REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 85-5728

SONIA DETTMANN,

Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Appellee

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

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I. THE DISTRICT COURT ERRED IN AWARDING SUMMARY JUDGMENT WHERE AGENCY DID NOT PROCESS ALL MATERIALS WITHIN THE SCOPE OF THE REQUEST

Appellant, Sonia Dettmann ("Dettmann"), contends that in processing her Freedom of Information Act ("FOIA") requests the Federal Bureau of Investigation ("FBI") wrongly refused to process portions of the requested documents on the ground that they were "not pertinent" to her. Appellee asserts, in response, that "appellant seems to argue that even if these records were considered

not pertinent to appellant's requests, they can be 'withheld' only on the basis of FOIA exemptions." Brief for Appellees at 7.

Dettmann's argument is, rather, that because the document portions withheld under this guise plainly are within the scope of her requests, they cannot properly be withheld unless subject to a claim of exemption. See Appellant's Brief at 14.

The crux of the dispute between the parties is whether Dettmann's request for "all documents . . . which contain my name or make reference to me or any activities in which I have allegedly engaged in" excludes from the scope of her requests those pages which the FBI says do not relate to her.[1/] Appellee asserts that a common-sense reading of Dettmann's requests "indicates that she was interested in only those records that pertained to herself." Appellee's Brief at 8.

That Dettmann's requests are restricted to documents pertaining to herself is undeniable. That her requests evince no indica-

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1/ The FBI's definition of "pertaining to" is exceedingly narrow, applying only to those document portions which expressly refer to Dettmann and appear on the very same page where her name is mentioned. Even this very narrow definition was initially applied wrongly in a number of instances. See Appellant's Brief at 8-9. Moreover, even after some of the erroneous applications of this very narrow definition were corrected, the FBI still continued to withhold information directly related to the mention of Dettmann's name on the previous page. Id., p. 9 n.1.

According to Appellee, the first issue presented is: "Whether the District Court properly granted summary judgment with regard to appellee's claim that portions of records that do not primarily pertain to appellant and do not contain identifiable references to her are not responsive to her first-party FOIA requests." (Emphasis added.) Brief for Appellee, "Issues Presented." This concedes that withheld document portions do pertain to Dettmann, even if less than "primarily."

tion that she merely wanted certain pages rather than the entire documents is equally undeniable. The wording of her requests provides no warrant to read them as if they asked for "all records on me but only those pages or portions thereof which the FBI thinks pertain to me, and even then only if my name is actually mentioned on the same page." Yet this is how appellee would have this Court construe them.

The FOIA requires a requester to "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3). Appellee does not assert that Dettmann failed to adequately describe the records she requested. This is not surprising. The FBI's failure to provide Dettmann with the "not pertinent to plaintiff" materials does not arise from an inability to understand plain English. In fact, it has nothing at all to do with the actual wording of the requests. Rather, it stems from a "general practice" which the FBI follows in processing "see" references under the Freedom of Information and Privacy Acts. See Third Supplemental Declaration of Walter Scheuplein, Jr., ¶6. [App. 183-184]

An agency's obligations under the FOIA are quite clear. It must address the actual request which is submitted. Its mission is to provide the requester with the information he wants to the extent it is not exempt. The agency is not free to substitute what it wishes the requester had asked for in place of the actual request.

Even where there is some ambiguity in a request, an agency must either construe it liberally or secure the requesters consent

to clarify or narrow it. "A FOIA request should not require the specificity and cunning of a carefully drawn set of discovery requests, so as to outwit narrowing legalistic interpretations by the government." Providence Journal Co. v. F.B.I., 460 F. Supp. 778, 792 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980). Thus, "[w]here the requester has endeavored to carefully specify what documents were being requested, the Court will not allow an agency's quibbling to obscure the issues." Norwood v. F.A.A., 580 F. Supp. 994, 1001 (W.D.Tenn.W.D. 1983).

The policy upon which such decisions are based is derived from the purpose of the FOIA. "Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Thus:

> Given the policy embodied in the FOIA requiring disclosure of information in government documents unless it falls within the reach of one of the specified exemptions, the agency should err on the side of liberally construing what material falls within the scope of the request.

Dunaway v. Webster, 519 F. Supp. 1059, 1083 (N.D.Cal. 1981). And,

> the agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester. To conclude otherwise would frustrate the central purpose of the Act.

Hemenway v. Hughes, 601 F. Supp. 1002, 1005 (D.D.C. 1985)(Joyce Hens Green, J.).

If a request is ambiguous or does not reasonably describe the records sought, Justice Department regulations provide that the component handling the request "shall either advise the requester what additional information is needed or otherwise state why the request is unsufficient (sic)." Moreover, the component "also shall extend to the requester an opportunity to confer with Department personnel with the objective of reformulating the request in a manner which will meet the requirements of this section." 28 C.F.R. § 16.3(b).

The procedure set forth in the Justice Department's regulation is obligatory on the FBI, as well as being just plain common sense. A practice like that described by the Department's regulation has been endorsed by a leading authority on the FOIA:

> The better agencies phone or write back to the requester for clarification of a confusing or broad request. The courts have endorse the view that agencies should not hold requesters to a legalistic specificity standard like that in litigation. If an agency has doubts, it should either contact the requester or provide some basic documents with the comment that additional documents in related subject areas will be available on further request.

O'Reilly, Federal Information Disclosure, § 5.06.

In this case the FBI made no attempt whatsoever to ascertain whether plaintiff merely wanted just those pages on which her name appeared or desired to have the entire documents. Despite the explicit language of the request to the contrary, it proceeded to apply its preordained policy of processing only those pages on

which her name was mentioned. Nor did the FBI inform Dettmann that it intended to process only those portions of the records which expressly mentioned her name. Thus, the FBI failed to give Dettmann's requests a reasonable interpretation and also violated Justice Department regulations.

Appellee's Table of Cases indicates that as regards the "outside the scope of the request" issue it principally relies upon" two cases: Halperin v. Webster, 1 GDS ¶79, 108 (D.D.C. 1979), and Posner v. Department of Justice, 2 GDS ¶82,229 (D.D.C. 1982). Neither case has been officially reported, and neither case elucidates the basis for its holding. Their value as precedent or as examples of persuasive reasoning is, therefore, nil.

Appellee also cites Dunaway v. Webster, 519 F. Supp. 1059 (N.D.Cal. 1981), which involved a third-party request for "all materials" in the FBI's files concerning certain musical groups. Id. at 1064. Because the operative term was "materials," not "documents," it was reasonable to interpret the request as excluding "materials," whether documents or portions thereof, which did not pertain to the subjects of the request. Such is not the case here, where Dettmann "documents" in which her name appeared, not just "materials" pertaining to the mention of her name.

It is also worth noting that the standard which the District Court in Dunaway applied is much stricter than that which the FBI utilized in this case. Finding during in camera inspection that the FBI had improperly withheld some material which could reason-

ably be considered relevant to plaintiff's request, the court ordered material released

> in those instances where the court felt that there was any possibility that the material might bear some relationship to the subject of the request, or if the information was necessary to understand the context in which the reference to the subject of the request arises in the document.

Id., at 1083-1084. The Dunaway court upheld the "outside the scope" deletions only "where it was convinced that the material was utterly unrelated to the subject of the plaintiff's request." Id., at 1084. Under this standard this case would have to be remanded, since the FBI obviously made no attempt to comply with an "utterly unrelated" standard.

Dunaway did hold that an agency "is under no obligation to release an entire document simply because the name of a person or organization which is the subject of the request is mentioned in the document. Id. at 1083. The court gave two reasons for this ruling: (1) this would impose on the government "a burdensome and time consuming task," and (2) under any other approach an agency could inundate the requester with mounds of documents of dubious relevancy, "potentially making the costs of receipt of the documents prohibitively expensive." Id. at 1083.

These are the same reasons relied upon by the District Court in this case. As Dettmann pointed out before, see Appellant's Brief at 15-16, neither is a valid reason for not providing requested records. Processing records for release under the FOIA

is likely to be costly and time-consuming in some degree, particularly given the way many government agencies go about it. But under the FOIA these burdens do not constitute a permissible ground for noncompliance with the terms of a request.

The specter of a requester being inundated with mounds of documents of dubious relevance is largely a chimera. So long as the government adheres to its own regulations, this fear, ostensibly summoned forth by the government out of concern for its adversary, the requester, should prove unfounded. Justice Department regulations require, for example, that when fees in excess of $25.00 are anticipated, the requester must be notified and offered the opportunity to confer with Department personnel "with the object of reformulating the request so as to meet his needs at lower cost." 28 C.F.R. § 16.10(c). And, as noted above, 28 C.F.R. § 16.3(b) similarly requires Justice Department personnel to extend to any requester who has failed to reasonably describe the records he is seeking the opportunity to meet with Department personnel and reformulate the request.

Thus, there is simply no legally sufficient basis for the District Court's conclusion that the FBI properly excluded the "not pertinent to plaintiff" materials from Dettmann's requests.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF DISCOVERY PURSUANT TO RULE 56(f)

Appellee argues that the District Court did not abuse its discretion in denying discovery sought by Dettmann because she

"has entirely failed to show how her discovery would address any legitimate issue of material fact in this case." Appellee's Brief at 22. In support of this claim, appellee cites cases holding that where the discovery sought under Rule 56(f) "appears irrelevant" or is "wholly speculative," it must be denied. Id., at 25.

Appellee is able to make this argument only because it ignores the content of Dettmann's Rule 56(f) affidavits. These affidavits set forth a number of facts which were directly relevant to "legitimate issues of material fact." Far from being "speculative," these facts were based on the FBI's own affidavits and the very documents at issue in this case.

For example, as regards threshold Exemption 7 issues, Dettmann contended that she needed to discover the law enforcement basis for records relating to her which reflected FBI surveillance of her public political activities and her private phone conversations. Lesar Rule 56(f) Declaration, ¶4. [App. 100] In her accompanying Opposition to Defendant's Motion for Summary Judgment [R. 26], at p. 11, she pointed to specific documents which reflected such surveillance and argued that these materials raised a question as to whether many of the documents contained in the files on her resulted from "generalized monitoring unrelated to law enforcement[]." Pratt v. Webster, 673 F.2d 408, 421 (D.C.Cir. 1982), citing Lamont v. Department of Justice, 475 F. Supp. 761, 774-776 (S.D.N.Y. 1979).

Another "legitimate issue of material fact" concerns whether nonexempt records not compiled for a law enforcement purpose were commingled with records that were compiled for a law purpose. Although appellee asserts that Dettmann has argued, "for the first time on appeal, that the Court should presume that appellee has attempted to 'commingle' non-exempt records with records that were compiled for law enforcement purposes," Appellee's Brief at 14, this statement is incorrect for two reasons.

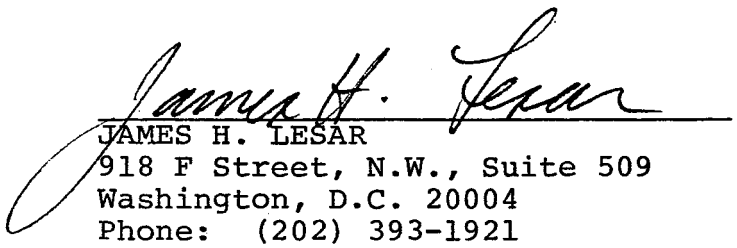
First, Dettmann has not argued that the Court should presume commingling. She has simply raised an issue as to whether such commingling may have occurred. The purpose of discovery is, of course, to find out what the evidence on the issue is.

Second, Dettmann most certainly did raise the issue of "commingling" in the court below. Referring to the files compiled on her as a result of her trip to Cuba, she stated that she needed to learn the basis for continuing this investigation for four years after the FBI supplied its field offices with criteria regarding the further pursuit of such investigations. This, she said, "is particularly required in view of the fact that these files contain materials from other investigations which on their face do not appear to have been compiled for law enforcement purposes." Opposition to Defendant's Motion for Summary Judgment, at 10. [R. 26]

Such facts as these, if not sufficient to raise genuine issues of material fact precluding summary judgment, and Dettmann would argue that they were, at least sufficed to warrant Rule 56(f) discovery.

For these reasons it was an abuse of discretion for the District Court to deny Dettmann the Rule 56(f) discovery she sought.

Respectfully submitted,



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