UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM MORRILL GILDAY, JR.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 85-292

MEMORANDUM

This matter is before the court on the parties' cross-motions for summary judgment on the issues of fee waiver and the scope of the search.

I. Background

Plaintiff William Morrill Gilday is presently incarcerated in the Massachusetts Correctional Institute in Norfolk, Mass. In 1972 he was convicted of slaying a police officer. At trial a rebuttal witness and co-defendant Michael Saul Fleisher testified that Gilday admitted to him that he shot the officer, and also testified that he had not been made any promises by the District Attorney. At a later trial of another co-defendant it was revealed that Fleisher's lawyer had in fact made a deal with the prosecutor, but that the deal was purposely made in such a way that Fleisher could testify truthfully that no deal had been made. The Supreme Judicial Court of Massachusetts in a subsequent opinion expressly disapproved this tactic in Commonwealth v. Gilday, 415 N.E.2d 797 (Mass. 1980), but found the tactic harmless error in Gilday's case. Although a co-defendant, Fleisher was never prosecuted.

Presumably to uncover whatever could be uncovered about the prosecutorial misconduct in this case, by letter dated January 28, 1982, Gilday, through his attorney, directed a FOIA request to the U.S. Attorney in Boston for all records pertaining in any way to Joseph Valeri (aka "Christopher Alexander"), Michael Saul Fleisher, Alan McCrory and himself. These people were named co-defendants of plaintiff or witnesses at his trial. He also requested the information on himself under the Privacy Act. Gilday also requested a waiver of all copying charges because he was indigent and because the release of the records "primarily would benefit the general public' because of their bearing on [his] charges that his trial was tainted by" the concealment of the facts about the Fleisher deal. If these grounds were deemed insufficient, plaintiff asked to be told what additional information is required

Nine months later, Gilday received a letter from the Executive Office for U.S. Attorneys ("EOUSA") aqknowledging it. The letter agreed that if the enclosed release was signed, EOUSA would search for the records pertaining only to Mr. Gilday. The letter went on to indicate:

> [I]n accordance with the spirit and intent of the Freedom of Information/Privacy Acts, it is the policy of the Executive Office for United States Attorneys not to indicate whether we do or do not have information of the type you requested [relating to Valeri, Fleisher, and McCrory].

The letter went on to indicate that without consent of the parties in question:

such information, if it exists, would be exempt from disclosure pursuant to Title 5, United States Code, Section 552(b)(6), which exempts information the disclosure of which would constitute a clearly unwarranted invasion of privacy, and/or (b)(7)(c), which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy.

Gilday appealed this refusal on November 22, 1982. The Justice Department's Office of Information and Privacy ("OIP") responded to the appeal on October 26, 1983. With regard to the non-Gilday documents it affirmed the earlier decision on the same grounds, except that it invoked only 5 U.S.C. § 552(b)(7). The letter also stated that it would then begin to process the records pertaining to Mr. Gilday himself. This suit was filed on January 28, 1985 and by letter dated March 15, 1985, EOUSA informed Mr. Gilday that advance payment of $100 was necessary before material will be processed. Defendant admits that this letter impliedly denied plaintiff's request for a fee waiver. The letter in no way responded to the plaintiff's earlier fee waiver request, nor stated any reason why the fee waiver request had apparently been denied. Plaintiff further argues that EOUSA cannot refuse to search for records predicting in advance that they will fall under a FOIA exemption, but must first locate the documents and then proceed in normal fashion under FOIA to claim whatever exemptions might apply.

II. Discussion

A. Fee Waiver.

The defendant apparently concedes that the March 15, 1985 letter was arbitrary and capricious in not explaining the reasons for the denial of the fee waiver. Thus, on May 28, 1985, roughly three weeks after the current motion was filed, EOUSA supplied plaintiff with reasons for denying the fee waiver. The letter stated that indigency alone did not permit fee waivers under FOIA, and as to public purpose the letter acknowledged that "there is a public benefit in safeguarding the integrity of the judicial process and exposing prosecutorial misconduct." However, in this case, the letter declared that "the prosecutorial misconduct you allege, was fully addressed by the Supreme Judicial Court of Massachusetts in Commonwealth v. Gilday, 415 N.E.2d 797, 803 (Sup. Jud. Ct. 1981)." The defendant also relies on Shaw v. F.B.I., CA. No. 82-1602, slip op. (D.D.C. Jan. 11, 1985), in which Judge Harold Greene upheld a denial of fee waiver where the agency declared that enormous funds had already been expended on the Kennedy assassination and much information had been made available. Id. at 8-9. Defendant also points to Correia v. U.S. Department of Justice, CA No. 84-1971 (D.D.C. March 13, 1985), in which the court upheld denial of a fee waiver because the information sought related largely to the plaintiff's conviction and therefore was of little public use.

In Shaw Judge Greene stated:

> With respect to plaintiffs' motion for a waiver of search fees, FOIA permits agencies to furnish records without charge where the agency determines that waiver of the fee is in the public interest "because furnishing the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552(a)(4)(A). An agency determination not to waive search fees should be disturbed by a reviewing court only if that determination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Slip op. at 7.

Whether this court would uphold the fee waiver had it been properly denied is an issue the court need not decide. It seems patently clear, however, that agency reasons advanced during the pendency of a motion in court cannot correct the shortcomings of its earlier decision to deny the fee waiver in a letter sent over three years after the initial waiver request, which made no attempt at providing reasons to the plaintiff. More importantly, however, to permit the agency to wait until a motion is pending before giving its reasons, or to then remand the issue to the agency, provides little incentive for the agency to accord proper treatment in all the cases that may never come into court. The court is of the view that the public interest in the material sought is sufficient enough to warrant a waiver of fees, and will order that fees be waived in this case.

B. Scope of the Search.

Plaintiff argues that the government cannot meet its burden of showing that documents are exempt under FOIA by simply

declaring, without locating any records, that the records are investigative records and that even the disclosure of the existence of records would violate the privacy of the people in question. First, the plaintiff points out that all of the people whose names were requested were named co-defendants or witnesses in plaintiff's case; thus, at first blush it is difficult to see how disclosure of the existence of a file would harm privacy rights. The court, however, need not decide now whether that would be so, because this determination can be made in due time under the procedure adopted by Judge Greene in Shaw, supra.

In order to be withheld under exemption 7(C), material (1) must be an "investigatory record," (2) must have been "compiled for law enforcement purposes," and (3) must satisfy the requirement that disclosure would be an unwarranted invasion of personal privacy. Pratt v. Webster, 673 F.2d 408, 413 (D.C. Cir. 1982). Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The plaintiff's position is that the government cannot possibly meet its burden of showing that either exemption exists without at least looking at the records that have been requested. It should be noted that the plaintiff is not seeking release on this motion, merely that the defendant search for the documents and make the appropriate showing to this court if in fact exempt documents are located. An approach akin to what the plaintiff seeks was spelled out by Judge Harold Greene in Shaw.

In Shaw, plaintiffs sought documents from the FBI to substantiate a theory that French mercenaries were involved in the Kennedy assassination. Plaintiffs moved to compel a search despite the absence of privacy waivers. Like the request here, the request there sought "all records maintained by the FBI on various named individuals." Slip. op. at 1. In Shaw, the FBI operated under guidelines relative to the Kennedy assassination, and was willing to make certain searches, but, as to certain records sought in that case they took the position that

> [A]ll files concerning individuals which are located within the FBI system of records are per se investigatory records compiled for law enforcement purposes and therefore meet the threshold test of exemption 7 of FOIA, and that maintenance of any such record on a particular individual, if confirmed by the FBI, would constitute a clearly unwarranted invasion of that individual's personal privacy.

Id. at 2. The court, while noting sensitivity to privacy concerns, noted also that the Court of Appeals in Pratt rejected the FBI's claim that all FBI records are per se investigative records. Judge Greene in Shaw ordered the FBI to conduct a search and ascribe to the following procedure:

> If such a search uncovers investigatory records on the individuals identified by plaintiffs, the FBI might conclude that disclosure of the records would not constitute an unwarranted invasion of privacy, or it might conclude that the public interest outweighs any privacy interest. The privacy interest could vary significantly from document to document, or from individual to individual. As the Court of Appeals has stated, "[b]ecause the myriad of consideration [sic] involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document

> requested, the type of individual involved, or the type of activity inquired into, are generally disfavored." Stern v. FBI, 737 F.2d [84,] 91 [(D.C. Cir. 1980)].
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> . . . .
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> The FBI must therefore conduct a search for records responsive to plaintiffs' request, including records on individuals for whom no privacy waivers have been submitted. If this search uncovers no materials of the sort described above, the FBI has met its obligations under the Act. If the FBI discovers such materials, it must determine whether the records in question meet the test for exemption from disclosure under (7)(C) or are exempt under any other provision of law. Any records which are found to be non-exempt must be disclosed to plaintiff. Where the FBI concludes that a record is exempt and where personal privacy considerations lead it to refuse to confirm or deny the existence of the record, the agency will file an in camera affidavit explaining to the Court what documents are being withheld, with a summary of the information and the privacy considerations which would, in the view of the FBI, militate in favor of or against release of the information pursuant to exemption (7)(C). This will permit the Court to review the FBI's determination without impinging upon valid privacy interests by confirming the existence of FBI records on certain individuals. Id. at 5-7.1/

Defendant's brief concentrates on the right of the FBI, or in this case the EOUSA, to protect privacy interests. That is not really what is at issue here. Even Judge Harold Greene in his Shaw case recognized that it may ultimately be proper to refuse to confirm that a file exists as to a certain individual, but he set up a procedure to deal with that eventuality.

Defendant relies on the Seventh Circuit's opinion in

1/ Defendant also relies on Rushford v. Civiletti, 485 F. Supp. 477 (D.D.C. 1980), aff'd mem., 656 F.2d 900 (D.C. Cir. 1981). That case, however, clearly involved law enforcement files and the question of releasing names of judges who had been investigated for wrongdoing but where no wrongdoing was found. Further, separation of powers concerns justified a refusal to search in that case, and no such concerns are present here. Finally, there the very description of what was sought easily demonstrated that release of information found would result in an invasion of privacy, while that is not true here.

Antonelli v. F.B.I., 721 F.2d 615 (7th Cir. 1983), cert. denied, 104 S. Ct. 2399 (1984), where the court upheld the FBI's decision not to search for files of people requested by Antonelli, who had been convicted on bank fraud charges. The Antonelli court, however, noted that in that case "the requesting party ha[d] identified no public interest in disclosure." Id. at 617. The court there rejected Antonelli's claim that the public's interest in being sure there are no unfair convictions was sufficient to warrant disclosure. Nevertheless, the court stated that "The FBI would have a greater burden if Antonelli had identified some public interest to be served by disclosing the information." Id. at 619. The court believes that the public interest in the current suit is significant enough to distinguish it from Antonelli. Further, without a search, how is the court, or the agency to know that the records do in fact meet the threshold requirements that they are law enforcement records as this Circuit required in Pratt?2/

The Smith affidavit supplied by the government merely states that "since the records allegedly relate to criminal activity [they] would most likely consist of 'investigatory records compiled for law enforcement purposes.'" Smith aff. ¶ 10 (emphasis added). Further, the affidavit states that the mere acknowledgment of a record could be an invasion of privacy. As

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2/ The court is not persuaded by defendant's reliance on Shaw v. U.S. Department of State, 559 F. Supp. 1053, 1059 n.24 (D.D.C. 1983) or Ray v. Department of Justice, CA No. 81-3113, slip op. (D.D.C. 1982).

plaintiff points out, however, the individuals about whom the search is to be conducted were named co-defendants or witnesses; Mr. McCrory may even be deceased. The affidavit also declares that an attempt was made to balance the public interest and the private interest to be protected, explaining that the public interest is minimal because the Supreme Judicial Court of Massachusetts had already aired the dispute. Id. ¶ 14. Again, however, the court notes that a proper weighing cannot take place without an examination of the actual records. Similarly, whether exemption 6 applies cannot be determined in the absence of a search.

The court concludes that the defendant must conduct a search of records and adopts the approach set forth by Judge Harold Greene in Shaw, supra. Any fears that the defendant has about the possibility of privacy invasions can be handled in the normal course, even in the unlikely event on the facts of this case that the mere acknowledgment of the existence of records would constitute an invasion of privacy. The proper method established by FOIA involves the conduct of a search at which point the government is free to claim any exemptions it deems proper. An appropriate Order accompanies this Memorandum.

Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

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FILED

JUL 22 1985

JAMES F. DAVEY, Clerk

ORDER

This matter is before the court on cross-motions for summary judgment on the issues of fee-waiver and scope of the search. Upon consideration of the parties' memoranda, the positions advanced at oral argument, and the entire record herein, it is, by the court, this 22nd day of July 1985

ORDERED that plaintiff's motion for summary judgment as to the waiver of copying fees is hereby granted; and it is further

ORDERED that defendant shall waive all copying fees for records responsive to plaintiff's request; and it is further

ORDERED that plaintiff's motion for summary judgment as to the scope of the search is hereby granted; and it is further

ORDERED that defendant shall conduct a thorough search for all records pertaining to the subjects of plaintiff's request regardless of whether privacy waivers have been obtained from said individuals.

UNITED STATES DISTRICT JUDGE