

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. GARY SHAW,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action No. 82-0756

FILED

NOV 9 - 1983

JAMES F. DAVEY, Clerk

ORDER

The government has moved for reconsideration of that part of the Court's order of January 13, 1983 which directed the FBI to release ten black and white photographs to plaintiff. The government had claimed the photographs were exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, because they would disclose "confidential information furnished only by a confidential source" compiled in the course of a criminal investigation within the meaning of exemption (b)(7)(D). The Court found to the contrary, determining after in camera review that the photographs "contain nothing to reveal the existence of an investigation, let alone the agency which might have conducted the investigation."

A supplemental affidavit executed by Special Agent John Phillips and filed with the government's motion for reconsideration may suffice to establish that the photographs were obtained

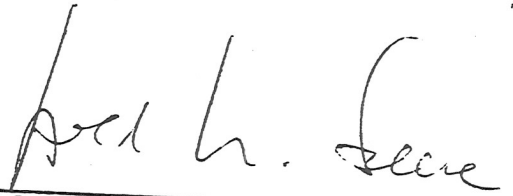
in the course of a criminal investigation. Nevertheless, the affidavit does not help the government to establish that the photographs are "confidential information." The "information" contained in otherwise unmarked photographs such as those involved here is the imprinted images reflected therein and the fact that photographs were taken. These photographs, taken outdoors, depict "information" that far from being "confidential" was public: individuals assembling in advance and then walking single file in a protest march along a public highway, carrying placards with slogans written on them. Cf. Save the Dolphins v. Department of Commerce, 404 F. Supp. 407 (N.D. Cal. 1975) (film taken on open seas not "confidential" within meaning of exemption (b)(4)).

In short, the law enforcement agency from which the FBI obtained the photographs may have been a confidential source, but the photographs are not "confidential information." Moreover, if the reason behind the exemption for "confidential information furnished only by a confidential source" is that "the identity of a source may be determined from an analysis of the information furnished by the source," Verona Pacheco v. FBI, 456 F. Supp. 1024, 1031 (D. Puerto Rico 1978), it is difficult to imagine how public information -- images of participants in a march -- could lead to a determination of the source or could properly be said to have been "furnished only" by the source (emphasis added).

For the foregoing reasons it is this 9th day of November, 1983,

ORDERED That defendant's motion for reconsideration be and it is hereby denied, and it is further

ORDERED That defendant shall release to plaintiff the ten photographs.



Harold H. Greene
United States District Judge