IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG

Plaintiff,

v. Civil Action No. 77-1997

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants.

_____/

REPLY TO PLAINTIFF'S SUPPLEMENTAL OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff has filed a supplemental opposition to defendants' motion for summary judgment, reformulating many assertions which have been amply resolved on the record and in oral argument in this case. However, as plaintiff has cited additional case law for the first time at this juncture, defendants are compelled to reply, only to further illustrate that plaintiff's position is devoid of any merit, legal or factual, particularly in light of recent developments in the law. On the basis of the foregoing, as well as the record now before this Court, defendants respectfully urge this Court to grant their motion for summary judgment.

Argument

I. DOCUMENTS CLASSIFIED BY NON-PARTY AGENCIES ARE NOT UNDER THE CONTROL OF THE AGENCY-DEFENDANTS AND THEREFORE NOT SUBJECT TO THE JURISDICTION OF THIS COURT

Defendants have fully described by affidavits, 1/ and fully explained in their Reply Memorandum (p. 9-13), the

1/ Conley, Forcier, Jones, O'Riley and Woods Affidavits filed on July 13, 1978.

disposition of each document referred to originating agencies for direct response to plaintiff. However, with respect to 62 classified FBI documents, the defendants are not in a position to address the procedural and substantive bases for their continued classification and are therefore in no position to adequately address their possible exemption from disclosure under the F.O.I.A. Executive Order 11652 provides:

> (A) Information or material may be down-graded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official
>
> (B) Down-grading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

Executive Order 11652, Sec. 3, 37 Federal Register 5211 (Part II) (March 10, 1972). (emphasis added). The only exceptions to the President's clear order occur in those rare instances in which the originating agency has ceased to exist, or the originating agency's functions have been transferred, by statute or Executive order, to another agency. Executive Order 11652, Sec. 3 (C), (D) and (E).

Central Intelligence Agency Regulations provide:

> . . . Any decisions to furnish or to deny or withhold requested records shall be made only by employees and officials to whom authority to make such decisions has been duly delegated.

32 CFR§1900.43. This sub-section as well as the appeal sub-section 32 CFR§1900.51 (e) (1) and (2), further provides that review shall be made specifically in accordance with the F.O.I.A. and EO 11652. Therefore the designated CIA officials are prohibited by the Executive Order and by their own regulations from reviewing the classification determinations of the F.B.I.

Moreover, the Attorney General correctly and properly concluded in his interpretation of the 1974 amendments that

> . . . it is necessary to consider documentary material contained in one agency's files which has been classified by another agency as being an "agency record" of the latter rather than the former. . . . It is unrealistic to regard classified documentary material as "belonging" to one agency for the purposes here relevant when primary control over dissemination of its contents, even within the Government, rests with another agency.

The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, United States Department of Justice, February 1975, pp. 2-3. See Defendant's Reply Brief, pp. 10-11.

Similarly, in interpreting the original Freedom of Information Act in 1967, the Attorney General stated, with respect to all referrals, classified or not:

> Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold after consultation with the other interested agencies. Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency.

Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, United States Department of Justice, June 1967, at 24.

The DC. Circuit Court of Appeals recently relied, in part, [2/] on that Attorney General opinion in determining that

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2/ The Circuit Court primarily relied upon the Tenth Circuit opinion in Cook v. Willingham, 400 F.2d 885 (10th Cir.1968) involving presentence investigation reports, which it concluded were not agency records, as they remained in the exclusive control of (the) court despite any joint utility they may eventually serve."

> An agency's possession of a document, standing alone, no more dictates that it is an "agency record" than the Congressional origin of a document, standing alone, dictates that it is not. Whether a Congressionally generated document has become an agency record, rather, depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.

Goland v. C.I.A., Civil No 76-1800 (DC Cir May 23, 1978 (attached to Defendant's First Brief as Appendix A), slip opinion at 11-12. For citation to Attorney General's Memorandum, see n. 46. Upon analyzing the conditions of confidentiality imposed by Congress in referring the documents to the C.I.A., the Circuit Court concluded that any decision to make a non-agency document public "should be made by the originating body, not by the recipient agency". Id at 13-14.

Although the Court's decision is factually distinguishable from the present case in which the referral documents originated with another agency rather than Congress, the Court's "control test" for defining "agency records" for purposes of conferring court jurisdiction is directly applicable to the present case. Indeed by relying, in part, upon the Attorney General's Memorandum,[3/] as well as the case of Friendly Broadcasting Co, 55 F.C.C. 2d 775, 775-76(1975),[4/] the Court of Appeals has commended its "control test" to any determination on referral documents, whether they be referrals from one government branch to another, or one government agency to another, and whether the documents be classified or not.[5/]

3/ which applied to non-party agency referrals

4/ Id n. 46. In this case, an administrative court applied a similar "control" analysis, in finding FBI documents not to be "agency records" of the F.C.C.

5/ In Friendly Broadcasting Co., supra the documents were not classified, but were provided to the F.C.C. for its "use on the condition that the contents of the Report would not be distributed outside this agency". 55 F.C.C. 2d at 776.

The plaintiff's reliance on one lone case, Church of Scientology v. Air Force, C.A. No. 76-1008 (April 12, 1978) (first attachment to plaintiff's Supplemental Opposition Brief) hardly compels a contrary conclusion. That case, decided before the Court of Appeals decision in Goland, supra, neither determined whether the documents in question were classified or not, nor applied the "control test" articulated first in Cook, v. Willingham, supra, and more recently in Goland, supra. Compare Serbian Eastern Orthodox Diocese v. Central Intelligence Agency, Civil No. 77-1412 (DD.C. July 13, 1978) (attached hereto as Appendix A), slip opinion at 2-3.

Despite the weight of judicial precedents concluding that a court lacks jurisdiction over documents originating with non-party agencies, at least where the control over the distribution of those documents is not referred as well, Defendants have submitted affidavits in defense of each and every document withheld by non-party agencies that was not classified. This was done as a matter of discretion in order to insure maximum disclosure to plaintiff and the maximum available information to enable the court to reach a determination on this case. The Court may determine, on its own, whether it has jurisdiction over any non-party exemption claims.

However with respect to classified referrals, defendants may not exercise similar discretion. For such discretionary review with a view to ultimate release would not only be prohibited by Executive order and regulations but might ultimately subject the officials exercising such discretion to criminal liability under 18 USC§798.

Accordingly, defendants and the Court have no choice but to defer to another agency and another forum for a determination on documents classified by an agency which is not a party to this action.

Refer to 1996

II. THE JURISDICTION OF THIS COURT DOES NOT EXTEND TO AN AMENDED REQUEST DATED OCTOBER 3, 1978, WELL AFTER SUBMISSION AND ORAL ARGUMENT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that defendant Central Intelligence Agency "has not retrieved all documents reasonably described by plaintiff's request" solely because it already failed to produce all files pertaining to all authors or all publications on the assassination of Dr. Martin Luther King, Jr., whether or not those files may be retrieved by the name of Dr. Martin Luther King, Jr. or James Earl Ray.[6/]

Plaintiff now suggests an interpretation of his original request numbered 6[7/] that would be as unreasonable as an interpretation of request numbered 1[8/] that would include records on all individuals that ever knew Dr. Martin Luther King, Jr., whether or not they are included in the records retrievable by reference to Dr. King's name. One would have to conduct an independent investigation of Dr. King's life in order to comply

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6/ Curiously, the first release to plaintiff on April 26, 1977, primarily included published materials that were retrieved by reference to the name of James Earl Ray. See Wilson Affidavit, Exhibit G. In his subsequent appeal, plaintiff protested that "What you have sent me is ludicrous." See Wilson Affidavit, Exhibit H. Indeed, in filing this lawsuit, plaintiff further complained that "Virtually all of the records released consisted of newspaper clippings." Amended Complaint, para. 9. In light of plaintiff's apparent disinterest in receiving these retrievable published articles, the Library of the Office of Central Reference, compiled a list of over 350 additional articles retrieved in response to plaintiff's request and informed the plaintiff that the publications were available in their entirety, should the plaintiff still wish their disclosure. Wilson Affidavit, para. 14. In light of plaintiff's outrage over the published materials he did receive, it would have been all the more unreasonable to expend additional energy researching and locating published materials beyond those retrieved by reference to the original subjects of his request. See also, documents numbered 225, 313 317, 318, 319, 320, 321, 337, 337, 342.

7/ Plaintiff's request numbered 6 included "all analyses, commentaries, reports, or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr., or the authors of said materials."

8/ Plaintiff's request numbered 1 included "all records pertaining to Dr. Martin Luther King, Jr."

with such a request. Likewise, to comply with plaintiff's interpretation of his request numbered 6, one would have to engage in independent research in order to discover, independent of the retrievable records on the assassination of Dr. King, the identity of all authors who have ever written on that subject. Then, and only then, would defendants be able to determine whether analyses on such published works, or on the authors themselves, exist in their files. In all likelihood, the disclosure of such documents on third party individuals, even if they existed, would have privacy implications.

Is it reasonable, under the aegis of the Freedom of Information Act to expect the government to engage in exhaustive research of published materials, that not only are available to plaintiff, but that may even be more familiar to plaintiff than to defendants? In analyzing an agency's obligations under the F.O.I.A., the Ninth Circuit Court of Appeals has distinguished "library material" from documents that reflect "the structure, operation or decision-making functions of the agency". SDC Development Corp. v. Mathews, 542 F 2d 1116, at 1119 (9th Cir 1976). The Court of Appeals noted that the legislative history of the Act 9/

> discloses deep congressional concern with the ability of the American people to obtain information about the internal workings of their government. Such information, Congress found, is vital in a democracy, for government by the people can be a reality only where the electorate can oversee the activities and decisions of public officials and agencies.

Id at 1119. It therefore concluded that there is such a "qualitive difference" between the type of records intended to be made available under the F.O.I.A. and a library

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9/ S. Rep. No. 813, 89th Cong. 1st Sess 5 (1965)

reference system, that the latter could not be deemed "agency records" for purposes of the F.O.I.A., explaining

> . . . the material prepared by the agency was primarily of a reference nature, and its values lay not in the substance of its content, which after all is freely available in various publications throughout the world, but rather in the effort of accumulation, organization, and abstraction.

Id at 1121. Thus, the C.I.A. did not provide books located in the C.I.A. library concerning the assassination of Dr. Martin Luther King, Jr. See Savige Affidavit, para. 9.

Those "analyses, commentaries, reports, or investigations" pertaining to such publications that were retrievable by reference to the named subject of this request were produced. Supra n. 6. Any additional documents that cannot reasonably be identified from plaintiff's request without engaging in independent research are not reasonably described by that request nor reasonably within the scope of this litigation. See Supplemental Gambino Affidavit (filed on July 13, 1978), para 1. The C.I.A. is not required to "organize its files in the form in which an F.O.I.A. request is made. Irons v. Schuyler, 465 F2d 608, 615 (DC Cir 1972) cert. denied 409 U.S. 1076 (1972); See also Goland, supra, slip opinion at 26. If an agency has not previously segregated, or indexed the requested records, as described by the plaintiff, production may be required only "where the agency can identify that material with reasonable effort." National Cable Television Ass'n, Inc. v. F.C.C. 419 F2d 183, 192 (DC Cir 1973), relied upon in Goland, supra, slip opinion at 27.

The C.I.A. has no indices or compendia that would identify the documents that plaintiff now alleges to have been requested (First Supplemental Gambino Affidavit, para. 1), without engaging in exhaustive research as described above or, alternatively, without undertaking a page-by-page review

of all records in C.I.A. files, (Savige Affidavit, para. 5.). Therefore, such documents could not possibly be identified with a reasonable amount of effort, as plaintiff seems to imply. Plaintiff's Supplemental Opposition Brief, p. 4.

Plaintiff did not suggest until his opposition to defendant's motion for summary judgment the breadth of his interpretation of request number 6. Since that interpretation could not have been forseen nor have possibly occurred to defendants prior to the amendment that plaintiff made at that time (as well as administratively by letter dated October 3, 1978), plaintiff's suggestion that defendants have acted in bad faith in this regard is unfounded and quite absurd. If such an interpretation was intended at the time of the request, [10/] such a request was, at best, ambiguous. As such, plaintiff can not be heard, at this late stage to clarify or amplify it. Goland, supra slip opinion at 30-31. Nor can plaintiff impute any bad faith to defendants' inability to anticipate his totally unforeseen interpretation or to defendants efforts to clarify it at this stage.

Plaintiff has only introduced evidence of his subsequent efforts to amplify his request. The factual record before this Court clearly and uncontrovertably establishes that "all identifiable records have been retrieved from those C.I.A. record systems that could conceivably contain responsive documents" Savige Affidavit, paragraph 5. That conclusion is supported by as thorough a description of the extent of the search, as security would permit. To divulge any more detail on the files and components searched could divulge classified records systems, classified because their identification would divulge the intelligence information and activities contained therein. Savige Affidavit,

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10/ An intention that is seriously doubted in light of subsequent protests by plaintiff concerning published works that were produced, supra n. 6.

paragraph 3 and 4. However, defendants respectfully suggest that the Court needs no further detail to conclude that the search was as conscientious and thorough in this case as is possible.

III. NO MATERIAL ISSUE OF FACT EXISTS ON THE RECORD THAT WOULD PRECLUDE SUMMARY JUDGMENT AT THIS TIME OR WARRANT DISCOVERY OF ANY KIND

The sole issue for the Court to resolve is legal rather than factual -- whether all information that defendants have withheld from public release, is legally exempt from the disclosure provisions of the Freedom of Information Act. In resolving that issue, the Act requires review de novo of the exemptions claimed. 5 U.S.C 552(a)(4)(B). The normal procedures for de novo review and for granting or denying summary judgment in Freedom of Information Act cases was most recently set out by the D.C. Circuit Court of Appeals in Ray v. Turner, Civil No. 77-1401 (D.C. Cir., August 24, 1978), (attached to Notice of Filing, September 12, 1978), slip opinion at 8. The Court of Appeals went to great lengths to delineate the nature of de novo review, the burden of proof that the government must shoulder, and the manner in which any question or controversy should be resolved.

The Circuit Court reemphasized that, in most instances, FOIA cases should be resolved on the basis of detailed government affidavits. Id. slip opinion at 17. However, wherever a judge is uneasy, or has any doubt that he wants satisfied, he may, in his discretion, order in camera review. However the Circuit Court cautions:

> In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt." When an agency affidavit or other showing is specific, there may be no need for in camera inspection.

Id. slip opinion at 16.

The resolution of FOIA cases by affidavit and, where necessary, by in camera review was recommended by Congress in enacting the 1974 amendments to the Act. Id. slip opinion at 9-16. However in national security cases, substantial weight should be accorded government expertise on the question of the adverse affect disclosure may have on the national security. Id. at 12 and 14. De novo review is primarily dependent on detailed government affidavits which should include relatively detailed analysis of the material withheld and indexing that subdivides the documents into manageable parts, cross-referenced to the relevant portions of the government justification. Id. slip opinion at 8.

The government has met this burden of proof. The first Owens, Zellmer and Gambino Affidavits contain specific, detailed explanation for the withholding of each type of information categorized in the respective Document Disposition Indices. The categories describe the specific content of the documents and are itemized for each document segment along with the correspondent FOIA exemptions.[11/] The supplemental Owen affidavit filed on October 6, 1978 provides even further details and justifications, deletion-by-deletion where necessary, to describe the 31 documents withheld by the CIA in their entirety, so that plaintiff and the Court may focus on the specific areas of dispute and the specific exemptions for which each portion has been withheld.

11/ Plaintiff, however, objects to this specificity, claiming that it is an attempt to create new exemptions. Weisberg Supplemental Affidavit (filed October 10, 1978), paras. 26 and 28. On the contrary, it was an attempt to provide more detail for each deletion than the mere recitation of the FOIA exemptions relied upon. Although the structure and cross-reference may have been awkward and cumbersome, as a result of the supplementation, plaintiff can hardly object to the detail that has been provided as a result.

Of the CIA documents released with portions deleted, the Supplemental Gambino and Owen Affidavits (filed October 3, 1978 and October 6, 1978 respectively each accompany annotated copies of the documents in question that reflect which category of information is contained in, and which exemption applies to, each deletion. The further detail now provided will facilitate the elimination of duplicative or coextensive claims of exemption and emphasize the exemptions that will require the Court's determination in order to resolve the proper withholding of the exempted information.[12/] Thus, defendants have fully met the burden of proof suggested by Ray v. Turner, supra, slip opinion at 8.

Despite defendants' extensive efforts to provide adequate detail to assist plaintiff in focusing on the legal issues in this case, plaintiff prefers to focus on irrelevant assertions concerning prior requests and prior litigation. Whatever reference plaintiff has made to the instant case has had no relation to the issues before this court for resolution. Rather than addressing the current exemption claims, plaintiff prefers to dispute information already released to him,[13/] to complain of the limited value to plaintiff and to the CIA of documents already released,[14/] and to debate

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12/ The first Zellmer Affidavit (CIA), Forcier Affidavit (State) and Wood Affidavit (FBI) required no further clarification or supplementation as only one category of information was withheld in each. The O'Riley Affidavit (Navy) already specified which exemption applied to which deletion. The Banner Affidavits (NSA) already explained that Exemption 1 and 3 were claimed coextensively to withhold all 27 documents in their entirety. First Banner Affidavit, paras. 6, 7 and 8.

13/ Plaintiff's Supplemental Opposition Brief, p. 8; see also Weisberg Supplemental Affidavit (filed October 10, 1978), para. 10.

14/ Weisberg Supplemental Affidavit (October 10, 1978), para. 16.

propriety of activities of the CIA allegedly reflected therein.[15] Such an inquiry has no relevance in FOIA litigation. Lesar v. Department of Justice, Civil No. 77-0692 (D.D.C. July 28, 1978) (attached to Notice of Filing, August 11, 1978), slip opinion at 2.

Plaintiff further challenges the thoroughness of defendants' search for documents by broadening his request with each stroke of the pen to encompass all authors on the King assassination,[16] all records on the Southern Christian Leadership Conference,[17] all records on "Black Power Elements",[18] and even records on allege surveillance of plaintiff himself.[19] The Court lacks jurisdiction over any such documents and therefore assertions and speculations as to the existence of such documents are not material issues in the instant action. Supra, pp. 6-10, and Defendants Reply Brief, pp. 6-9. Indeed, plaintiff's conjecture and speculation as to the probable existence of any additional documents,[20] are likewise insufficient to create any genuine issue of fact. As the D.C. Court of Appeals recently stated:

> Even if we assume that the documents plaintiffs posit were created, there is no reason to believe that the docu-

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15/ Id., para. 11.

16/ Plaintiff's Supplemental Opposition Brief, p. 4.

17/ Weisberg Supplemental Affidavit (October 10, 1978), para. 13, 14, and 15.

18/ Plaintiff's Supplemental Opposition Brief, p. 7., Weisberg Supplement Affidavit (October 6, 1978), para. 105.

19/ Weisberg Supplemental Affidavit (October 6, 1978) paras. 24 and 27.

20/ Id., paras. 99, 101 through 104.

> ments . . . still exists, or, if they exist, that they are in the possession of the CIA. Moreover, even if the documents do exists, and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search.

Goland v. CIA, supra, slip opinion at 26.

Mere assertion that the plaintiff believes a document to exist, that a document must exist or that it is incredible that a document does not exist will not be sufficient to create any triable issue of fact. Patterson v. DEA, Civil No. 78-0035 (D.D.C. July 7, 1978) (attached hereto as Appendix B), slip opinion at 2-3. Plaintiff must establish more than a mere suspicion to impeach the credibility of a responsible government official who has attested to the uncontroverted fact that no additional documents have been located. DiModica v. U.S. Department of Justice, Civil No. 75-2480 A (ND Ga., April 19, 1977) attached hereto as Appendix C) and Serbian Eastern Orthodox Diocese v. CIA, supra, slip opinion at 9-10.

The most outrageous and equally unsubstantiated of plaintiff's assertions are those directed at the credibility of government officials. Plaintiff attempts to corroborate his continual harangue that "all lie, all file false affidavits, all resort to trickery", etc.,[21/] by citing broad generalities and distorted hearsay.[22/] Thorough government affidavits will not be undercut by mere assertions of bad faith or misrepresentations. Ray v. Turner, supra, slip opinion at 17. Affidavits based on hearsay and conjecture do not create

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21/ Weisberg Supplemental Affidavit (October 6, 1978), para. 3.

22/ Id., paras. 11-12.

an issue of fact where none exists, nor do they merit the Court's consideration in ruling on a motion for summary judgment.[23/] Patterson v. DEA, supra at 2-3. "Otherwise, agencies could be forced to litigate the issue of the existence vel non of the requested documents in every case." Id at 3. Plaintiff's failure to focus on the legal issues to be resolved in this action is not for want of relevant information on the records (for such has been amply provided by defendants), but for want of any material issue of fact that could further forestall judgment in defendants' favor.

Disputed facts do not exist in a traditional sense in FOIA cases. Plaintiff's suggestion that facts are in the exclusive possession of the defendants implies that only by release of the documents themselves would the facts be resolved. Plaintiff's argument that he should be provided with the documents or with further details as to the content of the documents so that he can prove that the documents are not exempt, is paradoxical. Such a theory for the resolution

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23/ Indeed, Rule 56(e) of the Federal Rules of Civil Procedure, requires that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

In the instant case, plaintiffs affidavit, although presumably submitted to show the reasons plaintiff can not present facts to support his oppositon to summary judgment must nevertheless, satisfy these fundamental requirements. Plaintiff's affidavits which either distort or ignore the facts that are available to him, continually digress from the legal issues that remain to be resolved, Were they to merit any formal response, the only response appropriate would be a motion to strike.

of an FOIA dispute would result in the denial of summary judgment in every FOIA case. Clearly summary judgment following de novo review of the legal issues and, where necessary, in camera review of the documents in dispute is the only possible procedure to resolve such cases. Ray v. Turner, supra. Plaintiff's reliance on the limited holding of NAGE v. Campbell, et al. (D.C. Cir. May 79, 1978) (attached hereto as Appendix D) is therefore misplaced. That exemption 4 case is neither legally nor factually analogous. The application of the exemption claimed in that case did not depend on the content of the documents at issue. Indeed all parties were in agreement that the documents at issue contained certain financial data. The sole issue to be resolved was the competitive harm that release of the specific provisions and figures would wrought. The threatened companies intervened to introduce factual bases for the competitive harm that they, and the government, alleged.[24/] In contrast, plaintiff had introduced no evidence that warranted the summary judgment that was granted to it. Not only did the Court of Appeals recognize that a triable issue of fact had been overlooked but it distinguished that because of the unique factual issue of competitive injury that was crystallized in

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24/ Plaintiff desired access to the exact terms of proposed insurance plans or changes in existing insurance plans prior to their final publication, presumably to play a role in those negotiations.

in the record and because of the ability of each party to introduce factual information on that issue, ~~of that~~ the case could not be resolved on summary judgment for either side.

The existence of such clear factual issues is rare in FOIA cases. In the instant case, plaintiff has offered nothing but idle assertions of bad faith, and misrepresentation based on conjecture and hearsay, suprá. He has conceded that it is impossible for him to respond any further "to all the sworn untruths, deception and misrepresentations made by the CIA in this matter." Weisberg Supplemental Affidavit (October 6, 1978), para. 23. Clearly, he has been unable to create any material dispute of fact on any issue to which he has attempted to respond. Based on the irrelevance of plaintiff's objections to the government showing, and by the objectionable line of discovery already attempted in this case, it is improbable that any material issue of fact would be pursued and inconceivable that any could be established, let alone resolved, through discovery. This case may only be resolved by procedures recommend by Congress and the Courts. Ray v. Turner, supra.[25/] Under the proper procedures and standards,

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25/ Plaintiff"s reliance on language in a concurring opinion in Ray v. Turner, supra, is of little persuasion, in light of the majority's clear ruling, that

> [A]dequate adversary testing would be insured by opposing counsel's access to the information included in the agency's detailed and indexed justification and by in camera inspection.

for review, defendants' motion for summary judgment should be granted.

IV. PLAINTIFF'S SUGGESTED CORRECTION OF DEFENDANTS' BRIEF IS DECLINED

Plaintiff's suggestion that defendants did not correctly or completely reflect the transcript of his counsel's oral argument in the matter of Lesar v. Department of Justice, Civil Action No. 77-0692, is not taken lightly. See Plaintiff's Supplemental Opposition Brief, pp. 8-9.

Continuation of Footnote 25

Id. slip opinion at 9.

> . . . [T]he government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. . . . When an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertions of claims of bad faith or misrepresentation.

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Id. slip opinion at 17. (emphasis added)

The Court of Appeals opinion is entirely consistent with that rendered earlier this year in Goland v. CIA, supra, slip opinion at 24., to which the Court added

> . . . [I]f those requirements are met, the district court has discretion to forgo discovery and award summary judgment on the basis of affidavits.

Moreover these two opinion of the Court of Appeals, one contemporaneous to, and the other subsequent to, the NAGE opinion, upon which the plaintiff so heavily relies, are the clearest indication that the Court of Appeals did not intend its limited holding in NAGE to have any of the broader ramifications that plaintiff suggests.

Plaintiff continues to argue, against the great weight of precedents to the contrary (See Defendants' Reply Brief, p. 22-24), that wherever he can devine the possible content of the documents at issue from information already available in the public domain, the defendants' refusal to confirm or deny his suspicions by waiver of the exemption claimed is improper. Plaintiff's counsel's similar argument in the analogous case of Lesar v. Department of Justice was categorically rejected from the bench. (attached to Defendants' Reply Brief at Appendix L). Transcript at 42. No amplification of that transcript to reflect plaintiff's counsel's reply and futile attempt to pursue the issue further could possibly alter Judge Gesell's opinion expressed during oral argument and further decided in his memorandum opinion that:

> The fact that an expert can piece together identifying data does not make the identification in question automatically part of the public domain.

Lesar v. Department of Justice, Civil No. 77-692 (D.D.C., July 28, 1978) (attached to Notice of Filing of August 11, 1978) slip opinion at 6. See also, Judge Sirica's opinion in Fensterwald v. CIA, Civil No. 75-987 (D.D.C. July 12, 1978) (attached to Defendants' Reply Brief as Appendix M) slip opinion at 4-5.

It is therefore specious for plaintiff to argue that defendants have misrepresented the content of the hearing transcript or the events that transpired before Judge Gesell on that day. Judge Gesell's memorandum decision and the weight of judicial authority cited in Defendants' Reply Brief should dispel any doubt that plaintiff's recurrent argument neither prevailed then nor could prevail today.

CONCLUSION

Despite the volume of paper subitted in this litigation, plaintiff has failed to introduce a single genuine or material issue of fact. Nor has he articulate any legal argument that could preclude judgment in defendants' favor as a matter of law. Accordingly, defendants respectfully urge this Court to grant their Motion for Summary Judgment.

Respectfully submitted,

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October 16, 1978

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. 77-1412
CENTRAL INTELLIGENCE AGENCY et al., Defendants.	)	

FILED

JUL 13 1978

JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This Freedom of Information Act [FOIA] matter is before the Court upon defendants' motion for summary judgment. After an initial release of 22 documents, defendants, after further search[1/] have located numerous documents responsive to plaintiffs' request. Fifteen (15) of these documents were released in their entirety and of those remaining in dispute, 53 have been withheld in part, 10 have been withheld in toto, and 237 have been referred to the agencies wherein they originated for a releasability determination.

Plaintiffs' opposition rests on three basic grounds. They first protest defendants' policy of referring document requests to originating agencies. They further contend that their presentation of an opposition has been hampered by

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1/ Defendants' task was complicated by the fact that the searches needed to cover separate files relating to various transpositions of plaintiffs' official Church title, i.e., "The Church of Yugoslavia," "The Serbian Church," "The Yugoslavian Church," as well as other variants. Defendants have stated that most of the additional documents surfaced in response to FOIA requests by various individuals made in the same time frame.

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defendants' refusal to make non-conclusory showings with respect to factual matters in their exclusive possession, and seek an order of this Court compelling a more extensive Vaughn v. Rosen index of withheld documents. Finally, plaintiffs have filed substantive opposition to defendants' invocation of FOIA exemptions 1, 3 and 6. 5 U.S.C. § 552(b).

A. Referral of Documents to Originating Agency.

As stated previously, some 237 documents were referred to originating agencies for a determination as to releasability.[2/] Plaintiffs contend that "[t]he FOIA precludes an agency possessing responsice [sic] records to defer to another agency's determination as to disclosability." Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment [Plaintiffs' Opposition] at 3. Plaintiffs suggest that the FOIA provision authorizing an agency receiving a request to consult another agency which possesses "substantial interest in the determination of a request" impliedly prohibits the widespread government practice of referring documents to an originating agency for an exemption determination. 5 U.S.C. § 552(a)(6)(B)(iii). We cannot agree. Applicable government regulations require that an originating agency review documents before any declassification. See Supplementary Affidavit of Gene F. Wilson (March 17, 1978) at ¶ 4. It is clear that such agency is better equipped to determine the propriety of asserting exemptions. Recognizing that the requested agency

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2/ 213 of these documents were referred to the FBI, where they were processed pursuant to various FOIA requests to the FBI and are the subject of another suit decided this date. Serbian Orthodox Church et al. v. F.B.I., C.A. 77-1404.

will in all likelihood endorse an originating agency's withholding recommendation, we believe that no purpose can be served by directing the requested agency to expend time and energy in preparing its own justification for withholding. Furthermore, the course suggested by plaintiffs would make it necessary for each of many agencies in possession of documents to make separate disclosability determinations. No purpose will be served by forcing separate agencies of the Government to make numerous individual responses respecting a particular document; plaintiffs' interests are adequately protected by one thorough analysis of each document. We therefore decline to establish an implied statutory prohibition which we find to be inconsistent with the underlying purpose embodied in the FOIA. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at 24, U.S. Department of Justice (1967) (agency with paramount interest should make disclosure decision).

B. Applicable Exemptions.

Defendants have advanced three exemptions in support of their varied withholdings and deletions.

Exemption 1 - 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." By affidavit submitted in conjunction with its motion for summary judgment, defendants maintain that they have invoked exemption 1 only to protect documents classified pursuant to Executive Order 11652. Affidavit of Robert E. Owen (January 17, 1978) [Owen affidavit] at ¶ 2. Plaintiff protests that it is unable to challenge defendants' assertion

of exemption 1 due to the "generalized," "non-specific," "vacillating and indefinite" arguments advanced in support of the exemption claims. 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).

Exemption 3 - Materials "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.

By affidavit submitted in conjunction with its motion for summary judgment, defendants maintain that they have invoked exemption 3 only where information contained in the materials "reveals intelligence sources and methods in need of continued protection" or "because of the need to protect information concerning CIA organization, procedures, names, official titles and numbers of personnel employed by the Agency, ..." Owen Affidavit at ¶ 2. Defendants point to two statutes as "exempting statutes" within the meaning of exemption 3:

> Section 102(d)(3) of the National Security Act of 1947, which states in relevant part ". . . that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403(d)(3).
>
> Section 6 of the Central Intelligence Agency Act of 1949, which states in relevant part ". . . the Agency shall be exempted from the provisions of [any laws] which require the publication or disclosure of the organization, . . . names, [or] official titles, . . . of personnel employed by the Agency." 50 U.S.C. § 403g.

Plaintiffs have not disputed, and we find no reason to reject, defendants' contention that these two statutes are exempting statutes. Goland v. C.I.A., No. 76-1800 at 17-19 (D.C. Cir. May 23, 1978); Weissman v. C.I.A., supra at 565 F.2d 694. Having reached this determination, we need only decide whether the withheld information falls within the area protected by the statutes. See Baker v. C.I.A., No. 77-1228 at 8 (D.C. Cir. May 24, 1978); Fonda v. CIA, 434 F. Supp. 498, 504 (D.D.C. 1977). For the same reasons advanced respecting exemption 1, plaintiffs maintain that they cannot prepare an adequate challenge to defendants' assertions, i.e., inadequacy of the Vaughn index.

Exemption 6 - "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy."

Defendants have asserted exemption 6 in two types of situations. They have deleted "highly personal information, often of a potentially embarrassing nature" and instances where "individual's names appear as incidental references [since] the fact that an individual is the subject of a CIA file or is mentioned in a record maintained by CIA is easily misunderstood by the general public. . ." Owen Affidavit at ¶ 19. See Memorandum in Support of Motion for Summary Judgment [Defendants' Memo] at 6-7. Our function is to balance the competing interests in an effort to determine whether disclosure will constitute a "clearly unwarranted invasion of privacy." See Department of Air Force v. Rose, 425 U.S. 352, 373 (1976); Getman v. N.L.R.B., 450 F.2d 670, 674 (D.C. Cir. 1971). We are required to follow the procedure articulated by

our Court of Appeals for making exemption 6 determinations: first, determine whether the information would constitute an invasion of privacy, and if so, how severe; second, weigh the public interest asserted against the invasion of privacy; and finally, inquire as to whether alternative methods of obtaining the requested information are available. Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975).

Preliminarily, we must, as a matter of law, conclude that defendants' second justification for withholding, i.e, to protect individuals from public misunderstanding regarding the significance of a person's inclusion in a CIA file, is insufficient. We recently decided that exemption 7 (C) -- embodying only an "unwarranted invasion of privacy" standard -- did not provide a justification for the withholding of names of contributors and recipients of funds in a Watergate-related operation when based upon an interest of protecting wholly innocent individuals from public embarrassment. Congressional News Syndicate v. Department of Justice, 433 F. Supp. 538, 544 (D.D.C. 1977). Congress has placed a heavy burden upon the Government when invoking exemption 6, and we are not satisfied that this blanket assertion meets that burden.

C. Analysis of Vaughn v. Rosen Affidavit.

With the perspective articulated above, we have reviewed the Owen affidavits. In order for us to properly perform our duties in a FOIA controversy, an affidavit must be sufficiently detailed to permit a meaningful assessment of the applicability of cited exemptions to materials not produced. See Mead Data Central, Inc. v. Department of Air

Force, 566 F.2d 242, 250-51 (D.C. Cir. 1977); Pacific Architects and Engineering, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974); Cuneo v. Schlesinger, 484 F.2d 1086, 1092 (D.C. Cir.), cert. denied, 415 U.S. 977 (1974). Unless defendants present information sufficiently detailed to enable us to conclude that the withholding is justified, we must deny their motion for summary judgment. See National Cable Television Association v. FTC, 479 F.2d 183, 186 (D.C. Cir. 1973).

After careful review of the Owen affidavits, we have concluded that defendants' motion for summary judgment should be granted with respect to documents 1, 2, 3, 4, 7, 11, 12, 17, 19, 20, 23, 24, 36, 43, 46, 55, 56, 61, 68, 72, 75 and 76.[3/] Fifteen of those documents have been released in toto. As to the seven remaining, we have concluded upon analysis that documents 2, 17, 24, 61, 68 and 72 are protected from disclosure by exemption 3, 5 U.S.C. § 552(b)(3), and document 56 is protected from disclosure by exemption 1.

This leaves 63 documents remaining in dispute of which 53 have been withheld in part and 10 in toto. With respect to 16 of these documents to which exemption 6 has been advanced in support of withholdings, the Owen affidavit presents us no basis for balancing the competing considerations. We also cannot determine whether particular withholdings are based upon the justification which we found unacceptable, supra, or upon an acceptable basis.[4/]

3/ Documents are numbered as indexed in the Owen affidavit submitted January 20, 1978.

4/ Document 56 has been withheld based upon multiple exemptions, and the assertion of an improper objection will not invalidate an otherwise proper withholding. (Exemption 1).

Accordingly, defendants' motion for summary judgment should be denied with respect to documents 8, 13, 14, 15, 21, 25, 34, 44, 54, 59, 65, 66, 67, 70, 71 and 74.

Defendants, with respect to 47 documents, have supported their invocation of exemption 3 with a conclusory justification similar to that advanced for document 60, i.e., "deleted portions contained information which could identify an intelligence source and were deleted pursuant to exemption (b)(3)." Owen affidavit (Document Index). It is impossible, faced with such justifications, to determine whether withheld information falls within the area protected by the exempting statutes. 50 U.S.C. §§ 403(d)(3), 403g. To uphold the exemption claim, it is necessary to give complete credence to the good faith of the affiant compiling the Vaughn index. Neither Congress nor our Court of Appeals sanctions such blind faith. See Phillippi v. C.I.A., 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (requiring agency to demonstrate that release will lead to unauthorized disclosures); 5 U.S.C. § 552(a)(4)(B) (burden on agency to sustain withholding action). Plaintiffscorrectly suggest that indefiniteness in a Vaughn affidavit "casts serious doubt upon the comprehensive nature of defendants' review of these contested documents...." Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 19.

With respect to those documents also asserting exemption 1, we are unable to evaluate meaningfully the justifications advanced by defendants. Defendants do not cite the

dates of classification, the number of any classifying officer, or the portions which are appropriately classified. This is in marked contrast to the affidavit submitted in the related case decided this date, Serbian Eastern Orthodox Diocese for the United States of America and Canada v. F.B.I., C.A. 77-1404.

We therefore direct defendants to submit a complete and detailed Vaughn itemization which will afford us a basis upon which to evaluate their exemption claims. This procedure is consistent with directives recently issued by other judges of this Court. See Ayoub v. Department of State, C.A. 76-2309 (D.D.C., order filed July 1, 1977); Jaffe v. C.I.A., C.A. 76-1394 (D.D.C., order filed Apr. 7, 1977); S. Rep. No. 93-854, 93d Cong., 2d Sess. 1415 (1974). This procedure is preferable to, and should precede, in camera review. See Phillippi v. C.I.A., supra, 546 F.2d at 1013. If this procedure is unavailing, we will then reluctantly undertake a random in camera examination of withheld documents. See Ash Grove Cement Company v. F.T.C., 511 F.2d 815, 817 (D.C. Cir. 1975).

D. Other Documents.

Finally, plaintiffs maintain that it is "incredulous" that defendants possess no documents responsive to this FOIA request dated later than October 14, 1969. We do not share plaintiffs' sense of frustration, but instead accept the representations of defense counsel and affiants that all responsive records have been processed. "[A]llegations of conspiracy and cover-up are not relevant unless they relate directly to defendants' refusal to release requested documents

under the Act." Ayoub v. Department of State, supra at 18. We are not inclined to exercise our discretion to compel discovery into this issue without some factual basis which would indicate that such discovery might unearth improper withholding. See Goland v. C.I.A., supra, at 23-31.

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

J. H. Pratt

John H. Pratt
United States District Judge

July 12, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERBIAN EASTERN ORTHODIX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA et al.,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY et al.,

Defendants.

Civil Action No. 77-1412

FILED

JUL 13 1978

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of defendants' motion for summary judgment, plaintiffs' opposition thereto, and having determined that there are no relevant genuine issues of material fact, it is by the Court this 12th day of July, 1978,

ORDERED, that defendants motion for summary judgment be granted with respect to documents 1, 2, 3, 4, 7, 11, 12, 17, 19, 20, 23, 24, 36, 43, 46, 55, 56, 61, 68, 72, 75 and 76; and it is further

ORDERED, that within 30 days of this Order, defendants shall submit to this Court a complete and detailed Vaughn v. Rosen itemization respecting the remaining numbered documents withheld in whole or in part.

John H. Pratt
United States District Judge

3

FILED

JUL - 7 1978

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUE ANNE PATTERSON,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.,

Defendants.

Civil Action

No. 78-0035

MEMORANDUM

Presently before the Court is defendants' motion to dismiss or, in the alternative, for summary judgment. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (1976), in which plaintiff seeks from defendant Drug Enforcement Administration (DEA) "all records maintained by [the] Agency that in any manner whatsoever arguably relate to" her, certain of her relatives, and certain other individuals specified by plaintiff. By letter dated February 7 and 8, 1977, DEA informed plaintiff and her family that the agency's review of its files revealed no records relating to plaintiff or the other persons named in her request.[1/] Defendants contend that this action must be dismissed for lack of subject matter jurisdiction because DEA has no records that plaintiff could show were improperly withheld.[2/]

In opposition to the defendants' motion for summary judgment, plaintiff has submitted the affidavit of Andra S.

1/ See Affidavit of Anne Augusterfer, ¶ 5, and Exhibit D attached thereto.

2/ See 5 U.S.C. § 552(a)(4)(B).

CIVIL NO 77-1997

APPENDIX B

Patterson, the widow of John S. Patterson.[3] The affiant states that following her late husband's kidnapping in Mexico in March, 1974, she had various contacts with individuals who she believed were DEA agents. The affiant states that she "had . . . been informed that they were agents of the Drug Enforcement Agency."[4] Plaintiff contends that this affidavit testimony gives rise to the inference that DEA has records concerning Mrs. Andra S. Patterson, thereby placing into dispute defendant DEA's assertion that it has no records responsive to plaintiff's FOIA request.

The Court concludes that defendants' motion for summary judgment should be granted. Rule 56(e), Federal Rules of Civil Procedure, provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Thus, affidavits containing statements made on "information and belief" or based on hearsay may not be considered when ruling on a summary judgment motion. See, e.g., F.S. Bowen Electric Co. v. J.D. Hedin Construction Co., 316 F.2d 362, 364 (D.C. Cir. 1963); Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949); 6 Moore's Federal Practice ¶ 56.22[1], at 1312-13 (2d ed. 1976).

The affidavit of Andra S. Patterson, submitted by plaintiff in opposition to defendants' summary judgment motion, is therefore deficient because it states that the affiant "had . . . been informed" that the persons she had contact with were DEA

3/ The plaintiff in the instant action, Sue Anne Patterson, is the sister of John S. Patterson.

4/ See Affidavit of Andra S. Patterson, ¶¶ 4, 5.

agents. This statement is hearsay and not based on the affiant's personal knowledge. Thus, even assuming that this statement was sufficient to place into dispute DEA's affidavit that its search revealed no records pertaining to plaintiff or the other specified persons, the statement is not competent evidence to be considered in ruling on the summary judgment motion.

Moreover, the Court does not believe that Andra S. Patterson's affidavit is sufficient to place into dispute DEA's assertion that it has no records responsive to plaintiff's request. The Court recognizes that in certain situations the issue of whether an agency has records responsive to a FOIA request may legitimately be placed in dispute and must be litigated. See, e.g., Weisberg v. United States Dep't of Justice, 543 F.2d 308 (D.C. Cir. 1976). But the assertion by an individual that she had contact with persons believed to be employees of an agency is not sufficient by itself to create a genuine issue concerning whether that agency possesses documents relating to the individual. Otherwise, agencies could be forced to litigate the issue of the existence vel non of the requested documents in every case. In the case at bar, the Court finds nothing in the record genuinely placing into dispute DEA's assertion that it has no records relating to plaintiff's FOIA request.

Accordingly, the Court will grant defendants' motion for summary judgment and dismiss the complaint.

Judge

Date: July 6th 1978

FILED

JUL - 7 1978

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUE ANNE PATTERSON,

Plaintiff,

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.,

Defendants.

Civil Action

No. 78-0035

ORDER

Upon consideration of defendants' motion to dismiss, or in the alternative, for summary judgment, the points and authorities filed in support and opposition thereto, the entire record herein, and for the reasons set forth in the Court's memorandum issued this same day, it is by the Court this 6th day of July, 1978,

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

ORDERED that plaintiff's complaint be, and hereby is, dismissed.

Judge

7-7-78

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

APR 19 1977

BEN H. CARTER, Clerk
By: Deputy

VINCENT DI MODICA

vs.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

CIVIL ACTION

NO. 75-2480A

ORDER

This action to compel the production of documents, purportedly in the possession of respondents, brought pursuant to the Freedom of Information Act [hereinafter "FOIA"], 5 U.S.C. §552, et seq., is presently before the court on: (1) respondents' motion to dismiss and/or for summary judgment; and (2) petitioner's motion to compel answers to its first interrogatories. These motions will be considered seriatim.

Respondents' motion to dismiss is based on the arguments that affidavit testimony submitted by respondents conclusively shows that respondents have no files which concern petitioner's involvement with the Italian-American Civil Rights League [hereinafter "IACRL"] and that in any event the Federal Bureau of Investigation [hereinafter "FBI"] and its Director Clarence Kelly are not proper parties to this action.

Respondents' former argument is based on affidavits submitted by FBI personnel including Michael Hanigan (special agent and FOIA supervisor), Kenneth Holt (special agent and principle legal advisor in the Newark field office), and John H. Hawkes (special agent and legal advisor in the New York field office). Each officer states that a thorough review of FBI files in Washington, Newark and New York reveals no information relating to petitioner's membership or participation in

interviewed once on August [illegible], at petitioner's residence in Belleville, New Jersey, in connection with a theft from interstate shipment investigation and again on May 20, 1974, at Somerset Jail in Somerville, New Jersey, in connection with a bank robbery investigation. Petitioner supports by affidavit his contention that he has been a member of IACRL since 1969 and that he was twice taken into custody and interviewed extensively by FBI agents concerning his IACRL activities.

In our order of September 30, 1976, this court denied respondents' motion for summary judgment on a record which was supplemented solely at that time by affidavits of petitioner and agent Hanigan. In our order we stated that:

> [s]ince on a motion for summary judgment all favorable inferences must be drawn against the party moving for summary judgment [citation omitted], it is incomprehensible to this court that petitioner could have been interrogated on so many occasions (if in fact he was so interrogated as he claims) and yet the F.B.I. has kept no file or records on petitioner's activities.

In view of agent Holt's statement that petitioner was interviewed concerning subjects other than his IACRL activities, and that records exist concerning those interviews, it becomes apparent that in order to prevail at trial petitioner would have to show: (1) that he was in fact interviewed by the FBI concerning his membership in IACRL; and (2) that records exist concerning those interviews.1/ However, affidavits submitted

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1/ While normally in Freedom of Information Act cases the burden of proof is on the agency to show that the documents in question are privileged, see Schaffer v. Kissinger, 505 F.2d 389 (D.C. Cri. 1974); Tax Analysts and Advocates v. Internal Revenue Service, 505 F.2d 350 (1974), we do not believe that the burden may be placed upon the agency to show a negative; that is to show that given documents do not exist. Therefore, we believe that a person seeking such documents must meet a minimal initial burden of showing that the information in question was in fact gathered and transcribed, recorded, or otherwise perpetuated in some form. In view of the stringent civil and criminal penalties which may be imposed upon agency employees who misuse or fail to disclose information under the Freedom of Information Act see 5 U.S.C.§§552a(g)(1)(civil penalties); 552a(i)(1)(criminal penalties), we believe this allocation of the burden is proper. See Sears v. Gottschalk, 502 F.2d 122 (4th Cir. 1974)(request must be for identifiable records), National Cable Television Ass'n, Inc. v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973). Petitioner however fails to make such a showing.

locate any files concerning petitioner's involvement with the aforementioned organization. Therefore, petitioner's only means of proving his allegations would be through the impeachment of agents Hanigan, Holt and Hawkes. While it is true that respondent bears the burden of showing that summary judgment is warranted, see 10 C. Wright and A. Miller, Federal Practice and Procedure, §2725 at 503 (1971), it is equally tru that petitioner must show by more than a scintilla of evidence that a genuine material issue of fact remains for trial. Brady v. Southern Ry. Co., 320 U.S. 476 (1943). Petitioner's belief in the existence of the files which he requests coupled with his desire to cross-examine the FBI affiants at trial does not meet the foregoing standard.

In Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952), the Court of Appeals for the Second Circuit affirmed the distr court's entry of summary judgment. Dyer was an action in whic the plaintiff sought to prove his defamation claims through tw witnesses in addition to the two defendants. All four possibl witnesses submitted affidavits denying that the allegedly defamatory remark had been made. In affirming, the Court of Appeals noted that even if plaintiff succeeded in impeaching each of the four witnesses, he could not carry his burden of showing that the defamatory remark was in fact made. Similarl the instant petitioner cannot carry his burden of proof by negative inference through impeachment of the three FBI agents testimony. Accordingly, for the reasons hereinabove expressed respondents' motion for summary judgment is hereby GRANTED and petitioner's motion to compel answers to nine enumerated interrogatories is hereby DENIED as MOOT.

IT IS SO ORDERED, this 7 day of April, 1977.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-2010

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

v.

ALAN K. CAMPBELL, *et al.*
BLUE CROSS ASSOCIATION, *et al.*, APPELLANTS

No. 76-2013

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

v.

ALAN K. CAMPBELL, *et al.*
AETNA LIFE INSURANCE COMPANY, APPELLANT

No. 76-2022

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

v.

ALAN K. CAMPBELL, *et al.*
THE AMERICAN POSTAL WORKERS UNION, *et al.*,
APPELLANTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

D.J. 145-156-105 -

CIVIL NO. 77-1997

APPENDIX D

No. 76-2023

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

v.

ALAN K. CAMPBELL, *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 76-1041)

Argued April 22, 1977

Decided May 9, 1978

Julius Schlezinger, with whom *Denis F. Gordon, James R. Barnett* and *Mozart G. Ratner* were on the brief, for appellants in No. 76-2022, and also argued for appellants in Nos. 76-2010 and 76-2013.

John M. Rogers, Attorney, Department of Justice, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Irving Jaffe*, Deputy Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *William Kanter*, Attorney, Department of Justice, were on the brief, for appellants in No. 76-2023.

John Cary Sims, with whom *Alan B. Morrison, Larry P. Ellsworth* and *Kenneth L. Adams* were on the brief, for appellee.

Philip S. Neal and *Edward A. Lenz* were on the brief for appellants in No. 76-2010.

Peter J. Connell, Leonard W. Belter and *Matthew B. Van Hook* were on the brief for appellant in No. 76-2013.

Before ROBINSON, MACKINNON and ROBB, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: This appeal subjects to scrutiny the District Court's award of summary judgment to appellee, National Association of Government Employees (NAGE), in its Freedom of Information Act [1] suit against the Civil Service Commission. Error is attributed not only to that action but also to the court's denial of the Commission's countervailing motion for summary disposition in its favor. Our examination of the record has uncovered insuperable obstacles to summary judgment for either side. We accordingly reverse the judgment entered and remand the case for trial.

I

NAGE requested the Commission to disclose the benefit and premium proposals submitted by major health insurance carriers in 1977 [2] pursuant to the Federal Employees Health Benefits Act.[3] In the wake of that legislation, numerous health insurance plans have become available to federal employees, partly at governmental expense.[4] Only plans approved by the Commission are

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[1] Pub. L. No. 89-487, 80 Stat. 251 (1966), codified by Pub. L. No. 90-23, 81 Stat. 55 (1967), as amended, 5 U.S.C. § 552 (1976), hereinafter cited by code reference.

[2] Joint Appendix (J. App.) 10.

[3] Pub. L. No. 89-554, 80 Stat. 600 (1966), as amended, 5 U.S.C. §§ 8901 *et seq.* (1976), hereinafter cited as codified.

[4] 5 U.S.C. § 8906 (1976).

encompassed by the federal program,[5] and alterations of benefits or premiums under ongoing plans must garner the Commission's acceptance before they become effective.[6]

Commission regulations call upon participating health insurance carriers to submit all revisions of benefits and premiums under ongoing plans for the Commission's approval or disapproval.[7] At the time the instant controversy arose, changes in benefits were due by April 30 and modifications of premiums by July 31.[8] Following receipt of such proposals, the Commission negotiates with the carriers individually in an effort to secure for employees the most advantageous terms possible.[9] Packages ultimately to be offered by the carriers must be assembled in time for distribution of descriptive and explanatory literature to employees before the traditional November "open season," during which subscribers are free to switch from one plan to another.[10] These steps accomplished, approved revisions normally go into operation on January 1 of the year next ensuing.[11]

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[5] 5 U.S.C. §§ 8902(e)-(i), 8904 (1976); 5 C.F.R. §§ 890.201 *et seq.* (1977).

[6] 5 U.S.C. § 8902(i) (1976).

[7] 5 C.F.R. § 890.203(b) (1977).

[8] 5 C.F.R. § 890.203(b) (1976). Proposed changes in premiums or benefits must now be tendered at least five and eight months, respectively, before the carrier's current contract expires in order to take effect for the forthcoming contractual period.

[9] See 5 C.F.R. § 203(b) (1977).

[10] See 5 C.F.R. § 890.301(d)(1) (1977).

[11] 5 C.F.R. § 890.203(a) (1977). Beginning in 1977, approved health plans may become effective either January 1 or July 1. 5 C.F.R. § 890.203(a) (1977). To accommodate new plans with an effective date of July 1, the Commission announces and conducts special open seasons to permit employees to transfer their enrollment to the newly approved plan. 5 C.F.R. § 890.301(d)(2) (1977).

The Commission rejected, both at the initial [12] and appellate levels,[13] NAGE's request for copies of the carriers' 1977 proposals. Invoking the Freedom of Information Act, NAGE then commenced an action in the District Court for production of these materials.[14] The scope of its demand there, as previously before the Commission, was broad enough to intercept the original proposals in toto, as well as those emerging from negotiations.[15] Later, however, NAGE narrowed its bid to the descriptive portions of original proposals, thus eliminating supporting cost data,[16] and made clear that it desired nothing until after passage of the respective deadlines for submission.[17] The Commission and the several intervenors—major health insurance carriers participating in the federal program [18]—resisted the suit on the ground that the proposals were immune from mandatory disclosure.

II

The Freedom of Information Act requires subject federal agencies to release properly-requested information

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[12] J. App. 11.

[13] J. App. 18.

[14] *National Ass'n of Gov't Employees* v. *Hampton*, Civ. No. 76-1041 (D.D.C. June 11, 1976) (unreported).

[15] J. App. 8, 10.

[16] *National Ass'n of Gov't Employees* v. *Hampton*, *supra* note 14, at 1, J.App. 68.

[17] *Id.*

[18] The intervenors were Aetna Life Insurance Company, American Postal Workers Union, Blue Cross Association, National Association of Blue Shield Plans and the National Association of Letter Carriers. All are appellants here.

save to the extent that it is specifically exempted.[19] The statutory exemptions are to be narrowly construed,[20] and an agency opposing divulgence bears the burden of demonstrating that the material in issue falls within an exempted category.[21] The Commission and the carriers have argued consistently that the health insurance proposals are shielded by Exemption 4 [22] as "commercial or financial information obtained from . . . person[s] and privileged or confidential." [23] Since all of the litigants seemingly agree that the proposals incorporate data "commercial or financial" in nature [24] "obtained from"

[19] *Department of Air Force* v. *Rose*, 425 U.S. 352, 360-361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11, 20-21 (1976); *EPA* v. *Mink*, 410 U.S. 73, 79-80, 93 S.Ct. 827, 832-833, 35 L.Ed.2d 119, 127-128 (1973); *Vaughn* v. *Rosen*, 173 U.S.App.D.C. 187, 193, 523 F.2d 1136, 1142 (1975); *Soucie* v. *David*, 145 U.S. App.D.C. 144, 157, 448 F.2d 1067, 1080 (1971).

[20] See *Department of Air Force* v. *Rose*, *supra* note 19, 425 U.S. at 361, 96 S.Ct. at 1599, 48 L.Ed.2d at 21; *EPA* v. *Mink*, *supra* note 19, 410 U.S. at 79, 93 S.Ct. at 832, 35 L.Ed.2d at 127-128; *Vaughn* v. *Rosen*, *supra* note 19, 173 U.S.App.D.C. at 193, 523 F.2d at 1142 (footnote omitted); *Soucie* v. *David*, *supra* note 19, 145 U.S.App.D.C. at 157, 448 F.2d at 1080.

[21] *National Parks & Conservation Ass'n* v. *Kleppe*, 178 U.S. App.D.C. 376, 382, 547 F.2d 673, 679 (1976); *Vaughn* v. *Rosen*, *supra* note 19, 173 U.S.App.D.C. at 195, 523 F.2d at 1144.

[22] 5 U.S.C. § 552(b)(4) (1976). At the first level of administrative consideration of NAGE's request, the Commission also cited Exemption 5, 5 U.S.C. § 552(b)(5) (1976), but that objection was rebuffed, *National Ass'n of Gov't Employees* v. *Hampton*, *supra* note 14, at 2 n.1, J. App. 69, and has not been urged in this court.

[23] That is the relevant language of Exemption 4. 5 U.S.C. § 552(b)(4) (1976).

[24] The District Court, though "puzzled by the absence from the cases of any discussion of what constitutes 'commercial information,'" found it unnecessary, in view of its disposition

the carriers,[25] the only question remaining is whether those data are also "confidential" within the meaning of the exemption.[26]

As we proclaimed in *National Parks & Conservation Association* v. *Morton*,[27]

> [a] commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain the necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[28]

The Commission and the carriers contended, and NAGE of course disputed, that the health insurance proposals were exempt under each of these criteria, and the District Court agreed with NAGE on both counts. The arguments in this court have addressed the procedural as well as the substantive features of the court's rulings. Encountering a procedural flaw necessitating further proceedings in the District Court, we do not reach the merits of the case.

As stated earlier, both NAGE and the Commission sought summary judgment in the District Court. The

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of the case, to delve into the question. *National Ass'n of Gov't Employees* v. *Hampton*, *supra* note 14, at 3 n.2, J. App. 70. Since our decision rests upon procedural rather than substantive grounds, we have no occasion to ponder the question either.

[25] See text *supra* at note 23.

[26] See text *supra* at note 23.

[27] 162 U.S.App.D.C. 223, 498 F.2d 765 (1974), *aff'd in part and reversed in part after remand*, 173 U.S.App.D.C. 376, 547 F.2d 673 (1976).

[28] *Id.* at 228, 498 F.2d at 770 (footnote omitted).

Commission and the carriers filed affidavits buttressing the Commission's motion and opposing NAGE's;[29] NAGE tendered no affidavits of its own. The court granted NAGE's motion, concluding that the proposals had not been shown to be exempt under either of the *National Parks* tests. As to the first, the court was of the view that since carriers desiring to alter current contracts are statutorily required to present their proposals for change to the Commission, disclosure would not impair its ability to obtain information on which they are based.[30] With respect to the second test, the court believed that the Commission and the carriers had failed to meet "the burden of showing that disclosure of the initial benefit and premium proposals submitted by the participating carriers . . ., without any supporting justifying information, would result in substantial harm to the competitive position of any of those carriers. . . ." [31] The appeal by the Commission and the carriers summons us to examine at the outset the procedural propriety of summary judgment for NAGE and of the denial of summary judgment for the Commission.

III

A motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law.[32] In assessing the motion, all "inferences

[29] J. App. 21-23, 24-26, 36-38, 39-46, 50-52, 53-56, 57-60, 63-65.

[30] *National Ass'n of Gov't Employees v. Hampton*, *supra* note 14, at 5-6, J. App. 72-73.

[31] *Id.* at 9, J. App. 76.

[32] Fed. R. Civ. P. 56(c); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142, 154 (1970); *Bouchard v. Washington*, 168 U.S.App.D.C. 402, 405, 514

to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." [32] Indeed, "the record must show the movant's right to [summary judgment] 'with such clarity as to leave no room for controversy,' and must demonstrate that his opponent 'would not be able to [prevail] under any discernible circumstances.' " [33]

Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible of dispute. Facts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence; rather, the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue.[34] That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual

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F.2d 824, 827 (1975); *Nyhus* v. *Travel Management Corp.*, 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972); *Semaan* v. *Mumford*, 118 U.S.App.D.C. 282, 283, 335 F.2d 704, 705 (1954).

[32] *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, 177 (1962); accord, *Adickes* v. *S. H. Kress & Co.*, *supra* note 32, 398 U.S. at 157, 90 S.Ct. at 1608, 26 L.Ed.2d at 154.

[33] *Id.*, quoting *Semaan* v. *Mumford*, *supra* note 32, 118 U.S. App.D.C. at 283 n.2, 335 F.2d at 705 n.2, in turn quoting, *Traylor* v. *Black, Sivalls, & Bryson, Inc.*, 189 F.2d 213, 216 (8th Cir. 1951).

[34] *Adickes* v. *S. H. Kress & Co.*, *supra* note 32, 398 U.S. at 157, 90 S.Ct. at 1608, 26 L.Ed.2d at 154; *Bloomgarden* v. *Coyer*, 156 U.S.App.D.C. 109, 114-115, 479 F.2d 201, 206-207 (1973); *Nyhus* v. *Travel Management Corp.*, *supra* note 32, 151 U.S. App.D.C. at 271, 466 F.2d at 442.

issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." [36]

Proper application of these well-settled principles to the case at bar would have necessitated, we think, denial of NAGE's motion for summary judgment. Though appellants ultimately have the onus of proving that the insurance proposals are exempt from disclosure,[37] it was incumbent upon NAGE to establish the absence of material factual issues before a summary disposition of the case could permissibly occur.[38] Appellants came forth with affidavits alleging facts purporting to show that the documents sought by NAGE are exempt. The District Court, instead of searching merely to ascertain whether the case was devoid of factual questions, actually resolved lurking factual issues against them. Whether or not the resulting decision would have been warranted after a trial on evidentiary submissions by both sides—a matter upon which we intimate no view—it was inappropriate in the context of a motion for summary judgment.

In their affidavits, the carriers advanced several factual premises in support of their positions. Prominent among them was the assertion that the competitive advantage earned by a carrier developing an innovative benefit would be lost upon disclosure of the insurance proposals because other carriers could then add it to their own packages during the course of negotiations.[39] The District Court rejected this theory, stating:

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[36] *Nyhus* v. *Travel Management Corp.*, *supra* note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442 (footnote omitted).

[37] See text *supra* at note 21.

[38] See text *supra* at notes 32-36.

[39] J. App. 22, 43, 44, 53.

> The competing carriers would not have [the details of the innovation] since [NAGE] seek[s] disclosure of only a description of the benefits, and each carrier would have to make its own evaluation and computations in order to adapt such a benefit to its own program. In addition, in light of the possibility that any proposals initially submitted by a carrier could be subsequently dropped during negotiations, a competitor may not be so quick to blindly add a benefit to its program without full consideration of its feasibility. The Court cannot agree with [the] claim that a more efficient and innovative company would lose whatever advantage the current system gives it. Disclosure of its proposal will not affect the ability of a more efficient carrier to "offer a better product than its competitors," and another carrier who cannot afford such a product will not be any better able to provide similar services merely because it has learned a competitor has proposed a more attractive program.[10]

This, in our view, exceeded the legitimate bounds of issue-hunting and ventured into the realm of issue-adjudication. The carriers avowed that their innovations, once revealed, would be appropriated by rivals and that their competitive superiority would thereby be impaired. The court's rebuttal implicitly assumed that the logistics of adapting a carrier's ingenuity to other programs might preclude speedy implementation by competitors; it assumed as well that a prudent carrier would not supplement its own proposal with borrowed features to enhance its appeal absent full consideration of feasibility. These and other elements of the court's refutation are not to us so self-evident as to rob the dispute of all but one side. It may be that all the court said will eventually be proven true, but that is beside the point. The court's surmise, however plausible on its face, cannot substitute for full-

[10] *National Ass'n of Gov't Employees v. Hampton*, *supra* note 14, at 7-8, J. App. 74-75.

bodied proof. Unless a fact suitably advanced is plainly undemonstrable, the litigant is entitled to a fair opportunity to establish it by evidence, and to a hearing of his evidence before the fact is judicially assessed. The factual issues on competitive loss thus posed by the carriers and embellished by the court's analysis accordingly warrant full evidentiary trial.

Similarly, in scrapping the carriers' further charge that their competitive positions vis-a-vis insurance companies outside the federal program would be jeopardized by exposure of innovative benefits, the District Court again tackled factual issues and selected from competing inferences. Carrier affidavits represented that disclosure of insurance proposals would reveal to nonparticipating companies areas in which they might profitably pursue new research and development.[41] Even though innovations would be disseminated to the employee force—and thus laid bare to other carriers—by November if accepted,[42] they averred that the lead time afforded by divulgence of benefit-changes in May[43] would be significant.[44] Moreover, without compulsory disclosure—so the argument ran—if the innovation did not survive negotiations so as to become part of the final package, it would not be unveiled at all, and other carriers would not be aware that it had been developed by one of their competitors.[45]

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[41] J. App. 56, 58, 59.

[42] See text *supra* at note 10.

[43] See text *supra* at note 8.

[44] J. App. 58-59.

[45] The Commission opposed no more than release of the proposals prior to the time the ensuing contracts are made public. The carriers, however, resisted disclosure of unaccepted proposals even after the contents of the contracts become known. The Commission sought comments from the carriers on the latter, but had not concluded its consideration when this appeal was submitted.

The District Court spurned these contentions, deeming access to the proposals innocuous when unaccompanied by a view of the underlying statistical or actuarial data,[46] and reasoning that a competitor would be forced to develop the mechanics of the innovation on its own.[47] The court also observed that "[n]o showing [was] made that the innovations of one carrier are so radically different that the other carriers have not considered the possibilities themselves."[48] To be sure, a carrier might have to prove its innovation was "radically different" in order to prevail at a trial, but the burden at that stage was on NAGE—as the movant for summary judgment—to demonstrate that there was no factual disagreement of importance at all.[49] We reiterate[50] that "the party opposing [a] motion [for summary judgment] is entitled to all favorable inferences deducible from the parties' evidentiary representations,"[51] and here the carriers and the Commission were not so indulged.

IV

The Commission claims that the District Court erred additionally in denying its summary-judgment motion,

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[46] See text *supra* at notes 16-17.

[47] *National Ass'n of Gov't Employees* v. *Hampton*, *supra* note 14, at 89, J. App. 75-76.

[48] *Id.* at 9, J. App. 76.

[49] See text *supra* at notes 32-36.

[50] See text *supra* at note 33.

[51] *Bouchard* v. *Washington*, *supra* note 32, 168 U.S.App.D.C. at 405, 514 F.2d at 827, citing *Adickes* v. *S. H. Kress & Co.*, *supra* note 32, 398 U.S. at 157, 90 S.Ct. at 1608, 26 L.Ed.2d at 154 (footnotes omitted). Accord, *United States* v. *Diebold, Inc.*, *supra* note 33, 369 U.S. at 655, 82 S.Ct. at 994, 8 L.Ed.2d at 177; *Nyhus* v. *Travel Management Corp.*, *supra* note 32, 151 U.S.App.D.C. at 171, 466 F.2d at 442.

and urges us to direct the entry of such a judgment in its favor. Pointing out that NAGE offered nothing to counter the affidavits that it and the carriers had filed, the Commission contends that, for lack of response, no material issue of facts arose.

This argument is misguided. It is well settled that a party opposing summary judgment need come forward with a rebuttal only if its omission enables the movant to satisfy his burden of showing that no issue of material fact persists.[52] "[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue," the Supreme Court instructs, "summary judgment must be denied *even if no opposing evidentiary matter is presented.*"[53] Although, of course, it is preferable and certainly advisable for the opposing party to submit affidavits or other counter-active materials, such rebuttal is not necessary "[w]here by the nature of things the moving papers themselves demonstrate that there is inherent in the problem a factual controversy . . . ."[54] Here the same factual disputes that the District Court undertook to adjudicate on NAGE's motion[55] served equally as barriers to summary judgment for the Com-

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[52] *Adickes* v. *S. H. Kress & Co.*, *supra* note 32, 398 U.S. at 160, 90 S.Ct. at 1609-1610, 26 L.Ed.2d at 155-156; *Bloomgarden* v. *Coyer*, *supra* note 35, 156 U.S.App.D.C. at 114-115, 479 F.2d at 206-207; *Bromley-Heath Modernization Comm.* v. *Boston Housing Auth.*, 459 F.2d 1067, 1071-1072 (1st Cir. 1972); *Inglett & Co., Inc.* v. *Everglades Fertilizer Co.*, 255 F.2d 342, 348 (5th Cir. 1958).

[53] *Adickes* v. *S. H. Kress & Co.*, *supra* note 32, 398 U.S. at 160, 90 S.Ct. at 1610, 26 L.Ed.2d at 155 (emphasis in original), quoting the Advisory Committee Note on the 1963 amendment to Rule 56e (footnote omitted).

[54] *Inglett & Co., Inc.* v. *Everglades Fertilizer Co.*, *supra* note 52, 255 F.2d at 348.

[55] See Part III *supra*.

mission. The affidavits upon which the Commission relies did not negate the existence of factual issues; indeed, they made plain their presence.

The affidavits, for the most part, stated merely the conclusions of carrier officials that competitive harm would follow disclosure of the health insurance proposals, and did not supply evidentiary details to support those conclusions.[55] Ofttimes competitive injury is difficult to establish,[57] and in determining whether such injury will ensue from premature release of the health insurance proposals the factfinder might well be summoned to "exercise its judgment in view of the nature of the material sought and the competitive circumstances . . . relying at least in part on relevant and credible opinion testimony." [58] But the opinion-evaluation thus necessitated is a task for which a summary-judgment motion is ill-suited.[59] The judicial function at that stage, we repeat, is not factfinding, but rather an ascertainment of whether factfinding is essential to disposition of the litigation,[60] and in no event is summary judgment appropriate unless the movant is entitled to victory as a matter of law.[61] As

[55] "Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the [Act], since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act." *National Parks & Conservation Ass'n v. Kleppe*, *supra* note 21, 178 U.S.App.D.C. at 333, 547 F.2d at 630 (citations omitted).

[57] *Id.* at 336, 547 F.2d at 633.

[58] *Id.*

[59] *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627-628, 64 S.Ct. 724, 728-729, 88 L.Ed. 967, 972-973 (1944); *Dewey v. Clark*, 86 U.S.App.D.C. 137, 141, 180 F.2d 766, 770 (1950).

[60] See text *supra* at note 36.

[61] See text *supra* at notes 32, 34.

the Supreme Court has warned, expert opinions "have no such conclusive force that there is error of law in refusing to follow them";[42] to boot, expert witnesses normally should be subject to "cross-examination, the best method yet devised for testing trustworthiness of testimony."[43] It follows that "their credibility and the weight to be given to their opinions is to be determined after trial in the regular manner."[44] Particularly when, as is the situation here, experts are not wholly disinterested in the outcome of the litigation, courts must exercise cautious restraint in awarding summary judgments.[45] Nothing in the case before us suggests an occasion unsuited to observance of these wholesome admonitions.

We would hold, then, that the Commission's motion for summary judgment was correctly denied. Since however, NAGE's motion encountered factual controversy, summary judgment in its favor was improper. That judgment is accordingly reversed and the case is remanded to the District Court for trial.

So ordered.

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[42] *Sartor* v. *Arkansas Gas Corp.*, *supra* note 59, 321 U.S. at 627, 64 S.Ct. at 729, 88 L.Ed. at 973, quoting *Dayton Power & Light Co.* v. *Public Utils. Comm'n*, 292 U.S. 290, 299, 54 S.Ct. 647, 652, 78 L.Ed. 1267, 1275 (1934).

[43] *Sartor* v. *Arkansas Gas Corp.*, *supra* note 59, 321 U.S. at 628, 64 S.Ct. at 729, 88 L.Ed. at 972.

[44] *Id.* at 628-629, 64 S.Ct. at 722, 88 L.Ed. at 773.

[45] *Dewey* v. *Clark*, *supra* note 59, 86 U.S.App.D.C. at 141, 180 F.2d at 770, citing *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U.S. 401, 403, 19 S.Ct. 233, 235, 43 L.Ed. 492, 495 (1899).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Plaintiff's Supplemental Opposition has been served upon counsel for plaintiff by mailing, postage prepaid to:

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on this 16th day of October, 1978.

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