UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed
Feb 6 1984

ANGUS MACKENZIE,

Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,

Defendants

Civil Action No. 82-1676

OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME TO COMPLETE PROCESSING OF DOCUMENTS, AND PLAINTIFF'S CROSS-MOTIONS FOR DISCOVERY AND A VAUGHN INDEX

Plaintiff respectfully requests this Court to deny defendants' motion for an extension of time to complete processing documents subject to plaintiff's FOIA request. Defendants have had nearly seventeen months since they entered into a Stipulation as to production, and have failed to show circumstances which warrant an extension of time.

In addition, plaintiff respectfully moves this Court to lift the stay of proceedings, agreed to by the parties in the Stipulation of September 9, 1982, to permit plaintiff appropriate discovery as to whether all document responsive to plaintiff's FOIA request have been properly identified.

Plaintiff asserts that the search and production completed by the CIA thus far has been inadequate and incomplete.

Finally, plaintiff respectfully moves the Court to Order defendants to prepare a Vaughn index, itemizing and describing the factual basis upon which they claim exemptions from FOIA's disclosure requirements for all documents responsive to plaintiff's request, as delimited by the September 9, 1982 Stipulation.

In support of this Opposition and these Cross-Motions, plaintiff submits herewith a memorandum of points and authorities, and a proposed order.

Plaintiff requests the Court to grant an oral hearing on these motions.

Respectfully submitted,

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Dated: February 6, 1984

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGUS MACKENZIE Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, et. al. Defendants.	Civil Action No. 82-1676

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTIONS FOR DISCOVERY AND A VAUGHN INDEX

Plaintiff respectfully submits this memorandum in opposition to defendants' January 16, 1984, Motion for an Extension of Time to Complete Processing of Documents; and in support of plaintiff's Cross-motions for Discovery and for preparation of a Vaughn Index.

I. PLAINTIFF OPPOSES DEFENDANTS' REQUEST FOR AN EXTENSION, AND SEEKS AN ORDER COMPELLING PRODUCTION OF ALL REQUESTED DOCUMENTS WITHIN THIRTY (30) DAYS

The current motion and cross-motions before the Court result from the failure of the defendants, the Central Intelligence Agency, et al., (hereinafter "defendants" or "CIA"), to

comply with the terms of a Stipulation entered into by the parties and approved by this Court on September 9, 1982 (Hereinafter, "The Stipulation"). Pursuant to that Stipulation, defendants agreed search its files for materials responsive to a Freedom of Information Act ("FOIA") request made by plaintiff Angus Mackenzie (hereinafter "Mackenzie" or "plaintiff"). Plaintiff's request was for documents in the CIA's files relating to thirty-eight domestic newspapers or periodicals. Defendants were obliged, under the Stipulation, to report by November 9, 1982 if processing of any files would take more than one year, and to provide a schedule for production. Absent that, production was to have been completed by November 9, 1983. The defendants failed to meet these agreed-upon deadlines, and on or about November 16, 1982 informed plaintiff that it would be several weeks late in meeting its schedule for its final production. Moreover, defendants informed plaintiff at that time that they would not be able to produce any documents relating to plaintiff's request for files relating to one of those thirty-eight domestic periodicals -- Ramparts magazine -- and asked for a six-month extension.

Plaintiff was regrettably unable to agree to defendants' request. While plaintiff has continually sought, during the past four-and-one-half years since his initial FOIA request was filed, to accommodate the CIA, and to lessen its administrative burden, in achieving production of documents in this case, plaintiff could only conclude that the CIA intended only pro forma compliance with the terms of the Stipulation reached

on September 9, 1982. The CIA has not complied with either the substance or spirit of that Stipulation. Therefore, plaintiff has little option at this time other than to request relief from this Court in the form of an Order requiring the defendants to complete production of the documents subject to the stipulated agreement within thirty (30) days, and for other relief set forth in sections II & III of this memorandum. In order for the court to fully appreciate plaintiff's position, a short summary of the circumstances that have transpired thus far in this case is appropriate.

A. Plaintiffs FOIA request for documents has already been pending for more then four and one half years.

Plaintiff Angus Mackenzie is a free-lance journalist who has specialized since 1977 in investigating and reporting about government relations with the press. Mackenzie's articles have appeared in the Columbia Journalism Review, The Progressive, The Nation, Jack Anderson's syndicated Merry-Go-Round and in more than 550 newspapers throughout the United States. Mr. Mackenzie has received acclaim for his work, including the 1983 Award for Investigative Journalism from The Media Alliance, a San Francisco journalism society.

In 1979, Mackenzie was conducting research, on assignment for Columbia Journalism Review, regarding allege CIA interference with the "underground" or "dissident" press. After discovering evidence of a CIA operation which targetted the dissident press in the United States, Mackenzie filed a

request under the FOIA, 5 U.S.C. § 552 et seq, with the Central Intelligence Agency on June 25, 1979. Because the topic of his research primarily benefitted the general public nationwide Mr. Mackenzie requested that the CIA waive normal duplication and production fees.

The CIA responded by denying Mr. Mackenzie's request for the documents and for a fee waiver and required, instead, a $61,500 search fee. However, the CIA stated that it would produce and waive fees for those newspapers "whose authorized representatives . . . provided appropriate release in your favor."[1/] While Mr. Mackenzie continued to assert his rights under FOIA for production of the files related to all the requested newspapers, he did seek, and ultimately obtained, waivers or releases from about twenty newspapers, and submitted those to the CIA. The CIA never produced the requested documents for those twenty newspapers in spite of Mr. Mackenzie's compliance with this "waiver" request. Throughout 1979 and 1980 Mr. Mackenzie continued to seek the documents and a fee waiver from the CIA but to little avail. By April 9, 1981, Mr. Mackenzie had pursued appeals of this denial at various administrative levels at the CIA and was informed by the CIA that he had exhausted all administrative remedies.

1/ This "waiver" requirement is beyond any requirement found in FOIA or the agency's implementing regulations. Besides, it placed a virtually insurmountable block in Mr. Mackenzie's path because most of the newspapers for whom requests had been made had disbonded in the early 1970's.

In March 1982, plaintiff requested administrative reconsideration of the CIA's denial on the grounds that more recent publications of his research in national periodicals and prominent newspapers had provided clear evidence of the public benefit from his work. In that same request for reconsideration, plaintiff offered to reduce substantially the size of his original FOIA request to lessen the CIA's burden. At that time, the plaintiff identified a discrete list of several dozen newspapers which formed the basis of his revised request, and in addition requested several specifically named files. The CIA responded by stating that it would recalculate its estimated search fee but refused to reconsider plaintiff's entitlement to a fee waiver. The CIA asserted that it was continuing to process the files for which Mr. Mackenzie had obtained "waivers" but estimated, in a letter dated April 13, 1982, that it would take an additional two years to produce those documents even though the CIA had promised to produce as early as 1979. Despite diligent efforts by the plaintiff to reach an accommodation with the CIA, the agency showed no willingness to compromise. Therefore, on June 9, 1982, Mr. Mackenzie was forced to file suit in this case to assert his right to production of these documents and fee waiver under the Freedom of Information Act.

In the ensuing two months, plaintiff's counsel and counsel representing the CIA conducted continuous negotiations attempting to reach a settlement. On September 9, 1982, the parties reached an accord and entered into The Stipulation. In

essence, the plaintiff agreed to limit his request to documents relating to thirty-eight (38) U.S. underground or dissident newspapers and CIA agreed to produce those documents on a schedule which was to last approximately one year. The CIA also agreed, in a separate letter, to waive all fees for search and production.

B. Defendants were aware of the volume of the Ramparts files at the time they agreed to the Stipulation.

One of the reasons that plaintiff agreed in the Stipulation to a year's production schedule for his substantially-reduced request was that the CIA told plaintiff, during the period of negotiation, that it anticipated problems with regards to production of documents for four of the 38 domestic newspapers: the Liberation News Service, the Guardian, Quicksilver Times, and Ramparts.[2/] The CIA stated that it needed a sufficiently long period of production to respond to the request, especially since it anticipated large numbers of documents from these four periodicals. In fact, the CIA insisted on the inclusion of paragraph 7 of the Stipulation which specifically states that:

> Paragraph 6 does not apply to the following four publications or entities: (a) Liberation News Service; (b) Guardian; (c) Ramparts; (d) Quicksilver Times. At the end of the two months search period, CIA shall

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2/ Ramparts was a leading journal of protest in the 60's and 70's whose editorial staff included well-known journalists like Robert Scheer, now a reporter with the Los Angeles Times.

> provide an estimate as to the time for processing and releasing documents relating to these four publications or entities, subject to paragraphs 5 and 11.

Thus, defendants were well aware that the Ramparts files in particular were extensive at the time they agreed to a one-year production period.

Moreover, plaintiff has learned, upon infomation and belief, that defendants have previously processed numerous documents from the Ramparts files as part of its settlement of Scheer v. CIA, Civil No. 77-1492 (N.D. Cal.) (filed July 7, 1977) (Poole, J.). Mr. Robert Scheer, currently a reporter for the Los Angeles Times, and formerly a Ramparts editor, received numerous documents from the CIA marked "Subj: Ramparts", or similarly denominated as part of the CIA's Ramparts files. Having already conducted that search, and completed production, for that request, defendants knew more than just the general size of Ramparts files; they were aware of the number of documents likely to be involved. Thus, during the negotiation period, and from the very beginning of the search and production period designated in the Stipulation, the CIA knew that the Ramparts production would be substantial, and agreed to the one-year production period with that in mind.

C. The processing required for the first thirty-seven requests has placed little burden on the CIA, and it is therefore not entitled to any additional time.

In determining whether the CIA is entitled to additional time to process the Ramparts documents, the Court should

consider how diligent the CIA has been in responding to plaintiff's FOIA request since September 9, 1982. The total number of documents actually produced to Mr. Mackenzie in more than fourteen months' time has been thirty-six (36). Moreover, only 282 documents were identified by the CIA as even being "responsive" to plaintiff's request. Plaintiff believes that the CIA is actually in possession of many more documents that have been reported, and has evidence which demonstrates the CIA's search has been inadequate. See section II of this memorandum, infra. Nonetheless, the agency's expenditure of more than fourteen months simply to identify just 282 documents and to produce only 36, cannot reasonably be termed "diligent."

In spite of this, the Affidavit of Louis J. Dube, Information Review Officer for the CIA's Director of Operations, submitted in support of defendant's motion (hereinafter "Dube Affidavit"), states that "the Agency has processed the plaintiff's FOIA request in the utmost good faith and with evident due diligence." He states at paragraph 4 that "we completed the processing of the 37 requests within the one year time frame set forth by the stipulation. We have expended an enormous amount of resources, and terms of both money and personnel time, in accomplishing this processing of plaintiff's multi-faceted request." This language is conclusory and misleading, and the Court should ignore it. The truth is that plaintiff has received only a handful of documents from the CIA in the past seventeen months. An analysis of what the plaintiff has received thus far exposes Mr. Dube's claims of due

diligence on the part of the CIA; such an assertion cannot be supported by the meager search and production accomplished thus far in this case.

Initially, Mr. Dube's statement that the CIA has completed processing "37 of the 38" requests gives a misleading impression. The CIA reported to plaintiff on November 9, 1982 that there were no responsive documents whatsoever for nine of these 37 newspapers. Thus, the CIA had absolutely no burden in producing requests for nine newspapers, and at most, the CIA can claim to have had the burden of processing 28 requests, and not 37.

Moreover, the time expenditure required for the search of those twenty-eight requests can hardly have been "enormous." Whatever search method the CIA employed, it uncovered, as mentioned earlier, only 282 responsive documents. This is hardly a fourteen-month task, and Mr. Dube's affidavit is devoid of any explanation for such obvious inefficiency.

And, as noted above, the CIA has actually produced very few documents of those 282. The CIA has claimed exemptions for, and has withheld in entirety, 80 of the 282 documents. In addition, the CIA has not produced another 166 of the 282 documents because it claims that those documents belong to other agencies. It claims either to have returned those documents to the originating agencies, or has notified the plaintiff that production will be "coordinated" with another government agency.

Mr. Dube's claim that production is "complete" for the first thirty-seven requests is also inaccurate. To date, of the documents which the CIA claimed would be coordinated with other agencies, the plaintiff has received only two; plaintiff is still awaiting report from the CIA on what will be done with regard to those "coordinated" documents.

Thus, of the 282 documents which the CIA has identified since September 9, 1982 only a handful have actually been delivered and produced in some form to the plaintiff. Processing of the documents could not have taken "enormous" time as Mr. Dube claims. For example, several of the 36 documents produced were simply reproductions of Congressional reports, public Commission documents and generally available indexes for which no claims of exemptions would have been available to the CIA; therefore, little review or analysis by CIA staff was required. The CIA was simply faced with a simple reproduction task in those cases.

Also, the CIA has been put to little time or effort in evaluating the documents or in developing rationale for its claims of exemptions for the 116 documents either withheld in entirety or produced in deleted form. That is because the CIA has made no attempt to explain its withholding of documents. In virtually every case, it simply listed the "(b)(1)" national security exemption or the "(b)(3)" sources and methods exemption as its basis for its withholding without providing any further description of the documents, any analysis of why the documents qualified for such an exemption claim nor any other

information which might require some expenditure of time or effort on the CIA's part.

D. Defendants are bound to complete production in accordance with the terms of the Stipulation, and have not demonstrated "unexpected" difficulties which would entitle them to an extension.

Defendants seek to excuse their failure to comply with the production schedule established in the Stipulation by relying on the authority granted this Court, under 5 U.S.C. § 552(a)(6)(C), to extend certain statutory deadlines, and on the language of the Court of Appeals decision in Open America v. The Watergate Special Prosecution Task Force, 547 F.2d 605 (D.C. Cir. 1976) (hereinafter, "Open America"). Defendant's reliance is misplaced for several reasons.

5 U.S.C. § 552(a)(6)(C) is only intended to permit extension of the strict statutory deadlines for production established under 5 U.S.C. § 552(a)(6)(A) & (B). The language of the statute itself, the legislative history of FOIA, and the Court of Appeals decision in Open America make that clear. While the defendants Memorandum quotes partial language of 5 U.S.C. § 552(a)(6)(C), it omits the prior sentence which defines the purpose of that subsection's grant of authority to permit extensions. The statute provides:

> (C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances

> exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request.

5 U.S.C. § 552(a)(6)(C) (emphasis added). Moreover, as defendants later acknowledge in their memorandum, 5 U.S.C. § 552(a)(6)(C) "was put in as a safety valve after the protests of the administration that the rigid limits of subparagraphs (A) and (B) [of 5 U.S.C. § 552(a)(6)] might prove unworkable." Open America, supra at 610 (emphasis added).

Plaintiff is not insisting that the defendants produce documents subject to any deadline required by 5 U.S.C. § 552(a)(6). The standards established in Open America only apply to circumstances where those rigid deadlines are sought to be enforced, and that is not this case. During the entire history of this request, plaintiff has repeatedly attempted to accommodate the CIA, and has agreed to production schedules far longer than permitted by FOIA. In the Stipulation, plaintiff agreed to a production schedule which would permit the CIA sixty days to complete an initial review of its files and to produce a schedule of release, and then an additional year to complete its production.[3/] In Open America, plaintiffs were

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3/ In fact, plaintiff's accomodations to the CIA has already extended beyond the agreed-upon period. When informed by counsel for defendants in November, 1983, that the CIA would not meet the agreed upon deadline, plaintiff agreed to forestall filing a Motion to Compel with this Court and attempted

(Continued)

attempting to enforce strictly the twenty-day statutory period; here, defendants agreed to, and have been granted fourteen months under the terms of the Stipulation. This is simply not an Open America situation.

Thus, Open America may establish the standard for determining whether a government agency will be excused from complying with its statutorily-imposed deadlines, but is inapposite in circumstances where, as here, the government agency has committed itself to separate, contractual obligations to produce. Plaintiff submits that the Court must determine whether the CIA has lived up to its contractual obligations. Plaintiff asserts that the CIA plainly has not.

Those obligations were as follows: Under the terms paragraphs 4 & 5 of the Stipulation, defendants were required to complete initial search within two months, and to estimate its time of processing which "may be as long as one year." The CIA was then required, under paragraph 6, to process and release documents relating to at least seven publications every sixty days. Had the CIA identified documents for all 38 requested publications, production of all documents would have required, at most, one year.

Paragraph 7 permitted the CIA to exempt four publications, including Ramparts, from the schedule in paragraph 6,

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(Footnote 3 continued)

to negotiate an extension of time to produce which would be reasonable and certain. Defendants would not agree to a firm date and ultimately filed their Motion for extension.

but specifically required the CIA, at the end of the sixty day search period, to inform plaintiff if any additional time would be required.

The Stipulation did allow for some flexibility in adjusting the schedule. Two paragraphs of the stipulation are notable in this regard. Under Paragraph 8, the CIA undertook to produce the documents expeditiously and in good faith, and to release documents earlier than the schedule required if possible:

> When possible, when all documents pertaining to a particular newspaper have been processed, such documents shall be released (subject to withholding or deletion) without waiting for the conclusion of the entire process. Also, if possible, periodic releases of documents relating to the four publications or entities in paragraph 7 will be made without waiting for the conclusion of the entire processing.

Paragraph 11 of the stipulation permitted the CIA to seek by agreement of the parties or application to the Court an extension of the time period

> "If unexpected difficulties are encountered; for example, if documents discovered in the search lead to a substantial number of additional documents.

(Emphasis added.)

These two provisions were specifically included in the stipulation in order to ensure that the CIA would comply with the production schedule in good faith, but to allow some flexibility where "unexpected difficulties" occurred.

Defendants have simply failed to comply with any of these obligations. First, defendants failed to fulfill their

obligations, under paragraph 7, to provide at the end of the two-month search period, "an estimate as to the time for processing and releasing documents relating to these four publications or entities . . ." (including Ramparts). The CIA's November 9, 1982 letter stated that "it is estimated that it will take twelve months to complete the processing . . ." If the CIA was to seek extension of the production period because of Ramparts, it was obliged under paragraph 7 to report this fact in the November 9, 1982 letter. It did not do so.

Second, the CIA did not completed its production by November 9, 1983. As mentioned above, it produced no documents for Ramparts; it has never finished processing the "coordinated documents;" it did not even complete the first thirty-seven requests until December 5, 1983.

Finally, the CIA has not shown "unexpected difficulties" which would excuse its performance under the terms of paragraph 11. Mr. Dube's affidavit fails to mention any difficulties in production which were not known to, or could not have reasonably been anticipated by the CIA at the time the Stipulation was signed on September 9, 1982. The CIA clearly knew that the Ramparts production would be more voluminous than the other requests; the CIA had previously researched and produced a substantially similar request for Mr. Scheer. Moreover, the CIA surely knew that the Ramparts file was large because it said so during negotiations and because it had expressly reserved the right, which it failed to exercise, to seek an extension on the Ramparts production by informing

plaintiff by November 9, 1982 of time estimates for that production.

Mr. Dube's affidavit, in this regard, is singularly unfortunate and distressing because he provides no dates or time references to support his assertions. He states:

> When we searched ... for information on Ramparts . . . we discovered a voluminous amount of documents existed on that topic. At that point we realized that it would be impossible to complete processing and review of the Ramparts request within the time set forth in the stipulation. This unanticipated occurrence should not cloud [the CIA's other efforts].

Plaintiff submits that Mr. Dube's affidavit in this regard is wholly unadequate to demonstrate that "unexpected difficulties [were] encountered," as required by paragraph 11 of the Stipulation. Notably absent from the Dube affidavit is any statement of approximate date on which this "unanticipated" discovery was made. The affidavit attempts to leave the impression that the CIA had never estimated the size of the Ramparts files until just recently and after it had completed processing Mr. Mackenzie's first thirty-seven requests. In light of the CIA's own Stipulation reservation regarding Ramparts, and the prior Scheer production involving Ramparts materials, plaintiff suggests that the affidavit is misleading.[4/]

4/ In this same regard, Mr. Dube fails to state how the 6,500 "potentially responsive" Ramparts documents now identified compares with the number of Ramparts documents identified on November 9, 1982 at the conclusion of the search period. He

(Continued)

Finally, Mr. Dube fails to explain why the CIA could not process the Ramparts materials in the required fourteen months when it had uncovered a list of only 282 documents, and produced only 36 documents, for the other thirty-seven periodicals combined. Mr. Dube wholly ignores the CIA's obligation, under paragraph 8 of the Stipulation to release, where possible, documents prior to the conclusion of the entire processing period. Certainly a serious question of CIA compliance with the intent and spirit of the Stipulation exists where it took the entire one-year processing period to produce just thirty-six documents.

Much of the rest of the Dube affidavit, and of defendant's memorandum, dwells on the large number of other requests which the CIA must process. While this might be an appropriate consideration in an Open America situation where the government agency is being asked to comply with strict statutory deadlines, it is of little consequence in this case because this large number of requests cannot be said to constitute "unexpected difficulties," the test to be applied pursuant to paragraph 11 of the Stipulation. In fact, it is clear that dealing with a large number of FOIA cases is a regular fact of life for the CIA. See Dube Affidavit ¶ 6, at

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(Footnote 4 continued)

does not state that it is any different, or explain why this "voluminous" number was not discovered and reported to plaintiff on November 9, 1982 in accordance with the requirements of paragraph 7 of the Stipulation.

5-6. Defendants admit that there has been a continued high level of FOIA requests "since 1976." Defendants' Memorandum at 6. Even assuming the CIA did have a large number of cases to process, it clearly understood those pressures when it entered into the Stipulation on September 9, 1982. A large FOIA case load was simply not "unexpected," and therefore does not excuse defendants' failure to meet their contractual obligations.

The most troubling aspect of the CIA's request for extension until April 30 is that it does not even guarantee that it will complete processing by that date. Mr. Dube's affidavit, and the defendants' proposed order, state only that the CIA will "make every reasonable effort," to come into compliance by that date, but reserve the right to seek further extensions at that time if they deem it necessary. This is particularly unreasonable and must be rejected. It will soon be nearly five years since Mr. Mackenzie made his initial request; nearly two years since plaintiff offered to reduce the scope of his request to accommodate the CIA; twenty-one months since suit was filed in this case; eighteen months since the parties entered into a Stipulation as to production; and nearly three months since the production period was to end. The time has come to put an end to the CIA's clear pattern of delay and to require compliance with the intent of FOIA. Therefore, the plaintiff respectfully requests that this Court enter an order compelling production of all documents subject to plaintiff's request within thirty (30) days.

II. PLAINTIFF CROSS-MOVES FOR AN ORDER PERMITTING DISCOVERY TO DETERMINE WHETHER THE CIA HAS IDENTIFIED FEWER THAN ALL DOCUMENTS IN ITS POSSESSION

A. The CIA has failed to identify and produce all documents in its files responsive to plaintiff's request.

Throughout the period of the past 17 months during which the CIA has been producing documents, plaintiff has been continually surprised by the small number of documents which the CIA has identified as responsive to his request. Despite defendants' initial assertions, made during negotiations over the Stipulation, that plaintiff's requests were very extensive and would require at least one year to respond to, only 282 documents have ultimately been identified for 37 domestic periodicals and magazines. It is plaintiff's belief, based both on the initial CIA representation as to the scope of his request, and also based on research that he has conducted over the past six years, that the CIA has many more responsive documents than they have thus far identified.

As the Court is well aware, the difficulty with making such an assertion is that the CIA alone has access to its files, and plaintiff has limited ability to demonstrate instances of withholding. However, Mr. Mackenzie has been able to obtain CIA documents, from various sources during his research, which indicate that in a number of instances the CIA has documents responsive to these plaintiff's request but has neglected to identify or produce those documents.

Plaintiff has discovered that on November 30, 1976, the CIA responded to a FOIA request from Mr. Andrew R. Marks, a former employee at Liberation News Service. Liberation News Service was a news-syndicate serving about 400 anti-war newspapers in the late 1960's, and is one of plaintiff's 38 requests. Mr. Marks had asked for documents in the CIA's possession which concerned him personally. A number of these documents were documents which had been gathered by the CIA as part of their operations targeting the Liberation News Service where Mr. Marks served as managing and international editor during the period February 1969 to July 1972 and again from August 1977 through August 1981. See Marks Affidavit at Appendix A.

In its production to Marks, the CIA identified a number of documents in its possession related to the Liberation News Service; it has failed to identify a number of these same documents in its production to Mr. Mackenzie. For example, it produced to Mr. Marks an expurgated copy of a memo dated January 23, 1971. That document, appended hereto as Exhibit B, appears to be a CIA memorandum whose subject was the Liberation News Service. Similarly, an internal memo dated April 25, 1971, also released to Mr. Marks, refers to "LNS". In its response to Mr. Marks, the CIA also identified but did not release seven other dispatches or memoranda with dates between February 1972 and July 12, 1972. These were withheld from Mr. Marks on the basis of various claims of exemption. Plaintiff suspects that a number, or all of these documents were related to the

Liberation News Service because these dates directly correspond to Mr. Marks' employment with that news syndicate. The CIA had the responsibility to at least identify the existence of those documents subject to plaintiff's request, and then, if it felt appropriate, to make claims of exemptions. But it did not do so, and in fact, identified none of these documents in its report to Mr. Mackenzie.

Similarly, the CIA has previously produced, subject to a request by the Center for National Security Studies ("CNSS"), a copy of a "Situation Information Report", dated 9/9/68 and attached hereto as Appendix C. This report, which was released in total to CNSS, represents finished intelligence conducted by the CIA. That report specifically discusses the Liberation News Service, and yet, was not listed among the documents which the CIA has told Mr. Mackenzie are in its files regarding Liberation News Service. Again, the CIA is required under the terms of the request made by Mr. Mackenzie to identify this document.

More recently, the CIA replied to a FOIA request made by Mr. Bill Conn of the College Press Service. The CIA reply, dated February 17, 1983, released several documents including a memo dated January 8, 1969 and authored by Howard J. Osborne, Director of Security. This document makes reference both to the Liberation News Service and to the High School Independent News Service. See Appendix D, attached hereto. Both of these periodicals are among the 38 requests made by Mr. Mackenzie. In responding to Mr. MacKenzie's request for either the

Liberation News Service or the High School Independent Press Service, the CIA did not identify or release this document.

The High School Independent Press was also mentioned in a CIA document dated April 2, 1969, previously released to the CNSS, but again was not identified as responsive to Mr. Mackenzie's request. This document is especially noteworthy in that it states that CIA headquarters had an immediate and continuing requirement for information regarding. . ." [deleted] coordinating news service for high school underground newspapers called HIP--High School Independent Press--located at the offices of Liberation News Service, 160 Claremont Ave., N.Y.C., 10027." See Appendix E, attached hereto. Despite this document--and the reference found in it revealing the CIA's continued interest in this news service--the CIA reported in its letter on November 9, 1982, that there were no documents responsive to Mr. Mackenzie's request for High School Independent Press Service.

Even those few documents which have been released to plaintiff indicate that there are other documents in the CIA files which were not identified. For example, Document No. 9 of the CIA's production, which concerns Alternative Features Services, refers to information obtained about this periodical in CIA report "HQS-5547, 18 Oct. 71." See Appendix F, attached hereto. That source document was not identified or listed as responsive to Mr. Mackenzie's request for Alternative Feature Service. Similarly, Document No. 17 is a report concerning the Berkeley Barb and lists four other documents which served as

source documents. One, dated July 7, 1967, was not identified as responsive to Mr. Mackenzie's request for Berkeley Barb documents. See Appendix G, attached hereto.

These omissions in identifying responsive documents has led plaintiff to believe that the search that has been conducted by the CIA to date has been woefully inadequate. While plaintiff does not, at this time, assert that this omissions result from bad faith on the part of the Defendants, he respectfully suggests that the manner in which the search of agency files has been conducted, and the standards which agency employees were directed to use to recognize responsive documents, have resulted in an the incomplete and inadequate identification.

(a) Under circumstances where there is evidence of a less than adequate FOIA search, plaintiff is entitled to discovery.

This Court, and the D.C. Circuit Court of Appeals, have recognized that discovery is an appropriate remedy where factual disputes arise as to "whether [an agency] did in fact hand over all data requested in a FOIA petition." Murphy v. FBI, 490 F. Supp. 1134, 1137 (D.D.C. 1980), citing Weisburg v. Department of Justice, 543 F.2d 308 (D.C. Cir. 1976) and Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C. 1974). See also Founding Church of Scientology, of Washington, D.C. Inc. v. National Security Agency, 610 F.2d 824 (D.C. Cir. 1979) (FOIA case

remanded for further proceeding where there was doubt as to adequacy of agency search.)

In Weisburg, supra, our Court of Appeals reversed and remanded the District Court's dismissal of a FOIA case to permit the plaintiff to pursue discovery concerning information which he had requested and which had not been disclosed. The Court of Appeals found that the plaintiff had identified certain scientific data regarding the assassination of President Kennedy, which he believed to be in existence, but which had not been identified, and ordered further discovery to determine the "existence or non-existence" of the evidence.[5/] See also Exxon v. FTC, supra at 758 (court authorizes discovery to determine adequacy of FTC's document search in FOIA case).

In Founding Church of Scientology, supra, the D.C. Court of Appeals was faced with a very similar situation as here. There, defendant NSA had failed to identify certain documents responsive to plaintiffs request and had attempted to justify their search procedures on the basis of unspecific and highly conclusory affidavits. The Court of Appeals remanded the case for further proceedings, stating that discovery as to the adequacy of an agency's search is critical to plaintiff and to the proper judicial administration of the FOIA. "To accept its claim of inability to retrieve the requested documents in

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5/ Although the plaintiff in Weisburg had attempted to proceed by interrogatories, the Court of Appeals indicated that a more advisable procedure would be to proceed by "depositions or a court hearing." Weisburg, supra at 311.

the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . [a]nd if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversory scrutiny of its search techniques, the Act will inevitably become nugatory." Founding Church of Scientology of Washington, D.C., Inc. v. National Security Agency, 610 F.2d 824, 836-37 (D.C. Cir. 1979) (emphasis added).

In addition, this District Court has ordered additional discovery where, as here, the small number of documents listed as "responsive" to a request suggests that the agency may have utilized an overly narrow interpretation of the FOIA request, and where the documents produced themselves demonstrate the existence of other responsive documents. See Virginia Independent Schools Association v. Commissioner, 76-1 U.S.T.C. ¶ 9322 (D.D.C. 1976) at 83,758-62.

The Court in Murphy v. FBI, supra, indicated that discovery is permissible to test the adequacy of an agency's FOIA search where (a) the agency had released the data regarding its search; (b) the agency had filed affidavits claiming complete compliance with the FOIA request; and (c) there remained a factual dispute as to the adequacy of the search. 490 F.2d at 1137. All of these circumstances are present in this case.

First, the CIA has provided a list which it alleges contains all documents in its files responsive to all plaintiff's requests (except Ramparts); second, the CIA has provided

the affidavit of Mr. Dube which claims complete compliance with plaintiff's requests (except Ramparts); and third, plaintiff has demonstrated that documents, clearly responsive to some of these requests and in the control of the CIA, were nonetheless not identified as responsive. Plaintiff is, therefore, entitled to pursue appropriate discovery to determine whether his requests were adequately complied with.

III. THIS COURT SHOULD REQUIRE DEFENDANTS TO PREPARE AND PROVIDE A VAUGHN INDEX

Thus far, defendants have listed 282 documents as allegedly responsive to plaintiffs request for CIA files on 37 periodicals and newspapers. Defendants have withheld eighty (80) of those documents in their entirety; thirty-two (32) other documents have been released only in expurgated versions, some so totally masked as to constitute a de facto withholding in entirety. Defendants have provided no descriptions of the documents, no explanation of the nature of content, nor any justification for withholding these documents, either in whole or in part, other than cursory references--e.g., "(b)(1)" or "(b)(3)"--to various disclosure exemptions under FOIA.

In paragraph 10 of the September 9, 1982 Stipulation between the parties, plaintiff expressly reserved his "right to challenge documents withheld or information deleted by the CIA which would otherwise be responsive to this request." Plaintiff's ability to mount such a challenge, and indeed his

ability to decide whether such a challenge is appropriate, is hampered by the fact that he has been told nothing about the nature of the documents being withheld. Plaintiff asserts that the CIA's justifications for withholding and claims of exemption are inadequate to meet the agency's burden of proof under FOIA of establishing that it is entitled to such exemptions. Vaughn v. Rosen, 484 F.2d 820, 828 (D.C. Cir. 1973) (hereinafter, "Vaughn").

Therefore, plaintiff requests this Court to enter an order compelling the defendants to prepare a detailed justification statement for each document which it has either totally or partially withheld from plaintiff in accordance with the procedure recognized as appropriate in FOIA cases by our Circuit Court in Vaughn. Plaintiff requests that this order extend prospectively to all documents responsive to Plaintiffs Ramparts request, as well as to the documents already identified and withheld for files of the other thirty-seven domestic periodicals listed in plaintiff's request.

This type of detailed justification -- commonly referred to as a Vaughn index--is the mechanism recommended by our Court of Appeals for insuring full and fair disclosure under FOIA. Vaughn involved a request for disclosure of various Civil Service Commission records purportedly constituting evaluations of the personnel management programs of certain federal agencies. When the Commission refused to produce the records, the plaintiff filed suit under FOIA. The agency then submitted an affidavit containing conclusory and

generalized allegations of exemptions. The agency's motion for summary judgment was granted in the District Court, but the Court of Appeals reversed and remanded, holding that the FOIA's requirement of de novo review and its imposition on the agency of the burden of proving exemptions mandated that the agency be required to "undertake to justify in much less conclusory terms its assertion of exemption and to index the information in a manner consistent" with the guidelines enunciated by the Court. 484 F.2d at 828.

The Court of Appeals stated:

> "it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information . . . . The best [plaintiff] can do is to argue that the exception is very narrow and plead that the general nature of the documents sought make it unlikely that they contain such [exempt] information."

484 F.2d at 823-24.

The Vaughn court mandated a procedure to allow the law suit to proceed efficiently and in an traditionally adversary manner. The government is required to submit a detailed index and description of the withheld or deleted documents so that the burden of proof remains on the government to justify fully its claims of exemptions as the Act requires. The detailed procedure, was necessary because

> existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in the adversary capacity.

> It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.

484 F.2d at 826.

The Vaughn procedures -- which require the agency to produce both an itemized, indexed inventory, and detailed justifications statement for all requested documents for which exemptions have been claimed -- have been reaffirmed in many other D.C. Circuit opinions. See, e.g., Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); Founding Church of Scientology of Washington, D.C., Inc. v. Bell, 603 F.2d 945 (D.C. Cir. 1979). They have been utilized by other circuit courts, see, e.g. Ollestad v. Kelley, 573 F.2d 1109 (9th Cir. 1978); Seafarers International Union v. Baldovin, 508 F.2d 125, vacated as moot, 511 F.2d 1161 (5th Cir. 1975), and have been specifically endorsed by Congress. Rep. No. 93-854, 93rd Cong. 2d Sess., at page 15 (1974), reprinted in Staff of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-5072). "Vaughn Motions," and orders implementing Vaughn-type relief are now standard practice in the district courts in the District of Columbia, see e.g., Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458 (D.D.C. 1978) (Sirica, J.); Owens

v. United States Bureau of Prisons, 379 F. Supp. 547, 549-50, fn. 5 (D.D.C. 1974) (Waddy, J.); Cutler v. CAB, 375 F. Supp. 722, 724-25 (D.D.C. 1974) (Gesell, J.), and in other district courts. Chamberlain v. Alexander, 419 F. Supp. 235 (S.D. Ala. 1976); Bell v. Department of Defense, 71 F.R.D. 349 (D.N.H. 1976); Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976), on rehearing 430 F. Supp. 849 (S.D.N.Y. 1977).

Mr. Mackenzie, like the plaintiff in Vaughn, is in the anomalous position of having a great interest in seeking to enforce the FOIA's policy favoring an "overwhelming emphasis upon disclosure, Vaughn, supra at 823, and yet finds himself "at a loss to argue with desirable legal precision for the revelation of the concealed information." Id. The relief sought by this Motion would remedy this anomalous situation by insuring that the CIA will not be able to discharge its burden of proving exemptions through blanket claims and by providing plaintiff with the information he must have to effectively present his position on disputed exemption claims.

This Cross-Motion, if granted, will permit plaintiff to test the CIA's exemption claims and lay the foundation for a final determination of any disputes by this Court. The Court will be in a position to make a truly de novo review as mandated by FOIA and there will be a complete and appropriate record in the event of an appeal.

IV. CONCLUSION

For the reasons stated in this memorandum, it is respectfully submitted that the Court should deny defendants' request for an extension of time, and order prompt production within thirty (30) days. Moreover, the Court should permit the plaintiff to conduct discovery to assertain if the CIA's production has been complete, and should require defendants to prepare a Vaughn index.

Respecfully submitted,

Kevin J. Brosch

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

APPENDIX A

AFFIDAVIT

I, Andrew Marx, was employed at Liberation News Service from February 1969 through July 1972 and again from August 1977 through August 1981. During that time Liberation News Service moved from its former headquarters at 160 Claremont Ave., New York City, to 17 W. 17th St., New York City. My job titles included international editor and managing editor.

Andrew Marx

Andrew Marx Dated Jan. 3, 1984 New York, N.Y.

State of New York
County of New York
Sworn to before me this third day of January 19

EMILY M. JACOB
Notary Public, State of New York
No. 41-1939450
Qualified in Queens County
Commission Expires March 30, 1985

CENTRAL INTEL
WASHINGTON

APPENDIX B

30 NOV 1976

69-71

Mr. Andrew R. Marx
c/o The Amherst Record
P.O. Box 7
Amherst, MA 01002

Dear Mr. Marx:

This is in reply to your request for information concerning you which is held by this Agency. I regret our delay in responding. We are still at work on our backlog of similar requests.

Our search of the files has produced the documents listed below. They have been reviewed, and I have divided them accordingly into three groups--those which are released in full, those which are released with deletions, and those which have been found not releasable. In the latter instances, I have cited the applicable subsections of the Privacy Act for each of the items in question.

The following is released in full:

1. Liberation News Service, 31 March 1971.

The following are released in sanitized form:

	Document	Exemptions
2.	Memorandum, 6 November 1967.	(j)(1), (k)(1), Privacy
3.	Memorandum, 31 January 1971.	(j)(1), (k)(1),
4.	Memorandum, 23 January 1971.	(j)(1), (k)(1), Privacy
5.	Memorandum, 25 April 1971.	(j)(1); (k)(1), Privacy

Document		Exemptions
6.	Memorandum, 4 May 1971.	(j)(1), (k)(1)

The following have been found not releasable:

7.	Dispatch, 14 Februrary 1972.	(j)(1), (k)(1)
8.	Dispatch, 2 March 1972.	(j)(1), (k)(1)
9.	Dispatch, 23 March 1972.	(j)(1), (k)(1)
10.	Dispatch, 18 April 1972.	(j)(1), (k)(1)
11.	Dispatch, 13 May 1972.	(j)(1), (k)(1)
12.	Dispatch, 6 July 1972.	(j)(1), (k)(1)
13.	Memorandum, 12 July 1972.	(j)(1), (k)(1)

For your information, subsection (j)(1) applies to material which the Director of Central Intelligence is authorized to exempt from disclosure--in this instance, intelligence sources and methods, which includes the names of certain Agency employees and organizational components. Subsection (k)(1) applies to material which has properly been classified under Sections 1 and 5(B) of Executive Order 11652. In the spirit of the Act, we have also deleted the names of persons other than yourself, in the interests of their own privacy.

Under the provisions of the Act, I am advising you of your right to appeal our decisions. In the event that you choose to do so, please write me, stating the basis of your appeal, and I will see that it reaches the proper senior official.

In addition to the foregoing, we found reference to documents originated by the Federal Bureau of Investigation in which you name appears. I am advised that you have submitted a similar request to the Bureau, and that this material will be included in its reply to you.

Sincerely,

Gene F. Wilson
Information and Privacy Coordinator

Enclosures

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STOLAR ALT

Morton R. Stolar
Daniel L. Alterman
Paul M. Gulielmetti

Dec No. 350450

SENT TO
Gene Wilson, Info & Priv Coord
STREET AND NO.
C/A
P.O., STATE AND ZIP CODE
Wash, D.C. 20505
OPTIONAL SERVICES FOR ADDITIONAL FEES
RETURN RECEIPT SERVICES
1. Shows to whom and date delivered with restricted delivery
2. Shows to whom, date and where delivered with restricted delivery
RESTRICTED DELIVERY
SPECIAL DELIVERY (extra fee required)
CONSULT POSTMASTER FOR FEES
PS Form 3800 Jan. 1976
NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL

Mr. Gene F. Wilson
Information & Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: FOIA Request of Andrew R. Marx

Mr. Wilson:

Andrew R. Marx has requested the above office to pursue the appeal regarding the above-referenced Freedom of Information request (see attached authorization of Andrew R. Marx). Specifically, this letter shall constitute the appeal of your determination via letter dated 30 November 1976. Mr. Marx appeals said determination on the following grounds:

a. Though Mr. Marx's request was made pursuant to the Freedom of Information Act, you have unilaterally and unlawfully considered and responded to that request as if it were a Privacy Act request. In particular, you assert exemption (j)(1) of the Privacy Act, which exemption is not provided for under the F.O.I.A. and cannot be asserted to resist F.O.I.A. requests. Therefore, any assertion of Privacy Act exemption (j)(1) to the instant request is a nullity. In addition, though the F.O.I.A. does have a corresponding exemption to the Privacy Act exemption (k)(1), your assertion of this Privacy Act exemption is also null for the reasons set forth above.

b. As to the "sanitized" documents provided, we appeal your determination that the minimal portions provided therein constitute the only reasonably segregable portions you must, by law, provide.

c. As to those documents you do not provide, we appeal your determination that they cannot be provided and/or that reasonably segregable portions cannot be provided.

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d. We appeal any assertion of any exemption on the grounds that the collection of said documents by the Central Intelligence Agency, and the possession thereof by said agency, invades the First Amendment rights of Mr. Marx, both as an individual citizen and as a journalist. The exemptions of the F.O.I.A. (or the Privacy Act) are not available to conceal the unconstitutional activities of a federal agency, but only to protect against disclosure of an agency's lawful activities and, even then, only in the most specific and narrow circumstances.

e. The collection and possession of domestic intelligence by the Central Intelligence Agency is prohibited by statute. Upon information and belief, most if not all of the witheld and censored information relates to the domestic activities of Mr. Marx and, therefore, the collection and possession of it by the Central Intelligence Agency is illegal. In providing for exemptions to both the F.O.I.A. and the Privacy Act disclosure requirements, it was not contemplated that the exercise of said exemptions would be applicable to the ultra vires acts of government. No claim of "national security", and certainly not the spurious ones claimed herein, can be used to conceal the at best extralegal and at worst criminal activities of any government agency. We therefore appeal your use of any exemption to the instant request on the ground that the collection and possession of the information it seeks is unlawful and that all F.O.I.A. and Privacy Act exemptions are, therefore, inapplicable.

Wherefore, the determination of releasability contained in your letter of 30 November 1976 should be reversed and all listed materials should be provided in full.

Very truly yours,

Richard J. Wagner

Richard J. Wagner
Legal Assistant

rjw
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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