BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 85-5728

SONIA DETTMANN,

Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

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

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FOR THE DISTRICT OF COLUMBIA

SONIA DETTMANN,	:	
	:	
Appellant,	:	
	:	
v.	:	Case No. 85-5728
	:	
U.S. DEPARTMENT OF JUSTICE,	:	
	:	
Appellee	:	

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Sonia Dettmann, plaintiff-appellant, certifies that the following listed parties and amici, if any, appeared below:

Sonia Dettmann (Plaintiff)

U.S. Department of Justice (Defendant)

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

James H. Lesar

JAMES H. LESAR

TABLE OF CONTENTS

TABLE OF CASES

TABLES OF CASES (CONT.)

OTHER AUTHORITIES

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES

1. Did the District Court err in holding that the FBI justifiably withheld portions of requested documents for which no claim of exemption was made on the ground that they were "not pertinent" to the requester?

2. Did the District Court erroneously award summary judgment to the FBI on certain exemption claims?

3. Did the District Court abuse its discretion by denying plaintiff the opportunity to take discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure?

This case has not previously been before this Court, or any other court, under this or any other title. Counsel for appellant is unaware of any other related cases presently pending in this Court or any other court.

STATUTES AND REGULATIONS

The text of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and an applicable regulation, 28 C.F.R. § 16.10, are reproduced in the Addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

The parties to this lawsuit are Sonia Dettmann ("Dettmann"), plaintiff-appellant, and the United States Department of Justice, defendant-appellee.

Dettmann appeals from the judgment for defendant entered on April 4, 1985 [App. 201] in accordance with the District Court's opinion issued on March 20, 1985 [App. 186-200].

STATEMENT OF THE CASE

A. Background

On January 3, 1977, Dettmann submitted a FOIA request to the Federal Bureau of Investigations ("FBI") for copies of all documents "which contain my name or make references to me or any activities I have engaged in, either individually or in connection with my employment by Urban Planning Aid, Inc. . . ." Complaint, ¶4, Exh. 1 [App. 6, 9]. On October 26, 1978, she supplemented her request to make clear that it included "records located in any FBI Field Office, including but not limited to the FBI Field Offices in Boston, Chicago, Los Angeles, Philadelphia and New York." In her supplemental request, Dettmann also asked for a search of "see" references and ELSUR ("Electronic Surveillance") records both at FBI Headquarters and in these field offices. Complaint, ¶5, Exh. 2 [App. 6-7, 11]

By letter dated August 31, 1977, the FBI released 303 pages of materials from its Headquarters files. Declaration of David H. Cook ("Cook Declaration"), ¶8. [App. 19] On January 25, 1978, the FBI notified Dettmann that as a result of her administrative appeal, an additional 172 pages plus previously furnished documents that had been reprocessed were ready for release. Id., ¶10 [App. 20].

With respect to her request for field office records, Dettmann was advised that FBI regulations required her to make a di-

rect request to each of the field offices. Id., ¶¶17, 20 [App. 22-23]. In March-April, 1979, Dettmann submitted requests to the Boston, Los Angeles, Chicago, Philadelphia and New York Field Offices. Declaration of Walter Sheuplein, Jr. ("Scheuplein Declaration"), ¶¶11, 16, 19, 22, 25 [App. 50, 53-56]. These requests were worded similarly to her Headquarters request, asking for "all documents . . . which contain my name or make reference to me or any activities I have allegedly engaged in."

After receiving some materials from the field offices, see Scheuplein Declaration, ¶¶13-27 [App. 51-58], Dettmann remained dissatisified with the responses of Headquarters and the field offices to her request. Believing that she was entitled to more material than had been released, she filed this suit on April 23, 1982.

B. Proceedings in the District Court

On November 19, 1982, the FBI filed a Vaughn Affidavit and moved for partial summary judgment as to its Headquarters records. [R. 11] On September 27, 1983, the FBI filed its Vaughn Affidavit for the field office records and moved for summary judgment. [R. 20]

Dettmann's opposition raised several legal issues relevant to this appeal. First, she noted that the FBI had withheld much material on the ground that it was "not pertinent to plaintiff." She contended that because she had plainly requested "all documents" containing her name or referencing her alleged activities, there was no legal basis cognizable under the FOIA for withholding por-

tions of those documents except one or more of the FOIA's nine exemptions.

A second major issue concerned whether the FBI had met the threshold requirements of Exemption 7. Although Dettmann conceded that these requirements were met as to the "see" references in one file, the GILROB file, she contended that the FBI had not sustained its burden of demonstrating that other records in other files were compiled for law enforcement purposes. She noted that two files, FBIHQ file 100-45711 and Boston file 100-40664 were opened as a consequence of the fact that she went to Cuba as part of the "Venceremos Brigade," and that this investigation, according to the FBI, was not closed until September, 1976, "when it was determined that it did not meet the criteria under the Attorney General's Guidelines on Domestic Security Investigations." Cook Declaration, ¶25. [App. 25-26] She argued that even assuming that her trip to Cuba as part of the Venceremos Brigade justified a national security investigation, it did not follow that the entire six-year investigation was warranted. In this regard she noted that the FBI itself, at least as early as June 23, 1972, supplied its field offices with criteria to use in determining whether to devote further investigatory attention to members of the Venceremos Brigade. [App. 115-117]

Additionally, Dettmann challenged the sufficiency of the FBI's showing as to other records in other files. By way of example, she pointed out that these records included such matters as

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 me 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

whereas (b)(7)(D)-4 is "Information Provided on a Regular Basis under an Expressed Assurance of Confidentiality," the switch from (b)(7)(D)-4 to (b)(7)(D)-2 "is particularly troublesome since it was originally said to be based on an expressed assurance of confidentiality, something sufficiently definite and tangible that a mistake about it ought not be made." Id., ¶8, Att. 17 [App. 141, 177-178].

Because the changes in the FBI's code designations involved Exemption 7(D) quite extensively, Dettmann sought to undertake discovery regarding its application. Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment [R. 36], p. 4.

C. The District Court's Opinion

By its Memorandum Opinion and Order issued March 20, 1985 [App. 186-200], the District Court awarded summary judgment in favor of the FBI except as to one minor issue not challenged on this appeal. By its order of April 4, 1985, the District Court dispensed with the remaining issue and entered summary judgment for the FBI. [App. 201]

With respect to Dettmann's contention that the FBI had to process for release the entirety of each document she had requested, not merely the pages on which her name was mentioned, the District Court held to the contrary on the grounds that this "could be prohibitively costly and furthermore could overwhelm the requester with a vast amount of useless material." [App. 191]

the Court stated that it disapproved of "these evasive games," it ruled that the FBI "has finally complied fully with the FOIA requests and not withheld materials on well-known techniques. Id.

Although the District Court noted at the outset of its opinion that Dettmann also questioned whether segregable, non-exempt materials have been wrongfully withheld under Exemption 7(E), it made no finding with respect to this issue. Moreover, its phrasing of the issue ignored the fact that Dettmann had raised this issue with respect to not only 7(E), but also 7(C) and 7(D). Plaintiff's Supplemental Response to Defendant's Motion for Summary Judgment [R. 36], p. 3.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE FBI JUSTIFIABLY WITHHELD PORTIONS OF DOCUMENTS WITHOUT CLAIM OF EXEMPTION ON THE GROUND THAT THEY WERE "NOT PERTINENT TO PLAINTIFF"

Dettmann's several FOIA/PA requests were phrased similarly. They asked, inter alia, for "all documents . . . which contain my name or make reference to me or any activities I have allegedly engaged in." The import of these requests is plain and unambiguous: Dettmann wants all documents containing her name or making reference to her or to any activities in which she allegedly engaged, not just that information which might be deemed "pertinent" to her.

Notwithstanding this, the FBI withheld much material on the ground that it was "not pertinent to plaintiff." Although no claim of exemption was made to support this withholding, the District Court upheld it on grounds that "release of the complete document where only the name of the subject of the request is mentioned could be prohibitively costly and furthermore could overwhelm the requester with a vast amount of useless material." Slip Op. at 6 [App. 191].

The FOIA specifies only two requirements for access requests: first, that they "reasonably describe" the records sought, 5 U.S.C. § 552(a)(3)(A); second, that they be made in accordance with an agency's published procedural regulations, 5 U.S.C. § 552(a)(3)(B). There is no dispute here over whether Dettmann complied with these prerequisites. She plainly did.

The basic concept of the Freedom of Information Act is that all records of the federal government must be made available to the public unless they are specifically exempt from disclosure. S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965). The FOIA provides for nine exemptions from the otherwise mandatory disclosure requirements, "[b]ut unless the requested material falls within one of these nine statutory exemptions, FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public." NRLB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220-221 (1978). The exemptions are "specifically made exclusive. . . ." Dept. of the Air Force

v. Rose, 425 U.S. 352, 361 (1976).

In the absence of a statutory exemption, a court has no general equitable power to prevent disclosure of documents. Washington Post Co. v. U.S. Dept. of State, 222 U.S.App.D.C. 248, 250, 685 F.2d 687 (1982); Getman v. NLRB, 450 F.2d 670 (D.C.Cir. 1971). Only Congress, not the judiciary, may establish exceptions to the Act's disclosure commands. Doyle v. United States Dept. of Justice, 215 U.S.App.D.C. 333, 668 F.2d 1365 (1981), citing Soucie v. David, 448 F.2d 1067, 1076 (D.C.Cir. 1971).

The District Court rested its decision upholding the "not pertinent to plaintiff" deletions on the grounds that release of the entire document (1) could be prohibitively costly, and (2) could overwhelm the requester with a vast amount of useless material. Neither of these reasons constitutes a ground for withholding under the Freedom of Information Act.

The amended FOIA provides that agencies can only charge for the direct costs of search and duplication. 5 U.S.C. § 552(a)(4)(A). This provision was added to the Act in 1974 so that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." S.Rep.No.1200, 93rd Cong., 2d Sess. 7 (1974). "The clear implication of this is that agencies are expected to bear the cost of editing." Long v. U.S. Internal Revenue Service, 596 F.2d 362, 367 (9th Cir. 1979). Indeed, the Justice Department's own regulations recognize this, providing that "no charge shall be made for

the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy." 28 C.F.R. § 16.10(b)(7).

The District Court's second reason, that the requester could be overwhelmed by a vast amount of useless material, rests on unfounded assumptions and smacks of a Big Brother attitude that is alien to the FOIA. It intrudes into prohibited areas.

Under the FOIA a request can be made "for any reason, as no showing of relevancy or purpose is required. The law is clear that persons seeking information under the FOIA do not have to state a reason." "Short Guide to the Freedom of Information Act," Freedom of Information Case List (September 1984 Edition)(published by the Office of Information and Privacy, U.S. Department of Justice), at p. 243. The fact that one has, or lacks, a greater or lesser interest in the records than that of an average member of the general public "neither increase[s] nor decrease[s] his basic right of access. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143, n.10 (1975).

The District Court's holding threatens a return to the subjective requirement of Section 3 of the Administrative Procedure Act of 1946, 60 Stat. 238 (1946), that requesters must show that they are "properly and directly concerned." But "the [FOIA] eliminated the requirement that a requester of information be directly concerned with the information sought." Afshar v. Department of State, 226 U.S.App.D.C. 388, 405, 705 F.2d 1125, 1142 (D.C.Cir.

1983).

The FOIA places no limits on what records a person can ask for, only on what records he can obtain; nor does it restrict who can ask for records, only that he reasonably describe identifiable records. FOIA requests can be made by "any person," 5 U.S.C. § 552(a)(3), Afshar, supra, 702 F.2d at 1142, and "an agency must disclose wholly useless, meaningless and misleading information unless it is exempted." Morton-Norwich Products, Inc. v. Matthews, 415 F. Supp. 78 (D.D.C. 1978).

For these reasons this major encroachment upon "any person's" right of access under the FOIA must be rejected, and the FBI must be directed to process those portions of the records requested by Dettmann regardless of whether or not they contain her name.

II. THE DISTRICT COURT ERRED IN SUSTAINING THE FBI'S SUMMARY JUDGMENT MOTION

A. Summary Judgment Standard

The District Court granted summary judgment in favor of the FBI. Before proceeding to discuss the challenged applications of his ruling, a brief review of summary judgment standards is in order.

A motion for summary judgment is properly granted only when no material fact is genuinely 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, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824,

827 (1974). 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 relieved 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 v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972).

Moreover, 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., 369 U.S. 654, 655 (1962).

Finally, these stringent standards are augmented by a further provision, set forth in Rule 56(f), which affords the opponent of a summary judgment motion an opportunity to engage in discovery if he has been denied access to relevant facts that are needed to make his case. The purpose of Rule 56(f) is to permit the party opposing summary judgment to "fully develop" the facts relevant to the summary judgment motion. Rule 56(f) discovery is essential because "[t]here is . . . an inherent danger of injustice in granting summary judgment to the moving party on his own version of the facts within his exlusive control as set out only in ex parte affidavits." Donofrio v. Camp,

152 U.S.App.D.C. 280, 470 F.2d 428 (D.C.Cir. 1972).

"Under Rule 56(f) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a full trial; it is enough if he shows the circumstances which hamstring him in presenting the proof by affidavit in opposition to the motion." Prof. B. Kaplan, Amendments to the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harvard L. Rev. 801, 826 (1964). Unless dilatory or lacking in merit, a motion for a continuance to take discovery under Rule 56(f) should be liberally treated," Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973)(en banc), and where facts are solely in the possession of the defendants, a continuance should be granted "as a matter of course," Ward v. United States, 471 F.2d 667, 670 (3rd Cir. 1973).

For reasons set forth below, the District Court's ruling fails to comply with these standards and therefore must be reversed.

B. Summary Judgment on Exemption 7 Claims Was Improperly Granted

1. Threshold Ruling

All of the exemption claims still at issue in this litigation arise under 5 U.S.C. § 552(b)(7), Exemption 7. The FOIA prescribes a three-part test for withholding information under Exemption 7. In order to be withheld, the material (1) must be an "investigatory record," (2) must have been "compiled for law enforcement purposes," and (3) must satisfy the requirements of one of the six subparts of Exemption 7. Pratt v. Webster, 218 U.S.App.D.C. 17,

22, 673 F.2d 408, 413 (1982). The FBI, like any other federal agency, must meet the threshold requirements of Exemption 7 before it may withold requested documents on the basis of any of its subparts. Id., 673 F.2d at 416.

The FBI declarations asserted that three "main" files on Dettmann had been compiled for law enforcement purposes and cited possible statutory violations.[2/] No federal prosecution was undertaken with respect to any of the possible statutory violations. Scheuplein Declaration, ¶36 [App. 65-66]. A similar showing was made for "see" references on Dettmann in the "GILROB" files.[3/]

These declarations failed, however, to specify the law enforcement purpose of records which originated in other files. In addition, they failed to address the "law enforcement purpose" status of the individual records within the "main" files on Dettmann. Because Exemption 7 refers to "records" rather than files, "the location of a non-exempt document in an investigatory file does not necessarily make that document exempt from FOIA's disclosure requirements." Pratt, 218 U.S.App.D.C. at 31. Thus, the District Court erred in ruling that, on the basis of the record before him, all of the records at issue met Exemption 7's thresh-

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2/ See Cook Declaration, ¶¶25-26 [App. 25-26] re FBIHQ File 100-457511; Scheuplein Declaration, ¶¶35-36 [App. 64-65] re Boston File 100-40664; and Scheuplein Declaration, ¶40 [App. 67-68] re Los Angeles File 100-79764.

3/ See Scheuplein Declaration, ¶38 [App. 66], ¶41 [App. 68-69].

old test. A court cannot permit nonexempt records not compiled for a law enforcement purpose to escape the FOIA's disclosure mandate simply because they have been commingled in a file with records that were compiled for a law enforcement purpose. Hatcher v. United States Postal Service, 556 F. Supp. 331 (D.D.C. 1982).

Furthermore, the District Court abused its discretion in refusing to permit Dettmann to take discovery regarding the law enforcement purpose of the records. Dettmann raised in her Rule 56(f) affidavits a sufficient possibility that she would be able to establish a material fact in dispute through discovery that some form of discovery was warranted.

Dettmann pointed, for example, to the fact that although the "main" files on her were created in February, 1970, they were not closed until September, 1976, without any federal prosecution having been initiated. Additionally, she noted that at least as early as June 23, 1972, the FBI supplied its field offices with criteria to use in determining whether to devote further investigatory attention to members of the "Venceremos Brigade," and that in September, 1976 this investigation was closed because it failed to comply with the Attorney General's Guidelines on Domestic Security Investigations. These facts provided a realistic basis for believing that discovery focused on when the investigation first failed to comply with the Attorney General's Guidelines and what records were compiled thereafter might enable Dettmann to establish the existence of a material fact in dispute.

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 applicabilty 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 critizing 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

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 the 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 Special Counsel 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 Special Counsel, after investigation and consideration of the evidence submitted, shall submit his 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 Special Counsel 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 than 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 days (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 subpara-

graph (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 [5 USCS § 552b]), 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 be 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 complied for law enforcement purposes, but 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 by 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 or 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 Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection

(a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title [5 USCS § 551(1)] includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 383; June 5, 1967, P. L. 90-23 § 1, 81 Stat. 54; Nov. 21, 1974, P. L. 93-502, §§ 1–3, 88 Stat. 1561, 1563, 1564; Sept. 13, 1976, P. L. 94-409, § 5(b), 90 Stat. 1247; Oct. 13, 1978, P. L. 95-454, Title IX, § 906(a)(10), 92 Stat. 1225.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 USC § 1002	June 11, 1946, ch 324, § 3, 60 Stat. 238.

In subsec. (b)(3), the words "formulated and" are omitted as surplusage. In the last sentence of subsec (b), the words "in any manner" are omitted as surplusage since the prohibition is all inclusive.

Standard changes are made to conform with the definitions applicable and the style of this title (5 USCS §§ 101 et seq.).

Explanatory notes:

A former 5 USC § 552 was transferred by Act Sept. 6, 1966, which enacted 5 USCS §§ 101 et seq., and now appears as 7 USCS § 2243.

Amendments:

1967. Act June 5, 1967 (effective 7/4/67, as provided by § 3 of such Act), substituted this section for one which read:

28 C.F.R §16.10

the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

§ 16.9 Preservation of Records.

Each component shall preserve all correspondence relating to the requests it receives under this subpart, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to Title 44 of the United States Code. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 16.10 Fees.

(a) *When charged.* Fees pursuant to 31 U.S.C. 9701 and 5 U.S.C. 552 shall be charged according to the schedules contained in paragraph (b) of this section for services rendered in responding to requests for Justice Department records under this subpart unless the official of the Department making the initial or appeal decision determines that such charges, or a portion thereof, are not in the public interest because furnishing the information primarily benefits the general public. Such a determination shall ordinarily not be made unless the service to be performed will be of benefit primarily to the public as opposed to the requester, or unless the requester is an indigent individual. Fees shall not be charged where they would amount, in the aggregate, for a request or series of related requests,to less than $3. Ordinarily, fees shall not be charged if the records requested are not found, or if all of the records located are withheld as exempt. However, if the time expended in processing the request is substantial, and if the requester has been notified of the estimated cost pursuant to paragraph (c) of this section and has been specifically advised that it cannot be determined in advance whether any records will be made available, fees may be charged.

(b) *Services charged for and amount charged.* For the services listed below expended in locating or making available records or copies thereof, the following charges shall be assessed:

(1) *Copies.* For copies of documents (maximum of 10 copies will be supplied) $0.10 per copy of each page.

(2) *Clerical searches.* For each one quarter hour spent by clerical personnel in excess of the first quarter hour in searching for and producing requested record, $1.00.

(3) [Reserved]

(4) *Certification.* For certification of true copies, each, $1.

(5) *Attestation.* For attestation under the seal of the Department, $3.

(6) *Nonroutine, nonclerical searches.* Where a search cannot be performed by clerical personnel, for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel, and where the amount of time that must be expended in the search and collection of the requested records by such higher level personnel is substantial, charges for the search may be made at a rate in excess of the clerical rate, namely for each one quarter hour spent in excess of the first quarter hour by such higher level personnel in searching for a requested record, $2.00.

(7) *Examination and related tasks in screening records.* No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall be made for the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy.

(8) *Computerized records.*

(i) *Computer time charges (includes personnel costs).*

1. Central processor charge per hour	$168.00
2. Main storage charge per 1,000 bytes per hour	.50
3. Channel charges per hour	.74
4. Card reading per 1,000 cards	.20
5. Printing per 1,000 lines	.43
6. Card punching per 1,000 cards	10.76
7. Tape mount	.50
8. Specific device charges:	
a. IBM 2260 Cathode ray tube or equivalent per hour	4.20
b. IBM 3330 Disk storage or equivalent per hour	39.72