

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

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

Plaintiff)

v)

EDWARD LEVI, et al.,)

Defendants)

MAN 24 1978

JAMES F. DAVEY, Clerk
Civil Action

No. 75-1577

MEMORANDUM

In 1975, the Founding Church of Scientology of Washington, D.C. (Church) instituted this Freedom of Information Act (FOIA) suit to enjoin defendant Federal Bureau of Investigation (FBI) from withholding information in its files "relating to, containing references to, or dealing with" the Church or its founder, L. Ron Hubbard. Shortly thereafter, plaintiff served interrogatories on defendant requesting detailed information, in accordance with the requirements of Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir. 1973), cert. denied, 415 U.S. 977 (1974), on each such document in defendants' custody. By way of response, defendant filed a six-page affidavit from Special FBI Agent Howard and a thirty-four page "Exhibit A", a table describing each document which had been wholly or partially denied plaintiff and the statutory justification for the denial. Exhibit A demonstrated that 324 documents had been identified in connection with plaintiff's request and that the FBI had released, in whole or in part, 244.

Subsequently, in May 1976, the parties filed Cross-Motions for Summary Judgment. Attached to the government's motion was "Exhibit B", a true copy of all documents which

APPENDIX E
Civil Action No. 77-1997

had been turned over to plaintiff. After examining the papers and the briefs, and after hearing argument on the matter, the Court, on June 11, 1976, directed the FBI to provide plaintiff: "a proper index: (a) describing in detailed, non-conclusory terms the documents withheld from plaintiff in whole or in part; and (b) specifically justifying each exemption claimed...."

In November 1976, the government filed another affidavit from Special Agent Howard with nearly four hundred pages of justifications and additional disclosures of requested information. Shortly thereafter, it filed a Renewed Motion to Dismiss or, in the Alternative for Summary Judgment.

That matter was fully briefed and ready for argument when Attorney General Bell issued a directive requiring more government flexibility in the handling of FOIA requests and litigation. Accordingly, the Court ordered the defendants to reprocess the files under the Attorney General's new guidelines. This was done, and in July defendants released to plaintiff an additional 126 pages (thus, approximately 75% of the 1130 pages have been disclosed). Moreover, they abandoned reliance on Exemption 2, which had been used to justify deletion of administrative markings from almost every document produced, in all but three instances. Consequently, not only did the government produce many papers not previously published, but it also released information withheld in many documents theretofore made available.

However, the government did make one mistake when it reprocessed the documents in June and July, 1977. It

overlooked the fact that a score of inter-agency memos pertaining to another Scientology lawsuit in this Court had been disclosed the prior November. These documents, previously withheld under Exemption 5, had been disclosed with only administrative markings and employee names deleted. In July, the government decided to disclose the administrative markings but reinstated Exemption 5.

The government has catalogued the documents into eleven separate categories. They are:

File A (230 documents), which consists of communications received by the FBI from third persons (usually citizens) complaining of Church conduct or requesting information about Church activities. Also included are memos from other law enforcement agencies and information generated as a result of filed office checks.

File B (46 documents) contains the same sort of information as in File A, only with regard to L. Ron Hubbard and Allied Scientists of the World.

File C (5 documents) includes three records generated as a result of an investigation into violations of 18 U.S.C. §§1343 (fraud by wire) and 2314 (interstate transportation of stolen property), as well as two documents pertaining to a Scientology suit against the Justice Department, C.A. 74-744(D.D.C.).

File D (8 documents) concerns an FBI investigation into a securities theft. Plaintiff was the victim.

File E (2 documents) includes, first, a letter from Mr. Hubbard to the FBI and the reply thereto and secondly, an interoffice memo concerning an investigation into a matter raised in Hubbard's letter.

File F consists of six intra-agency memos, compiled in connection with the case of Scientology v. U.S. (Ct.Cl. No. 226-61), concerning the tax status of the Church.

File G contains three documents resulting from an investigation into allegations that plaintiff was training FBI agents. See 18 U.S.C. §912 (impersonation).

File H has only two documents. They were compiled as a result of a FOIA "referral" from another agency. Thus they were not found in the original search of central files.

File I contains twenty documents which had been indexed according to type of federal violation. Most are inter-agency memos concerning Hubbard and his various organizations.

File J is a collection of records gathered for this litigation but not responsive to plaintiff's FOIA request. No index has been prepared for this file.

File K (35 documents) consists of inter- and intra-agency memos relating to the suit Scientology v. Saxbe, C.A. 74-744 (D.D.C.).

In withholding these documents or portions thereof, the government relies chiefly on Exemptions 5, 7C and 7D. Of course, it has the burden of justifying nondisclosure.

Exemption 1. The affidavit of Special Agent Poptanich recites that four of the documents in File K are classified "secret" in accordance with Executive Order 11652 (unauthorized disclosure could reasonably be expected to cause serious damage to the national security) and are therefore exempt from disclosure under Exemption 1, 5 U.S.C. §552(b)(1). Poptanich explains that each document contains a list of persons in the Washington field office who are responsible for and engage in authorized electronic surveillance. He contends that disclosure of the identities of these individuals "could disclose the Government's interest in certain particular foreign groups", and could possibly lead to contact or surveillance by foreign agents whose ultimate purpose may be compromise of the federal agents.

In order to justify nondisclosure under Exemption 1, the government must demonstrate that the documents are authorized under criteria established by Executive Order to be kept secret and that they are properly classified under the executive order. While raising no real objection to the government claim, plaintiff does ask the Court to "undertake to assure that only the names of individuals and not substantive information concerning plaintiff, is being withheld." However, in view of the fact that the entire document, not just the sensitive portion, is classified, the request must be denied.

Exemption 2. Prior to the summer 1977 reprocessing, this exemption was the most widely used. However, it is now invoked for only three records.

The exemption protects an agency's "internal personnel rules and policies". 5 U.S.C. §552(b)(2). Examples of material intended to be withheld under the exemption are "rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave and the like." S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). See Department of Air Force v. Rose, 425 U.S. 352 (1976). Special Agent Hoeting claims that release of the administrative markings in these three documents "would harm substantive government interests." This is not the test. As stated by the Supreme Court in the Rose case, "the 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." 425 U.S. at 369-70. See Naughton v. Rosen, 513 F.2d 1136, 1142 (D.C.Cir. 1975).

Exemption 3. This exemption shields material specifically exempted by statute, so long as the statute requires the information to be withheld. 5 U.S.C. §552(b)(3) Only three documents, all in File K, have been withheld under this exemption. The "statute" claimed by the government is Rule 26(c) of the Federal Rules of Civil Procedure (protective orders). A protective order was issued in C.A. 74-744(D.D.C.) Scientology v. Saxbe (consent judgment against plaintiff issued January 23, 1976) to protect information obtained by deposition and to protect the identities of deposed individuals.

Exemption 5. This exemption protects "inter-agency or intra-agency memorandums or letters" not routinely available in civil litigation. 5 U.S.C. §552(b)(5). See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). Two classes of material were withheld hereunder: (1) material of a "deliberative nature, such as memoranda prepared by lower-echelon employees for the advice and edification of FBI executives, and (2) attorney work-product. The exemption has been claimed approximately twenty-five times. In fact, the government's generous disclosure of intra-agency memos in File K manifests its good faith. There is no reason for insistence that the defendants further justify withholding the remainder guarded by Exemption 5.

Exemption 7C and 7D. These two exemptions cover law enforcement investigatory records whose disclosure would cause invasion of personal privacy or compromise government confidential sources. 5 U.S.C. §552(b)(7)(C) and (7)(D). A careful review of each index, each justification statement, and the text of all released documents, indicate that the

defendants have used the exemptions only to delete the identities of those who have corresponded with the FBI and the names of Department of Justice employees who have authored various intra-agency memos. Despite the fact that the two exemptions were frequently invoked, the use appears to have been judicious.

Exemptions 7A, 7B and 7D. Defendants have also made sparing use of Exemptions 7A, 7B (three times each) and 7E (only once). 7A and 7B safeguard the conduct of enforcement proceedings; 7E allows nondisclosure of material which would reveal investigative techniques. The government justifications are sufficient and appear to have been made in good faith.

Finally, plaintiffs complain that the FBI should process documents which, although originating in other agencies, were discovered in FBI files. They have been sent back for processing by the originating agencies, and the contention is without merit.

Accordingly, defendants' Renewed Motion to Dismiss or, in the Alternative, for Summary Judgment is treated as a motion for summary judgment and granted.


United States District Judge

January 24, 1978

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