

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. GARY SHAW,)
)
 Plaintiff,)
)
 v.)
)
 FEDERAL BUREAU OF) Civil Action No. 82-0756
 INVESTIGATION,)
)
 Defendant.)

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS
NO GENUINE ISSUE, PURSUANT TO LOCAL RULE 1-9(h)

1. By letter dated October 24, 1979, to Federal Bureau of Investigation (FBI) Headquarters, plaintiff sought access to a copy of "an album of photographs of participants in th Quebec-Washington-Guantanamo Walk for Peace" which was referred to in Warren Commission Document 729. Affidavit of FBI Special Agent John N. Phillips, filed herewith (hereinafter "Phillips Affidavit"), para. (3)(A) and exh. A.

2. The FBI acknowledged receipt of plaintiff's request by letter dated November 6, 1979, and advised him that a search of the indices of FBI records would be made to locate records within the scope of his request. Phillips Affidavit, para. (3)(B) and exh. B.

3. By letter dated February 8, 1980, the FBI advised plaintiff that the requested materials were exempt from disclosure pursuant to the exemption of the Freedom of Information Act (FOIA), 5 U.S.C. §552 (b)(1), pertaining to information classified in the interest of the national defense or foreign policy. Phillips Affidavit, para. (3)(C) and exh. C. The FBI also advised plaintiff of his right to appeal this action to the United States Department of Justice. Id.

4. By letter dated February 18, 1980, to the Office of Privacy and Information Appeals (OPIA), Office of the Associate Attorney General, U.S. Department of Justice, plaintiff appealed the denial by the FBI. Phillips Affidavit, para. (3)(D) and exh. D.

5. By letter dated March 17, 1980, the OPIA acknowledged receipt of plaintiff's appeal letter. Phillips Affidavit, para. (3)(E) and exh. E. OPIA further advised plaintiff that there was a backlog of appeals and that he would be advised of the decision of the Associate Attorney General. Id.

6. By letter dated March 31, 1980, the OPIA advised plaintiff that it was affirming the denial by the FBI pursuant to 5 U.S.C. §552(b)(1). Phillips Affidavit, para. (3)(F) and exh. F. Plaintiff was also advised that the requested materials were being referred to the Department Review Committee for classification review and that he would be notified if any of the materials were declassified. Id.

7. By letter dated October 20, 1980, to the U.S. Department of Justice, plaintiff requested the Office of the Associate Attorney General to review its initial decision on plaintiff's appeal. Phillips Affidavit, para. (3)(G) and exh. G.

8. By letter dated November 5, 1980, the OPIA restated its position as set forth in its letter of March 31, 1980, and again advised plaintiff that the requested materials were classified and had been referred to the Department Review Committee for its review. Phillips Affidavit, para. (3)(H) and exh. H. The OPIA further advised plaintiff that if he intended to request access to Warren Commission Document 729 rather than the photographs referenced therein, he should contact the FBI directly. Id. Plaintiff was further advised that the OPIA would consider an appeal from the action of the FBI on materials other than the photographs. Id.

9. In October 1981, pursuant to the administrative appeal of another individual, the photographs requested by plaintiff were again reviewed by the Department Review Committee, at which time it was determined that the photographs no longer warranted classification. Phillips Affidavit, para. (7).


10. The FBI has invoked Exemption 7(D) of the FOIA, 5 U.S.C. §552(b)(7)(D), to withhold the photographs from release to plaintiff. Phillips affidavit, para. (7)(A). The withheld materials consist of investigative records compiled for law enforcement purposes which were provided to the FBI by a nonfederal law enforcement agency. Id. paras. (6) and (7)(A). The release of these materials would disclose the identity of a confidential source as well as the confidential information furnished by that confidential source. Id. para. (7)(A). In this instance, the photographs were furnished to the FBI by another law enforcement agency which has requested that its information and the fact of its cooperation with the FBI be held in confidence. Id.

Respectfully submitted,

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United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

DATED: July 13, 1982


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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. Gary Shaw,

Plaintiff

v.

Civil Action Number
82-0756

Federal Bureau of Investigation

Defendant

Affidavit of John N. Phillips

I, John N. Phillips being duly sworn, depose and say
as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Section, Records Management Division, FBI Headquarters (FBIHQ), Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures followed in processing Freedom of Information Act (FOIA) requests received at FBIHQ. Although I was not initially involved with the plaintiff's FOIA request, I am, however, familiar with all aspects of this request as it related to the FBI. I am also familiar with the various exemptions allowed under Title 5, United States Code (USC), Section 552, wherein documents or portions thereof may be withheld from disclosure, and I have supervised the preparation of the detailed justification and itemization set forth in this affidavit. All information contained herein is

based upon my personal review of the documents at issue in this law suit, as well as information provided to me in my official capacity.

(3) The following are items of correspondence with plaintiff:

(A) By letter dated October 24, 1979, plaintiff requested a copy of an "Album of photographs of participants in the Quebec-Washington-Guantanamo Walk for Peace" which was referred to in files of Warren Commission document as 729. (A copy of this letter is attached hereto as Exhibit A.)

(B) By letter dated November 6, 1979, the FBI acknowledged receipt of plaintiff's request. (A copy of this letter is attached hereto as Exhibit B.)

(C) By FBI letter dated February 8, 1980, plaintiff was advised that the requested material was exempt from disclosure pursuant to Title 5, U.S.C., Section 552 (b)(1). Plaintiff was also advised of his right to appeal. (A copy of this letter is attached hereto as Exhibit C.)

(D) By letter dated February 18, 1980 to the Associate Attorney General, Office of Privacy and Information Appeals (OPIA), United States Department of Justice (DOJ), plaintiff appealed the FBI's denial. (A copy of this letter is attached hereto as Exhibit D.)

(E) By letter dated March 17, 1980, the OPIA acknowledged receipt of plaintiff's appeal letter. Plaintiff was additionally advised of the backlog of appeals and that he would be advised of the decision of the Associate Attorney General. (A copy of this letter is attached hereto as Exhibit E.)

(F) By letter dated March 31, 1980, the OPIA advised the plaintiff that they were affirming the denial of the FBI. (A copy of this letter is attached hereto as Exhibit F.)

(G) By letter dated October 20, 1980 to the DOJ, plaintiff requested the Office of Associate Attorney General to review their initial action. (A copy of this letter is attached hereto as Exhibit G.)

(H) By letter dated November 5, 1980, the OPIA restated its position set out in their letter of March 31, 1980 and advised plaintiff that if he intended to request access to document number 729 rather than just the photographs he should contact the FBI. Plaintiff was also advised that the OPIA would consider an appeal from the FBI's action only on materials other than the photographs. (A copy of this letter is attached hereto as Exhibit H.)

(4) Explanation of the FBI's Central Records System and General Indices:

Access to the FBI Central Records System is afforded by the general indices, arranged in alphabetical order, consisting of index cards on various subject matters, including names of individuals. The decision to index is made by the investigative Agent and the supervising Agent, except for the names of subject(s), suspect(s) or victim(s) carried in the case caption, which are automatically indexed. The Central Records System contains administrative, applicant, personnel, general and investigative files compiled for law enforcement purposes. The records system consists of a numerical sequence for classifying of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity or foreign intelligence matter. The index cards in the general indices fall into two categories: "main" index cards and "see" index cards (i.e., cross references). A "main" index card carries the name of an individual, organization, activity, etc., which is the subject of a file contained in the records system. A "see" index card bears the name of an individual, organization, activity, etc., other than the main subject, which name is incidentally referenced to a portion of a document maintained in the system. Generally "see" references are only a mention or reference to that individual or organization contained in a

document (or in a portion of a document) located in the main file of another individual or organization.

"See" references may contain insufficient background or other identifying information by which a positive identification can be made with a given name. In many instances, receipt of specific additional identifying information from an FOIPA requester can assist in making a positive identification. Furthermore, it should be noted that the FBI indexes neither all names of individuals contacted or mentioned nor all information received during an investigation. Only names and information considered pertinent, relevant and necessary for future retrieval are indexed. Only that portion of a document pertaining to names or information indexed is considered to be the "see" reference.

(5) Indices and Records System Search for Records Responsive to Plaintiff's Request

A search for the records requested by plaintiff was made by consulting the General Indices. As a result of this search, the document forwarding the photographs requested by plaintiff was located. However, the photographs are no longer attached to this document in FBIHQ files.

Therefore, it was necessary to locate a copy of the same document in the corresponding Dallas Field Office files

which are currently maintained at FBIHQ for processing under the FOIA. As a result of this search the photographs requested by plaintiff were located.

(6) A review of the above materials by me determined them to be investigative records compiled for law enforcement purposes. The investigations were conducted to determine if activities of the subject of the file were in violation of one or more of the following statutes:

Title 18, United States Code, Section 2383
(Rebellion or Insurrection)

Title 18, United States Code, Section 2384
(Seditious Conspiracy)

Title 18, United States Code, Section 2385
(Advocating the Overthrow of the Government)

(7) Plaintiff was advised that these photographs were being withheld pursuant to Title 5, USC, Section 552 (b) (1). For the information of the court, as the result of an administrative appeal of another individual, these photographs were again reviewed by the Department Review Committee in October, 1981, at which time it was determined that these photographs no longer warrant classification. However, these photographs are still being withheld based on the following exemption allowed by the FOIA:

(A) Confidential Source Material From Law Enforcement Agencies

Title 5, United States Code, Section 552 (b) (7) (D)

allows the deletion of material that would disclose the identity of a confidential source and confidential information furnished only by the confidential source.

The photographs furnished by a non-federal law enforcement agency under an assurance of confidentiality have been withheld pursuant to exemption (b) (7) (D). The FBI is firmly convinced that any adverse effect of the existing system of exchange of information between law enforcement agencies would lead to disastrous and far reaching consequences to law enforcement proceedings. The FBI has been made aware that unless the confidentiality under which information is exchanged continues, the willingness of participating non-federal agencies to exchange essential information will be reconsidered. There is a traditional understanding of confidentiality, which is reinforced daily through contacts FBI Agents have with non-federal law enforcement agencies. The free flow of information between cooperating law enforcement agencies plays an integral part in the solution of criminal investigations and investigation into possible threats to the national security.

If the information furnished to the FBI by non-federal law enforcement agencies is made public pursuant to the FOIA, cooperation between the FBI and these non-federal agencies would be greatly diminished and information vital to the law enforcement functions of the FBI would no longer be available to the FBI.

In addition, the agency which provided the FBI with this material recently advised that it desires to have the information and the fact of their cooperation held confidential.

(8) Detailed Justification, Itemization and Indexing

All documents in FBI files pertaining to this request which were retrievable through search of General Indices have been processed, and material not exempt from disclosure for the reasons set forth above is being furnished to plaintiff. The detailed justification, itemization and indexing of documents withheld appears in chart from attached (see Exhibit I), with the following headings:

(A) Document Number

Assigned for purposes of the affidavit only.

(B) Serial Number

This is the number given to the document when it was made a matter of record and usually appears at the lower right hand side of the document.

(C) Description of Document

The date and nature of the document are furnished.

(D) Pages

The actual number of pages of the document and the number of pages released are furnished.

(E) Deletions

This section briefly describes the nature of the information deleted from the document. Any greater description of deleted material would in fact reveal the information which is properly withheld.

(F) Exemption

This section indicates the FOIA exemption(s) asserted for each deletion.

(G) Cross Reference

This section sets forth a reference to the paragraph in this affidavit detailing the utilization and justification.

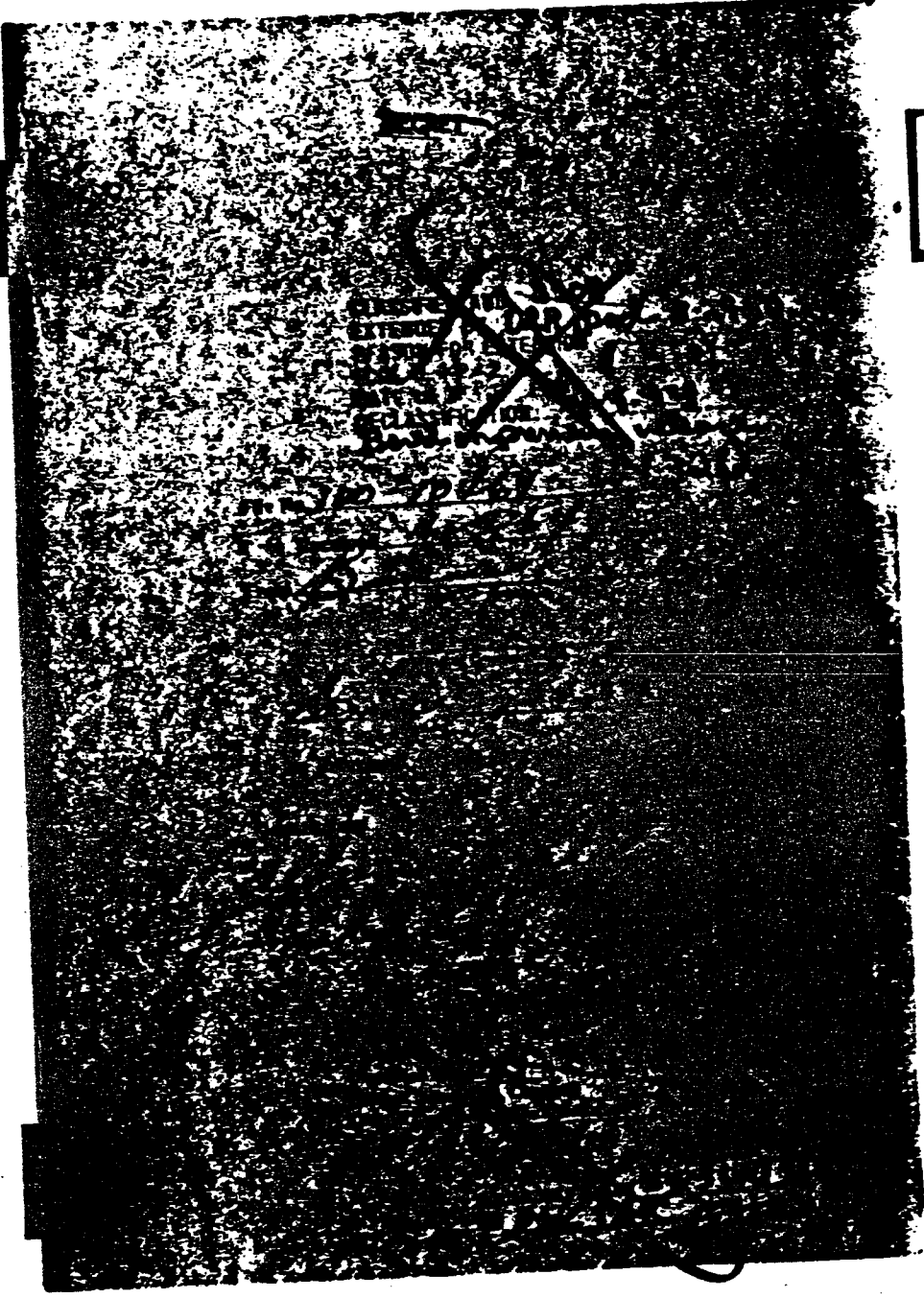
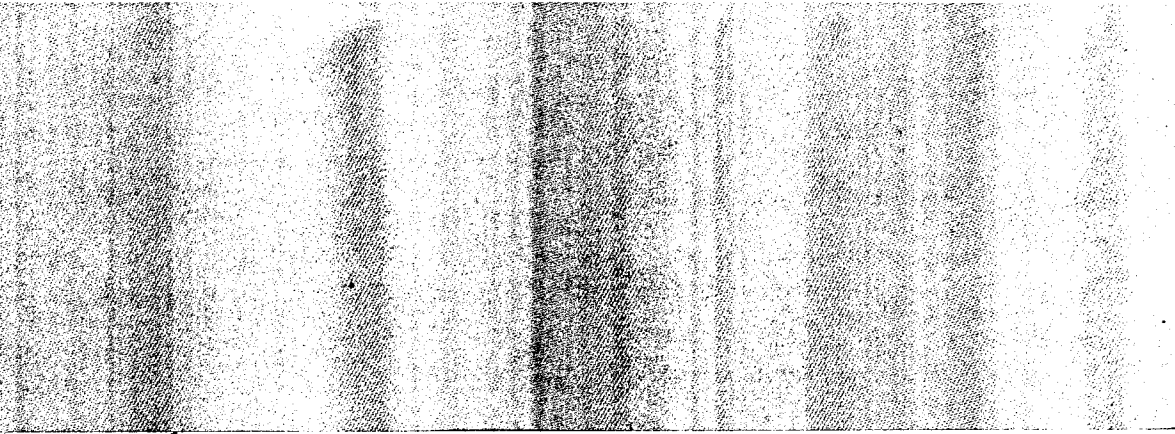
John N. Phillips
John N. Phillips
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and sworn to me this 13th day of July, 1982.

Mary B. Kischer
Notary Public

My Commission expires Sept. 14, 1982.

Document No.	Serial No.	Description of Document	Pages: Actual	Rel.	Deletion(s) Made	Exemption(s)	Cross-Reference
1	100-10461-1A328	Evidence envelope containing 10 photographs.	11	1	Identity of confidential source on envelope. All photographs-Information provided by a confidential source.	(b) (7) (D)	(7) (A)



On the basis of this Affidavit, the entire record herein, and for the reasons set forth below, defendant respectfully submits that there exists no genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

Factual Background

By letter dated October 24, 1979, to FBI Headquarters, plaintiff sought access to a copy of "an album of photographs of participants in the Quebec-Washington-Guantanamo Walk for Peace" which was referred to in Warren Commission Document 729. Phillips Affidavit, para. (3)(A) and exh. A. The FBI acknowledged receipt of plaintiff's request by letter dated November 6, 1979, and advised him that a search of the indices of FBI records would be made to locate records within the scope of his request. Id. para. (3)(B) and exh. B.

The FBI advised plaintiff, by letter dated February 8, 1980, that the requested materials were exempt from disclosure pursuant to the exemption of the Freedom of Information Act (FOIA), 5 U.S.C. §552 (b)(1), pertaining to information classified in the interest of the national defense or foreign policy. Phillips Affidavit, para. (3)(C) and exh. C. The FBI also advised plaintiff of his right to appeal its action to the United States Department of Justice. Id.

By letter dated February 18, 1980, to the Office of Privacy and Information Appeals (OPIA), Office of the Associate Attorney General, U.S. Department of Justice, plaintiff appealed the denial by the FBI. Phillips Affidavit, para. (3)(D) and exh. D. By letter dated March 17, 1980, the OPIA acknowledged receipt of plaintiff's appeal letter. Id. para. (3)(E) and exh. E. By letter dated March 31, 1980, the OPIA advised plaintiff that it was affirming the denial by the FBI pursuant to 5 U.S.C. §552(b)(1). Id. para. (3)(F) and exh. F. Plaintiff was also advised that the requested materials were being referred to the Department Review

Committee for classification review and that he would be notified if any of the materials were declassified. Id.

By letter dated October 20, 1980, to the U.S. Department of Justice, plaintiff requested the Office of the Associate Attorney General to review its initial decision on plaintiff's appeal. Phillips Affidavit, para. (3)(G) and exh. G. The OPIA responded to plaintiff by its letter dated November 5, 1980, restating its position as set forth in its letter of March 31, 1980, and again advising plaintiff that the requested materials were classified and had been referred to the Department Review Committee for its review. Id. para. (3)(H) and exh. H. The OPIA also advised plaintiff that if he intended to request access to Warren Commission Document 729 rather than the photographs referenced therein, he should contact the FBI directly. Id. Plaintiff was further advised that the OPIA would consider an appeal from the action of the FBI on materials other than the photographs. Id.

In October 1981, pursuant to the administrative appeal of another individual, the photographs requested by plaintiff were again reviewed by the Department Review Committee at which time it was determined that the photographs no longer warranted classification. Phillips Affidavit, para. (7). At a status conference held on May 13, 1982, defendant advised the Court that the photographs continue to be withheld as exempt under 5 U.S.C. §552(b)(7)(D), inasmuch as they consist of investigatory records compiled for law enforcement purposes which would disclose the identity of a confidential source and confidential information furnished by the confidential source. Defendant indicated that it would prepare and file an affidavit fully explaining and justifying this exemption claim in support of a summary judgment motion. On May 17, 1982, the Court ordered that such dispositive motion be filed by defendant on or before July 12, 1982. Accordingly, defendant has moved the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment on the basis of 5 U.S.C. §552(b)(7)(D).

Argument

PURSUANT TO 5 U.S.C. §552(b)(7)(D),
DEFENDANT HAS PROPERLY WITHHELD THE
RECORDS AT ISSUE IN THIS ACTION

In accordance with the statutory requirements of the FOIA, the FBI has processed all records responsive to plaintiff's request. These records, which are investigative records compiled for law enforcement purposes, consist of photographs provided to the FBI by a nonfederal law enforcement agency. Phillips Affidavit, paras. (6) and (7)(A). The evidence envelope containing the photographs is being released to plaintiff, with the identity of the law enforcement agency deleted therefrom. Id. para. (8) and exh I. The identity of that source of information, as well as the photographs, have been withheld pursuant to Exemption 7(D) of the FOIA, 5 U.S.C. §552(b)(7)(D). The Phillips Affidavit contains a complete description of the information withheld and a full explanation of the basis for its denial. As the following discussion will demonstrate, the application of 5 U.S.C. §552(b)(7)(D) to withhold this material is entirely justified under law.

Exemption 7(D) of the FOIA exempts from disclosure law enforcement records insofar as their production would "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" Exemption 7(D) was applied by the FBI in the instant case to withhold information provided to the FBI by a law enforcement agency with an assurance of confidentiality. Phillips Affidavit, para. (7)(A). Special Agent Phillips has explained the basis of the confidential relationship between the FBI and nonfederal law enforcement agencies as follows:

The FBI is firmly convinced that any adverse effect on the existing system of exchange of information between law enforcement agencies would lead to disastrous and far reaching consequences to law enforcement proceedings. The FBI has been made aware

that unless the confidentiality under which information is exchanged continues, the willingness of participating agencies to exchange essential information will be reconsidered. There is a traditional understanding of confidentiality, which is reinforced daily through contacts FBI Agents have with law enforcement agencies. The free flow of information between cooperating law enforcement agencies plays an integral part in the solution of criminal investigations and investigation into possible threats to the national security.

If the information furnished to the FBI by non-federal law enforcement agencies is made public pursuant to the FOIA, cooperation between the FBI and these nonfederal agencies would be greatly diminished and information vital to the law enforcement functions of the FBI would no longer be available to the FBI. In addition, the agency which provided the FBI with this material recently advised that it desires to have the information and the fact of their cooperation held confidential.

Phillips Affidavit, para. (7)(A).

Courts have consistently recognized that effective law enforcement depends on the government's ability to encourage the cooperation of any entity, be it institution or private citizen, in the enforcement of criminal laws. Any deterrent to that cooperation is clearly contrary to the public interest. See, e.g., Lesar v. United States Department of Justice, 636 F.2d 472, 489 (D.C. Cir. 1980); Pope v. United States, 599 F.2d 1383, 1387 (5th Cir. 1979); Church of Scientology of California v. United States Department of Justice, 612 F.2d 417, 422-23 (9th Cir. 1979); Malloy v. United States Department of Justice, 457 F. Supp. 543, 546 (D.D.C. 1978).

The Ninth Circuit's decision in Church of Scientology of California v. United States Department of Justice, supra, provides a careful analysis of the legislative history of the 1974 revision of Exemption 7, eliminating any doubt about whether Congress intended "confidential source" to include non-federal law enforcement agencies. The court observed that the scope or definition of the term "confidential source" was not expressly discussed in the legislative proceedings, but that the debates on the amendment made it "clear that the congressional intent was to broaden the scope to include sources of confidential information other than informers." 612

F.2d at 423-25. It found it apparent from the statements of both opponents and proponents of the exemption that "Congress was concerned that law enforcement agencies should not be faced with a 'drying up' of their sources of information or have their criminal investigative work be seriously impaired." Id. at 425. The Ninth Circuit accordingly concluded that Congress intended to maintain the exemption's protection of confidential sources and their information, both of which are crucial to effective law enforcement effects, and that the congressional purpose would be thwarted if federal law enforcement agencies were unable to assure foreign, state and local police departments that their information and methods would remain confidential. See id. at 425-26. In Lesar v. United States Department of Justice, supra, 636 F.2d at 489, the Court of Appeals for this Circuit followed the Ninth Circuit's analysis and reached the same conclusion regarding the intended breadth of Exemption 7(D). See also Founding Church of Scientology of Washington, D.C., Inc. v. Regan, 670 F.2d 1158, 1161 (D.C. Cir. 1981), cert. denied, 102 S.Ct. 2242 (1982); Baez v. United States Department of Justice, 647 F.2d 1328, 1340 (D.C. Cir. 1980).

Furthermore, it is well settled that information provided by a confidential source in the context of a criminal investigation -- regardless of whether it identifies the source -- is exempt from disclosure. See, e.g., Radowich v. United States Attorney, District of Maryland, 658 F.2d 957, 964 (4th Cir. 1981); Duffin v. Carlson, 636 F.2d 709, 712-13 (D.C. Cir. 1980). Indeed, in Lesar v. United States Department of Justice, supra, the Court of Appeals for this Circuit held that certain police records furnished to the Department of Justice were properly withheld in their entireties pursuant to Exemption 7(D):

[T]he pertinent question is whether the information at issue was furnished by a "confidential source" during the course of a legitimate criminal law investigation. Once that question is answer in the affirmative, all such information obtained from the confidential source receives protection.

636 F.2d at 492 (citations omitted). As has been consistently recognized, both the identity of, and the information provided by, foreign, state and local law enforcement agencies are protected by Exemption 7(D). See, e.g., Baez v. United States Department of Justice, supra, 647 F.2d at 1339-40; Church of Scientology of California v. United States, supra, 612 F.2d at 427; Terkel v. Kelly, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); Nix v. United States, 572 F.2d 998, 1004 (4th Cir. 1978); Crooker v. Davis, Civil No. 81-2598, slip op. at 5 (D.D.C. March 12, 1982) (attached hereto as Exhibit A); Robinson v. Federal Bureau of Investigation, No. 81-1946, slip op. at 2 (D.D.C. Jan. 27, 1982), aff'd per curiam, No. 82-1140 (D.C. Cir. May 21, 1982) (attached hereto as Exhibit B).²

Disclosure of the records at issue would severely damage federal law enforcement efforts, because the records were provided to the FBI in confidence and such vital cooperation by nonfederal law enforcement agencies would most certainly be hampered if confidentiality could not be assured. See Phillips Affidavit, para. (7)(A). Moreover, the nonfederal agency that was the source of these records recently advised the FBI that it desires that the information provided by it, as well as the fact of its cooperation with the FBI, remain confidential. Id. It is abundantly clear that the

² Indeed, the fact that a particular source's identity becomes known does not mean that the person or entity is no longer a "confidential source;" the information which was provided by it in confidence remains entitled to Exemption 7(D) protection. See Founding Church of Scientology of Washington, D.C., Inc. v. Regan, supra, 670 F.2d at 1161 n.27; Radowich v. United States Attorney, District of Maryland, supra, 658 F.2d at 960; Lesar v. United States Department of Justice, supra, 636 F.2d at 492 n.114; Scherer v. Kelley, 584 F.2d 170, 176 n.7 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Murphy v. Federal Bureau of Investigation, Civil No. 79-0919-CV-W-55, slip op. at 5 (W.D. Mo. Sept. 1, 1981) (attached hereto as Exhibit C); cf. Volz v. United States Department of Justice, 619 F.2d 49, 50 (10th Cir.), cert. denied, 449 U.S. 982 (1980) (protection of sources in Privacy Act context). To hold otherwise would be to ignore the "inextricable connection between the source and the substance of a confidential disclosure." Volz v. Department of Justice, supra, 619 F.2d at 50.

identity of that agency and the entirety of the records provided by it in confidence were properly withheld pursuant to 5 U.S.C. §552(b)(7)(D).

Conclusion

For the foregoing reasons, defendant respectfully submits that its Motion For Summary Judgment should be granted.

Respectfully submitted,

STANLEY S. HARRIS
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

DATED: July 13, 1982

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. CROOKER,

Plaintiff,

v.

REX D. DAVIS,

Defendant.

Civil Action No. 81-2598

FILED

MAR 12 1982

JAMES E. DAVEY, Clerk

MEMORANDUM

This matter comes before the court on cross-motions for summary judgment.^{1/} In this action under the Freedom of Information Act (FOIA), 5 U.S.C. §552 (1976), plaintiff has requested that the Bureau of Alcohol, Tobacco & Firearms (the Bureau) provide him with "copies . . . of all rap sheets, incident reports, photos, arrest records and any other documents maintained in [its] files under [his] name after March 1, 1977." Pursuant to this request, the Bureau has provided plaintiff with 123 pages of documents, with excisions; however, the Bureau has refused to provide the plaintiff with 8 remaining pages of documents on the ground that they are exempt from disclosure under FOIA. For the reasons discussed below and there being no material facts in dispute, defendant's motion for summary judgment is granted.

DISCUSSION

Defendant's motion for summary judgment asserts that two FOIA exemptions are applicable to the eight documents in question: exemptions 7(C) & 7(D). 5 U.S.C. § 552(b)(7)(C) & (b)(7)(D). Although plaintiff

^{1/} Defendant's motion is technically styled as a "motion to dismiss or in the alternative for summary judgment;" however, for present purposes, this court is treating it solely as a motion for summary judgment.

has never directly responded to defendant's motion,^{2/} he has filed two motions for summary judgment of his own. Plaintiff's first motion for summary judgment, dated January 8, 1982, is predicated solely on his belief that the defendant agency failed to respond to his complaint in this case within the sixty-day period provided by the Federal Rules of Civil Procedure. For a number of reasons,^{3/} this court denies that motion. Plaintiff's second motion for summary judgment, dated February 11, 1982, comes closer to dealing with the critical issues on this motion. Although this second motion never controverts the technical applicability of the exemptions claimed by the defendant, it does attempt to minimize their importance; basically, plaintiff argues that the exemptions should not be applied in this case because: 1) he already knows all the allegedly confidential sources being protected by virtue of the exemption, and 2) defendant can merely excise the identities of the confidential sources and then provide him with the information. These arguments will be discussed below in connection with the asserted FOIA exemptions.

I. Exemption 7(D)

FOIA Exemption 7(D) exempts from agency disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . 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,

^{2/} Defendant's motion was filed on January 29, 1982; recognizing the potential problems inherent in plaintiff's pro se prisoner status, this court gave plaintiff until February 25, 1982 to respond to defendant's motion. No response has yet been received however.

^{3/} First, there appear to have been some service of process problems in the instant case which make it unlikely that the defendant had been served, and thus that its time for answering the complaint had started running, at the time that plaintiff's motion presupposes. See Defendant's Motion for Summary Judgment at l. n.l. Second, given the previously discussed confusion and the entire record herein, the court finds the drastic remedy of a grant of summary judgment to plaintiff on this motion to be unwarranted.

or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source." 5 U.S.C. §552(b)(7)(D). At the outset, it should be noted that:

Exemption 7(D) differs from other FOIA exemptions in that its applicability depends not on the specific factual contents of a particular document; instead, the pertinent question is whether the information at issue was furnished by a 'confidential source' during the course of a legitimate criminal law investigation. Once that question is answered in the affirmative, all such information obtained from the confidential source receives protection.

Lesar v. United States Department of Justice, 636 F.2d 472, 492 (D.C. Cir. 1980) (emphasis supplied) (citing S.Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974) (Conference Report); 120 Cong. Rec. 36,865, 36,871 (1974) (remarks of Senator Hart)).

Addressing the above-described pertinent question in its two apparent parts: 1) whether a confidential source is involved, and 2) whether the information was transmitted to the agency during the course of a legitimate criminal investigation, the court finds initially that the documents at issue were transmitted to the Bureau by a state or local law enforcement agency. ^{4/} A number of recent decisions by this circuit's Court of Appeals establish beyond doubt that such a state or local agency can constitute a "confidential source" for purposes of Exemption 7(D). See, e.g., Founding Church of Scientology of Washington, D.C., Inc. v. Reagan, No. 80-1546 slip op. at 6-7 (D.C. Cir. Dec. 31, 1981) (Founding Church of Scientology); Baez v. United States Department of Justice, 647 F.2d 1328, 1340 (D.C. Cir. 1980); Lesar v. United States Department of Justice, 636 F.2d 472, 489 (D.C. Cir. 1980). Since

^{4/} This finding is based on both the affidavit submitted by the defendant, see affidavit of G. R. Dickerson at ¶10 (Dickerson Affidavit), and this court's own in camera examination of the documents in question.

the affidavit attached to defendant's motion, which is the affidavit of Mr. G. R. Dickerson — the Director of the Bureau, reveals that these documents were in fact transmitted "in confidence" to the Bureau, see Dickerson Affidavit at ¶10, the transmitting state or local agency involved in this case is clearly a "confidential source" within the meaning of Exemption 7(D).

This being so, the court reaches the remaining inquiry which is whether the withheld information was compiled in the course of a "legitimate criminal law investigation." ^{5/} On this point, defendant's affidavit states that the documents at issue were supplied to the Bureau "in the course of a criminal investigation." Dickerson Affidavit at ¶10. Considering this statement, together with the fact that the plaintiff has in no way challenged the legitimacy of the Bureau's investigative activities in this case, see Founding Church of Scientology, slip op. at 10-11 n.36, this court finds that the legitimate criminal investigation component of the Exemption 7(D) test is met in this case. ^{6/}

Both apparent prerequisites to the applicability of Exemption 7(D) having been met, the exemption applies to the eight documents at issue on this motion.

In the face of this apparent applicability, defendant maintains that the exemption need not be used in this case because: 1) he already knows the identity of the confidential sources that the Bureau is

5/ Although such an inquiry into the legitimacy of the law enforcement investigation at issue appears plainly contemplated by the Court of Appeals' language in Lesar v. United States Department of Justice, see Block Quote supra at 2, there still appears to be some indecision as to whether agency demonstration of the legitimacy of its investigation is required by Exemption 7(D). See Founding Church of Scientology, slip op. at 10-11 n.36.

6/ Further, there is nothing about the nature of the documents themselves which connotes any illegitimate or improper investigative objectives.

attempting to protect through assertion of the 7(D) exemption, and 2) the goal of retaining the confidentiality of sources can be achieved through the mere excision of all source-identifying information. These two contentions can be dealt with summarily. Defendant's first argument is, of course, one that could be raised by any plaintiff faced with an asserted 7(D) exemption; attempting to verify such claims, if they were relevant, would turn the judicial process into nothing more than a guessing game (i.e. plaintiff would attempt to guess where the documents in dispute came from in order to defeat the 7(D) assertion). Further, and in any event, it does not appear that mere knowledge of the alleged confidential sources of information is sufficient to defeat the applicability of Exemption 7(D).^{7/} See Lesar v. United States Department of Justice, supra (Atlanta and Memphis police departments known as the confidential sources; Exemption 7(D) upheld).

Defendant's second contention, that the Bureau should merely excise any potentially identifying information, might make sense if the purpose of Exemption 7(D) was merely to protect the confidentiality of the source itself; this circuit has clearly recognized, however, that the purpose behind Exemption 7(D) is not so limited. In reviewing and analyzing the legislative history of Exemption 7(D), the Lesar court noted that "the Conference Committee acted to ensure the secrecy of both the identities of confidential sources and all information furnished during the course of a criminal law enforcement investigation." Lesar v. United States Department of Justice, 636 F.2d at 490 (emphasis supplied). See also Block Quote supra at 2.

^{7/} Even if the defendant asserts that he knows the identity of the alleged confidential sources, there is undoubtedly still some protective value in refusing to confirm his suspicions.

Considering the dual purposes of Exemption 7(D), plaintiff's excision suggestion plainly lacks merit.

On the basis of the foregoing, Exemption 7(D) appears fully applicable to the documents in question and such exemption protects all the information contained in such documents from being released pursuant to plaintiff's FOIA request.

II. Exemption 7(C)

Because of the above-described applicability of Exemption 7(D), this court need not reach the merits of Exemption 7(C)'s applicability to the documents in question.

An appropriate Judgment accompanies this Memorandum.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN S. CROOKER,

Plaintiff,

v.

REX D. DAVIS,

Defendant.

Civil Action No. 81-2598

FILED

MAR 12 1982

JAMES F. DAVEY, Clerk

JUDGMENT

This matter comes before the court on cross-motions for summary judgment. Upon consideration of all the arguments in the memoranda and materials submitted by the parties and for good cause shown, it is, by the court, this 12th day of March, 1982,

ORDERED ADJUDGED and DECREED that defendant's motion for summary judgment in the above-entitled case is hereby granted; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RESTONEY ROBINSON,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action

No. 81-1946

FILED

JAN 27 1982

MEMORANDUM-ORDER

This is a suit under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by a pro se plaintiff. In a Memorandum and Order dated December 9, 1981, this Court disposed of most of this case by granting in part the defendant's motion for summary judgment. The only issue remaining in the case is whether the FBI must release a letter dated September 10, 1971, from Paul B. Calhoun, Police Chief of Greensboro, N. C. to J. Edgar Hoover. The defendant argues that the document is exempt from disclosure under 5 U.S.C. § 552(b)(7)(D) and has filed a supplemental motion for summary judgment. The plaintiff responded to this motion in a timely fashion.^{1/}

The letter in question pertains to a murder investigation which resulted in the arrest of Restoney Robinson. The letter was sent to the FBI laboratory in connection with a request for analysis of certain .32 caliber bullets. Pursuant to the Court's December 9, 1981, Order, the agency submitted the Affidavit of Michael M. Roman, which describes the letter in detail and clearly establishes that the agency withheld the letter from the plaintiff because of "a traditional understanding of confidentiality" (§ 20), which is necessary to continuing cooperation between federal and local law enforcement authorities (§§ 21-22).

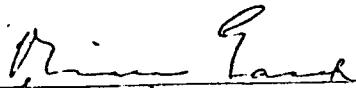
^{1/} Although styled as a motion to strike, plaintiff's submission does respond to the defendant's exemption claim. Consequently, the Court treats the motion to strike as an opposition to the motion for summary judgment.

(u)

Exemption (b)(7)(D) allows an agency to withhold "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . disclose the identity of a confidential source" The letter in question here is undoubtedly an investigative record compiled for "law enforcement purposes." Moreover, in this circuit, the courts have held that "confidential source" applies not only to individuals but also to state or local law enforcement agencies. See Founding Church of Scientology of Washington, D.C., Inc. v. Regan, No. 80-1546, slip op. at 7 (D.C. Cir., December 31, 1981); Lesar v. United States Dep't of Justice, 636 F.2d 472, 489 (D.C. Cir. 1980). The Roman affidavit demonstrates that the letter was submitted with an understanding that it would remain confidential. See Lesar, supra, 636 F.2d at 491. There has been no waiver of confidentiality; furthermore, it is of no significance that the identity of the writer of the letter is known or that the letter might be in the public domain. See id. The important policies underlying the need to exempt such confidential material from disclosure were discussed by the District Court in Lesar, 455 F. Supp. 921, 924-25 (D.D.C. 1978), aff'd, 636 F.2d 472 (D.C. Cir. 1980). Indeed, the reasons for nondisclosure in Lesar precisely fit this case. Accordingly, it is by the Court this 7th day of January, 1982,

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

ORDERED that judgment in this case be and hereby is, entered for defendant and against plaintiff.



Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 82-1140

RESTONEY ROBINSON, Appellant

v.

QUINLAN J. SHEA, JR., et al.

September Term, 19 81

Civil Action No. 82-1140
United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 21 1982

Appeal from the United States District for the District of Columbia.

GEORGE A. FISHER
CLERK

Before WRIGHT, MacKINNON, and EDWARDS, Circuit Judges.

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed herein by the parties. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum-Order filed January 27, 1982. See Appendix to Brief for Appellees at 4 -44.

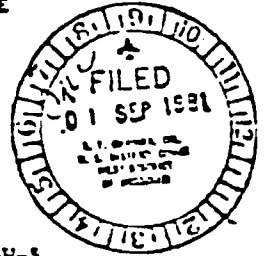
On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

George A. Fisher
George A. Fisher
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



STEPHEN P. MURPHY,)
Plaintiff.)
vs.) No. 79-0919-CV-W-5
FEDERAL BUREAU OF INVESTIGATION,)
Defendant.)

MEMORANDUM AND ORDER

This action, brought under the Freedom of Information Act, 5 U.S.C. § 552, et seq., is a request by the plaintiff, Stephen Murphy, to have this Court order the release of four documents which the Federal Bureau of Investigation has withheld from him. Each party contends that there are no material facts at issue in this litigation and believes that he or it is entitled to summary judgment as a matter of law. The Court finds that no material facts remain in issue and enters its order for summary judgment in accordance with the conclusions of law which follow.

I. Uncontested Facts

Since both parties contend that there are no material facts at issue between them and have asked that this action be disposed of by summary judgment, this Court derives its conclusions of law with respect to the following narrative of uncontested material facts. The plaintiff, Stephen Murphy, is the Senior Vice President, General Counsel and Secretary of Yellow Freight System, Inc. On behalf of Yellow Freight, the plaintiff entered into a dispute over the payment of licensing fees with the State of Nebraska. Charles Kneip represented the State of Nebraska in the licensing fee dispute. The dispute was settled out of court in 1979.

After the settlement was negotiated and finalized, Kneip contacted the Omaha branch of the F.B.I. and alleged that Murphy had bribed state officials of Nebraska in connection with the licensing fee dispute. The F.B.I.

undertook an investigation of the alleged bribery, but concluded that their investigation had not uncovered any facts which warranted prosecutive action. The F.B.I. then terminated its investigation of the plaintiff.

On being informed by officials of the State of Nebraska that he might be the object of an F.B.I. investigation, the plaintiff mailed a written request to the Director of the F.B.I. and asked for copies of all "documents, notes, letters and memoranda" which pertained to the F.B.I.'s investigation of him. In particular, the plaintiff requested confirmation of the fact that Kneip had been interviewed by the F.B.I. with regard to his charge of bribery against the plaintiff. In response to the plaintiff's letter of inquiry, the F.B.I. advised the plaintiff that the Omaha office "did conduct an interview as you [the plaintiff] so describe in an official F.B.I. investigation," and referred the plaintiff to the Omaha office for further information.

The Omaha office released eleven pages of documents from which extensive amounts of material were excised. The plaintiff appealed the excisions made by the F.B.I. to the Associate Attorney General. The Associate Attorney General's office made a supplemental release of records but affirmed the decision of the Omaha office to excise major portions of the documents requested. The plaintiff then properly sought judicial review of the Associate Attorney General's decision in this Court under 5 U.S.C. § 552(a)(4)(B).

II. Conclusions of Law

The plaintiff claims that he is entitled to full disclosure of the information contained in the investigative documents compiled by the F.B.I. In support of his claim, the plaintiff argues that the defendant has waived all of its rights under the Freedom of Information Act because it acknowledged in its letter to the plaintiff that it had, in fact, conducted an interview of Kneip concerning bribery charges. The F.B.I., on the other hand, resists the plaintiff's Freedom of Information Act request in order to protect the privacy of F.B.I. agents and third parties, 5 U.S.C. § 552(b)(7)(C), and to protect the identity of a confidential source and the information furnished only by that source, 5 U.S.C. § 552(b)(7)(D). The

Court finds that the F.B.I. has waived its right to excise the name of and the general information given by Charles Kneip under the privacy, confidential source and confidential information provisions of the Freedom of Information Act. With respect to all other materials excised, the Court affirms the decisions of the Associate Attorney General.

A. Material Under Privacy Exemption

The defendant has invoked Section 552(b)(7)(C) of the Freedom of Information Act [F.O.I.A.] in order to protect the identities of F.B.I. agents and third parties. That section, in pertinent part, provides that the duty to disclose information does not apply to matters that are "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (c) constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(c). The availability of the privacy exemption depends on the Court's balance of the public and private interests in disclosure. Department of the Air Force v. Rose, 425 U.S. 352, 372-73, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).

With respect to the names of F.B.I. agents and employees, the Court approves the use of this privacy exemption. Maroscia v. Levi, 559 F.2d 1000, 1002 (7th Cir. 1977); Mix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978). With the exception of the name of Charles Kneip, the Court, after balancing the public's interest in disclosure against the private interest in non-disclosure, finds that the F.B.I. properly withheld the names of all other third parties, if any, referred to in the documents released to the plaintiff. Maroscia, supra, at 1002.

The F.B.I. waived the right to withhold the name of Charles Kneip under the privacy exemption. In his letter to the Director of the F.B.I., the plaintiff's request for information concerning the F.B.I.'s bribery investigation stated:

Thus, I now have reason to believe Mr. Kneip, in October, last year, got in touch with your Omaha office and subsequently was interviewed for about three hours by agents from that office.

The letter from the F.B.I. in response to the plaintiff's inquiry stated:

This is to advise you that our F.B.I. Office in Omaha, Nebraska, did conduct an interview as you so describe in an official F.B.I. investigation.

When the plaintiff's letter of inquiry is read in conjunction with the F.B.I.'s response, it is clear that the anonymity of Charles Kneip has been compromised by the F.B.I. Consequently, the F.B.I. cannot claim that their decision to excise Mr. Kneip's name from the documents in question prevents an unwarranted invasion of Mr. Kneip's personal privacy. The F.B.I. has made public the fact that it interviewed Mr. Kneip as part of its investigation of the bribery charges levied against the plaintiff. The F.B.I. must disclose the name of Charles Kneip where it appears in Document No. 1, Document No. 2 and Document No. 3.

B. Material Claimed Under Confidential Source and Confidential Information Exemption.

The defendant has also invoked Section 552(b)(7)(D) of the F.O.I.A. in order to protect the identity of confidential sources and the confidential information furnished by those sources that might appear in the documents in question. The section exempts from disclosure "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source." 5 U.S.C. § 552(b)(7)(D).

With the exception of Charles Kneip, the Court agrees with the defendant's decision to invoke the confidentiality exemption for any other confidential sources. Scherer v. Kelly, 584 F.2d 170, 176 (7th Cir. 1978), cert. denied, 440 U.S. 964, 99 S.Ct. 1511; Marascia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977); Rix v. United States, 577 F.2d 998, 1003-1005 (4th Cir. 1978). For the reasons stated in Part A, the Court finds that the defendant has waived its right to protect the name of Charles Kneip as that of a confidential source. Thus, his name may no longer be excised from the documents under either the privacy or confidential source exemptions.

The plaintiff has further proposed that because Charles Kneip is no longer a confidential source, he is entitled to any information Charles Kneip presented to the F.B.I. The Court does not agree with the plaintiff's

expansive reading of 552(b)(7)(D). The F.B.I. has expressly compromised the identity of a previously confidential source, but has not waived any of its rights under the F.O.I.A. to the confidential information provided by that source. While this Court has not come upon any cases which have confronted the precise question of waiver under 552(b)(7)(D), this Court finds that the information supplied by Kneip is protected as "confidential information" if he was a "confidential source" at the time he was interviewed by the F.B.I. Neither party disputes that Charles Kneip was a confidential source at the time he was interviewed by the F.B.I. In fact, the plaintiff acknowledges in his brief in reply to the defendant's supplemental memorandum that the anonymity of Charles Kneip was not compromised by the F.B.I. until the F.B.I. verified its interview of Kneip in its letter to the plaintiff. The information was gathered long before the confidentiality of the source was breached. Thus, the F.B.I. properly withheld that information given by Kneip when he was, in fact, a confidential source.

Not all of the information claimed by the F.B.I. as "confidential" is confidential. The three full paragraphs on page 1 of document No. 2, the paragraph beginning on the bottom of page 3 of document No. 2 and concluding on page 4 of the same document, the first sentence in the second full paragraph on page 4 of document No. 2, and the only full paragraph appearing on page 6 of document No. 2 should be unveiled because they contain information that is not confidential. When disclosed, these passages will not invade the personal privacy of any F.B.I. agent or third party other than Charles Kneip, will not reveal the identity of any confidential source, and will not compromise any confidential information furnished only by the confidential source. 5 U.S.C. § 555 (b)(7)(C) and (D).

Accordingly, it is hereby

ORDERED that, in accordance with the parties' motions for summary judgment, the name of Charles Kneip should be disclosed wherever it appears in the documents in question, and that (1) the three full paragraphs on page 1 of document No. 2, (2) the paragraph beginning on the bottom of page 3 of document No. 2 and concluding on page 4 of document No. 2, (3) the first sentence in the second full paragraph on

page 4 of document No. 2, and (4) the only full paragraph appearing on page 6 of document No. 2 should be disclosed. It is further

ORDERED that each party bear his and its own costs.

Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.

September 1, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. GARY SHAW,
Plaintiff,
v.
FEDERAL BUREAU OF
INVESTIGATION,
Defendant.

Civil Action No. 82-0756

ORDER

Upon consideration of defendant's Motion For Summary Judgment, of all papers filed with respect thereto, and of the entire record herein, and it appearing to the Court that the granting of the motion would be just and proper, it is by the Court this ____ day of _____, 1982,

ORDERED that defendant's Motion For Summary Judgment be, and it hereby is, granted; and it is further

ORDERED that this action be, and it hereby is, dismissed.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion For Summary Judgment - with accompanying Statement Of Material Facts As To Which There Is No Genuine Issue, Affidavit of John N. Phillips, Memorandum Of Points And Authorities In Support Of Defendant's Motion For Summary Judgment, exhibits and proposed Order - was served upon plaintiff by deposit of a copy thereof in the U.S. mail, postage prepaid, first class mail, addressed to:

James H. Lesar, Esq.
Fensterwald & Associates
1000 Wilson Boulevard, Suite 900
Arlington, Virginia 22209

on this 13th day of July 1982.

Miriam M. Nisbet

MIRIAM M. NISBET