No. 77-1975

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE FOUNDING CHURCH OF SCIENTOLOGY
OF WASHINGTON, D.C., INC.,

Plaintiff-Appellant,

v.

NATIONAL SECURITY AGENCY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC.,	)	
Plaintiff-Appellant,	)	C.A. No. 76-1494
v.	)	
NATIONAL SECURITY AGENCY, et al.,	)	Civil No. 77-1975
Defendants-Appellees.	)	

CERTIFICATE REQUIRED BY RULE 8(c)

The undersigned, counsel of record for plaintiff-appellant, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal.

The Founding Church of Scientology of Washington, D.C., Inc.

L. Ron Hubbard

Academy of Scientology

Church of Scientology

Congress of Eastern Scientologists

The Distribution Center

Foundation of Scientology

Hubbard Association of Scientologists, Inc.

Hubbard Dianetics Research Foundation, Inc.

Scientology Foundation

Operation Transport Company

TSMY Apollo

Church of American Science

American Society of Civilian Defense

Freudian Foundation of America

National Security Agency (NSA)

Lt. Gen. Lew Allen, Jr., Director of NSA

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D.C., INC., Plaintiff-Appellant, v. NATIONAL SECURITY AGENCY, et al., Defendants-Appellees.	C.A. No. 76-1494 Civil No. 77-1975

BRIEF FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED

Did the district court err in granting summary judgment to defendants-appellees (NSA) in this Freedom of Information Act case:

1. On the basis of a conclusory affidavit devoid of specific facts to support NSA's claim that release of 16 documents, admittedly not exempt themselves, would somehow reveal information about NSA's secret organization, functions or activities;

2. In the face of massive, specific, detailed disclosures by NSA to the Congress and by Congress to the public of its communications interception activities in violation of law, which apparently resulted in NSA's possession of the 16 documents;

3. While denying to plaintiff-appellant discovery to probe NSA's conclusory affidavit and on the question whether NSA had hidden other documents plaintiff-appellant had requested; and,

4. In the face of NSA's admission that it had not reviewed the 16 documents to determine if segregable portions of them could be released?

STATEMENT PURSUANT TO RULE 8(b)

This case has not been previously before this Court.

REFERENCES TO PARTIES AND RULINGS

A. The district court's opinion and order granting summary judgment to NSA are reproduced at Appendix (App.) 114-16.

B. The parties hereto are plaintiff-appellant The Founding Church of Scientology of Washington, D.C., Inc., a non-profit religious corporation, and defendants-appellees National Security Agency, an agency of the United States, and its Director, Lt. Gen. Lew Allen, Jr.

STATUTES INVOLVED

5 U.S.C. § 552(a)(4)(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.

5 U.S.C. § 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 section 552b of this title), provided that such statute (A) requires that the matters 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;

....

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.

Public Law 86-36, § 6, 73 Stat. 64 (1959):

(a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

18 U.S.C. § 798:

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information --

....

(3) concerning the communication intelligence activities of the United States or any foreign government;

....

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section --

....

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

50 U.S.C. § 403. Central Intelligence Agency -- (a) Establishment; Director; appointment and compensation

....

Powers and duties

(d) For the purpose of coordinating the intelligence activities of the several Government departments and agencies in the interest of national security, it shall be the duty of the Agency, under the direction of the National Security Council --

....

(3) to correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities: Provided, That the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions: Provided further, That the departments and other agencies of the Government shall continue to collect, evaluate, correlate, and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

STATEMENT OF THE CASE

This is an appeal from the district court's grant of summary judgment to the defendants, the National Security Agency and its Director, in this Freedom of Information Act (FOIA) case.

In December 1974 plaintiff-appellant, the Founding Church of Scientology of Washington, D.C., Inc. (plaintiff), made its first request to defendants-appellees (NSA) for all records maintained by NSA respecting plaintiff and Scientology (the religious doctrine which plaintiff, as a Church, propagates) and records of transmission of such documents to foreign governments or domestic agencies (App. 10). In January 1975 plaintiff supplemented the request to include such records concerning L. Ron Hubbard, the founder of Scientology (App. 11). NSA replied that it had no such records (App. 12). In March 1975 plaintiff listed the names of a number of other Scientology organizations under which NSA records might be filed (App. 13). In April NSA again denied that it had any such records (App. 14).

The denials were false. In the course of Freedom of Information Act proceedings against the Department of State and the Central Intelligence Agency, plaintiff learned that NSA indeed did possess records concerning Scientology, plaintiff or other Scientology organizations (App. 15-16, 23-27). There were 16 such documents. When plaintiff requested access to these records, NSA retreated from denial of their existence to claims that the records were exempt from disclosure by other statutes, under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). The statutes invoked

were 18 U.S.C. § 798, 50 U.S.C. § 403(d)(3) and § 6 of P.L. 86-36 (App. 26).

Having exhausted its administrative remedies (App. 77-78), plaintiff filed this action (App. 3-9). Plaintiff served 25 interrogatories on NSA (App. 35-58). Some of the interrogatories sought information about what NSA actually did in its "search" for the documents requested (Ints. 3-8, App. 36-43). NSA's response was to claim that any substantive information about the search was itself classified (id.). NSA also refused to answer interrogatories about the classification procedures followed under Executive Order 11652 (Int. 10, App. 43-44); about the substantive basis for the classification (Int. 11, App. 45-46; Int. 17, App. 49-50; Int. 18, App. 50-52; Int. 19, App. 52-53), and about its communications with the CIA respecting the decision to refuse disclosure of NSA records whose existence was revealed by CIA after NSA had denied their existence (Int. 20, App. 53-54).

Plaintiff moved to compel answers to some of the interrogatories (App. 60). In response NSA moved for summary judgment or, in the alternative, for leave to submit affidavits (but not the documents) ex parte and in camera (App. 81-82). NSA's only supporting evidence was an affidavit by Norman Boardman, NSA's "Information Officer." Mr. Boardman's affidavit contained no indication that he had any personal knowledge, or any knowledge other than hearsay, of the crucial substantive matters asserted in the affidavit (App. 83-91).

The affidavit, while admitting that NSA's files were organized partially alphabetically and that those not so organized were partially indexed (App. 83-84), nevertheless claimed that

NSA had been unable to find the documents plaintiff had requested, even though State and CIA had experienced no difficulty finding NSA documents in their files (App. 85-88).

In support of the claim of exemption for the NSA documents which the State Department and CIA had located (App. 89), the affidavit stated they "were acquired in the course of conducting lawful signals intelligence activities" and that release "of any record or portion thereof would disclose information about the nature of NSA's activities including its functions," which, it was claimed, were protected from disclosure by "Section 6 of Public Law 86-36" and hence by FOIA Exemption 3 (App. 89-90). The affidavit also asserted Exemption 1 on the ground that the information was "properly classified under E.O. 11652," and claimed exemption under 18 U.S.C. § 798 and 50 U.S.C. § 403(d)(3) as additional Exemption 3 statutes (id.). Nothing further was stated or supplied in support of these bald, unsubstantiated and conclusory assertions. The affidavit claimed that the disclosure of such supporting evidence was itself prevented by claimed national security (App. 90-91).

NSA made a further crucial admission -- that in fact:

> The records at issue have not been withheld because of their substantive contents but rather because their public disclosure in this FOIA context would reveal vital national security information concerning the organization, function and communication intelligence capabilities of the NSA.... The exemptions claimed do not turn on the contents of the documents but rather the intelligence that would be revealed by virtue of the fact that N.S.A. possesses the documents.

Memorandum in Support of Defendants' Motion to Dismiss Or, In the Alternative, for Summary Judgment, and In Opposition to Plaintiff's

Motion to Compel Defendants' Answers to Certain of Plaintiff's Interrogatories (see Docket Entry 12, App. 1), p. 9 n.5 (emphasis in original).

NSA's motion relied exclusively on P.L. 86-36 as justifying application of FOIA Exemption 3. It indicated that should P.L. 86-36 fail, it would file fresh motions based on Exemption 1, and on 18 U.S.C. § 798 and 50 U.S.C. § 403(d)(3) as Exemption 3 statutes. Memorandum in Support of Defendants' Motion to Dismiss ..., supra, pp. 6-8, nn.2, 3.

On June 22, 1977, plaintiff filed a full brief in opposition to NSA's motions and in further support of plaintiff's motion to compel answers to interrogatories. Plaintiff's brief relied on the 1976 amendments to Exemption 3 (which NSA had virtually ignored) which reversed the presumption of exemption under other statutes that the Supreme Court had established in Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975). Plaintiff pointed out NSA's admission (p. 7, supra) that nothing in the contents of the documents was itself exempt. Most important, plaintiff pointed out the conflicting material fact issues raised by NSA's affidavit, by plaintiff's first interrogatories which NSA had refused to answer and by a second set of interrogatories filed with plaintiff's Opposition. Those issues were:

-- (1) Whether the NSA documents were nothing more than copies or transcripts of plaintiff's own communications;

-- (2) Whether national security would be damaged by release to plaintiff of its own communications;

-- (3) Whether NSA had followed proper classification procedures respecting the documents;

-- (4) Whether NSA possessed any other documents plaintiff had requested.

(App. 100).

On July 12, 1977, NSA filed a statement of facts as to which it contended there was no genuine issue (App. 101-09). The bulk of the statement sought to show that NSA has so arranged its files that its documents are impossible to locate (App. 107) and that therefore NSA was justified in claiming that it had none of the documents plaintiff had requested (App. 102-05). NSA thus did not contest that there existed a dispute of fact whether it had any more documents (plaintiff's Material Fact in Dispute No. 4, supra).

NSA's statement likewise did not contest plaintiff's statement that there existed a dispute of fact whether the 16 documents found and withheld were simply copies of plaintiff's own communications (plaintiff's Material Fact in Dispute No. 1, p. 8, supra).

NSA's statement attempted to provide a basis for its national security claims, while entirely avoiding plaintiff's material disputed fact No. 2 (p. 8, supra), whether national security could be damaged by disclosure of plaintiff's own communications. NSA asserted that the documents were "intelligence reports obtained in the course of a classified foreign intelligence activity" (App. 107). As noted above, NSA had already admitted that nothing in the contents of the documents was itself classified or otherwise national security sensitive. Its

NSA nevertheless insisted that its bald, conclusory assertion was enough to satisfy its burden of proof. Its refusal to make any substantive response to plaintiff's first interrogatories continued.

Plaintiff had served a second set of interrogatories on June 21, 1977 (App. 110-13). These interrogatories focused on NSA activities of public knowledge, in an effort to expose NSA's national security claims (p. 6, supra) as sham. They asked if plaintiff had been on an NSA "watch list" or the subject of various, newly revealed NSA eavesdropping programs (App. 110-11). They asked if the 16 documents NSA admitted to holding were the fruits of electronic surveillance or of the theft of telegrams (theft with the connivance of communications companies) (App. 111-12). NSA refused to answer any of these interrogatories (App. 112-13).

On July 21, 1977, one day after NSA filed its objections to answering plaintiff's second interrogatories (on July 20, Docket Entry 22, App. 2) but nine days before plaintiff learned that NSA has refused to answer them (App. 117), the district court granted NSA's motion for summary judgment (App. 116). The district court swallowed whole NSA's conclusory assertion that disclosure of the 16 documents would "disclose information about the nature of NSA's activities including its functions," ignoring the voluminous public record of disclosure of NSA's "functions," and ignoring (and rejecting by denial of plaintiff's motion to compel) plaintiff's attempts by discovery to have NSA place on record something in support of its bald claim (App. 114-15). The district court

passed over in silence the question of the existence of other documents and NSA's record of mendacity on this question.

When, ten days after they were filed, plaintiff received in the mail NSA's objections to its second set of interrogatories, plaintiff filed a motion for relief from judgment (App. 117). The district court ignored the motion and never ruled on it. Plaintiff then appealed the grant of summary judgment to NSA (App. 120).

SUMMARY OF ARGUMENT

The district court's grant of summary judgment to NSA was error.

1. The statute NSA relied on, section 6 of P.L. 86-36, exempts disclosure only of the "organization," "functions" or "activities" of NSA, as "particular types of matters," 5 U.S.C. § 552(b)(3)(B). NSA admitted that nothing in the contents of the 16 documents it held was entitled to exemption but claimed that the fact that it held them would reveal information about NSA's mission. However, detailed information about NSA's "functions" and "activities" had been revealed by NSA and made public by the Congress, and nothing new could possibly have been revealed by disclosure of the 16 documents. Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F.2d 1009 (1976) (Argument I and II).

2. NSA's affidavit, by its "Information Officer," was conclusory and inadequate to satisfy the agency's burden of proof of exemption and to support summary judgment. Weissman v. Central Intelligence Agency, No. 76-1566 (D.C. Cir. January 6, 1977, modified April 4, 1977); Phillippi; Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973), cert. denied, 415 U.S. 977 (1974), (remanded, 383 F. Supp. 1049 (1974), aff'd, 173 U.S. App. D.C. 187, 523 F.2d 1136 (1975)); National Cable Television Ass'n, Inc. v. Federal Communications Commission, 156 U.S. App. D.C. 91, 479 F.2d 183 (1973). At least the district court should have required NSA to respond to discovery concerning its conclusory assertions, both as to exemption of the 16 documents and its claim

that its filing system was so structured that it could find no others (Argument III).

3. None of the other statutes NSA referred to justifies exemption of the documents under 5 U.S.C. § 552(b)(3). NSA failed to establish, and refused to answer interrogatories about, the procedural and substantive validity of its claims that the documents were classified under FOIA Exemption 1, 5 U.S.C. § 552(b)(1) (Argument IV).

4. NSA failed even to review the 16 documents to determine if segregable portions of them could be released, with deletion of any exempt items. 5 U.S.C. § 552(b) (Argument V).

ARGUMENT

I. THE EXEMPTION 3 STATUTE ON WHICH THE DISTRICT COURT RELIED ONLY PERMITS NSA TO WITHHOLD INFORMATION ABOUT ITS "ORGANIZATION," "FUNCTIONS" AND "ACTIVITIES"

Section 6 of P.L. 86-36, 73 Stat. 64 (1959), gave NSA legislative existence. It provides, in pertinent part, that "nothing in this Act or any other law ... shall be construed to require the disclosure of the organization or any function" or "information with respect to the activities" of NSA. Section 6 is obviously discretionary -- disclosure of these matters shall not be required, but disclosure is not forbidden. Accordingly, section 6 is not a non-discretionary Exemption 3(A) statute, 5 U.S.C. § 552(b)(3)(A), one which "requires that the matters be withheld from the public"; Irons v. Gottschalk, ___ U.S. App. D.C. ___, 548 F.2d 992, 994 n.3 (1976).

The district court rejected NSA's vigorous Exemption 3(A) argument; see Defendants' Memorandum in Reply to Plaintiff's Opposition to Motions to Dismiss Or, In the Alternative, for Summary Judgment and to Submit Ex Parte Affidavits (see Docket Entry 20, App. 2), at 4-5. The district court correctly held that section 6 was an Exemption 3(B) statute, 5 U.S.C. § 552(b)(3)(B) -- one which "refers to particular types of matters to be withheld," App. 115, as plaintiff had readily conceded below, Plaintiff's Opposition to Defendants' Motions to Dismiss Or In the Alternative for Summary Judgment and to Submit Ex Parte Affidavits (see Docket Entry 16, App. 2), at 5-6.[1/]

1/ The district court's opinion mistook plaintiff's position, stating that plaintiff maintains that section 6 "is not an Exemption 3 statute" (App. 115).

II. NSA FAILED TO DEMONSTRATE THAT DISCLOSURE OF THE 16 DOCUMENTS IT ADMITS POSSESSING WOULD DISCLOSE INFORMATION ABOUT ITS ACTIVITIES OR FUNCTIONS NOT ALREADY RELEASED BY NSA

The "organization," "functions" and "activities" of NSA are obviously "particular types of matters" which the agency could withhold in its discretion; Exemption 3(B); Irons v. Gottschalk. Plaintiff had argued, however, that the Exemption 3(B) license to withhold extended only to "particular types of matters" that would in fact be disclosed by release of the requested records, and that whether such matters would in fact be disclosed was an issue for court decision, not agency fiat.

A. The District Court's Ruling

The district court erred in accepting without supporting proof, in the face of overwhelming contrary evidence in the public domain and while denying plaintiff the chance to probe the claim in discovery, NSA's Information Officer's conclusory assertion that release of the requested records "would disclose information about the nature of NSA's activities including its functions" (App. 115). The district court failed to require NSA to "demonstrate," as the FOIA requires, "see 5 U.S.C. § 552(a)(4)(B)," not merely assert, "that release of the requested information can reasonably be expected to lead to unauthorized disclosure of" NSA activities and functions. Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 249 n.14, 546 F.2d 1009, 1015 n.14 (1976). The district court failed to heed this Court's

teaching that such an Exemption 3 statute[2/] may no longer be read as "authorizing the Agency to withhold any information it may not, for some reason, desire to make public." Id.

The district court relied below on Kruh v. General Services Administration, 421 F. Supp. 965 (E.D.N.Y. 1976) (App. 115). The reliance was misplaced; Kruh, if anything, supports rejection of NSA's affidavit here as inadequate.

In Kruh the plaintiff had sought access to the presidential directive, the "Truman memorandum," which first established NSA as an executive agency. GSA, custodian of the memorandum, invoked section 6 of P.L. 86-36 under FOIA Exemption 3. The Kruh court found that section 6 was an Exemption 3(B) "particular types of matters" statute, 421 F. Supp. at 967 n.4. The Kruh court also noted, however, that GSA's affidavits, unlike NSA's conclusory affidavits here, very specifically described the "particular types of matters" contained in the Truman memorandum -- the "mission" of NSA, the "responsibilities" of its director, its function for "the conduct of communications intelligence" and security activities. Most significant, NSA Director Allen had testified that "foreign nations are not aware of certain specific information" which would be revealed by disclosure of the Truman memorandum. 421 F. Supp. at 968-69, and id. n.5.

2/ What this Court said in Phillippi about 50 U.S.C. § 403g applies with equal force to section 6 of P.L. 86-36. The two statutes are virtually identical. Section 403g provides, in pertinent part, that the CIA "shall be exempted from ... the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency." As noted, section 6 similarly permits NSA to withhold information about "its organization, or any function."

Here, contrariwise, no such information is contained in the requested records -- there is nothing secret in their "content," p. 7, supra. There is no claim that foreign nations are unaware of what might be disclosed by release of the records. As we shall see, NSA has itself disclosed the claimed-to-be-sensitive information to Congress and the public -- a matter apparently not considered by the Kruh court. Finally, there is no explanation here of any adverse effect disclosure might have on the national security (compare Kruh, the affidavit of Jeanne W. Davis, 421 F. Supp. at 968 n.5).

B. NSA's Public Disclosures

If section 6 of P.L. 86-36 is not a license to keep secret anything the agency wants to keep secret, as Kruh confirms, then exemption under the FOIA is confined to the "particular types of matters" specified in the statute. Section 6 thus permits NSA to withhold only documents or information that would reveal its "organization," "any function," "any information with respect to [NSA's] activities" or the "names, titles, salaries, or number of persons employed" by NSA. Once NSA has made such information public, however, the reason for exemption from disclosure, and logically the exemption itself, disappear. So much has now been revealed by NSA about its own functions and activities that its bald claims cannot be accepted at face value. It bears a heavy burden of demonstrating, not merely asserting, that what it claims to protect is not already public. See Phillippi, 178 U.S. App. D.C. at 248-49 nn.10-13, 546 F.2d at 1014-15 nn.10-13.

1. The Nature of the Documents Withheld

NSA asserts that the 16 documents which it now admits to

holding "were acquired in the course of conducting lawful signals intelligence activities." It goes on to claim that while there is nothing secret about "the contents of the documents" (p. 7, supra), their release "would disclose information about the nature of NSA's activities including its functions," and it "cannot provide additional ... evidence which would fully justify the withholding of the records ... without revealing information which itself requires ... protection" (App. 89-91). If there is a kernel of candor in NSA's position, it is its admission that the only way in which release of the documents would disclose anything about NSA activities is by "the intelligence that would be revealed by virtue of the fact that NSA possesses the documents" (p. 7, supra). But close examination of this claim against the official public disclosures of the once super-hush-hush mission and function of NSA demonstrates its hollowness.

It seems apparent that if the 16 documents' contents are innocuous but that NSA's mere possession of them would reveal its activities, then the documents are very likely to be themselves copies of international or domestic wireless or cable messages -- probably those of plaintiff itself (see plaintiff's Second Interrogatories to NSA, App. 110-12). For NSA acquired copies of cables by a wholesale rummaging in the files of the international telegrams sent by unsuspecting Americans via RCA Global Communications, ITT World Communications and Western Union-International in its "Operation Shamrock" and plucked telephone conversations from the wires or the air waves in its "Operation Minaret," targeted on particular organizations and individuals on various "Watch Lists." The details of these operations (with the

exception of NSA's technical methods for tapping telephone conversations) now have been made public. S. Rep. No. 755, Final Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 2d Sess. (1976) (hereafter Select Comm. Rpt.), Book II, 12, 56-59, 104-05, 108-09; Book III, 735-83.

2. NSA's Operations

Such activities "violated not only the ban on internal security functions by foreign intelligence agencies in the 1947 [National Security] Act, but also specific statutes protecting the privacy of the mails and forbidding the interception of communications," particularly section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605. Select Comm. Rpt. II, 58-59. NSA is prohibited "from monitoring communication between persons within the United States and communication concerning purely domestic affairs." NSA circumvented this prohibition by interpreting "foreign communications" to include any international communication to or from the United States. NSA defined "intelligence" to include economic and financial matters. NSA intercepted messages of Americans "suspected of involvement in civil disturbance," and, in short, read "millions of the private communications of Americans." Id. at 104. These "covert techniques ... intruded upon individual privacy," particularly of "domestic dissenters." Id. By 1969 NSA was intercepting "[i]nformation on U.S. organizations or individuals who are engaged in activities which may result in civil disturbances or otherwise subvert the national security of the U.S." Id. at 105. However, "most [of the] intercepted communications were of a private or personal

nature....," and the FBI (one of the agencies supplying names for the "Watch Lists") got "very little in the way of good product as a result." Id. at 108-09.

NSA's monitoring of telegrams violated its own charter, which limited it to interception of encrypted (coded) communications. Select Comm. Rpt. III, 737. It violated a prohibition against monitoring messages between Americans. Id. at 738. Its "Watch List" program against Americans suspected of civil, peaceful dissent, "Operation Minaret," was ruled of "questionable legality" by Attorney General Richardson in 1973 and terminated. Id. at 739. But NSA continued until May 1975 its "Operation Shamrock" -- the "largest governmental interception program affecting Americans," which involved reading copies of 150,000 cables each month. Id. at 740. In short, NSA operated a "vacuum cleaner." Id. at 741.

"Between 1969 and 1973, NSA disseminated approximately 2,000 reports (e.g., the text or summaries of intercepted messages)" from the "Watch List" activities to other agencies. Id. at 743. The "Watch Lists" included names of "civil rights and antiwar groups," "Black Power" organizations, "individuals and organizations in U.S. in contact with agents of foreign governments," radicals, "celebrities," ordinary citizens involved in dissent, and organizations -- like plaintiff here -- "nonviolent and peaceful in nature." If a name was on a "Watch List," NSA collected communications to, from or even mentioning the individual or organization. Id. at 745-46, 749-50. Dissemination of the messages was hedged with secrecy. Messages between two Americans, for example, were classified as "Top Secret." Id. at 747.

NSA gave its agency "customers" the product they wanted. The CIA was interested in activities of U.S. individuals involved in anything labeled "radical." The FBI was interested in "white and black racial extremists." The Bureau of Narcotics and Dangerous Drugs was interested in drug traffic. Id. at 751-52. In this NSA "vacuum cleaner," communications of plaintiff and its related individuals and organizations (App. 4, 10-13), "nonviolent and peaceful in nature," possibly deemed "radical" -- communications apparently including the 16 documents at issue here -- were swept up, copied and disseminated outside NSA. There is no longer any secret about the NSA "activities" and "functions" which would be disclosed by release of the documents pursuant to the FOIA. The secrets have already been disclosed by NSA's Director in testimony related in the Senate Select Committee's report (see Select Comm. Rpt., pages cited, passim).

3. NSA's Apparent Motive for Secrecy

NSA therefore cannot have made its claim of exemption here to protect the secrecy of NSA's functions and activities that are now public -- that it copied cables and tapped the wires and air waves. We may speculate that the purpose for the claim is to protect NSA and its employees from civil and criminal liability. Perhaps -- as with CIA mail openings -- the Department of Justice would decline to prosecute; see Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Central Intelligence Agency Mail Opening Activities in the United States, released January 14, 1977. Perhaps, however, as with FBI "black bag jobs," i.e., burglaries, the Department of Justice would indeed prosecute. In either event,

there would be civil suits against the NSA Director and other NSA officials by innocent Americans whose privacy was invaded by NSA's vacuum cleaner; see, e.g., Driver v. Helms, C.A. No. 75-224 (D.R.I. April 1, 1977). The United States itself also is potentially liable, under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), for the "wrongful act" of NSA personnel "within the scope of their employment" which would be actionable against a private person. Black v. Sheraton Corp. of America, No. 75-2039, slip opinion at 13-17 (D.C. Cir. August 22, 1977); Cruikshank v. United States, C.A. No. 76-0362 (D. Hawaii May 9, 1977).[3]

The public record thus demonstrates that disclosure of the 16 documents at issue, themselves admittedly innocuous in content, would reveal nothing about NSA's "functions" or "activities" not already public. There are, therefore, no secrets for P.L. 86-36 to protect and no secrets entitled to exemption from disclosure under 5 U.S.C. § 552(b)(3).

3/ NSA activities directed against United States citizens in the United States are, like similar CIA activities, "wrongful," unlawful and in violation of the spirit of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), as applied to NSA by its executive branch "charter." See Select Comm. Rpt. II, 104; III, 736-38, 766. Interception of communications, of course, violates the Fourth Amendment. United States v. United States District Court, 407 U.S. 297 (1972); Zweibon v. Mitchell, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1685 (1976). As such it is actionable under the Constitution, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976), appeal pending; Halperin v. Kissinger, 424 F. Supp. 838 (1976), as well as under 47 U.S.C. § 605, see Select Comm. Rpt. III, 765-66, and 18 U.S.C. § 2520.

III. NSA'S AFFIDAVIT WAS INADEQUATE TO MEET ITS BURDEN OF PROOF OF ENTITLEMENT TO EXEMPTION AND WAS INSUFFICIENT BASIS FOR A GRANT OF SUMMARY JUDGMENT, AND THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING DISCOVERY TO PLAINTIFF

Even if none of NSA's activities had been made public, the district court's grant of summary judgment to NSA on the basis of its Information Officer's affidavit would have been error. In Freedom of Information cases, as in all other cases:

> Summary judgment may be granted only if the moving party proves that no substantial material facts are in dispute and that he is entitled to judgment as a matter of law. To prevail, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements. (footnotes omitted)

National Cable Television Ass'n, Inc. v. Federal Communications Commission, 156 U.S. App. D.C. 91, 94, 479 F.2d 183, 186 (1973) (emphasis added). An agency may not "rest on ... blanket allegations of ... exemption," id., 156 U.S. App. D.C. at 98, 479 F.2d at 190, nor may it prevail on "nothing except a flat assertion" of a basis for exemption, id., 156 U.S. App. D.C. at 102, 479 F.2d at 194.

A. The Claim of Exemption for 16 Documents

As the FOIA expressly provides, 5 U.S.C. § 552(a)(4)(B), and as the Supreme Court has held, Environmental Protection Agency v. Mink, 410 U.S. 73, 93 (1973), the agency has the burden of establishing its claim of exemption, to be satisfied "by means of detailed affidavits or oral testimony," EPA v. Mink, id. Affidavits like the affidavit of NSA's Information Officer, which do no more than "set forth in conclusory terms" that the requested records are exempt, do not satisfy that burden. Vaughn v. Rosen, 173 U.S.

App. D.C. 187, 196-97, 523 F.2d 1136, 1144-45 (1975); cf. Tax Analysts & Advocates v. Internal Revenue Service, 164 U.S. App. D.C. 243, 246-47, 505 F.2d 350, 353-54 (1974).

These principles are not suspended for cases in which the agency invokes the shibboleth of national security. In Phillippi v. Central Intelligence Agency, 178 U.S. App. D.C. 243, 546 F.2d 1009 (1976), this Court rejected the CIA's attempt to short circuit the FOIA and the judicial process by a claim that it could not publicly admit its possession of requested records and its demand to submit the reasons to the district court in secret. Phillippi reaffirmed the obligation that the FOIA imposes on agency defendants to prove their entitlement to exemption on the public record, accepting secret proceedings only as a last resort.

This Court held in Phillippi that FOIA "procedures ... require the Agency to provide a public affidavit explaining in as much detail as possible the basis for its claim" of exemption. Its "arguments should then be subject to testing" by the plaintiff, "who should be allowed to seek appropriate discovery when necessary to clarify the Agency's position or to identify the procedures by which that position was established." 178 U.S. App. D.C. at 247, 546 F.2d at 1013.

The court below failed altogether to follow the procedures mandated in Phillippi. Yet here the argument for short circuiting normal public proceedings and full discovery is even weaker than the CIA's argument which this Court rejected in Phillippi. Here there is no claim that the national security required the agency to stand mute on the question of its possession of requested documents; the agency admits possession of 16 documents.

Here, moreover, the agency also admits that nothing in the contents of the documents is exempt. Here the agency's only claim is that disclosure of these apparently innocuous documents would reveal classified information not contained in them, "by virtue of the fact that NSA possesses the documents." That is indeed a weak reed to support the district court's summary acceptance of untested, conclusory assertions.

The district court's uncritical acceptance of NSA's affidavit ignored the duty this Court imposed in Weissman v. Central Intelligence Agency, No. 76-1566 (D.C. Cir. January 6, 1977, modified April 4, 1977):

> If exemption is claimed on the basis of national security [either an Exemption 3 national security statute or Exemption 1 classification] 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.

(slip opinion at 10-11; emphasis added). As the Weissman court went on, quoting from Vaughn v. Rosen, 157 U.S. App. D.C. at 345, 484 F.2d 820 at 825 (1973), "[t]he burden has been placed specifically by statute on the Government," and that burden is not met "where the record is vague," as it patently is here, "or the agency claims too sweeping," as they patently are here. Weissman, slip opinion at 12.

Weissman held that only where the agency has not met this burden is in camera inspection required. Here plaintiff did not seek that last resort. Here plaintiff asked only that the agency file the detailed public affidavits explaining "the basis for its claim of exemption," to be tested "by appropriate discovery," which Phillippi requires. As this Court held in Schaffer v. Kissinger,

164 U.S. App. D.C. 282, 284, 505 F.2d 389, 391 (1974), where the facts respecting national security "are solely in the control" of the agency claiming national security, the plaintiff should be allowed to undertake discovery for the purpose of uncovering facts which might prove his right of access to the documents which he seeks." See also, Weisberg v. Department of Justice, 177 U.S. App. D.C. 161, 164, 543 F.2d 308, 311 (1976) (ordering the testimony of live witnesses to be produced).

NSA filed conclusory affidavits devoid of detail; the district court denied even the limited discovery by interrogatory which plaintiff had sought and granted summary judgment to NSA. In doing so it fell far below the standards this Court has established for national security FOIA cases, and its summary judgment for the agency should be reversed.

B. The Documents Not Produced

NSA consistently claimed throughout the district court proceedings that it had no way of locating the documents plaintiff requested -- until other agencies had, without difficulty, located copies and sent them to NSA. Plaintiff filed a set of interrogatories (App. 110-13) designed, inter alia, to obtain information about how NSA obtained the 16 documents the CIA had found and how it would have obtained other such documents, in an effort to probe the truth of NSA's claims, in affidavits and answers to interrogatories, that its search had been thorough but its records were all lost (see App. 35-43, 83-89). Plaintiff also specified as a material fact in dispute whether NSA possessed other, unproduced documents (App. 100). This Court has held

that the agency "must prove that each document ... requested" which is not exempt "has been produced." National Cable Television Ass'n, Inc., 156 U.S. App. D.C. at 94, 479 F.2d at 186. Nevertheless, NSA refused to answer any of plaintiff's second set of interrogatories (App. 112-13). The district court granted NSA summary judgment despite this refusal and before plaintiff had the opportunity to move to compel answers (App. 117-19).

Discovery on this issue is imperative. There is ample evidence in the Select Committee report, pp. 19-22, supra, to support the need for probing NSA's assertions that documents cannot be found. NSA's attempts to hide its activities are spread on the record of the Senate's inquiry. For example -- and parallel to what happened in this case -- the Senate obtained the full story of "Operation Shamrock" only by the inadvertent discovery of documents not by NSA, but by the Department of Defense. Select Comm. Rpt. III, 769. It is a measure of NSA's coverup intentions -- and success -- that "no president since Truman knew of the [Shamrock] program." Id. at 770 (emphasis added).

The "Watch List" activity was likewise kept secret and "compartmented" because "American citizens were involved." Id. at 747. Communications (like those at issue here) disseminated outside NSA were "classified, given a serial number, and filed." They were given the same "high level security classification" as "the most sensitive NSA intercepts" [which would, presumably, be cables between (say) Soviet Chairman Krushchev and Cuban Premier Castro during the Cuban Missile Crisis]. Intercepted communications "between two Americans ... were classified Top Secret,

prepared with no mention of NSA as the source," called "For Background Use Only," given no serial number and "not filed with regular communications intelligence intercepts," which "effectively limited access to the material" and made it sure that "there would not be any record of this material held in other places within the Agency in the permanent files." Id. at 747-48 (emphasis in original). In other words, NSA engaged in a willful program to hide material that might later be sought. They cannot, in a government and a republic of law, so easily evade the command of the law -- in this case the Freedom of Information Act.

It was error for the district court to ignore plaintiff's frustrated attempt at discovery on this question.

IV. NONE OF THE OTHER STATUTES WHICH NSA HAS INVOKED APPLY TO THIS CASE UNDER FOIA EXEMPTION 3, NOR IS EXEMPTION 1 AVAILABLE HERE

A. Other Exemption 3 Claims

In addition to section 6 of P.L. 86-36, NSA cited below 18 U.S.C. § 798 and 50 U.S.C. § 403(d)(3) as other Exemption 3 statutes that entitled it to withhold the 16 documents at issue (see App. 90). None of these statutes is applicable here.

1. 50 U.S.C. § 403(d)(3)

Section 403(d)(3) of Title 50, U.S.C., provides in pertinent part, "[t]hat the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." This was one of the provisions of the National Security Act of 1947, which established the Central Intelligence Agency, see 50 U.S.C. § 403(a); see 50 U.S.C.A. § 401, Historical Note (1951). The statute applies expressly and

exclusively to the CIA and its Director, neither of which is involved in this case. The statute does not apply to NSA.

2. 18 U.S.C. § 798

Section 798 of Title 18, U.S.C., provides in pertinent part:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, ... any classified information --
>
> ....
>
> (3) concerning the communication intelligence activities of the United States or any foreign government [shall be subject to fine or imprisonment].

Section 798 is remarkably similar to 18 U.S.C. § 1905, which provides:

> Whoever ... discloses, or makes known in any manner or to any extent not authorized by law [certain confidential] information coming to him in the course of his employment or official duties ...; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be [punished].

In 1976 Congress amended FOIA Exemption 3 to overrule the Supreme Court's interpretation of the original version of Exemption 3 as including statutes which gave discretionary power to agencies or departments to withhold or release documents, in Administrator, Federal Aviation Administration v. Robertson, 422 U.S. 255 (1975). P.L. 94-409, 94th Cong., 2d Sess. (1976), § 5(b). Section 1905 of Title 18 was one of a number of statutes Congress had in mind as not to be considered an Exemption 3 statute under the amendments. H.R. Rep. No. 880 Part I, Government in the Sunshine Act, 94th Cong., 2d Sess. (1976) 22-23. Had Congress given express consideration to the similar 18 U.S.C. § 798, it would doubtless have been similarly categorized.

In any event, resort to the legislative history is unnecessary in this case. As we have shown in part II, supra, disclosure of the 16 documents at issue here would reveal nothing about NSA's "communications activities" that NSA has not already made public. As we have shown in part III, supra, NSA's affidavit is too conclusory and insufficiently specific to support summary judgment on the basis of section 6 of P.L. 86-36. Section 798 of Title 18 is no more specific and provides no more protection than section 6; a record requiring reversal of the district court's grant of summary judgment on section 6 will not support summary judgment on 18 U.S.C. § 798.

B. The Exemption 1 Claim

NSA has also invoked (App. 90) FOIA Exemption 1, 5 U.S.C. § 552(b)(1), which provides:

> 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;....

Agencies have the burden of establishing both the procedural and substantive validity of a classification in Freedom of Information court proceedings; 5 U.S.C. § 552(a)(4)(B); Schaffer v. Kissinger, 164 U.S. App. D.C. 282, 284, 505 F.2d 389, 391 (1974); Zweibon, 516 F.2d at 642; Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 1-2 (1975); H.R. Rep. No. 1380, 93d Cong., 2d Sess. (1974), reprinted in Joint Committee Print, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents (94th Cong., 1st Sess. 1975) (hereafter Source Book)

219 at 230. It is for the district court to decide on the record, subject to appellate review, "the reasonableness or propriety" of a claim of exemption of documents for national security reasons, see H.R. Rep. No. 876, 93d Cong., 2d Sess. (1974), Source Book 121 at 127; whether a classification "imposed some time in the past continues to be justified," S. Rep. No. 854, 93d Cong., 2d Sess. (1974), Source Book 153 at 182, and if the classification is "proper," House debates, March 14, 1974, Source Book 235 at 247 (remarks of Rep. Erlenborn), i.e., whether the documents "conformed with the criteria" of the Executive Order, id. at 254.

This decision is to be made with "intelligence, sensitivity, commonsense, and an appreciation for the right of the people to know what their Government is doing and why," id. at 257 (remarks of Rep. Moss). Congress felt that "the deceptions practiced on the American public under the banner of national secrecy ... prove to us that Government classifiers must be subject to some impartial review." Senate debates, May 30, 1974, Source Book 281 at 305 (remarks of Sen. Muskie). Congress knew that the "claim of exemption ... all too often in the past has been used to cover up inefficiency or embarrassment even in foreign policy matters which, many times, are fully known by other countries...." House Action on Presidential Veto, November 20, 1974, Source Book 403 at 413 (remarks of Rep. Reid).

Congress greatly distrusted claims of "national security." As Senator Kennedy pointed out in the Senate debate on the President's veto of the 1974 amendments:

> This national security argument should be placed in its proper perspective. John Ehrlichman gave us a

clue to how the executive branch views national security when he told President Nixon, during a discussion of the Ellsberg break-in, 'I would put the national security tent over this whole operation.' National security improvements to the San Clemente swimming pool; national security wiretaps on journalists; national security burglaries. The White House taped conversation of April 17, 1973, has the President summing up the Watergate coverup thusly.

It is national security -- national security area -- and that is a national security problem.

Source Book at 437. See National Security and the Public's Right to Know: A New Role for the Courts Under the Freedom of Information Act, 123 U. Pa. L. Rev. 1438, 1438-39 (1975):

Recent years, however, have seen a new and dangerous use for the national security label: to provide a cover for politically embarrassing and sometimes illegal government activities. The transcripts of White House conversations taped during the Nixon Administration provide a vivid example. By the middle of March 1973, President Nixon realized that testimony at the Los Angeles trial of Daniel Ellsberg would inevitably reveal that White House agents had rifled confidential files in the office of Ellsberg's psychiatrist. At a March 17 meeting, the President asked H. R. Haldeman, his Chief of Staff, and John Dean, his counsel, for advice on how to justify the incident. 'You might put it on a national security grounds basis,' Dean answered. The President apparently liked the suggestion and worked out the 'scenario' with his two advisors:

P - National Security. We had to get information for national security grounds.
D - Then the question is, why didn't the CIA do it or why didn't the FBI do it?
P - Because we had to do it on a confidential basis.
H - Because we were checking them.
P - Neither could be trusted.
....
D - I think we could get by on that.

Thus it was agreed that the 'national security' label would be used to cloak the government's illegal spying activities. Had the pressures of continuing investigation of presidential conduct not forced disclosure of the details of the burglary, the public would never have learned the relevant information. (footnotes omitted)

Here NSA has not met, and cannot meet, the burden of satisfying Exemption 1. NSA has not merely failed to demonstrate the procedural (Schaffer) and substantive (Zweibon, p. 31, supra) validity of the claimed classification under Executive Order 11652. NSA refused to answer, and the district court declined to compel it to answer (App. 116), interrogatories posing specific questions about these crucial facts -- as to procedure, Interrogatories 10 (basis for and process of original classification) (App. 43-45) and 13-15 (concerning compliance vel non with declassification provisions of the Executive Order) (App. 46-49); as to substance, Interrogatories 11 (application of the substantive standards of the Executive Order for classification) (App. 45-46) and 17-19 (details of basis for classification) (App. 49-53).

In short, the record affords no basis for this Court to "be satisfied that proper [classification] procedures have been followed." As we have shown in parts II and III, supra, the record demonstrates that NSA's national security claims are "pretextual" and "unreasonable." NSA admits (p. 7, supra) that "the contested document[s]" themselves do not fall "into the category of the exemption indicated" or, indeed, into any category of exemption. Weissman, slip opinion at 11. Exemption 1 is unavailable to NSA here.

V. NSA FAILED TO COMPLY WITH ITS OBLIGATION TO RELEASE "SEGREGABLE" PORTIONS OF DOCUMENTS

Section 552(b) of Title 5, U.S.C., provides that for all exemptions, "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."

NSA admits that it has never conducted any review to release segregable portions of the requested documents (App. 48). On that basis alone, its claims of exemption fail. The entirety of the 16 documents is "segregable" and could be disclosed; for, as NSA has admitted, nothing in their contents is classifiable, secret or otherwise entitled to exemption (p. 7, supra). Of course, should there be any internal NSA routing marks or the like on the records, items that would reflect NSA's internal procedures, such marks can be deleted before release of the records.

CONCLUSION

The judgment of the district court granting summary judgment to NSA should be reversed and the cause remanded for trial, with directions to allow plaintiff to conduct discovery as provided by the Federal Rules of Civil Procedure.

Respectfully submitted,

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