Volume 109 - Number 102 - Page 1037 Thursday, May 28, 1981

THE DAILY WASHINGTON Law Reporter

Established 1874

U.S. Court of Appeals

EMPLOYMENT

STATE ACTION

Summary judgment was properly granted against plaintiff's claims of improper dismissal as Vice President of non-profit corporation organized by Smithsonian Institution.

FOSTER v. RIPLEY, ET AL., U.S.App. D.C. No. 79-2107, April 7, 1981. *Affirmed* per Lumbard, J. (2nd Cir.) (Robb and Mikva, JJ. concur). *Cameron F. Kerry* with *William J. Kolasky, Jr., Richard F. Goodstein* and *Arthur B. Spitzer* for appellant. *Constance L. Belfiore* with *Charles F. C. Ruff, John A. Terry* and *Dennis A. Dutterer* for appellees. Trial Court—Harold H. Greene, J.

LUMBARD, J.: Plaintiff Willis R. Foster appeals from the order of the District Court for the District of Columbia, Harold H. Greene, J., granting summary judgment against the plaintiff on his claims that his dismissal from the position of Vice President for Professional Services of the Smithsonian Science Information Exchange, Inc. (SSIE) violated his First and Fifth Amendment rights. We now affirm.

The SSIE is a clearinghouse for information on developments in medical and scientific research. Its purpose is to facilitate the planning, management and coordination of such research among federal agencies and private institutions. The SSIE evolved from an information exchange created by an agreement among a number of government agencies. Although originally operated under the auspices of the National Science Foundation, administrative responsibility for the SSIE was transferred to the Smithsonian Institution in 1953. In 1971, the SSIE was incorporated as a nonprofit corporation under the laws of the District of Columbia.

* * *

I. STATE ACTION

Since the restrictions imposed by the First and Fifth Amendments are applicable only to the instrumentalities of government, an initial issue is whether the SSIE's dismissal of Foster constituted state action. Defendants assert that the Supreme Court's decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and subsequent cases established a two-part test for determining whether an entity's actions are state action: first, the entity must be endowed with governmental powers such that it performs a state function or exercises state authority, and 2) there must be a close nexus between the government and the challenged action such that the action "may be fairly treated as that of the state itself." Defendants point out that the SSIE is a nonprofit institution incorporated under the laws of the District of Columbia, and that the SSIE independently determines its personnel policies. Finally, the defendants also draw our attention to cases holding that mere receipt of

(Cont'd. on p. 1043 - Action)

JUDGE NEILSON HONORED

Judge George D. Neilson

The Superior Court of the District of Columbia has recently honored Judge George D. Neilson on two separate occasions. On May 1, 1980, under the direction of Chief Judge H. Carl Moultrie I, a citation honoring Judge Neilson for his forty years of judicial service was unveiled in the presence of the Chief Judge; the Executive Officer of the District of Columbia Courts, Mr. Larry P. Polansky; and many others, including lawyers, court employees, and friends. The west wall on the third floor of the Superior Court, called the "forty-year wall," was chosen as the site for the citation, which reads:

IN RECOGNITION OF 40 YEARS OF JUDICIAL SERVICE

NEILSON, GEORGE D. 1940-

On May 8, 1981 at a special retirement dinner, Judge Neilson was again honored for his long oustanding service and presented with a plaque which reads as follows:

SUPERIOR COURT
DISTRICT OF COLUMBIA

PRESENTED TO THE
HONORABLE
GEORGE D. NEILSON
ON BEHALF OF THE JUDGES AND EMPLOYEES

(Cont'd. on p. 1040 - Judge Neilson)

U.S. District Court

GOVERNMENT INFORMATION

GOOD FAITH

Based on in camera inspection, court determines that FBI investigation of plaintiff was made in good faith and not to discredit him as opponent of State Department.

DEMETRACOPOULOS v. FEDERAL BUREAU OF INVESTIGATION, Dist.Ct., D.C., C.A. No. 78-2209, January 30, 1981. *Opinion* per Harold H. Greene, *J. William A. Dobrovir* for plaintiff. *Dennis Dutterer* for defendant.

HAROLD H. GREENE, J.: This is an action under the Freedom of Information Act (5 U.S.C. §552) and the Privacy Act (5 U.S.C. §552a) in which the plaintiff seeks to compel the disclosure of FBI files pertaining to him. A substantial amount of material was released administratively but a number of documents were withheld in whole or in part. The parties have filed voluminous memoranda and other documents and the Court has heard oral argument.

I

The FBI defends the withholding of many of the documents under the national security

(Cont'd. on p. 1041 - Faith)

Legal Ethics Committee of the District of Columbia Bar

COMMITTEE ON LEGAL ETHICS
THE DISTRICT OF COLUMBIA BAR
OPINION NO. 102

DR 9-102—Deposit of Client's Funds in Separate Accounts—Use of Interest Bearing Accounts—Disposition of Interest

The Bar Counsel has asked us to consider several questions arising from the advent of interest bearing checking accounts and a lawyer's obligation under DR 9-102(A) to deposit the funds of a client in one or more separate and identifiable bank accounts maintained in the state in which the law office is situated. Specifically, Bar Counsel asks:

1. Does a lawyer have the option to continue to use a non-interest account for his client's funds or must he utilize an account which pays interest?
2. If he must utilize an account which pays

(Cont'd. on p. 1041 - Opinion)

TABLE OF CASES

Latin American countries.

Along with his legal and judicial work, he has been active in civil and community affairs. He is a member of the D.C. Bar, the D.C. Bar Association, American Bar Association, American Judicature Society, American Society of International Law, Inter-American Bar Association, Columbia Historical Society, Fellow of the Smithsonian Institute, and the University Club. He also has taken an active part in promoting hemispheric goodwill, and has served as President of the Simon Bolivar Memorial Foundation, and spoke along with Presidents Truman and Gallegos of Venezuela, and Governor Donnelly of Missouri at the dedication of the Bolivar Statute in Bolivar, Missouri. He is an active member of the Church of Jesus Christ Latter Day Saints—Mormon.

Judge Neilson was born in Logan, Utah and attended public schools there and was graduated from the Utah State University, where he was awarded the distinguished Alumni Service Award in 1961. He later was graduated from the Law School of George Washington University. His two sisters, Mrs. Maurice R. Barnes and Mrs. G. Stanley McAllister, formerly resided in Washington, D.C., but are now residents of Salt Lake City. Mrs. Barnes, the distinguished musician, was D.C. Mother of the Year in 1976; his brother, Roy Harold Neilson is a lawyer in the Trademark Section of the U.S. Patent Office; and his brothers Rulon and Alfred are energy consultants in Salt Lake City. His daughter, Stephanie F. Neilson, is a graduate of the University of North Carolina.

He also served as a member of the Cherry Blossom Festival Committee, the National Citizens' Committee for Columbus Day, and was Chairman of the Embassy Participation Committee of the Annual Christmas Pageant of Peace at the Washington Monument grounds. He delivered the July Fourth address before the oldest inhabitants of the District of Columbia and also the principal address before the Daughters of the American Revolution's annual meeting honoring the 177th anniversary of the signing of the United States Constitution. He received the Citizens' Certificate of Appreciation for Outstanding Service to the Community. He also has served as Chairman of the Court's Committee of the Metropolitan Council of Governments.

Judge Neilson was one of the founders of the popular Washington Metropolitan Area Traffic and Trial Courts Program, televised weekly at different times over a six-year period, by all local television stations. He appeared regularly as the presiding judge. Judge Neilson also has lectured extensively throughout the country at governors' safety conferences and conferences of the American Bar and the D.C. Bar Association. He also has lectured at Yale University, and at other schools.

OPINION

(Cont'd. from p. 1037)

interest and assuming the rates vary among institutions, must he select one which pays a rate reasonably comparable with the rate available from other "banks"?

3. What disposition is to be made of any interest received on an account? In this respect is a *de minimum* rule applicable?

4. Does the use of "bank accounts" in DR 9-102 require that the account be in a conventional bank as distinguished from a savings and loan or credit union which have accounts with characteristics similar to checking accounts?

This Committee's Opinion 36 provides substantial guidance on the first two of these questions. In that case, a law firm with an active real estate practice asked, *inter alia*, whether it is ethically proper to deposit money designated for settlement purposes in an interest bearing account. We responded that the Code of Professional Responsibility is silent on this question and that deposits in interest bearing accounts are certainly not prohibited by the Code. We also noted that "[a]s a general matter, to deposit a client's money in such a way as to earn interest for him would appear to be consistent with Canon 7, whose overall direction is that 'A Lawyer Should Represent a Client Zealously Within the Bounds of Law.' "

Although the Code neither commands nor prohibits deposits of a client's funds in interest earning accounts, we think that a lawyer should discuss with his client the advantages and disadvantages of deposits in interest bearing accounts and the various types of accounts which different banks provide. It may well be that the expenses involved in maintaining an interest earning account will exceed any interest that might be earned, particularly when the sum is small or is deposited for only a brief period. Such expenses might include various bank charges and reasonable fees for bookkeeping performed by the law firm or lawyer. On the other hand, if the sum is substantial or there is a substantial period of time before the money will be disbursed, the client may wish to earn interest on the money. These are all matters on which the lawyer should fully advise the client and then be guided by the client's wishes.

If an interest earning account is established, there is no doubt that the interest must be credited to the client and cannot be retained by the lawyer, absent an agreement to the contrary. Opinions interpreting the old ABA Canon 11 unequivocally hold that interest earned on a client's funds may not be retained by the lawyer.[1] ABA Informal Opinion 545 (May 21, 1962) states that "a lawyer who received money in his capacity as a lawyer, under circumstances that required him to account to another for such money, would be acting in violation of Canon 11 should he place the money in an interest-bearing account and keep for his own use the interest earned on such account, unless he was specifically authorized to keep the interest for his own use." *See* ABA Informal Opinion 991 (July 3, 1967); Arizona Opinion 224 (May 9, 1967), 6 Arizona Bar Journal 36 (Dec. 1970); Los Angeles County Bar Informal Opinion 1961-67; Oregon Opinion 144, 24 Oregon State Bar Bulletin 10 (July, 1964); Bar Association of the City of New York Opinion 181 (March 27, 1931). Moreover, recent opinions in other jurisdictions construing DR 9-102 hold that interest earned on a client's funds must be credited to the client. *E.g.*, Massachusetts Opinion 74-6 (June 20, 1974), 50 Mass.L.Q. 298 (1974); North Carolina Opinion CPR-26 (Oct. 24, 1974), 21 North Carolina Bar Bulletin 13 (No. 4,1974); Florida Opinion 72-13 (May 9, 1972), Florida Ops. 36. Even if the interest is minimal, it belongs to the client, absent an agreement to the contrary.

If interest is earned on a client's funds, DR 9-102(B) prescribes certain record-keeping and reporting practices which lawyers must follow. DR 9-102(B)(3) is especially pertinent. This provision requires that a lawyer shall "[m]aintain complete records of all funds . . . of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them." Compliance with this requirement with respect to interest earned on bank deposits might be very difficult and perhaps impossible unless the funds of each client are maintained in a separate account. Thus, depositing the funds of several clients in one interest bearing account would not be appropriate, unless accurate records can be maintained of each client's interest earnings.

In answer to Bar Counsel's fourth question, we think that the term bank account in DR 9-102 is sufficiently broad to include any savings institution similar to a bank. The most important factor in determining whether a savings institution is sufficiently similar to a conventional bank is whether it provides the same measure of deposit insurance as does a conventional bank. However, with the client's consent, funds could be deposited in other ways as well.

Inquiry 80-11-36

1. Canon 11 provided: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or used by him."

FAITH

(Cont'd. from p. 1037)

exemption to the Freedom of Information Act (Exemption 1) and that of others under the law enforcement exemption (Exemption 7). The principal issue with regard to these exemptions is whether the Federal Bureau of Investigation is and has been acting in good faith. In this regard, plaintiff claims that there were and are no legitimate national security or law enforcement reasons either for the government's investigation of him or for the government's present withholding of the files. In his view, that investigation was "bogus from the beginning," and designed solely to discredit him as an opponent of State Department policy toward Greece. These assertions are not frivolous on their face, and the Court must therefore resolve the good faith issue.

In this connection, plaintiff requests, and the FBI vigorously opposes, an *in camera* inspection of the relevant documents. The Court has carefully reviewed the documents filed on behalf of defendant, including the affidavits of FBI Special Agents James H. King and Jerry M. Graves, and it has concluded that it cannot rely on these papers alone in making its decision. The affidavits and other document submitted by defendant are insufficiently specific to permit the drawing of definitive conclusions, particularly in light of the basic conflict referred to above. Accordingly, the Court has conducted an *in camera* inspection of the disputed documents.

Twenty-three documents have been withheld, in whole or in part, under the national

security exemption. All of these documents were classified in accordance with the procedural requirements of Executive Orders 11652 and 12065. As concerns substance, defendant contends, and its affidavits aver, that release of the documents could reasonably be expected to cause identifiable damage to the national security. The standard of review with respect to classified documents has been fixed a number of times by the U.S. Court of Appeals for this Circuit. As that court stated in *Halperin* v. *CIA*, *supra*, slip opinion, pp. 7-8,

> [t]he court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions: to do so would violate the principle of affording substantial weight to the expert opinion of the agency. Judges, moreover, lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case. (footnotes omitted).

To be sure, the court's remarks were made in cases where the trial courts had ruled strictly on the papers, without the benefit of an *in camera* inspection. However, the limited scope and competence of judicial officers is as true in the one situation as in the other, and the rule of deference applies *a fortiori* where the Court has actually viewed the documents.

Within this general framework, the Court must still consider, however, whether release on national security by the agency is made in bad faith, where, as is true here, the agency's statements are called into question by some contradictory evidence. See *Halperin*, *supra*. Similarly, Exemption 7 is not available if the documents in question were not compiled "for law enforcement purposes," that is, if the agency was not gathering the information in the good faith belief that the subject may violate or had violated federal law. Cf. *Weissman* v. *CIA*, 565 F.2d 692, 694-95 (D.C. Cir. 1977).

Plaintiff asserts that the FBI inquiry here was conducted for the purely political purpose "to 'get' something on an embarrassing opponent of the State Department policy favoring the Greek dictatorship"—obviously not a legitimate law enforcement reason. Defendant claims, to the contrary, that the investigations of plaintiff were conducted strictly for law enforcement purposes. The Court has examined the documents with this conflict between the parties in mind.

It is necessary, first of all, to draw a distinction between the purpose of the investigation and the purpose of the act of withholding the documents. Even if it were true, as plaintiff claims, that the investigation was bogus, it would not necessarily follow that he would be entitled to the release of all the documents irrespective of the consequences in terms of the types of injury[.] * * * Thus, the identity of sources could well be subject to withholding under Exemption 1 (or possibly Exemption 3) even if the particular investigation in which the source participated did not meet the FOIA standards. Some of the material sought by plaintiff is in this category and may be subject to withholding on that basis alone.

In any event, the Court finds, based upon its review of the documents, that the investigation of plaintiff by the FBI was not a mere sham designed to intimidate or embarrass him in his role of critic of Greek or American policy. The information available to the FBI could lead a reasonably prudent government official to conclude that plaintiff may have been violating the Foreign Agents Registration Act, that he might be subject to deportation, or that by his contacts with and financial support from others he might be involved in improper relationships with foreign powers.

The documents in plaintiff's file indicate that various officials were operating on such assumptions. To be sure, to an extent conclusions in that regard are bound to be subjective, and the Court cannot, in this FOIA action, review what was actually in the minds of those who ordered plaintiff investigated or continued with that investigation once it had begun. But based upon the objective factors on the public record and those gleaned from the *in camera* inspection the Court cannot affirmatively find that the FBI and those making requests of it were acting in bad faith. See *Hayden* v. *National Security Agency*, 608 F.2d 1381, 1388 (D.C. Cir. 1979); *Baez* v. *U.S. Dept. of Justice*, *supra*, slip opinion, pp. 9-10. As the court said in *Irons* v. *Bell*, 596 F.2d 468, 474 (1st Cir. 1979),

> . . . we are hard pressed to conceive of a standard that would enable a district court to distinguish at an *in camera* proceeding between a colorably justifiable investigation that turned out to be a blind alley and an investigation that was bogus from the beginning.

Without necessarily endorsing that court's conclusion that even where there is a total lack of any likelihood of enforcement FBI records are nevertheless always regarded as compiled for law enforcement purposes, this Court concludes that Exemption 1 was properly invoked in this instance, and that where Exemption 7 was cited a law enforcement purpose was present.

II

Other issues may be dealt with more summarily.

Defendant relies on Exemption 7(C) to withhold the names of FBI agents and other FBI personnel, those of officials of other federal agencies, those of third parties associated with plaintiff, and those of individuals of investigative interest to the FBI.

Plaintiff does not contest the deletion of the names of FBI agents and other FBI employees, and such deletions are therefore no longer in issue.

Public officials do not have as great a claim to privacy as is normally afforded to purely private citizens (although they do not altogether forego their privacy claims even with respect to matters related to official business). *Lesar* v. *U.S. Dept. of Justice*, *supra*, slip opinion, p. 29; see also, *Nix* v. *United States*, 572 F.2d 998, 1005-06 (4th Cir. 1978). Defendant claims that disclosure of the identities of such officials could subject them to unofficial inquiries that could result in harassment or discomfort. That bare claim is insufficient under the law. The individuals mentioned in the files are officials of the Department of State, the Immigration and Naturalization Service, the United States Information Agency, the Department of Justice, and the Central Intelligence Agency who had some relationship to the collection of data concerning plaintiff. Beyond the assertion that their identification would subject them to unofficial inquiries they did not anticipate, defendant provides no basis for withholding disclosure. Such a claim could be upheld only on the theory that an automatic immunity exists under the FOIA regarding the identity of all federal officials. Defendant has not pointed to any precedent awarding such blanket immunity and the Court has found none. Accordingly, these names may not be withheld.

The names of plaintiff's associates are withheld because of the "sensitive and intimate nature" of the information or because disclosure might connect these "innocent" individuals with an FBI investigation. It is clear that these individuals do have a privacy interest which outweighs the interest asserted by plaintiff in disclosure. *Maroscia* v. *Levi*, *supra*. Similarly, the names of individuals of investigative interest to the FBI were properly withheld. *Baez* v. *U.S. Dept. of Justice*, *supra*, slip opinion, p. 22.

Exemption 7(D) permits the withholding of the identity of confidential sources, and this exemption was asserted here in 56 instances. The sources are said by the FBI to be of two kinds: those who were interviewed in connection with the investigation of plaintiff and those who provide information on a regular basis. In every instance where a 7(D) exemption is claimed by defendant, it is asserted in conjunction with a claimed 7(C) exemption, and since the Court has upheld all but one category of 7(C) exemptions, there is no need to consider the former in any detail. In any event, assurances of confidentiality were given either expressly or under circumstances where such assurances could reasonably be inferred, and the withholding is therefore appropriate. See, *e.g.*, Judge Weinfeld's opinion in *Lamont* v. *Department of Justice*, *supra*, 475 F.Supp. at 779 (S.D.N.Y. 1979).

Defendant asserts Exemption 7(E) in two instances to protect investigative techniques the disclosure of which would impair the ability of the FBI to utilize similar techniques in the future. Plaintiff asserts that the techniques involved are wiretaps which may not be lawful, but the FBI has asserted that there is no record of plaintiff's having been the subject of an electronic surveillance. The Court's *in camera* inspection confirms that the two deletions under Exemption 7(E) do not involve wiretaps.

Defendant originally relied on Exemption 2 to withhold administrative markings (such as file numbers, handwritten notations, names and initials, routing slips, and the like). More recently, however, defendant has offered to produce such markings at the request of plaintiff. The only remaining area of dispute under the Exemption 2 rubric is that of "leads," *i.e.*, FBI guidelines for the handling of investigations. Defendant asserts that such information is exempt, while plaintiff claims that a judgment with respect thereto cannot be made without an *in camera* inspection to determine whether the investigative methods used were, in fact, illegal. Since the Court has

conducted an *in camera* inspection with respect to other matters, it has also reviewed the deletions within this category, and has concluded that they do not involve improper activity.

For the reasons stated, defendant's motion for summary judgment will be granted, except with respect to the identities of public officials and certain materials in Document No. 22.

ACTION

(Cont'd. from p. 1037)

federal funding does not convert actions of institutions such as private universities into state actions. *See, e.g, Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975); *Spark v. Catholic University*, 510 F.2d 1277 (D.C. Cir. 1975).

We are not persuaded by these arguments, but instead agree with the district court that Foster's dismissal constituted state action. The district court relied upon *Burton* [365 U.S. 715 (1961)], in which the Supreme Court stated that in each case presenting the question of state action, courts must proceed by "sifting facts and weighing circumstances." *Id.* at 722. In *Burton*, the Court held that racially discriminatory policies of a restaurant which leased space in a public parking facility constituted state action. The Court in *Jackson, supra*, in holding that a state-regulated utility's termination of services did not constitute state action, noted the continuing vitality of *Burton* as standing for the proposition that state action will be found where the activities of the government and the entity in question are so intertwined that a "symbiotic relationship" exists between them. *Jackson, supra*, 419 U.S. at 357. In subsequent cases, the circuit courts have agreed that *Jackson* did not overrule this principle established in *Burton. See, e.g., Chalfant v. Wilmington Institute*, 574 F.2d 739 (3rd Cir. 1978) (en banc); *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1978); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977) (en banc); *Holodnak v. Avco Corp.*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

We believe here that the government's involvement in the operation of the SSIE is sufficient to constitute the type of symbiotic relationship found in *Burton*. As the district court found, the majority of the SSIE's board of directors are Smithsonian officials, the SSIE continues to serve primarily as a clearinghouse for research undertaken or funded by federal agencies, over 90 percent of the SSIE's budget originates from federal appropriations or contracts, the SSIE is treated by the Smithsonian and held out to the public as one of its bureaus, and the Smithsonian handles its accounting, personnel, payroll, audit, legal, fiscal, and procurement services and its requests to the Congress for appropriations. Indeed, the SSIE is close in character to a federal agency or department; it is essentially an operating branch of the federal government.

* * *

II. FIRST AMENDMENT CLAIM

We also agree with the district court that Foster's dismissal did not violate his rights under the First or Fifth Amendments. Under *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), to demonstrate a violation of First Amendment rights, a government employee allegedly discharged as a result of certain speech or activity must first demonstrate that the conduct was constitutionally protected. Once such a showing is made, the burden is on the employer to demonstrate that it would have reached the same decision as to employment in the absence of the protected conduct. The Court noted in *Mt. Healthy:*

> That question of whether the speech of a government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).,

429 U.S. at 284. In this case, the district court held that Foster's actions did not constitute constitutionally protected conduct because Foster's situation was quite dissimilar from those in which protected conduct has been found. The court distinguished *Pickering, supra*, as involving a public employee commenting upon matters of public concern and distinguished Foster's situation from that of a government "whistleblower" who exposes corruption among public officials, as in *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979). Instead, the court found that in this case, the plaintiff's actions were taken as part of a "bureaucratic tangle" in which the plaintiff was attempting to protect his personal interests.

Foster argues on appeal that the district court erred in holding that his conduct was not protected. He argues first that the district court's holding amounted to an impermissible content-based denial of free speech protection, since the district court improperly took into account the degree of public interest and the mere fact of Foster's personal interest, and thereby failed to undertake the balancing required by *Pickering* and *Mt. Healthy*. In effect, Foster argues that all speech by government employees relating to their jobs is "protected," but that the right of the employee to speak out must then be balanced against the employer's interest in efficiency, as required by *Pickering*.

We believe that Foster misreads the holding of the district court. As the quoted passage from *Mt. Healthy* makes clear, conduct of government employees is "protected" when, *after* balancing the interests of employee and employer, it is concluded that the employee's interest in speech outweighs the government's interest as an employer in efficient management. Under *Pickering* and *Mt. Healthy*, one factor relevant in weighing the side of the balance favoring the employee is the interest served by his speech. That interest is entitled to more weight when the employee is commenting on a matter of general interest or acting as a whistleblower exposing corruption among public officials rather than merely trying to advance his own interests as an employee, interests that would be no different if his employer were not the government. Thus, it was quite proper for the district court, in considering whether Foster's conduct was "protected," to consider whether Foster was commenting upon matters of public interest or was acting to further his own interests. Indeed, *Pickering* and *Mt. Healthy* expressly require such an inquiry.

Foster also argues that, even so, the district court erred by failing to specify in detail, on the other side of the *Pickering* balance, the interests of the government as an employer in punishing Foster's conduct. Admittedly, this court and others have made clear that, in carrying out the balancing required by *Pickering*, government efficiency interests should be closely examined, and summary judgment in such cases is often disapproved. *See, e.g., Hanson v. Hoffman*, 628 F.2d 42 (D.C. Cir. 1980); *Tygrett v. Barry*, 627 F.2d 1279 (D.C. Cir. 1980); *Porter v. Califano, supra*. Nevertheless, in this case, we believe that the balancing of interests so clearly weighed against Foster that summary judgment on the issue was appropriate.

As the district court noted, Foster was engaged in a bureaucratic fight over administrative control of certain SSIE bureaus. We agree with the district court's characterization of the case as essentially involving a mere power struggle between an employee and his superior, in which the employee attempted to subvert his superior's actions by attacking them through external rather than internal channels. Foster certainly has a First Amendment interest in speaking out on matters of public interest. The internal reorganization of the SSIE is conceivably a matter of public interest. On the other side of the balance, however, it is clear that Foster's action could have caused considerable harm to the interests of the SSIE. Foster's letter to Schneider in effect stated that the SSIE would be incapable of providing high quality services to an important client of the SSIE. Such a comment was a direct attack on his superior Hersey and others and made it impossible for Foster to continue to perform effectively at the SSIE. This was clearly a case in which an employee's working relationships and effectiveness were completely disrupted by the purportedly protected conduct.

* * *

III. DUE PROCESS CLAIMS

Foster also asserts that his dismissal constituted a deprivation of a protected property interest without due process. We have some doubts whether Foster had any such property interest. In support of his claim, Foster submitted numerous affidavits from present and prior SSIE employees which state that the employees "understood" that they could be fired only for cause. He argues that there was a "common law" of tenure at the SSIE. *C.F. Perry v. Sindermann*, 468 U.S. 593 (1972).

Nevertheless, it is undisputed that the SSIE's policy governing employee tenure was set forth in Smithsonian Institution Office Memorandum 172. That Memorandum states that "[a]ppointments may be terminated at any time." The policy is consistent with the