BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1700

HAROLD WEISBERG, Appellant,

v.

WILLIAM H. WEBSTER,
Director, Federal Bureau of
Investigation, et al., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.A. No. 78-0249

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED

In the opinion of appellees the following issues are presented:

I. Whether summary judgment was properly granted where appellant's challenges to the adequacy of the search for records responsive to his FOIA request were based upon irrelevant speculation and failed to raise any genuine issue of material fact.

II. Whether the District Court correctly found that appellees sustained their burden of proving entitlement to withholding under Exemption 1 of the FOIA where they filed detailed affidavits establishing that the withheld information was properly classified and its disclosure would cause identifiable harm to national security, where there was no showing of lack of good faith, and where no substantial issues of material fact remained.

III. Whether this court's previous ruling that the records accumulated by the FBI during its investigation of President Kennedy's assasination were compiled "for law enforcement purposes," and therefore were subject to withholding under Exemption 7 of the FOIA, should be ignored.

IV. Whether the District Court properly upheld appellees' invocation of Exemptions 2 and 7 of the FOIA where the claims were clearly and comprehensively established by detailed affidavits, and where appellant's challenges were either inconsequential, irrelevant, or plainly contradicted by established facts.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant filed suit under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking the disclosure of documents related to the processing of Federal Bureau of Investigation (FBI) records concerning the assassination of President John F. Kennedy. By letter dated December 6, 1977, appellant made the following request:

> I herewith ask for a copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they may be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the content of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released. I ask for a copy of it also or if

an inventory was made, a copy of the inventory. (R. 8, Exh. A; App. .)1/

Appellant previously had been informed by FBI officials that on December 7, 1977, they would release over 40,000 pages of records concerning the assassination of President Kennedy, and his request pertained to documents prepared for the processing of those pages (id.). Shortly thereafter, on January 18, 1978, the FBI released to the public an additional 58,754 pages of records concerning the same subject (R. 1, p.2; App.).

On January 18 Allen H. McCrieght, the Chief of the FBI's Freedom of Information/Privacy Acts Branch, Records Management Division, sent a letter to appellant which prompted a reply apparently complaining about the lack of immediate response to his December 6 request.2/ The Director of the Department of Justice's Office of Privacy and Information Appeals, Quinlan J. Shea, Jr., responded to appellant's request on February 21, 1978. Shea explained that appellant's January 19 letter would be treated as an appeal of a denial of his request based on the lack of timely response, but that the appeal would be maintained in an open status and would receive his personal attention because it concerned the disclosure of worksheets, which had been the subject of his

1/ "R" refers to the record on appeal; "App." refers to the joint appendix, to be filed shortly; and "Supp. R." refers to the transcript of the hearing held on January 10, 1979.

2/ The exact contents of these letters are not apparent from the record, but are referred to in the February 21 letter from the Department of Justice, infra (R. 3, Exh. 2; App.)

and Congressional attention for some time. Shea further indicated that the FBI worksheets pertaining specifically to the assassination of President Kennedy would probably be made public in the near future. The letter concluded with a pledge to keep appellant informed of any new developments, and a reminder of the available means for seeking judicial relief (R.3, Exh. 2; App.).[3/]

On March 3, 1978, McCreight sent a letter to appellant explaining that although the FBI was making every effort to process his request quickly, the large volume of similar requests unavoidably had delayed a final response (R. 3, Exh. 3; App.). Ultimately, on April 12, 1978, the FBI released to appellant 2,581 pages of inventory worksheets utilized in the processing of files pertaining to its investigation of President Kennedy's assasination. In a cover letter McCreight detailed the legal bases for the few deletions made, and advised him of his right to, and the means of, appeal to the Deputy Attorney General (R. 3, Exh. B; App.).

Thereafter, on July 7, Shea sent a letter to appellant in response to his appeal of January 19. Shea explained the bases for the excisions made and affirmed the action taken. He also related that he had referred the classified materials to the Document Review Committee for a determination whether they war-

3/ In the interim, communications concerning a waiver of processing fees passed between appellant and the FBI (R.16, Att. A-C; App.).

ranted continued classification, and that appellant would be notified if declassification occurred. The letter concluded with a confirmation of the protected status of appellant's appeal, and a reminder of the availability of judicial review. (R. 16, Exh. 11; App.).

Appellant filed a complaint in the District Court on February 13, 1978, based on the lack of response to his December FOIA request (R. 1; App.). Appellee's answer, filed on March 5, asserted lack of jurisdiction, suit of improper parties, and failure to state a claim upon which relief could be granted (R.2; App.). After further proceedings unrelated to the instant appeal,[4/] appellees filed a motion to dismiss or in the alternative for summary judgment on July 3, asserting that Clarence M. Kelley and Griffin Bell were not proper parties to the suit, no documents were improperly withheld, no genuine issue existed as to any material fact, and appellees were entitled to judgment as a matter of law (R. 10; App.). In support of this motion appellees filed a memorandum of law and the detailed affidavits of Special Agent David M. Lattin, supervisor in the Document Classification Review Unit of the FBI's Records Management Division, and Special Agent

4/ On March 31, appellant filed a motion for summary judgment which was mooted by the April 12 release of the inventory worksheets, and was opposed by appellees in a pleading filed on April 18 (R.7; App.). Appellees' opposition was accompanied by an affidavit of Special Agent Horace P. Beckwith explaining in detail the bases for the exemptions claimed (R.8; App.). At the motions hearing held on January 10, 1979, counsel for appellant acknowledged that his motion was no longer at issue (Supp. R.1; App.).

Horace P. Beckwith, supervisor in the Freedom of Information/ Privacy Act Branch of the same division (R. 10, Exhs. 1,2; App.).

The Lattin affidavit addressed itself primarily to appellees' claim of exemption under 5 U.S.C. § 552 (b)(1)(Exemption 1). A brief summary of its contents follows. Lattin was authorized to classify FBI documents pursuant to Executive Order (E.O.) 11652 and 28 C.F.R. 17.23 et seq. He personally examined the inventory worksheets and had personal knowledge of the information for which the exemption was claimed. He conducted his examination in strict adherance to the criteria set forth in E.O. 11652, relied solely upon the classification level "Confidential" to justify the excisions, and verified that the withheld portions of the worksheets were exempt from automatic declassification as authorized by E.O. 11652. Lattin then further described the exempted categories.

Specifically, 13 of the 19 items classified in the inventory worksheets pertained to cooperation with foreign police agencies; and as those agencies required that such cooperation be strictly confidential, its official disclosure could have the serious national and international consequences detailed in the affidavit. Four of the classified items identified an intelligence method directed at the establishments of foreign governments within the United States, and in current use by the FBI. Official acknowledgement of the method and details of its use could engender disastrous reaction from foreign governments and compromise nation-

al security investigations. The remaining two classified items identified foreign intelligence sources, specifically foreign nationals having foreign contacts. The affidavit specified the obvious need for protecting such sources, and the potential personal, national and international ramifications of disclosure. Finally, Lattin stated that he reviewed the worksheets and determined that the proper classifications had been assigned and that they were properly marked.

The Beckwith Affidavit addressed itself first to describing the inventory worksheets, their function, and the general reason why deletions were necessary. In brief, the inventory worksheets were working tools of FBI employees who used them to record certain descriptive data relating to each document processed pursuant to request, and later to review the documents prior to release. Data thus inventoried included the statutory exemptions underlying any excisions made and the federal agency to which the document was referred, if any. The documents pertaining to President Kennedy's assassination were processed by a special group of temporarily assigned Special Agents during 1977, and a few Agents, in a misguided effort to assist the reviewer, made the mistake of writing on the worksheet the material excised in the original document (next to the exemption claimed). This raised the need to delete such writings on the worksheets, and to assert exemptions for those writings. Deletions were made on only 4.8 percent of the 2,581 pages released to appellant.

Beckwith then explained in detail the bases for invoking the several FOIA exemptions. Concisely stated, his affidavit reflects the following. Exemption 1 was invoked for material properly classified under E.O. 11652, as stated more expansively in Lattin's Affidavit. A claim of exemption under 5 U.S.C. § 552 (b)(2)(Exemption 2) was asserted solely to remove FBI informant file and symbol numbers for the purposes of protecting the informant program and the administration of informants. Claims of exemption under 5 U.S.C. § 552 (b)(7)(C)(Exemption 7 (C)), which protects against unwarranted invasions of personal privacy, were asserted to withhold information identifying third parties and the Special Agents responsible for producing the worksheets. Seven examples were listed in the affidavit. As there appeared to be no public need for the identities of those individuals, the inevitable effects of disclosure -- public exposure, harassment, harassment of families, and interference with the ability to execute responsibilities -- were avoided.

Claims asserted under 5 U.S.C. § 552 (b)(7)(D)(Exemption 7 (D)) protected the identity of a confidential source and non-public information furnished only by that source. In addition, this exemption was cited to remove the file and symbol numbers of informants which could reveal their identities. Finally, claims of exemption under 5 U.S.C. § 552 (b)(7)(E)(Exemption 7 (E)), were made seven times on the worksheets, and were used to protect two investigative techniques, thereby avoiding the impairment of their future effectiveness. Beckwith concluded his

affidavit by stating that the inventory worksheets represented the only documents available within the FBI which were responsive to appellant's request for records relevant to the processing and review of the original documents.

On August 2, 1978, appellant filed an opposition to appellee's motion to dismiss or in the alternative for summary judgment, alleging that he had not been provided with all the records he requested, that appellees had not met their burden of showing entitlement to Exemptions 1 and 7, that the public interest required that information withheld under Exemption 2 be disclosed, and that Exemption 7 was inapplicable because the records were not composed for law enforcement purposes (R. 16; App.). Appellant also filed lengthy attachments, which included two rambling affidavits and papers relating primarily to previous FOIA suits he had brought in different contexts (R.16, Att. A-Exh. 3; App.).

After additional court proceedings concerning depositions,[5/] appellees submitted to the District Court a memorandum opinion rendered by United States District Judge Gerhard A. Gesell in Lesar v. Department of Justice, No. 77-0692 (D.D.C., filed Dec. 15, 1978), appeal pending, No. 78-2305 (D.C. Cir.), a case dealing with very similar issues in which summary judgment was granted

5/ In August, 1978, appellant filed a notice to take depositions of Special Agents Lattin and Beckwith, to which appellees responded with a motion for a protective order (R. 17, 18; App.). In October appellant filed another deposition notice, causing appellees again to move for a protective order, which appellant opposed (R. 19, 20, 21). On October 25, appellees' motion for a protective order was granted (R. 22; App.)

for appellees (R. 23; App.). Oral argument on the outstanding motions was held on January 10, 1979, and the court took the decision under advisement (Supp. R. 1-32; App.). On January 12 it issued an order requiring appellees to submit within ten days an affidavit regarding classification status under the recently issued E.O. 12065 of the documents previously classified under E.O. 11652 (R. 24; App.). On January 22 appellees sub-submitted the affidavit of Special Agent Bradley B. Benson, supervisor in the Document Classification Review Unit, FBI Records Management Division (R. 25; App.).

In his affidavit, Benson stated that he personally had made an independent and comprehensive examination of the inventory worksheets and had found that the excisions were appropriately classified "Confidential" under both E.O. 11652 and E.O. 12065. He described in detail the difference in standards between the Orders, and explained how the withheld information met both standards. He reviewed the documents to determine if there were any portions that reasonably could be segregated out, but found none, and he determined that the classifications and markings were still correct. Finally, he compiled a list of the worksheets (identified by file subject, section and serial number) found to contain classified data, and gave a description and classification justification for each item. Benson concluded that the unauthorized disclosure of the classified material reasonably could be expected to cause at least identifiable damage to the national security.

In an Opinion and Order issued on February 15, 1979, the District Court granted appellees' motion for summary judgment (R. 30, 31; App.). Regarding materials withheld under Exemption 1, the court determined that the three FBI affidavits were worthy of the substantial weight accorded them by the caselaw and the legislative history, that the FBI had acted only in good faith throughout the proceedings, and that appellees sustained their burden of showing that the withheld material was protected from disclosure. The court further found that the withholding of informant file and symbol numbers under Exemptions 2 and 7 (D) was proper, and that the public's interest in such information was neither significant nor genuine when compared with the FBI's need to keep the information confidential.

Concerning the claims of exemption under Exemption 7(C), the court explicitly recognized the need to apply a de novo balancing test, weighing the public's interest in disclosure against the individual's privacy interest and the extent of its invasion. After applying the test, the court concluded that the privacy interests of third parties and the FBI agents who processed the worksheets far outweighed any public interest in the disclosure of their identifying information.

Appellee's claims of exemption under Exemption 7(D), protecting the identity of and information supplied by confidential informants, were upheld as being consistent with legislative history and the caselaw. The court also determined that the exemption covered any confidential source, be it an individual, an agency,

a business or an institution. As to Exemption 7(E), the court found that the withholding of two investigative techniques was consistent with the purpose of the exemptions.

Finally, the court dismissed the suit against Clarence M. Kelley and Griffin Bell, reasoning that neither party was an "agency" within the meaning of the FOIA (R. 30; App.).[6/]

A motion for reconsideration and clarification was filed by appellant on February 26, 1979. In the motion appellant asked the court to make "findings of fact" that worksheets responsive to his request existed and had not been disclosed, that the Benson and Lattin affidavits were insufficient in several respects and were not worthy of credence, that the worksheets were improperly classified, that the disclosure of all the withheld information would cause no identifiable harm to the United States, and that the FBI had established a pattern of bad faith towards appellant (R. 32; App.). As a proffered basis for such findings appellant filed three voluminous and rambling affidavits which simply restated his earlier positions.

On March 22, 1979, appellees filed an opposition to appellant's motion for reconsideration and clarification, disputing the need for the court to make the requested "findings of fact," and urging denial of appellant's motion based upon the "extraordinary wealth of information" already before the court, the high degree of consideration already given to this suit by all parties

6/ As appellant does not in his brief take issue with this ruling, it remains the law of the case.

involved, the correct nature of the court's Opinion, and the stale nature of the issues raised in appellant's motion (R. 36; App.). After receiving appellant's reply, the court, on March 29, 1979, denied appellant's motion (R. 37, 38; App.).[7/] This appeal followed.

ARGUMENT

I. Summary judgment was properly granted where appellant's challenges to the adequacy of the search for records responsive to his FOIA request failed to raise any genuine issue of material fact.

Appellant contends that summary judgment was improvidently granted because a genuine issue of material fact remained concerning the adequacy of the FBI's search for records responsive to his request. Appellant tilts at windmills, however, as his claim conflicts with the facts and is based solely upon conjecture, misrepresentations and irrelevancies.

Appellees were entitled to summary judgment if they satisfied their burden of demonstrating that there were no remaining genuine issues of material fact. Fed. R. Civ. P. 56 (c); Bloomgarden v. Coyer, 156 U.S. App. D.C. 109, 116, 479 F.2d 201, 208 (1973). Although matters of fact are to be viewed in the light most

7/ The court also declared moot a motion to vacate the court's Protective Order of October 25 and to set a schedule for discovery filed by appellant on March 21, 1979 (R. 38; App.). The motion had been accompanied by an affidavit of appellant's counsel and several attachments (R. 34; App.). The court's order also mooted appellant's motion for the production of a Vaughn v. Rosen, [157 U.S. App. D.C. 340, 484 F.2d 820 (1973)] Index, filed on March 22 (R. 35, 39; App.).

favorable to the party opposing the motion, Nyhus v. Travel Management Corp., 151 U.S. App. D.C. 269, 271, 466 F.2d 440, 442 (1972); Semaan v. Mumford, 118 U.S. App. D.C. 282, 283 n.2; 335 F.2d 704, 705 n.2 (1964), mere assertions in appellant's pleadings will not suffice to defeat a motion for summary judgment. Dewey v. Clark, 86 U.S. App. D.C. 137, 141, 180 F.2d 776, 770 (1950).

The FOIA, of course, requires an agency to disclose only existing records which are responsive to a specific request, N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 161-162 (1975); Nolen v. Rumsfeld, 535 F.2d 890, 891 (5th Cir. 1976), cert. denied sub nom. Nolen v. Brown, 429 U.S. 1104 (1977), and agency affidavits averring in good faith that all responsive records have been produced are accorded "substantial weight." The Founding Church of Scientology of Washington, D. C., Inc. v. National Security Agency, No. 77-1975, slip. op. at 27 (D.C. Cir. May 15, 1979). Here appellees explained in detail how and for what purpose the inventory worksheets were processed, and averred that they "represent the only documents available within the FBI which are responsive to plaintiff's request" (R. 10, Exhs. 1, 2 p. 5; App.).

Appellant's request was discerned from the last paragraph of a lengthy and rambling letter dealing primarily with the recent release of over 40,000 pages of FBI documents relating to President Kennedy's assassination. Referring to those documents, appellant wrote:

> Those records were processed under the FOIA I take it. This means that other records relevant to the processing were generated. These should include worksheets on which the records are listed and where exemptions are noted. There are other records relevant to the processing and review. I herewith ask for a copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they might be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the contents of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released I ask for a copy of it also or if an inventory was made, a copy of the inventory. (R. 8, Exh. A; App.).

Pursuant to this request appellees determined that the processing and review of the records now public had been accomplished by means of the inventory worksheets, and the worksheets were the only documents available pertaining to such processing and review. Consequently, 2,581 pages of the worksheets were reviewed and released to appellant.[8/]

Appellant now postulates that several additional sets of records existed which were not disclosed pursuant to his request. Initially, he complains that one set of records in the form of memoranda and letters "must" have emanated from an administrative decision to distribute public information about the assas-

8/ In his brief appellant lists four separate requests which he claims he made in his letter of December 7. While it is evident that the wording in the letter was not nearly so specific, appellees maintain that they disclosed all the documents in their possession which were responsive to his request.

ination to various libraries and reading rooms. Not only does this complaint appear to be an attempt to obtain material well beyond the scope of appellant's original request, but it is a bald assertion falling far short of creating a genuine factual issue. Dewey v. Clark, supra. Similarly, appellant's speculation concerning the existence of an itemized list of all FOIA requests, and of inventory lists distinct from the worksheets disclosed, are unsupported and insufficient to defeat summary judgment. Id.

Appellant also alleged for the first time in his motion for reconsideration that a distinct set of inventory worksheets was sent to another FOIA requester. This allegation, however, is unsupported by relevant information about the scope of the other request, the date of the request, and the extent of the alleged discrepancy. Inventory worksheets are working tools, subject to change and update when individual underlying document are declassified, sent to another agency, etc. Moreover, minor discrepancies, not unlikely to occur when different reviewers are compiling thousands of documents at different times, do not affect the appropriateness of summary judgment. Weissman v. CIA, 184 U.S. App. D.C. 117, 122, 565 F.2d 692, 697 (1977); Lesar v. Department of Justice, supra, mem. op. at 5.[9/]

9/ Appellant also attempts to impune the integrity of Special Agent Beckwith, and thereby discredit his affidavit, by alleging misconduct in prior cases. Not only would a prior mistake be irrelevant, Hayden v. Nation Security Agency, No. 78-1728, slip. op. at 11 (D.C. Cir. Oct. 29, 1979), but the District Court found Beckwith's affidavit worthy of credence and executed in good faith.

The "competence of any records-search is a matter dependent upon the circumstances of the case," The Founding Church of Scientology of Washington, D.C., Inc. v. Nation Security Agency, supra, slip. op at 23. Here the search, conducted independently by three Special Agents and confirmed as fully responsive to appellant's request by supervisors McCreight and Shea, was competent, and appellant's self-serving and superficial attempts to create genuine issues of material fact draw no record support.[10/]

II. The District Court correctly found that appellees sustained their burden of showing that the withheld materials were properly classified and exempt from disclosure under Exemption 1 of the FOIA.

Appellant next argues that the District Court erred in granting summary judgment on appellees' Exemption 1 claims because (1) it erroneously relied on an allegedly outdated case, (2) it misconstrued the weight to be given agency affidavits, (3) the withheld information was not classified in accordance with the procedural requirements of E.O. 11652, and (4) the withheld information was not properly classified under the substantive criteria of E.O. 11652 and E.O. 12065. Appellant's argument fails to find firm footing in either the facts or the law.

10/ At the end of this argument in his brief, appellant slips in a challenge to the District Court's exercise of discretion in issuing the October 25 protective order. As the District Court's decision concerning summary judgment was still pending, however, the issuance of the protective order was eminently reasonable. Klein v. Lionel Corp., 18 F.R.D. 184 (D. Del. 1955). Further, a court enjoys broad discretion in this area, and a reviewing court should not engage in de novo review of a protective order. Grinnell Corp. v. Hackett, 70 F.R.D. 326 (D.R.I. 1976).

Exemption 1 provides that mandatory disclosure under the FOIA 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.

In reviewing agency withholdings under this exemption, a court must make a de novo determination by "first accord[ing] substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record," and by taking into account the executive's "unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record." S. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974), quoted in Ray v. Turner, 190 U.S. App. D.C. 290, 297, 587 F.2d 1187, 1194 (1978).[11/] Then, whether or not to award summary judgment based solely upon the pleadings, affidavits and oral argument rests in the sound discretion of the court. Ray v. Turner, supra, 190 U.S. App. D.C. at 297, 587 F.2d at 1194; Weissman v. CIA, supra, 184 U.S. App. D.C. at 122, 565 F.2d at 697; Serbian Eastern Orthodox Diocese v. CIA, 458 F. Supp. 798 (D.D.C. 1978).

Here appellant contends that the District Court must have misconstrued the weight accorded agency affidavits because it

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11/ That the classified materials generally are over ten years old is no basis for questioning the bona fides of the current classification or the FBI affidavits. Bell v. United States, 563 F.2d 484, 486 (1st Cir. 1977).

did not dismiss them out of hand.[12/] To the contrary, the court, after explicitly considering the three affidavits and their great detail, cited legislative history and caselaw according "substantial weight . . . to agency affidavits" to support his conclusion that appellees sustained their burden of showing that the withheld material is protected from disclosure under Exemption 1 (R. 30, p.2; App.). The record is devoid of any indication that the court gave "conclusive" weight to the agency affidavits as alleged by appellant; indeed the large volume of papers filed by appellant, supplemented by extensive oral argument and the ensuing court order requiring additional information from appellees (R. 24-25; Supp. Tr.; App.), show that the court gave careful consideration to appellant's position.

Appellant also baldly asserts that the agency affidavits themselves are "highly conclusory at best and deliberately deceptive at worst." This mere assertion is insufficient to defeat summary judgment. Dewey v. Clark, supra. Moreover, a

12/ Appellant's first contention -- that Weissman v. Central Intelligence Agency, supra, was overruled by Ray v. Turner, supra, -- is blatantly false. Both cases address and reaffirm the ample scope of the trial court's discretion in reaching a de novo determination of the issues in an FOIA case, and both stress the "substantial weight" that must be accorded agency affidavits, especially in Exemption 1 cases. Indeed the Ray opinion quoted Weissman with approval, 190 U.S. App. D.C. at 298, 587 F.2d at 1195, and several subsequent opinions have cited both cases as precedent for their holdings. E.g., Hayden v. National Security Agency, supra, slip op. at 4 n.7, 10-11; Serbian Eastern Orthodox Diocese v. CIA, supra, 458 F. Supp. at 801. Thus appellant's irresponsible assertion that the District Court erroneously relied upon Weissman is unsupported because no support exists.

reading of the affidavits reveals that they are sufficiently detailed to warrant reliance and summary judgment without further review. The affidavits show that the assigned classifications "are reasonable and proper," and that the withheld documents "logically fall into the categories provided by the exemption." Serbian Eastern Orthodox Diocese v. CIA, supra, 458 F. Supp. at 801; accord, Ray v. Turner, supra, 190 U.S. App. D.C. at 297, 587 F.2d at 1194; Weissman v. CIA, supra, 184 U.S. App. D.C. at 122, 565 F.2d at 697. This court recently stated:

> If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate . . . . The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith, nor by past agency misconduct in other unrelated cases. Unless the affidavits are [conclusory, merely reciting statutory standards, or too vague], the court need inquire no further into their veracity. This is in accordance with congressional intent that courts give affidavits "substantial weight," in recognition of the agency's expertise. In this scheme, in camera review is a "last resort" to be used only when the affidavits are insufficient for a responsible de novo decision. Hayden v. National Security Agency, supra, slip op. at 10-11 (citations omitted).

Appellant next attacks the procedures allegedly used to classify the underlying documents. He argues that, according to one affidavit, certain exempted portions of the worksheets were not classified and marked until after he received his copies. But

this fact does not undermine the claimed exemption, as the worksheets receive derivative protection from the underlying documents, which undisputedly were timely classified. Lesar v. Department of Justice, supra, mem. op. at 5; accord, Weissman v. CIA, supra, 184 U.S. App. D.C. at 122, 565 F.2d at 697. Moreover, there is a presumption of regularity in the performance by a public official of his public duties, and in the absence of clear and material evidence to the contrary, a security classification will be upheld. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1368 (4th Cir. 1975), cert. denied, 421 U.S. 992 (1975). Here there is no reason to believe that the alleged lack of immediate, formal classification of the worksheets resulted from anything but the belated discovery of classified information mistakenly noted on the worksheets by new and temporarily assigned Special Agents. Such a minor mistake does not defeat an exemption claim, especially in cases concerning national security.

In a final attempt to acquire properly classified "Confidential" information under Exemption 1, appellant asserts without authority that the classified information -- at least insofar as it relates to the cooperation of the Royal Canadian Mounted Police (RCMP) in the assassination investigation -- is "public knowledge" and therefore must be disclosed. The FBI affidavits clearly and comprehensively state the totally confidential atmosphere in which such cooperation was conducted, and the great damage to our international relations that official disclosure of such cooperation could cause. While "rumors

and speculations circulate and sometimes get into print," a public official "in a confidential relationship surely may not leak information in violation of the confidence reposed in him . . . ." Alfred A. Knopf, Inc. v. Colby, supra, 509 F.2d at 1362. Further, even if information concerning the general cooperation of the RCMP were in the public domain, disclosure of their cooperation in the context of the worksheets would add great detail to that information, detail which must be withheld in the interests of national security and institutional integrity.[13/]

In sum, appellant has failed to draw from the records in this case any genuine issue of material fact disputing appellees' entitlement to withhold properly classified information under Exemption 1. The District Court's holding that appellees met their burden should not be disturbed.

III. This Court's previous holding that the records accumulated by the FBI during its investigation of President Kennedy's assassination were clearly compiled for law enforcement purposes and therefore subject to withholding under Exemption 7 of the FOIA should not be ignored.

In response to appellant's exhumed claim that appellees cannot withhold information under Exemption 7 because the FBI

13/ In addition, the fact that appellant, who is a self-acclaimed expert on the Kennedy and King assassinations, can piece together identifying data does not make the classified data automatically a part of the public domain. Lesar v. Department of Justice, supra, mem. op. at 6.

records resulting from its investigation of President Kennedy's assassination were not compiled for "law enforcement purposes," we respectfully refer this Court to its previous decision in Weisburg v. United States Department of Justice, 160 U.S. App. D.C. 71, 73-74, 489 F.2d 1195, 1197-1198 (1973) (en banc), for sound reasoning and the law of the case. There this Court concluded: "We deem it demonstrated beyond peradventure that the Department files: (1) were investigatory in nature; and (2) were compiled for law enforcement purposes." Id.

We note also that this issue was never raised before the District Court, and therefore is not properly raised on appeal.

IV. The District Court properly upheld appellees' well-established and essentially uncontroverted claims for exemption under Exemptions 2 and 7 of the FOIA.

Appellant challenges the withholding of informant file and symbol numbers under both Exemption 2 (records relating solely to internal personnel rules and practices) and Exemption 7 (D) (protecting the identity of, and information furnished only by, a confidential source). Under Exemption 2, however, his claims are muddled, and as best can be determined, specious. 14/ Under

14/ Appellant first argues that summary judgment was precluded because the District Court's opinion was not worded exactly as the statute was worded, although it clearly tracked the statute as well as the relevant caselaw. Appellant also postulated that an informant not paid as a federal employee could not be covered

(Footnote continued on next page)

Exemption 7 (D), appellant contends that informant file and symbol numbers do not identify informants, and argues that there is an overriding public interest in using the numbers to evaluate the content of the worksheets. Clearly appellant is mistaken: the explicit legislative history of this exemption, as reflected in the caselaw, stresses that "Congress feared that the revelation of even apparently innocuous information might inadvertently reveal the identity of confidential sources." Shaver v. Bell, supra note 14, 433 F. Supp. at 411; accord, Church of Scientology v. Department of Justice, 410 F. Supp. 1297, 1301 (D.C. Cal. 1976). Thus, as the file and symbol numbers undisputedly could lead to identifying informants, and as the public interest in obtaining the numbers is minimal at best, the District Court correctly held that disclosure was unwarranted.

Appellant's challenge to the FBI's withholding of the identities of third parties and the Special Agents who processed the worksheets under Exemption 7 (C) (avoiding unwarranted invasions of privacy) again involves little more than unsupported allegations and recriminations insufficient to raise genuine issues of

14/ Footnote continued from previous page.

by this exemption; and because the FBI once had an informant whom it did not publicly employ, a genuine issue of material fact was created concerning the possible existence of such a creature in the instant case. Both claims are meritless. Informant symbols were held properly exempted as administrative markings under Exemption 2 in Lesar v. Department of Justice, supra, mem. op. at 5. See Nix v. United States, 572 F.2d 998, 1005 (4th Cir. 1978); Shaver v. Bell, 433 F. Supp. 438, 439 (N.D. Ga. 1977).

material fact.[15/] The broad scope of this exemption is well established, Congressional News Syndicate v. Department of Justice, supra note 15, 438 F. Supp. at 541; Shaver v. Bell, supra note 14, 433 F. Supp. at 440, and courts have held that it covers third parties and Special Agents who merely process information. Lesar v. Department of Justice, supra, mem. op. at 6 (persons supplying information and FBI personnel below the rank of section chief are protected); Shaver v. Bell, supra note 14, 433 F. Supp. at 440 & n.2 (anyone, including law enforcement officers, whose privacy might be invaded is protected); Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976) (names of special agents and third parties properly withheld). To the extent that the court's holding in Ferguson v. Kelley, 448 F. Supp. 919 (N.D. Ill. 1977)

15/ For example, appellant baldly asserts that the FBI "is notoriously inconsistent" in applying the exemption, failing to recognize that the need to protect third parties and Special Agents from embarrasment and harassment varies depending on the context. See Congressional News Syndicate v. Department of Justice, 438 F. Supp. 538, 543 (D.D.C. 1977) (". . . the context in which the information appears is determinative"). Further, the fact that the public already knows much about President Kennedy's assassination, a fact upon which appellant relies heavily, does not presume that they know or need to know the identities of individuals only peripherally involved. The District Court recognized that balanced against the possibility that the individuals and their families could become the subjects of rumor, innuendo, and harassment, the public's need to know, if any, paled. Accord, Congressional News Syndicate v. Department of Justice, supra 438 F. Supp. at 541-542; Shaver v. Bell, supra, note 14, 433 F. Supp. at 440. In addition, appellant can ill infer that because he has possession of certain information it is in the public domain. See note 13 supra.

(as supplemented 1978) is different, it must be disregarded.[16/] Thus the District Court's conclusion, properly reached using the de novo balancing test -- weighing the minimal public interest in disclosure against the vital individual privacy interests fully explained in appellees' affidavits -- was well-reasoned and solidly supported.

Appellant's attempts to manufacture genuine issues of material fact from the circumstances surrounding the claims under Exemption 7 (D) (protecting the identity of, and information furnished only by, a confidential source) also are misplaced. The FBI affidavits clearly and comprehensively set out the bases for these claims, and graphically portray the personal and institutional harm which could result from unauthorized disclosure. Appellant's bald allegation that "there has been no showing that the material in the 'original documents' . . . was properly excised" is further undermined by reference to Shea's letter of July 7, 1978, in which he stated that he had referred the original documents to a reviewing board, and would inform appellant of any subsequent change in their status.

The worksheets initially were processed during the summer and fall of 1977; they were reveiwed at the time of their release to appellant in April 1978, and they again were reviewed

16/ The Ferguson court held, without support, that the excision of the names of FBI agents could not be justified under Exemption 7 (C). Id. at 922-923, 924. Fortunately, that decision stands alone with regard to that ruling. The Ferguson court, however, did protect the identities of third parties under this exemption. Id. at 924-925.

with the original documents in accordance with Shea's July 7 letter. These uncontradicted facts prove groundless appellant's claim that the FBI arbitrarily "rubberstamped" its claims of exemption. Appellant additionally faults the agency for not showing that the withheld information was confidential or subject to an express or implied agreement of secrecy. However, simple reference to all three FBI affidavits reveals appellant's criticisms to be patently false. (E.g., Lattin Affidavit, R. 10, Exh. 1, ¶ 6,8; Beckwith Affidavit, R. 10, Exh. 2, ¶ (d); Benson Affidavit, passim.)

Finally, appellant again resurrects an argument laid to rest long ago. In Church of Scientology v. Department of Justice, supra, 410 F. Supp. at 1302, the court found that "[a] recognition of the overall purpose of the [1974] amendment [to the FOIA] and political realities surrounding its passage make it unmistakably clear that the term source means source, not human source." Accord, Lesar v. Department of Justice, supra, mem. op. at 14. Appellant's tired contentions to the contrary thus disintegrate.

Referring to Exemption 7 (E), appellant challenges only the lack of evidence that the excisions made in the original documents were proper, and the allegedly "public," and therefore disclosable, nature of the investigative techniques protected. However, the presumption of regularity that attaches to public officials performing their public duty, the actual review of the original documents provided by the Department of Justice, and appellant's failure to support either of his claims with anything but personal

opinion defeat his argument. See Ott v. Levi, supra. Moreover, and again, the fact that appellant may recognize or piece together an investigative technique does not mean that the information was public, or that the nature and extent of its use in a certain investigation were within the public domain.

CONCLUSION

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be affirmed.

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