UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 77-1404
FEDERAL BUREAU OF INVESTIGATION et al.,	)	
Defendants.	)	

FILED

JUL 13 1978

JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This Freedom of Information Act [FOIA] action is before the Court upon defendants' motion for summary judgment. Plaintiffs have sought information in FBI files "pertaining to the investigation not only locally, but nationally, of the controversy in the Serbian Orthodox Church, and, more particularly any interference or infiltration of the Yugoslav government or any of its authorities and agents and their relationship and activities" vis-a-vis [plaintiffs] and associated interests. Defendants have released, in whole or in part, some 1,858 pages of documents and refused to disclose documents or portions thereof pursuant to exemptions 1, 2, 3 and 7(C) (D) and (E) of the FOIA, as detailed in a most estensive Vaughn v. Rosen affidavit[1/] submitted in conjunction with their summary judgment motion. Plaintiffs have contested substantively defendants' invocation of the various exemptions and have challenged the

1/ The affidavit contains a document-by-document itemization which exceeds 225 pages. It sets forth a description of each document, the number of pages of each document, the number of pages released, the deletions made, if any, and the exemption or exemptions relied upon.

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adequacy of defendants' Vaughn v. Rosen affidavit. They further challenge the defendants' policy of referring documents to an originating agency. We reject this final challenge 2/ and proceed to analyze the two remaining issues.

Exemption 1. This exemption protects from disclosure materials "(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." To achieve the protection of this exemption, an agency need show only that proper classification procedures have been followed, that the claim is not pretextual, and that the contested document logically falls within the category of exemption indicated. See Weissman v. C.I.A., 565 F.2d 692, 697 (D.C. Cir. 1977). In support of each invocation of exemption 1, defendants have identified the relevant document portions assertedly protected by the exemption, the date of classification, the classifying officer, and the provisions of the Executive Order which protect the material from disclosure.

Plaintiffs protest that the classifications are suspect due to the fact that they were classified after defendants received the FOIA request of December 10, 1975. They further argue that the Weissman v. C.I.A. standard articulated above is inappropriate "[d]ue to the serious

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2/ We addressed this precise issue in our decision issued this date in the related action Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Central Intelligence Agency, C.A. No. 77-1412, slip op. at 2. The originating agencies will review the referred documents and directly respond to plaintiffs' FOIA request. Affidavit of Walt H. Sirene (December 1, 1977) at ¶ 13.

issues raised in this instant litigation."[3/] We find plaintiffs' arguments unpersuasive. Defendants have by affidavit and pleadings explained that documents dated prior to June 1, 1972 were informally classified pursuant to Executive Order 10450 which did not require formal classification of internal FBI documents. Effective that date, Executive Order 11652 established formal classification procedures; defendants thereafter formally reviewed documents for classification upon receipt of a request for release. The documents at issue in this litigation were classified formally in conjunction with the processing of plaintiffs' FOIA request. We find nothing improper in this classification procedure, conducted pursuant to Executive Order 11652.

We take only brief pause in response to plaintiffs' efforts to distinguish Weissman v. C.I.A., supra. In that case our Court of Appeals did not articulate any inclination to employ a sliding scale analysis of exemption 1 claims based upon a court's perception of the importance of the issues underlying the FOIA request. We believe that such a course would be futile and unmanageable, and decline to formulate a standard merely because of plaintiffs' dissatisfaction with current law.[4/] For these reasons we sustain defendants' invocation of exemption 1.

3/ Additional problems related to the adequacy of the Vaughn v. Rosen itemization, particularly failure to present relevant dates and an exemption designation, apparently have been resolved by defendants' submission of a supplemental affidavit. Affidavit of SA John F. Loome, Jr. (March 9, 1978) [Loome Affidavit].

4/ Plaintiffs have not presented any evidence, and have declined to allege before this Court, that the FBI employed the classification procedure to discriminate purposely against them. We cannot rely upon unsubstantiated, vague statements to other authorities. See Letter to the President at 2 (August 10, 1977) ("We have heard on what we believe to be completely reliable authority, that certain officials, in particular in the State Department and the CIA have made an A PRIORI determination to deny us access to these documents -- apparently because they believe that the Yugoslav Communist government might be offended by their release.")

Exemption 2. This exemption protects materials "related solely to the internal personnel rules and practices of an agency." Defendants maintain that exemption 2 has been advanced only to protect "FBI symbol numbers used to identify confidential sources and informants, words and symbols used to designate the transmittal or storage of documents . . . [and certain] administrative references to previous communications in order to maintain internal control of the investigation." Affidavit of Walt H. Sirene (December 1, 1977) [Sirene Affidavit] at ¶ 33(B). They further argue that the administrative markings "do not pertain to the plaintiff and have no effect on the substance of the document." Id. They assert the exemption in order to protect information release of which would harm FBI investigative functions. Apparently a large number of documents covered by this exemption have already been released in the FBI's discretion and the few remaining are not "matters subject to . . . a genuine and significant public interest." Department of Air Force v. Rose, 425 U.S. 352, 369 (1976). Plaintiffs protest that the allegation of potential harm has not been substantiated.

It is our conclusion that counsel have failed to present an exemption 2 controversy to the Court. Code numbers and the like do not constitute "internal personnel rules and practices." While the material may perhaps present an issue under some other exemption, it does not raise an issue under exemption 2. See Hawkes v. Internal Revenue Service, 467 F.2d 787, 797 (6th Cir. 1972) (applicable only to employer-employee concerns); Stokes v. Hodgson, 347 F. Supp. 1371, 1373 (N.D. Ga. 1972) (applicable to intra-agency housekeeping

rules and practices, e.g., office assignment, parking facilities).[5/] We deny the applicability of exemption 2 to any of the material concerned herein.

Exemption 3. This exemption covers material "specifically exempted from disclosure by statute . . . 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."

Defendants argue that certain records relating to testimony taken in Executive Session before a U. S. Congressional Committee are protected from disclosure by operation of 5 U.S.C. § 551, which exempts Congressional records from the operation of the FOIA. That section defines "agency" for FOIA purposes as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-(A) the Congress;". They present their substantive argument under two operationally identical theories, i.e., that the records are not subject to the FOIA, or, in the alternative, that if subject to the FOIA they have been exempted from disclosure.

In Goland v. Central Intelligence Agency, our Court of Appeals recently held that a transcript of Executive Session was "not an 'agency record' but a Congressional document to which FOIA does not apply." No. 76-1800, slip op. at 14 (D.C. Cir. May 23, 1978). The Court focused upon circumstances

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5/ Defendants have asserted exemption 2 only in conjunction with exemption 7(D). Loome Affidavit at ¶ 3. Defendants will prevail if able to sustain either exemption for the material in dispute.

surrounding the transcripts' preparation and retention in recognizing Congress' clear intent to retain control of the document.

In the controversy before this Court, defendants by affidavit indicate that the withheld material "pertain[s] to testimony taken in an Executive Session before a U. S. Congressional Committee." Sirene Affidavit at ¶ 33(C). It has more particularly been described as "certain testimony taken in Executive Session before a U. S. Congressional Committee." Defendants' Memorandum of Points and Authorities at 7. Such testimony, currently in possession of the FBI is a Congressional document. Irrespective of the possible applicability of exemption 3, it is not releasable under the FOIA or Privacy Act.

Exemption 7(C). This exemption comprises "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."

Defendants have advanced this exemption to protect the identities of three groups of persons: persons associated with plaintiffs who may be criminal suspects, potential witnesses, or sources of information; FBI agents and investigative employees; and non-Federal law enforcement officers. Defendants suggest that there is considerable overlap between the materials covered by exemptions 7(C) and 7(D), particularly

with reference to names of individuals.[6/] Plaintiffs argue (1) that federal agencies have no expectation of privacy for actions conducted in an official capacity, (2) that the excision of names of third parties is erroneous under applicable law, and (3) that defendants have not sustained their burden of demonstrating that the records have been compiled for law enforcement purposes.

In analyzing a dispute involving exemption 7(C), a court must consider and balance both the public and private interests in disclosure as compared with nondisclosure. See Deering Milliken, Inc. v. Irvin, 548 F.2d 1131, 1136 (4th Cir. 1977); Tarnopol v. Federal Bureau of Investigation, 442 F. Supp. 5, 7 (D.D.C. 1977). Our analysis convinces us that the defendants' assertion of exemption 7(C) to protect identities and identifying data concerning third parties who were not focal points of investigations must be sustained. Similarly, the names of law enforcement personnel, at the FBI and non-Federal level, must be deemed protected from disclosure. While plaintiffs have not denominated any public interest which would be served by disclosure of this information, defendants assert that disclosure of identities could subject individuals to embarrassment or harassment. Sirene Affidavit at 9-11. A balancing of such considerations clearly

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6/ With respect to its interest in protecting information sources, defendants assert exemption 7(D) to protect continuing channels of information that might be jeopardized by disclosure. Exemption 7(C) assertions appear to be based more upon defendants' concern for protecting individuals who have furnished information in the past from adverse consequences that might flow from disclosure of their FBI associations.

mandates nondisclosure.[7/] Tarnopol v. Federal Bureau of Investigation, supra, 442 F. Supp. at 8. The detailed affidavits submitted in support of defendants' motion for summary judgment adequately demonstrate that the records were compiled for law enforcement purposes.

Exemption 7(D). This exemption covers "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 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."

Defendants have advanced this exemption to protect confidential informants "who regularly provide investigative information, as opposed to citizens in general, who, from time to time, have provided information" and to protect the confidential system of exchange of information between various law enforcement agencies. Plaintiffs argue that defendants

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7/ We find plaintiffs' case citations easily distinguishable. In Robbins Tire and Rubber Co. v. N.L.R.B., statements of witnesses before the N.L.R.B. were denied 7(C) protection because eventual disclosure was permitted, and quite likely under applicable regulations. This case was recently reversed by the Supreme Court, 563 F.2d 724, 733 (5th Cir. 1977), rev'd 46 U.S.L.W. 4689 (June 15, 1978) (protected by exemption 7(A)). In Poss v. N.L.R.B., exemption 7(C) was held to be inapplicable to purely factual information which supplying sources recognized would be stripped of its confidential status if a formal hearing were conducted. 565 F.2d 654, 658 (10th Cir. 1977).

have failed to meet their statutory burden of demonstrating that there was an actual criminal investigation in progress when the documents were prepared, and that they have further failed to show that the information was in fact confidential and furnished only by a confidential source.

We first conclude that plaintiffs seriously misperceive the threshold requirement for invoking exemption 7(D) when they seek to require a demonstration of an ongoing criminal investigation: the exemption by its express terms provides that an agency "conducting a lawful national security intelligence investigation" may invoke exemption 7(D).

It is our opinion that the defendants have properly invoked exemption 7(D) to withhold the identity of information supplied by confidential sources. The affidavits submitted clearly indicate the concern of officials at the FBI with the need to protect confidential sources. Sirene Affidavit at 11-15; Loome Affidavit at ¶ 7. We find no basis for ignoring these assertions made under oath, as detailed and applied to specific deletions from the materials delivered to plaintiffs. Established FBI informants are entitled to the protection of exemption 7(D). Carroll v. Department of Justice, C.A. 76-2038, slip op. at 3 (D.D.C., order filed May 26, 1978).

Exemption 7(E). This exemption refers to "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (E) disclose investigative techniques and procedures." Defendants have supported their invocation of this exemption in two instances (Document 316, 448) with affidavits in which they assert that disclosure of a valuable investigative technique would impair the FBI in its ability to conduct

investigations. Sirene Affidavit at ¶ 33(F); Loome Affidavit at ¶ 9 (lawful use of a facility as a method of obtaining information without revealing the identity of the FBI). Plaintiffs' opposition to the assertion of this exemption is disjointed, unpersuasive, and without legal citation or merit. We are not disposed to overrule defendants' withholding pursuant to exemption 7(E).

In summary, the FBI has responded to the instant request conscientiously and fairly. As the Court of Appeals said in Weissman, supra, in language closely applicable to the present facts:

> "It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. * * * The Agency submitted affidavits summarizing each document, or portion of a document withheld, and indicated the rationale for each claimed exemption. It filed an indexed description of all material withheld, and supported the withholding by explicit affidavits. No discovery was attempted; plaintiff simply contested the adequacy of the affidavits. There is no reason in this record to presume bad faith on the part of the CIA." 565 F.2d at 698.

An Order consistent with the foregoing has been entered this day.

John H. Pratt
United States District Judge

July 12, 1978