

a report on a public demonstration protesting the way an inmate uprising at Attica, New York was handled [App. 118-119], and reports on the public activities of the Prairie Fire Organizing Committee, including the listing of persons seen "outside or entering the church" and the identification by role and frame number of persons photographed at the committee's national convention. [App. 101-107] She also noted that one of the files, Boston file 157-2206, appears to have been, at least in part, a file comprised of the logs of a telephone used by her which was being monitored by the FBI, but that there is nothing in the record to indicate what law enforcement purpose, if any, lay behind its creation.

Dettmann sought discovery on this issue. Her counsel filed a Rule 56(f) affidavit stating that he needed to undertake discovery to determine what the law enforcement basis was for records which reflect FBI surveillance of her public political activities and her private phone conversations. He also pointed to the need to learn what facts and circumstances led to the determination, in 1976, that the investigation which resulted in the creation of the Headquarters and Boston Field Office main files on her violated the Attorney General's Guidelines for Domestic Security Investigations. He asserted, for example, that he needed to learn whether this judgment applied to the entire investigation of Dettmann from start to finish or only after a certain date or event. Declaration of James H. Lesar Pursuant Rule 56(f) of the Federal Rules of Civil Procedure, ¶4 [App. 100].

Initially, in her opposition to defendant's motion for summary judgment, Dettmann challenged only two of the three subparts of Exemption 7 invoked by the FBI, 7(C) and 7(E). With respect to 7(C), her opposition was confined to one of several employments made of that provision, the one which the FBI designated on the redacted documents as (b) (7) (C)-7. According to the FBI, this code was used "to delete the names and identifying data concerning individuals who were mentioned during the course of interviews or contacts with third parties who are not subjects of or suspects in, an FBI investigation." Scheuplein Declaration, ¶67 [App. 87] Dettmann contended that this description is insufficient to invoke the threshold showing of an invasion of privacy which Exemption 7(C) requires.

Dettmann vigorously opposed the FBI's myriad Exemption 7(E) claims, asserting that it was evident from even the most cursory examination that the FBI had withheld investigatory techniques and procedures that are well-known to the public, such as the use of pretext phone calls and telephonic, microphonic and physical surveillance. Moreover, some of the Exemption 7(E) claims were so extensive as to make it implausible that there were no segregable portions releaseable. For example, 8 pages of one record were withheld solely on the claim that they were protected by Exemption 7(E). [App. 126]

Noting that the FBI had recently conceded in another case that its current guidelines no longer allowed for excision of pre-

text phone calls under Exemption 7(E), Dettmann sought discovery on how the FBI determined that a technique or procedure was well-known to the public and whether it contended that techniques such as pretext phone calls, telephonic, microphonic, photographic and physical surveillance are not well-known to the public. Lesar Rule 56(f) Declaration, ¶3 [App. 99].

In its response to Dettmann's opposition to its summary judgment motion, the FBI stated: (1) that as a matter of discretion it would reprocess certain material which was deleted with the notation "not pertinent to plaintiff" adjacent thereto on pages wherein Dettmann's name appeared, and (2) that having reviewed the material concerning investigative techniques and procedures in certain records at issue, its declarant had "observed instances wherein investigative techniques and procedures which are or may be known to the public, were withheld under FOIA exemption (b)(7)(E)"; consequently, the FBI "will again examine the material which was previously withheld under exemption (b)(7)(E) and will release to plaintiff . . . that material . . . which identifies those investigative techniques and procedures which are known to the public." Supplemental Scheuplein Declaration, ¶¶8-9 [App. 131-132].

The FBI subsequently released a substantial body of materials in both categories. The release of these materials failed to resolve the issues concerning them, however. The reprocessing of materials previously withheld as "not pertinent to plaintiff"

viewing the reprocessed materials, "[i]nstances were noted wherein withheld material could be described more accurately and, in addition, applicable exemptions were not cited for withholding material on records which are the subject of this litigation." Id., ¶6 [App. 135]. Accordingly, in the new release the FBI made changes in the code designations specifying its exemption claims.

According to Scheuplein, the changes and additions in its numerical code designations had no effect on the material withheld because "the same material is being withheld under the same FOIA exemptions previously cited." Id., [App. 125]. Dettmann took issue with this assertion and with the impression given that there were only "some" changes made, not a lot. In her counsel's supplemental Rule 56(f) declaration, he asserted that "dozens upon dozens of changes have been made in the numerical code designators," and that not all of the material remained withheld under the same exemption provision as previously cited. Supplemental Lesar Rule 56(f) Declaration, ¶7 [App. 141].

As Dettmann's counsel pointed out, material formerly described as withheld under (b)(7)(C)-1, the designator for "Names of FBI Agents and Clerical Personnel," was changed to (b)(7)(D)-1, the designator for "Source Symbol Numbers and Source File Numbers"; thus, "one or the other description is very wrong." Id. Two documents were adduced as examples of changes from (b)(7)(D)-2 to (b)(7)(D)-4 and the reverse. Because (b)(7)(D)-2 is said to be "Information Provided Under Express or Implied Confidentiality,"

With respect to Dettmann's contention that discovery was needed to determine whether the FBI had met the threshold requirements of Exemption 7, the District Court found that Dettmann's "possible illegal activities, her alleged association with the 'underground organizations,' and her guilty plea for unlawful possession of explosives, weapons and stolen property provided the FBI with a nexus and colorable claim for the investigations." [App. 196] Thus, he held that the FBI had met its burden with respect to the law enforcement purpose threshold test.

The District Court made no ruling with respect to Dettmann's contention that the material deleted under the FBI's (b)(7)(C)-7 code designation did not qualify for exemption.

With respect to Dettmann's contention that she needed to take discovery regarding the FBI's Exemption 7(C) and 7(D) claims, the District Court stated that it did not approve of the errors in the numerical code designations employed by the FBI, and it cautioned the FBI to be more careful and precise in processing FOIA requests in the future. However, because it was satisfied that these changes "represent corrections in administrative errors and are not deliberate evasions of FOIA," the Court concluded that discovery regarding the code changes was unwarranted. [App. 198]

In regard to Exemption 7(E), the District Court stated that the FBI's errors "raise more troubling problems and indicate that the FBI applied this exemption too broadly when it first processed plaintiff's FOIA request." Slip Op. at 13 [App. 198]. Although