

Dettmann also supplied the District Court with examples of records which, on their face, suggest that they may not have been compiled for law enforcement purposes but rather as part of generalized monitoring of persons engaged in the exercise of their First Amendment Rights. She pointed, for example, to documents reflecting routine surveillance on persons at public protest demonstrations and political conventions. Rather than establishing any kind of nexus between any alleged law enforcement purpose, these documents suggest on their face that the FBI was engaged in generalized monitoring of dissidents.

Rule 56(f) clearly contemplates that the parties shall have an opportunity for discovery in order to establish the existence of a material issue. Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S.App.D.C. 380, 463 F.2d 783 (1971); Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974) (FOIA). The District Court abused its discretion by not allowing such discovery in this case on the threshold Exemption 7 issues, as well as in regard to certain exemption claims.

2. Exemption Claims

Dettmann's opposition to the FBI's motion for summary judgment challenged its 7(E) claims and one aspect of its 7(C) claims. Subsequently, as result of further FBI releases, she also raised questions about 7(D) claims.

Dettmann's challenge to the Exemption 7(C) deletions was restricted to those materials which the FBI identified under a

numerical code as (b) (7) (C)-7, which it said 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 were not the subjects of, or suspects in, an FBI investigation." The District Court failed to rule on Dettmann's challenge to this claim.

The description of material withheld under this rubric is insufficient to invoke the threshold showing of an invasion of privacy which Exemption 7(C) requires. The mere mention of someone's name during the course of an investigation, by itself, affords no basis for concluding that there is any invasion of privacy. Exemption 7(C) applies to matters which under normal circumstances "would prove personally embarrassing to the individual of normal sensibilities" Committee on Masonic Homes v. NLRB, 414 F. Supp. 426, 431 (E.D.Pa. 1976); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 78 (D.C.Cir. 1974); Rushford v. Civiletti, 485 F. Supp. 477, 480 (D.D.C. 1980), aff'd mem., 656 F.2d 900 (D.C.Cir. 1981).

The District Court upheld the FBI's Exemption 7(D) and 7(E) claims. He noted, however, that the original descriptions of the claims contained inaccuracies, and that he did not approve of the "evasive games" which the FBI had played regarding its extensive and baseless Exemption 7(E) claims. Despite these comments, he nonetheless upheld the FBI's claims. In so doing, he erred. The FBI's own declarations, because they gave conflicting descriptions

of the material withheld under Exemptions 7(C), (D) and (E), raised material issues about the applicability of these exemptions to the redacted materials. The District Court improperly tried to resolve these conflicts in the evidence on summary judgment. Moreover, Dettmann had raised a material issue regarding the applicability of the Exemption 7(E) claims, and the FBI had been forced to concede that she was right. Finally, the record suggested that there had been some "bad faith" on the part of the FBI, as the District Court acknowledged in criticizing the "evasive games" it had played in regard to the Exemption 7(E) claims. Nor was the evidence of "bad faith" limited to this area alone. Although Dettmann was notified in May, 1979, that a Boston file had been sent to Headquarters for processing, this file of 1,375 pages was not released to her until March, 1983. Scheuplein Declaration, ¶¶35-37 [App. 64-66]. And the refusal of the FBI to process materials requested by her as "not pertinent to plaintiff" is a classic example of the Bureau's obstruction of FOIA requests. Under these circumstances the representations made by the FBI in its declarations were not sufficiently trustworthy to warrant summary judgment.

Finally, the District Court could not properly rule that the FBI had met its burden of demonstrating that no segregable nonexempt portions of the documents remained withheld. The FBI's two boilerplate declarations on this contain identical language

on this, asserting that: "Every effort was made to provide plaintiff with all reasonably segregable portions of the material requested." Cook Declaration, ¶29 [App. 28]; Scheuplein Declaration, ¶47 [App. 74]. This is not an outright statement that there are no such segregable portions. More importantly, such a claim is belied by (1) the withholding of large numbers of pages under 7(E) or 7(D) with no description of the documents, see Exhibit 19 to Plaintiff's Opposition to Defendant's Motion for Summary Judgment (8 pages withheld in their entirety under Exemption 7(E) [App. 126], and Exhibit 20 (6 pages entirely withheld under 7(D); and (2) the fact that the FBI released a large volume of 7(E) materials that were previously withheld despite the claim that every effort had been made to provide all reasonably segregable portions. On this record a material fact existed as to the existence of segregable portions, and summary judgment was not appropriate. Allen v. Central Intelligence Agency, 636 F.2d 1287, 1293 (D.C.Cir. 1980).

CONCLUSION

For the reasons stated above the District Court erred in granting summary judgment to defendant. The decision must be reversed and remanded for further proceedings.

Respectfully submitted,

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A D D E N D U M

§ 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