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U.S. Court of Appeals

GOVERNMENT INFORMATION
Exemption 3

Freedom of Information Act Exemption 3 for documents specifically exempt by statute does not apply where statute authorizes secrecy in public interest.

Robertson, et al. v. Butterfield, et al., U.S. App. D.C. No. 72-2186, May 9, 1974. Affirmed in part, remanded in part per Fahy, J. (Bazelon, C.J., concurs; Robb, J., Dissents). Harold H. Titus, Jr., with Robert E. Kopp and Thomas G. Wilson for appellants. Alan B. Morrison and Ronald L. Plesser for appellees. Trial Court—Waddy, J.

FAHY, J.: The appeal raises the question whether the Federal Aviation Administration is obligated under the Freedom of Information Act, 5 U.S.C. §552, to disclose to appellees, plaintiffs in the District Court, certain reports in the files of the Administration. These reports, compiled under what is known as the System Worthiness Analysis Program (SWAP), consist of analyses made by employees of the Administration of the operation and maintenance performance of airlines, under the responsibility of the Administration to regulate the safety of civil aeronautics. Special teams of experienced inspectors make periodic visitations of airlines to inspect and analyze their safety and maintenance operations. The findings and recommendations for corrective action are disclosed to the airline management in a meeting of Administration and airline personnel. A final SWAP report is thereafter prepared, containing the findings and recommendations of the inspection team. Appellees requested but were denied access to those reports for the year 1969. While an intra-agency appeal was pending the Air Transport Association, on behalf of numerous airlines which are members, requested that the Administrator issue an order under section 1104 of the Federal Aviation Act of 1958 withholding SWAP reports from the public. The Administrator, complying, ruled that all SWAP reports, not only those requested by appellees, but all in existence and thereafter to be compiled, should be withheld from

(Contd. on p. 1143, Col. 1 - Exemption 3)

D.C. Court of Appeals

CRIMINAL LAW & PROCEDURE
Indecent Act

Criminal statute prohibiting lewd, obscene, and indecent act held to be unconstitutionally vague.

District of Columbia v. Walters, et al., D.C. App. No. 6972, May 9, 1974. Affirmed in part, vacated in part per Kern, J. (Kelly and Fickling, JJ., concur). Leo N. Gorman with C. Francis Murphy and Richard W. Barton for appellant. Peter Weisman for appellees. Trial Court—Halleck, J.

KERN, J.: Each appellee was charged on a printed form information by a check made solely in the box designating "INDECENT ACT . . . commit a lewd, obscene and indecent act . . . in violation of Section 22-1112(a) of the District of Columbia Code." The Police Department forms prepared by the arresting officers and received into evidence by the trial court recite that Hubert Walters and the other eight appellees were arrested inside a commercial establishment in the District of Columbia for engaging in acts of mutual masturbation.

Appellees moved to dismiss the informations on the ground that the part of the statute in question, viz., the third clause of Section 22-1112(a), is unconstitutionally "vague on its face . . . and overbroad." A hearing was held on their motions at which the Director of the Morals Division of the Metropolitan Police Department testified that he had neither received from his superiors nor transmitted to his subordinates any guidelines for the enforcement of the statute in question and that he interpreted the statutory prohibition against "any other lewd, obscene or indecent act" as proscribing the touching of the genital areas or the display of these portions of the body in public. According to his further testimony, he left to each branch of his Division responsibility "for having their own standard of operation and guidelines" and the interpretation of statutes is "passed down" by officers to new recruits.

The Lieutenant Commander of the Prostitution, Prohibition and Obscenity

(Contd. on p. 1141, Col. 2 - Act)

D.C. Superior Court

DOMESTIC RELATIONS
Jurisdiction

D.C. Superior Court has no jurisdiction to declare marriage valid where defendant is not a resident of D.C. and not personally served.

Bassford v. Bassford, Superior Ct. D.C., Family Division No. D 3781-73. April 24, 1974. Opinion per Moultrie, J.. Aaron M. Levine for plaintiff. Paul M. Parent for defendant.

MOULTRIE, J.: The above-captioned matter came on to be heard upon defendant's motion to dismiss for lack of jurisdiction. At issue is whether this Court lacks jurisdiction to hear plaintiff's complaint to affirm the validity of a marriage where defendant, a nonresident, received notice of the proceedings by substituted service.

Plaintiff and defendant were married in the State of Connecticut on September 7, 1968. Until 1972, the parties lived together as man and wife in various locations, but never in the District of Columbia. On July 17, 1972, in the Western section of Port-au-Prince, Haiti, a decree of divorce was entered allegedly disbanding the bonds of matrimony between the parties. The validity of this divorce is the subject of plaintiff's complaint.

Plaintiff avers she is an adult bona fide resident of the District of Columbia having been so for more than one year next preceding filing of the complaint, an averment which is unchallenged. Defendant currently resides in the Republic of Panama.

Defendant was notified of the instant action in Panama, where he was per-

(Contd. on p. 1141, Col. 1 - Jurisdiction)

TABLE OF CASES

United States Court of Appeals

D.C. Court of Appeals

D.C. Superior Court

than what offends them, Smith v. Goguen, supra at 4397, and impermissibly delegates to them basic policy matters to be resolved on an ad hoc, after-the-fact basis with the attendant dangers of arbitrary and discriminatory application. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

We deem applicable to the instant case the Supreme Court's comment in Goguen that "perhaps the most meaningful aspect of the vagueness doctrine is not actual notice but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies."

* * *

Our determination that the third clause of D.C. Code 1973, §22-1112(a) is unconstitutional renders moot the question of the police department's notification of arrests under that statute. We vacate, however, the order of the trial court insofar as it purports to enjoin notification of arrests for all other sex offenses, since there is no person before the court who has sustained (or represents anyone who has sustained) a direct injury as a result of the notification policy. To invoke the judicial power to restrain executive action a party must show that he has suffered or is immediately in danger of suffering a direct injury as the result of that action. Laird v. Tatum, 408 U.S. 1, 13 (1972). The existence of a policy of transmitting information about arrests for sex offenses does not, in and of itself, entitle a court to act to effect that policy. Accordingly, we affirm the trial court's order dismissing the informations but vacate the order insofar as it attempted to affect the police notification procedures.

EXEMPTION 3

(Contd. from p. 1137, Col. 1)

public disclosure because "disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public."

I

Appellees' suit in the District Court for injunctive relief under the Information Act ensued. The court granted their motion for summary judgment as to Count I of the Complaint, which raised the issue as to the SWAP reports, and ordered the Administrator to release the reports, holding, "the documents sought by plaintiffs in Count I are, as a matter of law, public and non-exempt within the meaning of 5 United States Code 552. . . ." All other counts were dismissed.

No other explanation of the decision appears, but it is clear from the above posture of the case that Exemption (3) of the Information Act, relied upon by appellants in the District Court, was held not to apply. That exemption protects from disclosure matters "specifically exempted from disclosure by statute." 5 U.S.C. §552(b)(3). We are accordingly faced with the question whether Exemption (3), considered with the Administrator's action under section 1104 to which we have referred, protects the reports from disclosure as matters "specifically exempted from disclosure by statute." We think not, for reasons now explained.

II

This court has continued to adhere to the position that exemptions of the Information Act are to be narrowly construed. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, ____ U.S. ____ (1974); Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied, ____ U.S. ____ (1974). The ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny. Section 1104 of the Aviation Act fails to do this. It is, rather, a congressional delegation to the Board or Administrator of the Aviation Authority to weigh whether a person objecting to disclosure would be adversely affected by it, and whether, even if so affected, disclosure nevertheless "is not required in the interest of the public."

In EPA v. Mink, 410 U.S. 73 (1973), the Supreme Court considered a specific exemption by statute, Exemption (1) of the Information Act itself, which exempts matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. §552(b)(1). The documents sought to be disclosed had been classified as secret pursuant to Executive Order 10501. Exemption (1) was construed to be a specific reference by Congress itself to a definite class of documents which were not to be disclosed. 410 U.S. at 83. Their disclosure accordingly was not required. No particular class of documents as such are referred to in section 1104 of the Aviation Act. The Administrator ordered the SWAP reports not to be disclosed although they did not fall within any congressionally specified statutory category. It would be unacceptable to hold that his conclusion that disclosure of any and all of the reports requested would adversely affect the interests of each airline covered, and is not required

"in the interest of the public," is a specific exemption by section 1104. Not only would such an interpretation over-strain the language of Congress in Exemption (3), see Cutler et al. v. C.A.B., C.A. No. 74-8, ____ F.Supp. ____ (D.D.C., April 3, 1974), it would also be at odds with the history and purpose of the Information Act considered in its relationship to section 1104, a matter further to be considered.

III

* * *

IV

Both statutes—section 1104 and the Information Act—have to do with disclosure of government information. They are pari materia and should be construed together so as to effectuate the over-all congressional policy. This approach is peculiarly appropriate in a case involving section 1104, in which the final statutory standard upon which disclosure turns is the public interest. The Information Act is now the basic congressional expression of the public interest with respect to information in the possession of the federal government. When a previously enacted statute, such as 1104, has provided such a standard the subsequently enacted and comprehensive Information Act, in the varied circumstances enumerated in its provisions, is the guide to the congressional intent with respect to the public interest. This view is confirmed indirectly by the Supreme Court in Mink. The Court there discussed the legislative development culminating in the replacement by the Information Act of section 3 of the Administrative Procedure Act. 5 U.S.C. §1002 (1964). That section, the Court stated, fell "far short of its disclosure goals and came to be looked upon more as a withholding than a disclosure statute." Continuing, the Court said that section 3 was:

> . . . plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." (Emphasis added.)

410 U.S. at 79.

Accordingly, we believe it follows that the public interest standard of section 1104 is not a specific exemption by statute within the meaning of Exemption (3) of the Information Act.

We are not unmindful that many important regulatory statutes, such as the Federal Communications Act and the Natural Gas Act, invest agencies of government with authority to act upon the basis of the public convenience and necessity, or the public interest; but in so legislating Congress has guided action under these general standards by requiring hearings, with findings supported by evidence directed to the decisional catalyst so phrased, followed by the right of judicial review of the validity, procedurally and substantively, of the action taken. Nothing of the sort is attached to a determination of non-disclosure under section 1104. Even were we in error in holding action under that provision not within Exemption (3), such action in our opinion would require that the courts build upon the section at least procedural safeguards for review of the reasons for the determination, supported by findings to enable the court to appraise, as under the Information Act, the validity of nondisclosure.

V

In holding that Exemption (3) does not prevent disclosure of the SWAP reports we realize that appellants desire to press their claim under Exemption (7), especially in light of our decision in Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973) (en banc). Therefore, we affirm the summary judgment for appellees insofar as appellants rely upon Exemption (3) but remand the case for consideration of Exemption (7) or any other defense to disclosure appellants may raise except Exemptions (1) and (3).

Order granting summary judgment to appellees on Count 1 is affirmed, and case in other respects remanded to District Court for further proceedings not inconsistent with this opinion.

ROBB, J., dissenting: The Federal Aviation Administration is required by law "to promote safety of flight of civil aircraft in air commerce" by the issuance of standards, rules and regulations. 49 U.S.C. §1421(a). Under 49 U.S.C. §1425(b) the Administrator is also required to employ inspectors who shall advise and cooperate with air carriers in the inspection and maintenance of aircraft, aircraft engines, propellers, and appliances used in air transportation. To carry out these mandates the FAA developed the Systemsworthiness Analysis Program (SWAP).

SWAP investigative teams composed of highly trained and experienced FAA inspectors make periodic visitations to certified air carriers to inspect and analyze their maintenance and safety operations. A SWAP inspection covers the entire operation of the carrier being studied, including such matters as flight crew training, non-flight crew training, airport and communications facilities, flight operations policies and procedures, air carrier records and crew scheduling, and check airmen and examiners. See SWAP Handbook, FAA Order 8000.3C. The investigative team works in close cooperation with airline management to find any area of maintenance, operations, management or performance which needs improvement. To facilitate cooperation and the full and frank disclosure by the airline upon which the system depends, the SWAP program operates with the understanding between the airlines and the FAA that the contents of SWAP reports will not be released to the public. FAA Order 8000.3C para. 204. The findings of a SWAP inspection team are disclosed to the operator under examination, to enable that operator to discuss them intelligently, but they are not made available to any other operator.

Against this background the airlines, invoking section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. §1504, objected to the public disclosure of SWAP reports. The airlines stated:

> As has been set forth by the FAA in a memorandum to its regions dated February 6, 1967, "The SWAP Program requires a cooperative effort on both the part of the company and FAA if it is to work effectively." Information freely given to the FAA SWAP team by air carrier management personnel is not specifically required by the FAR's [Federal Aviation Regulations].
>
> If public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA. The present practice of nonpublic submissions, which includes even tentative findings and opinions as well as certain factual material, encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety—the paramount consideration of airlines and government alike in this area.

(J.A. 100.)

The Administrator sustained the objection, holding that disclosure of SWAP reports "would adversely affect the interests of the airline being investigated and is not required in the interest of the public." I think the Administrator's ruling was justified by exemption (3) of the Freedom of Information Act, 5 U.S.C. §552(b)(3).

Congress did not intend the Freedom of Information Act to repeal all other statutes which restricted public access to government records. * * *

Section 1104 is tailored to the needs and problems of the Federal Aviation Administration—needs and problems which are well illustrated by this case. I cannot believe that this specific statute was overridden or repealed by the general terms of the Freedom of Information Act. The earlier and specific statute should prevail over the later more general enactment. In particular, the later act should not be read to delete the "public interest" standard from every disclosure statute in which it appears—including section 1104.

The Circuit Court of Appeals for the 5th Circuit has held that exemption (3) authorizes the Federal Aviation Administration to withhold information pursuant to section 1104, 49 U.S.C. §1504. Evans v. Dept. of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972). I agree.