Act "calls for a reasonable description enabling a Government employee to locate the requested records . . . ." Bristol-Myers v. FTC, 424 F.2d 935, 938 (D.C. Cir. 1970), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). So long as the defendant agency is able to ascertain what documents are being sought, "[t]his is all the identifiability requirement contemplates. The fact that to find the material will be a difficult or time-consuming task is of no importance in making this determination . . . ." Wellford v. Hardin, 315 F. Supp. 175, 177 (D. Md. 1970), aff'd 444 F. 2d 21 (4th Cir. 1971).

The defendants make no claim that they are unable to locate the documents to which plaintiff seeks access. On the contrary, they have identified and enumerated in detail the FBI files within which these documents are contained [Mintz Affidavit, ¶4], an identification which under similar circumstances has been held conclusively to satisfy the statute.

See Frankel v. SEC, 336 F.Supp. 675, 676 n.2 (S.D.N.Y. 1971), rev'd on other grounds, 460 F2d 813 (2nd Cir. 1972); Wellford v. Hardin, 315 F. Supp. at 177. The sole basis for their claim that the documents do not come within the terms of 5 U.S.C. §552(a)(3) is that they are simply too voluminous.

The cases cited by the defendants to support this novel proposition are inapposite or clearly distinguishable. In Tuchinsky v. Selective Service System, 418 F2d 155 (7th Cir. 1969), the Court of Appeals affirmed a denial of access to draft board personnel data on the ground that the information sought came within the privacy exemption, section 552 (b)(6). The court's only reference to the identifiable records issue was a passing speculation "that the district court might well have denied relief . . .on the basis of affidavits which state that the Selective Service System kept no 'identifiable records' of personnel data about board personnel." 418 F.2d at 157. There were, however, no such affidavits in that case, as there are none in this.

Irons v. Schuyler, 465 F.2d 608 (D.C.Cir. 1972), also relied upon by the defendants, involved the issue of identifiable records, but there the court affirmed the district court's finding that the appellant had completely neglected to provide a "reasonably identifiable description" of the documents sought. 465 F.2d at 612. In the instant case, of course, the defendants made no such claim, nor could they in the face of the Mintz Affidavit. Moreover, the request in Irons for "all unpublished manuscript decisions of the Patent Office, together with such

indices as are available," potentially covered approximately 3,500,000 files compiled for more than 100 years without specifying which files were sought. The total lack of identifiability of requested records was underscored in Judge Fahy's supplemental opinion denying the petition for rehearing:

> The [records] are dispersed . . . among millions of Patent Office files. I do not think the Patent Office was required to reorganize these files in response to appellant's request in the form in which it was made. 465 F.2d at 615.

The documents sought in the instant case have been identified with great care and specificity, and they are no more voluminous than documents whose disclosure has been compelled in a variety of cases arising under the Freedom of Information Act. See, e.g., Wellford v. Hardin, supra (all letters of warning issued to meat and poultry processors over a five year period by the Department of Agriculture); Getman v. NLRB, 450 F2d 670 (D.C.Cir. 1971) (names and addresses of all employees entitled to vote in approximately 35 union elections); Bristol-Myers v. FTC, supra (all information compiled by the agency or in its possession concerning certain specified medicines).

II. THE COURT HAS JURISDICTION OVER THIS CASE BECAUSE THE DOCUMENTS SOUGHT DO NOT COME WITHIN ANY OF THE EXEMPTING PROVISIONS OF THE FREEDOM OF INFORMATION ACT.

A variety of citizen and Congressional reactions against the withholding of information by federal agencies resulted in the enactment of the Freedom of Information Act. The Act was particularly intended to lift the veil of secrecy from documents withheld long after they had become historical or no longer had any governmental use. S. Rep. No. 813, 89th Cong., 1st Sess. (1965); cf. Cooney v. Sun Shipbuilding & Drydock Company, 288 F. Supp. 708 (E. D. Pa. 1968). The exemptions from the Act are intended to be narrowly construed and the burden of proof is explicitly placed upon the agency to justify the denial of access to a qualified member of the public seeking to inspect particular records. Soucie v. David, 448 F.2d 1067 (D.C.Cir. 1971); Getman v. NLRB, 450 F.2d 670 (D.C.Cir. 1971). In doubtful cases, moreover, where the agency either has waived the exemption by prior disclosures or has failed to introduce sufficient evidence that the exemption applies, disclosure rather than confidentiality is required. Bristol-Myers Company v. FTC, 424 F.2d 935 (D.C.Cir.), cert. denied, 400 U.S. 824 (1970).

A. The documents sought by the plaintiff have served their law enforcement purpose, are of no current investigatory use and therefore are not exempt from disclosure under 5 U.S.C. § 552(b)(7).

Defendants claim that the documents at issue need not

be disclosed because they are "investigatory files compiled for law enforcement purposes" and therefore exempt under subsection (b)(7) of the Act. In view of the age of the documents; the successful prosecution, conviction, and imprisonment of the subject of the investigation; and the failure of the defendants to offer any evidence that the documents have any continuing investigatory use, [1] the exemption does not apply.

Congress clearly specified that the purpose underlying the investigatory files exemption was to prevent prejudice to pending law enforcement proceedings. Thus the Senate Report on the bill clearly states that investigatory files are "files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court." S. Rept. at 9 [emphasis supplied].

For this reason the courts of this circuit and elsewhere

1/ The defendants' sole attempt to justify the withholding of the Hiss files on the ground that they have a continuing law enforcement purpose is contained in ¶ 8 of the Mintz Affidavit:

> 8. Further, the matters described in this affidavit should continue to be held in confidence because the controversy surrounding Alger Hiss still exists. In view of the publicity received by the Hiss perjury case and the continuing contentions of Alger Hiss, it is impossible to state the information contained in these files will not have to be produced for a legal proceeding.

This conclusory and speculative assertion in no way suggests that further proceedings against Hiss are contemplated.

have consistently held that the exemption is inapplicable when there is no cognizable law enforcement interest in avoiding premature disclosure of evidence in a pending or reasonably contemplated proceeding. In Bristol-Myers Company v. FDC, 424 F. 2d. at 939, for example, the Court of Appeals declared that the "investigatory files" exemption is available to an agency only "[i]f further adjudicatory proceedings are imminent." Similarly, the Fourth Circuit has recognized the purpose of the exemption to be the prevention of "premature discovery by a defendant" of the case against him, Wellford v. Hardin, 444 F.2d 21,23 (4th Cir. 1971), a recognition previously made by Judge Higgenbotham in Cooney v. Sun Shipbuilding & Drydock Company, 288 F. Supp. 708, 711-12 (E.D.Pa. 1968):

> A primary purpose of the exemption is to avoid a premature disclosure of an agency's case when engaged in law enforcement activities. [emphasis in original].

Indeed, even under circumstances where no law enforcement proceeding had already occurred (as it has in the case at bar), the exemption was held not to apply when the agency "has not proferred any facts that would show it contemplated within the reasonably near future a law enforcement proceeding based upon the materials sought." Schapiro v. SEC, 339 F. Supp. 467, 469 (D.D.C. 1972) (disclosure of investigative information compelled six years after being compiled).

Nothing in the cases cited by the defendants is to the contrary. Each of these cases--with one exception--was brought by the subject of an investigation or law enforcement proceeding who was seeking to make improper use of the Act as an additional means of discovery. As Judge Bazelon pointed out in Bristol-

Myers v. FTC, 424 F.2d at 939, the investigatory files exemption is the Act's safeguard against such abuse:

> 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,' H.R. Rept. No. 1497, 89th Cong. 2nd Sess. 11 (1966).

For this reason the District Court in Barceloneta Shoe Corporation v. Compton, 271 F. Supp. 591 (D.P.R. 1967), the case principally relied upon by defendants, refused to allow parties who had been charged with violating the Labor Management Relations Act of 1947 to inspect, pursuant to a demand under the Freedom of Information Act, "'any statements or evidence' received by [the defendant] during the course of his investigation of the alleged unfair labor practice." 271 F. Supp. at 593. Similarly, in NLRB v. Clement Brothers, 407 F.2d 1027, 1030-31 (5th Cir. 1969), the plaintiffs were simultaneously engaged in NLRB enforcement proceedings and unsuccessfully sought the disclosure of "all prehearing statements taken by Board agents in the course of investigating the unfair labor practice charges"; and in Benson v. United States, 309 F. Supp. 1144, 1145 (D. Neb. 1970), the plaintiff pointlessly requested the Air Force to provide him with "certain statements which he claims will aid him in preventing his discharge."

Frankel v. SEC, 460 F.2d 813 (2d Cir. 1972) and Aspin v. Department of Defense, 348 F. Supp. 1081 (D.D.C. 1972), also relied upon by defendants, are similarly inapposite because they involved requests for investigatory information in cases still pending. In Frankel the court carefully recognized that

"the Commission has not affirmatively decided that no further action will be taken against the individuals or corporations connected with the transactions and occurrences which were investigated," 460 F.2d at 815, while in Aspin, the exemption applied to investigative information concerning the "My-lai incident" in South Vietnam because Lt. Calley's court martial was pending on appeal.

There is no basis in the Act or its legislative history for defendants' bald assertion that documents which "have not been made a part of the record in agency proceedings" are not disclosable [Def. Mem., P.6]. On the contrary, much of the information disclosed under the Act is not part of agency proceeding records, see, e.g., Getman v. NLRB, 450 F.2d 670 (D.C.Cir. 1971), and is requested for that very reason. In making this unfounded assertion the defendants are apparently trying to clothe in more general terms their Draconian rule that FBI files are absolutely privileged from disclosure in perpetuity if they are not introduced in evidence by the government. This "rule", like the more general one, has been consistently rejected by the courts in ruling on discovery motions in civil proceedings. See, e.g., Zimmerman v. Poindexter, 74 F. Supp. 933, (D. Hawaii 1947), aff'd, 132 F. 2d 442 (9th Cir.), cert. denied 319 U.S. 744 (1948) (FBI ordered to produce investigative reports pertaining to plaintiff's alleged wrongful imprisonment); United States v. Cotton Valley Operators Comm., 9 F.R.D. 719, 720 (W.D. La. 1949), aff'd by equally divided court, 339 U.S. 940 (1950) (failure by government as plaintiff to produce FBI documents for inspection on defendant's discovery motion resulted in dismissal of complaint). Cf.

Mackey v. United States, 351 F.2d 794 (D.C.Cir. 1965) (District Court in error for quashing subpoena of FBI files by criminal defendant); Capitol Vending Company v. Baker, 35 F.R.D. 510 (D.D.C. 1965) (subpoena of FBI documents by civil litigant, which were directly relevant to current prosecution, quashed, but held renewable when prosecution concluded).

Finally, the defendants' reliance on the recent decision of the Fifth Circuit in Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972), is also misplaced. The sole issue in that case was whether the name of an informer who supplied information about the capacity of the plaintiff to serve as a commercial airline pilot under an express promise of confidentiality should be disclosed. There is no such issue in this case, since the plaintiff has consistently maintained in all his requests to the defendants that he is "willing to use any materials that are available [for use by scholars] under whatever conditions and restrictions the Bureau feels necessary" [Complaint, Exhibit B]. Such conditions, of course, could include the deletion of the names of any live informers in order to protect their privacy and the confidentiality of their communications. See Davis, The Freedom of Information Act: A Preliminary Analysis, 34 U. CHI. L. REV. 761 (1967). Cf. Getman v. NLRB, supra. Since the bulk of the Mintz Affidavit is addressed to the need for informer protection, the defendants' chief objection to the disclosure of the documents as investigatory files must fall once the disclosure is properly conditioned in order to provide

such protection. Moreover, since most of the documents are between twenty-five and forty years old, the number of live informants who require protection must be extremely limited.

B. The documents are not exempt from disclosure under 5 U.S.C. § 552(b)(1) because the defendants have failed conclusively to demonstrate that each documents bears on its face a current classification, or that each document has been properly reviewed for downgrading and declassification, pursuant to Executive Orders 10501 and 11652.

Relying on the Supreme Court's recent decision in Environmental Protection Agency v. Mink, 41 U.S.L.W. 4201 (January 23, 1973), the defendants maintain that the documents plaintiff is seeking are exempt from disclosure because they "contain sensitive matters which were classified in order that they would be kept secret in the interests of the national defense or foreign policy." [Mintz Affidavit, ¶5A] [emphasis supplied]. Significantly, this claim is made for the first time in defendants' motion papers, apparently as an afterthought to their administrative denials of plaintiff's request for access to the Hiss documents, each of which were made prior to the Supreme Court's decision in Mink [see Complaint, Exhibits C,E and F].

For several reasons, the defendants' ambiguous assertion is insufficient to bring the documents within the terms of Exemption 1. First,the defendants do not even claim that the documents are currently classified pursuant to Executive Order 11652, but only that they "were classified", or at least that "sensitive matters" contained within some of the documents were classified. Not only does this characterization create an ambi-

guity' about the current status of the documents, it completely fails to satisfy the requirements of Section 4(A) of Executive Order 11652, which provides that:

> Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

The defendants have failed to show that each of the documents bears a current classification on its face, or, if any are classified, that they have been given a portion-by-portion declassification review so that nonsensitive material can be excerpted. 2/ Nor is the indufficiency of defendnats' Exemption 1 claim limited to these failures of proof. Defendants have also failed to

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2/ A prime example of such portion-by-portion declassification was carried out under the supervision of a federal district court in Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 788 (D. Cir.), cert. denied, 404 U.S. 917 (1971), where a secret portion of an evaluation by the Atomic Energy Commission was excised from the document, which was then declassified.

This practice was specifically recommended by President Nixon in his statements accompanying the promulgation of Executive Order 11652, expressing dissatisfaction with over-classification:

> A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which portions of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and innocuous portions of neither paper could be released.
>
> To the extent practicable, each classified document under the new systemwill be marked to show which portions are classified, at what level, and which portions are unclassified. 9 Presidential Documents 544 (Mar. 13, 1972) [emphasis supplied].

show, assuming the documents are in fact currently classified, that any of the requirements of Executive Order 11652 concerning downgrading and declassification have been satisfied. For example, Section 5(D) of the Order provides that "after the expiration of ten years from the date of origin, [a document classified prior to the effective date of the Order] shall be subject to a mandatory classification review . . ." [emphasis supplied]. Following such review, the document shall be declassified unless it falls into one of four exemption categories, in which case the reviewing official "shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification." The categories, specified in Section 5(B), are as follows:

> (1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.
>
> (2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources and methods.
>
> (3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.
>
> (4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

Since each of the documents at issue in this case is at least twenty years old, they are all subject to automatic declassification review. Exemption from declassification "shall be kept to the absolute minimum" under the terms of Section 5(b) of the Executive Order, and no document can remain classified unless it is expressly shown to fall within one of the four exempt categories. Defendants, however, have made no such

showing, and have based their claim of continued exemption solely upon the ambiguous and conclusory statement in the Mintz Affidavit that "[u]pon receipt of the complaint in this suit, we undertook a review of certain of these matters and concluded that they should continue to be kept secret in accordance with the classification standards of Executive Order 11652" [Mintz Affidavit, ¶5A] [emphasis supplied].

Many of the documents plaintiff is seeking to inspect are between thirty and forty years old. Declassification of these documents (assuming again they are in fact currently classified at all) is virtually mandated by Executive Order 11652, and the defendants have totally failed to demonstrate any basis for exemption. Section 5 (E)(2) of the Order provides as follows:

> All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E)(1) above. In such case, the head of the Department shall also specify the period of continued classification.

The extremely narrow basis for exemption provided in Section 5(E)(1), and the determination of such exemption by the "head of the Department" (in this instance, the Attorney General), are totally lacking in this case. Section 5(E)(1) provides:

> (1) All information and material classified after the effective date of this order shall, whether or not

> declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

For all these reasons this court cannot properly conclude that the documents are covered by Exemption 1 of the Act. Indeed, Justice White carefully pointed out in his opinion for the majority in Mink that a failure to comply with the requirements of Executive Orders 10501 and 11652 would have precluded the government from asserting the applicability of the exemption:

> The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1 and the duty of the District Court under 552(a)(3) was therefore at an end. 41 U.S.L.W. at 4205.

In the case at bar, on the other hand, both the fact of the classifications and the documents' characterizations have been squarely put in issue by the defendants' own motion papers.

Finally, quite apart from their failure to satisfy the applicable classification requirements, the defendants have made no showing that they have complied with an additional requirement of Executive Order 11652 with regard to plaintiff's request for access to the Hiss documents. Section 12 of the Order provides that:

> The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall

not apply to persons outside the executive branch who are engaged in historical research projects . . .; Provided, however, that in each case the head of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised [emphasis added]

In the Complaint [¶3; Exhibit D] and his affidavit, plaintiff has set forth his scholarly qualifications to conduct an unbiased and discrete review of the historical documents he is seeking to inspect. Nothing in the Mintz Affidavit demonstrates that the defendants have reviewed his request in light of the special consideration to which it is entitled under Section 12 of the Executive Order, if the documents he is seeking are in fact currently classified pursuant to the Order.

C. Plaintiff's access to the files would not constitute a clearly unwarranted invasion of personal privacy, and is therefore not precluded by 5 U.S.C. §552 (b)(6).

Defendants' final ground for denying the plaintiff's request for access to the Hiss-Chambers files is that the files are barred from disclosure under the privacy exemption from the Freedom of Information Act.

This objection is baseless. Since his very first request in 1969 to inspect the files during the course of his research, plaintiff has consistently indicated his willingness to do so "under whatever conditions and restrictions the Bureau feels necessary" [Complaint, Exhibit B]. One of the conditions contemplated by the plaintiff is the deletion of names of persons who may be the subjects, in the words of Inspector Mintz, "of unfounded statements and allegations later found to be false"

[Mintz Affidavit, ¶5C]. Such deletion is a commonplace solution to potential invasions of privacy under the Act, e.g., Wellford v. Hardin, 315 F. Supp. 768 (D.D.C. 1970), aff'd., 444 F.2d 21 (4th Cir. 1971); Grumman Aircraft Engineering Corporation v. Renegotiation Board, 425 F. 2d 578 (D.C. Cir. 1970); Rose v. Department of the Air Force, ___F. Supp.___ (S.D.N.Y. December 19, 1972), and any administrative difficulties in accomplishing it are not the proper concern of the courts. See, e.g., Wellford v. Hardin, 444 F.2d at 24.

Once the deletions are properly made the defendants cannot logically press their objection. As one district court recently noted under similar circumstances:

> Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy. It is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of the sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder to be released. Rose v. Department of the Air Force, supra, Slip Op. at 4-5.

With this in mind the precise language of the exemption should be noted. It is only when disclosure "would constitute a clearly unwarranted invasion of personal privacy" that such disclosure is excused. [emphasis supplied]. The legislative history indicates that the use of the words, "clearly unwarranted" was not fortuitous, but the product of carefully considered Congressional policy favoring disclosure.[3/] In NLRB v. Getman,

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3/ The Treasury Department, for example, suggested dropping the word "clearly," and the NLRB went even further, recommending the deletion of "clearly unwarranted," so that non-disclosure would have been permitted whenever disclosure would result in any invasion of privacy. Testimony of Edwin Rains, Assistant

(footnote cont'd)

450 F.2d 670 (D.C. Cir. 1971), the case principally relied upon by the defendants, for example, the very names and identifying information which plaintiff would delete from the files he is seeking in the instant case were ordered disclosed, because the court found that their disclosure would not clearly result in an invasion of privacy. In this case, therefore, it is inconceivable that the defendants could not protect living persons whose privacy would clearly be invaded "by deleting identifying features of the transcripts and documents, before release . . . ." 4/ Schapiro v. SEC, 339 F. Supp. 447 , 471 (D.D.C. 1972).

3/ cont'd.
General Counsel, Hearings on S. 1160 before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 36 (1965) ('Senate Hearings"); Testimony of Fred B. Smith, Acting General Counsel, Hearings before a Subcommittee of the Committee on Government Operations of the House of Representatives on H.R. 5012, 89th Cong. 1st Sess. 56 (1965) ("House Hearings"); Testimony of Mr. Clark R. Molenhoff, House Hearings p. 151; Testimony of William Feldesman, Solicitor, NLRB, Senate Hearings p. 491; House Hearings 257. Congress refused, however, to delete language it considered critical in limiting the scope of the exemption. See S. Rep. 9 H. Rep. 11.

4/ The defendants have asserted, at p. 11 of their Memorandum, an "additional controlling consideration" that it is "a violation of due process . . .to seek to compel an organization to release the names and addresses of all of its members and agents . . . ." Plaintiff fails to see how the protection of freedom of association

(footnote cont'd.)

III. DEFENDANTS' DENIAL OF PLAINTIFF'S REQUEST FOR ACCESS TO THESE DOCUMENTS IS AN ARBITRARY INTERFERENCE WITH FIRST AMENDMENT INTERESTS BECAUSE SIMILAR REQUESTS FOR ACCESS HAVE PREVIOUSLY BEEN GRANTED TO AUTHORS, SCHOLARS AND OTHER PERSONS.

The Freedom of Information Act is based on the philosophy that an informed public is essential to the proper functioning of a representative democracy. As President Johnson commented when he signed the new law:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits . . . 2 Weekly Compilation of Presidential Documents 895, July 11, 1966.

The Reports of the House and Senate Committees that considered the Act reflect similar viewpoints. The House Committee on Government Operations concluded, for example, that:

> A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a truism needs repeating . . . House Report No. 1497, supra at 12. See also Senate Report No. 813, supra at 3.

This principle is reflected in the First Amendment, which protects not only the right of citizens to speak and publish, but also the right of the public to receive and hear such speech and information. See Martin v. City of Struthers,

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4/ cont'd.
has any relevance whatsoever to the privacy considerations defendants are ventilating in attempting to seal off the documents at issue in this case, and suggests that the defendants are misleading the court by injecting such a spurious "additional consideration".

319 U.S. 141, 143 (1943); Lamont v. Postmaster General 381 U.S. 301, 308 (1965) (Brennan & Goldberg, JJ., concurring); Stanley v. Georgia, 394 U.S. 557, 564 (1969); New York Times v. Sullivan, 376 U.S. 254,270 (1964); see generally Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C.Cir. 1966) Thus, the Act must be seen as an affirmative effort on the part of Congress to give meaningful content to the system of freedom of expression as provided by the First Amendment. See Emerson, The System of Freedom of Expression (1971), Chapter XVII.

Because the public interest in disclosure of government documents under the Freedom of Information Act rises to Constitutional stature, Congress has carefully limited the circumstances under which this interest may be governmentally restricted to the nine exemptions provided in subsection (b) of the Act. 5/

These exemptions touch on First Amendment interests and must therefore be construed as "narrow, definite and objective standards to guide the licensing authority," Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969). Moreover, they must be applied where applicable in a "uniform, consistent and non-discriminatory" manner by federal agencies receiving requests for

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5/ Subsection (c) provides: "This Section [5 U.S.C.§552] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." The purpose of this provision is crystal clear. As the Senate Report stated:

> The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions. S. Rept. at 10

The House Report contains very similar language. See House Rept. at 11.

documents. See Cox v. Louisiania, 379 U.S. 536, 545 (1965).

Plaintiff maintains that none of the exemptions is applicable to the documents he wishes to inspect. Even if they were applicable, however, the defendants have failed to apply them in a non-discriminatory manner and cannot now assert them against Dr. Weinstein. Paragraph 13 of the Complaint alleges that the defendants have "selectively and arbitrarily allowed persons other than plaintiff access to at least some of the items listed in paragraph 6, supra, and to other similar FBI documents." These persons include Don Whitehead, author of The FBI Story; Frederick L. Collins, author of The FBI in Peace and War; Win Brooks, author of "How the FBI Trapped Hiss", American Weekly (September 1950); and the authors and producers of the nationwide television series, "The FBI". In an affidavit filed with his opposition to defendants' motion to dismiss, or, in the alternative, for summary judgment, plaintiff has set forth the basis for this allegation, which he intends further to substantiate through discovery. 6/

The Supreme Court has long established that freedom of expression or inquiry cannot be arbitrarily regulated. In Niemotko v. Maryland, 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. Concluding that the

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6/ The allegation as substantiated in plaintiff's affidavit, of course, must be taken as true in the face of either of the defendants' alternative motions. Rules 12 (b)(1), 12 (b)(6) and 56, F.R.C.P. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

permit was denied because of the city's "dislike for or disagreement with the Witnesses or their views," the Court held that refusal violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments." 340 U.S. at 272. See also Fowler v. Rhode Island, 345 U.S. 67 (1953).

The principle enunciated in Niemotko is that while the regulation of protected First Amendment activity may itself be proper, such regulation must be "even-handed" to a fault. See, e.g., Edwards v. South Carolina 372 U.S. 229 (1963). In Cox v. Louisiana, 379 U.S. 536, 555-56 (1965), for example, the principle was explained as follows:

> We have no occasion in this case to consider the constitutionality of a uniform, consistent, and non-discriminatory application of a statute forbidding all access to streets and other facilities for parades and meetings. Although the statute here involved on its face precludes all street assemblies and parades, it has not been so applied and enforced . . . . [emphasis supplied].

Last term the Supreme Court had occasion three times to pass on the constitutionality of discriminatory denials of licenses to engage in regulated speech activity, and in all three instances the discrimination was struck down. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) the Court held that the prohibition against picketing not related to a labor dispute, within 150 feet of a public school, was a denial of equal protection because it made an impermissible distinction between labor picketing and other peaceful forms of picketing. In language very relevant to the case at bar, Mr. Justice Marshall, writing for a unanimous Court, pointed out that:

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the

> use of a forum to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are more worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas' [citing A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1948)], and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. 408 U.S. at 96.

See also Healy v. James, 408 U.S. 169 (1972) (arbitrary denial of campus organization status to Students for Democratic Society); Flower v. United States 407 U.S. 197 (1972) (conviction for leafletting on military base to which public had access, reversed).

This case presents issues strikingly similar to those in Mosley. Plaintiff has applied for a license under the Freedom of Information Act to inspect documents in the possession of the defendants, and he has indicated his complete willingness to submit to whatever conditions may properly be imposed on his access to the documents. Nevertheless, his application has been arbitrarily denied while other authors have been given access to these and similar FBI documents, under circumstances which give rise to a presumption that the defendants approved the research purposes of those who were granted access while disapproving of the research of Dr. Weinstein.

This discriminatory conduct is not only proscribed by the Niemotko principle where First Amendment interests are at stake. Plaintiff's denial of access where others have been permitted is based upon an arbitrary administrative distinction which must fall of its own weight regardless of the rights or interests involved. In granting access to others the defendants have

failed to follow their own regulations, and they cannot now be heard to say that they wish to enforce them against the plaintiff. Cf. Peters v. Hobby, 349 U.S. 331, 342 (1955). Such arbitrary administration has been proscribed in a wide variety of contexts beyond the protection of the First Amendment. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (voting); Skinner v. Oklahoma, 315 U.S. 535 (1942) (procreation).

CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss, or, in the alternative, for Summary Judgment, should be denied.

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