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U.S. Court of Appeals

GOVERNMENT INFORMATION O.S.T. Report

Office of Science and Technology is an "agency" for purposes of Freedom of Information Act and suit seeking information from O.S.T. should not be dismissed for lack of jurisdiction.

Soucie v. David, U.S. App. D.C. No. 24,573, April 13, 1971. Remanded per Bazelon, C.J. (Van Dusen, J. (3 Cir.), concurs; Wilkey, J., concurs in result and in part). Peter L. Koff with Lawrence Speiser and Melvin L. Wulf for appellants. Jeffrey F. Axelrad with Thomas A. Flannery, Robert V. Zener and Harland F. Leathers for appellees. Peter L. Koff for the City of Boston as amicus curiae. Trial Court—Pratt, J.

BAZELON, C.J.: This is an appeal from the dismissal of a suit for injunctive relief under the Freedom of Information Act. Two citizens seek to compel the Director of the Office of Science and Technology (OST) to release to them a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft (SST).

The Report originated in the following manner. The President asked the Director of the OST, then Dr. Lee A. DuBridge, to provide him with an "independent assessment" of the SST program. Dr. DuBridge convened a panel of experts, headed by Dr. Richard L. Garwin, to assist him. When the President learned of the panel, he asked to see its report. Dr. DuBridge subsequently transmitted the Garwin Report, along with his own evaluation, to the President.

When appellants inquired about the Garwin Report, the OST indicated that it would not release the Report to members of the public because the Report was a Presidential document over which the OST had no control, and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President." Appellants brought suit under the Freedom of Information Act to compel disclosure of the Report.

(Cont'd on p. 766, Col. 3 - Report)

Report

(Cont'd from p. 761, Col. 2)

The District Court dismissed the complaint with a brief order stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain that relief. At the hearing, the trial judge discussed the basis for his ruling. He stated that the OST is not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the Garwin Report is protected from compulsory disclosure by the doctrine of executive privilege.

In Part I of this opinion we review the origin and functions of the OST and conclude that the OST is an agency, and that the Garwin Report is an agency record. Consequently, subject to any constitutional issues which may be raised, the complaint states a cause of action under the Freedom of Information Act, and the District Court erred in dismissing the suit. The case must be remanded for that court to consider whether the document is protected, in whole or in part, by any of the specific exemptions enumerated in the Act. In Part II of this opinion we indicate some of the considerations that will be relevant to that determination.

While the District Court referred to the doctrine of executive privilege in support of its decision, the privilege was not expressly invoked by the Government, and therefore, it was not properly before the court. Serious constitutional questions would be presented by a claim of executive privilege as a defense to a suit under the Freedom of Information Act, and the court should avoid the unnecessary decision of those questions. Accordingly, whether or not the Government

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makes a claim of privilege on remand, the court should first consider whether the Report falls within any statutory exemption. Only if the Act seems to require disclosure, and if the Government makes an express claim of executive privilege, will it be necessary for the court to consider whether the disclosure provisions of the Act exceed the constitutional power of Congress to control the actions of the executive branch.

I

Congress passed the Freedom of Information Act in 1966 to strengthen the disclosure requirements of the Administrative Procedure Act (APA). Each federal agency subject to the APA must now make its records, with certain specific exceptions, available to "any person" who requests them; district courts have jurisdiction to order the production of any "identifiable record" which is "improperly withheld," and "the burden is on the agency to sustain its action."

Under the APA, an agency is any "authority of the Government of the United States, whether or not it is within or subject to review by another agency." The statutory definition of "agency" is not entirely clear, but the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. While the primary purpose of the APA is to regulate the processes of rule making and adjudication, administrative entities that perform neither function are nevertheless agencies, and therefore subject to the public information provisions of the APA, i.e., the Freedom of Information Act.

The District Court ruled that the OST is not an agency, but merely staff to the President. On that theory, the only "authority" controlling the Garwin Report is the President, and the trial court held that the President is not subject to the disclosure provisions of the APA. We need not determine whether Congress intended the APA to apply to the President, and whether the Constitution would permit Congress to require disclosure of his records, for we have concluded that the OST is a separate agency, subject to the requirements of the Freedom of Infor-

mation Act, and that the Garwin Report is a record of that agency.

The OST, created in 1962 by an executive reorganization plan, is authorized (1) to evaluate the scientific research programs of the various federal agencies, and (2) to advise and assist the President in achieving coordinated federal policies in science and technology. Its functions had previously been assigned to the National Science Foundation. * * *

A reorganization plan proposed by the President can take effect only if both houses of Congress acquiesce, i.e., if neither house passes a resolution disapproving the plan within a fixed period of time. The congressional understanding of a proposed plan is therefore entitled to considerable weight in determining its effect. The one house of Congress that explicitly considered the plan creating the OST clearly contemplated that the OST would function as a distinct entity and not merely as part of the President's staff. * * *

* * *

If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President—a relation that might result in the use of such information as a basis for advice to the President. By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act.

* * *

Having concluded that the OST is an agency, we think it clear that the Garwin Report is a record of that agency for purposes of a suit under the Freedom of Information Act. The function of the OST is to evaluate federal scientific programs. Consequently, any report prepared by the agency or its consultants in fulfillment of that function must be regarded as a record of the agency. It is true that the SST program was selected for evaluation because the President had requested an assessment of it. That request may bring the document within a statutory or constitutional exemption from the disclosure requirements of the Act. But the request does not deprive the Garwin Report of its character as the record of a study made in the performance of the ordinary functions of the agency.

II

The conclusion that the Garwin Report is an agency record is only the beginning of the inquiry required under the Freedom of Information Act. The Act enumerates nine specific exemptions to its general requirement of disclosure. On remand, the trial court must determine whether any of those exemptions is applicable.

* * *

* * * [U]nless the Government on remand makes a valid claim of constitutional privilege, it will be able to prevent disclosure only by showing that the Garwin Report falls within one or more of the statutory exemptions.

On the basis of the present record, the exemption which seems most likely to be relevant is the fifth, protecting "inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." That exemption was intended to encourage the free exchange of ideas during the process of deliberation and policy-making; accordingly, it has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports. Factual information may be protected only if it is inextricably intertwined with policy-making processes. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of "the inevitable temptation of a government litigant to give [this exemption] an expansive interpretation in relation to the particular records at issue."

The OST is specifically authorized by Congress to evaluate federal scientific programs in order to provide Congress and the President with better information. Its evaluations may be useful to the President, the Congress, and other agencies with the power to make science policy. Nevertheless, the evaluations themselves may not reflect the internal policy deliberations that the "internal communications" privilege is designed to protect. The Garwin Report may contain some policy advice and recommendations which are protected by the statutory exemption. In the present record, however, there is no evidence to indicate that releasing the factual information in the Garwin Report will expose the decisional processes of the President or other executive officers with policy-making functions. Unless the Government introduces such evidence on remand, the factual information in the Report will not be protected by the exemption for internal communications.

Another statutory exemption which may be applicable to the Garwin Report is the fourth, protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose. If the Garwin Report contains material pro-

tected by this exemption, then that material should be deleted before disclosure of the remainder may be required.

Finally, the trial court on remand may be called upon to consider the first exemption, for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."

Under the Freedom of Information Act, the District Court is required to expedite the proceedings on remand to determine whether the Garwin Report is protected by any statutory exemption or constitutional privilege. The court can most effectively undertake the statutory de novo evaluation of the Government's claim by examining the Report in camera. Since the record indicates that the Report is an evaluation of the federal program for development of the SST, it seems likely that the Report contains factual information on the SST and on the Government's activities with respect to it. If the Government asserts a specific privilege on remand, inspection of the Report will enable the court to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies of the Act. Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, in camera inspection may be necessary. In such a case, however, the court need not inspect the Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified.

III

Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives. The OST itself was created to help alleviate this problem; Congress intended that the OST would provide better information and coordination with respect to federal activities in the scientific field. It would defeat the purposes of the OST, as well as the purposes of the Act, to withhold from the public factual information on a federal scientific program whose future is at the center of public debate.

Reversed and remanded for further proceedings in accordance with this opinion.

WILKEY, J., concurring: I concur in the result reached and in the court's opinion, except on the point of equitable discretion discussed below.

* * *

These examples of recognition by all three branches of a constitutional privilege to withhold certain documents under given circumstances not only show the tripartite nature of the constitutional privilege, but are relevant here, where the appellants are private citizens, because the original request for the Garwin Report stemmed from a Congressman and was denied by the executive on grounds the validity of which is not yet finally determined. But it would be an absurdity to contend that a Congressman—who is both citizen and Member of the House of Representatives—could not have access to a document in the executive branch, and yet another citizen could gain access on the strength of a statute enacted by Congress. Thus, if the exemptions to the Freedom of Information Act are found not to permit withholding of the information sought here, the executive may still assert a constitutional privilege on the ground that Congress may not compel by statute disclosure of information which it would not be entitled to receive directly upon request.

Part II of the court's opinion also expresses the view that Congress, in providing for de novo court review of agency refusals to disclose information, intended to require the courts to enjoin withholding of any agency record not exempted by the Act and not protected by a constitutional privilege. Congress, the opinion states, "did not intend to deny relief on equitable grounds apart from the exemptions in the Act itself." This quoted statement and related discussion relate to an issue which is not presented for decision in this case and is not likely to face the trial court on remand. There is no suggestion in the record that the District Court here denied relief on equitable grounds, nor is it likely that such grounds could be presented in the contest of this case. It has been suggested that a court may, on equitable grounds, decline to require disclosure of records not covered by a specific exemption in the Act, where to order disclosure would irreparably invade personal privacy or cause the Government to violate an agreement with a private party that non-commercial and non-financial information provided by him will be kept confidential. There do not appear to be such equitable grounds for non-disclosure present in the instant case and I would not therefore reach the difficult question of statutory construction of the District Court's power in such circumstances.

The Act itself merely provides: "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." It does not in terms require

that such jurisdiction be exercised in all cases. The legislative history pulls in opposite directions on this question * * *.

There is, no doubt, force to the majority's opinion that the thrust of the Act is to limit the grounds for agency withholding to the exemptions therein stated, and that the discretion of the court in enforcing the Act should thus be similarly curtailed. Nevertheless, because of the conflicting legislative history and the difficulty in determining congressional intent on this matter, I believe that pursuant to sound principles of judicial decision making, decision of this issue can and should await the case where it is squarely raised. I therefore express no view as to the correctness of the majority's suggestion that the courts are generally without equitable power to decline to order production of agency records in cases not specifically covered by exemption.

III.

Part III of the court's opinion is a summary of the laudable objectives of the Freedom of Information Act of assuring public access to information necessary to making informed decisions on public issues, but I respectfully suggest it is nevertheless unessential to our decision here. Since it forms part of the court's opinion, however, I think it should be made clear that neither the public nor the Congress is being denied the facts here in regard to the supersonic transport, and therefore recourse to legal action under the Freedom of Information Act as a practical matter was simply unnecessary.

Each of the persons who were asked by Dr. DuBridge to form the ad hoc panel to prepare the Report for the President could be called before the appropriate congressional committee and asked for his views on any aspect of the SST program. There is no reason why the views of these scientists and engineers cannot be made available to the Congress and to the public. The only matter about which they should not be asked is exactly what advice they gave the President. Furthermore, almost two years have gone by since they expressed their views to the President, and the opinions which they might now give to the Congress or to the public, in the light of additional information obtained, might be somewhat different from their best advice at the time they helped formulate the Garwin Report. Even without an appearance before a congressional committee any one or several of these scientists or engineers could be interviewed by the press or on TV, invited to write an article for a magazine or newspaper, or participate in public discussion in any form, in order to enlighten the public. There would be nothing improper in a public expression of individual opinion, so long as exactly what the person advised the President was not explicated.

As a matter of recorded fact, Dr. Richard Garwin, who chaired the panel, has done just that. He has appeared before three different congressional committees, and has been publicly reported as stating that he had "said everything I have to say" in lengthy critical testimony about the SST before the three committees, although he appears to have carefully refrained from discussing the Garwin Report itself.

Thus it appears that alternate means of obtaining the facts in regard to the SST, other than a lawsuit to compel production of the Garwin Report, are available both to the public and to Congress. This hints at the possibility that what the appellants are seeking here is really the advice given the President of the United States by his subordinates, rather than the facts in regard to the SST program on which the public and the Congress can form an intelligent judgment. Viewed in this light, the issues may take on a different aspect from those framed by the appellants.

Conference

(Cont'd from p. 761, Col. 1)

Backus of the University of Kansas, and Eugene Methvin, associate editor of Reader's Digest.

The conference is part of the Committee's continuing law student-educator program. The Committee conducts studies and educational programs on communist tactics, strategy and objectives in order to illustrate the contrast between life under communist rule and liberty under law.