4/15/87

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 86-1886
	:	
U.S. SECRET SERVICE, ET AL.,	:	
	:	
Defendants	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTIONS FOR IN CAMERA INSPECTION AND TO COMPEL A FURTHER SEARCH

Plaintiff Alan L. Fitzgibbon ("Fitzgibbon") opposes defendants' motion for summary judgment for the reasons set forth below. In addition, he moves this Court to inspect in camera the withheld materials and to compel defendant Secret Service to conduct a further search.

Background

This action arises out of two Freedom of Information Act ("FOIA") requests which Fitzgibbon submitted to the United States Secret Service. The first request, dated December 5, 1985, sought all information in the files of the Secret Service concerning (1) George Waldemar Mallen Jimenez ("Mallen"), (2) Rafael Anselmo Rodriguez Molins ("Rodriguez"), also known as Ralph Molins, and (3) a plot by these individuals to assassinate President Kennedy or kidnap his daughter, Caroline Kennedy. See Complaint, Exhibit 1. The second request, dated January 27, 1986, asked for all photographs

of Mallen and Rodriguez, "with captions . . . and, if possible, the dates on which the photographs were made." See Complaint, Exhibit 6.

Defendants have released a number of documents, but on the whole they have construed the Freedom of Information Act more as an ode to Orwell than as a paeon to Madison. Much of the material that has been withheld is primarily notable for its senescence. Thirty-one of the fifty-one dated documents listed in defendants' Exhibit K index are more than 20 years old; twenty-one are over 25 years of age. Thus, 75% of these documents are more than two decades old.

It is this superannuation which Fitzgibbon suggests this Court should keep constantly in mind when evaluating the credibility of defendants' declarations and the justifications they set forth in support of the extensive withholdings that have been made.

I. THE SECRET SERVICE HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT IT CONDUCTED AN ADEQUATE SEARCH

To prevail in a FOIA case, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the Act's inspection requirements." National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C.Cir. 1973). Agency affidavits regarding the search for responsive records are inadequate to support summary judgment where they "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 plaintiff] to challenge the procedures utilized." Weisberg v. United States Dept. of Justice, 627 F.2d 365, 371 (D.C.Cir. 1980).

The Secret Service has not met this standard. There is no description of the search whatever, and there are positive indications of the existence of responsive records which have not been located. First, the Secret Service's releases refer to two relevant documents which have not been produced and which are not listed in Exhibit K to the Declaration of Larry B. Sheafe, the Secret Service's index of totally and partially withheld documents. These two documents are (1) an "office memo from ASAIC [deleted] dated Nov. 15, 1961," and (2) a December 28, 1961 memo from the Secret Service chief's office to the SAIC, Chicago. See Declaration of Alan L. Fitzgibbon ("Fitzgibbon Declaration"), ¶5.

Secondly, "the genesis of the Secret Service/FBI hunt for Rodriguez Molins and Mallen Jimenez in late 1961 is poorly recorded by both agencies, which implies that relevant documents have not been unearthed." Fitzgibbon Declaration, ¶6. Although a Secret Service field office report states that on May 25, 1961, the State Department advised that Rodriguez and Mallen had left the Dominican Republic to travel to the U.S. for the purpose of assassinating President Kennedy and members of his family, "[n]o memorandum of conversation or other document recording the re-

ceipt of this information from the State Department is mentioned in Exhibit K." Id. In fact, on the basis of the releases made so far, "no documents in the Secret Service and FBI files allow the information to be traced to its source." Id., ¶7.

There are other gaps in the documentation of the investigation into the allegation that Rodriguez and Molins had left the Domincan Republic on a trip to assassinate President Kennedy and members of his family. The Secret Service's statutory responsibility for protecting the first family logically implies that upon receiving this report it took immediate action, yet "Exhibit K does not mention any document dated between May 25 and June 6, 1961. . . ." Id., ¶8. "Nor, with two reputed kilers still allegedly on the loose, is any document noted in Exhibit K from June 6 to July 20 when the Secret Service's Washington field office reported on an investigation of a rule "priest" who might be Rodriguez Molins. . . . Nor is there further mention of any document about the two gunmen until November 15, . . . when the Secret Service's New York office prepared a repot." Id.

Lastly, there is no indication that the Secret Service searched the files of its Chicago, Miami, New York and Washington field offices for pertinent information. Several of the Secret Service's releases record interoffice telephone calls in which its investigation was discussed or orders about it issued, but no local memoranda of conversation are recorded in Exhibit K. Id., ¶9.

In view of these questions about the adequacy of the search made by the Secret Service, this Court should either order it to conduct a further search or allow Fitzgibbon to undertake discovery on this point. As to the latter alternative, a number of courts have recognized that discovery into the nature of an agency's search is sometimes necessary. In Founding Church of Scientology of Washington, D.C., Inc. v. NSA, 610 F.2d 824 (D.C.Cir. 1979) the Court of Appeals recognized that discovery as to the adequacy of agency's search is crucial to the FOIA plaintiff and to the proper administration of the FOIA, stating:

> To accept [the agency's] claim of inability to retrieve the requested documents in the circumstances presented is to raise the specter of easy circumvention of the Freedom of Information Act . . . and if, in the face of well-defined requests and positive indications of overlooked materials, an agency can so easily avoid adversary scrutiny of its search techniques, the Act will inevitably become nugatory."

Id., at 836-837. See also Weisberg v. Department of Justice, 543 F.2d 308, 311 (D.C.Cir. 1976); Schaffer v. Kissinger, 505 F. 2d 389, 391 (D.C.Cir. 1974).

II. DEFENDANTS HAVE NOT MET THEIR BURDEN OF SHOWING ENTITLEMENT TO CERTAIN EXEMPTION CLAIMS

A. Exemption 1

The classified material at issue in this case consists of one paragraph in one FBI document and two paragraphs in a second

document. Both documents are 20 years old this month.

The FBI claims that the information withheld under Exemption 1 is properly classified and that its release will damage the national security. It asserts that its claims are entitled to "substantial weight." But the courts have held that such affidavits will not suffice to support summary judgment if, inter alia, the agency's claims are conclusory, too vague or sweeping, or contradicted by information in the record. Allen v. Central Intelligence Agency, 636 F.2d 1287, 1291 (D.C.Cir. 1980); Hayden v. National Security Agency/Central Security Service, 608 F.2d 1381, 1387 (D.C.Cir. 1979). And in ruling on an Exemption 1 claim a district court is required to conduct a de novo review to determine "'whether unauthorized disclosure of the materials reasonably could be expected to cause the requisite harm.'" Fitzgibbon v. CIA, 578 F. Supp. 704, 713 n.22, quoting Lesar v. United States Department of Justice, 636 F.2d 472, 481 (D.C.Cir. 1980).

The FBI's affidavit fails to meet summary judgment standards.

The first of the two documents allegedly containing classified information, FBI Document #5, is a two-page FBI Letterhead Memorandum dated January 30, 1967. It is said to concern intelligence information concerning Rodriquez Molins and others. Declaration of Sherry L. Davis ("Davis Declaration"), ¶12.

The FBI asserts that release of the Exemption 1 material in this document "may reveal the existence of a particular intelli-

gence operation and allow hostile assessment of its areas or targets." Id., ¶13. This assertion is not entitled to substantial weight. It is nothing more than a conclusory allegation, with no fact being set forth to buttress the speculation. It fails to assert that there is any hostile force which would want to make an assessment of the areas or targets of this operation, much less explain why, after the passage of twenty years, it would want to do so or how such an assessment would damage our current national security.

The FBI also asserts that release of this information could "reveal or identify a present, past or prospective intelligence source that provides, has provided or is being developed to provide intelligence or counterintelligence, or information that could disclose the identities (sic) of intelligence activities." Id. This vague assertion does not provide the kind of specific detail that this Court needs to conduct a responsible de novo review. Obviously, whether the intelligence source is a present source or only a past source is highly relevant to this Court's determination that release of the information reasonably can be expected to jeopardize current national security. Equally obviously, the source either is or is not a present source, and a declarant with personal knowledge of the source's status could so state rather than hiding behind obfuscatory language. Here the withheld information originated from "another Government agency," id., ¶12, and Davis lacks the personal knowledge required to sup-

port a motion for summary judgment. Rule 56(e), Federal Rules of Civil Procedure. In order to properly support its Exemption 1 claim for Document #5, the FBI needs to obtain an affidavit from the originating agency.

Paragraph 14 of the Davis Declaration sets forth three ways in which it is asserted that disclosure of the information in Document #5 could result in damage to the national security. Davis fails to explain why or how such revelations, after the passage of twenty years, would damage the security of the United States. Rather than supplying evidentiary details in support of her conclusion that revelations of this kind would damage the national security, she simply presumes that such disclosures ipso facto cause such damage.

Davis does state in general terms, with respect to both documents, that "classification is warranted notwithstanding the passage of time," id., ¶6, but this is merely a conclusory assertion unsupported by an specific details which might give it body, such as an assertion that the source's life or economic well-being or present operational use might be threatened by disclosure of the withheld information even at this late date. At base, Davis rests her conclusion that the passage of time has had no effect on the damage-wreaking capabilities of this information on nothing more substantial than the "presumption" in Section 1.3(c) of E.O. 12356 that unauthorized disclosure of the identity of an intelligence source causes damage to national security. Id., ¶5.

The presumptions in Section 1.3(c) of E.O. 12356 themselves violate the FOIA. Congress emphatically rejected attempts to cre-

Congress emphaticall rejected attempts to create such presumptions. The original Senate version of the bill to amend Exemption 1, S. 2543, stipulated that if an agency head submitted to the court an affidavit stating that, on the basis of his personal examination, a contested document is properly withheld under the appropriate executive order, "the court shall sustain such withholding unless . . . it find the withholding is without a reasonable basis. . . ." S. 2543, § (a)(4)(B)(ii), reprinted at 120 Cong. Rec. 9311 (daily ed. May 30, 1974). Senator Muskie argued that this created an "overwhelming" presumption of the validity of a classification. Id., at 9319 (remarks of Senator Muskie). This provision would defeat the objective of independent judicial review by "shift[ing] the burden of proof away from the Government." Id. Since the purpose of the amendment was to force the government to persuade the court that its withholding was justified, Senator Muskie insisted that: "We ought not to classify information by presumptions, but only on the basis of merit." Id., at 9321.

To the extent that the FBI's claim of damage to national security rests on the presumptions contained in Section 1.3(c) of E.O. 12356, this Court cannot accord it substantial weight. Such a presumption does not elucidate "what adverse effects might occur as a result of public disclosure of a particular classified record." See Conference Report, at 10. In addition, to do so would be to frustrate the de novo review provision of the FOIA and to establish the very presumption in favor of the validity of a classification rejected by Congress.

The assertion by Davis that the passage of time has had no effect on the damage to national security which reasonably can be expected to result from disclosure of this information cannot be taken at face value because it is markedly at variance with common experience. Executive Order 12356 itself acknowledges that the need to protect against the disclosure of once-sensitive matters declines with age. Section 3.1(a) provides that "[i]nformation shall be declassified as soon as national security considerations permit." The same section implies that passage of time will normally abate the sensitivity of material which was originally properly classified, stating: "Information that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time will continue to be protected in accordance with this Order."

This Court has previously noted that the contention that the passage of time makes no difference "has, indeed, been rejected by those courts which have presided over FOIA cases involving requests for [antiquated] documents. . . ." Fitzgibbon v. C.I.A., 578 F. Supp. 704, 719-720 (D.D.C. 1983), citing Diamond v. FBI, 532 F. Supp. 216 (S.D.N.Y. 1981), aff'd 707 F.2d 75 (2d Cir. 1983); Times Newspapers of Great Britain v. CIA, 539 F. Supp. 678, 683 (S.D.N.Y. 1982); Dunaway v. Webster, 519 F. Supp. 1059 (N.D.Cal. 1981).

The same arguments made in opposition to the FBI's Exemption 1 claims for Document #5 are generally applicable to the claim

that FBI Document #12 also contains national security information which must be withheld. FBI Document #12 is a one-page FBI Letterhead Memorandum dated January 31, 1967 which concerns an investigation of George Waldemar Mallen. Davis Declaration, ¶15. The withheld information is said to consist of information furnished to the United States by a foreign government, and it includes the name of the foreign government. Davis Declaration, ¶15.

Once again, the FBI relies on a "presumption" in Section 1.3 (a)(3) of E.O. 12356 to support its claim that release of this foreign government information reasonably could be expected to cause damage to the national security. Id. Just as the presumption regarding the disclosure of intelligence sources carries no weight, particularly after the passage of twenty years, so, too, is the presumption regarding foreign government information lacking in any force or evidentiary value.

Paragraphs 16-18 of the Davis Declaration fail to provide the kind of nonconclusory details required to support summary judgment. They consists of generalized, boilerplate allegations not tied to the facts relevant to this specific information and the results of its disclosure. Additionally, they in no way address the impact of the passage of time on the alleged damage to national security, nor do they indicate whether political changes have occurred which have altered the fact or extent of damage to national security which reasonably could be expected to result from disclosure. Given the vast changes in the governments of some Caribbean countries over the

past two decades, notably in the Dominican Republic, from whence Rodriguez and Mallen came, and in Haiti, its neighbor, such information is essential to this Court's de novo review.

In short, the FBI has not met its burden of proof with respect to Exemption 1. In addition, there are genuine issues of material fact in dispute which preclude summary judgment, such as whether any harm to national security reasonably can be expected to result from the disclosure of the withheld information. Accordingly, the motion for summary judgment should be denied as to Exemption 1.

A. Exemption 2

The Secret Service has withheld references to Secret Service file numbers, administrative markings, and certain internal administrative forms used solely by it pursuant to Exemption 2. Affidavit of Deputy Director Larry B. Sheafe ("Sheafe Affidavit"), ¶18. Exemption 2 permits the withholding of matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

The plain meaning of this provision obviously does not encompass the kinds of materials which the Secret Service seeks to protect, since they involve neither internal personnel rules nor internal personnel practices of the agency. As a matter of basic English grammar, the phrase "internal personnel" modifies both "rules" and "practices." Jordan v. United States Dept. of Justice,

591 F.2d 753, 764 (D.C.Cir. 1978)(en banc). Additionally, "[i]t is clear from the legislative history of this particular clause, with direct reference to its grammatical construction, that Congress intended the exemption to be read as a composite clause, covering only internal personnel matters." Id.

If Jordan were the last word on the subject, there could be no quibble over Fitzgibbon's right to receive the information withheld by the Secret Service in this case. Unfortunately, Jordan's pellucidity has been muddied by subsequent decisions, including another en banc ruling by the D.C. Circuit. In view of the convoluted and confusing history of the judicial construction of Exemption 2, a brief summary of the major cases is in order before Fitzgibbon presents the merits of his argument that he is entitled to materials withheld by the Service.

In Vaughn v. Rosen, 523 F.2d 1136 (D.C.Cir. 1975), the D.C. Circuit took cognizance of the conflicting views as to the scope of the exemption expressed in the legislative history. The Senate Report stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to the personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S.Rep.No. 813, 89th Cong., 1st Sess. (1965), p. 8. The House Report, on the other hand, declared:

> 2. Matters related solely to the internal personnel rules and practices of any agency:

> Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

H.Rep.No. 1497, 89th Cong., 2d Sess. (1966), p. 10.

Thus, the House Report suggested a much broader scope for Exemption 2 than did the Senate Report, and it also seemed to require disclosure of the very kinds of "routine administrative matters" that the Senate Report listed as examples of materials that should be exempt. The Court of Appeals decided, however, that the Senate Report was the more reliable indicator of the intent of Congress. Quoting Professor Kenneth Culp Davis for the proposition that "[t]he content of the law must depend upon the intent of both Houses, not just one," the Court chose to rely upon the Senate Report because: "By unanimously passing the Senate Bill without amendment, the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy)." Vaughn, supra, 523 F.2d at 542-543.

In Vaughn the plaintiff sought Personnel Management Evaluations which dealt with the compliance of federal agencies with policies set down by statute, Executive order, and Civil Service Commission regulations. Finding that these materials were unlike the "house-keeping" matters such as parking facilities, lunchrooms, and sick leave, the Court ruled that they were not exempt because (1) they were the focus of legitimate public interest and atten-

tion, and (2) they did not "relate solely to . . . an agency,' but to common policies and problems in many agencies." Id., at 1143.

The year after Vaughn was decided the Supreme Court issued its decision in Department of the Air Force v. Rose, 425 U.S. 352 (1976), a case in which the plaintiff sought summaries of hearings concerning violations of the Air Force Academy's Honor and Ethics Code. Relying heavily on Vaughn, the Supreme Court favored the Senate Report over the House Report. It also affirmed the distinction drawn by Vaughn "between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest." 523 F.2d at 1142. In so ruling it stated that the "general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." 425 U.S. at 369-370.

Rose noted but left open the issue of whether Exemption 2 might permit "withholding of matters of some public interest . . . where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." 425 U.S. at 364. In 1978 the D.C. Circuit addressed this issue in its en banc decision in Jordan, which involved a request for documents containing guidelines for the exercise of prosecutorial discre-

cretion by the U.S. Attorney in the District of Columbia. Jordan ruled that Exemption 2 "was not designed to protect documents where disclosure might risk circumvention of agency regulation" because such documents were not solely related to internal personnel rules and practices. Jordan, supra, 591 F.2d at 763-771. Two judges who concurred in the result reached by the majority expressed reservations about the majority's flat rejection of the "circumvention of agency regulation" rationale for applying Exemption 2. Id., at 783.

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir. 1981)(en banc), a case in which the Government claimed that portions of a training manual for BATF agents should not be disclosed because it would benefit those attempting to violate the law and avoid detection, the Court of Appeals confronted the "circumvention of agency regulation" issue head-on. It held that

> if a document for which disclosure is sought meets the test of "predominant internality," and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure.

670 F.2d at 1074. In holding the BATF training manual subject to Exemption 2, the Court asserted that:

> The critical considerations here . . . are that the manual is used for predominantly internal purposes; it is designed to establish rules and practices for agency personnel; i.e., law enforcement investigatory techniques; it involves no "secret law" of the agency; and it is con-

> ceded that public disclosure would risk circumvention of agency regulations.

Id., at 1073.

Crooker took note of Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C.Cir. 1980), in which the Court of Appeals held that Exemption 2 applies to code symbols which the FBI employs to disguise the identity of its informants, and Allen v. Central Intelligence Agency, 636 F.2d 1287 (D.C.Cir. 1980), in which it held that Exemption 2 does not cover filing and routing instructions. Crooker, 670 F.2d at 1069. With regard to Allen, the Court of Appeals pointed out that although Allen had noted that the narrow scope of Exemption 2, as reflected in the Senate Report, would not exempt the filing and routing instructions from disclosure, it also noted that "it is even doubtful that the filing and routing instructions would be exempt under the broader reading of the exemption given in the House Report," since disclosure "would not cause such 'circumvention of agency regulations.'" Crooker, 670 F.2d at 1069 n.48, quoting Allen, 636 F.2d at 1290 n.20.

In Founding Church of Scientology, Wash. D.C. v. Smith, 721 F.2d 828 (D.C.Cir. 1983), the Court of Appeals dealt with a case in which the FBI had disclosed the full contents of an airgram from the American legal attache in Havana, Cuba, but deleted certain notations at the top and bottom of the page "to protect sensitive administrative instructions for the handling of the document." 721 F.2d at 829. The FBI invoked Exemption 2, asserting that "[t]he negligible value of such routine internal administrative material

to the plaintiff, when weighed against the material's comparative sensitivity, called for a withholding of the material." Id., quoting Affidavit of Special Agent Martin Wood.

The Court of Appeals agreed. Noting the apparent conflict between Allen and Lesar, it held that "to the extent that Allen conflicts with our subsequent en banc decision in Crooker, it no longer represents the law of this circuit." 721 F.2d at 830, citing Crooker, 670 F.2d at 1069 n. 48.

The Secret Service relies on the Smith case to justify its Exemption 2 withholdings. But Smith itself noted a difficulty in applying Exemption 2 to administrative markings:

> The only remaining difficulty arises from the implication in Crooker that administrative handling instructions, although within the broader reading of exemption 2, must be shown to threaten circumvention of agency regulation upon disclosure before withholding can be approved under this exemption. See id. at 1069 n. 48.

Smith, 721 F.2d at 830.

Because the plaintiff neither contested the District Court's finding that public disclosure of the information would risk circumvention of federal statutes nor disputed the FBI's claim of "sensitivity, Smith found it unnecessary to reach this issue, ruling that on the record before it the case satisfied even the more rigorous standard applied in Crooker. Id., at 831.

This case presents the issue left unresolved by Smith. The scholarly commentary on the judicial decisions holding that administrative markings are protected by Exemption 2 has been quite

critical. Thus, O'Reilly says in his treatise:

> Other courts have added to the personnel aspects of the (b)(2) exemption a protection for "administrative markings such as file numbers, initials, signature and mail routing stamps, and references to previous communications . . ." because the public interest in them is minimal. This appears to be a poorly-considered judgment adopted with little consideration of the public's interest, for example, in knowing the level of agency approval which an opinion letter has received, the timing of its passage through the agency channels of approval, etc. This portion of the exemption probably would not survive a direct court challenge.

O'Reilly, Federal Information Disclosure, § 12.04 (1986)(citation omitted. Similarly, the authors of another treatise state:

> When administrative markings refer to personnel practices (such as informant identifiers), they arguably fall within the statutory terms of Exemption 2. When they refer to filing, routing, and document storage, the literal language of the exemption does not cover them.
>
> The rational most commonly used to justify nondisclosure of administrative type markings is that these markings are the type of "routine housekeeping matter" that Exemption 2 was designed to protect." Courts also frequently refer to the lack of a "legitimate," "perceiptible," or "reasonable" public interest in such materials. On the contrary, these symbols often do have public significance since an understanding of the filing system, routing methods, and other administrative procedures relating to document storage can often assist a requester in determining whether an FOIA response is complete and whether and adequate and comprehensive search has in fact been carried out. Certainly, the number of cases in which requesters have sought to compel the disclosure of administrative markings suggest that requesters have an interest in their disclosure. Furthermore, courts that base their endorsement of the use of Exemption on their perception that the public has no significant or legitimate interest in disclosure are making

> an assessment of the balance between the agency and the public interest that Congress has already struck by its determination that everything in government files is a matter of legitimate interest unless it falls within one of the exemptions to the Act.

Braverman and Chetwynd, Information Law, § 6-3.2.1 at 235 (1985).

The Secret Service asserts that the excised administrative markings are "numbers and markings [which] are used for the purposes of indexing, storing, locating, retrieving, identifying or classifying information in our files." Sheafe Affidavit, ¶18. Ignoring the fact that a scholar laboring in the public benefit can use them for these same purposes--and others--the Secret Service declares that "[t]hese numbers and markings would not benefit plaintiff or the public if released and could possibly compromise the integrity of our record keeping systems." Id.

The Secret Service's expertise is in protection and law enforcement, not in historiography. It is suggested, therefore, that its views on this matter should be accorded no deference whatsoever. See Federal Information Disclosure, § 12.04 at 12-11 (". . . the member of the public's statement that the details are of public interest should carry more weight than the bureaucracy's denial that they are of public interest.")

Additionally, it is apparent that the integrity of historical documents is of importance to scholars and to the public. See Fitzgibbon Declaration, ¶10. Not least in a case such as this, where relevant documents are missing. Id., ¶¶ 4-9.

In addition to those listed above in the excerpts from the O'Reilly and Braverman/Chetwynd treatises, there are a number of other reasons why the release of administrative file numbers and markings are of interest to the public. File numbers leave no doubt what documents are in which file, and when published in facsimile they convey an authenticity unencumbered by distracting deletions. They may suggest the sequence, hence the possible connectedness of ostensibly separate investigations. Administrative markings may show which officials and agency components had what information at what time, thus making it possible to better evaluate their acts and statements and to determine to what extent the investigation was coordinated with other officials, other agencies and other agency units.

Also bearing on the public interest in such administrative markings is the fact that scholars have an obligation to accurately and precisely cite the sources of their information so that other scholars may investigate and utilize this same information. To this end, scholars commonly cite the file numbers on government documents. Indeed, the Government itself does so. For example, footnotes 47-48 on p. 614 of the Report of the House Select Committee on Assassinations cite four different Secret Service file numbers: 2-34,000; 2-34,030; 2-34,104; and 2-1.611.0. See Attachment 1 hereto.

The first prong of the two-prong test established by Crooker requires that "a document for which disclosure is sought" must meet the test of "predominant internality." Here the Secret Service

documents from which administrative numbers and markings have been removed are unquestionably concerned with matters of public interest since they detail the investigations of two men alleged to have been plotting to assassinate the President of the United States. Moreover, even the information excised from these documents on Exemption 2 grounds is of interest to plaintiff and to the public because it implicates the integrity of agency records and facilitates a researcher's work. Thus, the Secret Service has failed to show that it has satisfied the first prong of Crooker with respect to the administrative numbers and markings withheld.

The Secret Service has also withheld administrative forms under Exemption 2. The paragraph of the Sheafe Affidavit dealing with Exemption 2, Paragraph 19, makes no mention of these forms. Paragraph 29, which deals with Exemption 7(E), does mention two "internal forms," an "Administrative Profile," and "another form the title of which itself could reveal special investigatory techniques." Obviously, both forms contain content which would be of interest to scholars and to the public and thus cannot be said to be "predominantly internal." Indeed, although the Sheave Affidavit describes these forms as "internal," it fails to state that they have no significance to plaintiff or to the public. Indeed, the suggestion that they contain a "profile" and could reveal "special investigatory techniques" itself demonstrates their public interest.

The second prong of Crooker stresses that an agency invoking Exemption 2 must also demonstrate that disclosure will "significant-

ly risk circumvention of agency regulations or statutes." 670 F.2d at 1064 (emphasis added). The Secret Service asserts, very tentatively, that release of the file numbers and markings "could possibly compromise the integrity of our recordkeeping system." Sheafe Affidavit, ¶19. It does not explain how this would be possible, let alone likely, even with current records. Given the age of the documents at issue, this claim is at best highly speculative. This argument is further undercut by the fact that the Secret Service has in the past released such information.[1/]

In any event, the Secret Service's claim of harm fails to measure up to Crooker's stringent standards. The Sheafe Affidavit does not assert "significant risk" of circumvention, nor does it cite any agency regulations or statutes which would be circumvented. Thus if fails to satisfy Crooker's second prong. Moreover, even if such a claim had been made, it would be extremely dubious in view of the age of these documents, the extensive public disclosures by and about the Secret Service that have been made already, and the drastic changes in Secret Service methods and procedures which have occurred over the past twenty years. See Declaration of Dr. Philip H. Melanson, ¶¶6-7.

The FBI invokes Exemption 2 to protect its "temporary source symbol numbers." Declaration of David H. Cook ("Cook Declaration"),

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1/ For example, Secret Service records on the assassination of President Kennedy made public long ago contain Secret Service file numbers. See Attachments 2-4. One document partially disclosed in this case, Secret Service Document #27, is captioned: "Lee Harvey Oswald-Assassination of President." Although the Secret Service file number applied to this investigation was first released 23 years ago, and has been released many times since, it is withheld in Document #27. See Attachment 5.

¶23(A). By "temporary source numbers" plaintiff understands the FBI to refer to those symbol numbers in its documents which are preceded by a "T".[2/] We refer to these numbers as "'T' symbols," "'T' numbers," or "'T' symbol numbers."

The documents in which these "temporary source symbols" appear are not "predominantly internal"; they deal with events of interest to the public, such as the investigation in this case of two men who allegedly engaged in a plot to assassinate the President. Nor are the "T" symbol numbers themselves devoid of public interest. To the contrary, the disclosure of "T" symbols is important to scholars:

> Where more than one "T" source is supplying information . . ., confusion can result unless it is clear which "T" source supplied which information. The disclosure of "T" symbols enables a researcher to determine which information is being supplied by which source and how many sources have supplied the same, corroborative or contradictory information. Once it has been determined that a particular "T" source supplied bad or inaccurate information, then all other information supplied by that source must be scrutinized with particular care. *** Without disclosure of the "T" symbol numbers, it is not possible to determine which source applied the information; this makes it more difficult to evaluate the reliability of the information provided.

Declaration of Bernard Fensterwald, Jr., ¶5.

2/ "T" numbers apply only to the document in which they appear; that is, the same source may be T-1 in one document and T-5 in another. As FBI Special Agent David Cook notes in his affidavit, the actual identity of the source or the source's permanent FBI symbol number generally appears only in an "Administrative Page" which is attached to the report but which is not disseminated outside the FBI. By this means "[i]nformation developed during an FBI investigation may . . . be furnished to other agencies . . . without compromising the identity of a confidential source. . . ." Cook Declaration, ¶23(A).

Additionally, "T" numbers cannot be considered "predominantly internal" because their purpose is to facilitate transmission of FBI reports outside the Bureau. Although the actual identities or permannent FBI code numbers of "T" sources may appear in the Administrative Page attached to a report, that page is detached from the report when the report is transmitted outside the Bureau. See Cook Declaration, ¶23(A). Thus, "T" numbers are used for external, not internal purposes. As such they do not "relate solely to . . . an agency." 5 U.S.C. § 552(b)(2). See Vaughn, supra, 523 F.2d at 1143 (Personnel Management Evaluations held not exempt under Exemption 2 because "[t]hey do not 'relate solely to . . . an agency,' but to common policies and problems in many agencies.")

Because the FBI's "T" numbers are of interest to scholars, appear in documents that are of interest to the public, and are employed for the purpose of transmitting information externally, they cannot be said to be "predominantly internal." Thus, the FBI fails to clear the first Exemption 2 hurdle erected by Crooker.

The second hurdle erected by Crooker requires that the agency demonstrate that disclosure "significantly risks circumvention of agency regulations or statutes." In laying down this standard, the Court of Appeals said:

> We add the word "significantly" to stress the narrow scope of our construction of Exemption 2; in all cases in which the Government relies on Exemption 2, it remains the Government's burden to prove the "significant risk."

Crooker, 670 F.2d at 1074.

The FBI fails to clear this hurdle, too. It cites no regulation or statute which might be circumvented, nor does it even show that there is any significant risk that disclosure of the "T" numbers will reveal the identities of any confidential sources. To the contrary, its own affiant asserts that "temporary symbol numbers" enable the FBI to furnish information developed during an investigation to other agencies "without compromising the identity of a confidential source who has furnished information to the FBI." Cook Declaration, ¶23(A)(emphasis added).

The FBI's failure to comply with the Crooker standard is not surmounted by its citation of other cases on which it also reliees, principally Lesar v. United States Dept. of Justice, 636 F.2d 472 (D.C.Cir. 1980). The law of the circuit now is Crooker, not Lesar, and the factual record here is significantly different from that reflected in the Lesar decision.

It is not clear from Lesar whether the Court of Appeals was considering the "temporary source symbol numbers" at issue here or the FBI's permanent informant symbol numbers or both. However, the Court held that FBI "informant codes" fell within Exemption 2 because they were matters of "internal significance in which the public has no substantial interest." Id., at 485-486.

Crooker, however, repeatedly asserts that it is not up to the courts "to decide what matters are of legitimate public interest." 670 F.2d at 1065-1066. Asserting "[n]or is it for this court to decide which disclosures are in the public interest," the Crooker

rejected language in two cases, Cox v. United States Dep't of Justice, 601 F.2d 1, 5 (D.C.Cir. 1979), and Jordan, supra, 591 F.2d at 783, "suggesting that the courts are to decide when there is a legitimate public interest in disclosure." Id., at 1074. This is in direct conflict with Lesar's assertion that the public had "no legitimate interest" in disclosure of the FBI informant codes at issue there. Lesar, 636 F.2d at 486.

Lesar also declared that "informant codes" are matters of "internal significance." That is disputed by the factual records developed here, which shows that they are of interest to researchers, and that the "temporary symbol codes" involved in this case are employed not for internal use, but to permit external dissemination of information supplied by FBI informants.

Additionally, Lesar did not apply the "significant risk" test ennunciated by Crooker. As amply demonstrated above, the FBI cannot meet this test in this case.

In summing up the case against defendants' proposed applications of Exemption 2, we return to Crooker's statement that in interpreting this provision "our job is to determine congressional intent." Crooker, 670 F.2d at 1074. Crooker rejected Jordan's exclusive reliance on the Senate Report and instead looked to the intent of both houses. Reviewing the intent of both houses reinforces the conclusion that Congress did not intend Exemption 2 to encompass the materials at issue here.

The Senate Report states that Exemption 2 applies to matters such as rules on parking leave, sick leave and lunch hours. None of these examples concerns anything other than administrative personnel matters. "Filing and routing instructions for a document . . . are plainly not included in that narrow category of administrative personnel rules and are totally unlike any of the examples cited." Allen, supra, 636 F.2d at 1290. So, too, are the FBI's "temporary source symbol numbers." In addition, in Rose the Supreme Court, relying on the Senate Report, found that:

> The general thrust of the exemption is simply to relieve the agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest.

Rose, supra, 425 U.S. at 369-370 (citations omitted). Regardless of whether the materials at issue here are properly characterized as trivial, none of them falls within Rose's description of the congressional intent. Exempting these materials would not relieve the agencies of any burden, it would merely endorse a burden they have eagerly assumed of redacting countless snippets of information in documents which they are obligated to maintain and produce.

The Supreme Court has suggested that the focus of the House Report on Exemption 2 was "to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory functions." Id., at 364. However, "[d]isclosure of filing and routing instructions . . .

would not cause such 'circumvention of agency regulations.'" Allen, supra, 636 F.2d at 1290 n. 20. Nor, as shown above, would the disclosure of the FBI's temporary source numbers.

B. Exemption 5

The Secret Service has made a number of redactions pursuant to 5 U.S.C. § 552(b)(5), which provides that the FOIA does not apply to matters that are "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." The Secret Service asserts this material is being withheld pursuant to the deliberative process privilege which is incorporated in Exemption 5.

The ultimate burden which the agency must carry to withhold materials under the deliberative process privilege is to show that "the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communications with the agency." Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). Accord: Parke, Davis & Co., v. Califano, 623 F.2d 1, 6 (6th Cir. 1980); New England Apple Council v. Donovan, 560 F. Supp. 231, 233 (D.Mass. 1983).

In order to fall within the deliberative process privilege, the communication must be "predecisional," that is, it must be "antecedent to the adoption of agency policy." Jordan, supra, 591 F.2d at 774. The agency has the burden of establishing what deliberative process is involved, and the role played by the documents at issue in the course of that process. Vaughn, supra, 523 F.2d

at 1146. The agency must be able to explain how the decision-making process works and how that process would be jeopardized by disclosure of the requested documents. Id., at 1146. Accord: Copus v. Rougeau, 504 F. Supp. 534 (D.D.C. 1980); Bush Wellman, Inc. v. Dept. of Labor, 500 F. Supp. 519 (N.D.Ohio 1980). It must be able to show where in the process the decisions are made, and when they are finalized. See, e.g., Renegotiation Bd. v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), especially n. 22. As one noted authority has said: "An agency claim that a lower staff level decision should not be disclosed should include a statement of how the lower decisions are reviewed (and how carefully) at the levels above." O'Reilly, Federal Information Disclosure, § 14.13 (citations omitted).

The agency must also show by specific and detailed proof that disclosure would defeat rather than further the purposes of FOIA. Mead Data Control, Inc. v. Department of Air Force, 566 F.2d 242, 258 (D.C.Cir. 1977). The scope of Exemption 5 is narrow "and the strong policy of the FOIA [is] that the public is entitled to know what its government is doing and why." Coastal States Gas Corp., supra, at 868.

The Selective Service has not met these standards. Although the Sheafe Affidavit declares that disclosure of the withheld material "would interfere with this agency's ability to conduct criminal investigations, as well as deal with other important law enforcement concerns," this is merely standard Exemption 5 boiler-

plate couched in conclusory terms. In Parke, Davis & Co., supra, the Sixth Circuit found similar remarks in the agency's affidavits to be "conclusory statements" which were "not sufficient to bring the documents within Exemption 5." Id., 623 F.2d at 6.

The materials withheld here are described as "opinions and evaluations concerning information gathered during the course of the investigation." Sheafe Affidavit, ¶19. Essentially, these materials seem to constitute the expert investigative opinions or evaluations of Secret Service officials in the performance of their duites. Such materials do not come within the purview of Exemption 5. See Moore-McCormack Lines, Inc. v. ITO Corp. of Baltimore, 508 F.2d 945 (4th Cir. 1974)(inferences based on observed facts which depend on the expertise of the investigating official are not protected by Exemption 5).

Additionally, to the extent that these materials constitue recommendations or advice, the Secret Service has failed to meet its burden of showing whether or not the recommendations were approved or adopted. Even if material is clearly protected from disclosure by the deliberative process privilege, this privilege may be lost if a final decision adopts it. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975). This adoption may be "formal or informal." Coastal States Gas Corp., supra, 617 F.2d at 866. The Exemption 5 materials are almost invariably accompanied by adjacent claims made under Exemption 2 and/or Exemption 7(E). This suggests that the deleted matter may concern recommendations rou-

routinely approved during an investigation because they concern the use of standard investigative techniques. See Attachments 5-7 for examples of the use of Exemption 2 and Exemption 7(E) in conjunction with Exemption 5.

At least one Secret Service document with material excised pursuant to Exemption 5 carries the word "Approved:" above the deleted name of the Special Agent in Charge. See Attachment 8. Given this approval, this material must be disclosed.

In Coastal Gas Corp., supra, the D.C. Circuit rejected the agency's Exemption 5 claim because its description of the withheld materials did not suggest that any "candor" was likely to be found in the documents and because it did not think that an attorney performing the job would be less "frank" or "honest" if he or she knew that the document might have been made known to the public. Although Coastal Gas Corp. arose under different circumstances than those presented here, the same conclusion is warranted. The Secret Service has provided no facts which would warrant a conclusion that the "views" or "evaluations" or "suggestions" said to be contained in these materials required "candor" or involved controversial opinions which, if revealed, would inhibit such advice in the future. Thus, there simply is no basis in fact for this Court to conclude that this kind of information would not flow freely within the agency if the materials at issue here were disclosed. Scott Management Company, et al., v. National Labor Relations Board, 626 F. 2d 1327 (6th Cir. 1980).

A final point must be made regarding the Secret Service's Exemption 5 claims. The purpose of the exemption is to prevent public scrutiny of government records from inhibiting frank discussions of leagl or policy matters. As the Senate Report explained:

> It was argued, and with merit, that efficiency of government would be greatly hampered if, with respect to legal and policy matters, all government agencies were prematurely forced to "operate in a fishbowl."

S.Rep.No. 813, 89th Cong., 1st Sess. 9 (1965 (emphasis added). It hardly promotes this policy to apply it here, where "all the senior Secret Service personnel who participated in this investigation in the 1960's" have retired or died. See Fitzgibbon Declaration, ¶11.

The Office of Information and Privacy ("OIP"), which sets government FOIA policy, has recently recognized the temporal limitations on Exemption 5. On November 26, 1986, Mr. Richard L. Huff, the OIP's Co-Director, wrote to Mr. Harold Weisberg about some of his administrative appeals to the Justice Department's Criminal Division regarding records on the assassination of President John F. Kennedy. Huff informed Weisberg that "[i]n view of the historic nature of this case and the age of these records, the Criminal Division will no longer rely on Exemption 5 to withhold information subject to these appeals. . . ." See Attachment 9. These same considerations apply equally to the materials in this case, which are of approximately the same age and which also involve an historic matter.

C. Exemption 7(C)

Exemption 7(C) permits nondisclosure of material compiled for law enforcement purposes which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(B)(7)(C), as amended by Pub. L. No. 99-570 (Oct. 27, 1986). Defendants claim that the change in this provision, from "would," to "could reasonably be expected to," establises a lesser standard for Exemption 7(C) than existed before the amendment. Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment ("Defendant's Memorandum") at p. 28 n. 10. This claim is totally unfounded. The legislative history of the 1986 amendments to Exemption 7, with minor exceptions not relevant here, make no change in the previous standard. Thus, the Chairman of the House Subcommitee on Government Information, Mr. Glenn English, described the amendments to Exemption 7 as follows:

> Together, these law enforcement amendments make only modest changes to the FOIA. For the most part, the changes to the seventh exemption only codify existing law. Except for a slight expansion of exemptions 7(E) and 7(F), no information that is subject to disclosure today will be withholdable under the revised seventh exemption.

132 Cong. Rec. H9462 (daily ed. October 8, 1986)(Rep. English).

Even under a lessened burden, defendants' Exemption 7(C) excisions would be untenable. Some of the deletions would be plainly silly under any standard. Using its 7(C)-1 code designation, which

is applied to "the names and/or identifying data concerning individuals who were mentioned during the course of interviews or contacts," Cook Declaration, ¶26(A), the FBI deleted the name of a New York Times reporter who Molins acted as interpreter for in 1959. See FBI Document #8, p. 2. The Secret Service has absurdly deleted the name of the U.S. Attorney for Chicago in 1962 under 7(C). Using its 7(C)-5 code designation, which purportedly was applied to protect "Intimate Or Personal Information Wholly Unrelated To The Subject Matter Of The Investigation Supplied by The Interviewee," Cook Declaration, ¶26(E), the FBI has deleted the name of a branch of the U.S. Post Office and the city in which it was located in 1965. See Attachment 11.

These examples indicate the kind of abuse to which Exemption 7(C) is subject. This exemption properly applies when there is a "substantial risk of embarrassment for, and reprisals against, the authcrs and subjects of the documents," and where there are "intimate or personal details which raise[] privacy concerns." Van Bourg, Allen, Weinberg & Roger v. N.L.R.B., 751 F.2d 982, 985-986 (9th Cir. 1985). That is, it 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 examples given above, which are not intended to be exhaustive, involve no invasion of privacy whatsoever. In the case of the deletion of the name of the U.S. Attorney in Chicago, Fitzgibbon, knowing that U.S. Attorneys are listed in the U.S. Government Manuel, was able to obtain his name, James P. O'Brien, by phoning the Montgomery County Public Library. Fitzgibbon Declaration, ¶18.

Although there is no privacy interest with respect to these 7(C) deletions, there is a public interest in disclosure with regard to them and the other 7(C) excisions. The materials here are of public interest because they relate to an historic matter. Full disclosure promotes accuracy in writing about such events and permits publication of documents in a form which authenticates the genuineness and completeness of the information relied upon by the historian. Needless withholding frustrates these objectives. It wastes the time of researchers, who may have to spend time establishing details already a matter of public record, such as the name of the U.S. Attorney for Chicago in 1962. The FOIA, which represents a national commitment to full disclosure, was intended to eliminate just such obstacles to obtaining government information. Several features of the Act were specifically designed to expedite access to such information.

Defendants' Exemption 7(C) deletions are oblivious to the passage of time. Yet the impact of the passage of time on privacy interests is undeniable. As the court stated in Powell v. United

Dept. of Justice, 584 F. Supp. 1508, 1526 (N.D.Calif. 1984):

> The privacy interests of each of these groups [FBI agents, FBI interviewees, subjects or suspects of investigations and those associated with them] have, however, seriously diminished with the passage of time. Many of the persons mentioned in the documents may be deceased. Many of the agents may be dead or retired from service. Undoubtedly, memories and hostile feelsings, if any, have waned. There is likely to be little fear of retaliation, humiliation or embarrassment over twenty years after the events.
>
> * * *
>
> Far less compelling privacy interests exist when the material sought relates to events over twenty years old.

Wilkinson v. F.B.I., 633 F. Supp. 336, 345 (C.D.Calif. 1986), citing Powell, noted that the agency had failed to address the fact that "many of the documents at issue are between 20 and 40 years old," and then held that: "Any balancing process must necessarily address the age of the documents and the extent to which the privacy interests of those mentioned in the files may have diminished with time." In this case, defendants have failed to meet the stricter burden of proof placed upon them by the passage of time.

The Secret Service has in the past released under FOIA documents pertaining to the assassination of President Kennedy in which "the names of Secret Service agents are uniformly disclosed." See Declaration of Dr. Philip H. Melanson ("Melanson Declaration"), ¶3. The Secret Service, "like other investigative agencies, is fond of publicizing its accomplishments: when such agencies arrest criminal

suspects of parochial interest they customarily telephone the news to local media as formatted releases in which the name of the area special agent in charge figures prominently." Fitzgibbon Declaration, ¶18. The names of senior Secret Service officials can be obtained with ease from the agency itself by a phone call. Id. Yet the Secret Service has routinely deleted these names, and the names of other law enforcement officials, pursuant to Exemption 7(C).

In withholding these names, the Secret Service relies, inter alia, on Lesar v. United States Dept. of Justice, 636 F.2d 472 (D.C.Cir. 1980). In Lesar the plaintiff sought records related to the assassination of Dr. King and the FBI's security investigation of him. The District Court ruled that the names of FBI personnel below the rank of section chief were protected "because of the contemporary character of the data. . . ." Lesar v. United States Dept. of Justice, 455 F. Supp. 921, 925 (1978). At the time the District Court ruled, the King assassination records were barely ten years old.

Although this decision was upheld on appeal, the D.C. Circuit added significant limitations on its ruling. Acknowledging that "[i]n their capacity as public officials FBI agents may not have as great a claim to privacy as that afforded ordinarily to private citizens," the Court of Appeals ruled that they do "have a legitimate interest in preserving the secrecy of matters that conceivably could subject them to annoyance or harrassment in their official or private lives." Lesar, 636 F.2d at 487. Applying these precepts

to the case at hand, the Court of Appeals stated:

> Public identification of these individuals conceivably could subject them to annoyance or harassment; we discern no countervailing public interest in disclosing this information at this point. This is not to imply a blanket exemption for the names of all FBI personnel in all documents. Rather, we find that in this instance public identification of the individuals involved in the FBI's investigation of Dr. King would constitute an unwarranted invasion of privacy in light of the contemporary and controversial nature of the information.

Id., at 488 (emphasis added).

The distinctions between this case and Lesar are obvious. The documents at issue here are mostly 20-25 years old, not 10 years-old. Lesar stressed the "controversial nature of the information," noting with regard to the investigation of Dr. King that "the available evidence indicates that at some point this investigation wrongly strayed beyond its initial lawful scope and took on the nature of a campaign to harass and attempt to discredit Dr. King." Id., at 487. The circumstances of this case completely different. The information is stale. There is no campaign to harass or discredit anyone, much less a figure of Dr. King's stature and following. There is no suggestion that there are any political or racial factors which could inflame "activists" to harass Secret Service agents or other law enforcement personnel. There is simply an historian seeking information which may prove useful to him in his research. As he points out, "[h]istorians do not harass or counter-surveil those of the past about whom they write." Fitzgibbon Decla-

ration, ¶15.

Although Lesar disapproves of the blanket deletion of the names of law enforcement personnel, the Secret Service has routinely deleted such names. Although Lesar restricts the justification for such excisions to contemporary and controversial information, the Secret Service has applied it to stale information over which no controversy rages.

D. Exemption 7(D)

The Secret Service and the FBI have applied Exemption 7(D) to protect a variety of alleged "confidential sources" and/or the information provided by such sources. The "sources" include persons interviewed; credit, commercial and financial institutions; state and local law enforcement agencies and personnel; and symbol numbers for FBI informants.

In order to sustain its burden of proof for this claim the agency must demonstrate that the information provided by the source was provided pursuant to "an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1978). The Sheafe Affidavit justification for 7(D) consists of generalized and conclusory statements. It makes no assertion of any express assurance of confidentiality with respect to the confidentiality of the sources invovled in this case. The Cook Declaration claims that its sources provided the information pursuant to "express or implied" assurances of confidentiality. It provides no

details evidencing any express assurance of confidentiality.

"[W]hether confidentiality has been implied is a question of fact which must be determined from the surrounding circumstances." Powell, supra, 584 F. Supp. at 1528-1529. Defendants' claims that their sources furnished information pursuant to an assurance of confidentiality, claims which are couched in generalized terms, conflict with Fitzgibbon's specific experience in researching the Galindez case.

According to Fitzgibbon, sources theFBI and Secret Service still regard as "confidential" have been delighted to talk to him. He has identified five such sources whose names were deleted by the FBI on Exemption 7(D) grounds: "All were happy to be interviewed and three were so voluble that I had to end the interviews because of writer's cramp and general exhaustion." Fitzgibbon Declaration, ¶21. He adds that "the New York Police Department, New York County District Attorney's office, and Pasadena and Seattle Police Departments--the only local law enforcement agencies I have so far queried--have opened and allowed me to copy their pertinent historical files without any attempt to suppress information in them." Id. These concrete facts dispute defendants' conclusory allegations regarding the "confidential" status of their sources. Summary judgment in favor of defendants on Exemption 7(D) must therefore be denied.

Defendants have excised not only the identities of their alleged "confidential" sources, but also, in some instances, infor-

mation furnished by them as well. In so doing, they have failed to take into account the age of these documents. Yet time has an obvious bearing on the viability of an Exemption 7(D) claim. As Wilkinson said:

> The FBI's redactions also require additional justifications when they involve events contained in 20-40 year-old documents. While there may have been a danger of identifying the informant when the events were recent, that danger clearly fades as the documents become decades old. Therefore, the government will have to justify redacting more than the source's name with a specific showing of how the remaining information would identify the source.

Id., at 348. Defendants' in this case have not made the specific showing of how the information would identify the source required by Wilkinson. This Court should require them to make that showing.

Even if source is established to have been a "confidential source" once upon a time, it doesn't follow logically that he, she or it retains this status in perpetuity. The 1974 amendments to the FOIA added clauses to Exemption 7 which are intended to prevent against specific harms which could reasonably be expected to result from certain disclosures. Once the harm abates sufficiently, the reason for the exemption disappears. Time and a change in circumstances can work this result with Exemption 7(D). As Fitzgibbon has demonstrated, sources the FBI and Secret Service consider "confidential sources" are quite willing at this late date to impart information to him. As he also notes, see Fitzgibbon Declaration, ¶¶27-29, changes in circumstances can dramatically alter the reasons for keeping a source's identity secret, leading even the FBI to

disclose it.

There is no reason to believe, on the facts of this case, that disclosure of the identities of defendants' sources would have any impact on their ability to recruit sources in the future or would damage their relations with state and local law enforcement agencies. Apart from the fact that some such sources are already assisting Fitzgibbon in his inquiry, the sources involved here are so ancient that it is difficult to conceive, absent special facts which have not been presented, how the revelation of their identities could reasonably be expected to cause any harm to governmental interests.

E. Exemption 7(E)

5 U.S.C. § 552(b)(7)(E) exempts from mandatory disclosure material which "would disclose techniques and procedures for law enforcement investigations or prosecutions. . . ." 5 U.S.C. § 552 (b)(7)(E), as amended by Pub. L. No. 99-570, § 1802 (Oct. 27, 1986).

The legislative history of this provision makes clear that it does not apply to routine or well-known techniques, such as techniques of questioning witnesses, ballistics tests or fingerprinting. See 120 Cong. Rec. at 17,034(1974)(remarks of Sen. Hart); H.R. Rep. No. 1380, 93d Cong., 2d Sess. 11 (1974). Techniques that have been denied protection include "security flashes" or tagging of fingerprints, Ferguson v. Kelley, 455 F. Supp. 324, 326 (N.D.Ill. 1978); mail covers, Dunaway v. Webster, 519 F. Supp. 1059, 1083

(N.D.Calif. 1981); laboratory techniques to detect arson, Ott v. Levi, 419 F. Supp. 750, 752 (E.D.Mo. 1976); and Department of State "lookout" notices, Krohn v. Department of Justice, 1 GDS ¶80,053 (D.D.C. 1980).

Exemption 7(E) has been asserted in 25 out of 51 Secret Service documents listed in the Sheafe Affidavit's Exhibit K, as well as in 4 FBI documents. The very frequency with which it has been asserted suggests that it is likely that some of these techniques, if not all, are commonly known. It is "quite doubtful that any investigative techniques used a quarter-century ago have not become publicly known since then." Fitzgibbon Declaration, ¶22.

III. THIS COURT SHOULD ORDER IN CAMERA INSPECTION

In Allen, supra, the Court of Appeals set forth the standards which guide a district court's discretionary decision to grant or deny in camera inspection. Several of these criteria favor in camera inspection in this case. Judicial economy would be served by in camera inspection. The documents at issue are relatively few, and most of them are quite short. The agency's affidavits are generally conclusory and inadequate to resolve the legal issues presented. There are numerous disputes concerning the factual contents of the documents. Fitzgibbon's inquiry has previously been found to be of sufficient public interest to qualify him for a fee waiver. Fitzgibbon v. CIA, C.A. No. 76-0700 (D.D.C. Jan. 10, 1977). See Allen, supra, 636 F.2d at 1297-1300.

CONCLUSION

For the reasons set forth above, this Court should deny defendants' motion for summary judgment, compel the Secret Service to perform a further search for unlocated documents, and inspect some or all dispuated documents in camera.

Respectfully submitted,

JAMES H. LESAR #114413
918 F Street, N.W. #509
Washington, D.C. 20004
Phone: (202) 393-1921

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of January, 1987, mailed a copy of the foregoing motion to Mr. Richard M. Schwartz, Office of Information & Privacy, U.S. Deptartment of Justice, Washington, D.C. 20530.

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 86-1886
	:	
U.S. SECRET SERVICE, ET AL.,	:	
	:	
Defendants	:	

O R D E R

Upon consideration of plaintiff's motions for in camera inspection and to compel a further search, defendants' opposition thereto, and the entire record herein, it is by this Court this _____ da of _____, 1987, hereby

ORDERED, that plaintiff's motion to compel a further search is GRANTED; and it is further

ORDERED, that defendant Secret Service shall promptly conduct a thorough search for any additional records responsive to plaintiff's request, including a search of its Chicago, Miami, New York and Washington field offices; and it is further

ORDERED, that within _____ days of the date of this Order defendants shall submit to this Court for in camera inspection all documents listed in Exhibit K to the Declaration of Larry B. Sheafe.

_____
UNITED STATES DISTRICT JUDGE