

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, )  
 )  
 Plaintiff, )  
 )  
 v. ) CA No. 75-1996  
 )  
 U.S. DEPARTMENT OF JUSTICE, )  
 )  
 Defendant. )

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT


Defendant Department of Justice moves pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment dismissing plaintiff's remaining claims in the above-captioned action against the Department of Justice as described in the attached memorandum.

Respectfully submitted,

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CHARLES F.C. RUFF  
United States Attorney

  
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 U.S. DEPARTMENT OF JUSTICE, )  
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MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

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Statement

On April 25, 1980, the Department of Justice filed a summary judgment motion with this Court. That motion was filed with a sample Vaughn v. Rosen index pursuant to an Order of this Court of February 26, 1980. The summary judgment motion also relied on a "Finding As To Scope of Search" by the Court filed on February 26, 1980.

In a hearing held on August 15, 1980, the Court informed the Department of Justice that the sample Vaughn v. Rosen index was not complete. While the Court recognized that the Department of Justice had acted in good faith in its selection of sample documents, (Tr. Hearing of August 15, 1980, p. 6), the Court determined that some additional items should be produced in order to provide a proper sample for adjudication. Consequently, in the Court's order of September 11, 1980 the Court denied the Justice Department's April 25, 1980 summary judgment motion and set out a very specific procedure for adding items to the existing sample Vaughn v. Rosen index. The Justice Department was given twenty days to comply with these requirements. On October 1, 1980, the additional items with a supplemental Vaughn index were filed with the Court accompanied by explanatory affidavits.

The Order of September 11, 1980, also required the Department of Justice to (a) supply copies of two magazines free of charge to plaintiff after contacting the publishers and (b) make available records of the Offices of the Attorney General and Deputy Attorney

General pertinent to this litigation. The magazines have been furnished (see letter of September 24, 1980, Appendix A) and the Offices of the Attorney General and Deputy Attorney General have been searched without discovering any pertinent records.

(Affidavit of Quinlan J. Shea, Jr., Appendix B.)

Two other items were mentioned at the August 15, 1980 hearing but not incorporated in the Court's September 11, 1980 Order. First, the Department of Justice, having received permission from Time, Inc., agreed to furnish plaintiff certain glossy photographs free of charge. This has now been done (see letter of October 7, 1980, Appendix C). Second, plaintiff's counsel suggested that FBI files existed that had not been produced in accordance with the August, 1977 Stipulation between the parties. This suggestion was later put in memorandum form by plaintiff and filed with the Court on August 20, 1980. A clarification of the memorandum was filed by plaintiff on August 27, 1980. These memoranda, while they have not required action by the court, still appear to indicate the existence of disputed facts. For this reason, the FBI has reviewed all of the issues raised by plaintiff in that memorandum and has found either that the files requested have already been provided to plaintiff or that the files are not responsive to plaintiff's FOIA requests in this case. (See Second Affidavit of John N. Phillips, Appendix D.)

#### ARGUMENT

The Court's Order of September 11, 1980 requires the Department of Justice to perform specific acts. Whether the Department has fully performed so as to justify the summary judgment it now requests is a question of fact. The Department of Justice relies on the previous section of this memorandum and the affidavits attached to support its claim that all such requirements have been met.

Noted in the Affidavit of John N. Phillips attached to the supplemental Vaughn v. Rosen index filed on October 1, 1980 and in the justification sheets of the index itself, are justifications for each deletion claimed pursuant to 5 U.S.C. §552(b). The issue



of whether these deletions are proper is a question of law. The great majority of the deletions referenced in the supplemental index, and indeed in the records as a whole, have been taken pursuant to 5 U.S.C. §552(b)(7)(C) and (D). Legal support for these deletions can be found in defendant's April 25, 1980 memorandum filed with this Court. In the supplemental index, however, are three records classified "Confidential" for which a 5 U.S.C. §552(b)(1) exemption is claimed. The new index also includes deletions of informant symbol numbers pursuant to 5 U.S.C. §552(b)(2). In each of the cases where (b)(2) is used, (b)(7)(D) is relied on as well. The legal basis for relying on (b)(1) and (b)(2) exemptions in this matter is, therefore, explained briefly here.

A. The FBI Correctly Applied FOIA Exemption 1 to the Sample Documents.

FOIA Exemption 1, 5 U.S.C. §552(b)(1), exempts from release matters that are:

specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order.

Executive Order [EO]12065, 43 Fed. Reg. 28949 (1978) requires an agency to review classified documents withheld under Exemption 1. It also prohibits the unauthorized disclosure of materials classified under its auspices. Section 4-101, 43 Fed. Reg. 28957 (1978).

The three sample items containing information withheld under Exemption 1 are Documents 30A, 34A and 39A. They are all classified "confidential" under the classification requirements of EO 12065. The withheld information in documents 30A and 39A was originated by a foreign government and has been withheld pursuant to the requirements of EO 12065, 1-301(b), 1-302 and 1-303. (See MacDonald Affidavits attached to Vaughn index filed October 1, 1980, pp. 2, 13, 15) The withheld portion of 34A, which involves a specific foreign relations matter and concerns intelligence sources and activities, has been withheld pursuant to the requirements of EO 12065, 1-301(c) and (d) and 1-302. (See

MacDonald affidavit pp. 2, 14.)

While this clearly shows that the information in these three documents is presently being withheld properly from plaintiff; it does not, in itself, indicate the propriety of the original withholding. Evidence of this comes from Mr. MacDonald's Second Affidavit (Appendix E).

As explained by Mr. MacDonald, Document 30A was reviewed in 1977 pursuant to Mr. Weisberg's FOIA request and withheld in its entirety under Exemption 7(D) as disclosing the identity of a confidential source. Legal support for the propriety of this original exemption claim is found in the Affidavit of John N. Phillips, pp. 11-14, filed with the Court on October 1, 1980. Mr. MacDonald, reviewing the document in September, 1980, noted that the confidential source was, in fact, a foreign government, and, accordingly, classified the document "confidential" under EO 12065. (MacDonald, Second Affidavit ¶(III)(A) and (B), pp. 2-3.)

As explained by Mr. MacDonald, portions of document 34A were properly classified in 1976 under EO 11652 and reviewed again for classification on September 20, 1977 at which time no declassification action was appropriate. (MacDonald, Second Affidavit, ¶(IV)(A), (B); pp. 3-4.) In connection with the third and latest classification review, the declassification of three paragraphs of the document has occurred as the result of events since 1977 (MacDonald, Second Affidavit ¶(IV)(B), p. 3.)

Document 39A was examined on June 10, 1977 and one paragraph was properly classified as "confidential" according to Mr. MacDonald. (MacDonald, Second Affidavit ¶(V)(A)(B) and (C), p. 4.) Apparently by oversight, no original classification authority stamp was placed on the document in 1977. This procedural error was rectified by Mr. MacDonald when he reclassified the paragraph under EO 12065. (MacDonald, Second Affidavit ¶V(C), p. 4.)

This Court now has before it the two MacDonald affidavits and the justification sheets which are to be accorded "substantial weight" since "[j]udges, moreover, lack the expertise necessary to second guess such agency opinions in the typical national security

FOIA case". Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980). Those documents show clearly that the three documents for which Exemption 1 has been claimed have been both procedurally and substantially properly classified. See Lesar v. Department of Justice, No. 78-2305 (D.C. Cir., July 15, 1980) (Appendix F) at 16; Weissman v. CIA, 184 U.S. App. D.C. 117, 565 F.2d 692 (1977); Serbian Eastern Orthodox Diocese v. CIA, 458 F. Supp. 798, 801 (D.D.C., 1978); Ferry v. CIA, 458 F. Supp. 664, 667 (S.D. N.Y. 1978). Therefore, based upon the evidence in this sample, this Court should uphold the FBI's Exemption 1 claims in this case.

B. The FBI Correctly Applied FOIA Exemption 2 to the Sample Documents

Exemption 2 has been used to justify the deletion of informant symbol numbers assigned to protect the identity of sources. This is a routine internal administrative practice of the FBI. Affidavit of John N. Phillips, pp. 6-7 (attached to Notice of Filing of October 1, 1980).

The propriety of withholding these informant numbers pursuant to Exemption 2 has been repeatedly upheld. See Harold Weisberg v. Kelly, No. 78-249 (D.D.C., filed Feb. 15, 1979, aff'd May 12, 1980) (Appendix G) at 2-3; Lesar v. Department of Justice, No. 78-2305 (D.C. Cir., 15 July 1980.) (Appendix F). The excision of such information has, in any event, been approved pursuant to Exemption 7(D). See e.g., Harold Weisberg v. Kelley, supra at 2-3; Lopez Pacheco v. FBI, 470 F. Supp. 1091, 1103 (D.P.R., 1979). The deletions are proper therefore under either Exemptions 2 or 7(D).

CONCLUSION

For the reasons stated, defendant's motion for summary judgment should be granted.

Respectfully submitted,

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STATEMENT OF MATERIAL FACTS AS TO  
WHICH DEFENDANT CONTENDS THERE IS  
NO GENUINE ISSUE

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Defendant, pursuant to Rule 1-9(h) of the Court's Local Rules, states the following material facts as to which it contends there is no genuine issue:

1. Plaintiff's information requests in this case are contained in letters dated April 15, 1975 and December 23, 1975.
2. A Stipulation between the parties and signed by the Court on August 12, 1977 set up a procedure to expedite the processing of information requested by plaintiff's letters of April 15, 1975 and December 23, 1975.
3. Defendants have provided approximately 53,000 pages of documents to plaintiff in response to plaintiff's request.
4. On February 26, 1980, this Court found that a proper and good faith search had been made for all items responsive to plaintiff's requests in the FBI headquarters' Murkin files and all files of the FBI field offices, except the "Frederick residency."
5. In the Sixth affidavit of S.A. Martin Wood, filed on February 26, 1980, the FBI stated that it had no "Frederick residency", and had completed a search for documents in the office to which documents formerly in Frederick had been sent.
6. On February 26, 1980, this Court ordered a sample Vaughn v. Rosen index justifying the deletions on every 200th document released or to be released.
7. On September 11, 1980, this Court ordered a supplemental Vaughn v. Rosen index, transmittal of two gun magazines to plaintiff and release of all records of the Office of the Attorney General and the Office of the Deputy Attorney General pertinent to



this litigation.

8. In response to the Court's orders regarding the sample Vaughn v. Rosen indices, defendant filed documents and supporting affidavits from the FBI, CIA, Bureau of Alcohol, Tobacco and Firearms, and Department of Justice on April 25, 1980, October 1, 1980 and with this motion, which are hereby incorporated by reference. (See Seventh Affidavit of S.A. Martin Wood, First and Third Affidavit of Janet Blizzard, First Affidavit of John N. Phillips, First and Second Affidavits of Donald R. McDonald and Affidavit of Robert L. Prichett).

9. These affidavits explain exemptions taken in the sample pursuant to 5 U.S.C. §552(b)(1) to protect classified information originated by foreign government sources, identifying specific foreign relations matters and concerning intelligence sources and activities; 5 U.S.C. §552(b)(2) to protect informant symbol numbers; 5 U.S.C. §(b)(7)(C) to protect from unwarranted invasion of privacy the identities of certain individuals who were investigated, third parties, not investigated, about from whom information was recorded, and FBI employees through Section 86 of the FBIHQ MURKIN file; 5 U.S.C. §(b)(7)(D) to protect the identity of third parties and confidential sources through withholding of names, symbol numbers or other identifiers; and 5 U.S.C. §(b)(7)(E) to withhold an interview technique.

10. In response to the Court's order regarding the two gun magazines, the magazines were copied and transmitted to plaintiff at no cost on October 7, 1980.

11. In response to the Court's order regarding records of the Offices of the Attorney General and Deputy Attorney General, defendant files with this Motion the affidavit of Quinlan J. Shea, Jr. indicating that those offices have been searched without discovering pertinent records. This supplements affidavits of Michael E. Shaheen, Stephen Horn, E. Ross Buckley and Mark L. Gross filed by the Department of Justice on August 9, 1976 attesting to the scope of its original search.


12. In response to a complaint from plaintiff during a status hearing on August 15, 1980 that certain FBI files exist that have not been produced in accordance with the Stipulation, defendant has fully reviewed the allegation and responded in the Second Affidavit of John N. Phillips attached to this Motion.

Respectfully submitted,

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Assistant Attorney General

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ORDER

Upon reviewing Defendant's Motion for Summary Judgment and the Memorandum in Support, and filing that it responds fully and completely to the Order of this Court of September 11, 1980 and finding that defendant's deletions from documents produced are justified pursuant to 5 U.S.C. §552(b), it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 1980,

ORDERED that Defendant's Motion for Summary Judgment be, and hereby is granted; and it is

FURTHER ORDERED that plaintiff's claims against defendant in the above-captioned action are dismissed with prejudice except for claims of attorney and consultancy fees, over which the Court retains jurisdiction.

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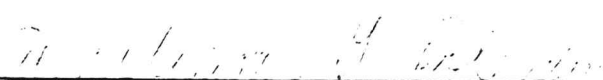
HONORABLE JUNE L. GREEN  
UNITED STATES DISTRICT COURT



CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Defendant's Motion for Summary Judgment was sent by mail, postage prepaid, on the \_\_\_\_ day of December, 1980 to:

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