MEMORANDUM

Re: Lesar v. United States Department of Justice, No. 78-2305 (D.C. Circuit, July 15, 1980) and FOIA Exemption 7(D)

In Lesar the D.C. Circuit construes FOIA Exemption 7(D) as including not only individuals but also institutions, like federal or local government agencies.

Exemption 7(D) provides (emphasis added) that the Act

> does not not apply to (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of these 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 ... confidential information furnished only by the confidential source.

I. "LAW ENFORCEMENT AUTHORITY" AS "CONFIDENTIAL SOURCE"

In Lesar the controversy related to records of the Atlanta and Memphis police departments. There is no question of disclosure of the identity of these two agencies as "confidential sources"; their identity is disclosed. The opinion however, immunizes as "confidential information" records furnished to the FBI by these agencies under a promise of confidential treatment, even though their identity has been revealed. The court does not deal with this issue, and devotes its main effort to establishing the entitlement of a non-individual, an institution, to treatment as a confidential source.

Thus the opinion ignores that the underlying premise for exemption--confidentiality--no longer exists, because the identity of the Memphis and Atlanta police departments, as sources, is no longer confidential. By doing so the Lesar court gives greater protection--in effect a blanket protection--to records of local law enforcement agencies sent to the FBI, than to records of the FBI itself (which of course must satisfy one of the specific subheads of Exemption 7).

This appears to contradict the intent of the Congress. The Conference report (quoted in Lesar, slip opinion at 35), distinguishes

between "criminal law enforcement authorit[ies]" as collectors, and "confidential sources" as suppliers, of information. Thus even if Lesar were correct in interpreting Congress' intent as including some institutions (say corporations or universities) as entitled to treatment as confidential sources, it is wrong in including law enforcement agencies themselves, public bodies, under the protective blanket. The ~~records~~ remarks of Senator Hart (p. 6 infra) support this interpretation. The purpose of the "confidential information" exception, he indicated, was to protect sources who supplied information to law enforcement agencies, not such agencies.

II. LEGISLATIVE HISTORY

The Lesar opinion's analysis of the legislative history is constructed to support the desired result. It thus ignores a great deal of contrary material, and borders on deliberate distortion by way of omission and selective quotation.

As Lesar notes, slip opinion at 33, Exemption 7(D) was introduced on the Senate floor by Senator Hart of Michigan. The opinion then ignores the Senate debate that followed. Senator Hart referred to interference with "specific" law enforcement "interests." He indicated that his amendment "explicitly places the burden of justifying nondisclosure on the Government." As to 7(D), the Government must show that disclosure would "reveal the identity of informants," whom Senator Hart described as "paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." Freedom of Information Source Book at 333-34.

In opposing the amendment, Senator Hruska discussed the informant question at length. His remarks all focused on individual, human informants, and the need to keep their identities secret from those who would criticize or otherwise damage such individuals:

> The FBI has been successful in the past in apprehending criminal offenders and for carrying out its other investigative duties because of one chief and important asset--that is, its ability to obtain information from its informants and private citizens throughout these United States. In many instances it has not solved a crucial case because of deductive reasoning or a specific clue but because a private citizen was not afraid to come forth and offer a piece of information. In the past, the FBI has usually

taken the information it receives as a matter of confidence and assured the individual his name would be kept in confidence.

The passage of this proposed amendment would undoubtedly have the effect of inhibiting FBI informants and citizens from coming forth to offer vital bits of information to the FBI. They will no longer feel confident that their names will remain secret from public scrutiny, possibly subjecting them to embarrassment and/or reprisals. The net result will be a crippling effect of the FBI's ability to garner information and obtain successful prosecution in criminal cases.

* * *

In one instance, a researcher asked for the files on the investigation of Ezra Pound for treason. Pursuant to its regulations, the FBI deleted the names of the informants and other information that it thought could reveal his identity. Yet, the research was so knowledgeable about the facts of the case that he was able to link the information in the file to the actual informants. The researcher then went on in his article to criticize these informers for cooperating with the FBI and squealing on their friend, Pound.

Apart from the merits of it, apart from the justice or injustice of it, Mr. President, if it becomes known that files may be released subject to deletions such as those enumerated in the amendment proposed by the Senator from Michigan, if it becomes known and if by deduction names can, in effect, be restored by a researcher, then the forecast can be readily and reliably made that the sources for FBI information will dry up and become fewer and fewer as time goes on. This was an issue in the Pound case that arose more than 15 years after the file was current. But the Deparment is finding administrative difficulties with the regulations which have been adopted; regulations which are very similar to those which the Senator from Michigan seeks to put into the concrete form of a statute.

Mr. President, a few more instances like that of the Ezra Pound case and the FBI will be hard put to use informants as legitimate law enforcement techniques.

* * *

The proposed amendment would apply to records of any age, including those most recently compiled. And it is commonsense that the more recent the case and the more recent the forced disclosure of the identity of the informant, the more impact such a disclosure will have on other individuals who may wish to do their part to assist the FBI in enforcing the law.

> In my judgment, the mere approval of this amendment, even without any further procedures under it, will have that effect, Mr. President, because there will always be the imminent potential that there will be a release of that document and that there will be, through it, notwithstanding the deletion of names, the ability to trace the informant's name, address, and location.
>
> * * *
>
> The identification of an informant, even if accomplished by other information, together with a reference that portions of an FBI file were obtained, can strike fear in the hearts of those who already have cooperated with the FBI. This fear will be not only for their reputations but also for their own safety and that of their families.

Source Books at 340-42 (emphasis added).

Senator Thurmond, also opposing, was similarly concerned about individuals:

> The FBI, being an investigative agency of the Federal Government, obtains raw, unevaluated data from individuals from all walks of life who furnish this information with the implied or expressed understanding that such information is being furnished the Government in confidence, never to be disclosed unless to an official, authorized individual or agency.
>
> * * *
>
> Disclosures of this type of information can only hinder the investigative responsibilities of the FBI or those of similar agencies whose primary responsibility is to investigate criminal activities. The FBI has always staked its high reputation on the fact that information given to it in confidence is kept secret. It is just such assurance as this that encourages individuals from all walks of life to furnish this agency information felt to come within its investigative responsibilities. If we now attempt, through legislation, to discourage such people from reporting to their Government violations of law because of fear that their identities will be made public, we will be doing a disservice to our country.
>
> Therefore, I am unalterably opposed to any amendment which will weaken the investigative effectiveness of the FBI or other agencies responsible for investigating criminal activities, by shutting off one of their greatest sources of information--the American public.

Source Book at 342-43 (emphasis added).

Senator Hruska later returned to the theme:

> I ask this question, to which I should like an answer from the Senator from Connecticut: How are we going to investigate effectively violations of law, how are we going to investigate organized crime when, if this amendment is passed, individuals will say, "Nothing doing, Mr. FBI, because if we give you a statement, it will be in that file, and there will be a court order saying that the file should be disclosed. My name may be deleted but there are other ways to find out, and they may identify me, threaten my family, or myself." These are not possibilities I am dreaming up. They can be documented by the examples I referred to earlier.

Source Book at 348 (emphasis added).

Then, after Senator Kennedy pointed out that the amendment would "protect the identities of informants," Senator Hruska admitted that it would indeed "preserve the identity of an informer," but not "the names of those persons ... not informers ... people whose names will be in there ... people who will be named by informers ... and whose name presumably would stay in the file." Source Book at 350 (emphasis added).

Senator Hart again replied, "[i]f informants' anonymity--whether paid informers or citizen volunteers--would be threatened, there would be no disclosure." Id. at 351.

The Lesar opinion lays great stress on the change made in the Conference Report, substituting "confidential source" for "informant" or "informer," but ignores the obvious thrust of the Conference Report's explanation of the change:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes--either civil or criminal in nature--the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information.

Source Book at 230 (emphasis added); compare Slip Opinion at 34-35.

President Ford's veto message objected to the amended Exemption 7 in toto; there was no mention of the confidential source question. While arguing that the change in language reflects Congress' intent to broaden the exemption to cover "institutional sources," slip opinion at 36-37, the opinion quotes only selectively from Senator Hart's post-veto explanation of the change in his amendment, Id. at 36-37 n.108. The full context is to the contrary:

> Mr. President, I rise under a very limited request to suggest that we be aware that the position of the administration with respect to the treatment of disclosure of investigatory files has shifted. Initially, and through a very long conference, they insisted that the safeguards were inadequate to protect against the identification of an informant. Language was incorporated in the conference report to insure against that possibility. Now the objection with respect to the investigative files is that there is an administrative burden too great to be imposed.
>
> * * *
>
> The major change in conference was the provision which permits law enforcement agencies to withhold "confidential information furnished only by a confidential source". In other words, the agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informer's identity; all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt. In fact, this protection was introduced by the conferees in response to the specific request of the President in a letter to Senator Kennedy during the conference. All of the conferees endorsed the Hart amendment as modified.

Source Book at 450-51 (emphasis added). Thus there was no intention to change the thrust of the amendment to protect institutions; it was rather, to broaden the protection to include not only identity of but information supplied by the informant.

This continued interpretation of protection of individuals was echoed by Senator Eruska:

> The second issue relates to the criminal and civil files of law enforcement agencies. The confidentiality of countless law enforcement files containing information of the highest order of privacy is jeopardized by this bill. At stake here is not simply the issue of effective law enforcement but the individual's right to privacy assurance of personal security, and to be secure in the knowledge that information he furnishes to a law enforcement agency will not be disclosed to anyone who requests it.

Source Book of 456 (emphasis added). He urged a substitute that would "protect the privacy and personal security of those who cooperate with the State and Justice Departments by furnishing" information, and "instill in informants the necessary confidence that they will not be endangered by disclosure." Id. at 457 (emphasis added).

The opinion takes a remark of Senator Byrd (slip opinion at 36) quite out of context--a context that supports interpretation of Exemption 7(D) as applying to individuals, not institutions:

> The Senate-passed version of the bill contained an amendment which would have required disclosure of information from a law enforcement agency unless certain information was specifically exempted by the act. What particularly disturbed me was that while the identity of an informer would be protected, the confidential information which he had given the agency would not have been protected from disclosure. Another matter that disturbed me was the use of the word "informer", since that could be construed to mean that only the identity of a paid "informer" was to be protected and not the identity of an unpaid confidential source. I was deeply concerned that without such protection, law enforcement agencies would be faced with a "drying-up" of their sources of information and their criminal investigative work would be seriously impaired.

Source Book at 468 (emphasis added).

III. CASE LAW

Some pre-Lesar cases indicated that the main purpose of Exemption 7(D) was to protect individual informants from personal danger. For example, in Scherer v. Kelly, 584 F.2d 170 (7th Cir. 1978), the plaintiff had been the subject of criminal prosecution; the court applied Exemption 7(D) to protect sources of accusations against plaintiff from "great peril." Id. at 176 n.7. In Maroscia v.

Levi, 569 F.2d 1000 (7th Cir. 1977), the plaintiff had been investigated for such crimes as extortion and assault on a federal officer; the court recognized the problem of sources' safety. Id. at 1001, 1002. In Nix v. United States, 472 F.2d 998 (4th Cir. 1978), involving prison brutality, the court recognized that sources who were prisoners would face reprisal from the guards they had complained about, and that those who were guards might face reprisal from prisoners. Id. at 1003, 1004. In Mobil Oil Corp. v. FTC, 430 F.Supp. 849 (S.D.N.Y. 1977), the court found:

> These materials indicate a desire for anonymity on the part of the retailers arising out of their fear of harassment or retaliation and law enforcement efforts would be hampered if such persons were unable to complain to the regulatory agencies in private without fear that the agency might disclose their identity to their harm.

430 F.Supp. at 852. In Scherer, moreover, the Seventh Circuit described the purpose of 7(D) as "to protect those citizens who voluntarily provide law enforcement agencies with information, ... to insure that such persons remain willing to provide such information in the future." 584 F.2d at 176, quoting Maroscia v. Levi, 569 F.2d at 1002.

There is of course, no such endangerment problem for a law enforcement agency or similar institution. On the other hand, the court in Church of Scientology v. Department of Justice, No. 76-2506 (9th Cir. Nov. 8, 1979), argues that the amendment was intended to address the problem of a local law enforcement agency's reluctance, for any reason, to provide information that might be revealed. Id., slip opinion at 15:

> There is substantial evidence in the record below that some of those groups would refuse to cooperate with federal agencies if they could not be assured of confidentiality in instances where they thought it was necessary. While CSC argues that Congress intended to limit the scope of the 7(D) exemption to human sources, there is no evidence in the legislative history that the congressional concern was focused on the possibility of physical harm to individuals. Rather, the paramount concern was the loss of sources of confidential information.

(footnote omitted). The Ninth Circuit apparently did not read Senator Eruska's remarks quoted above about harassment, personal security, reprisal, threats, fear, etc.

The Ninth Circuit opinion was followed without comment in Church of Scientology v. Gray, No. 76-1165 (D.D.C., April 1, 1980). But Judge Bryant, in Church of Scientology v. Miller, No. 75-1471 (D.D.C., April 17, 1980), relied on the dissent in the Ninth Circuit case, in which Judge Wallace construed "person" in the legislative history to have been used to indicate individuals, not--as in Lesar--as referring to "judicial persons," including institutions.

The Ninth Circuit relied on a number of other opinions (Slip opinion at 4). None are substantial independent authority. Varona Pacheco v. FBI, 456 F.Supp. 1024, 1032 (D.P.R. 1978), simply states the conclusion that local agencies are protected sources under Exemption 7(D). Nix v. United States, 572, F.2d 998, 1005 (4th Circuit 1978), relied, without analysis, on the District Court opinion that the Ninth Circuit affirmed (reported at 410 F.Supp. 1297 (C.D.Cal. 1976)), as did Lopez Pacheco v. FBI, No. 76-83 (D.P.R., May 10, 1979), slip opinion at 18-19 (Lopez also relied on the district court opinion in Lesar, 455 F.Supp. 921 (D.D.C. 1978).

Another decision relied on in Lopez Pacheco, Maroscia v. Levi, supra, is likewise devoid of analysis. It simply lumps law enforcement agencies together with other sources under 7(D), without addressing the issue.

The Lesar panel cited the Ninth Circuit's opinion in Church of Scientology as well as Nix, Gray, and Varona Pacheco. Slip opinion at 33 n.108. But the only opinions with extensive discussion of the issue are Church of Scientology and Lesar.

Contrary to these opinions are the Wallace dissent in Church of Scientology, Judge Bryant's opinion in Miller, and Ferguson v. Kelley, 455 F.Supp. 324 (N.D.Ill. 1978).

Besides his reference to "person," Judge Wallace points out that Congress-created exceptions to a disclosure rule should not be expanded absent clear Congressional intent--which he finds is contrary to inclusion of non-human sources--and that a narrow construction

of the exemption is consistent with FOIA's general purpose.

In Ferguson v. Kelley, the court looked to the purpose of Exemption 7(D), (as did the courts in Scherer, Maroscia, Nix, and Mobil, see pp. 7-8 supra). The analysis is the only one in all the cases that probes intelligently into the consequences of disclosure:

> Defendants object under exemption (b)(7)(D) to our disclosure of information submitted by "confidential sources" that are corporations, credit bureaus or other organizations. Although defendants did not assert this exemption for any police departments (Second Hoyt Affidavit, par. 6B), it was asserted for names of credit bureaus. Defendants have presented no new arguments why the term "source" should encompass corporate entities. We reiterate that a corporate source simply is not as concerned as an individual with the disclosure of its identity and does not have the same expectation of privacy. We conclude that the possibility of losing such sources of information because of disclosure is slight. Thus, the policy of insuring an uninterrupted flow of information to the government is not significantly hampered, and the FOIA policy of disclosure is furthered by our limiting the meaning of "confidential source" to individuals.

455 F.Supp. at 326-27.

CONCLUSION

The legislative history of 7(D) supports a construction that "confidential source" is limited to individuals. Most of the cases, including two appellate court decisions, hold that agencies are included. Those decisions, Church of Scientology in the Ninth Circuit and Lesar in the D.C. Circuit, are in conflict with Ferguson, a district court decision in the Seventh Circuit. Accordingly, certiorari is a possibility, based on the conflict in the Circuits. Cf. Supreme Court Rule 17.1(a).