BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUBMIA

No. 82-2499

G. ROBERT BLAKEY,

Appellant,

v.

DEPARTMENT OF JUSTICE, ET AL.,

Appellees

On Appeal from the United States District Court for the District of Columbia, Hon. Thomas P. Jackson, Judge

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

G. ROBERT BLAKEY,	:	
	:	
Appellant,	:	
	:	
v.	:	Case No. 82-2499
	:	
DEPARTMENT OF JUSTICE, ET AL.,	:	
	:	
Appellees	:	

CERTIFICATE REQUIRED BY RULE 8(C)

The undersigned, counsel of record for G. Robert Blakey, certifies that the following listed parties and amici (if any) appeared below:

G. Robert Blakey (Plaintiff-Appellant)

U.S. Department of Justice (Defendant-Appellee)

Federal Bureau of Investigation (Defendant-Appellee)

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

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BRIEF FOR PLAINTIFF-APPELLANT

Professor G. Robert Blakey instituted this Freedom of Information Act ("FOIA") suit to obtain Department of Justice records pertaining to the assassination of President John F. Kennedy. He also sought a fee waiver for copies of approximately 50,000 pages of documents which had been previously released to other requesters and placed in the Reading Room of the Federal Bureau of Investigation ("FBI").

The District Court ruled that Prof. Blakey was not entitled to a waiver of the copying charges; that the Department of Justice had conducted an adequate search for other records requested by Blakey; and that the FBI had properly invoked Exemption 7(C) to refuse to confirm or deny the existence of records on one Rogelio

Cisneros, an anti-Castro Cuban refugee of interest to both the Warren Commission and the House Select Committee on Assassinations. Blakey v. Department of Justice, 549 F. Supp. 362 (D.D.C. 1982).

Prof. Blakey seeks an order reversing the District Court's denial of his fee waiver, ruling that Exemption 7(C) was not properly invoked to protect against a further search for records on Cisneros, and remanding the case to the District Court for a further search regarding both the Cisneros and acoustics materials he requested.

STATEMENT OF ISSUES

1. Whether the Federal Bureau of Investigation abused its discretion in denying a fee waiver for records on the assassination of President John F. Kennedy where the requester is the former Chief Counsel of the House Select Committee on Assassinations and intends to use the records for scholarly purposes.

2. Whether Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), was properly employed to refuse to confirm or deny the existence of records on an anti-Castro Cuban refugee who was of interest both to the Warren Commission and the House Select Committee on Assassinations in their investigations into the murder of President John F. Kennedy.

3. Whether the Federal Bureau of Investigation sustained its burden of demonstrating that it had conducted an adequate

search for records responsive to Prof. Blakey's request for acoustics materials.

4. Whether there are disputed issues of material fact which preclude summary judgment.

This case has not previously been before this Court under this or any other title and counsel is unaware of any related case pending in this or any other Court.

REFERENCES TO PARTIES AND RULINGS

The plaintiff in this case is Professor G. Robert Blakey. The defendants are the Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ").

Prof. Blakey appeals from the order dated October 14, 1982 (filed October 18, 1982) granting summary judgment in favor of defendants and denying plaintiff's cross-motion for summary judgment. The District Court's Memorandum and Order are officially reported at 549 F. Supp. 362 (D.D.C. 1982).

STATUTE INVOLVED

The statute involved is the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and it and pertinent regulations are set forth in the statutory addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE LAWSUIT

A. The Requester

This lawsuit arises under the Freedom of Information Act, 5 U.S.C. § 552. The requester, Professor G. Robert Blakey, seeks records pertaining to the assassination of President John F. Kennedy. He also seeks a fee waiver for approximately 50,000 pages of records on this subject which have already been released to the public.

Prof. Blakey is a professor of law at the Notre Dame Law School, Notre Dame, Indiana, where he teaches courses related to the field of criminal law, criminal procedure, evidence, and matters generally relating to sophisticated investigations and prosecutions. He has had extensive experience in government. From 1960 to 1964 he was a special attorney in the organized crime section of the Department of Justice; from 1969-1973, he was chief counsel of the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee; and from 1977 to 1979 he served as chief counsel and staff director of the House Select Committee on Assassinations ["HSCA"]. February 15, 1982 Affidavit of G. Robert Blakey, ¶2. [R. 29]

Prof. Blakey is co-author of Racket Bureaus: Investigation and Prosecution of Organized Crime (National Institute of Law Enforcement and Criminal Justice 1978), an empirical study of the management of joint attorney-police officer units engaged in the

investigation and prosecution of sophisticated forms of criminal activity; he is also co-author of The Plot to Kill the Presient (Times Books 1981), a book on the assassination of President John F. Kennedy and the official investigations into the crime. First Blakey Affidavit, ¶3. [R. 29]

While Prof. Blakey was its chief counsel, the House Select Committee on Assassinations held length public hearings into the assassinations of both President Kennedy and Dr. Martin Luther King, Jr. At the conclusion of its hearings, the Committee issued a lengthy report which found that President Kennedy and Dr. King were each probably assassinated as the result of a conspiracy. Report of the Select Committee on Assassinations, U.S. House of Representatives, 95th Cong., 2d Sess. at 1, 3. Thus, the Committee's findings differed from those of the Warren Commission, which concluded that Lee Harvey Oswald was the sole assassin of President Kennedy. In addition, the Committee was critical of the FBI, finding that it failed to investigate adequately the possibility of a conspiracy to assassinate the President, and that it was deficient in its sharing of information with other agencies and departments. Report, at 2.

B. The Requests

1. FBI Records on Lee Harvey Oswald and Jack Ruby

By letter dated June 11, 1979, Prof. Blakey requested all FBI records relating to Lee Harvey Oswald and Jack Ruby. He also sought a fee waiver for copies of these records. In support of

his fee waiver application, Blakey explained that although not indigent, he had no independent funds that could be used for copying these documents; that as a result of the Select Committee's recommendations he expected there would be public discussion on what action, if any, the Bureau should take; and that while he had read substantial portions of these files as chief counsel to the Committee, he had never completed a personal review of the entire file. He stated that, in any event, these files "should now be re-examined by one knowledgeable with the Committee's entire investigation, so that concrete recommendations can be made to the Bureau and the Department [of Justice] about what, if anything, should be done to finish the investigation. He said that the results of his examination would be made available to the FBI, the Department of Justice, and the House Judiciary Committee. He also added that he expected to teach a course at the Notre Dame Law School on legal and other aspects of the Kennedy case, and that after he finished using the files he expected to turn them over to the Library for the use of the general public. In addition, he stated his expectation that one or more publications contributing to public understanding would result from classroom use of the files. Complaint Exhibit A. [R. 1]

By letter dated June 21, 1979, the FBI acknowledged his request and suggested that he view the materials at no cost during working hours (9:00 a.m. to 4:00 p.m.) at FBI Headquarters. He was told that no decision had been made on his request for a fee waiver. Complaint Exhibit B. [R. 1]

On August 14, 1979, Blakey replied that access to the records in the FBI's Reading Room in Washington, D.C. would be of no assistance to him because he lived in Ithaca, New York. Complaint Exhibit C. [R. 1] Nearly a month later, the FBI denied his fee waiver request. Asserting that the fee waiver provision "permits an agency to waive or reduce fees in the public interest when furnishing the information is considered as primarily benefiting the general public," the FBI wrote that "[i]n balancing the potential public benefit in this instance against the concomitant expenditure of public funds, we have determined that under reasonable standards the interests of the general public appear more likely to be served by the preservation of public funds." It also advised him that upon receipt of $5,196.70 it would send him the Oswald-Ruby documents. Complaint Exhibt D. [R. 1]

On September 17, 1979, Blakey appealed the fee waiver denial. Complaint Exhibit E. [R. 1] At the time this suit was filed, two years later, his appeal had not been acted upon. However, a month after the complaint was filed, the Assistant Attorney General affirmed the denial of the fee waiver on the grounds that the materials sought were available for inspection and copying in the FBI's Reading Room, and that the FBI had advised him that it was possible that a library near him has a copy of the records produced by the Microfilm Corporation of America. The letter denying the appeal also noted that ever since these records had been initially processed, it had been the policy of the Department of Justice not to waive copying costs. [R. 20]

2. Organized Crime records

By letter dated November 8, 1979, Blakey requested a two volume study on organized crime ("the Mafia Study") which is mentioned in The Bureau: My Thirty Years in Hoover's FBI, the biography of former Assistant FBI Director William C. Sullivan. He also requested the study's five-page synopsis. Complaint Exhibit F. [R. 1] By letter dated November 19, 1979, the FBI advised him it had assigned this request number 89045. Complaint Exhibit G. [R. 1] Subsequently, by letter dated November 29, 1979, Blakey enlarged his November 8 request to include two additional FBI reports, one dated June 29, 1962, the other dated July 17, 1965. Complaint Exhibit H. [R. 1] By letter dated January 2, 1980, the FBI advised Blakey that a search was being made for these two reports, which had been split into separate requests numbered 90085 and 90086. Complaint Exhibit I. [R. 1]

By letter dated April 9, 1980, the FBI reported that it had located the reports responsive to requests 90085, but it had been unable to locate the two volume Mafia Study or its five-page synopsis. The FBI requested more data; namely, "the specific time frame, geographic location and topic in relation to this study." Complaint Exhibit J. [R. 1] By return mail Blakey provided the specific file number (92-6054), the time frame (November 15, 1959 to November 15, 1962), and described the materials as a literature study on organized crime done in Washington, D.C. but including within its scope "all of the United States as well as overseas." Complaint Exhibit K. [R. 1]

By letter dated May 7, 1980, the FBI advised Blakey that in order for it to locate the Mafia Study, it would have to review files consisting of approximately 2,000 pages or more. Based on a review rate of 50 pages per hour and an $8.00 per hour search fee, it estimated the search charges at approximately $320. The FBI demanded Blakey's written commitment to pay these search fees before it commenced processing his request. Complaint Exhibit L. [R. 1] On May 20, 1980, Blakey wrote the FBI to express his outrage at the suggested fee schedule. Stating that he knew the character of the FBI files, having read hundreds of them, he asserted that the two volume Mafia Study could be found in less than three hours if contained within 2,000 pages. He authorized payment of 24 for the search. Complaint Exhibit M. [R. 1]

By letter dated August 21, 1980, the FBI informed Blakey that it had located the two volume Mafia Study, including the synopsis. Although the FBI said it had incurred a search fee in excess of $24, as a matter of discretion it would limit its charge to the $24 he had agreed to pay. February 18, 1982 Phillips Affidavit (Phillips Affidavit), Exhibit 14. [R. 20] By letter dated January 5, 1981, Blakey forwarded his check for $24. Phillips Affidavit, Exhibit 17. [R. 20] By letter dated April 1, 1981, the FBI forwarded the Mafia Study consisting of 284 pages. The Noting its policy of not charging for copies where the materials to be released total less than 250 pages, the FBI said it would nonetheless not charge him in this instance because the Mafia Study "is the subject of a concurrent FOIA request and ... you

were charged a $24 search fee unnecessarily. Phillips Affidavit, Exhibit 19. [R. 20]

By letter dated July 31, 1980, the FBI furnished Blakey with 36 pages of material thought to be responsive to his November 29, 1979 request for an FBI report "The Criminal Commission" dated June 29, 1962 (#90085) and an FBI report "La Cosa Nostra" dated July 19, 1965 (#90086). It withheld 235 pages. Phillips Affidavit, Exhibit 13. [R. 20]

3. Records Pertaining to Rogelio Cisneros

In his letter of April 14, 1980, which supplied additional information on the Mafia Study he had requested previously, Blakey submitted a new request for records on Rogelio Cisneros, who he described as a member in 1964 of JURE, an anti-Castro group, who used the war name "Eugenio." Complaint Exhibit K. [R. 1] When it responded on May 7, 1980, the FBI stated that it would not supply material on Cisneros without a notarized authorization from him. It further asserted that under subsection (b) of the Privacy Act, 5 U.S.C. § 552a, it was prohibited from releasing personal information about a living person without such an authorization, and that to confirm or deny investigative interest in Cisneros "would, of itself, reveal personal information concerning a third person." This decision, the FBI said, "is predicated upon a determination that there is insufficient public interest in the subject matter of your request to require release of personal records under the Freedom of Information Act." Complaint Exhibit L. [R. 1]

In his letter of May 20, 1980, Blakey asked the Bureau to reconsider its position on Cisneros; or, alternatively, if it persisted in its denial to forward his letter to the Associate Attorney General as an appeal. He pointed out that the the Bureau had already found that the Oswald file on the President's death was of public interest and had released it under FOIA. Citing Warren Commission records, he stated that Cisneros had been identified by the Rev. Walter J. McChann as one of three individuals who may have visited Sylvia Odio in Dallas in the summer of 1963; that Lee Harvey Oswald also may have been one of the three; that although Cisneros denied to the Secret Service that he knew Oswald or was in Dallas at the time of the alleged Oswald visit, he acknowledged being in Dallas that summer and knowing Odio; and that "[c]onsequently, Cisneros is in a position that his background and relation to anit-Castro Cuban groups that may have had a hand in the President's death are a matter of vital public concern." Complaint Exhibit M. [R. 1]

By letter dated August 21, 1980, the FBI sent Blakey "documents located regarding Rogelio Cisneros in connection with the Warren Commission Report and the Lee Harvey Oswald case." Except for this slight modification of its earlier position, the FBI continued to insist that "[r]elease of material other than the enclosed documents pertaining to Mr. Cisneros, should any exist in our files, would constitute an unwarranted invasion of Mr. Cisneros' privacy and could not be released without his written no-

notarized authorization." The Bureau informed Blakey that it was sending his letter of May 20, 1980, to the appeals office. Complaint Exhibit N. [R. 1]

In a letter dated November 6, 1980, Mr. Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, informed Blakey, in the name of Associate Attorney General John H. Shenefield, that the FBI, after consultation with members of his staff, had agreed to conduct "an all reference search for any records on Mr. Cisneros that relate to the Kennedy assassination." He went on to state, "I have concluded, however, that Mr. Cisneros is not so much of a public figure that all aspects of his life should be open to the public. In my judgment, even to confirm or deny the existence of investigatory records on Mr. Cisneros unrelated to the assassination would constitute an unwarranted invasion of his personal privacy...." He thus affirmed the Bureau's decision not to search for such records. Complaint Exhibit Q. [R. 1]

4. Acoustical Materials

During the course of its investigation, the House Select Committee on Assassinations developed an accoustical analysis of a Dallas Police Radio tape recorded at the time President Kennedy was assassinated. This analysis played a major role in the Committee's conclusion that President Kennedy was assassinated as a result of a conspiracy, since it indicated with a high degree of probability that a shot was fired from the Grassy Knoll to the right front of the President, whereas the Warren Commission had found that

all shots had been fired by Lee Harvey Oswald from the Sixth Floor of the Texas School Book Depository to the right rear of the President. The Committee's acoustical evidence was ultimately sent to the Department of Justice for further study and action. Reviews of the Committee's evidence were made by the National Bureau of Standards, the Federal Bureau of Investigation, and the National Academy of Science.

In his letter of October 29, 1980, to Mr. Robert Keuch, Office of the Attorney General, Blakey informally sought to obtain:

1) a copy of the National Science Foundation "refusal" of May 18, 1979;

2) a copy of the National Bureau of Standards review of December 7, 1979;

3) a copy of the FBI review of the acoustics (due in mid-October); and

4) a copy of the National Academy of Science report (due in mid-January, 1981).

A handwritten note stated that with respect to item 3, the FBI's review of the acoustics, he also wanted "all supporting documents, notes and calculations." Complaint Exhibit S. [R. 1]

This informal request for these records was referred to the Criminal Division for reply. On November 25, 1980, the Criminal Division advised him to submit formal FOIA requests for the first three items and suggested that he make arrangements with the Speaker's Office of the House of Representatives to get the fourth. Complaint Exhibit T. [R. 1]

By letter dated December 11, 1980, Blakey made a formal FOIA request to the Department of Justice. Complaint Exhibit U. [R. 1] On December 16, 1980, the Criminal Division released a copy of the FBI's acoustics report to Blakey. Complaint Exhibit V. [R. 1] By letter dated January 5, 1981, Blakey submitted the same request to the FBI. Complaint Exhibit O. [R. 1]

By letter dated February 3, 1981, Blakey supplemented his earlier requests by asking for:

a. copies of all memoranda by the FBI in connection with a meeting of its representatives with the NSF Panel on Acoustics held January 31, 1981;

b. any transcript of the January 31, 1981 meeting; and

c. a copy of the motorcycle tape and the log showing access to it. Complaint Exhibit W. [R. 1]

The FBI claims not to have received this request until it was served with a copy of the complaint. Answer. [R. 4]

II. PROCEEDINGS IN DISTRICT COURT

On September 10, 1981, Blakey filed suit. On October 23, 1981, defendants filed their answer. [R. 4] Plaintiff undertook a limited amount of discovery relevant to the fee waiver issue by serving interrogatories and requests for production of documents on defendants. On February 8, 1982, plaintiff moved to compel release of records which had been referred to the CIA. [R. 16] By letter dated March 19, 1982, the FBI released these referrals, consisting of 16 pages of documents pertaining to Cisneros and

JURE, to Prof. Blakey. [R. 27]

On February 23, 1982, the FBI moved for summary judgment as to all issues pertaining to it, and on March 4, 1982, the Criminal Division did likewise. [R. 20, 23] On March 30, 1982, Blakey filed an opposition to the FBI's motion for summary judgment. [R. 28] On the same date he also cross-moved for summary judgment on the fee waiver issue. [R. 29] On April 7, 1980, he filed his opposition to the Criminal Division's summary judgment motion. [R. 32]

In opposing the FBI's summary judgment motion, Blakey submitted an eight-page affidavit in which he challenged many of the FBI's claims. In his affidavit, Blakey protested the blanket excision of material from the July 19, 1965 La Cosa Nostra report, from which 235 pages had been withheld in their entirety. He asserted knowledge from a variety of sources that most of the information in this report came from electronic surveillance, not "confidential sources" entitled to Exemption 7(D) protection. March 17, 1982 Blakey Affidavit ("Second Blakey Affidavit"), ¶¶20-27. Blakey also maintained that the June 29, 1962 "Criminal Commission" report the FBI had furnished him was not the one he had requested, which he described as a a national summary over 100 pages long which had issued out of New York or Philadelphia, but a field office report barely 11 pages long. Id., ¶19.

On the basis of this showing, the FBI located the correct "Criminal Commission" report, also dated June 29, 1962, but over

100 pages long. In addition, as a result of Blakey's protest that his request was being "stiff-armed," Second Blakey Affidavit, ¶27, the FBI took cognizance of his complaints about the FBI's blanket excisions under Exemption 7(C) and 7(D) in the La Cosa Nostra report, reprocessed this document and released 213 pages which originally had been withheld from him. In his July 7, 1982 letter to Blakey's counsel, Mr. James K. Hall, Chief of the FBI's Freedom of Information-Privacy Acts Section, confirmed that the FBI had wrongly deleted information under the guise of 7(D), stating, "Please be advised that symbol sources and information furnished by these sources were initially denied in total, inasmuch as symbol sources appearing in FBI documents are taken at face value by our Document Examiners as being individuals and not mechanical sources. There is no indication in these reports that distinguishes between the two."

Blakey's motion for summary judgment on the fee waiver issue also sought summary judgment with respect to a document known as the "Bayse Memorandum." This was a six-page internal memorandum from an FBI Special Agent assigned to the Technical Services Division to a Mr. Bayse. The Bayse Memorandum, dated February 13, 1981, set forth the details of the appearance on January 31, 1981, of FBI personnel before the Committee on Ballistic Acoustics of the National Research Council of the National Academy of Sciences. The FBI sought to withhold it in its entirety on the basis of Exemption 5. When the Committee on Ballistic Accoustics released its

report on May 14, 1982, the FBI claimed this mooted the issue and released the Bayse Memorandum of Blakey by letter dated May 19, 1982.

On September 30, 1982, the District Court heard oral argument on the cross-motions for summary judgment. By memorandum and order filed October 19, 1982, the Court granted defendants' motion for summary judgment as to all issues and denied Blakey's cross motion for summary judgment.

ARGUMENT

I. THE DENIAL OF BLAKEY'S FEE WAIVER REQUEST WAS ARBITRARY AND CAPRICIOUS

Under 5 U.S.C. § 552(a)(4)(B), the District Court has jurisdiction to review a violation of any portion of the Freedom of Information Act. American Mail Line, Ltd. v. Gulick, 133 U.S.App. D.C. 382, 411 F.2d 696 (1969). This review includes alleged violations of the fee waiver provisions of § 552(a)(4)(A). Eudey v. CIA, 478 F. Supp. 1175 (D.D.C. 1979).

The proper standard for judicial review of an agency denial of a fee waiver is whether that decision was arbitrary and capricious. Eudey, supra, at 1175; Allen v. F.B.I., 551 F. Supp. 694, 696 (D.D.C. 1982). But see Rizzo v. Tyler, 438 F. Supp. 895 (S.D.N.Y. 1977)(de novo review in District Court).

The statutory provision mandates that documents "shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. § 552(a)(4)(A) (emphasis added). Thus, the standard for determining whether a fee waiver is in the public interest is "whether furnishing the information can be considered as primarily benefiting the general public." Eudey, id. An agency's decision not to waive fees is arbitrary and capricious "when there is nothing in the agency's

refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." Eudey, supra, quoting Fitzgibbon v. CIA, Civ. No. 76-700 (D.D.C. Jan. 10, 1977)(unreported).

In determining whether furnishing the information can be considered as "primarily benefiting the general public," the identity of the requester and the nature of the information sought are proper factors for the agency to consider. Eudey, supra. In this case, these factors weighed heavily in Blakey's favor. As the chief counsel and staff director of the House Select Committee on Asssassinations which reviewed the executive branch investigations into the King and Kennedy murders, and as co-author of a book on the assassination of President Kennedy, he extremely well suited to benefit the general public. Not only does he have the ideal experience and background which equip him to carry out the review and analysis which he seeks to undertake, but as a professor and author and former chief counsel of the House Select Committee, he also possesses the means of disseminating his knowledge to the public, as well as important government officials.

The second factor properly considered, the nature of the information requested, is equally in Blakey's favor. This Court has itself noted the strong public interest in the subject of the Kennedy assassination on two occasions: Allen v. Central Intelligence Agency, 205 U.S.App.D.C. 159, 172, 636 F.2d 1287, 1300 (1980) (Kennedy assassination is an event in which the public has demon-

strated an almost unending interest); Weisberg v. Dept. of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976)(plaintiff's inquiry into existence of FBI Laboratory records pertaining to the Kennedy assassination is "of interest to the nation"). In Allen v. F.B.I., supra, the District Court found that the Congressional investigation into President Kennedy's assassination is "clearly a matter of public interest." 551 F. Supp. at 697.

Moreover, the FBI has itself recognized the public importance of these records by placing a complete set of its Headquarters records on the Kennedy assassination in its Reading Room and announcing that it anticipated placing additional sets "at other research facilities, such as the Library of Congress ..."[1/] In view of such facts, the second factor properly taken into account also weighs overwhelmingly in Blakey's favor.

The primary factor cited by the FBI in denying plaintiff's fee waiver was cost.[2/] The Act itself does not mention cost as a factor to be taken into account in making a fee waiver determination. The legislative history of the provision likewise fails to

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1/ Representations that the Bureau was making arrangements to place the released Kennedy assassination materials in a number of different public locations were made in connection with its attempt to defeat a requested fee waiver for these materials by Harold Weisberg in Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155 (D.D.C.) This was never done, however. See Affidavit of James H. Lesar, 4-10, Exhibits 2-3. [R. 42]

2/ The FBI's concern with duplication costs is ironic, if not hypocritical, in light of its reluctant disclosure that it has destroyed two sets of its Headquarters records on the assassination which comprise 200,000 pages of documents duplicated for the public in 1977-1978. These include the very materials for which Blakey seeks a fee waiver. The FBI now claims that it does not know when these 200,000 pages were destroyed and that it has no records relating to their destruction. See Affidavit of James H. Lesar. [R. 42]

to evince any concern with costs.[3/] In fact, the legislative history reflects, to the contrary, a concern for the costs to requesters. See S. Rep. No. 854, 93d Cong., 2d Sess. 11 (1974).[4/]

The FOIA places no limitation on the amount of documents for which a fee waiver may be granted. This, of course, is additional evidence that Congress did not intend costs to taken into consideration. In Eudey v. CIA, supra, the District Court held that the statute did not permit a consideration of how many documents will ultimately be released. Id. at 1176. Although the Court made that decision in a different context, logic compels the conclusion that if the Act does not permit consideration of how many documents will ultimately be released, then cost is not a proper factor in a fee waiver determination. This is, in fact, exactly what the same District Court held in an unreported case, Fitzgibbon v. CIA, Civ. No. 76-1700 (D.D.C. Jan. 10, 1977).

Further butressing the conclusion that cost is not relevant to fee waiver determinations is the FOIA's provision for an award of attorney's fees to a requester who "substantially prevails" in litigation. 5 U.S.C. § 552(a)(4)(E). The legislative history

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3/ The legislative history of the fee waiver provision is carefully tracked in Bonine, Public Interest Fee Waivers under the Freedom of Information Act, 1981 Duke L. J. 213 (1981).

4/ Congress has recently criticized agencies that do consider cost in making fee waiver determinations. See Subcomm. on Administrative Practices and Procedure of the Senate Comm. on the Judiciary, Agency Implementation of the 1974 Amendments to the Freedom of Information Act: Report on Oversight Hearings, 95th Cong., 2d Sess. 78-79 (Comm. Print 1980).

demonstrates that both the fee waiver and the attorney's fees provisions are based on the same public-benefit test. Since costs to the government are not a limiting factor in attorney fee awards, it follows that they are not so for fee determinations either.

The only other consideration relied upon by the FBI in denying the fee waiver is the availability of documents in the FBI's Reading Room. However, for all practical purposes these documents are unavailable to this requester, who lives in Notre Dame, Indiana, and who travels to Washington, D.C. only for brief periods of time on other business. It is not rational for an agency to take the position that only one free copy of certain documents will be released free of charge. Obviously situations will arise when more than one requester may benefit the public through his study of government documents. To hold that subsequent requesters must either travel to Washington, D.C. or pay the full cost of the documents no matter how much in the public interest it may be for them to have access to the documents is irrational and quite obviously frustrates the purposes for which Congress enacted the Freedom of Information Act.[5/]

Because the FBI ignored the relevant factors in considering Blakey's fee waiver--his unique ability to contribute to the fund

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5/ To requester is known to have asked that the Kennedy assassination records be placed in the FBI Reading Room. The FBI's log book, which was made availble to Blakey on discovery, shows that no author of a major book on the Kennedy assassination has used the Reading Room during the years 1978-1981 (the years for which the log was made available), and that there has been very little, almost non-existent, use of the Reading Room by Kennedy assassination researchers after 1978.

of public knowledge on the Kennedy assassination and the public importance of the subject matter--it's decision to deny the fee waiver was an abuse of discretion. It's consideration of irrelevant factors--cost and the existence of the records in the FBI's Reading Room--likewise show that it abused it's discretion. Finally, note must be taken of the fact that the FBI has a policy and practice of routinely denying all fee waiver requests for Kennedy assassination materials. Although there have been at least 166 requests for Kennedy assassination materials, the FBI has never granted a fee waiver request. The only fee waivers for Kennedy assassination documents have been obtained as a result of court order. See FBI's Answers to Interrogatories 7 and 8. [R. 12] In 1978, at oral argument of Weisberg v. Griffin Bell, et al., supra, government counsel told the District Court that it had a policy of denying fee waiver requests for Kennedy assassination materials. See pp. 29-30 of transcript of oral argument on summary judgment motions in this case held September 30, 1982. That this has been and still is the FBI's policy is confirmed by the letter of the appeals officer affirming the FBI's denial of the fee waiver request. October 14, 1981 letter from Richard L. Huff to Mr. Bernard Fensterwald, Jr. [R. 20] Such a policy is inherently an abuse of discretion. Accordingly, the District Court's ruling upholding the fee waiver determination must be reversed. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 402, 415-416. (1972)

II. DISTRICT COURT ERRED IN RULING THAT EXEMPTION 7(C) WAS PROPERLY INVOKED ON A PER SE BASIS TO REFUSE TO CONFIRM OR DENY THE EXISTENCE OF ADDITIONAL RECORDS ON CISNEROS

Blakey's request for records on Rogelio Cisneros involves one of the most troubling incidents to come to light in connection with the investigation into President Kennedy's assassination, the threat to kill the President which was made during a visit to Sylvia Odio's apartment in Dallas by three men, one of whom was introduced to her as "Leon Oswald."[6/] Rogelio Cisneros was of in-

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6/ In 1963 Sylvio Odio was a twenty-six year odl Cuban emigree active in the anti-Castro movement. When she heard a news bulleting that President Kennedy was shot, she fainted and had to be taken by ambulance to a hospital in Irving, Texas. The cause of her collapse was the recollection of three men who visited her apartment in Dallas in the latter part of September, 1963, and the realization that it was "very possible that they might have been responsible, as one had mentioned that night that President Kennedy should have been killed by the Cubans." Warren Commission Exhibit 3147 (CE 3147).

The three men who called on Mrs. Odio identified themselves as members of an anti-Castro organization, JURE, and as friends of her father, a political prisoner in Cuba. Two of the men appeared to be Cuban or Mexican; the third was an American who was introduced as "Leon Oswald." 11 Warren Commission Hearings 369 (11H369).

When Mrs. Odio saw Lee Harvey Oswald on television after his arrest, she recognized him immediately as "Leon Oswald." Her sister, Annie Laurie Odio, who had seen the visitors briefly, independently recognized Oswald as one of the three men as soon as she saw him on television. (11H382)

Mrs. Odio told the Warren Commision that one of the three visitors later quoted the person she identified as Lee Harvey Oswald as saying, following the visit to her apartment, that Cubans "don't have any guts ... because President Kennedy should have been assassinated after the Bay of Pigs, and some Cubans should have done that, because he was the one that was holding the freedom of Cuba...." Warren Commission Report,

terest to both the Warren Commission and the House Select Committee on Assassinations [HSCA] because he was identified by the Rev. Walter J. McChann (CE 2943) as one of the three men, including Lee Harvey Oswald (CE 3146) who may have visited Mrs. Odio in Dallas, Texas.[7/] As Prof. Blakey points out, Cisneros' "identity as a possible associate of Lee Harvey Oswald in the context of highly incriminating evidence--an explicit death threat a month before the assassination itself--makes it of substantial public interest, as the Department and the Bureau have already acknowledge by previously releasing documents about him." March 17, 1982 Blakey Affidavit, ¶8. [R. 28]

The FBI originally took the position that it would release no records on Cisneros without a privacy waiver from him. Subsequently, however, it released those records on Cisneros which it considers to be related to the Kennedy assassination.[8/] But it refused to confirm or deny the existence of other records on Cisneros on the grounds that such disclosure of the existence of such records would violate his privacy in violation of 5 U.S.C. § 552(b)(7)(C).

8/ The Warren Commission discussed the Odio incident in its Report at pp. 321-324. The incident has received intense scrutiny by Warren Commission writers and scholars. See, e. g., Sylvia Meagher, Accessories After the Fact, pp. 376-387, and Harold Weisberg, Whitewash, pp. 270-278.

The HSCA conducted a further investigation of the Odio incident. Unlike the Warren Commission, the HSCA was inclined to believe Sylvia Odio. On the basis of her testimony HSCA concluded that three men did visit her apartment in Dallas prior to the Kennedy assassination. Based on its judgment of the credibility of Sylvia and Annie Odio, the committee concluded that one of these men at least looked like Oswald and was introduced to Mrs. Odio as Leon Oswald. HSCA Report at 137-139.

The District Court upheld the FBI's claim that under Exemption 7(C) it could refuse to confirm or deny the existence of records on Cisneros unrelated to the Kennedy assassination.[9/] Blakey, supra, at 365-366. In so doing, the Court failed to follow proper procedures and decided the issue on its merits without a proper evidentiary base.

First, it is clear from the holding in Phillipi v. Central Intelligence Agency, 178 U.S.App.D.C. 243, 246-247, 546 F.2d 1009, 1012-1013 (1976), that when an agency takes the position it can neither confirm nor deny the existence of the requested records, the Court may resolve the matter by in camera examination, including the inspection of ex parte affidavits. However, "[b]efore adopting such a procedure, the District Court should attempt to create as complete a public record as is possible." Id., 178 U.S.App.D.C. at 247.

Secondly, the District Court had no evidentiary basis upon which to conduct the de novo balancing test it claimed to engage in. The FBI files hold many records on individuals that are not law enforcement records and thus do not meet the threshhold requirements of Exemption 7; that is, they are not compiled for law enforcement purposes. Until the "other records" are actually searched, located, and reviwed, there can be no evidentiary basis for asserting that they meet the threshhold requirement. Moreover, since Exemption 7(C) requires a balancing of the invasion of privacy interest against the public interest, the weight to be given

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9/ Blakey disputes the FBI's position that only records in the main files on the Kennedy assassination are related to that subject.

to the former cannot be evaluated until the records are actually examined. This is because a per se rule is fundamentally incompatible with the balancing standard required by Exemption 7(C). Congressional News Syndicate v. U.S. Dept. of Justice, 438 F. Supp. 538, 543 (D.D.C. 1977). See Common Cause v. National Archives and Records Service, 202 U.S.App.D.C. at 184-185, 268 F.2d at 184-85; Fund for Constitutional Gov. v. National Archives, 211 U.S.App.D.C.267, 277, 656 F.2d 856, 866 n. 23 (1981).

Finally, assuming arguendo that the record was sufficiently developed for the District Court to engage in the required balancing, the Court erred in striking the balance in favor of the privacy interest. Cisneros is an important figure in an event, the assassination of a president, which is of paramount importance to the public. Moreover, given his political activities in JURE, an anti-Castro organization, his status as a public figure may further diminish whatever invasion of privacy there may be in whatever other records may exist on him in FBI files. If there is a balance to be struck on the existing record, it is heavily in favor of requiring the FBI to search for any records on Cisneros in its files which have not yet been located.

III. THE FBI DID NOT SUSTAIN ITS BURDEN OF DEMONSTRATING THAT IT HAS CONDUCTED AN ADEQUATE SEARCH FOR THE ACOUSTICS MATERIALS

To prevail in a Freedom of Infromation Act lawsuit, "the defending agency must prove that each document that falls within the requested class either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirement's." Na-

tional Cable Television Association, Inc. v. F.C.C., 156 U.S.App. D.C. 91, 479 F.2d 183 (1973). In order to meet its burden of demonstrating that it has conducted a thorough, good faith search, an agency must detail the scope of the search and the manner in which it was conducted. Weisberg v. United States Dept. of Justice, 200 U.S.App.D.C. 312, 317, 627 F.2d 365, 372 (1980). Agency affidavits which "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized," are insufficient to support summary judgment on the search issue. Id. 200 U.S.App.D.C. at 318, 627 F.2d at 373. Furthermore, even if the agency affidavits are detailed and nonclusory and are submitted in good faith, "the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Founding Church of Scientology, Etc. v. Nat. Sec. Agcy., 197 U.S. 305, 317, 610 F.2d 824, 836 (1979).

In this case, Blakey has submitted countervailing evidence that the FBI has not searched all appropriate locations where responsive materials may reside. March 17, 1982 Blakey Affidavit, ¶14. [R. 28] By virtue of his considerable experience in and with the Justice Department, Blakey is knowledgeable in the FBI's records creation and distribution practices. Indeed, the FBI does not deny that additional records responsive to his request for

acoustics materials may repose in locations not searched by the FBI. Rather, the FBI contends that it has conducted an adequate search already and need do nothing more.

In Founding Church of Scientology v. National Security Agency, 610 F. 2d 824, 837 (D.C.Cir. 1979), this Court stated:

> [A]n agency is not "'required to reorganize its [files] in response to'" a demand for information, but it does have a firm statutory duty to make reasonable efforts to satisfy it. (footnotes omitted)(emphasis added).

More recently, in McGehee v. CIA, 3 GDS ¶83,039, this Court has ruled that:

> ... the agency bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with its obligation to conduct a reasonably thorough investigation.

The FBI has failed to satisfy that burden in this case. Insofar as it pertains to the acoustical materials, the February 18, 1982 affidavit of Special Agent John N. Phillips is insufficient to support summary judgment on the search issue. In the first place, the affidavit fails to state that materials responsive to this request were located and produced. It states only that an unidentified employee of the FOI/PA Section contacted the employee in the Technical Services Division handling liaison with the National Academy of Sciences; that the TSD employee advised that he had no knoweledge of the requested material, other than the public report of the FBI's review of the acoustical analysis; and that in reviewing a memorandum regarding the appearance of FBI personnnel before the National Academy of Sciences Committee on Acoustics on January 31, 1981, two additional memoranda regarding the original

FBI Acoustical study were located. Phillips Affidavit, ¶(4)(C).

Phillips affidavit does not comply with the requirement of Rule 56(e) that "supporting and opposing affidavits" on summary judgment motions "shall be made on personal knowledge ...." As this Court recently held, the rule's "requirement of personal knowledge by the affiant is unequivocal, and cannot be circumvented. An affidavit based merely on information and belief is unacceptable. Londrigan v. Federal Bureau of Investigation, 670 F.2d 1164, 1174 (D.C.Cir. 1981). Nor does it make any showing as to why the search of the additional locations specified by Blakey should not be considered a reasonable effort to satisfy its statutory duty.

Finally, it must be pointed out that during the course of the proceedings in this case the FBI repeatedly uncovered responsive documents that had not been previously located. As this Court recently noted in Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982), the discovery of additional documents is more probative that a search was not thorough than if no other documents were found to exist.

For the foregoing reasons, the FBI has failed to meet its burden with respect to the search issue.

IV. DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

Summary judgment is properly granted only when no material fact in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); Adickes v. S.H.

Kress & Co., 398 U.S. 144, 147 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc. 269 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109, 113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieve through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, 151 U.S.App.D.C. at 271, 466 F.2d at 442 n. 32.

There are factual disputes here as regards the adequacy of the FBI's search for records responsive to Blakey's request for acoustics materials and the reasonableness of the limitations which the FBI has placed on that search. There is also a factual dispute as to whether unlocated records on Cisneros will invade his privacy or otherwise comply with the standards of Exemption 7.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's affirmance of the FBI's denial of a fee waiver,

The remaining issues should be remanded to the District Court for further proceedings.

Respectfully submitted,

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§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details

when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under

any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which tbe complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more tban one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> (i) determine within ten daya (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(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. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not he available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, hut only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or hy an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Sen-