HISS v. JUSTICE DEPARTMENT

U.S. District Court
Southern District of New York

ALGER HISS and WILLIAM A. REUBEN v. THE DEPARTMENT OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION, THE CENTRAL INTELLIGENCE AGENCY, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, THE DEPARTMENT OF STATE, and THE UNITED STATES OF AMERICA, No. 76 Civ. 4672, October 20, 1977

NEWSGATHERING

Statutory right of access — Freedom of Information Act — Scope of exemptions (§44.105)

Restraints on access to information — Privacy (§50.15)

Central Intelligence Agency documents containing frank evaluations of former Office of Strategic Services employee's character and qualifications, his performance during employment with OSS, and his physical health, are exempt from disclosure, in Alger Hiss' Freedom of Information Act lawsuit alleging that disputed material would provide "complete picture" of government's conduct of "Hiss case," under exemption (b)(6) of Act, 5 U.S.C. Section 552(b)(6), as personnel and medical files whose disclosure would constitute clearly unwarranted invasion of personal privacy.

Freedom of Information Act lawsuit in which Alger Hiss seeks Central Intelligence Agency documents concerning former employee of Office of Strategic Services and in which Hiss alleges that disputed material would provide "complete picture" of government's conduct of "Hiss case." Before court on defendant's motion for summary judgment.

Granted.

K. Randlett Walster, of Rabinowitz, Boudin & Standard, New York, N.Y., for plaintiffs.

Full Text of Opinion

OWEN, District Judge

This is an action under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. §552, seeking disclosure of ninety-four documents identified by defendant CIA as responsive to plaintiffs' FOIA request of October 20, 1975. Defendant has refused to release the requested material, claiming that it is protected by several of the nine exemptions from disclosure listed in the FOIA. Before me now is a motion by defendant for summary judgment.

All the documents in question relate to one Horace W. Schmahl, a private investigator. Between October 1948 and February 1949, Schmahl was employed by Debevoise, Plimpton & McLean, the law firm retained by Alger Hiss in connection with his investigation by the House Un-American Activities Committee. Prior to his employment by the Hiss defense, Schmahl had worked as a translator for the Foreign Broadcasting Intelligence Service, the United States Department of Justice, and the War Department. During World War II he served in Army Military Intelligence and the Office of Strategic Services (OSS).

Plaintiffs have obtained material from the FBI which indicates that while he was engaged by Debevoise, Plimpton & McLean, Schmahl volunteered information on the Hiss case to the FBI (Pruitt Affidavit §7,8). Plaintiffs contend that disclosure of the ninety-four documents held by the CIA, eighty-one of which predate October 1948, will detail Schmahl's relationship with government intelligence agencies and provide insight into the government's handling of the Hiss case.

Although the CIA cites six different exemptions in its refusal to disclose the requested documents, claiming multiple exemptions for most, I am able to resolve the motion by ruling solely on the applicability of Exemption (b)(6), which is claimed for each of the ninety-four documents. This course of action is further suggested by the fact that plaintiffs have substantially withdrawn their request for material claimed as exempt under (b)(1), (b)(2) and (b)(3), and urge that the documents claimed as exempt under (b)(7)(c) and (b)(7)(d) be analyzed in part according to the standards of Exemption (b)(6) (plaintiffs' memorandum of law, pp. 21, 22-29).

This court recognizes that the intent of Congress in passing the FOIA was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Rose v. Department of the Air Force*, 495 F.2d 261, 263 (2d Cir. 1974), *aff'd*, 425 U.S. 352 (1976). This policy of disclosure was reaffirmed by Congress in its 1974 amendments to the FOIA, which

provide for the release of reasonably segregable portions of otherwise exempt documents, and authorize District Courts to inspect documents *in camera* and make a *de novo* determination as to whether they are being properly withheld. 5 U.S.C. §§552(a)(4)(B) & (b).

The mandate to disclose is qualified by nine exemptions which protect documents of a highly sensitive nature, such as those pertaining to national security matters or internal rules and practices of an agency. Exemption (b)(6) covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

In its careful analysis of Exemption (b)(6) in *Getman v. N.L.R.B.*, 450 F.2d 670 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia notes that it is unique among the exemptions enumerated in §552 (b) because it calls for the court to exercise its discretion by balancing the interests of the parties, i.e., the public's right to governmental information against the right of personal privacy of affected individuals. Footnote 10 in *Getman* states in part:

> Any discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies . . . . But Exemption (6), by its explicit language, calls for such balancing and must therefore be viewed as an exception to the general thrust of the Act. S. Rep., at 9, explains:
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> > "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. * * *"

In carrying out the balancing process required by Exemption (b)(6), this Court must first determine whether release of these documents would constitute an invasion of privacy, and if so, how serious an invasion. Secondly, I must consider the public interest purpose asserted for release and whether the information is available from other sources. *Rural Housing Alliance v. United States Department of Agriculture*, 498 F.2d 73, 77 (D.C. Cir. 1974); *Wine Hobby USA Inc. v. United States Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974); *Campbell v. United States Civil Service Commission*, 539 F.2d 58 (10th Cir. 1976). The statutory language "clearly unwarranted" and judicial construction of this exemption instructs courts to tilt the balance in favor of disclosure. *Getman, supra*, 450 F.2d at 674; *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

Having read the brief summary of each document in the affidavit of Gene F. Wilson, and the supporting affidavits of Messrs. Briggs and Gambino, I find that the great majority of these documents contain information of a personal nature, the disclosure of which would be embarrassing to Schmahl. Approximately thirty documents concern Schmahl's application to the OSS, his assignments within that organization, and memoranda between OSS employees regarding a security investigation of Schmahl.[1] Six documents refer to an administrative matter involving Schmahl and an "incident" involving Schmahl and other OSS trainees.[2] Other documents concern Schmahl's medical status;[3] his interest in employment with the CIA;[4] and the investigation of some of his associates by the OSS.[5] About fifteen documents are letters of recommendation or introduction, and background reports, from Schmahl's employers previous to the OSS.[6]

It is only reasonable to believe that much of the above described material contains frank evaluations of Schmahl's character and qualifications, his performance with the OSS, and his physical health. As such, its disclosure would be a serious invasion of privacy, and could only be justified by an overriding public interest in the information sought by plaintiffs. Even the few documents which do not pose a serious threat to Schmahl's privacy are protected absent a showing of at least minimal public interest in their disclosure. I am not persuaded that any such public interest exists.

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[1] Documents 2-9, 12, 13, 25, 41, 42, 45, 54, 55, 57, 59, 60, 65-69, 72, 75, 78, 88, 44, 24.
[2] Documents 14-16, 20-22
[3] Documents 19, 28-31
[4] Documents 33-36, 47, 48
[5] Documents 56, 58, 61-63, 70, 73, 74, 76
[6] Documents 71, 77, 79, 80-86, 90-94

The arguments advanced by plaintiffs in support of a public interest in the requested documents are vague and conclusory. Plaintiffs contend that release of the disputed material would reveal the nature and extent of Schmahl's ties with government intelligence agencies, providing "a complete picture of the government's conduct of the Hiss case," and would also help to place in context the FBI documents showing Schmahl's disclosure of information to the FBI. "Both are issues of obvious general historical significance and of great moment to the plaintiffs here" (plaintiffs' memorandum of law, p.5).

Leaving aside the fact that it is only plaintiffs' speculation which connects Schmahl's activities prior to 1945 with his cooperation with the FBI on the Hiss case, I do not believe that the historical significance of the government's conduct of the case, or the FBI's role in it, is as "general" or "obvious" as plaintiffs assert. Certainly there is a public interest in the proper conduct of government prosecutions, but it is small compared to the interest of the accused. Thus, the true basis for this proceeding is that the documents are "of great moment to plaintiffs here." It appears that plaintiffs' interest is paramount, and that the public interest in a fair judicial system has been invoked only to satisfy the requirements of the FOIA.

It may in fact be true that at this late date, the documents sought by plaintiffs are not available by any other means. But it is equally clear that "the FOIA is not intended to be an administrative discovery statute for the benefit of private parties." *Columbia Packing Co., Inc. v. United States Department of Agriculture*, 417 F.Supp. 651, 655 (D. Mass. 1976). *See also Title Guarantee Co. v. N.L.R.B.*, 534 F.2d 484 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3251 (U.S. Oct. 5, 1976).

Finally, I note that plaintiffs urge that *in camera* review of the ninety-four documents is necessary to determine whether any portions of them might be held non-exempt under (b)(6), and thus subject to release (plaintiffs' memorandum of law, p.14). I decline to make such a review. All of the documents relate to Schmahl, and plaintiffs' only interest in them is with regard to Schmahl. Therefore, the release of any relevant portion of a document would necessarily constitute an invasion of Schmahl's privacy, and as already stated, I find no compelling justification for such an invasion.

Accordingly, defendant CIA's motion for summary judgment is granted with respect to all ninety-four documents in dispute.

So ordered.

ARCAND v. EVENING CALL

U.S. Court of Appeals
First Circuit

LIONEL G. ARCAND, et al., v. THE EVENING CALL PUBLISHING COMPANY, et al., No. 77-1307, December 29, 1977

REGULATION OF MEDIA CONTENT

Defamation — Defamatory content (§11.05)

Newspaper column that defamed one unidentified member of city police department but that did not imply or suggest that unidentified policeman's conduct was typical of all police officials does not give rise to cause of action for defamation on behalf of city's entire 21-member police department.

Group libel action brought by members of city police force against newspaper. From decision of the U.S. District Court for the District of Massachusetts granting defendants' motion to dismiss, plaintiffs appeal.

Affirmed.

Alfred B. Cenedella, III, and Robert B. Calagione for appellants.

Neil Sugarman for appellees.

Full Text of Opinion

Before COFFIN, *Chief Judge*, CAMPBELL and BOWNES, *Circuit Judges*.

COFFIN, *Chief Judge*. This appeal raises the question whether defendants' allegedly defamatory newspaper column comment made sufficient reference to plaintiffs-appellants to withstand a motion to dismiss the complaint. The case belongs in the ancient but not overpopulated genre of group libel.[1]

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[1] According to Tanenhaus, *Group Libel*, 35 Cornell L. Q. 261, 263 (1950), the earliest in-