UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

Plaintiff,

v. Civil Action No. 77-0692

DEPARTMENT OF JUSTICE,
et al.,

Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, pursuant to Rule 56 of the Federal Rules of Civil Procedure, hereby move for summary judgment in the above-captioned action on the grounds that there exists no genuine issue of material fact and defendants are entitled to judgment as a matter of law. In support of this motion, defendants respectfully refer the Court's attention to the affidavits of Michael E. Shaheen, Jr., James P. Turner, and Salliann Dougherty, filed with the Court on February 1, 1978, with attached documents; the affidavits of Lewis L. Small and James F. Walker, filed on this date with attached documents; the Supplemental Affidavit Of James P. Turner, with attached documents, filed on this date; and the memorandum of points and authorities filed herewith.

Respectfully submitted,

BARBARA ALLEN BABCOCK
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STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, PURSUANT TO LOCAL RULE 1-9(h)

Defendants adopt and incorporate by reference as their Statement Of Material Facts As To Which There Is No Genuine Issue, the affidavits of Michael E. Shaheen, Jr., James P. Turner, and Salliann M. Dougherty, filed with the Court on February 1, 1978; the affidavits of Lewis L. Small and James F. Walker, filed on this date; and the Supplemental Affidavit Of James P. Turner, also filed on this date.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiff brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as amended, seeking complete access to particular records maintained by the Department of Justice which pertain to the investigation of the assassination of Dr. Martin Luther King, Jr.[1/] Certain limited portions of these materials have been withheld by the Department as exempt from disclosure under 5 U.S.C. §552(b)(1), (2), (6), (7)(C), (7)(D), and (7)(E),[2/] for the reasons fully described and explained in the affidavits of Michael E. Shaheen, Jr., James P. Turner, Salliann M. Dougherty, Lewis L. Small, James F. Walker, and in the Supplemental Affidavit Of James P. Turner, which have been

1/ It should be noted at the outset that portions of the disputed documents pertain also to the FBI's security investigation of Dr. King, although plaintiff's FOIA request sought assassination investigation records only. See note 3 infra.

2/ Additionally, as is indicated at pages 3 and 7 of the Affidavit Of Michael E. Shaheen, Jr. ("Shaheen Affidavit"), material pertaining to the electronic surveillance of Dr. King between 1963 and 1968 has been withheld pursuant to Judge Smith's January 31, 1977 Court Order in the consolidated cases of Lee v. Kelley, Civil No. 76-1185 and Southern Christian Leadership Conference v. Kelley, Civil No. 76-1186 (D.D.C. 1977). (Attached hereto as Defendants' Exhibit A).

filed with the Court with accompanying expurgated documents. Defendants have now moved for summary judgment on the grounds that there exists no genuine issue of material fact and defendants are entitled to judgment as a matter of law. For the reasons set forth below, and on the basis of the supporting documentation on file with the Court, defendants respectfully suggest that their motion for summary judgment should be granted.

Factual Background

In the Freedom of Information Act request underlying this litigation, plaintiff requested access to certain records maintained by two particular components of the Department of Justice which pertain to the investigation of the assassination of Dr. Martin Luther King, Jr.[3/]

3/ Plaintiff's request, dated February 7, 1977, sought access to the following:

> 1. Any orders, memorandums, or directives instructing the Civil Rights Division to review the investigation into the assassination of Dr. Martin Luther King, Jr.
>
> 2. The report made by Assistant Attorney General J. Stanley Pottinger on the 1975-76 review which the Civil Rights Division conducted of the King assassination.
>
> 3. Any press release relating to a review by the Civil Rights Division of the King assassination.
>
> 4. Any orders, memorandums, or directives instructing the Office of Professional Responsibility to review the investigation of Dr. King's assassination.
>
> 5. Any orders, memorandums, or directives to the Project Team which conducted the review of Dr. King's assassination for the Office of Professional Responsibility.
>
> 6. The 148 [sic] page report by the Office of Professional Responsibility on its review of the King assassination.

Freedom Of Information Request, February 7, 1977 (attached hereto as Defendants' Exhibit B).

The Departmental components involved, the Civil Rights Division and the Office of Professional Responsibility in the Office of the Attorney General, each responded to plaintiff's FOIA request in an expeditious and comprehensive manner.

1. The Civil Rights Division Documents

The Civil Rights Division's portion of plaintiff's request, which comprised its first three paragraphs, sought access to a particular intra-agency report prepared for the Attorney General by former Assistant Attorney General J. Stanley Pottinger, as well as to any other intra-agency documents instructing the Civil Rights Division as to its review of the investigation of Dr. King's assassination.[4/] As regards this latter portion of the request, one responsive document was located and, after appropriate referral to the Attorney General, it was disclosed in its entirety as a discretionary release.[5/] As regards the particular intra-agency report sought by plaintiff, it was identified as consisting of an April 9, 1976 intra-agency memorandum from former Assistant Attorney General Pottinger to the Attorney General, with two attached intra-agency memoranda dated March 31, 1976, which had been prepared for Assistant Attorney General Pottinger by a member of his staff; each of these documents was classified in its entirety on April 9, 1976, pursuant to Executive Order 11652. See

4/ See id. at ¶¶1-2. In paragraph 3 of his request, plaintiff sought a copy of any press release relating to this same subject matter. This portion of plaintiff's request was referred to the Department's Office of Public Information for appropriate processing. See Affidavit of Salliann M. Dougherty ("Dougherty Affidavit"), ¶3. Inasmuch as such materials are by their very nature unquestionably in the public domain, this paragraph appears not to be a part of the controversy in this lawsuit.

5/ This memorandum, dated November 26, 1976, was issued by Attorney General Edward H. Levi and accordingly was referred to the Office of the Attorney General for a release determination. See Dougherty Affidavit, ¶¶4, 7-8.

Affidavit Of James P. Turner ("Turner Affidavit"), ¶2; Dougherty Affidavit, ¶5. See also Affidavit Of Lewis L. Small ("Small Affidavit"), ¶13. Accordingly, plaintiff's request for access to these documents was denied in its entirety, inasmuch as the documents were exempt from disclosure under 5 U.S.C. §552(b)(1).[6/]

Subsequently, the classification of these three documents was reviewed on appeal and it was determined that certain portions of the documents, including the entirety of one of the two March 31, 1976 memoranda (comprising six pages), no longer required classification.[7/] Accordingly, this material was declassified and released to plaintiff, subject only to certain minor excisions of certain names and other identifying data on privacy grounds. See Turner Affidavit, ¶¶4-5; Dougherty Affidavit, ¶¶10-14; Supplemental Affidavit Of James P. Turner ("Supplemental Turner Affidavit"), ¶¶4-6. Thus, most of the contents of these documents has been released, and only that material which is exempt from disclosure pursuant to 5 U.S.C. §552(b)(1) or (7)(C) has been withheld.[8/]

6/ See Dougherty Affidavit, ¶8; Turner Affidavit, ¶3. Additionally, it was determined that these three documents were exempt from mandatory disclosure also pursuant to 5 U.S.C. §552(b)(5), because of their character as intra-agency memoranda, and in certain portions pursuant to 5 U.S.C. §552(b)(7)(C) and (E), because such portions contain personal privacy information or reflect protected investigative techniques or procedures. See id. As is indicated below, Exemption 7(C) continues to be pertinent to these documents.

7/ It was at the same time determined that certain portions of the two remaining documents required reclassification at another classification level. See Dougherty Affidavit, ¶¶10-11; Supplemental Turner Affidavit, ¶3.

8/ It should be noted that the one March 31, 1976 memorandum which was declassified in its entirety contains no privacy information and hence has been released without excision. See Supplemental Turner Affidavit, ¶6. Thus, only the April 9, 1976 memorandum and the other March 31, 1976 memorandum remain at issue; portions of each of these two documents continue to be withheld pursuant to Exemption 1 and Exemption 7(C), as reflected by the expurgated copies of these documents filed with the Court as part of Exhibit A to the Supplemental Turner Affidavit.

2. The Office of Professional Responsibility Documents

The remaining three paragraphs of plaintiff's FOIA request sought access to records pertaining to the Office of Professional Responsibility's ("OPR") "review of the King assassination."[9] By letter dated February 23, 1977 (attached hereto as Defendants' Exhibit D), plaintiff was provided with complete copies of the documents requested in paragraphs 4 and 6 of his request and was advised of the non-existence of any documents in the category described by paragraph 5. See Shaheen Affidavit, ¶11. Subsequently, by letter of March 10, 1977 (attached hereto as Defendants' Exhibit E), plaintiff amended his request to include "all appendix material" associated with the 149-page report provided him pursuant to paragraph 6 of his original request.[10]

In response to this request for the appendices to the report, OPR initially denied further releases in Appendix

9/ See note 3 supra. It should be noted that plaintiff's initial request in paragraph 6 was limited to "[t]he 148 page report" dealing with OPR's review of the King assassination. As is detailed in the Affidavit Of Michael E. Shaheen, Jr., the report to which plaintiff referred was in fact the product of an intradepartmental task force created to review the King assassination investigation by Order of the Attorney General. This group, known as the Department of Justice's Martin Luther King, Jr. Task Force ("Task Force") was disbanded upon submission of its report and its records are now in the custody of the Office of Professional Responsibility. See Shaheen Affidavit, ¶¶1-4, 8.

10/ This 149-page report, entitled "Report Of Department Of Justice Task Force To Review The FBI Martin Luther King, Jr., Security And Assassination Investigations," was submitted to the Attorney General on January 11, 1977 and was made public in its entirety. The three appendices to this report, which contain exhibits (Appendix A), Task Force working papers (Appendix B), and a compilation of all documents reviewed by the Task Force (Appendix C), were not made public, except that most of Appendix A was published together with the report. See Exhibit B to the Affidavit Of Michael E. Shaheen, Jr., at ii-iii.

A, released every page (some with minor deletions) in Appendix B, and withheld the Appendix C materials in their entirety. See Shaheen Affidavit, ¶13. On administrative appeal, the Department undertook substantial releases of the previously-withheld materials in Appendices A and C and further reduced the limited excisions made in certain pages within Appendix B. See Defendants' Exhibit F; Shaheen Affidavit, ¶14.

Thus, all pages of Appendices A, B, and C have now been disclosed in their entirety except for those pages which have released in deleted form[11/] and with the further exception of those appendix volumes (e.g., #17 and #18 of Appendix A; Volumes XIII through XVII of Appendix C) which have been withheld in their entirety. See Shaheen Affidavit, ¶15 and at page 7, ¶5(a). As is indicated in the Index contained within the Shaheen Affidavit, this material is withheld as exempt from disclosure pursuant to Exemptions 1, 2, 6, 7(C), 7(D), and 7(E) of the FOIA, and also pursuant to the specific prohibition of Judge Smith's Order of January 31, 1977.[12/]

11/ These pages were filed, with the basis for each deletion shown, on February 1, 1978, as Exhibit I to the Shaheen Affidavit. Additionally, Exhibit I has been supplemented where necessary by Exhibit A to the Affidavit Of Lewis L. Small.

12/ See note 2 supra. It should be noted that the Exemption 6 issue is no longer part of this case. Despite the best efforts of counsel, however, the parties have been unable to stipulate as to the applicability of any other exemption or even as to the material withheld pursuant to Judge Smith's Order. See Report To The Court, dated March 30, 1978.

Argument

I. The Classified Material Here At Issue Is Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(1)

The first exemption of the Freedom of Information Act provides that Act's disclosure provisions do not apply to records that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

5 U.S.C. §552(b)(1). Thus, once it is established that particular documents are of such nature that they need be kept secret in the interests of national defense or foreign policy, and that these documents are in fact currently and properly classified pursuant to the provisions of an appropriate Executive Order, such documents are thereby exempt from disclosure under the FOIA.

In its recent decision addressing in camera inspection of classified documents, Weissman v. CIA, 565 F.2d 692 (1977), the Court of Appeals for this Circuit discussed the inquiry which must be made upon an Exemption 1 claim:

> If exemption is claimed on the basis of national security, the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated.

565 F.2d at 697.

The classified documents, or document portions, involved in this lawsuit meet every requirement for non-disclosure pursuant to Exemption 1. As is indicated in the Affidavit Of Lewis L. Small, Special Agent of the Federal Bureau of

Investigation,[13] each portion of classified material contained in the requested OPR and Civil Rights Division documents is currently and properly classified in compliance with the substantive and procedural requirements of Executive Order 11652.[14] See Small Affidavit, ¶¶6, 13. The damage to the national security which could reasonably be expected to result from disclosure of these classified materials is specified on a paragraph-by-paragraph basis (and, where necessary, line-by-line) by Special Agent Small and is described in greater overall detail in paragraph seven of his affidavit.

The prospect of such harm to our national interests requires that this information be maintained in the strictest of secrecy, as is recognized by both Executive Order 11652 and Exemption 1 of the FOIA. Accordingly, the evidence of current and proper classification is entitled to substantial weight and compels the finding that this classified information is exempt from disclosure pursuant to 5 U.S.C. §552(b)(1). See, e.g., Maroscia v. Levi, 569 F.2d 1000, 1003 (7th Cir. 1977); Frank v. CIA, Civil No. 77-14-D (S.D. Iowa, September 2, 1977) (slip opinion at 3-4) (attached hereto as Defendant's Exhibit G); Klaus v. Blake, 428 F. Supp. 37, 38-39 (D.D.C.

13/ The Affidavit of Lewis L. Small has been filed by defendants as the primary classification affidavit for all classified documents involved in this lawsuit and effectively supplants the classification discussions contained in the previous affidavits of James P. Turner and William N. Preusse.

14/ The authority to classify documents is derived from a succession of Executive orders, the most current being Executive Order 11652. It specifically enumerates the qualifications of officials empowered to and charged with the duty of classifying documents, or portions thereof, in the interests of the national security. Under EO 11652, the threshold classification criterion is whether disclosure of the information could reasonably be expected to damage the national security or foreign relations. Examples of the types of classified information protected against disclosure include that which would jeopardize intelligence operations, sources, or methods, or sensitive foreign relations matters adversely affecting our national defense. Such information is at issue here.

1976); Bennett v. United States Department of Defense, 419 F. Supp. 663, 665-66 (S.D. N.Y. 1976).[15/]

II. The Informant Symbol Numbers Withheld From The OPR Documents Are Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(2)

The second exemmption of the Freedom of Information Act provides that the Act does not apply to matters that are ". . . related solely to the internal personnel rules and practices of an agency." 5 U.S.C. §552(b)(2). The parameters of this exemption were recently defined by the Supreme Court in Department of the Air Force v. Rose, 425 U.S. 352 (1976), wherein the Court held that "Exemption 2 is not applicable to matters subject to . . . a genuine and significant public interest." 425 U.S. at 369. In so ruling, the Supreme Court quoted Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975) to the effect that

> the line sought to be drawn [in Exemption 2] is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest. . . . Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.

425 U.S. at 365, quoting Vaughn v. Rosen, supra, at 1142, and Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (em-

15/ As was counselled by the Court of Appeals in Weissman, supra, the Court

> . . . need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

565 F.2d at 697. See also DiViaio v. Kelley, Civil No. 76-1955 (10th Cir., March 6, 1978) (slip opinion at 9-12) (attached hereto as Defendant's Exhibit H); Bell v. United States, 563 F.2d 484, 487 (1st Cir. 1977).

phasis added) (footnote omitted).

In all of the documents involved in this lawsuit, the only items of information deleted pursuant to Exemption 2 are the informant symbol numbers often found on the FBI materials contained in the OPR documents. See Shaheen Affidavit at page 6, ¶2. These symbol numbers are used by the FBI for internal purposes only and provide an effective clerical mechanism for necessary administrative reference to confidential sources without undue internal disclosure of the identities of such sources. As such, they can hardly be characterized as the subject of a legitimate or genuine public interest, nor do they bear any substantive relation to the content of the document upon which they appear. Rather, they are a perfect example of the type of administrative markings which, because of their routine administrative use and the negligable legitimate public interest in their disclosure,[16/] fall squarely within the protective scope of Exemption 2. See Linebarger v. FBI, Civil No. C-76-1826-WWS (N.D. Cal., August 1, 1977) (slip opinion at 3) (attached hereto as Defendants' Exhibit I); see also Day v. FBI, Civil No. 76-3209 (S.D. N.Y., March 10, 1977) (slip opinion at 2-3) (attached hereto as Defendants' Exhibit J); Curry v. DEA, Civil No. 75-1416 (D.D.C., November 5, 1976) (slip opinion at 3) (attached hereto as Defendants' Exhibit K).

16/ Because the symbol numbers have no substantive signficance other than as substitutes for the true identities of the informants to which they refer, there can be no public interest in their disclosure which would not readily run afoul of the protections provided such informants under 5 U.S.C. §552(b)(7)(D). In fact, when viewed from such a perspective, these symbol numbers would appear to be equally protected from disclosure under that latter exemption.

III. The Privacy Material Here At Issue Is Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(7)(C)

Exemption 7(C) of the FOIA exempts from compelled disclosure

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy,

5 U.S.C. §552(b)(7)(C).

Although the 1974 amendments to the FOIA made investigatory records more accessible to the public, they did so with a recognition that certain valid interests warrant protection from compelled disclosure. Thus, Exemption 7(C) recognizes these interests and protects individuals from the unwarranted invasions of personal privacy that would certainly result from the wholesale release of investigatory files. Congress first recognized the need to protect individual privacy when the 1966 amendments to the FOIA were passed. At that time, Exemption 6 was included to protect the privacy interests of individuals when release of personal information threatened to result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). The 1974 amendments to the FOIA carried over the privacy interest protections of Exemption 6 to law enforcement records,[17] but with one significant difference: the standard to be met when investigatory records are involved was lessened -- such records are exempt when release would constitute "an unwarranted invasion of personal privacy."

17/ Senator Hart, who authorized Exemption 7(C), introduced this part of the 1974 amendment with the statement that it was designed to protect ". . . the privacy of any person mentioned in . . . requested [investigatory] files and not only the person who was the object of the investigation." 120 Cong. Rec. 17033 (May 30, 1974). Senator Hart's statement leaves absolutely no doubt but that Exemption 7(C) is intended to protect the type of privacy information withheld in the instant case.

5 U.S.C. §552(b)(7)(C). Thus, the stricter standard imposed by the modifier "clearly" was dropped. The Supreme Court's opinion in Department of the Air Force v. Rose, supra, emphasized this distinction:

> The legislative history of the 1974 amendment of Exemption 7, which applies to investigatory files compiled for law enforcement purposes, stands in marked contrast. Under H.R. 12471, 93d Cong., 2d Sess. (1974), as originally amended and passed by the Senate, 120 Cong. Rec. 17033, 17040, 17047 (1974), although not as originally passed by the House, 120 Cong. Rec. 6819-6820 (1974), Exemption 7 was amended to exempt investigatory files compiled for law enforcement purposes only to the extent that their production would 'constitute a clearly unwarranted invasion of personal privacy' or meet one of several other conditions. In response to a Presidential request to delete 'clearly unwarranted' from the amendment in the interests of personal privacy, the Conference Committee dropped the 'clearly,' 120 Cong. Rec. 33158-33159 (1974) (letters between President Ford and Cong. Moorehead), and the bill was enacted as reported by the conference committee, 88 Stat. 1563.

425 U.S. at 379 n.16.

Thus, while it is appropriate to consider the body of law construing Exemption 6 to determine the applicability of Exemption 7(C), the deletion of the term "clearly" means that when the protection of privacy interests is at issue in the context of law enforcement records, the government need not meet as rigorous a standard as that applied when Exemption 6 is asserted.[18/]

18/ Even under its more rigorous standard, Exemption 6 has been applied by the courts to protect matters capable of causing embarrassment, Campbell v. U.S. Civil Service Commission, 539 F.2d 58, 62 (10th Cir. 1976); personal data concerning an individual and his family, Ditlow v. Schultz, 517 F.2d 166, 170 (D.C. Cir. 1975); facts concerning the family status of a person, Wine Hobby U.S.A. v. IRS, F.2d 133, 136-37 (3d Cir. 1974); and facts concerning marital status, personal habits, and reputation, Rural Housing Alliance v. U.S. Department of Agriculture, 498 F.2d 73, 76-77 (D.C. Cir. 1974). In each case the court found that the protection of the individual privacy interest clearly outweighed any public interest that might conceivably be served by disclosure.

In the documents here at issue, Exemption 7(C) has been applied with respect to information which would identify and/or describe persons who were in some way connected with the FBI investigation of Dr. King's assassination in such a way so as to cause substantial and unnecessary injury to their privacy interests. See Shaheen Affidavit at pages 6-7, ¶4. In the case of the Civil Rights Division documents, some of the 7(C) excisions were made with respect to information not known to be within the public domain, in order to protect the privacy of Dr. King's family. See Supplemental Turner Affidavit, ¶¶4, 6 .

The information withheld pursuant to Exemption 7(C) is thus highly personal data, the disclosure of which would cause damage to valued personal reputations. Although this Court's determination of the applicability of this exemption must take into consideration any counterveiling public interest which could conceivably be advanced by disclosure,[19] it is suggested that the privacy "interest in avoiding harassment on other embarrassment" strongly compels non-disclosure of

19/ It is now well-established that a court's de novo analysis of a privacy interest threatened by disclosure of requested information should include a balancing process whereby any established public interest in disclosure is weighed against the nature and severity of the threatened injury. As both Congress and the Supreme Court have taken pains to make clear, however, an especially great weight is accorded to the particular injury to privacy interests which can be caused by disclosure of the type of information maintained in law enforcement records. See Department of the Air Force v. Rose, supra, at 378 n.16; Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 n.7 (4th Cir. 1977).

information such as that involved here.[20/] Nix v. United States, Civil No. 76-1898 (4th Cir., February 28, 1978) (slip opinion at 20) (attached hereto as Defendants' Exhibit L).

As was recently observed in a similar context by the Seventh Circuit:

> Furthermore, references to third parties may be properly deleted to protect their privacy and to minimize the public exposure or possible harassment of those persons mentioned in the files. Their claims to privacy under Exemption 7(C) outweighs the minimal public interest which would be served by release of their names.

Maroscia v. Levi, supra, at 1002. See Schwartz v. Department of Justice, Civil No. 76-2039 (D.D.C., February 9, 1978) (slip opinion at 2-3) (attached hereto as Defendants' Exhibit M); Shaver v. Bell, 433 F. Supp. 438, 440 (N.D. Ga. 1977); Tax Reform Research Group v. IRS, 410 F. Supp. 415, 419-20 (D.D.C. 1976); see also authorities cited at note 20, supra.

20/ Also withheld pursuant to Exemption 7(C) in this case are the names of FBI personnel below the rank of Section Chief. See Shaheen Affidavit at page 7, ¶4. Though the point need not be belabored, it is obvious that disclosure of these identities could result in harassment or other personal inconvenience to the FBI personnel involved and could conceivably impair their abilities to fully perform their official duties in the future. As the Fourth Circuit recently observed while upholding the deletion of such names in privacy grounds:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Nix v. United States, supra, at 18. Accordingly, it is suggested that the withheld names of FBI personnel are plainly exempt from disclosure under Exemption 7(C). See Rafter v. FBI, Civil No. 77-1131 (S.D. N.Y., July 21, 1977) (slip opinion at 2-3) (attached hereto as Defendants' Exhibit N); Turner v. Department of Justice, Civil No. 76-2180 (D.D.C., July 6, 1977) (slip opinion at 3) (attached hereto as Defendants' Exhibit O); Day v. FBI, supra, at 3; Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976).

IV. The Confidential Source Information Here At Issue Is Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(7)(D)

Exemption 7(D) exempts from compelled disclosure investigatory records compiled for law enforcement purposes which would

> disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

5 U.S.C. §552(b)(7)(D). Thus, Exemption 7(D) provides, inter alia, for the withholding of information which would disclose the identity of a "confidential source" who provides information toward a criminal law enforcement investigation, as well as for the withholding of all information provided by that source alone.

The legislative history of the 1974 FOIA amendments indicates that the choice of the term "confidential source" was intended to include a broader group than had the term "informer" been used: "These may be paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." 120 Cong. Rec. S9330 (daily ed., May 30, 1974) (Remarks of Senator Hart). Moreover, it only stands to reason that a person who furnishes information to a law enforcement agency does so with the usual expectations that his identity as well as the information which he provides will be held in strict confidence. See, e.g., Evans v. Department of Transportation, 446 F.2d 821, 824 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972). Indeed, the courts have recognized the real danger that citizen cooperation with law enforcement agencies would virtually end if the identities of confidential sources were not protected.

See, e.g., Wellman Industries, Inc. v. NLRB, 490 F.2d 427, 430 (4th Cir. 1973).

These conclusions were recently reaffirmed by Judge Corcoran in Mitsubishi Electric Corp. v. Department of Justice, Civil No. 76-813 (D.D.C., April 1, 1977) (attached hereto as Defendants' Exhibit P):

> The legislative history of Exemption 7(D) reveals Congress' desire to protect not only the "paid informer", but also the "simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." Sources of information certainly would be reluctant to provide information to law enforcement agencies if they had reason to believe that their identities or the data they supplied in confidence would be subject to disclosure. It is, therefore, essential that federal law enforcement authorities be able to give binding assurances, where necessary, that the identity of a confidential source supplying information for law enforcement purposes will not be publicly disclosed. This is plainly the purpose of Exemption (7)(D).

(slip opinion at 6) (citations omitted).

It is absolutely crucial that an investigative organization such as the FBI be able to obtain information from confidential sources. That agency's ability to do so is predicated upon the source's belief in and reliance upon the agency's commitment to absolute confidentiality. If this confidentiality is breached, even in one instance, the FBI's sources would begin to "dry up," and information vital to the FBI's functions -- and, in turn, to our domestic security -- could be lost.

The Affidavit Of Michael E. Shaheen, Jr. describes in great detail both the individual source information which has been withheld by OPR pursuant to Exemption 7(D), as well as the reasons compelling non-disclosure.

See Shaheen Affidavit at pages 7-8, ¶5(b). This description leaves no doubt but that in all instances the deleted information was received by the FBI pursuant to an express -- or at very least an implied -- assurance of confidentiality and that only the minimum information necessary to effectuate the protection of Exemption 7(D) was deleted. Under such circumstances, the information was properly withheld. See Nix v. United States, supra, at 10-15; Maroscia v. Levi, supra, at 1002; Mitsubishi Electric Corp. v. Department of Justice, supra, at 6-7; Luzaich v. United States, 435 F. Supp. 31, 35 (D. Minn.), aff'd, 564 F.2d 101 (8th Cir. 1977).

A separate category of documents deemed exempt from disclosure under Exemption 7(D) is comprised of complete volumes of duplicate Memphis Police Department investigatory records pertaining to the local police investigation of the King assassination. See Shaheen Affidavit at page 7, ¶5(a). These local law enforcement records were obtained by the Task Force for its review during the preparation of its report and were subsequently placed into Appendix C along with all other records reviewed by the Task Force in similar fashion.[21/]

As is described in the Affidavit Of James F. Walker ("Walker Affidavit"), the Task Force obtained possession of these duplicate records from Hughes W. Stanton, Jr., District Attorney General (Fifteenth Judicial Circuit) for Shelby County, Tennessee, who was (and remains) the

21/ With only one exception, however, the other records reviewed by the Task Force and placed in Appendix C were federal agency records already subject to the FOIA. The exception situation involves copies of twenty-nine pages of Atlanta Police Department records which were obtained by the Task Force from the FBI Atlanta Field Office, to which they originally had been forwarded in confidence by the Atlanta police. These records have been withheld in their entirety pursuant to Exemption 7(D) on the same basis as pertains to the Memphis Police Department records.

custodian of the records pursuant to his prosecutorial responsibilities. See Walker Affidavit, ¶2. Because of the nature of these records, however, District Attorney General Stanton at first refused to provide the Task Force with duplicate copies, and ultimately did provide the copies only when compelled to do so by a grand jury subpoena.[22/] See Walker Affidavit, ¶¶4-5 and Exhibit A thereto; Shaheen Affidavit, page 7, ¶5(a).

It is thus evident that these local law enforcement records were "furnished under circumstances from which an assurance of confidentiality could be reasonably inferred." Nix v. United States, supra, at 10 (footnote omitted). See also Maroscia v. Levi, supra, at 1002; c.f. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 733-34 & n.31; Mitsubishi Electric Corp. v. Department of Justice, supra, at 7 (confidentiality expectation to be gauged according to "totality of circumstances"). The confidentiality, of course, centered around the contents of the documents and the fact that they were not intended to be released in any way by their custodian absent an appropriate court order. See Walker Affidavit at ¶4.

Thus, it can be seen that the Memphis Police Department (through its cautious custodial intermediary in the District Attorney General's Office) effectively occupies the role of a "confidential source" to the Department of

22/ The role played by a grand jury subpoena in the transmittal of these documents raises the possible issue of whether the documents are in fact barred from disclosure pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, as amended by Public Law 95-78, 91 Stat. 319 (1977), in conjunction with Exemption 3 of the FOIA. See, e.g., Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598, 601-02 (N.D. Ill. 1974); Application of State of California, 195 F. Supp. 37, 40 (E.D. Pa. 1961); see also Hiss v. Department of Justice, 441 F. Supp. 69, 70 (S.D. N.Y. 1977).

Justice in this uniquely anomalous situation.[23] As was squarely held in the case of Church of Scientology v. Department of Justice, 410 F. Supp. 1297, 1303 (C.D. Cal. 1976), ". . . the (b)(7)(D) exemption is applicable to law enforcement agency sources." This must be so, the Court found, because

> [i]n light of the legislative history, it is clear that the Congress did not intend to throw open the confidential files of law enforcement to the general public, and its intent to protect against disclosure of confidential information extends to material provided by any confidential source including law enforcement agencies.[24]

Id. (emphasis added) (footnote omitted).

Accordingly, it is urged that both circumstances and law compel the finding that the local law enforcement records at issue here are entirely exempt from disclosure as information provided to a federal agency under circumstances quite pertinent to Exemption 7(D). Defendants respectfully suggest that any contrary finding by this Court could seriously impair the free flow of necessary law enforcement information between federal and local

---

23/ It appears that this may be the first situation ever in which a component of the Department of Justice (or perhaps any federal agency) has taken custody and control of local law enforcement agency records under circumstances leading to such FOIA susceptibility. But see Church of Scientology v. Department of Justice, 410 F.2d 1297 (C.D. Cal. 1976).

24/ In its footnote to this language, the Court stressed the critical fact that ". . . a contrary result . . . would have the effect of revealing confidential information contained in the files of foreign, state, and local governments." 410 F. Supp. at 1303 n.18.

authorities and would thus jeopardize the law enforcement interests of the Department of Justice.[25/]

V. The References To Investigative Techniques And Procedures Are Exempt From Disclosure Pursuant To 5 U.S.C. §552(b)(7)(E)

Exemption 7(E) of the FOIA provides protection for those portions of an investigatory file compiled for law enforcement purposes which ". . . disclose investigative techniques and procedures." 5 U.S.C. §552(b)(7)(E). As is indicated in the Affidavit Of Michael E. Shaheen, Jr., this exemption was used sparingly to delete only those few portions of the subject documents which identify certain investigative techniques and procedures used by the FBI which are not a matter of public knowledge. See Shaheen Affidavit at page 8, ¶6. As such, these references are properly exempt under Exemption 7(E). See Shaver v. Bell, supra, at 441; Ott v. Levi, supra, at 752.

VI. The Electronic Surveillance Material Withheld Pursuant To Court Order Cannot Be Disclosed

By Order of January 31, 1977, Judge John Lewis Smith, Jr. required the FBI to inventory and deliver to the Archives

25/ If these records are not deemed exempt in their entirety, then it would become necessary to address any individual deletions (i.e. for "direct" Exemption 7(D) material) that are appropriate to the contents of the documents. This would of course necessitate a complete "processing" of these records, which might well require that the Memphis Police Department (or the District Attorney General's Office, as appropriate) be joined as a party defendant to this lawsuit pursuant to Rule 19(a)(2)(i) of the Federal Rules of Civil Procedure. Such a prospect, alone, would perhaps be sufficient to "chill" any future cooperation of state and local law enforcement agencies.

all FBI records pertaining to its electronic surveillance of Dr. Martin Luther King, Jr. during the years 1963 through 1968. See Lee v. Kelley, Civil No. 76-1185 and Southern Christian Leadership Conference v. Kelley, Civil No. 76-1186 (D.D.C. 1977) (attached hereto as Defendants' Exhibit A). This inventory has been completed and the information pertaining to this subject matter has been placed under seal for a fifty-year period. See Shaheen Affidavit, ¶9.

To ensure complete compliance with Judge Smith's Order, all references in the subject documents to the information placed under seal at the Archives have been deleted. See Shaheen Affidavit at page 9, ¶7. Defendants respectfully suggest that these deletions (identified in the margin of the filed expurgated copies by the designation "C.O.") are both appropriate and necessary under the Court Order.[26/]

Conclusion

For the foregoing reasons, and for such additional reasons as are set forth in defendants' supporting

26/ Given the well-recognized nature of the material withheld pursuant to Judge Smith's Order, and also considering the specific thrust of plaintiff's FOIA request (see notes 1 and 3 supra), it is not entirely certain that plaintiff seeks to contest this withholding. But see note 12 supra.

documentation, defendants respectfully suggest that their motion for summary judgment should be granted.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

LYNNE K. ZUSMAN

DANIEL J. METCALFE

Attorneys, Department of Justice
P.O. Box 7219
Washington, D.C. 20044
Tel: 739-4544

Dated: May 11, 1978

Attorneys for Defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

Plaintiff,

v. Civil Action No. 77-0692

DEPARTMENT OF JUSTICE,
et al.,

Defendants.
_____/

ORDER

Upon consideration of the parties' cross-motions for summary judgment, and of the memoranda of points and authorities filed by the respective parties in support thereof and in opposition thereto, and upon further consideration of the argument of counsel in open Court and of the entire record herein, and for the reasons set forth in this Court's Memorandum filed this date, it appearing that defendants are entitled to summary judgment as a matter of law, it is by the Court this _____ day of _____, 1978,

ORDERED that defendants' motion for summary judgment be, and it hereby is, granted; and it is further

ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied; and it is further

ORDERED that judgment shall be entered in favor of defendants and that this action be, and it hereby is, dismissed.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendants' Motion For Summary Judgment, with accompanying memorandum of points and authorities and attachments, together with the affidavits of James F. Walker, Lewis L. Small and the Supplemental Affidavit Of James P. Turner, and all attachments thereto, was served upon plaintiff pro se by forwarding a copy thereof by hand delivery to James H. Lesar, Esq., 910 16th Street, N.W., Washington, D.C. 20006, on this 11th day of May, 1978.

DANIEL J. METCALFE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 21 1977

JAMES F. DAVEY, Clerk

BERNARD S. LEE, Plaintiff v. CLARENCE M. KELLEY, et al., Defendants	)	Civil Action No. 76 - 1185
SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, Plaintiff v. CLARENCE M. KELLEY, et al., Defendants	)	Civil Action No. 76 - 1186

MEMORANDUM OPINION AND ORDER

Bernard Lee, former assistant to Dr. Martin Luther King, and the Southern Christian Leadership Conference (SCLC), headed by Dr. King until his death in 1968, are suing Clarence Kelley, Cartha DeLoach, William Sullivan, John Mohr (executor of the estate of Clyde Tolson), and two unknown (and unserved) FBI agents for violation of rights guaranteed them under the First, Fourth, and Fifth Amendments to the Constitution of the United States. Specifically, Lee alleges that defendants surreptitiously tape-recorded his conversations in a room at the Willard Hotel in 1963 and that a copy of the tape was sent to Mrs. King in 1964. He further contends that other of his conversations have unlawfully been recorded since that time,

Defendant's Exhibit A

including some after the enactment, in 1968, of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520. SCLC complains that, "beginning in 1963 and ending in the Fall of 1968", defendants eavesdropped on the conversations of the organization's employees. It too contends that recordings of these conversations have been made available to the news media and others outside the FBI. Both plaintiffs seek money damages and request that all records of the monitored conversations be destroyed or impounded.

Defendants' Motions to Dismiss, now before the Court, raise several substantial defenses. However, in view of the fact that the Court now finds the damage claims to be barred by the statute of limitations, consideration of the other defenses is pretermitted.

When suing either under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), or under Title III, plaintiffs are governed by the most analogous statute of limitations of the state in which the Court sits. Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Ernst & Ernst v. Hochfelder, 44 U.S.L.W. 4451 4459n.29 (1976); Forrestal Village, Inc. v. Graham, No. 76-1314 (D.C.Cir. January 13, 1977). In this case, the three-year District of Columbia statute controls. Pub.L.88-241, 77 Stat. 509, 12 D.C. Code §301(8). The statute began to run when plaintiffs actually discovered, or in the exercise of due diligence should have discovered, the operative facts of the cause of action. See Lewis v. Denison, 2 App.D.C.

387 (1894); Holmberg v. Armbrecht, supra.

Starting in the mid-1960s and reaching a peak in 1968 and 1969, at the time of former Attorney General Robert Kennedy's campaign for the Presidency and thereafter, the nation's leading newspapers were rife with accounts of buggings of Dr. King. See Exhibit A to Federal Defendants' Motion to Dismiss. Under these circumstances, plaintiffs' avowal that they had no knowledge of the source of the tapes until the 1975 report by the Senate Select Committee on the FBI is not well taken. Accordingly, the motions to dismiss the amended complaints are granted.

With reference to the custody of the intercepted conversations, an inventory of all such records shall be presented to the Court, and the records themselves shall be turned over, under seal, to the Archivist of the United States. See 44 U.S.C. §2101 et seq.

Therefore, it is by the Court this 31st day of January 1977,

ORDERED that the Motions by defendants Clarence M. Kelley, Cartha DeLoach, William C. Sullivan and John P. Mohr to dismiss the Amended Complaints be, and the same hereby are, granted; and it is further

ORDERED that, within ninety (90) days of the date of the entry of this Order, the Federal Bureau of Investigation shall assemble at its headquarters in Washington, D.C., all known copies of the recorded tapes, and transcripts thereof, resulting from the FBI's microphonic surveillance, between 1963 and 1968, of the plaintiffs' former president, Martin

Luther King, Jr.; and all known copies of the tapes, transcripts and logs resulting from the FBI's telephone wiretapping, between 1963 and 1968, of the plaintiffs' offices in Atlanta, Georgia and New York, New York, the home of Martin Luther King, Jr., and places of public accommodation occupied by Martin Luther King, Jr.; and it is further

ORDERED that at the expiration of the said ninety (90) day period, the Federal Bureau of Investigation shall deliver to this Court under seal an inventory of said tapes and documents and shall deliver said tapes and documents to the custody of the National Archives and Records Service, to be maintained by the Archivist of the United States under seal for a period of fifty (50) years; and it is further

ORDERED that the Archivist of the United States shall take such actions as are necessary to the preservation of said tapes and documents but shall not disclose the tapes or documents, or their contents, except pursuant to a specific Order from a court of competent jurisdiction requiring disclosure.

United States District Judge

JAMES H. LESAR
ATTORNEY AT LAW
1231 FOURTH STREET, S. W.
WASHINGTON, D. C. 20024
TELEPHONE (202) 484-6023

February 17, 1977

FREEDOM OF INFORMATION REQUEST

The Deputy Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Dear Sir:

Under the Freedom of Information Act, 5 U.S.C. §552, I am requesting that I be provided with copies of the following records:

1. Any orders, memorandums, or directives instructing the Civil Rights Division to review the investigation into the assassination of Dr. Martin Luther King, Jr.

2. The report made by Assistant Attorney General J. Stanley Pottinger on the 1975-1976 review which the Civil Rights Division conducted of the King assassination.

3. Any press release relating to a review by the Civil Rights Division of the King assassination.

4. Any orders, memorandums, or directives instructing the Office of Professional Responsibility to review the investigation of Dr. King's assassination.

5. Any orders, memorandums, or directives to the Project Team which conducted the review of Dr. King's assassination for the Office of Professional Responsibility.

6. The 148 page report by the Office of Professional Responsibility on its review of the King assassination.

Sincerely yours,

James H. Lesar

James H. Lesar

Defendant's Exhibit B

C

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY
WASHINGTON, D.C. 20530

FEB 23 1977

James H. Lesar
Attorney at Law
1231 Fourth Street, S.W.
Washington, D. C. 20024

Dear Mr. Lesar:

This is in response to Freedom of Information Act requests 4-5 of your letter to the Deputy Attorney General dated February 7, 1977.

In response to item 4, enclosed is a memorandum from Attorney General Levi dated April 26, 1976, instructing this Office to complete the review of the FBI's investigation of the assassination of Dr. King.

In response to item 5, no written orders, memoranda or directives were given to the Project Team, except for the memorandum from the Attorney General referred to in item 4.

In response to item 6, enclosed is the report prepared by this Office on the FBI's investigation of the assassination of Dr. King.

Sincerely,

Michael E. Shaheen Jr.

MICHAEL E. SHAHEEN, JR.
Counsel

Copies to: Freedom of Information Units
FBI, Civil Rights Division
Criminal Division
Attn: James Powers, FBI
Walter Barnett, CRD
Ross Buckley, Crim

Defendant's Exhibit C

D

UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

WASHINGTON, D.C. 20530

FEB [illegible] 1977

James H. Lesar
Attorney at Law
1231 Fourth Street, S.W.
Washington, D. C. 20024

Dear Mr. Lesar:

This is in response to Freedom of Information Act requests 4-6 of your letter to the Deputy Attorney General dated February 7, 1977.

In response to item 4, enclosed is a memorandum from Attorney General Levi dated April 26, 1976, instructing this Office to complete the review of the FBI's investigation of the assassination of Dr. King.

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In response to item 6, enclosed is the report prepared by this Office on the FBI's investigation of the assassination of Dr. King.

Sincerely,

Michael E. Shaheen, Jr.

MICHAEL E. SHAHEEN, JR.
Counsel

Copies To: Freedom of Information Units
FBI, Civil Rights Division,
Criminal Division

Attn. [illegible]
Rm. [illegible]

[redacted]

FOI/PA
Civil Rights Div.

REC'D. FEB 24 1977

Defendant's Exhibit D

E

JAMES H. LESAR
ATTORNEY AT LAW
910 SIXTEENTH STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006
Telephone (202) 737-[illegible]

RECEIVED
OFFICE OF THE
MAR 14 11 35 AM '77
DEPUTY
ATTORNEY GENERAL

#30160

March 10, 1977

FREEDOM OF INFORMATION APPEAL

Mr. Griffin Bell
Attorney General
Department of Justice
Washington, D. C. 20530

RECEIVED
Freedom of Information
Appeals Unit
Department of Justice
3/14/77

Dear Mr. Bell:

By letter dated March 9, 1977, a copy of which is enclosed herein, Mr. James P. Turner, Deputy Assistant Attorney General, Civil Rights Division, has denied Item 2 of my Freedom of Information Act request of February 7, 1977. I hereby appeal that denial.

I note that Mr. Turner states that the materials requested in Item 2 of my request have been classified under Executive Order 11652. I would appreciate it if you could inform me as to the provision(s) of Executive Order 11652 under which these documents were classified, who classified them, and the date of classification.

By letter dated February 23, 1977, Mr. Michael Shaheen, Jr., of the Office of Professional Responsibility, responded to Items 4-6 of my February 7, 1977, Freedom of Information Act request. Although Mr. Shaheen did send me a copy of the report prepared under his direction which I requested in Item 5, the copy which I was provided does not contain any of the material in Appendix B to that report. I intended my Freedom of Information Act request to include all appendix material. I hereby appeal this de facto denial of the material in Appendix B which was deleted from the copy of the report sent me. I also appeal from the deltions made in the materials contained in Appendix A of this report.

Sincerely yours,

James H. Lesar

James H. Lesar

FOI/PA
Civil Rights Div.
REC'D APR 18 1977

Defendant's Exhibit E

F

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

James H. Lesar, Esquire
1231 4th Street, S. W.
Washington, D. C. 20024

OCT 31 1977

Dear Mr. Lesar:

You appealed from the actions of Deputy Assistant Attorney General James P. Turner and Counsel Michael E. Shaheen, Jr., on your request for access to specific records pertaining to the reviews by the Civil Rights Division and the Office of Professional Responsibility of the investigation by the F.B.I. of the assassination of Dr. Martin Luther King, Jr.

You will now be provided the two Civil Rights Division documents within the scope of your appeal, subject to certain limited excisions. Subsequent to Mr. Turner's action on your request, the Civil Rights Division declassified most of the information in these documents. The declassified information will now be made available to you directly by the Division, subject only to excisions of information the disclosure of which would constitute an unwarranted invasion of the privacy of certain third persons or of Dr. King's immediate family. 5 U.S.C. 552(b)(7)(C). The remaining classified information has been found by the Department Review Committee to warrant continued classification under sections 5(B)(2) and (3) of Executive Order 11652 and will continue to be withheld pursuant to 5 U.S.C. 552(b)(1).

The appendices to the "Report of the Department of Justice Task Force to Review the F.B.I. Martin Luther King, Jr., Security and Assassination Investigations" will also be made available to you, subject to certain excisions. The classified information in each appendix has been found by the Department Review Committee to warrant continued classification under sections 5(B)(2) and (3) of Executive Order 11652. This classified material will also continue to be withheld pursuant to 5 U.S.C. 552(b)(1).

Exhibits 8 and 11 of Appendix "A" will be released to you again, this time with fewer excisions. Exhibit 9 will be provided in its entirety and exhibit 12 will be released for the first time, subject to certain excisions. Minor excisions were

Defendant's Exhibit F

made in exhibits 7 and 12 to protect the personal privacy of other individuals against unwarranted invasion. 5 U.S.C. 552(b)(7)(C). The classified information in exhibits 8, 11, 12, 17 and 18 is being withheld on the basis of 5 U.S.C. 552(b)(1). Every page of Appendix "E" has already been released to you. Eight pages will be released to you again, however, with no excisions. The other pages of Appendix "E" were properly released with excisions of classified information or material which would cause an unwarranted invasion of the privacy of third persons. 5 U.S.C. 552(b)(1) and (7)(C). Names of Special Agents of the F.B.I. were also withheld. 5 U.S.C. 552(b)(7)(C).

Appendix "C" encompasses twenty volumes, fourteen of which will now be made available to you, in whole or in part. Volumes I through XI and XXI [there is no volume XVIII -- the index to Appendix "C" was incorrectly numbered] contain brief one or two sentence summaries of each F.B.I. and D.O.J. document reviewed by the Task Force. Certain material in Volume XXI which originated with the United States Information Agency is being referred to the Department of State for consideration and direct response to you. Volume VII and certain materials in Volumes I through VI, VIII through XI and XXI are being withheld to protect specific administrative markings which cannot be released to you without actual harm to the operational capability of the F.B.I., the names of Special Agents, the privacy of certain third persons against unwarranted invasions, and the protection of confidential sources. 5 U.S.C. 552(b)(2), (7)(C) and (7)(D).

Volume XII contains the letters and notes (242 pages) sent to William Bradford Huie by James Earl Ray. I have been advised that these documents are a matter of public record and that you already have a copy of some of them. Should you desire an additional copy, this Department will make them available at the rate of ten cents per page. Volumes XIII and XX are also a matter of public record, as they contain the transcripts of the testimony given by James Earl Ray, John L. Ray and Jerry W. Ray in the case of James Earl Ray v. James H. Bomar, Warden, United States District Court for the Western District of Tennessee, Western Division, October 1974. If you desire copies, they can be obtained by writing to the Clerk of that Court. Should you prefer to have this Department furnish them to you, however, copies of these transcripts (574 pages) will be made available at the same rate of ten cents per page.

The Memphis Police Department documents comprise Volumes XIII through XVII. As the information is of a confidential nature and was provided in confidence, these volumes will continue to be withheld in their entirety. 5 U.S.C. 552(b)(7)(D).

Judicial review of my action on these administrative appeals is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is also where the records you seek are located.

Sincerely,

Peter F. Flaherty
Deputy Attorney General

By:

Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

FILED

SEP 7 - 1977

UNITED STATES ATTORNEY
SOUTHERN DISTRICT
OF IOWA

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

LAWRENCE FRANK,

Plaintiff,

vs.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

CIVIL NO. 77-14-D

ORDER

This is an action brought by Lawrence Frank, plaintiff, to compel disclosure of a document under the Freedom of Information Act, 5 U.S.C. § 552, as amended by Public Law No. 93-502, 88 Stat. 1561, and the Administrative Procedures Act, 5 U.S.C. § 701-706. The matter is before the Court on plaintiff's motion to require detailed justification, itemization, and indexing; defendants' motion for summary judgment; and plaintiff's motion for in camera inspection of non-disclosed documents. As the matter is fully submitted and well briefed by opposing counsel, oral arguments are not necessary.

By letter dated April 30, 1976, plaintiff requested disclosure from defendants of any and all documents in defendants' possession which relate to the plaintiff. Subsequently, plaintiff was advised that search of the records yielded one document relating to plaintiff but the document was withheld from disclosure, citing subsections (j)(1) and (k)(1) of the Privacy Act, 5 U.S.C. § 442a(j)1 and (k)(1), and sections (b)(1) and (b)(3) of the Freedom of Information Act, 5 U.S.C. § 552(b)(1) and (3). Appeal to the Agency brought affirmation of the initial refusal to disclose.

The Freedom of Information Act is designed "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language". N.L.R.B. v. Sears, Roebuck and Co., 421 U.S. 132, 95 S.Ct. 1504, 44 L. Ed. 2d 29 (1975). S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). If information sought under the FOIA falls within one of the Act's nine exempt categories, the Act "does not apply" to the information. N.L.R.B. v. Sears, Roebuck and Co., supra; Westinghouse Elec. Corp. v. Schlesinger, 542 F. 2d 1190 (4th Cir. 1976). In determining whether the Act applies, the burden is upon the government to establish that the information

9-2-77

(18)

Defendants' Exhibit G

is within the protection of the exemptions. Campbell v. United States Civil Service Commission, 539 F. 2d 58 (10th Cir. 1976).

The pertinent portions of The Freedom of Information Act, 5 U.S.C. § 552(b)(1) and (b)(3) provide:

> 552(b) This section does not apply to matters that are -
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
> (B) are in fact properly classified pursuant to such Executive Order;
> * * *
> (3) specifically exempted from disclosure by statute (other than 552b of this title) provided that such statute
> (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or
> (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

The pertinent portions of the Privacy Act, 5 U.S.C. § 552a(j)(1) and (k)(1) provide:

> 552a(j) General exemptions--The head of any agency may promulgate rules [in accordance with 553(b)] to exempt any system of records within the agency from any part of this section except [certain subsections] if the system of records is --
> (1) maintained by the Central Intelligence Agency.
>
> 552a(k) The head of any agency may promulgate rules in accordance with the requirements [of certain sections] of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4), G H and I and (p) of this section if the system of record is --
> (1) subject to the provisions of 552(b)(1) of this title.

50 U.S.C. 403(d)(3) provides in part that:

> * * * That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.

The act provides, in § 552(a)(4)(b), that in an action in District Court to compel disclosure, "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection(b) * * *".

Congress thus amended the Freedom of Information Act in 1974 to override the Supreme Court's holding in E.P.A. v. Mink, 410 U.S. 73 (1972), which interpreted subsection (b)(1) as barring disclosure of documents classified by Executive Order and not permitting in camera inspection of such documents.

At that time, however, Congress recognized that:

> [T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. U.S. Code, Congressional and Administrative News, 93rd Congress, Second Session, 1974 Vol. 3, page 6290.

In E.P.A. v. Mink, supra, the Court gave some guidance on the use of in camera inspection stating:

> 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 to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure * * * and if it fails to meet its burden without in camera inspection, the District Court may order such inspection. * * * In short, in camera inspection of all documents is not a necessary or inevitable tool in every case. Others are available.

410 U.S. at 93. See similar language in the Conference Committee Report, U.S. Code and Administrative News, supra, at pp. 6287, 88. See also Bell v. U.S. Department of Defense, 71 F.R.D. 349 (D.C. N.H., 1976).

While the power exists to order an in camera inspection, it is a power that is to be used with discrimination and need not be used in every case. In camera proceedings are particularly a last resort in "national security" situations where the exemption of (b)(1) is claimed. Weissman v. CIA, No. 76-1566 (D.C. Cir. Jan. 6, 1977). Before resorting to in camera inspection the court should give the government an opportunity to establish by detailed affidavits the basis for the exemption. Further, it was the intent of Congress that substantial weight be accorded such affidavits. 1974 U.S. Code Cong. and Admin. News, 93rd Cong. 2nd Sess. 6273, 6287-88.

It was not the intent of congress, in statutorily placing upon the courts the obligation of a de novo determination, that mere conclusory statements should suffice to preclude in camera inspection and to warrant the withholding of information. Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir., 1973). But where detailed affidavits are provided which demonstrate that the documentary material claimed exempt on grounds of national security has been conscientiously re-examined by a classification officer and remains classified, and there is no showing of any lack of "good faith" on the part of the CIA, the Court need go no further in its examination. Bennett v. U.s. Dept. of Defense, 419 F. Supp. 663 (S.D. N.Y. 1976); Weissman v. CIA., supra.

The affidavits filed in this case indicate that the document in question was reviewed by the Information Review Officer for the Directorate of Operations of the CIA. His affidavit shows the document to be a one page memorandum with cover sheet, dated July 26, 1971, bearing the appropriate markings to evidence its classified status, and consisting of information provided on a classified basis by a foreign intelligence service pursuant to a liason arrangement with the CIA. The affidavit reveals that the document was personally examined by the Information Review Officer, that a classification review was conducted by that officer and that the document may not be released for the reasons that:

> (a) it is currently and properly classified pursuant to Executive Order 11652 and thus exempt from disclosure pursuant to Freedom of Information Act exemption (b)(1) and Privacy Act exemption (k)(1); and,
> (b) it would reveal intelligence sources and methods in need of continued protection and thus exempt from disclosure pursuant to Freedom of Information Act exemption (b)(3) and Privacy Act exemption (j)(1).

The affidavits go on to explain why information received from such sources must remain classified under Executive Order 11652. While recognizing the possibility of abuse in this area, the Court must also recognize the sensitive nature of the information when examining the justification of the claimed exemption. The court in Vaughn v. Rosen, supra, showed its awareness of this problem when it noted, "An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information * * *". The justifications provided in this case

for the refusal to disclose are sufficiently detailed to show the propriety of the classification and to show the exempt status of the document in question.

The Court is of the opinion that the document in issue is also within the exemption stated in subsection (b)(3). 50 U.S.C. § 403(d) is "precisely the type of statute comprehended by exemption (b)(3)". Weissman v. Central Intelligence Agency (D.C.C.A.) (January 6, 1977).

Although an in camera inspection would not place an onerous burden on this court as the document consists of only one page, the Court is satisfied that the affidavits establish it as a document clearly exempt from disclosure and it would therefore not be proper for this court to make an in camera inspection. Because the document is so short indexing or itemizing are not necessary.

Plaintiff has also raised the possibility that the information contained in the document was illegally obtained. This is a serious matter, not to be lightly dismissed, but it is not a basis for disclosure under the Freedom of Information Act. See Bennett v. U.S. Department of Defense, supra.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment shall be, and the same is hereby granted.

IT IS FURTHER ORDERED that plaintiffs motions for in camera inspection and to compel justification, itemization and indexing shall be, and the same are hereby denied.

Signed this 21 day of September, 1977.

H. C. Stuart, Chief Judge
Southern District of Iowa

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1955

GUY DiVIAIO, Petitioner-Appellant, vs. CLARENCE M. KELLEY, Director FBI; WM. E. COLBY, Director CIA; JOHN R. BARTELS, JR., Administrator Drug Enforcement Administration, Dept. of Justice, Respondents-Appellees.	Appeal from the United States District Court for the District of Kansas (D.C.No. 76-33-C3)

Submitted on the Briefs: January 23, 1978

George B. Powers of Foulston, Siefkin, Powers and Eberhardt, Wichita, Kansas, for Appellant.

Barbara Allen Babcock, Assistant Attorney General; James P. Buchele, United States Attorney, Topeka, Kansas; Leonard Schaitman, Mark N. Mutterperl, Department of Justice, Washington, D.C., for Appellees.

Before HOLLOWAY, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

D.J. 145-12-2411 - INFO. & PRIVACY M.N.MUTTERPERL:LS

Defendants' Exhibit H

Guy DiViaio, an inmate of the United States Penitentiary at Leavenworth, Kansas, appeals from the trial court's summary judgment granted to the United States whereby the court found that a certain document in the possession of the Central Intelligence Agency (CIA) referring to DiViaio is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552, et seq., (the Act). DiViaio challenges other findings of the trial court and a purported settlement effecting dismissal of his claim against the federal Drug Enforcement Administration (DEA).

DiViaio filed this action seeking to obtain the release of copies of certain "records and files" compiled and maintained by the Federal Bureau of Investigation, the CIA and the DEA which in any way identify or relate to him. He alleged, inter alia, that he was in need ". . . of records and files . . . because [it] has been brought to his attention that contained therein are many misleading, erroneous, unverified statements and ambiguous information that is directly affecting his incarceration, in that it is denying him custody changes, and rehabilitation programs that would otherwise be available to him." [R., p. 37.] In addition to DiViaio's efforts to obtain documentary material, he sought orders of the trial court directing the respective directors of the three federal agencies above named to answer specific questions relating to the manner and the reasons that certain material was acquired or accumulated, and to whom the information had been disseminated.

On May 17, 1976, DiViaio dismissed his action against the Federal Bureau of Investigation and its director, Clarence M. Kelley, following receipt from that agency of voluminous documents. With regard to the DEA and its Director, DiViaio's

petition of May 17, 1976 prayed for an order ". . . granting all released documents that the agency refers to in their [its] affidavits, - to be given the Petitioner in forma pauperis as provided in 5 U.S.C., §552, and dismissal of the action without Prejudice to the Petitioner." [R., p. 303.] Thereafter, the trial court granted the motion of defendants Colby, Director, and the CIA and Dogin, Director, and the DEA for summary judgment based upon the pleadings, the affidavits filed in support of the motions and the entire record. The court found that there was no genuine issue as to any material fact and that the defendants were entitled to summary judgment as a matter of law. The action was then dismissed as to all defendants without prejudice.

This Court, on appeal, appointed Attorney George B. Powers of Wichita, Kansas, to serve as counsel for DiViaio. Mr. Powers communicated with attorneys representing the defendants Dogin and the DEA in accord with DiViaio's request of May 17, 1976, to-wit, that the voluminous documents compiled by DEA consisting of 339 pages be released to DiViaio under the Freedom of Information Act without cost to him. The DEA had agreed to release the documents only upon receipt of copying fees of $50.86. A settlement proposal was received by Mr. Powers from Government counsel for DEA whereby the DEA agreed to waive the copying fees of $50.86 and to release the documents to DiViaio if DiViaio dismissed the appeal as to Dogin and the DEA. Mr. Powers contacted DiViaio, who accepted these terms. However, when the settlement proposal was firmly agreed upon between counsel for the parties, DiViaio refused to honor it on the ground that he had not previously agreed to a dismissal of his action against DEA with prejudice as set forth in the settlement agreement. Diviaio contended that he may, at some future date, wish to

renew his request for the documents withheld by the DEA. DiViaio's counsel advised him that, in his opinion, a binding settlement had been reached. In light of the contrary positions taken on this matter by Attorney Powers and DiViaio, Mr. Powers was permitted by this court to withdraw as counsel for DiViaio prior to oral arguments. DiViaio then agreed to submit the settlement issue for decision by this Court upon waiver of oral arguments by the parties.

I.

DiViaio's first challenge is directed to the issue as to whether there was a binding settlement agreement that his dismissal of Dogin and DEA was with prejudice. He contends that the dismissal was to be without prejudice. We hold that DiViaio's contention is without merit.

The record reflects that Attorney Powers contacted DiViaio after careful consideration of the problems and following negotiation conversations and correspondence with counsel for DEA. Clearly, DEA agreed to release the 339 pages of documents and to waive the copying fee only upon dismissal with prejudice. This, we believe, was implicit in the September 14, 1977 letter from Attorney Powers to DiViaio. In that letter, Mr. Powers refers to the 339 pages of documents compiled by DEA as constituting exclusively those documents which DEA agreed to be subject to production under the Act. DiViaio did not then nor does he now contend that the withheld DEA documents are subject to release.

DiViaio's petition of May 17, 1976 heretofore referred to, specifically prayed only for the release of the 339 pages of documents without cost to him. No other relief was sought except

a recital that the dismissal be without prejudice. Thus, it is obvious that in view of DEA's full compliance with the requirement of the Act, there was no cause then remaining by DiViaio against DEA. One Thomas G. McWeeney, Staff Assistant assigned to the Freedom of Information Division, Office of the Chief Counsel, DEA, executed an affidavit which, in summary, states that DEA undertook a thorough research of its documentary records and that 339 pages or portions thereof were processed for release to DiViaio. The affidavit further states that some 749 pages were withheld (following review and concurrence by the Attorney General of the United States) as exempt from disclosure pursuant to the Act, in that these pages contain information: relating to the internal rules and practices of the DEA; relating only to inter-agency communications; the disclosure of which would reveal the identity of confidential sources and confidential information; disclosing investigative techniques and procedures together with names and identities of DEA special agents, personnel and infor-ants, whose disclosure would have a detrimental effect on the successful operation of DEA. [R., pp. 100-111.] DiViaio did not contest these deletions based upon the claimed exemptions under the Act by filing an appeal from the agency determination reviewed by the Deputy Attorney General who specifically found, on a page by page review, that the documents withheld by the DEA are exempt from disclosure. Even though DiViaio was specifically advised of this available remedy and that the review disclosed that the documents offered him constitute 90% of all of the materials relating to him, he did nothing to pursue the appeal. [R., pp. 118, 119.] Thus, there is a serious question whether DiViaio intentionally by-passed available administrative remedies.

Nothwithstanding the serious question involving DiViaio's by-pass, supra, we hold that the proper procedures of the Act have been followed and that the withholding claims of the DEA are not unreasonable and that the contested documents fall into the exempt category. The settlement thus reached was, under the totality of the circumstances, a compromise between the parties litigant whereby DEA agreed to the release to DiViaio, without payment by him of copying costs and fees, documents consisting of 339 pages in consideration for DiViaio's dismissal of his action seeking other DEA documents. Such mutual settlement we hold, necessarily dictates a dismissal with prejudice. There could hardly be a compromise settlement under any other circumstances. The dismissal with prejudice is in accord with a valid, binding settlement reached between DiViaio and DEA. To hold otherwise would render the compromise a "one-way street" in that Diviaio would receive the 339 pages of documents by reason of the Government's waiver of his payment of the copying fees without anything in return from him except his dismissal of this action only insofar as it relates to the 339 pages. It is difficult to ascertain just what DiViaio is surrendering or giving to DEA in return for the 339 pages cost free if it is not in fact a dismissal of his cause of action and claim with prejudice.

II.

DiViaio contends that the trial court erred in granting summary judgment to Colby, Director, and the CIA without permitting him to conduct discovery.

On May 16, 1975 DiViaio was advised by the CIA that its records contained only one document relevant to him and that it was to be withheld from him under the exemptions from disclosure

provisions in 5 U.S.C. §552(b)(1) and (3) as a document properly classified under Executive Order in the interest of national security. On May 20, 1975 DiViaio appealed this determination to the CIA's Information Review Committee. On June 20, 1975 the Committee advised DiViaio that it had determined that the document containing information on him was not subject to release in that it is properly classified [secret] in accordance with Executive Order 11652 and ". . . consists of information concerning intelligence sources and methods which the Director of Central Intelligence has the responsibility to protect from unauthorized disclosure in accordance with section 102(d)(3) of the National Security Act of 1947, as amended. Consequently . . . your [appeal is denied] as to this document on the basis of exemptions (b)(1) and (b)(3) of the Freedom of Information Act." [R., p. 94.] Diviaio appealed therefrom.

One Charles A. Briggs, Chief, Services Staff of the Directorate of Operations of the CIA, executed an Affidavit considered by the trial court in rendering the summary judgment wherein Briggs stated that the subject document is a dispatch from a CIA station overseas to CIA Headquarters; that transmitted by the dispatch (two pages in length) is a seven-page document which contains no information on DiViaio and a two-page document containing information concerning DiViaio provided by an intelligence source; that the dispatch, with attachments [referred to here as document] consists of eleven pages, classified SECRET with notations thereon; that the document identifies a foreign country in which a CIA station is located, employees assigned thereto and information identifying intelligence sources, methods, collection projects and the names of confidential informants; that if the document should be publicly disclosed it could be

expected to result in ". . . a serious deleterious effect on United States relations with the government of the country in which the CIA station . . . was located . . . confidential sources of intelligence information can be expected to furnish information only so long as they feel secure in the knowledge that they are protected from retribution or embarrassment by the pledge of confidentiality. . . . In the case of a foreign national who has been willing to act as an agent or informant for American intelligence [who] . . . is exposed, the consequences are swift and sure. That individual faces imprisonment or, possibly, death. . . . Informants who do remain within their society are at all times subject to retribution if and when they are discovered. . . . Intelligence methods must be protected in cases where the capability itself, or the application of certain techniques, is unknown to those who would take countermeasures." [R., pp. 95-99.]

On appeal, DiViaio does not directly challenge the basis for exemption from disclosure tied to the legitimate national security interests of the United States succinctly set forth in Briggs' Affidavit. However, he contends: (1) that he is entitled, under the Act, to require - in a general discovery sense - that the CIA reveal whether any of its agents have ever photographed him and, if so, whether they have disseminated the photographs outside the agency, and (2) that the District Court erred in failing to make and render specific findings of fact required in granting summary judgments. We disagree.

DiViaio's so-called "discovery" request for photographs taken of him by CIA agents, if ever, and if so whether same have been disseminated outside of the agency are clearly demands not

countenanced by the scope and reach of the Freedom of Information Act. Rather than seeking documents, as contemplated by the Act, DiViaio seeks answers to interrogatories relating thereto.

The Freedom of Information Act requires all federal agencies to make public their records to any person requesting them unless the records contain material which is exempt from disclosure by reason of one of the nine specific exemptions set forth in 5 U.S.C.A. §552(b). The Act does not define the terms "records." However, it has been held that under such circumstances, reliance may be placed on a dictionary meaning of the word "record" defined as that which is written or transcribed to perpetuate knowledge or events. Nichols v. United States, 325 F. Supp. 130 (D.C. Kan. 1971), affirmed, 460 F.2d 671 (10th Cir. 1972), cert. denied, 409 U.S. 966 (1972). The Act's purpose was that of expanding a citizen's access to governmental information in a manner that disclosure was to be the rule rather than the exception, but not at the risk of disclosing information whose confidentiality was necessary to protect legitimate governmental functions. FAA Administrator v. Robertson, 422 U.S. 255 (1975).

The exemption upheld by the trial court here is that set forth in 5 U.S.C.A. §552(b)(1) which provides that disclosure shall not apply "to matters" specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Order. In the case at bar Executive Order No. 11652 applies. It defines, for our purposes, the "secret" classification of national security information or material whose disclosure would seriously damage national security or foreign relations significantly affecting

national security. Under the Act, as amended in October of 1974, federal district courts, in making de novo determinations of exempt status in §552(b)(1) cases, are to accord substantial weight to an agency's affidavit concerning the details of classification status of the disputed documents or records. The trial court is vested with discretion as to whether to act on the basis of the testimony or affidavits or to inspect the document in camera. In the instant case, the trial court elected to rely upon the Affidavit and its accompanying attachments. The trial court did not err.

We agree with the holdings in Weissman v. Central Intelligence Agency, 565 F.2d 692 (D.C. Cir. 1977) and Bell v. United States, 563 F.2d 484 (1st Cir. 1977). These courts there held that while the Freedom of Information Act authorizes in camera review of documents claimed to be exempt, such an inspection is not mandated and before an in camera inspection is ordered the agency should be given an opportunity to demonstrate by affidavit or testimony that the documents are clearly exempt from disclosure. The opinions further hold that the District Court must accord substantial weight to the agency's affidavits.

Applying the rule set forth in Weissman, supra, and Bell, supra, to the instant case, it is clear that nothing in the Act requires "answers to interrogatories" but rather and only disclosure of documentary matters which are not exempt. The rule further dictates that if the agency (as here) diligently and conscientiously submits affidavits summarizing the matters withheld wherein it clearly indicates the rationale for the claimed exemption, the trial court need not undertake an in camera inspection of the documents.

Certainly the so-called "discovery" matters sought by DiViaio do not come within the reach of the Act. They do not involve disclosure of documents or documentary matters which could have any bearing upon the content of any record or documents. While it may be of some unidentifiable personal interest to DiViaio to know whether the CIA ever photographed him and whether any photographs of him have been disseminated outside the agency, such interest cannot overcome the compelling need of the Government agency to protect the national security. In Weismann, supra, the Court aptly observed:

> . . . Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem, and when it amended the FOIA to permit in camera inspection in exemption (b)(1) cases, it indicated that the court was not to substitute its judgment for that of the agency. If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.
>
> In every FOIA case, there exists the possibility that Government affidavits claiming exemptions will be untruthful. Likewise, in every FOIA case it is possible that some bits of non-exempt material may be found among exempt material, even after a thorough agency evaluation. If, as appellant argues, these possibilities are enough automatically to trigger an in camera investigation,

one will be required in every FOIA case. This is clearly not what congress intended, nor what this Court has found to be necessary.

565 F.2d, at p. 697.

WE AFFIRM.

FILED

AUG - 1 1977

WILLIAM C. WHITTAKER, CLERK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS MICHAEL LINEBARGER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

NO. C-76-1826-WWS

JUDGMENT

This matter having come before the Court on defendants' motion for summary judgment, and the Court having considered the affidavits and memoranda filed by the parties, and the arguments of counsel and the documents submitted for in camera inspection,

IT IS HEREBY ORDERED that defendants' motion for summary judgment be granted, each party to bear their own costs.

DATED: August 1, 1977.

WILLIAM W SCHWARZER
United States District Judge

Civil Action No. 77-2099
Appendix A

Defendants' Exhibit I

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS MICHAEL LINEBARGER, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	NO. C-76-1826-WWS ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This action arises under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. It follows a request by plaintiff to the F.B.I. "to send me any and all documents you have gathered on me." The F.B.I. responded by sending plaintiff some but not all of such documents, and excising portions of some of the documents sent. Following plaintiff's administrative appeal to the Attorney General, additional documents were released. Not being satisfied with these responses, plaintiff filed this action on August 27, 1976. Defendants filed a motion for summary judgment. Upon review of the affidavits and memoranda filed by the parties, the Court on June 22, 1977, ordered the documents held by defendants submitted for in camera inspection by the Court. The documents have now been submitted and reviewed by the Court. For the reasons stated below, defendants' motion for summary judgment must be granted.

Initially, we may exclude from consideration a substantial volume of material contained in the documents and excised by defendants which, although it contains an occasional reference to plaintiff, is not material within the request for "documents you have gathered on me." Defendants have produced the documents but have deleted from them everything but the material which refers to plaintiff. The other material is extraneous to the request and hence not required to be produced. 5 U.S.C. § 552(a)(3).

The bulk of the other excisions made by defendants consists of identification by name or code of the source of information relating to plaintiff. Section 522(b)(7) exempts from production

> "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .
>
> "(C) constitute an unwarranted invasion of personal privacy;
>
> "(D) disclose the identity of a confidential source and, in the case of a record compiled . . . by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source; [or]
>
> "(E) disclose investigative techniques and procedures . . ."

The threshold question here is whether the particular records of the F.B.I. were "compiled for law enforcement purposes." No reported decisions shed light on the question what showing is required to qualify F.B.I. records as such. The decision of the Court of Appeals in Weisberg v. U. S. Department of Justice, 489 F.2d 1195 (C.A. D.C., 1973), cert. denied, 416 U.S. 993 (1974), appears to take a liberal view, suggesting that inasmuch as the F.B.I. is an arm of the Department of Justice, its investigatory activities are conducted for law enforcement purposes. While the 1974 amendments to the FOIA were intended to overrule Weisberg

and certain other cases in other respects (see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 160-164 (1975)), the meaning of the term "law enforcement" was not changed. Mezines, Stein & Gruff, Administrative Law, Sec. 10.03[3], p. 10-199 (hereafter cited as "Mezines"). The documents examined by the Court reveal that the investigations were conducted by the F.B.I. for internal security purposes. Although the documents do not indicate a suspected or incipient violation of law, they reflect a sufficient nexus between the conduct of the investigation and legitimate concern for national and internal security as to warrant their classification as being for law enforcement purposes.

The identification of persons, whether employed by the government or not, who provided information to the F.B.I. clearly falls within subsection (b)(7)(C). In addition, that information, along with the information contained in some of the documents revealing methods used in the investigation, also falls within subsection (b)(7)(E). Finally, the codes employed for identification of persons who were sources are exempt under subsection (b)(2) as being "related solely to the internal personnel . . . practices of the agency . . ."

Defendants also rely on subsection (b)(7)(D), but the extent to which that exemption applies is not clear. The act here seems to require not only that the source be confidential but also that the information which would be disclosed be confidential as well. Inasmuch as not all of the documents claimed to fall under this subsection were classified, there is no basis for determining whether the information provided was "confidential information furnished only by a confidential source . . ." This subsection presents difficult questions of interpretation. Inasmuch as other

provisions of the act exempt the excised information, it is not necessary for the Court to reach these questions.

Several of the documents are classified confidential. Affidavits by intelligence personnel of the C.I.A., F.B.I. and Army explain in some detail the reasons and necessity for classification. Subsection (b)(1) exempts matters

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

Executive Order 11652 (March 8, 1972), authorizes classification of the matters involved as national security information. Disclosure would jeopardize sources of information vital to national defense and foreign policy. The legislative history of the 1974 amendments establishes that the Court may order a withheld document released only if it finds "the withholding to be without a reasonable basis . . ." Senate Report No. 93-854, 93rd Cong. 2d Sess. (1974); Mezines, Sec. 10.02[2], p. 10-19. The Court finds that defendants have met their burden of showing that a reasonable basis for classification exists. See, Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1368 (4th Cir., 1975).

Accordingly, the Court finds that the matter withheld from production falls within one or more exemptions of the FOIA and need not be produced. The complaint is therefore dismissed and judgment granted in favor of defendants.

IT IS SO ORDERED.

DATED: August 1, 1977.

WILLIAM W SCHWARZER
United States District Judge

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SYLVIA DAY,

Plaintiff,

- against -

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

MEMORANDUM AND ORDER

76 Civ. 3209

KNAPP, D.J.

Having reviewed the documents submitted to us as comprising plaintiff's file, we are satisfied that nothing was improperly withheld. Moreover, we can assure the plaintiff that we found no indication of illegal surveillance methods. Several items, however, require comment.

Much information was deleted pursuant to 5 U.S.C. §552 (b)(2), the exemption for internal personnel rules and practices of the agency. A large portion of that material consists merely of administrative notations apparently relating to internal processing of the documents. Another portion, however, consists of what is characterized as "lead" information, instructions as to what further action should be taken to pursue the investigation, for example, requests that another agency transmit photographs of the plaintiff. 1/

The Bureau has cited only one case for the proposition

Defendants' Exhibit J

that the (b)(2) exemption covers such "lead" information, but that case, Concord v. Ambrose (N.D. Cal. 1971) 333 F.Supp. 958, is totally inapposite, stating only in passing dictum that "'personnel rules' can be so construed to cover instructions to law enforcement personnel on the tactics by which they should effect arrests." 333 F.Supp. at 960. Our own research has produced no case that construes the (b)(2) exemption as the Bureau urges.

The Supreme Court has recently considered the reach of this exemption in Department of the Air Force v. Rose (1976) 425 U.S. 352, concluding that (at 369-70):

> "[A]t least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to . . . a genuine and significant public interest . . . . [T]he general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest."

In that opinion the Court held that case summaries of disciplined Air Force cadets were clearly of public interest and could not be withheld pursuant to (b)(2). In the instant case the "lead" information in question is generally routine material. Presumably it is of public interest to the extent that it tends to establish that ordinary investigation techniques were used, a matter of some significance to the plaintiff who is convinced that she was the target of illegal surveillance and investigation. While we are troubled at the broad exemption for "lead" information that the Bureau seeks to establish, contrary to our mandate to construe narrowly all exemptions to the Act, EPA v. Mink (1970) 410 U.S. 73, we are satisfied that in this case the routine nature of the information and the slight public interest militates

against disclosure. We emphasize that we reach this conclusion solely on the basis of the particular documents we have examined; we do not hold that the (b)(2) exemption covers "lead" information.

Another large amount of material was withheld pursuant to §552(b)(7)(C) which protects from public disclosure matter which would "constitute an unwarranted invasion of personal privacy". This exemption was properly applied to delete information which revealed the identity of various agents who handled the file as well as the identity of persons interviewed in connection with the investigation and third persons mentioned by them to the agents. The exemption was also applied to withhold the name of a third party who was a co-subject of this file and was investigated jointly with the plaintiff. All references to this party were deleted to protect his privacy, these deletions constituting the bulk of the passages excised from the file. We imagine that plaintiff can surmise who this individual might be, and should she persuade him to waive his privacy interests then of course the material could be disclosed.

Finally, some passages were deleted pursuant to §552(b)(7)(D), to protect the identity of a confidential source and the confidential information furnished by that source. Although we are appalled at the uncorroborated gossip that finds its way into citizens' files as a result of such informants' activities, and we recognize that without disclosure the subject is totally powerless to correct any misinformation that may have been supplied, we are constrained to agree that the exemption was properly applied in this case.

Accordingly, the Bureau's motion for summary judgment must be granted. The documents submitted for our in camera inspection shall be filed and kept under seal.

SETTLE JUDGMENT.

Dated: New York, New York
March 10, 1977.

WHITMAN KNAPP, U.S.D.J.

FILED

NOV 5 1976

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIE A. CURRY Plaintiff	:	
v.	:	Civil Action No. 75-1416
DIRECTOR, DRUG ENFORCEMENT ADMINISTRATION Defendant	:	

MEMORANDUM OPINION

This matter, involving a request under the Freedom of Information Act (FOIA), 5 U.S.C. §552, et seq. comes before the Court on defendant Director's motion for summary judgment and plaintiff's opposition thereto. The Court finds, after in camera inspection of the disputed documents, that there are no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law.

By letter dated February 22, 1975, plaintiff requested documents contained in Drug Enforcement Administration (DEA) files pertaining to criminal case No. CR.5511. The documents plaintiff requested were compiled, all of which related to the case of United States v. Curry, CR. No. 5511, Eastern District of North Carolina. By letter dated March 4, 1975, plaintiff was notified that his request had been received and was being processed

Plaintiff was notified by letter dated March 7, 1975, that the processing of his request had been completed and that DEA would furnish to the plaintiff the documents or portions thereof described in the letter upon receipt of the fees indicated. By letter dated April 2, 1975, plaintiff requested the Attorney General to compel DEA to disclose the information which had been

Defendants' Exhibit K

withheld. The Attorney General, by letter dated June 12, 1975, affirmed DEA's decision to withhold certain information. On July 2, 1975, DEA received a check in the amount of $4.90 from plaintiff and on July 3, 1975, DEA forwarded to the plaintiff twenty-nine (29) pages, or portions thereof.

During the week of January 26, 1976, the documents compiled as a result of plaintiff's request of February 22, 1975 were again reviewed. This processing identified information contained in portions of seventeen (17) pages of documents that could also be released to the plaintiff. Nine (9) of these pages had previously been withheld in their entirety and eight (8) of these pages had previously been released in excised form. The seventeen (17) pages were processed and pages or portions thereof were forwarded to the plaintiff on January 29, 1976. Thus, sixty-four (64) pages were reviewed pursuant to plaintiff's request with thirty-eight (38) pages or portions thereof being furnished to the plaintiff. Twenty-six (26) pages were withheld in their entirety. The complaint in this matter was filed on September 3, 1975. By order dated September 28, 1976, this Court ordered the defendant to submit for in camera inspection the disputed documents.

Defendant maintains that the materials not released to plaintiff are exempt from disclosure under 5 U.S.C. §552(b)(2), (5), (7)(C),(7)(D) and (7)(F). The Court has carefully examined a copy of each original document submitted in camera and has determined that the exemptions asserted by defendant provide the proper grounds for withholding the documents or portions thereof at issue in this case.

Exemption (b)(2), 5 U.S.C. §552(b)(2) exempts from disclosure information "related solely to the internal personnel

rules and practices of an agency". Defendant has deleted file numbers, initials, and other administrative markings relating to DEA internal procedures for maintaining documents within defendant DEA. These deletions reflect only routine "housekeeping" matters in which the defendant and the general public may be presumed to lack any substantial interest. See, Vaughn v. Rosen, 523 F.2d 1136 (D.C.Cir. 1975). Accordingly, the administrative markings deleted herein are exempt from disclosure pursuant to exemption (b)(2).

Exemption (b)(5), 5 U.S.C. §552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agenc in litigation with the agency." This exemption was asserted herei to delete a portion of a report of a DEA official to his superior concerning certain administrative procedures relating to this case or others. The deletion was required in order to protect the internal deliberations of the agency and was clearly a predecisional deliberation protected by Exemption (b)(5). See, NLRB v. Sears Roebuck and Company, 421 U.S. 132 (1975); Montrose Chemic Corp. v. Train, 491 F.2d 63 (D.C.Cir. 1974).

Exemption (b)(7)(C), 5 U.S.C. §552(b)(7)(C) exempts investigatory files compiled for law enforcement purposes to the extent that the disclosure of such files would "constitute an unwarranted invasion of personal privacy." The materials for which (b)(7) exemptions are claimed were clearly investigatory files compiled for law enforcement purposes within the meaning of the act. Deletions were made of personal data which could reveal the identity of persons involved in the criminal allegations against the plaintiff. Documents were also withheld where no

mention of plaintiff was made therein. Exemption (b)(7)(C) was properly invoked in order to prevent the unwarranted invasion of personal privacy of those persons mentioned in certain of the documents at issue herein.

Exemption (b)(7)(D), 5 U.S.C. §552(b)(7)(D), exempts from disclosure information which would reveal the identity of confidential sources and confidential information furnished only by confidential sources. The confidential sources in this instance were local law enforcement officers and agencies who confidentially supplied information to DEA, and confidential informants who supplied information after assurances that their identities would remain undisclosed. The release of this information could subject such persons to personal harm and could impede DEA's ability to obtain information vital to law enforcement investigations. Thus, exemption (b)(7)(D) was properly invoked.

Finally, exemption (b)(7)(F), 5 U.S.C. §552(b)(7)(F), provides for the withholding from disclosure of materials which would endanger the life or physical safety of law enforcement personnel. The exposure of the identity of DEA agents under the circumstances of this case presents a threat to the safety of such agents and is exempt from disclosure under the stated exemption.

Accordingly, the Court will enter judgment herein for the defendant.

JUNE L. GREEN
U.S. District Judge

Dated: November 5 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
NOV 5 1976
JAMES F. DAVEY, Clerk

WILLIE A. CURRY	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No. 75-1416
	:	
DIRECTOR, DRUG ENFORCEMENT ADMINISTRATION	:	
	:	
Defendant	:	

JUDGMENT

Upon consideration of defendant's motion for summary judgment and plaintiff's opposition thereto, the Court having examined the documents in question in camera, and being otherwise fully advised in the premises, and the Court having determined that there are no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law, and in accordance with the memorandum opinion filed herein, it is by the Court this 5th day of November 1976,

ORDERED that defendant's motion should be and hereby is granted; and it is further

ORDERED that judgment should be entered for the defendant and the complaint herein should be dismissed, with each to bear his own costs.

JUNE L. GREEN
U.S. District Judge

APPENDIX F

DJ#145-12-2388 Gen. Lit WILSON :LS

PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1898

DANIEL NIX,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. J. Robert Martin, Jr., Chief Judge.

Argued February 16, 1977 Decided February 28, 1978

Before CRAVEN* and WIDENER, Circuit Judges, and COPENHAVER, District Judge.**

Clay G. Guthridge, Third Year Law Student (Allan R. Holmes, Legal Aid Service Agency on brief) for Appellant; Thomas G. Wilson, Attorney, Department of Justice (Rex E. Lee, Assistan Attorney General; Mark W. Buyck, Jr., United States Attorney; Morton Hollander and Leonard Schaitman, Attorneys, Appellate Section, Civil Division, Department of Justice on brief) for Appellee.

* Although Judge Craven did not participate in the hearing on this case, it was agreed that he would listen to the tape and then participate in the decision. Judge Craven, however, died before the opinion was prepared.

** District Judge for the Southern District of West Virginia, Sitting by Designation.

Defendants' Exhibit L

COPENHAVER, District Judge:

In April 1974, appellant Nix was incarcerated at the South Carolina Central Correctional Institution of Columbia. Nix alleges he was gassed and beaten by several of the institution's guards without provocation on his part. As a consequence of that incident, two letters written by four of Nix's fellow inmates were received by the Federal Bureau of Investigation (FBI), complaining of the ill treatment afforded Nix. Subsequently, FBI agents interviewed some thirty persons, consisting of inmates, prison guards and a prison supervisory official. A statement was also obtained from a physician. The results of this investigation of the alleged violation of Nix's civil rights were brought to the attention of an assistant United States Attorney for the District of South Carolina, who deemed the case to be without prosecutive merit.

Nix brings this action pursuant to the Freedom of Information Act (hereinafter referred to as FOIA), 5 U.S.C.

Wilson :LS

§ 552, as amended.[1] He seeks the inmate letters, interview reports, and various other materials compiled by the FBI in the course of its investigation. This appeal is from an order of the district court dismissing appellant's complaint. We affirm save for one item of medical material refused Nix and the names of guards omitted from an FBI interview with inmate Isenock, who consented to release of his interview.

Prior to institution of this suit, Nix unsuccessfully sought to obtain these materials from the Civil Rights Division of the Department of Justice. After commencement of this action, Nix was furnished with the following materials, constituting but a minor portion of that which he requested:

1. A copy of the FBI's interview with Nix.

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[1] Section 552(a)(4)(B) provides as follows:

> (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. A half-page synopsis of the events leading to the FBI investigation.

3. A one-page statement concerning the civil action filed by Nix and another against several members of the South Carolina Department of Corrections.

4. Two one-page drawings of the cellblock area where Nix was confined.

5. A one-sentence statement that an assistant United States Attorney had found the alleged beating and gassing of Nix to be without prosecutive merit.

6. Four photographs of Nix depicting his injuries.

Various deletions were made from the material so furnished, including FBI file numbers, the names of the investigating or reporting FBI agents, identification numbers, some pre-printed form language and the name of the assistant United States Attorney.[2]

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[2] Deletions from the synopsis included identification numbers, the name of the reporting FBI agent, the title of the investigation, the characterization of the investigation, a statement of where one copy of the report was to be sent, some pre-printed form language at the bottom of the paper, and the name of one of the "subjects" who had resigned due to the underlying threat. From the brief statement concerning the status of the civil action, the name of the investigating agent was deleted, as well as the FBI's file number of the investigation. From each of the drawings, the name of the FBI agent and the date of the drawing were deleted. Finally, from the one-sentence pronouncement of the decision of the assistant United States Attorney, there was deleted the name of the assistant and the file number of the investigation.

Subsequently, Nix also received from the FBI a copy of the report of its interview with inmate Isenock. Nix had obtained Isenock's consent for this purpose and the FBI deemed the inmate's consent to be a waiver of his right to privacy. Deletions were made from the interview report, including the names of guards mentioned by Isenock.[3] In view of Isenock's consent, there is no justification for the deletion of the names of the guards as given by him and whose names are also to be found in the released copy of the FBI's interview with Nix. Accordingly, the Isenock statement as released is to be issued anew with the names of the guards inserted as set forth in the interview report by the FBI agent.

At the direction of the court below, the FBI filed the disputed material with the court for an in camera inspection in keeping with the provisions of 5 U.S.C. § 552(a)(4)(B). Both the district court and this court have examined the disputed material which consists essentially of the following:

1. The two letters written by four inmates alerting the FBI to Nix's alleged ill treatment

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[3] Other deletions consisted of the day and place of the interview, the investigation file number, the name of the agent interviewer, his typist's initials, the dictation date, and the pre-printed form language at the bottom of the page. These other deletions, all being made in keeping with this opinion, are deemed proper.

2. Reports of interviews with guards who were suspects, inmates who were witnesses and a prison supervisory official

3. Report of a physician's statement

4. Names of third parties, such as FBI agents, prosecutors, witnesses and suspects

5. Reports obtained from sources within a non-federal law enforcement agency

6. Various internal procedural items such as the investigation title and file numbers, as well as items deemed cover letters

Prior to the 1974 amendments to the Freedom of Information Act, virtually all of the material at issue here would have been deemed exempt simply on the ground that it constitutes part of the investigatory records compiled for law enforcement purposes by a criminal law enforcement authority in the course of a criminal investigation. Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974).

The 1974 amendments, which were enacted on November 21, 1974, and became effective February 19, 1975, narrowed

and defined the exemptions from disclosure as now set out in the subsections to 5 U.S.C. § 552(b).[4]

The Justice Department contends that the withheld material is exempt from disclosure by virtue of the provisions of various subsections of section 552(b): (2) (internal personnel rules and practices); (6) (personnel and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy); (7)(C) (unwarranted invasion of personal privacy); and (7)(D) (confidential source identity and confidential information). In applying these exemption

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[4] Section 552(b) provides, in part:

> (b) This section does not apply to matters that are --
>
> . . . .
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> . . . .
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy, [or] (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source. . . .

provisions, it would appear that Congress intended the courts to balance the public and private interests involved. The United States Supreme Court has so held in the course of employing the subsection (6) exemption. Department of the Air Force v. Rose, 425 U.S. 352, 372-73 (1976). This court has found the balancing test to be equally appropriate when construing subsection (7)(C). Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 n.7 (4th Cir. 1977). We find the balancing test applicable as well to subsections (2) and (7)(D).

In employing the balancing test, we are mindful that FOIA exemptions are to be narrowly construed in accordance with the legislative purpose of Congress that disclosure rather than secrecy is the dominant objective of the Act. Department of the Air Force v. Rose, 425 U.S. at 360-61. As we have recently observed, Congress, in enacting the 1974 FOIA amendments, was dissatisfied with the broad application given by the courts to exemption 7 of the original Act and with the limited extent to which the courts were allowing disclosure of investigatory files. Charlotte-Mecklenburg Hospital Authority v. Perry, No. 76-2272 (4th Cir. January 26, 1978).

The FOIA exemptions, together with the balancing of private and public interests in keeping therewith, are to be construed and applied accordingly.

The record in this case indicates that Nix has also filed a civil rights suit in the same district court below on his own behalf and on behalf of an asserted class alleging mistreatment by the guards at the South Carolina Correctional Institution of Columbia. That suit concerns the same incident involved in the FBI investigation under consideration in this FOIA action as well as prison conditions generally. As this court observed in Deering Milliken, 548 F.2d at 1134-35, FOIA's purpose is to inform the public about the action of government agencies. It was not designed to supplement the rules of civil discovery. Thus, the right of Nix to obtain information is neither enhanced nor diminished because of his needs as a litigant, but is to be measured by the right of the public to obtain the same information.

I. The Inmate Letters and FBI Interviews (Excluding Physician's Statement)

Although the four inmates did sign their names to the two letters to the FBI, the accusations of impropriety

contained in the letters are of such a nature that individuals in the vulnerable position of these informers, facing potential reprisal from the very prison guards and prison officials against whom they complain, would hardly have made the charges unless they were confident that their identities would remain concealed. In applying the confidentiality exemption of subsection (7)(D), it is enough to show that the information was furnished under circumstances from which an assurance of confidentiality could be reasonably inferred.[5] Deering Milliken, 548 F.2d at 1137.

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[5] The joint explanatory statement of the House and Senate conferees respecting the 1974 amendments to FOIA contains the following:

> The conference substitute follows the Senate amendment except for the substitution of "confidential source" for "informer" . . . .
>
> . . . .
>
> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes — either civil or criminal in nature — the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, all of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. Conf. Rep. No. 1200, 93rd Cong., 2d Sess. p. , reprinted in [1974] U.S. Code Cong. & Ad. News 6285, 6291 (emphasis in the original).

At the time the letters were written in May 1974, being prior to the 1974 FOIA amendments, the state of the law was such that investigatory files compiled for law enforcement purposes were deemed exempt from disclosure.[6] Although questions of confidentiality as well as privacy are to be determined in accordance with the present language of the statute, the district court properly considered the law applicable at the time the letters were written in determining the confidential nature of these communications. In view of the peril of reprisal confronting the inmate-informers and the state of the law as it existed when their letters were transmitted to the FBI, the finding by the court below that the letters were written and received under an implied assurance of confidentiality is amply supported by the record. Consequently, the identity of each of the inmate authors is protected from disclosure by subsection (7)(D). This does not, we hasten to add, suggest that, had the inmate-informers written their letters after the effective date of the 1974 FOIA amendments, they would not be protected. Rather, we undertake now to pass only on those questions presented by the circumstances of the case before us.

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[6] Eg., Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974).

For essentially the same reasons, the FBI interviews with the guards, inmates and a prison supervisory official are exempt as having been given under an implied assurance of confidentiality, as found by the court below. The interviews were conducted at a time prior to the 1974 FOIA amendments when it was reasonable for the interviewees to understand that investigatory files compiled for law enforcement purposes were exempt from disclosure. Further, inasmuch as a number of the guards were themselves the focus of the investigation, the prospect of reprisal of guard against inmate and even inmate against guard becomes an entirely realistic one. As found by the court below, the prison altercation being investigated was one between a prisoner and priso guards and in such a situation natural resentment would be hig with a definite potential for creating conflicts and jeopardizing the personal well-being of the prisoners and guards alik Moreover, it is hot without significance that, of the some thirty guards and inmates other than Nix interviewed by the FB only Isenock has seen fit to consent to the release of his interview. Accordingly, the district court's finding of an implied assurance of confidentiality to the guards, inmates an the prison supervisory official interviewed by the FBI is readily supported by the record in the case and by this court'

own in camera inspection. Thus, the identity of the guard, inmate and prison supervisory official interviewees is free from disclosure under the confidential source exemption of subsection (7)(D).

The second phase of subsection (7)(D) also serves to protect, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, "confidential information furnished only by the confidential source." As already noted, the joint explanatory statement of the House and Senate conferees states that "all of the information furnished only by a confidential source may be withheld . . . ." (emphasis in original).[7] The (7)(D) exemption is plainly designed to remove impediments to investigation by assuring confidential sources that not only will their identities be retained in confidence save for the proper exercise of the power of subpoena but so, too, will the information itself when obtained only from confidential sources. We find that the exemption is intended to protect all such confidential information when furnished only by a confidential source whether one or more.

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[7] See note 5, supra.

This suggests in turn that such information is not protected under the second phase of subsection (7)(D) unless it is furnished "only" by confidential sources. It is apparent from a review of the record in this case that the information released by the FBI, especially the FBI's interviews with Nix and inmate Isenock, contains some of the same revelations as are to be found in the inmate letters and FBI interviews with other inmates, guards and the prison supervisory official. To that extent, the information which the FBI declines to disclose stems from nonconfidential sources, namely, Nix and Isenock.

Nevertheless, we conclude that no part of the inmate letters and FBI interviews with other inmates, guards and the prison supervisory official is subject to disclosure. Although it is by no means clear that revelation of the parts of these inmate letters and other interviews corresponding to the Nix and Isenock versions would reveal the identity of the authors or interviewees, there is a substantial risk that their identities would thereby become ascertainable. This risk becomes more apparent when it is recognized that the focus of one's attention in this prison setting is naturally drawn and narrowed at the outset to those inmates who were in Nix's cellblock area and to those guards who were on duty at the time of the event under investigation. Inasmuch as the nonconfidential portion

of the information involved has already surfaced and become available for public consumption, and in view of the risk of disclosure of the identity of the confidential sources by revelation of any significant portion of the withheld inmate letters and interviews, a balancing of the private and public interests involved compels the conclusion that the undisclosed inmate letters and interviews in their entirety be deemed exempt under subsection (7)(D). Any other result would jeopardize the opportunity of federal law enforcement agencies to obtain similar information in future cases and, as a consequence, law enforcement at the federal level would needlessly suffer without any compensating benefit.

Inasmuch as the withheld inmate letters and interviews are found wholly exempt under subsection (7)(D), it becomes unnecessary to consider whether their disclosure is also exempt under subsection (7)(C) protecting unwarranted invasion of personal privacy.

II. Reports from Non-Federal Law Enforcement Sources

The FBI has obtained certain records provided by sources within a non-federal law enforcement organization. The FBI insists that these records were supplied to it in confidence,

that such records are not generally available to the public, that they were obtained by FBI agents for official purposes and contain criminal records of individuals as well as candid remarks and observations of non-FBI law enforcement officials, and that release of this information would seriously inhibit the FBI's relationship with its confidential sources and with other law enforcement personnel. We agree with the court below that these materials were obtained in confidence and are fully protected by subsection (7)(D). Church of Scientology of California v. United States Department of Justice, 410 F. Supp. 1297 (C.D. Cal. 1976).

III. Internal Practices

We next take up those miscellaneous materials which include file numbers, routing stamps, cover letters and secretary initials. The district court denied release of these materials pursuant to subsection (2) which protects from disclosure matters related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2) (1970).

Merely how the FBI routes and labels its investigations, to whom its agents send reports of the investigations, and who does the typing of the reports are ordinarily not of

such genuine and significant public interest as to require FOIA disclosure. In this instance, these items are at most routine matters of mere internal significance and, as such, are protected from disclosure by subsection (2). Maroscia v. Levi, No. 76-2236 (7th Cir. December 20, 1977).

Nix further contends that other material is being withheld merely because notations of file numbers, routing stamps, secretary initials and the like are to be found on documents to which he is otherwise entitled. Our in camera inspection of all these materials satisfies us that such is simply not the case. Rather, the FBI has undertaken here to comply with the requirement of 5 U.S.C. § 552(b) that "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

IV. Identity of FBI Agents and Assistant United States Attorney

The FBI also seeks to maintain the secrecy of the identity of the FBI agents who conducted the interviews. Non-disclosure is sought under subsection (7)(C) on the ground that identification of the FBI agents would constitute an unwarranted invasion of their personal privacy. It is

contended by Nix, however, that public officials and employees are not entitled to shield their identities from public disclosure in those matters in which they are acting in their official capacities.

One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.[8] While the right of privacy to these FBI agents is perhaps minimal, we find that the public interest in the identification of the FBI agents who conducted the investigation of the alleged civil rights violation of Nix to be even less. For the same reason, the assistant United States Attorney who made the decision that appellant's alleged civil rights violation was without prosecutive merit is also entitled to have his identity remain undisclosed as being an unwarranted invasion of personal privacy under subsection (7)(C). It is

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[8] The FBI does not urge, nor does this court find, that such harassment and annoyance rises to the level that the life or physical safety of any of these law enforcement personnel is in danger. See 5 U.S.C. § 552(b)(7)(F). Maroscia v. Levi, No. 76-2236 (7th Cir. December 20, 1977).

enough that the identity is known of the United States Attorney in charge of the Columbia, South Carolina, office in which the assistant who made the decision is employed.

The court recognizes that, in a matter arousing greater public interest, nondisclosure of these officials' identity might be overborne by the legitimate interest of the public. See Deering Milliken, 548 F.2d at 1136-37. This is not such a case.

V. Physician's Statement

The last of the withheld information which Nix seeks concerns the investigation made by the FBI into his physical condition and the medical treatment administered to him. The FBI obtained the statement of a physician which the court below deemed exempt by virtue of subsection (6), protecting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The medical record in question here, however, is that of the very individual who seeks its disclosure. Thus, there is no invasion of his privacy, and subsection (6) is inapplicable.

The FBI insists that release of this statement might subject the medical personnel named therein to claims that improper medical treatment was delivered and, perhaps, to harassment by civil suits. For reasons similar to those assigned with respect to the propriety of withholding the names of the investigating FBI agents, it is concluded that the name of the reporting physician, as well as that of the medical technician and the other doctor mentioned in the statement, may in this instance be deleted pursuant to subsection (7)(C) which exempts disclosure constituting an unwarranted invasion of personal privacy. We find no significant public interest in the identity of the attending medical personnel, particularly when balanced against their interest in avoiding harassment or other embarassment which release of their identities may well precipitate.

Accordingly, the substantive content of the statement by the physician must be released, with deletions therefrom being made in keeping with this opinion.

VI. Attorney's Fees

FOIA provides for an award of attorney's fees to a complainant who has substantially prevailed, 5 U.S.C. § 552(a)(4)(E):

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

It cannot be said that Nix has substantially prevailed. The only fresh information of consequence obtained by him as a result of this suit consists of the photographs of his injuries and a half-page physician's statement of the treatment of those injuries. It is significant to note that a member of the public other than Nix would likely have been denied access to both the photographs and the physician's statement by virtue of the privacy exemptions contained in subsections (6) and (7)(C), absent consent from Nix. Similarly, the Nix and Isenock statements became available only by virtue of their consent. Thus, the FOIA request alone has yielded virtually nothing beyond the FBI half-page synopsis of the events leading to the investigation and the pronouncement that an assistant United States Attorney found the case to be without prosecutive merit.

Even if all of the rather limited amount of material derived by Nix were deemed sufficient to qualify him as substantially prevailing, Nix must nevertheless be denied recovery of attorney's fees. The United States Court of Appeals for

the District of Columbia Circuit has extensively reviewed the legislative history of FOIA's attorney's fees provisions and the factors a district court should use in exercising its discretion in awarding such fees. Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704 (D.C. Cir. 1977), and Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). This court agrees with the District of Columbia Circuit that an award of attorney's fees is not automatic, but is to be made where doing so will encourage fulfillment of the purposes of FOIA. In this case, Nix has failed to show benefit to the public by his action. On the contrary, Nix brought this suit to benefit himself by supplementing the discovery procedure in his civil rights action currently pending in the district court. Further, the government's withholding of the records in this case has been founded largely on a reasonable basis in law. Under these circumstances, this court cannot say that the district court abused its discretion in denying Nix his attorney's fees and litigation costs.

VII.

On remand, the district court shall enter an appropriate order releasing the material referred to in this opinion.

AFFIRMED AS MODIFIED AND REMANDED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT B. SCHWARTZ,

Plaintiff,

v.

DEPARTMENT OF JUSTICE et al.,

Defendants.

Civil Action No. 76-2039

FILED

FEB - 9 1978

JAMES E. DAVEY, Clerk

MEMORANDUM ORDER

Defendant Department of Justice has moved for summary judgment in this Freedom of Information Act (FOIA) action, producing numerous documents and withholding others pursuant to FOIA exemptions 5, 6, 7(C) and 7(D). 5 U.S.C. § 552(b). In support of its motion, defendant has submitted Vaughn v. Rosen affidavits analyzing in detail the documents themselves, and where pertinent, citing the provisions of the statute relied upon. We previously, by Order of December 13, 1977, granted summary judgment for the remaining defendant Peter Rodino, who was sued in his official capacity as Chairman of the House Judiciary Committee: defendant Rodino by sworn affidavit informed this Court that no records existed in his files responsive to plaintiff's request and that relevant background material voluntarily was being supplied to plaintiff by defendant Rodino. 1/

At issue in this action are documents pertaining to an investigation regarding the conduct of Peter Schlam, an Assistant United States Attorney for the Eastern District of New York, in the unsuccessful extortion and conspiracy prosecution of United States Representative Angelo Roncallo. Schlam fell ill during the final days of that trial as a result of the

1/ The Attorney General of the United States also was joined as defendant, in his official capacity, and his liability will be treated as incorporated into that of the Department of Justice.

Defendants' Exhibit M

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT B. SCHWARTZ,

Plaintiff,

v.

DEPARTMENT OF JUSTICE et al.,

Defendants.

Civil Action No. 76-2039

FILED

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1/ The Attorney General of the United States also was joined as defendant, in his official capacity, and his liability will be treated as incorporated into that of the Department of Justice.

Defendants' Exhibit M

ingestion of a quantity of drugs, possibly self induced, and his illness attracted substantial public attention. Plaintiff seeks documents relating to the investigation of that drugging incident by the Department of Justice. Because we find that the documents are protected from disclosure by exemptions 6, 7(C) and 7(D), we do not find it necessary to analyze the applicability of exemption 5 as advanced by defendant.[2/]

A. Exemption 7(C). The FOIA exempts from mandatory disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy." Our review of the itemizations of documents convinces us that the withheld documents were compiled for law enforcement purposes. It is not necessary that further enforcement proceedings be imminent in order to qualify under exemption 7. Rural Housing Alliance v. U. S. Department of Agriculture, 498 F.2d 73 (D.C. Cir. 1974) (compilation of records for adjudicatory purposes sufficient to achieve protection of exemption 7); see Koch v. Department of Justice, 376 F. Supp. 313, 315 (D.D.C. 1974) (records compiled for enforcement of regulatory provisions protected); Green v. Kleindienst, 378 F. Supp. 1397, 1400 (D.D.C. 1974) (business review letters protected). We find that these records were compiled for law enforcement purposes relating to alleged improprieties in the prosecution of Congressman Roncallo, particularly noting that a letter of reprimand was placed in Schlam's file as a result of the investigation. See Defendant's Motion for Summary Judgment, Exhibit I (letter of V. Rakestraw, at 4).

It is also our opinion that release of intimate details regarding the drugging incident would constitute "an unwarranted invasion of personal privacy." Since we also hold that the relase would constitute a clearly

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2/ We have reviewed the itemizations of the withheld documents carefully, but do not in this memorandum discuss the individual documents. Notably, exemptions 6 and 7(C) are asserted for each and every document withheld.

unwarranted invasion meriting exemption from disclosure pursuant to exemption 6 (see discussion, infra), we are satisfied that the less demanding burden on the Government in meeting the privacy invasion aspects of exemption 7 has been satisfied. See Department of the Air Force v. Rose, 425 U.S. 352, 378-79 n.16 (1976).

We therefore conclude that these documents are protected from disclosure by exemption 7(C).

B. Exemption 7(D). Exemption 7(D) protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (D) disclose the identity of a confidential source. . . ." Defendant asserts that disclosure of the requested information would jeopardize the confidential relationships which enabled the Government to secure the information at issue, since a person familiar with this incident would be able to ascertain the identity of the source by an analysis of information involved. See Defendant's Motion for Summary Judgment, Exhibit III (Affidavit of G. R. Schweickhardt at 7-10). We accept this sworn testimony, and determine that these records are protected by exemption 7(D). See Harbolt v. Alldredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1015 (1972) (FBI interrogation reports not subject to disclosure).

C. Exemption 6. Exemption 6 protects from disclosure "personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To determine the applicability of this exemption, it is necessary to balance the privacy interest of Peter Schlam against the public interest purpose which would be satisfied by the production of the documents at issue,[3/] recognizing that we should tilt the

3/ We must evaluate the public interest with reference to the advantages to be secured by release to this plaintiff. See Rural Housing Alliance v. Department of Agriculture, supra, at 77; Getman v. N.L.R.B., 450 F.2d 670, 677 n.24 (D.C. Cir. 1974). But see Ditlow v. Schultz, 517 F.2d 166, 171 (D.C. Cir. 1975) (dictum) (evaluation should be with reference to the advantages to be secured by release to the general public). Our decision in this action would not be altered by application of the standard suggested in Ditlow.

balance in favor of disclosure. Getman v. N.L.R.B., 450 F.2d 670, 674-75 (D.C. Cir. 1971). In reaching our conclusion, we endorse the reasoning employed by the court in Hiss v. Department of Justice, C.A. No. 76Civ4672 (S.D. N.Y. Oct. 18, 1977) in upholding the applicability of exemption 6 to protect from disclosure records relating to the conduct of a private investigator engaged in the defense of Alger Hiss before the House Un-American Activities Committee. The Court there determined that disclosure of information relating to the investigator's relationship with government intelligence agencies would be embarrassing and clearly unwarranted. Plaintiff in this action protests the nondisclosure of unverified opinions and reports regarding Schlam's personal, social, professional and medical status, and it is this Court's conclusion that disclosure would constitute a serious privacy invasion. See Columbia Packing Co., Inc. v. Department of Agriculture, 417 F. Supp. 651, 654 (D. Mass. 1976).

In balancing the interests at issue in this litigation, we have evaluated plaintiff Schwartz's assertions that the public interest would be advanced by release of this information. Plaintiff asserts that such release would enable him "to judge the quality and fairness of [the Roncallo] judicial proceedings and the conduct of AUSA Peter R. Schlam." Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 2. While we find that this proffered interest may be a legitimate one, we do not find that it is sufficient to tip the balance in favor of disclosure. Furthermore, in the context of this case, we are prone to believe that plaintiff's real motivation may lie elsewhere.

In Hiss v. Department of Justice, supra, slip op. at 7, the Court in rejecting plaintiff's assertions that release of the information would be in furtherance of the public interest in the conduct of government prosecutions, characterized them as being invoked "only to satisfy the requirements of the FOIA," whereas the plaintiff's personal interests were paramount. We find plaintiff Schwartz's attempt to distinguish the Hiss

case to be unpersuasive, and like the Hiss court determine that plaintiff here has not met his burden of demonstrating that the public interest in the disclosure outweighs the clear invasion of privacy which disclosure of these documents would constitute.

For these reasons, it is by the Court this 9th day of February, 1978,

ORDERED, that defendant's motion for summary judgment be granted; and it is further

ORDERED, that this action is dismissed.

J. H. Pratt

John H. Pratt
United States District Judge

(21)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT V. RAFTER,

Plaintiff,

-against-

FEDERAL BUREAU OF INVESTIGATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

Defendant.

PRO SE

~~77 Civ. 1134 (MEF)~~
77C.V 1131

MEMORANDUM AND ORDER

FRANKEL, D.J.

Plaintiff, an attorney proceeding pro se, brought this action to compel disclosure under the Freedom of Information Act of F.B.I records pertaining to him. It now appears without material dispute that the thin sheaf of records in question pertains to an F.B.I. investigation made in 1967 at plaintiff's request of a Connecticut sheriff and others who were alleged by this plaintiff to have violated his federal civil rights by attaching his Ford automobile and by other actions connected with a dispute over the rent due under a summer lease of a house in Hartsdale, New York. (The same events were evidently the occasion for a private federal civil rights action by plaintiff dismissed by Judge Bonsano in 1967. The later history of that action, if any, does not appear.) The F.B.I. has now delivered to plaintiff its file on him, complete except in one particular to be noted below. At least,

Defendants' Exhibit N

declared on oath by a responsible agent charged with FOIA compliance that the file is complete, and there is no contrary indication generating a genuine issue of fact. The agent covers this subject in full and circumstantial detail, describing the procedures for file searches for this situation and swearing to careful fulfillment of these procedures. Plaintiff's conclusory averment that "there are other records" cannot be thought to tender a triable issue or to justify the series of depositions he proposes.

The single issue, legal rather than factual, arises from the undisputed fact that the F.B.I. has deleted in about three places the name of the agent conducting the investigation made at plaintiff's behest. In this state of affairs, plaintiff has sought to depose four F.B.I. people and the City Bar Association's Counsel "to determine the existence of New York records and the extent thereof."* Defendant has moved for summary judgment dismissing the complaint. The latter motion will be granted.

1. The name or names of the investigating agent(s) have been withheld under the asserted authority of 5 U.S.C. §552(b)(7)(C), which protects against any "unwarranted invasion of personal privacy" through disclosure of "investigatory records compiled for law enforcement purposes. . . ." It may be debatable whether the

*Plaintiff's affidavit sworn May 25, 1977, p.2.

"privacy" thus safeguarded was intended or primarily intended, to embrace that interest of law enforcement personnel as distinguished from private persons. However, the only cited precedents on the subject favor the defendant, Day v. Federal Bureau of Investigation, 76 Civ. 3209 (S.D.N.Y. 1977) (Knapp, J.); Ott v. Levi, 419 F. Supp. 750, 752 (D. Mo. E.D. 1976), and this court finds no justification for considering departure from those precedents in the circumstances of this case. Plaintiff suggests no reason of any kind why he needs the names of investigating agents. If there is room for debate, there is also ample room for holding that F.B.I. agents too retain some claims to personal privacy and security, at least against casual disclosures of the kind here sought without any suggestion of purported purpose.

2. A second argument advanced by the Government both reinforces the first and supplies an independent basis for dismissal. Plaintiff, as he was duly informed, had a right of administrative appeal to the Deputy Attorney General. He has chosen to ignore that right. This is the clearest kind of case for requiring exhaustion of administrative remedies. If plaintiff has some special need for the name of any investigating agent, a need not disclosed to the court, it would be the kind of submission appropriately to be weighed by the agency's responsible leadership in the first instance. But this merely illustrates the sound principle defendant invokes. The failure to exhaust is an independently sufficient ground for dismissal.

3. The effort to take depositions must be overridden. The mere assertion, with no semblance of specificity, that there may be rare records cannot be accepted as a basis for either keeping cases like this one alive or for allowing routinely the interrogation of agency personnel.

The complaint is dismissed. It is so ordered.

Dated, New York, New York
July 21, 1977

Marvin E. Frankel
U.S.D.J.

6-7-c
7-d

FILED

JUL 7 1977

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY DEAN TURNER :

Plaintiff :

v. : Civil Action No. 75-2180

U.S. DEPARTMENT OF JUSTICE, et al:

Defendants :

MEMORANDUM OPINION

This action, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et seq., seeks access to documents in the possession of the Federal Bureau of Investigation (FBI) which pertain to the plaintiff. Defendants have moved to dismiss, or in the alternative, for summary judgment.

Plaintiff herein seeks documents within the control of defendants relating to his 1973 conviction in the Northern District of Oklahoma on two counts of interstate transportation of forged securities. By letter dated May 6, 1976, the FBI furnished plaintiff with one hundred seventeen (117) pages in response to one of two requests which he had lodged with the Bureau. Plaintiff's administrative appeal of this action was affirmed by the Office of the Deputy Attorney General by letter dated December 13, 1976. During May 1977, in light of the amount of time which had elapsed since plaintiff's request was first processed, plaintiff's request was reprocessed. By letter dated May 24, 1977, two hundred ninety-nine (299) pages, including specimens of evidence were released to plaintiff. Twenty-nine (29) pages of documents and fifty-six (56) pages of specimens of evidence were withheld in their entirety.

Defendants' Exhibit O

Defendants have submitted with their motion a detailed itemization and justification which includes a description of each document or specimen; the pages contained therein and pages released or withheld; deletions made and exemptions claimed; and a cross reference to true copies of each document released to plaintiff. Such itemization, indexing and justification satisfies the requirements of Vaughn v. Rosen, 523 F.2d 1136 (D.C.Cir. 1975). Defendants have claimed only exemptions (b)(7)(C and (b)(7)(D), 5 U.S.C. § 552(b)(7)(C) and (D). 1/ The Court finds that all documents involved are "investigatory records compiled for law enforcement purposes" within the meaning of 5 U.S.C. § 552(b)(7).

Information which has been deleted herein pursuant to exemption (b)(7)(C) includes other person's names in investigatory files, third parties named during interviews, and possible suspects or associates of suspects. Also withheld pursuant to (b)(7) were the names of FBI Special agents and one Secret Service agent, none of whom had any contact with plaintiff during the instant investigation. It is clear that the deletions made in reliance upon exemption (b)(7)(C) were limited in scope, and only utilized in order to protect legitimate personal privacy interests. The withholding of person's names who may have been associated with plaintiff under any of a number of different circumstances is within the scope of those matters properly withheld pursuant to

1/ 5 U.S.C. § 552(b)(7)(C) and (D) read as follows:

> (b) This section does not apply to matters that are --
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .
> (C) constitute an unwarranted invasion of personal privacy,
> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source . . .

exemption (b)(7)(C). Likewise, the disclosure of the identities of law enforcement agents who had no contact with the plaintiff could place such agents in jeopardy and/or inhibit future investigative activities of such agents or their law enforcement entities. Defendants have disclosed information relating to agents who had actual contacts with the plaintiff, thus giving him access to the crux of the information which he is seeking.

Defendants have invoked exemption (b)(7)(D) in order to protect the identities of persons interviewed during the course of their investigation and the identities of and information provided by local law enforcement agencies. To require this information to be made public could result in the loss of or danger to the sources and could greatly inhibit the cooperation between local and federal agencies which is essential to effective law enforcement efforts. Thus, the identities of confidential sources as well as identifying information, may be withheld pursuant to exemption (b)(7)(D). It should be noted that not all information from local law enforcement agencies was withheld from the plaintiff, as only information obtained from the confidential sources of such local agencies was deleted. Likewise, in most instances, information from a confidential source or other cooperating persons was released to the plaintiff. Information that was withheld was of the type which in and of itself could identify its source.

The documents submitted in support of defendants' motion for summary judgment and the entire record herein indicate that defendants have made a diligent effort to disclose to the plaintiff all requested information or segregable portions thereof except where specified valid and limited exemptions apply. Accordingly,

defendants have satisfied the Court that the exemptions claimed were properly invoked, that there are no genuine issues of material fact, and that they are entitled to judgment as a matter of law.

JUNE L. GREEN
U.S. District Judge

Dated: July 15, 1977.

FILED

JULY 1977

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY DEAN TURNER :

Plaintiff :

v. : Civil Action No. 75-2180

U.S. DEPARTMENT OF JUSTICE, et al :

Defendants :

JUDGMENT AND ORDER

Upon consideration of defendants' motion to dismiss, or in the alternative, for summary judgment and the entire record herein, the Court having determined that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law, and in accordance with the memorandum opinion filed herein, it is by the Court this 6th day of July 1977,

ORDERED that defendants' motion for summary judgment should be and hereby is granted; and it is further

ORDERED that judgment should be entered for the defendants.

JUNE L. GREEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MITSUBISHI ELECTRIC CORPORATION, et al.,	FILED
Plaintiffs,	APR 1 1977
	JAMES E. DAVEY, Clerk
v.	Civil Action No. 76-0813
UNITED STATES DEPARTMENT OF JUSTICE, et al.,	
Defendants.	

MEMORANDUM AND ORDER

This Freedom of Information Act [FOIA] 1/ action is before the Court upon the defendants' motion for summary judgment. Pertinent facts concerning the background and development of the present litigation have been set forth in our previous memoranda and, therefore, will not be repeated here.

The documents at issue consist of the responses of several multinational corporations 2/ to certain investigatory survey requests 3/ of the Foreign Commerce Section, Antitrust

1/ 5 U.S.C. §552 (Supp. IV 1974).

2/ Twenty-two corporations were contacted during the course of this survey, each of which was assigned a letter identification code from A through V by the Foreign Commerce Section. To date, fifteen firms have responded to survey requests.

3/ A typical survey request cover letter, attached to the second Sheldon Affidavit, states, in pertinent part, as follows:

> As an aid to its duty to enforce the American antitrust laws as they apply to the foreign commerce of the United States, the Antitrust Division of the United States Department of Justice requests that your company produce, or make available for copying, within ninety days of receipt of this letter, all documents listed in the attached

Defendants' Exhibit P

Division, Department of Justice, relating to areas of international territorial restraints in patent and know-how licensing, joint ventures, and membership in foreign-based cartels. 4/ Responses to these survey requests were made on a voluntary basis. Most documents were provided in reliance upon or written assurances, sought and obtained from the Foreign Commerce Section, that they would be disclosed only to department personnel and returned, together with copies made, upon completion of the investigation. All of the submitting firms expressed strong concern about the competitive sansitivity of the materials and the adverse effects which could result from their release.

The specific records generated by the survey requests, indexed by subject matter in an attachment to the Neshkes Affidavit, are joint venture formation agreements, patent, know-how, and trademark licensing agreements, and in certain instances, articles of incorporation and patented or secret processes related to the various agreements. Materials furnished by one corporation pursuant to a more extensive follow-up investigation include SEC 10K forms, additional licensing agreements, preliminary inter- and intra-company communications concerning specified proposed agreements, lists of trademarks licensed and used, annual sales records, patents registered in the United States and foreign countries, and various catalogues and manuals provided pursuant to engineering and know-how licensing agreements with foreign affiliates.

4/ These investigations commenced on February 4, 1974, with the mailing of questionnaires to eight multinational firms. On January 7, 1975, a second series of questionnaires, slightly modified from the first, was forwarded to eight additional firms. Subsequent to receipt of plaintiffs' initial FOIA agency request, that is, on June 10, 1976, a third series of questionnaires was sent to six companies.

Defendants base their withholding of these documents upon three FOIA exemptions -- 5 U.S.C. §552(b)(7)(A) [Exemption 7(A)], 5 U.S.C. §552(b)(7)(D)[Exemption 7(D)], and 5 U.S.C. §552(b)(4)[Exemption 4]. For reasons discussed infra, we are of the opinion that such exemptions permit non-disclosure under the present circumstances.

EXEMPTION 7(A)

Under Exemption 7(A), the FOIA's disclosure requirements are made inapplicable to matters which are "investigatory records compiled for law enforcement purposes", to the extent that their production would "interfere with enforcement proceedings". The legislative history of the 1974 Amendments to the FOIA indicates that this exemption applies "whenever the government's case in court -- a concrete prospective law enforcement proceeding -- would be harmed by the premature release of evidence or information not in the possession of known or potential defendants . . . [or] where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding." 120 Cong. Rec. S9330 (daily ed., May 30, 1974)(Remarks of Senator Hart).

The Court of Appeals for this Circuit, in Rural Housing Alliance v. United States Dept. of Agriculture, 498 F.2d 73 (D.C.Cir. 1974), has concisely articulated the test which must be applied in determining whether "investigatory files" have been "complied for law enforcement purposes", as follows:

> It is now established that the Government need not show "imminent adjudicatory proceedings or the concrete prospect of enforcement proceedings". What the Government is required to show is that the investigatory were complied for adjudicative

> or enforcement purposes. Whether the adjudication or enforcement has been completed is not determinative, nor is the degree of likelihood that the adjudication or enforcement may be imminent . . . .
>
> * * *
>
> The purpose of the "investigatory files" is thus the crucial factor. . . . If the purpose of the investigation was . . . not customary surveillance . . ., but an inquiry as to an identifiable possible violation of law, then such inquiry would have been "for law enforcement purposes" . . . . 498 F.2d at 80-82. (Emphasis in original).

On the basis of the entire record in this case, and particularly the two Sheldon Affidavits filed in support of defendants' summary judgment motion, the Court is convinced that the Foreign Commerce Section's purpose in obtaining the documents in question was to examine them with a view toward possible enforcement actions under the antitrust laws. 5/ Consequently, such materials constitute "investigatory records complied for law enforcement purposes" within the purview of Exemption 7(A).

As to the second requirement under Exemption 7(A), viz., that production of the records would "interfere with enforcement proceedings", we are in agreement with the defendants that premature disclosure of the materials sought by plaintiffs would reveal to all interested parties the enforcement intentions of the Antitrust Division and, once alerted, potential defendants might attempt to disguise violations, destroy or alter incriminating data, or refuse to voluntarily produce germane information. As stated in the first Sheldon Affidavit:

> The questionnaires sent out as of this date are part of a more comprehensive study of the joint venture and patent-license agreements of multinational corporations. The Division anticipates that, once the documents currently

5/ The second Sheldon Affidavit indicates that documents supplied in response to the survey requests are analyzed by Antitrust Division Attorneys "for possible violations of the Federal Antitrust laws" and that suspect corporations are investigated further "and may eventually be prosecuted".

> in our possession have been adequately examined, more questionnaires will be sent to additional companies. If those companies to which questionnaires are to be directed in the future are given advance notice of precisely the types of documents which we feel indicate violations of the antitrust laws, they may take measures to avoid detection of their own violations. By comparing those documents which the Division has determined do not provide sufficient evidence of violations of law (those documents relating to individual investigations which have been closed) with those documents which we have determined do evidence violations of law (those documents which relate to investigations which remain open), they will be put on notice as to precisely the quantity and quality of evidence which we feel is determinative in making a decision to further pursue an investigation. This advance information would be invaluable to a company which is trying to avoid prosecution under the antitrust laws.

In addition, since the Antitrust Division has relied upon non-compulsory compliance with the instant survey requests, production of the documents sought would have a predictably adverse impact upon further cooperation by investigatory sources, as well. Under such circumstances, the Division would be compelled to resort to cumbersome procedures such as Civil Investigative Demands [CID's] under 15 U.S.C. §1313.

It is, therefore, the opinion of the Court that the release of these investigatory records, compiled for law enforcement purposes, would be likely to result in interference with on-going investigations and future enforcement proceedings of the Antitrust Division. For those reasons, Exemption 7(A) permits non-disclosure. See Title Guarantee Company v. National Labor Relations Board, 534 F.2d 484 (2d Cir. 1976); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (1st Cir. 1976).

EXEMPTION 7(D)

Investigatory records compiled for law enforcement purposes, such as the records involved in the present case, by virtue of Exemption 7(D), need not be disclosed to the extent that production would reveal "the identity of a confidential source and, in the case of a record complied by a criminal law enforcement authority in the course of a criminal investiagtion, . . . confidential information furnished only by the confidential source." Defendants have asserted this exemption in order to protect the identities of the fifteen multinational companies which have supplied information to the Foreign Commerce Section in response to its survey requests.

The legislative history of Exemption 7(D) reveals Congress' desire to protect not only the "paid informer", but also the "simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential". 120 Cong. Rec. S9330 (daily ed, May 30, 1974) (Remarks of Senator Hart); see also Conference Report, S. Rep. No. 93-1200, 93d Cong., 2d Sess., at 12. Sources of information certainly would be reluctant to provide information to law enforcement agencies if they had reason to believe that their identities or the data which they supplied in confidence would be subject to disclosure. See e.g., Evans v. Deaprtment of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918; see also Wellman Industries, Inc. v. National Labor Relations Board, 490 F.2d 427, 431 (4th Cir. 1973). It is, therefore, essential that federal law enforcement authorities be able to give binding assurances, where necessary, that the identity of a confidential source supplying information for law enforcement purposes will not be publically disclosed. This is plainly the purpose of Exemption 7(D).

As we have noted previously, most of the documents at issue were furnished by companies in specific reliance upon oral or written pledges of confidentiality and all such submitting firms cautioned that the materials are competitively sensitive. The totality of circumstances surrounding their responses to the Foreign Commerce Section's survey requests justified a reasonable belief on the part of submitting companies that their identities would be kept in strict confidence. Moreover, the defendants' affidavits indicate that the Antitrust Division itself regarded such sources as confidential.

Disclosure of the documents which plaintiffs here seek, even with deletions of names and identifying information, 6/ would be likely to reveal the identities of these confidential sources. Accordingly, the defendants have properly invoked Exemption 7(D).

EXEMPTION 4

The final exemption relied upon by the defendants, Exemption 4, relates to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." For purposes of this exemption, trade secrets and commercial or financial information is "confidential" if not generally disclosed to the public, see Sterling Drug, Inc. v. Federal Trade Commission, 450 F.2d 698 (D.C. Cir. 1971), and its production is likely to either impair the Government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974); Petkas v.

6/ See first Sheldon Affidavit at ¶21.

Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Pacific Architects and Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 384 (D.C. Cir. 1974).

It is, admittedly, impossible to determine on the present record what portion, if any, of this information is a trade secret. However, the defendants' affidavits and attachments thereto do establish that all of the materials in question fall within the category of commercial or financial information not generally disclosed to the public.

Since the Court has previously held that the release of these documents would seriously jeopardize the possibilities of future voluntary cooperation with Antitrust Division investigations, see p. 5, supra, defendants' claim to Exemption 4 is fully justified for the above reasons alone. There is, nevertheless, an additional basis upon which the Court concludes that the commercial or financial information at issue satisfies confidentiality requirements under this exemption.

The uncontroverted first affidavit of Thomas E. Sheldon plainly indicates that release of these documents would be likely to cause substantial harm to the competitive positions of the submitting companies:

> 15. My experience with multinational firms and with the documents involved here would indicate that the competitive position of the various firms supplying information would be seriously impaired by the release of the multinational documents. The dissemination of technical information related to patent and know-how licensing, and the terms of joint venture agreements would be invaluable to competitors. Although the existence of such agreements may be known by competitors, their specific terms are not. Joint venture agreements indicate the locus of control within a newly formed entity. Licensing agreements contain royalty rates, the disclosure of which would facilitate estimates of profit margins and divulge sensitive provisions for safeguarding secrecy and effecting quality control. Disclosure of the terms of one such agreement could impair

> a company's bargaining position in negotiating future agreements. Some know-how licenses produced in this study contain highly confidential diagrams of chemical process plant construction. these are but a few ways in which the release of these documents could be competitively harmful to the firms supplying them.

For the aforementioned reasons, we find that Exemption 4 applies to the survey request responses which are the subject of the plaintiffs' FOIA request.

ORDER

It is, accordingly, by the Court this 1st day of April, 1977,

ORDERED that defendants' motion for summary judgment should be, and the same hereby is, granted.

JUDGE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED

APR 1 1977

JAMES F. DAVEY, Clerk

MITSUBISHI ELECTRIC CORPORATION, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.

Civil Action No. 76-0813

ORDER

Upon consideration of plaintiffs' renewed motion for itemization and indexing, defendants' opposition thereto, the memoranda in support thereof and in opposition thereto, and the entire record herein, it is, accordingly, by the Court this 1st day of April, 1977,

ORDERED that plaintiffs' aforementioned motion should be, and the same hereby is, denied.

JUDGE

145-12-2795