BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 79-1700

HAROLD WEISBERG,

Plaintiff-Appellant

v.

CLARENCE M. KELLEY, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. John Lewis Smith, Jr., Judge

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FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff-Appellant v. CLARENCE M. KELLEY, ET AL., Defendants-Appellees	:	Case No. 79-1700

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appellant certifies that the following listed parties and amici (if any) appeared below:

Harold Weisberg (Plaintiff)

Clarence M. Kelley (Defendant)

Griffin Bell (Defendant)

U.S. Department of Justice (Defendant)

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

JAMES H. LESAR
Attorney for Appellant

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether dispute as to adequacy of search for records responsive to plaintiff's Freedom of Information Act request precluded summary judgment.

2. Whether 5 U.S.C. § 552(b)(1) exempts from disclosure purportedly classified information which is in fact public knowledge.

3. Whether it was error for the District Court to uphold agency claims of exemption under 5 U.S.C. § 552(b)(1), (2), (7)(C), (7)(D), and (7)(E) on the basis of vague, conclusory, and false government affidavits, and without allowing plaintiff to conduct any discovery.

4. Whether an agency can properly excise information under 5 U.S.C. § 552(b)(7) where the records sought were not compiled for law enforcement purposes.*

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part:

> (b) This section does not apply to matters that are--
>
> (1)(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;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> * * *
>
> (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, (D) disclose the identity of a confidential source and, in the case of a rec-

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*This case has not previously been before this Court, or any other Court (other than the Court below), under this or any other title.

> ord compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques or procedures ***

Because of their length, Executive order 11652, Executive order 12065, and the National Security Council directive of May 19, 1972 implementing E.O. 11652 are set forth in the addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

The parties to this litigation are Harold Weisberg, plaintiff-appellant, and Clarence M. Kelley, Hon. Griffin Bell, and the United States Department of Justice, defendants-appellees.

On February 15, 1979, United States District Court Judge John Lewis Smith awarded summary judgment to the defendants. His opinion is found at pages - of the Appendix. On March 29, 1979, Judge Smith entered an order denying plaintiff's motion for reconsideration.

STATEMENT OF THE CASE

A. Background

On May 23, 1966 plaintiff Harold Weisberg ("Weisberg") wrote then-FBI Director J. Edgar Hoover a letter suggesting that there were at least five bullets involved in the assassination of Pres-

ident Kennedy rather than the three alleged by the Warren Commission. He brought to Hoover's attention certain matters which he believed "require immediate unequivocal explanations," and he called upon Hoover to make "immediately available" the spectrographic analysis which the FBI had performed upon the intact bullet alleged to have wounded both President Kennedy and Governor Connally and upon various bullet fragments said to have been connected to the shooting. A June 6, 1966 memorandum from Alex Rosen to Cartha DeLoach recommended "[t]hat Weisberg's communication not be acknowledged." [See Exhibit 1 to 2/21/79 Weisberg Affidavit] It never was.

After the Freedom of Information Act ("FOIA") became effective on July 1, 1967, Weisberg submitted numerous requests to the FBI for information pertaining to the assassinations of President Kennedy and Dr. Martin Luther King, Jr. Years passed without any response to his requests.

On December 6, 1977, Weisberg received a letter from Mr. Allen McCreight, Chief, Freedom of Information/Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, in which McCreight informed him--for the first time--that on December 7, 1977 the FBI would be releasing the first of two segments of Headquarters records on the assassination of President Kennedy, and that the two segments together would total approximately 80,000 pages.

In replying to McCreight, Weisberg pointed out that he had filed "two dozen or more" FOIA requests for records on President

Kennedy's assassination but that there had been no compliance. In addition to soliciting "any explanation you would care to provide for this persisting non-compliance," Weisberg made a new information request which asked for:

1. All worksheets related to the processing of FBI Headquarters records on the assassination of President Kennedy;

2. All other records related to the processing, review, and release of these records;

3. Any other records which indicated the content of FBI Headquarters records on the assassination of President Kennedy, and,

4. Any separate list or inventory of FBI records on President Kennedy's assassination not yet released. [App.]

On February 13, 1978, there having been no response to his December 6, 1977 FOIA request, Weisberg filed suit in District Court.

A week after Weisberg filed suit, the Department of Justice replied to his January 19, 1978 appeal. Writing in the name of Acting Deputy Attorney General Benjamin Civiletti, Mr. Quinlan J. Shea, Jr., Director of the Office of Information and Privacy Appeals, informed Weisberg that:

> Even prior to the receipt of your letter of January 19, I had been discussing with the Bureau the matter of the possible release of its worksheets; that was in the general sense--not just the Kennedy case--and resulted from my testimony before the Abourezk Subcommittee late last year. At that time, former Deputy Attorney General Flaherty and I assured the Subcom-

> mittee that we would give serious attention to the problem of giving requesters more information, at the initial stage, about the nature and quantity of records to which access is denied. ***
>
> With respect to the actual Kennedy assassination worksheets, it may possibly turn out not to be necessary for me to act formally. The Bureau is still considering whether to put "clean" copies of the final version of these items into the reading room and otherwise to make them available to interested persons. [App.]

By letter dated March 6, 1978, Chief McCreight responded to Weisberg's December 6, 1977 FOIA request, telling him: "Please be assured that we are making every effort to process your request promptly." [App.] On April 12, 1978, McCreight sent Weisberg "2,581 pages of inventory worksheets utilized in the processing of files pertaining to the investigation into the Asssassination of President John F. Kennedy." [App.] However, no records other than these worksheets were provided.

B. Proceedings in District Court

1. Government's Motion to Dismiss/Summary Judgment

On April 18, 1978, the government told the District Court that "defendants will move for summary judgment within the next thirty (30) days." The thirty days, it asserted, "is necessary in order that defendants might be afforded an opportunity to prepare proper affidavits." It also mentioned the workload of government counsel.

Two and a half months later, on July 3, 1978, the government filed a motion to dismiss or, alternatively, for summary judgment. The motion was supported by the affidavits of two FBI Special Agents, David M. Lattin and Horace P. Beckwith. Both affidavits were executed on April 28, 1978; both consisted largely of familiar FBI boilerplated. Beckwith's affidavit primarily dealt with excisions made on the worksheets on the basis of Exemption 2, 7(C), 7(D), and 7(E). In large measure it was identical in content and language to the affidavit he had executed just eleven days earlier, on April 17, 1978. A key paragraph, identical to one in his earlier affidavit, asserted that:

> (7) The release of these inventory worksheets is pursuant to plaintiff's request for records relevant to the processing and release of the original records. <u>These worksheets represent the only documents available within the FBI which are responsive to plaintiff's request</u>. (Emphasis added) [App.]

The Lattin Affidavit attempted to justify, in extremely vague and conclusory language, 19 excisions made on the worksheets under Exemption 1. All 19 excisions were said to be classified "confidential." Lattin swore that he had determined that "the proper classification has been assigned and that they have been appropriately marked in accordance with EO 11652 and Section 4(A), and 28 C.F.R. 17.40, <u>et seq</u>." [Lattin Affidavit, ¶9]

Of the 19 classified items on the worksheets, Lattin stated that 13 were classified because they would "reveal cooperation with foreign police agencies." [Lattin Affidavit, ¶6] Four items

were allegedly classified because they "could identify an intelligence method," one which Lattin described as "a method that was directed at establishments of foreign governments within the United States." [Lattin Affidavit, ¶7] Finally, two of the items were purportedly classified because they would identify intelligence sources. According to Lattin, "[b]oth of these sources are foreign nationals having contacts with foreign establishments or individuals in foreign countries." [Lattin Affidavit, ¶8]

Lattin did not state that he had examined the underlying documents, i.e., the FBI documents from which the "classified" information on the worksheets had been extracted, and he did not state that the underlying documents were actually properly classified under E.O. 11652. Nor did he state that the "classified" information on the worksheets was not already a matter of public knowledge.

2. Plaintiff's Opposition

On August 2, 1978, plaintiff filed an Opposition to the government's motion to dismiss/summary judgment. The Opposition was supported by two lengthy affidavits by Harold Weisberg, dated July 10 and July 19, 1978, and numerous exhibits. The Opposition and these supporting materials disputed the government's contentions as to the adequacy of the search for records responsive to the request and all claims of exemption for the excisions made on the worksheets.

3. Plaintiff's Attempts to Exercise Discovery

On August 16, 1978, plaintiff noted the depositions of FBI Agents Allen H. McCreight and Horace P. Beckwith and issued a subpoena duces tecum requiring them to bring certain records with them. The notice of deposition specified that the depositions would be taken on August 30, 1978. However, the day before the depositions were to be taken, Weisberg's counsel was told, upon phoning defendants' attorney, that Agents Beckwith and McCreight would not appear and that the government was filing a motion to quash the depositions. Consequently, no depositions were taken.

On October 4, 1978, Weisberg again noted the depositions of Beckwith and McCreight, this time for October 31, 1978. No subpoena duces tecum was issued in connection with this deposition. On October 16, 1978, the government again moved for a protective order, asserting that the court should act on pending dispositive motions prior to any discovery, and that the depositions "would indeed be burdensome and possibly a waste of resources." (Defendant's 10/16/78 Memorandum in Support of Motion for a Protective Order, p. 3.)

On October 25, 1978, the District Court issued an order granting the Motion for a Protective Order. The Court made no findings and stated no grounds for its order.

4. Oral Argument

On January 10, 1979, oral argument was held on the government's Motion to Dismiss/Summary Judgment. At oral argument Weis-

berg pointed out that the E.O. 12065, the new Executive order governing national security classification, had become effective on December 1, 1978. He argued that because E.O. 12065 significantly changed the security classification standards, the determinations made by Special Agent Lattin under E.O. 11652 were no longer valid.

On January 12, 1979, the District Court ordered the government to submit within ten days "an affidavit by the appropriate person regarding classification status under Executive Order 12065 of those documents at issue in this action previously classified pursuant to Executive Order 11652." His order also gave Weisberg just five days to respond to the government's new security classification affidavit. [App.]

On January 22, 1979, the government filed an affidavit by FBI Special Agent Bradley B. Benson which asserted that the information previously said to have been properly classified under E.O. 11652 was also classified under E.O. 12065.

Weisberg's counsel did not receive a copy of the Benson affidavit until January 25, 1979. The following day he filed a motion for an extension of time in which to respond to the Benson affidavit. In the motion he represented that he had mailed a copy of the affidavit to Weisberg the day he received, but that Weisberg might not get it until January 29th; that Weisberg would undoubtedly want to file a counteraffidavit, but that he had been unable to reach him by phoning him at his Frederick, Maryland home; that Weisberg should be allowed several days to check his own records and to prepare a counter affidavit; and that he himself would

be working for the next several days to complete a brief due in the Court of Appeals in another Weisberg case.

The District Court granted the motion for an extension of time to and including February 8, 1979. On February 9, 1979, Weisberg moved for a further extension of time, to and including February 17, 1979, within which to respond to the Benson affidavit. Weisberg's counsel represented to the Court that Weisberg had nearly completed his counteraffidavit, but that he suffered from circulatory problems and had not been feeling well; that in recent weeks he had passed out on one occasion and had nearly done so again "only last week"; that he had been forced to take time out to see his physician and to undergo medical testing; and that because of his personal situation, he had also had to spend time battling to keep his 100-yards long country lane free of ice and snow. The motion concluded by noting that, weather and health permitting, Weisberg would be coming to D.C. on February 13, 1979, to hear oral argument in the Court of Appeals on one of his cases, and that at that time he should be able to furnish his counsel with a completed draft of his affidavit. He requested an additional four days after this date so his counsel could make any necessary revisions in the affidavit and draw up a memorandum to accompany it.

On February 12, 1979, the District Court denied the motion for a further extension of time in which to respond to the affidavit of Special Agent Benson.

5. District Court's Opinion

On February 15, 1979, the District Court issued an Opinion and an order granting summary judgment in favor of the government. [App. -] The Opinion recited that Weisberg "seeks the disclosure of worksheets and records relating to the processing, review and release of the material on the assassination of President Kennedy made public by the Federal Bureau of Investigation on De- 7, 1977 and thereafter." (Emphasis added) [App.] Although only worksheets had been provided Weisberg, the District Court made no finding as to whether an adequate search--or any search at all--had been made for other records relevant to his request.

With respect to Exemption 1, the District Court found that "the FBI affidavits show that the documents are classified according to the proper procedural criteria and that they are correctly withheld under both Executive Orders 11652 and 12065." Relying upon Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977), and the fact that the legislative history of the Freedom of Information Act contains a statement that "substantial weight" is to be accorded to agency affidavits setting forth the basis for claims of exemption under 5 U.S.C. § 552(b)(1), the Court found that Weisberg had made no showing of lack of good faith on the part of the FBI, and that "[t]he defendants have sustained their burden of showing that the withheld material is protected from disclosure under Exemption 1." [App.]

With respect to Exemption 2, the District Court found that the deletion of informant file and symbol numbers was related to

the internal practices of an agency, that release of these numbers "could result in the disclosure of the identity of the informant, protected under 7(D)," and that "[i]t is obvious that the public's interest in knowing the names of FBI informants is neither significant nor genuine when compared with the FBI's need to keep this information confidential." Therefore he found that "the numbers utilized by the FBI have been properly withheld pursuant to Exemptions 2 and 7(D)." [App. -]

In regard to Exemption 7(C), the Court found that the government had invoked it "to withhold the names, background data and other identifying information involving third parties as well as the names of FBI agents who produced the worksheets." Asserting that the withheld information "pertains to individuals coming to the attention of the FBI who were not the subject of the investigation," the Court held that "[t]he public interest in disclosing this information does not outweigh the privacy interests of these individuals." [App.]

Turning to Exemption 7(D), the Court asserted that the government had invoked it "to withhold the identity of confidential informants and the information supplied by them." He went on to construe the phrase "confidential source" as used in Exemption 7(D) to include "any source whether it be an individual, an agency or a commercial or institutional source." On this basis he ruled that all material withheld under 7(D) is exempt from disclosure. [App.]

Finally, with respect to Exemption 7(D), the Court stated that the FBI had asserted it "to protect two investigative techniques from disclosure." On the basis of this meagher assertion, the Court conlcuded only that "[t]his is consistent with the purpose of the exemption." [App.]

The Court made no finding that any of the information sought by Weisberg had been "compiled for law enforcement purposes," as required by Exemption 7.

6. Motion for Reconsideration and Clarification

On February 16, 1979, Weisberg filed a Motion for Reconsideration and Clarification Pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure. The motion was supported by three affidavits by Weisberg and numerous exhibits. Weisberg had originally intended to file one of these affidavits--the one executed on February 14, 1979--in opposition to the Benson Affidavit. However, because the District Court refused to give Weisberg a few more days to complete his counteraffidavit, even though counsel had represented to the Court that he was in ill health, the affidavit was filed after the Court's decision rather than before it.

The Motion for Reconsideration provided new materials bearing directly on the government's claims and the Court's findings. For example, on the issue of whether he had been provided all materials within the scope of his request, Weisberg provided incontrovertible documentary evidence of another set of worksheets, differing in many particulars from the one provided to him but in-

tended to describe the same records. This different set of worksheets had been sent to a different requestor on October 8, 1977, a month prior to Weisberg's FOIA request. [See 2/21/79 Weisberg Affidavit, ¶¶47-51, 70; Exhibits 6-7. App. - , ; -]

The Benson Affidavit marked the first time that the government had identified any excisions in a way which made it possible to locate them on the 2,581 pages of worksheets. While this itemization was limited to the 19 excisions allegedly based on national security grounds, it did make it possible for Weisberg to check Benson's representations concerning these excisions with the underlying documents or routing slips which referred to them.

The materials attached to Weisberg's February 14 affidavit, garnered as a result of the time-consuming check he made, showed that many, if not most, of the excisions made under Exemption 1 consisted of masking the initials "RCMP," standing for "Royal Canadian Mounted Police." The documents produced by Weisberg also established that the cooperation of the Royal Canadian Mounted Police with the FBI in the investigation of the assassination of President Kennedy had already been disclosed by the FBI's release of routing slips with this information on them. [See 2/14/79 Weisberg Affidavit, ¶¶66-70; Exhibits 12-14. App. - ; -]

In addition, Weisberg swore that the fact that the Mounties had cooperated with the FBI during the investigation of the President's assassination had long been public knowledge; that this information is available in the National Archives; and that Weisberg had himself published records showing the cooperation of the

Mounties and the FBI. [See 2/14/79 Weisberg Affidavit, ¶¶99-107. App. -]

Weisberg's Motion for Reconsideration also pointed out that Benson's affidavit made it apparent that the worksheets had not been classified until after he filed suit for them. Because Executive Order 11652 provided that classification was to occur at the time of origination, this disclosure contradicted the Lattin Affidavit, which swore that the proper classification procedures under E.O. 11652 had been followed.

On March 22, 1979, Weisberg filed a motion to vacate the Protective Order which the Court had issued on October 25, 1979. At the same time he also filed a motion for a Vaughn v. Rosen index.

The government filed an Opposition to the Motion for Reconsideration on March 22nd. On March 29th the District Court denied the Motion for Reconsideration.

SUMMARY OF ARGUMENT

This is a Freedom of Information Act lawsuit for all worksheets related to the processing of FBI Headquarters records on the assassination of President Kennedy; all other records relating to the processing, review, and release of these records; and any inventories of JFK assassination records. The FBI claimed that the only records responsive to the request were 2,581 pages of worksheets which it released to plaintiff Weisberg. However, Weisberg established by documentary evidence that other records exist which come within the scope of his request, including other sets of inventory worksheets. These records were not provided. The District Court made no finding as to whether all records within the scope of the request had been provided, nor did he rule on the adequacy of the search which was made for such records. Because an agency must prove in a FOIA case that each document which falls within the class requested either has been produced, is unidentifiable, or is wholly exempt, summary judgment was improper. National Cable Television Association v. F.C.C., 156 U.S.App.D.C. 91, 194, 479 F.2d 183, 186 (1973).

The government claimed that certain excisions made on the worksheets were justified under Exemption 1. The District Court, erroneously relying upon Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977), which had previously been substantially modified by Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978),

and giving conclusive weight to the FBI's affidavits, upheld the government's claims. However, Weisberg demonstrated by documentary evidence that many, if not most of the materials deleted under Exemption 1 consisted of nothing more than the initials "RCMP", standing for "Royal Canadian Mounted Police", that cooperation between the Mounties and the FBI during the investigation of President Kennedy's assassination had been public for years, and that the FBI itself had already released the withheld information.

In addition, despite deceptively worded FBI affidavits to the contrary, the proper classification procedures were not followed. In violation of the procedures required by E.O. 11652, as implemented by the National Security Council Directive of May 17, 1972, and the Justice Department's own regulations, the worksheets were not classified at the time of origination. In fact, they were not classified until several months after Weisberg's FOIA request. The failure to follow classification procedures prescribed by Executive order, including the time of classification, can compel disclosure. Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974). Where proper classification procedures have not been followed and the government alleges that disclosure would constitute a grave danger to national security, the District Court should examine the materials in camera to determine whether they may be withheld according to the exacting standard employed in First Amendment cases involving prior restraint. Halperin v.

Department of State, 184 U.S.App.D.C. 124, 131-132, 565 F.2d 699, 706-707; Ray v. Turner, 190 U.S.App.D.C. 290, 318, 587 F.2d 1197, 1215, note 62 (concurring opinion of Chief Judge Wright).

Because materials which are already publicly known cannot be properly classified according to the substantive criteria of either E.O. 11652 or E.O. 12065, the "RCMP" excisions must be restored. The government's conclusory affidavits do not provide an adequate basis for awarding summary judgment with respect to any other Exemption 1 excisions. Moreover, under E.O. 12065 even if the unauthorized disclosure of information would result in identifiable harm to the national security, such information is protected by Exemption 1 only if that identifiable harm is not outweighed by the public interest in disclosure. The affidavit of the FBI Special Agent who examined the Exemption 1 excisions under the provisions of E.O. 12065 fails to recite that he made this determination.

The District Court also upheld the government's excision of informant symbol and file numbers under Exemption 2, ruling that these numbers "relate to the internal practices of an agency." This ruling is defective in two regards. First, it does not assert that these numbers relate solely to such practices, even though this is plainly a requirement of the law. Secondly, it has been held that in the phrase "internal personnel rules and practices of an agency", the phrase "internal personnel" modifies both "rules" and "practices". Jordan v. United States Dept. of Justice, 192 U.S.App.D.c. 144, 155, 591 F.2d 753, 764 (1978). The FBI made no

showing that the informants represented by the excised symbol and file numbers were FBI personnel. Weisberg provided documentary evidence of one FBI informant covered by a symbol number who was required to sign a statement that he was not an FBI employee.

Because the disclosure of informant file and symbol numbers does not reveal the names or identities of informants, there is no harm to governmental interests. On the other hand, there is a genuine and substantial public interests in the disclosure of these numbers because they provide a means of evaluating the content and significance of events and information. They also enable an evaluation of the FBI's performance in its investigation of President Kennedy's assassination. On balance the public interest in disclosure clearly predominates. Thus, even if such numbers fall within the purview of Exemption 2, they must be disclosed.

The government also made excisions on the worksheets under Exemptions 7(C), (D), and (E). Weisberg contends that this Exemption is inapplicable because the government did not make a required preliminary showing that the FBI compiled these records for "a law enforcement purpose." In this regard he notes that FBI Director J. Edgar Hoover testified before the Warren Commission that there was no Federal jurisdiction to investigate the assassination of the President, and that the Warren Commission stated it had no law enforcement purposes.

The FBI excised the names of the FBI agents who prepared the inventory worksheets on the grounds that the release of their names "could cause public exposure or harassment of Special Agents and their families . . . ." These excisions are unjustifiable and the

reason advanced for them is preposterous. FBI agents "have no legitimate privacy right to deletion of their names. Their involvement in investigative activities for the FBI is not a 'private fact'." Ferguson v. Kelley, 448 F.Supp. 919, 923 (N.D.Ill. 1977) Morever, the overriding public interest in the fullest possible disclosure of information about the assassination of President Kennedy would have to be given substantial weight in balancing privacy considerations against the public interest were any valid privacy interest really presented.

With respect to 7(C) excisions made to protect the names and other identifying information on third parties, the District Court failed to take into account the overriding public interest in disclosure of information about the Kennedy assassination and the obvious liklihood that most such information in FBI files has already been publicly disclosed through books, the news media, congressional hearings and the like. The FBI made no claim that its 7(C) excisions do not include information already publicly known. In addition, in view of the numerous examples Weisberg adduced of the FBI's inconsistent application of 7(C), the refusal of the District Court to allow him to undertake discovery and the failure of the FBI to provide a Vaughn v. Rosen-type index made summary judgment inappropriate.

The FBI's invocation of 7(D) presents similar issues. The government failed to make any showing that information withheld under this claim of exemption was confidential or that there was

an agency promise or implicit agreement to hold the matter in confidence. Rural Housing Alliance v. U.S.Dept. of Agriculture, 162 U.S.App.D.C. 122, 498 F.2d 73 (1974); Local 32 v. Irving, 91 LRRM 2513 (W.D.Wash. 1976). In addition, the FBI made no claim that the information excised under 7(D) was not already public domain and it did not provide an index and itemization of these excisions. Consequently, there was no a sufficient basis upon which to base an award of summary judgment.

The District Court's ruling that the phrase "confidential source" as used in 7(D) applies to an agency or a commercial or institutional source is clearly wrong since the legislative history of the Act shows that it was intended to refer only to human sources.

The FBI also deleted information on the worksheets under Exemption 7(E) because it would reveal "investigative techniques and procedures." The legislative history of 7(E) shows that it is not intended to apply to matters which are already publicly known. See Conference Report, H.Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974). The FBI failed to state that the investigative techniques it excised are not publicly known. Accordingly, summary judgment was improperly granted with respect to these claims also.

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPER WHERE ADEQUACY OF SEARCH FOR DOCUMENTS RESPONSIVE TO FOIA REQUEST WAS IN DISPUTE

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. Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824,

827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences 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." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

In a Freedom of Information Act lawsuit, National Cable Television Association v. F.C.C., 156 U.S.App.D.C. 91, 94, 479 F. 2d 183, 186 (1973), this Court held that in order to prevail on a motion for summary judgment,

> the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.

In this case Weisberg's seeks:

1. All worksheets related to the processing of FBI Headquarters records on the assassination of President Kennedy;

2. All other records related to the processing, review, and release of these records;

3. Any other records which indicated the content of FBI Headquarters records on the assassination of President Kennedy, and,

4. Any separate list or inventory of FBI records on President Kennedy's assassination not yet released.

The government provided Weisberg with a set of worksheets said to total 2,581 pages. It then submitted an affidavit by FBI Special Agent Horace P. Beckwith which asserted that: "These worksheets represent the only documents available within the FBI which are responsive to plaintiff's request." [4/17/78 Beckwith Affidavit, ¶4. App.]

Agent Beckwith has been used extensively as an affiant in Weisberg's FOIA cases. He has been publicly reported as being an unindicted co-conspirator in FBI illegalities. [See 7/10/78 Weisberg Affidavit, ¶¶16-19] This alone militates against giving any credence to his affidavits. In addition, however, he has misrepresented critical facts in other FOIA cases. Thus, as a result of an affidavit which Agent Beckwith submitted in Lesar v. Department of Justice, Civil Action No. 77-0692 (now pending in this Court as Case No. 78-2305), Weisberg learned that in another case, Weisberg v. Department of Justice, Civil Action No. 75-1996, Beckwith had misrepresented two Atlanta Field Office serials on the assassination of Dr. King as consisting of 2 pages, neither of which was withheld, when in fact they consisted of 29 pages, 27 of which had been withheld without Weisberg's knowledge. [See 7/10/78 Weisberg Affidavit, ¶19; Exhibit 2. App. ;]

In this case, Agent Beckwith has again misrepresented the facts. The worksheets provided Weisberg were not "the only documents available within the FBI which are responsive to [his] request." Indeed, they are not even the only set of worksheets responsive to his request. For example, a different set of worksheets, one which did not itemize the identical underlying records and which contained improper obliterations, was sent to another requester, a Mr. Paul Hoch. Comparison of the Hoch worksheets with those sent to Weisberg reveals "different entries, different handwriting, different information and other differences, even though both sets are dated July, 1977." [2/21/79 Weisberg Affidavit, ¶¶43-51; Exhibits 6-7. App. - ; -]

Nor is Beckwith's affidavit true with respect to Item 2 of Weisberg's request, which calls for "[a]ll records related to the processing, review, and release of" the FBI's Central Headquarters files on the assassination of President Kennedy. Weisberg provided evidence that such records existed when he filed his Opposition to the government's Motion to Dismiss/Summary Judgment.

For example, Weisberg noted that in connection with Weisberg v. Bell, et al., Civil Action No. 77-2155, FBI Director Clarence M. Kelley had tried to deny him a total waiver of search fees and copying costs for the FBI's Kennedy assassination records by representing to his counsel--and the District Court--that "[w]e anticipate that additional sets of documents will be produced and placed in other research facilities, such as the Library of Con-

gress, in the near future." [1/9/78 letter from Director Kelley to James H. Lesar. Opposition Attachment A. App.] Three days later Office of Privacy and Information Appeals Director Quinlan J. Shea, Jr. wrote, in the name of Acting Deputy Attorney General Benjamin R. Civiletti, that in recognition of the historical importance of the FBI's records on President Kennedy's assassination, "Director Kelley . . . on his own initiative, made arrangements for the released materials to be made available at a number of different public locations . . . ." [1/12/78 from Quinlan J. Shea, Jr. to James H. Lesar. Opposition Attachment B. App.]

Unless these representations were false--and it bears repeating that they were made to United States District Judge Gerhard Gesell, as well as to Weisberg's counsel--then the FBI should have records relating to the decision to place these documents in other locations, such as the Library of Congress, as well as records reflecting those locations actually selected, the conditions under which the recipients got them, and the arrangements for their actual transmittal. No such records were provided to Weisberg.

It is also obvious that the decision to place a set of these Kennedy assassination records in the FBI reading room did not spring from the head of Director Kelley as did Athena from the head of Zeus, full-grown, in complete armor, and with a might war-whoop. Such a decision would not be made without discussions and memoranda on whether this project should be undertaken, as well as the costs and mechanics of doing it. One example of this kind

of record is the November 17, 1977 memorandum from A. J. Decker to Mr. McDermott which discusses the costs involved in processing the "approximately 600 sections" of FBI records which comprise the JFK assassination files. [Opposition Attachment C; App.] It was not provided to Weisberg in response to the FOIA request which is the subject of this lawsuit, although it should have been.[1/] Nor were any other documents of this kind supplied.

The Decker memorandum states that approximately 60 FOIA requests "of various scope" had been made for FBI records on President Kennedy's assassination. These requests and the administrative records generated in response to them are clearly within the scope of Item 2 of Weisberg's request. Yet none have been provided. Also within the scope of Item 2 would be any list of FOIA requests for Kennedy assassination records. At the September 16, 1976 hearing in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996, FBI Special Agent John Howard testified that such a list was compiled. [Opposition Attachment D; App.] No such list has been provided to Weisberg.

Finally, Item 4 of Weisberg's request asked for "[a]ny separate list or inventory of FBI records on President Kennedy's assassination not yet released." Weisberg provided the District Court with documentary evidence that FBI Headquarters had directed all

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1/ The Decker memorandum shows on its face that it was distributed to no less than six FBI officials, not including Decker or McDermott. It was marked to the attention of FBI Special Agent Horace P. Beckwith, who twice submitted affidavits declaring that the FBI had no records responsive to Weisberg's FOIA request except the worksheets provided him.

59 FBI field offices to provide inventories of all records relating to the assassinations of President Kennedy and Dr. King. [See 2/21/79 Weisberg Affidavit, ¶¶71-73; Exhibits 11-12; App. - ; -] The FBI did not provide Weisberg with copies of these or other such inventories.

On this evidence it is obvious that the FBI did not produce all records responsive to Weisberg's request. It was, therefore, error for the District Court to grant summary judgment.

The District Court also abused its discretion in granting a Protective Order forbidding the taking of the depositions of FBI Agents Beckwith and McCreight. Such orders are "generally regarded by the court as both unusual and unfavorable, and most requests of this kind are denied. Grinell Corp. v. Hackett, 70 F.R.D. 326, 333-334 (1976), citing Investment Properties International, Ltd. v. Ios, Ltd., 459 F.2d 705, 708 (2d Cir. 1972). In barring Weisberg from taking these depositions, the District Court denied him the opportunity to exercise discovery on the issue of the adequacy of the search for records responsive to his request. In Association of National Advertisers, Inc. v. Federal Trade Commission, et al., 28 Ad.L.2d 643 (D.D.C. 1976), an FOIA case in which the plaintiff challenged the adequacy of the search for responsive records, then Chief Judge Jones of the United States District Court for the District of Columbia ruled that:

> It is clear that civil discovery is a proper method for pursuing factual disputes as to the adequacy or completeness of an agency search for records requested pursuant to FOIA. See

National Cable Television Ass'n, Inc. v. FTC
479 F.2d 183, 193 (DC Cir. 1973).

It is apparent, therefore, that the District Court also committed reversible error in denying Weisberg the opportunity to depose Agents Beckwith and McCreight as to the adequacy of the FBI's search for records responsive to his request.

II. DISTRICT COURT COMMITTED ERROR IN AWARDING SUMMARY JUDGMENT TO GOVERNMENT ON EXEMPTION 1 CLAIMS

Exemption 1 of the Freedom of Information Act excludes from its mandatory disclosure requirements matters that are--

> (1)(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

The government filed affidavits by three different FBI agents alleging that information on the worksheets provided to Weisberg had been excised in the interests of national security. The District Court found that "the FBI affidavits show that the documents are classified according to the proper procedural criteria and that they are correctly withheld under both Executive Orders 11652 and 12065." In addition, the Court ruled that "[t]here has been no showing of lack of good faith on the part of the FBI." [App.]

A. District Court Erroneously Relied on Weissman v. CIA

In making its determination, the District Court erroneously relied upon Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692

(1977), which was substantially modified, if not in fact overturned by Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978), a decision which this Court handed down nearly six months prior to the District Court's ruling in this case.

B. District Court Misconstrued Weight Required To Be Given To Agency Affidavits

In holding that the government was entitled to summary judgment on its Exemption 1 claims because the legislative history "clearly indicates that substantial weight is to be accorded to agency affidavits setting forth the basis for exemption under subsection (b)(1)," the District Court relied upon a passage in the Conference Report on the 1974 Amendments to the Freedom of Information Act which states:

> . . . the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in [Exemption 1] cases . . . , will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

H.R. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974)

The District Court misconstrued the suggestion of the conferees that "substantial weight" be accorded agency affidavits directed at establishing Exemption 1 claims. He gave no consideration whatsoever to Weisberg's detailed and carefully documented counteraffidavits. He gave conclusive weight to the FBI's affida-

vits, even though they were highly conclusory at best and deliberately deceptive at worst. This is not what the conferees intended when they stated that they expected the courts to give "substantial weight" to agency affidavits dealing with the classified status of withheld information. As one commentator has written:

> This suggestion by the conferees is merely a reminder that those within the executive branch authorized to make security classifications will often be in a better position to evaluate the need for classification than the party seeking disclosure. The conferees have not suggested that the evidence of the party seeking disclosure should be afforded any less "substantial weight." In fact the legislative history indicates that it was Congress' intent that the evidence of both parties be accorded equal weight, commensurate with the degree of expertise, credibility, and persuasiveness underlying it. More fundamentally, the "substantial weight" suggestion of the conferees should in no way be taken to suggest the imposition of a presumption favoring the agency. President Ford vetoed the Act because he felt the conferee language failed to create such a presumption; Congress, in its initial consideration of the 1974 amendments, specifically rejected a similar presumption contained in the Senate draft of the bill. (Emphasis added) (Citations omitted)

Howard Roffman, Commentary, "Freedom of Information: Judicial Review of Executive Security Classifications," 28 University of Florida Law Review 551, 558-559 (Winter 1976).

For the District Court to give the FBI affidavits conclusive weight was improper. Given the nature of the FBI affidavits and the totality of the circumstances which had been laid before the

District Court, according them "substantial weight" was also improper. As Chief Judge Wright stated in his concurring opinion in Ray v. Turner:

> An affidavit explaining in detail the factors about particular material that have convinced the agency that the material should be classified should and will be quite influential with a reviewing court. On the other hand, an affidavit stating only in general or conclusory terms why the agency in its wisdom has determined that the criteria for nondisclosure are met should not and cannot be accorded "substantial weight" in a de novo proceeding. To substitute a presumption favoring conclusory agency affidavits for the court's responsibility to make a de novo determination with the burden on the government would repeal the very aspects of the 1974 amendments that made it necessary for the Congress to override the President's veto. (Emphasis in original)

Ray v. Turner, supra, 190 U.S.App.D.C. at 316-317, 587 F.2d at 1213-1214.

C. Withheld Information Was Not Classified in Accordance With Procedural Requirements of E.O. 11652

The affidavits which the FBI submitted in support of its Exemption 1 claims were deliberately worded to give the false impression that, as required by Exemption 1, the withheld information on the worksheets was classified in accordance with the procedural requirements of E.O. 11652. The District Court expressly ruled that this information was classified "according to the proper procedural criteria." [App.]

The first FBI affidavit to address the classified status of the information on the worksheets was the April 17, 1978 affidavit

of FBI Special Agent Horace P. Beckwith, which stated:

> [Exemption 1] exempts from disclosure information which is currently and properly classified pursuant to Executive Order 11652. This information contained in the inventory worksheets in the form of notations and short phrases is identical to information which is duly classified in the original documents. This information, if released, would identify foreign sources or sensitive procedures, thereby jeopardizing foreign policy and the national defense. [4/17/78 Beckwith Affidavit, ¶3(a)]

The Beckwith Affidavit thus gives the clear impression that certain "notations and short phrases" appearing on the worksheets had already been classified in that form, as well as in the underlying "original documents." But if the January 22, 1979 affidavit of FBI Special Agent Bradley B. Benson is correct, this impression is entirely false, since Benson swears that the information on the worksheets was not classified until April 27, 1978, ten days after the date of the Beckwith Affidavit. [Benson Affidavit, ¶10]

On April 28, 1978, FBI Special Agent David M. Lattin executed an affidavit in which he swore that:

> (9) The affiant has reviewed the worksheets and has determined that the proper classification has been assigned and that they have been appppropriately marked in accordance with EO 11652 and Section (4)(A), and 28 C.F.R. 17.40 et seq.

This, too, gives the false impression that the procedural requirements of E.O. 11652 (and Exemption 1) were followed. It is carefully worded to attain the FBI's objective of misleading both plaintiff and the District Court while avoiding outright perjury.

The Lattin Affidavit refers to Section 4(A) of E.O. 11652 because it pertains to the informational content of certain required classification markings but not to the time when classification should take place. Yet the National Security Council Directive implementing E.O. 11652 requires that: "At the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to the or exempt from the General Declassification Schedule." (Emphasis added) Section 4(A), National Security Council Directive, 43 Fed.Reg. 10053 (May 17, 1972). Similarly, Lattin's citation to "28 C.F.R. 17.40 et seq" omits reference to 28 C.F.R. 17.14, which also provides that classification shall occur "at the time of origination." (Emphasis added)

Even prior to the enactment of the 1974 amendments to the Freedom of Information Act, this Court held that failure to comply with the classification procedures prescribed by Executive order, including the time of classification, could compel disclosure. Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974). The Amended Act clearly provides that in order to qualify for nondisclosure under Exemption 1, the material withheld must be classified in accordance with both the substantive and procedural requirements of the relevant Executive order. 5 U.S.C. § 552(b)(1). The Conference Report on the 1974 amendments explicitly states that material withheld under Exemption 1 must be properly classi-

fied "pursuant to both procedural and substantive criteria contained in such Executive Order." H.Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974). (Emphasis added)

The courts have hedged enforcing this provision of the law as it was written. However, this Circuit has held that where the proper classification procedures have not been followed and the government alleges that disclosure would constitute a grave danger to national security, the District Court should examine the materials in camera to determine whether they may be withheld according to the exacting standard employed in First Amendment cases involving prior restraint. Halperin v. Department of State, 184 U.S.App.D.C. 124, 131-132, 565 F.2d 699, 706-707; Ray v. Turner, 190 U.S.App.D.C. 290, 318, 587 F.2d 1197, 1215, note 62 (concurring opinion of Chief Judge Wright).

The Benson Affidavit states that although the worksheets dated to August, 1977, they were not classified until April 27, 1978. This is some nine months after origination and five months after Weisberg requested them. This failure to follow proper procedures requires that the District Court be reversed as to the Exemption 1 claims.

D. Withheld Information Is Not Properly Classified Under Substantive Criteria of Executive orders 11652 and 12065

The FBI's justification for withholding information on the worksheets under Exemption 1 sounds formidable. For example, in explaining the "identifiable damage" to the national security

which "could reasonably be expected" from the "unauthorized disclosure" of some of the allegedly classified information on the worksheets, Special Agent Benson declares, at paragraph (8)(a):

> If a withheld classified item identifies a foreign government source or international organization source, the item is so identified but with no further particularity. The information may not be further described without breaching the assurance of confidentiality afforded the foreign source. The revelation of either the identity of the source or the information furnished could reasonably be expected to cause identifiable damage to the national security by the curtailment of such information from foreign or international sources who demand or expect confidentiality. The revelation could harm foreign relations, cause expulsion of United States officials and precipitate a break in normal diplomatic intercourse. The revelation could cause physical harm or other personal disruption in the lives of cooperative foreign officials and their sources.

a/

The spectre raised by such claims is enough to make all but the most hardened FOIA recidivist withdraw his information request forthwith and abjectly request that he forgiven for his impudence. After all, what right-minded citizen merely questing after information about the way his government operates wants to cause a break in diplomatic relations or physical harm to "cooperative foreign officials"?

But it turns out that the FBI affidavits, though written to decieve judges and to intimidate them by evoking the horrific possibility that actual damage to national security might result from the release of the requested information, are purely hallucinogenic. What all this claptrap is about is withholding the initials "RCMP"--standing for "Royal Canadian Mounted Police"--under

the guise that their "disclosure" would actually harm national security.

Weisberg's February 14, 1978 affidavit establishes that the earth-shattering news that the Mounties had cooperated with the FBI in the investigation of President Kennedy's assassination had already been disclosed by the FBI itself. Moreover, it had long been public knowledge. This information is freely available at the National Archives, and Weisberg has himself published records showing this cooperation. [See 2/14/79 Weisberg Affidavit, ¶¶69-70, 99-107; Exhibits 12-14. App. - , - ; -]

Executive orders 11652 and 12065 both make it clear that the purpose of security classification is to protect against the "unauthorized disclosure" of official information which must be protected in the interests of national security. It is obvious that information which is already a matter of public knowledge cannot qualify for security classification under either order.

In addition, even if disclosure would result in identifiable harm to national security, under E.O. 12065 such information is protected by Exemption 1 only if that identifiable harm is not outweighed by the public interest in disclosure. The affidavit of Special Agent Benson, who purportedly examined the "classified" information on the worksheets under the provisions of E.O. 12065, fails to recite that he made this determination. Because it does not qualify for classification under the substantive criteria of either E.O. 11652 or E.O. 12065, the information on the worksheets which has been withheld under Exemption 1 must be released.

III. INFORMATION CANNOT BE WITHHELD UNDER EXEMPTION 7 WHERE RECORDS WERE NOT COMPILED FOR LAW ENFORCEMENT PURPOSES

The FBI deleted information on the worksheets on the authority of Exemption 7(C), (D), and (E). By its express terms, Exemption 7 applies only to "investigatory records compiled for law enforcement purposes." (Emphasis added) FBI Director J. Edgar Hoover, testifying before the Warren Commission, stated that there was no Federal jurisdiction to investigate the assassination of the President. Hearings Before the President's Commission on the Assassination of President Kennedy, Vol. V, p. 98. The Warren Commission explicitly stated that it had no law enforcement purposes. Report of the President's Commission on the Asssassination of President Kennedy, p. xiv. [See 7/10/78 Weisberg Affidavit, ¶¶41-42. App.]

In Weissman v. CIA, 184 U.S.App.D.C. 117, 120, 565 F.2d 692, 695 (1977), this Court held that where the CIA had conducted an extensive investigation of an American citizen living at home, without his knowledge and without authority to do so, "[i]t cannot be contended that this activity was for law enforcement purposes."

In this case the FBI made no showing that the materials withheld under Exemption 7 were derived from "investigatory records compiled for law enforcement purposes." The District Court made no such finding. Unless and until such a showing is made, any withholding under Exemption 7 is improper.

IV. AWARD OF SUMMARY JUDGMENT WITH RESPECT TO EXCISIONS MADE UNDER EXEMPTIONS 2 AND 7(C), (D), AND (E) WAS IMPROPER

As noted above, 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. Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 284, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In addition, on a motion for summary judgment, "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issues." Nyhus, supra, note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

The District Court violated these principles of summary judgment in upholding the government's claims of exemption. Exemption 1 has already been discussed in this context. A discussion of what is at issue with respect to the government's other claims of exemption follows.

A. Exemption 2

Exemption 2 excludes from mandatory disclosure matters that are: "related solely to the internal personnel rules and practices of an agency." Construing this provision in Department of the Air Force v. Rose, 425 U.S. 352 (1976), the United States Supreme Court held that: "Exemption 2 is not applicable to matters

subject to . . . a genuine and significant public interest." In so holding, the Court quoted Vaughn v. Rosen, 173 U.S.App.D.C. 187, 523 F.2d 1136 (1975) to the effect that:

> ". . . the Senate Report indicates that the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest.
>
> * * *
>
> Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.' [Soucie v. David, 145 U.S.App.D.C. 144, 157, 448 F.2d 1067, 1080 (1971)]"

Department of Air Force v. Rose, supra, at 375.

The two affidavits of Special Agent Beckwith contain a discrepancy as to the employment of Exemption 2. The first affidavit swears that this exemption was asserted "solely to remove informant file numbers." (Emphasis added) [4/17/78 Beckwith Affidavit, ¶3(b)] The second vows that it was used to remove "informant file numbers and informant symbol numbers." (Emphasis added) [4/28/78 Beckwith Affidavit, ¶6]

The District Court found that both informant file numbers and informant symbol numbers "relate to the internal practices of an agency." [App.] This finding is defective in two regards. First, it does not assert that they relate solely to such practices, even though this is plainly a requirement of the law. Secondly, the phrasing of Exemption 2 refers to "internal personnel

rules and practices of an agency", not "the internal practices of an agency", as the District Court would have it. In Jordan v. United States Dept. of Justice, 192 U.S.App.D.C. 144, 155, 591 F. 2d 753, 764 (1978), this Court observed that

> . . . every court which has considered the specific language of Exemption 2 has concluded, for good and sufficient reasons, that the phrase "internal personnel" modifies both "rules" and practices". (Citations omitted)

For reasons having to do with basic rules of English grammar, the legislative history of the exemption, and the general purpose of the Act, this Court reached the same conclusion. Id.

The issues which Weisberg raises in this regard are not academic. He put before the District Court evidence that the FBI had claimed Exemptions 2 and 7(D) for the file number of a known FBI informant who had signed an agreement with the FBI stating that he was not a Federal employee and would not represent himself as such. [See 3/21/79 Lesar Affidavit, ¶3; Attachment A. App. ;] An informant not employed by the FBI is obviously not covered by an exemption which pertains only to the "internal personnel practices" of the agency. This raises an issue of fact as to whether the Exemption 2 claims made by the FBI in this case erroneously assert coverage for non-FBI personnel, thus precluding summary judgment.

The District Court found that release of the informant file and symbol numbers "could result in the disclosure of the identity of the informant, protected by Exemption 7(D)." [App.] Weisberg contends that this is another disputed factual issue which the District Court improperly resolved in awarding summary judgment.

He insists that disclosing the symbol informant number does not reveal the names or identities of informants. In addition, the FBI has not stated that the names and identities of these informants are not already known. Where the informers are publicly known, there can be no basis for invoking Exemption 2 to cover their informant file and symbol numbers, even where they are (or were) FBI employees.

The District Court also opined that, "[i]t is obvious that the public's interest in knowing the names of FBI informants is neither significant nor genuine when compared with the FBI's need to keep this information confidential." (Emphasis added) [App.] This does not correctly state the issue, since the disclosure of informant file and symbol numbers does not reveal the names or identities of informants. In addition, it gives no indication what factors the District Court considered in weighing the public interest. It is obvious, however, that there is a very substantial public interest in evaluating both the information provided to the FBI in regard to President Kennedy's assassination and in evaluating the FBI's performance in investigating this national tragedy. Informant symbol numbers provide a means of evaluating the content and significance of events and information. For example, if the informant represented by a particular symbol number provides information known to be false on any occasion, all information provided by him must be viewed as suspect unless more reliably confirmed. In such cases, content cannot be evaluated

apart from the informant. Yet unless the symbol number is known, it will not be possible to make this sort of evaluation. [See 7/10/78 Weisberg Affidavit, Exhibit 3. App. -]

To give another example, it is obviously important to know whether the information in several FBI reports on the same subject came from a single informant or was supplied by two or more informants. Such information provides a means of ascertaining whether an informant's account is supported by information supplied by other informants or is contradicted by them. In turn, this provides a means of evaluating the actions taken or not taken by the FBI in response to information supplied by an informant. Unless the symbol informant numbers are divulged, there is no means of evaluating such considerations.

Thus there is a legitimate public interest in the disclosure of informant symbol numbers. Because disclosure of these numbers does not reveal the names or identities of informants, there is no harm to governmental interests. Thus the public interest predominates and they should be released.

B. Exemption 7(C)

Exemption 7(C) provides that the FOIA's compulsory disclosure requirements do not apply to investigatory records compiled for law enforcement purposes to the extent that their production would "constitute an unwarranted invasion of personal privacy."

The FBI purportedly utilized this information to "protect names, background data, and other identifying information of third parties that appear on the inventory worksheets and were withheld

in the original documents." It was also utilized to excise the names of the FBI agents who produced the inventory worksheets. The FBI claims that to release these names "could cause public exposure or harassment of Special Agents and their families, which is unwarranted and would inevitably affect their ability to perform their responsibilities." [4/28/78 Beckwith Affidavit, ¶6(c). App.]

The District Court, in an entirely conclusory ruling, stated only that "[h]ere the information pertains to individuals coming to the attention of the FBI who were not the subject of investigation," and that "[t]he public interest in disclosing this information does not outweigh the privacy interests of these individuals." [App.]

The FBI's utilization of Exemption 7(C) is notoriously inconsistent. Drawing on his study of tens of thousands FBI records, Weisberg has summarized the pattern:

> Where the FBI did not like these people, where they have held political views not approved by the FBI or where, as in the case of the widow Oswald, they spoke of the FBI in a manner the FBI did not like, the FBI displayed no interest in their privacy.

[7/10/78 Weisberg Affidavit, ¶14. App.] As an example, the FBI has released unexpurgated records of Marina Oswald's sexual dreams and acts and her comments about the married man with whom she slept. [See 7/10/78 Weisberg Affidavit, ¶¶13-14; Exhibit 1]

With respect to FBI Agents, however, the FBI frequently invokes "invasion of privacy" where there is none at all. In this

regard, it now claims it is an unwarranted invasion of privacy to release the names of the FBI Special Agents who processed the inventory worksheets, even though it did not excise the names of FBI Agents from the worksheets which accompanied the release of records on the assassination of Dr. King. [7/10/78 Weisberg Affidavit, ¶44] The FBI holds the privacy or its agents in such tender regard that even deleted the name of one Special Agent from a newspaper article!

Yet even with respect to the withholding of the names of FBI Special Agents, the FBI has been inconsistent. It has, for example, released lists giving the names, home addresses and home telephone numbers of FBI Agents. [See 7/19/78 Weisberg Affidavit, Exhibits 1-3]

The practice of excising, albeit inconsistently, the names of FBI Special Agents appears to have begun after the Freedom of Information Act was amended in 1974. [7/10/78 Weisberg Affidavit, ¶50. App.] The Warren Commission published a large number of unexpurgated FBI reports in facsimile. "No FBI names were withheld, no names of those who gave information to the FBI were withheld from what the Commission published or what was available at the National Archives." [7/10/78 Weisberg Affidavit, ¶49. App.]

It appears that the FBI's use of Exemption 7(C) is sometimes intended as harassment of FOIA litigants. The unjustifiable invocation of this and other exemptions also helps the FBI build statistics which it can use in its campaign to repeal the FOIA.

The FBI's description of what it has withheld in this case under Exemption 7(C) is not sufficiently detailed to provide a proper basis for awarding summary judgment. For example, there is

no statement by the FBI that what it has excised under 7(C) is not already in the public domain. Weisberg's experience is that the FBI withholds public information under all exemptions, but particularly under Exemption 7(C) and (D). Thus it has withheld from its records exactly the same information that Weisberg has himself published. [7/10/78 Weisberg Affidavit, ¶53. App.] It is also common FBI practice to withhold from the records it releases what is contained in its own news clippings files. [7/10/78 Weisberg Affidavit, ¶54. App.]

The plain fact is that after 15 years of investigations by the FBI, the Warren Commission, and several congressional committees, not to mention the countless magazine and newspaper articles, books, radio and T.V. reports that each new development has spawned, there is very little information which is not already public knowledge. Whether the FBI is withholding public information under the guise that it is protected by 7(C) is a factual issue which properly precludes summary in favor of the government at this point. The District Court erred in adjudicating this issue on an insufficient record, by not requiring the FBI to cross-index its claims of exemption to its justification for withholding, and by denying Weisberg the opportunity to take discovery on this issue.

It is apparent that the District Court failed to take into account the overriding interest in the fullest possible disclosure of information about the Kennedy assassination, as well as the fact that most such information is already public. By failing to spell out the factors that it weighed in coming to the conclusion that

privacy considerations outweigh the public interest in disclosure, the District Court provided an insufficient basis for review by this Court. Therefore, its decision must be reversed for this reason also.

Finally, the District Court was wrong as a matter of law in holding that the names of FBI Agents are properly withheld under Exemption 7(C). FBI Agents "have no legitimate privacy right to deletion of their names. Their involvement in investigative activities for the FBI is not a 'private fact'." Ferguson v. Kelley, 448 F.Supp. 919, 923 (N.D.Ill. 1977)

C. Exemption 7(D)

Exemption 7(D) protects "investigatory records compiled for law enforcement purposes" to the extent that the 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 . . . confidential information furnished only by the confidential source."

The FBI justification for excising material under 7(D) affords no basis for awarding summary judgment in its favor. It proffers only two facts in support of this claim. First, it asserts that 7(D) "was cited in the inventory worksheets corresponding to the same information as excised in the original documents." [4/28/78 Beckwith Affidavit, ¶6(d). App.] Since there has been no showing that the material in the "original documents" which was excised under 7(D) was properly excised under that claim, this is irrelevant. In addition, this claim makes it evident that

in processing the worksheets, the FBI simply rubber-stamped the claims of exemption which were made on the original documents at the time they were processed. Since the passage of time alone may errode a justification for withholding information, this procedure would be defective even if the FBI could show that the excisions on the original documents were proper at the time they were made, which it can't and hasn't.

Secondly, the FBI asserted that 7(D) was used to remove the symbol numbers and file numbers of informants "in order to insure protection of the identity of sources." [4/28/78 Beckwith Affidavit, ¶6(d). App.] Since by the FBI's own admission these informant file and symbol numbers "are used to cover the actual identity of the informant," the release of these numbers would not "disclose the identity of a confidential source" as required by Exemption 7(D).

Moreover, under Exemption 7(D) the agency has the burden of showing that the withheld information is confidential and that there was an agency promise or implicit agreement to hold the matter in confidence. Rural Housing Alliance v. U.S. Dept. of Agriculture, 162 U.S.App.D.C. 122, 498 F.2d 73 (1974); Local 32 v. Irving, 91 LRRM 2513 (W.D. Wash. 1976). The FBI has not met that burden here. Indeed, it has not even stated that the information on the worksheets which was excised under 7(D) on the basis of similar claims on the original documents is confidential and that there was an agency promise or implicit agreement to keep it confidential. On this basis alone, summary judgment was improper.

Nor did the FBI state whether it withheld the identity of in-
of institutional sources and information provided by them under the auspices of Exemption 7(D). The District Court ruled, however, that the purpose of 7(D) "would include any source whether it be an individual, an agency or a commercial or institutional source." [App.]

This ruling is clearly wrong. The term "confidential source" is not defined in the FOIA. However, the legislative history of the Act indicates that Congress intended it to apply to human, not institutional sources. The Senate amendment to Exemption 7 originally employed the term "informer" rather than "confidential source." In explaining the substitution, the Conference Committee said:

> 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.

(Emphasis added) H.Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974).

This makes it clear that Congress intended to broaden the term "informer", a term which refers only to persons, to include persons other than paid informers. It obviously did not contemplate that the term would be expanded to include agencies, whether state, federal or local. If this were the case, it would be possible to defeat the intent of Exemption 7(D) by transferring records from one federal agency to another under a promise of confidential-

ity. Nor did Congress contemplate that "source" would be expanded to include institutional sources.

Finally, Weisberg again notes that the government failed to provide any index correlating the claim of exemption 7(D) on particular records with the justification for withholding. Nor did the FBI state that information which is already publicly known is not being withheld under 7(D). For these reasons, the District Court's award of summary judgment as to Exemption 7(D) claims must also be reversed.

D. Exemption 7(E)

Exemption 7(E) bars compulsory disclosure of information which would reveal investigative techniques and procedures. In invoking this exemption the FBI stated only that, "[t]hese techniques and procedures were deleted in the worksheets in those instances where they were deleted in the original document." [4/28/78 Beckwith Affidavit, ¶6(e). App.] This is irrelevant because no showing was made that the 7(E) excisions made in the original documents were proper.

The legislative history of 7(E) shows that it is not intended to apply to matters which are already publicly known. The Conference Report directly addressed this issue, commenting that:

> The conferees wish to make clear that the scope of this exception against disclosure of "investigative techniques and procedures" should not be interpreted to include routine techniques and procedures already well-known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques.

H.Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974)

The Beckwith Affidavit makes no claim that the investigative techniques excised from the inventory worksheets are not publicly known. Numerous investigative techniques employed by the FBI in connection with its Kennedy assassination investigation, such as electronic and mail surveillance, pretext, and the "con man" technique are all well-known and do not come within the protection afforded by 7(E). [See 7/10/78 Weisberg Affidavit, ¶61; 7/19/78 Weisberg Affidavit, ¶¶4-5. App. ;]

Because the FBI did not provide an index of its claims of exemption and the District Court refused to allow Weisberg to engage in discovery, there was no basis upon which the District Court could properly determine that these excisions come within the scope of Exemption 7(E). Accordingly, the award of summary judgment made with respect to Exemption 7(E) excisions must also be reversed.

CONCLUSION

In a recent book by Sanford Ungar, the Washington Post reporter, he quotes the views of the Assistant Director of the Files and Communications Division and his "number one man" on a new effort to release FBI records under the terms of the Freedom of Information Act: "It's a young program. . . . We would like to see it killed in infancy." The FBI, p. 152.

If the FBI cannot kill the Freedom of Information Act outright, it can at least wage a war of attrition against it. By

refusing to conduct an adequate search for the records requested, by making baseless and inconsistent claims of exemption, by filing affidavits which are conclusory, obfuscatory, misleading, and false, the FBI can create "make-work" for its employees, increase its backlog of FOIA cases, and drive up the cost of FOIA litigation. Through the use of such tactics it can grind down FOIA litigants and those who represent them in court. These tactics can be particularly effective where the FBI finds it has allies among the district court judges. While bad decisions

may be reversed on appeal, the cost and delay involved in forcing an FOIA litigant to appeal inevitably frustrate the purpose of the Freedom of Information Act, which is the prompt disclosure on non-exempt information.

It is time that some thought be given to doing something more than simply reversing the bad decisions of judges hostile to the Freedom of Information Act. The law in this circuit is sufficiently clear now that there is no excuse for this case having been handled the way it was. But unless this Court soon finds some means of disciplining agencies, judges, and government attorneys who make a mockery of the FOIA, there will an endless subversion of it.

In this case the government has continued to withhold allegedly classified information even after Weisberg has shown that the material which was excised is a matter of public knowledge and never justified classification in the first place. This Court may want

to consider whether the circumstances of this case would warrant any of the sanctions provided by Rules 11 and 56(g) of the Federal Rules of Civil Procedure or 28 U.S.C. § 1927.

In any event, appellant Weisberg should be granted the following relief:

1. The District Court's award of summary judgment should be reversed on all counts.

2. On remand, the FBI should be required to file a Vaughn v. Rosen inventory and index.

3. On remand Weisberg should be allowed to take discovery with regard to the adequacy of the search for records responsive to his request. In addition, he should also be permitted to take discovery to determine what standards the FBI employed in asserting it claims of exemption and whether or not it withheld information which is already in the public domain.

4. On remand the District Court should be directed to conduct an inquiry into why the government continued to withhold purportedly classified information on the inventory worksheets even after Weisberg established that it was public knowledge and had already been released by the FBI itself, with a view towards determining whether this involved a violation of Federal Rule 11. If this Court considers that Judge John Lewis Smith cannot conduct an impartial inquiry into this matter because he continued to uphold the government's claims after Weisberg brought the public nature of "classified" information to his attention, then this case should be remanded to a different judge.

Respectfully submitted,

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