STATE OF MICHIGAN
IN THE COURT OF APPEALS

JAMES W. AMBERG
Plaintiff-Appellant,

vs.

Docket No. 311722
Lower Court Case No. 12-002188 CZ

CITY OF DEARBORN
and CITY OF DEARBORN POLICE DEPARTMENT
Defendants-Appellees.

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PLAINTIFF/APPELLANT'S BRIEF ON APPEAL

– ORAL ARGUMENT REQUESTED –

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SUMMARY

Plaintiff-Appellant JAMES AMBERG submitted a FOIA request directed to the City of Dearborn and the Dearborn Police Department on November 16, 2011. Amongst other documents, Mr. Amberg's FOIA sought copies of video tapes that the municipal government had obtained from a local Tim Horton's and Wendy's Restaurant through subpoena. The Defendants-Appellees sent Mr. Amberg a bill for the FOIA materials which he later paid. After he picked up and reviewed the materials, the Tim Horton's and Wendy's Restaurant videos were not included in the packet, but the Defendants-Appellees did not claim that any materials had been withheld. Instead, Defendants-Appellees acted as if they had granted the request in whole, without exempting or redacting any materials. They did not draft a letter pursuant to the provisions of MCL 15.235 claiming that certain materials were being claimed as exempt. Mr. Amberg had previous telephone conversations with counsel for restaurants and they had refused to produce the videos for him but indicated that they had turned over copies to the city and police department pursuant to a subpoena.

Mr. Amberg confronted one of the Dearborn city prosecutors from the city's law department and several police officers on February 9, 2012, explaining that he knew they had the videos despite the Defendants-Appellee's improper response to the FOIA. The prosecutor confirmed that the Defendants-Appellees possessed the video, but the city attorney would not allow Mr. Amberg to have a copy of the video, indicating on the record in the 19th District Court that the city would likely claim it was not a public record.

Mr. Amberg hired counsel and filed a FOIA lawsuit on February 16, 2012, seeking to compel disclosure of the videos. He filed a complaint and scheduled a show cause hearing. Although the Defendants-Appellees made no attempt prior to the filing of the lawsuit to release

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the previously undisclosed documents, the looming show cause hearing compelled the Defendants-Appellees to agree to provide the videos. On February 27, 2012, these videos were turned over along with a 27-page police report that had gone previously undisclosed, even though it was responsive to his FOIA request. The Defendants-Appellees offered no reason for the clear attempt to hide the report.

Mr. Amberg subsequently reviewed the newly disclosed documents and believed that an additional video remained undisclosed. Having filed an answer by this time, counsel for the Defendants-Appellees claimed that no additional videos existed but offered no proof of this assertion. Mr. Amberg filed a notice of deposition seeking to perform limited discovery on issues pertaining to the existence of additional documents that might not have been disclosed pursuant to the agreement reached prior to the show cause hearing. Defendants-Appellees objected to any and all discovery, claiming that the Answer spoke for itself, and they refused to submit to a deposition.

Defendants-Appellees filed a motion for summary disposition, and Mr. Amberg filed an answer to that motion. The lower court granted summary disposition to Defendants-Appellees after oral argument, and an order was entered. The lower court's order held that Defendant-Appellees never violated the FOIA (for numerous reasons), Mr. Amberg was not entitled to any discovery to ascertain whether additional videos existed, and Mr. Amberg was not entitled to costs, attorney fees, or sanctions under the FOIA statute even though it was the filing of the FOIA lawsuit and pending show cause hearing that caused the Defendant-Appellees to disclose the documents.

Because the lower court's order was contrary to well-established FOIA law, Mr. Amberg filed a motion and brief for reconsideration. The lower court denied the motion for reconsideration

on July 20, 2012.

Mr. Amberg now pursues this appeal of right asking that this Court reverse and remand this matter for further proceedings consistent with the law.

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ISSUES PRESENTED

I. Did the lower court err by ruling as a matter of law that the videos obtained through subpoena by the City of Dearborn and Dearborn Police Department were not public records?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

II. Did the lower court err in granting summary discovery and denying Plaintiff-Appellant the right to conduct discovery?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

III. Did the lower court err in granting summary disposition on this FOIA action because Mr. Amberg could have independently obtained Tim Horton and Wendy videos that were in the Defendants-Appellees possession through subpoena?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

IV. Did the lower court err by ruling that summary disposition should be granted because Mr. Amberg's claim was possibly a *Brady* violation under *Brady v Maryland*, 373 U.S. 83 (1963), but was not a proper matter under FOIA?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

V. Did the lower court err in granting summary disposition because the Defendant-Appellees turned over the Tim Horton and Wendy videos as well as the police reports after the lawsuit was filed, thus causing the case to become moot and denying any costs, attorney fees, and punitive sanctions under the FOIA statute?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

VI. Did the lower court err when it ruled, sua sponte without briefs or arguments, that the records sought by Mr. Amberg were exempt under FOIA because the records were related to a criminal investigation?

The trial court said, "No."

Plaintiff-Appellant submits that the answer is, "Yes."

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STATEMENT OF JURISDICTION

This matter is before the Court as an appeal of right pursuant to MCR 7.203(A)(1).

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STANDARD OF REVIEW

A motion for summary disposition is reviewed de novo, viewing the evidence in the light most favorable to the nonmoving party. ***Maiden v Rozwood***, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion for summary disposition under **MCR 2.116(C)(8)** tests the legal sufficiency of the complaint, while a motion under **MCR 2.116(C)(10)** tests the factual sufficiency of the complaint. *Id.* at 119. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden*, 461 Mich at 121. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

In appeals under the FOIA, the Court reviews a trial court's legal determinations de novo, findings of fact for clear error, and decisions committed to the trial court's discretion for an abuse of discretion. ***Herald Co, Inc v E Mich Univ Bd of Regents***, 475 Mich 463, 471-472; 719 NW2d 19 (2006). "Whether requested information fits within an exemption from disclosure under FOIA is a mixed question of fact and law." ***Taylor v Lansing Bd of Water & Light***, 272 Mich App 200, 205; 725 NW2d 84 (2006).

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FACTS

On November 16, 2011, Plaintiff-Appellant, JAMES W. AMBERG, a criminal defense lawyer, submitted a Freedom of Information Act request for access to public records in the possession of the City of Dearborn and the City of Dearborn Police Department. Mr. Amberg requested seven categories of documents pertaining to a criminal defense action he was handling on behalf of a client, Towfeeg Muhsen. The Towfeeg Muhsen case is highly charged and politically controversial case gaining local attention in the City of Dearborn because a young, clean-cut Arabic college student was roughed up by a couple of Dearborn Police Officers and charged with resisting and obstructing those officers. The entire incident was recorded by video cameras inside the Dearborn Tim Horton and Wendy restaurant located in the City of Dearborn.

Relevant to this lawsuit, Mr. Amberg specifically requested under FOIA:

a. Any and all information (documents, forms, records, etc...) pertaining to the investigation and arrest of Towfeeg Muhsen in regard to his arrest for Incident No. 110048642, dated September 28, 2011

. . . .

e. Any and all police reports, names of witnesses, and any other information regarding Incident No. 110048642.

. . . .

g. All videos from Tim Hortons and Wendys Restaurants in regard to Incident No. 110048642.

A FOIA response was drafted on December 2, 2011, by Defendants-Appellees' attorney, Matthew Zalewski. That FOIA response indicated that there were seven (7) pages of paper documents, three DVDs, and one audio tape, assessing a cost of $125.50 for the materials. The FOIA response by Mr. Zalewski did not indicate that there were any materials that were being withheld, and the FOIA response did not claim or describe any exemption. As it was later determined that the Defendants-Appellees were withholding materials, this response failed to satisfy the mandatory statutory

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requirements of MCL 15.235 because the Defendants-Appellees knew that they were withholding several videos as well as lengthy police report.

On February 9, 2012, Mr. Amberg paid and picked up the FOIA materials that the Defendants-Appellees had prepared. By this time, Mr. Amberg had done extensive research into the case, and he knew that the Defendants-Appellees were withholding the Tim Horton and Wendy videos even though the FOIA response deceptively omitted this fact. The lower court was provided a lengthy affidavit executed by Mr. Amberg. Mr. Amberg did not know, and had no ability to ascertain, that the Defendants-Appellees were also hiding a 27-page police report that was directly responsive to his FOIA request. The last entry on the 27-page police report was entered on October 22, 2011, almost four weeks prior to Mr. Amberg's November 16th FOIA request. From that report, it is also evident that the Defendants-Appellees were in possession of the Tim Horton and Wendy videos long before Mr. Amberg had made his November FOIA request since the reports meticulously detail the matters viewed on the video.

At a pretrial held in the district court criminal case, Mr. Amberg confronted the prosecutor on the missing videos. As the pair discussed the case, Mr. Amberg saw the DVDs in the prosecutor's file that had not been disclosed. This was addressed on the record during the district court proceedings, and the district court judge agreed with Mr. Amberg and offered to assist in compelling the production of the requested materials or adjourning the case if Mr. Amberg wanted to pursue his options under FOIA. The city attorney indicated that the Defendants-Appellees would likely oppose a FOIA claim by claiming that the videos were not public records.

Mr. Amberg filed the instant lawsuit on February 17, 2012, after the Defendants-Appellees made no effort to turn over the requested materials despite the district court judge's ruling and Mr.

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Amberg's threat to file a FOIA lawsuit. More than a week had gone by before Mr. Amberg filed his lawsuit, and it was clear that the Defendants-Appellees would not willingly turn over the materials.

On February 22, 2012, after the lawsuit was served, counsel for the respective parties discussed resolution of the case. The Defendants-Appellees refused to say whether they would release the FOIA materials, revealing that they had no desire to turn over the materials unless legally compelled to disclose those records. With a tentative show cause hearing date scheduled for March 7, 2012, the Defendants-Appellees finally agreed to turn over the materials after extensive bullying a week before the show cause.

Since the Defendants-Appellees turned over the materials, the Defendants-Appellees have acted as if they never did anything wrong, claiming that they acted in good faith at all times even though their track record shows otherwise.

Mr. Amberg reviewed the report and videos tendered by the Defendants-Appellees on February 28, 2012, and Mr. Amberg concluded that an additional video from Wendy's restaurant exists. The Defendants-Appellees claimed that there was no additional video, insisting that the Answer denied the existence of additional videos so therefore the issue was foreclosed.

In order to resolve any factual disputes, Mr. Amberg attempted to notice up depositions. In addition to a possible third video, Mr. Amberg wanted to establish whether there was any factual support for the claim that the Defendants-Appellees acted in good faith; whether additional documents responsive to the FOIA request remained undisclosed; and the decision-making process engaged in by the FOIA coordinator to justify both the nondisclosure of the videos and 27-page police report as well as the fact that the Defendants-Appellees omitted this nondisclosure from the

FOIA response, contrary to statute. These were all fair and relevant matters for inquiry.

The Defendants-Appellees' attorney objected to depositions, claiming that the Answer was sufficient. Defendants-Appellees' counsel further indicated that, since there was no issue of material fact based upon the Answer, the Defendants-Appellees would move for summary disposition. Further, they argued that the case had been rendered moot because they turned over materials after they were sued.

The Defendants-Appellees subsequently moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), claiming that the complaint failed as a matter of law and that no genuine issue of material fact existed in the case. With the filing of their motion, the Defendants-Appellees tendered an affidavit from Dearborn Police Officer Patricia Penman, who claimed in relevant part that the nondisclosed videos were not public records since they were not used to charge Towfeeg Muhsen. Ms. Penman also claimed that all videos in the police department's possession had been turned over at that time. Importantly, Ms. Penman was not the FOIA coordinator, she did not effectuate the FOIA response, and she did not attempt to claim that the Defendants-Appellees acted in good faith by denying--and deliberating concealing--the prior nondisclosure of the videos and extensive police reports. To the contrary, it later turned out at the hearing that Defendants-Appellees own counsel had personally handled all aspects of the entire FOIA, deciding which materials would be released, composing the letter to Mr. Amberg, filing the Answer, etc.

Mr. Zalewski would also later file a supplemental brief with the trial court contradicting Ms. Penman's affidavit that claimed that no additional videos existed. Despite his long-standing objections to Mr. Amberg's claim regarding an additional video, chiding that Mr. Amberg's claim was completely without any merit, Mr. Zalewski admitted that an additional video existed but that

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the Defendants-Appellees were unable to get a copy of that video.

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ARGUMENT

INTRODUCTION

Michigan's Freedom of Information Act preamble states in section 15.231(2) that, "[i]t is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process." In ***Kestenbaum v Michigan State University***, 414 Mich 510 (1982), the Michigan Supreme Court noted that, "each provision of the FOIA must be read so as to be consistent with the purpose announced in the preamble." The Act further states in section 15.233(1) that, "[e]xcept as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body . . . ." All public records are subject to full disclosure under the FOIA unless the material is specifically exempted from disclosure under **MCL 15.243**. ***Swickard v Wayne Co Medical Examiner***, 438 Mich 536, 544 (1991). When a public body refuses to disclose a requested document under the act, and the requester sues to compel disclosure, the public body bears the burden of proving that the refusal was justified under the act. **MCL 15.240(1)**. Because the FOIA primarily is intended as a statute favoring disclosure, the exemptions to disclosure are to be narrowly construed. *Swickard* at 536.

When a FOIA coordinator receives a request for inspection of public documents, the government is obligated to undertake a process to locate and ascertain the existence of documents

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that are responsive to the person's request. **MCL 15.235** states:

> (2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:
>
> (a) Granting the request.
>
> (b) Issuing a written notice to the requesting person denying the request.
>
> (c) Granting the request in part and issuing a written notice to the requesting person denying the request in part.
>
> (d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request.

In the event that a public body denies all or a portion of the right to inspect public records, the statue mandates that the "written notice shall contain" certain provisions:

> (4) A written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request. The written notice shall contain:
>
> (a) An explanation of the basis under this act or other statute for the determination that the public record, or portion of that public record, is exempt from disclosure, if that is the reason for denying all or a portion of the request.
>
> (b) A certificate that the public record does not exist under the name given by the requester or by another name reasonably known to the public body, if that is the reason for denying the request or a portion of the request.
>
> (c) A description of a public record or information on a public record that is separated or deleted pursuant to section 14, if a separation or deletion is made.
>
> (d) A full explanation of the requesting person's right to do either of the following:
>
> (i) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the disclosure denial.
>
> (ii) Seek judicial review of the denial under section 10.

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(e) Notice of the right to receive attorneys' fees and damages as provided in section 10 if, after judicial review, the circuit court determines that the public body has not complied with this section and orders disclosure of all or a portion of a public record.

(5) The individual designated in section 6 as responsible for the denial of the request shall sign the written notice of denial.

The Defendants-Appellees in this case did not comply with these provisions by detailing the omissions from the FOIA response. They never claimed that any materials were being withheld, and they never detailed any proper reason for withholding and exempting any materials.

I. THE LOWER COURT ERRED BY RULING AS A MATTER OF LAW THAT THE VIDEOS OBTAINED THROUGH SUBPOENA BY THE CITY OF DEARBORN AND DEARBORN POLICE DEPARTMENT WERE NOT PUBLIC RECORDS

The Defendants/Appellees argued in the lower court that the documents sought by Mr. Amberg in his FOIA were not "public records," and the lower court agreed, holding that the Tim Horton / Wendy videos received through a subpoena by the Defendants-Appellees were not "public records" under the Freedom of Information Act. While making this ruling, the lower court failed to address the lengthy police report which was clearly not subject to the argument. Nonetheless, whether the videos that the Defendants/Appellees obtained through subpoena constitute a public record subject to FOIA is the core of the Defendants/Appellees argument, and, if true, would alleviate the need for the Defendants/Appellees' FOIA coordinator to enumerate and detail the omissions from the FOIA response. Whether the subpoenaed documents constitute a "public record" is an important issue of public policy, but this case is hardly the first in Michigan or elsewhere to tackle issues regarding possession, control, and authorship.

MCL 15.232(e) defines a public record as follows:

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> "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. This act separates public records into the following 2 classes:
>
> > (i) Those that are exempt from disclosure under section 13.
> >
> > (ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act.

[Emphasis added.]

Defendants-Appellees have never argued that they did not possess the videos at the time of Mr. Amberg's FOIA request. They admit that they had received the videos from Tim Hortons/Wendy's before Mr. Amberg tendered his FOIA request. Instead, Defendants-Appellees claim that "possession, by itself, is not controlling." They also focus on the statutory language "from the time of its creation" and "official function" contained in **MCL 15.232(e)**, claiming that they did not possess the videos from the "time of its creation" and that they did not use the videos in an "official function" because the videos were not incorporated into the criminal charges brought against Mr. Amberg's client.

In order for a record to constitute a "public record," it is not necessary for the public body to be the drafter or creator of the document. In ***Detroit News v City of Detroit***, 204 Mich App 720, 723 (1994), the Detroit News sought "'records of all telephone calls to and from the office of Mayor Coleman A. Young and to and from Manoogian Mansion,' from January 1983 to the date of the request." The Detroit News sought telephone bills that are clearly drafted by the telephone company. The City of Detroit responded by claiming that:

> the mere fact that a public body possesses a record does not make it a public record. It argues that the telephone bills are not public records because they were not created by the city, gathered at its request, or used by it, and that the bills are unrelated to "the

> performance of an official function." The city asserts that it does not audit or in any way use the information in the bills; it simply pays the total amount. It also argues that it does not create or control the records; the form, presentation, and information provided in the bills are controlled entirely by Michigan Bell Telephone Co.

Detroit News at 723.

The circuit court agreed and dismissed the case. The Court of Appeals reversed, holding that the circuit court erred and ruling that the documents were public records. The City of Detroit also argued that the statutory language "from the time it is created" contained in **MCL 15.232(e)** exempted the telephone bills from disclosure under FOIA. The Court of Appeals also rejected those arguments, which were raised by the Defendants-Appellees in the immediate case, holding that:

> *A writing can become a public record after its creation*. We understand the phrase "from the time it is created" to mean that the ownership, use, possession, or retention by the public body can be at any point from creation of the record onward. See OAG, 1979-1980, No. 5500, pp 263-264.

Id at 725. [Emphasis added.]

Defendants-Appellees admit that they subpoenaed the videos from the restaurants, and they admit that they were in possession of the videos at the time that Mr. Amberg made his FOIA request, but they claim that the videos were not "used" to formulate any type of criminal charge. Essentially, the Defendants-Appellees claim that some police officers decided to issue a ticket citation to Mr. Amberg's client, while other police officers reviewed the videos independently. Therefore, Defendants-Appellees conclude, the videos may have been in the Defendants-Appellees possession but the videos were not used by the Defendants-Appellees in some type of "official function."

From a review of the 27-page police report, it is clear that the Defendants-Appellees sought

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out, subpoenaed, and used the videos to see what happened between two Dearborn police officers and Mr. Amberg's client. Defendants-Appellees adamantly claim that the videos were not used in an official function to pursue criminal charges against Mr. Amberg's client (thus abandoning any possible claim that the records might be exempt under FOIA as part of an ongoing criminal investigation), but this does not mean that the videos did not become public records once the Defendants-Appellees obtained copies. Accepting the Defendants-Appellees adamant denials that these videos were not used to further a criminal investigation, these videos revealed whether police officers working in their official capacity conducted themselves appropriately on a specific date during a specific occurrence. This is the core democratic purpose behind the FOIA.

Defendants-Appellees rely upon ***Hoffman v Bay City School District***, 137 Mich App 333 (1984) and ***Walloon Lake Water System, Inc. v Melrose Township***, 163 Mich App 726 (1987) for the proposition that the videos are not public records. Both of these cases support disclosure, even though Defendants/Appellees relied upon them in the lower court. Both cases deal with authorship and possession and are clearly distinguishable from the immediate case.

In *Hoffman*, a school district had its attorney perform an investigation into the district's finance department. The attorney conducted the investigation, and then he "reported the investigation's results in an oral opinion. He told the school board members that no improprieties were discovered during the investigation. The records of the investigation have at all times remained in the possession of the school district's attorney." *Hoffman* at 333 (emphasis added). The *Hoffman* Court relied upon the US Supreme Court's ruling in ***Forsham v Harris***, 445 US 169 (1980), holding that, "courts have consistently refused to require production of records held by private organizations which conduct studies or investigations for federal agencies, reasoning that

such organizations are not public agencies and that records not in the actual possession of public agencies are not public records." The *Hoffman* Court concluded by ruling that:

> It is apparent from the reasoning of the federal cases that the fact that the attorney was paid by a governmental body, the school board, and conducted his investigation at its request, does not transform his report into a record subject to disclosure under the FOIA. Of more concern to the federal courts has been the fact of *who* created or *obtained the information*. In this case, it was the attorney who both created and retained the information. What the attorney reported to the board was not the information he obtained during his investigation, but rather his opinion of the results of that investigation. No court has held, as plaintiff would have us hold, that defendants' use of the attorney's report in reaching their decision amounts to "constructive possession" of the attorney's investigatory file.

Id at 338-339. [Emphasis added.]

The *Hoffman* case does not support nondisclosure because the Defendants/Appellees were in actual possession of the records. The videos were not records received by outside counsel as part of an independent investigation as to whether the Dearborn police officers had conducted themselves appropriately. The videos were obtained by Defendants-Appellees for their own use and evaluation.

It is undisputable that Mr. Amberg could not have received copies of the videos from Tim Hortons or Wendys through FOIA if those videos had never been turned over the Defendants/Appellees. There is no private cause of action between a citizen requesting information under FOIA and a private business. But in the immediate case, the Defendants/Appellees were a governmental body subject to FOIA, and they had come into possession of the videos through a subpoena. Once the municipal government came into possession of the records, the videos became public records subject to analysis under FOIA.

Defendants-Appellees also relied on *Walloon Lake,* supra. This is likewise misplaced. In that case, a letter was read to the township board at an open meeting. A copy of the letter was

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submitted to the board, and it became part of the public record at that time. But the township argued that 1) the letter was not created by the township; 2) the letter was never "used" by the public agency; 3) the document never became a public record; and 4) because the township gave its copy to a third party, the lawsuit was moot. The township lost on all points, with the Court holding that:

> [W]e agree with the trial court that the letter was a public record generally subject to disclosure. At the township meeting, the letter was read to the board, which considered its contents to decide that the subject of the letter did not require township action. Without opining as to what extent an outside communication to an agency constitutes a public record, we believe that here, once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record "used . . . in the performance of an official function."
>
> Both parties offer various dictionary definitions of the term "use," as contained in § 3, in support of their positions. However, we find adequate support for our conclusion from a perusal of the FOIA, which states in pertinent part: (2) It is the public policy of this state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2); MSA 4.1801(1)(2).]
>
> We believe that this purpose must be considered in resolving ambiguities in the definition of public record.

Walloon Lake Water System, Inc., at 729-730 (1987).

It is clear that the letter in *Walloon Lake* would not have been subject to FOIA had it not been tendered to the board. See for comparison and example, ***Howell Ed Ass'n MEA/NEA v Howell Bd of Ed***, 287 Mich App 228, 789 NW2d 495 (2010) (Private emails stored on school's computer system are not public records under FOIA because these private emails are not used in any official capacity); ***Hopkins v Twp. of Duncan***, 294 Mich App 401, 418 (2011) ("Handwritten notes of a township board member taken for his personal use, not circulated among other board

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members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion are not public records subject to disclosure under FOIA.").

Federal cases have dealt with the issue of what constitute a public record far more extensively, but these cases universally support Mr. Amberg's position in this case. The "similarity between the FOIA and the federal act invites analogy when deciphering the various sections and attendant judicial interpretations" ***Evening News Asso. v Troy***, 417 Mich 481, 495 (1983). See also, *Hopkins v Twp. of Duncan*, supra at 414 ("Federal court decisions regarding whether an item is an "agency record" under the federal freedom of information act, 5 USC 552, are persuasive in determining whether a record is a 'public record' under the Michigan FOIA.")

In ***RCA Global Communications, Inc. v FCC***, 524 F Supp 579, 580 (D Del 1981), a case that is extremely similar to the facts of this case, the Court held that private business documents turned over by Western Union to the Federal Communications Commission pursuant to a subpoena constituted agency records that are subject to FOIA. These records, which were created by Western Union, came into the federal agency's possession by way of a subpoena. Western Union turned them over to the FCC even though the documents might contain trade secrets or proprietary information, and RCA sought copies of the documents so that they could take commercial advantage of the data. The FCC attempted to block release under FOIA because it might have a chilling effect on the release of future information. Nonetheless, because the subpoenaed records were being used by the FCC, they became agency records that were subject to FOIA. Likewise, in ***Weisberg v U. S. Dep't of Justice***, 631 F2d 824, 825 (DC Cir 1980), 107 copyrighted photographs taken at the scene of the assassination of Dr. Martin Luther King, Jr. were subject to disclosure under FOIA after Time Inc. turned these photographs over to the FBI because they

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might prove helpful in the investigation. The issue in *Weisberg* was whether the existence of a copyright over the materials might preempt FOIA. In *Weisberg*, the Court noted that, "[t]he Government concedes, as it must, that generally materials obtained from private parties and in the possession of a federal agency may be agency 'records' within the meaning of FOIA." The Court continued and ruled that, "[w]e hold that the mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records." Relying upon *Forsham v Harris*, supra, the Court held that the photographs were public records even though they had been created by a private non-governmental entity that held copyright protections.

Yet another significant case that deals with authorship versus possession is the US Supreme Court decision in ***U.S. Dep't of Justice v Tax Analysts***, 492 U.S. 136 (1989). In that case, court opinions were sought from the United State Department of Justice under FOIA by a legal publisher that disseminated its journal of tax decisions to lawyers and accountants. The DOJ received copies of all civil tax decisions as a party to the litigation in all district court cases, court of appeals, and the Claims Court, and Tax Analysts wanted to obtain copies of these opinions from DOJ because the DOJ was a convenient repository. The DOJ objected to the release of these documents claiming that the records were not agency records and the records were already available as public documents from the "90 or so district courts around the country." *Id* at 139. The Supreme Court ruled against the DOJ, holding that records were subject to FOIA as agency records and must be disclosed by the department even though the documents might be available elsewhere. Relevant to this case, the Court held that a two-prong analysis was appropriate to determine whether documents were agency records:

First, an agency must "either create or obtain" the requested materials "as a prerequisite to

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> its becoming an 'agency record' within the meaning of the FOIA." Id., at 182.In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. See *Chrysler Corp. v Brown*, 441 U.S. 281, 292 (1979). To restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. See *id*., at 290, n. 10. As we noted in *Forsham*, "The legislative history of the FOIA abounds with . . . references to records acquired by an agency." 445 U.S., at 184 (emphasis added).
>
> Second, the agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with [Kissinger v Reporters Committee for Freedom of Press, 445 U.S. 136, 150 (1980)]'s teaching that the term "agency records" is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. See 445 U.S., at 157. This requirement is suggested by Forsham as well, 445 U.S., at 183, where we looked to the definition of agency records in the Records Disposal Act, 44 U.S.C. § 3301. Under that definition, agency records include "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business . . . ." *Ibid.* (emphasis added). Furthermore, the requirement that the materials be in the agency's control at the time the request is made accords with our statement in Forsham that the FOIA does not cover "information in the abstract." 445 U.S., at 185.

Tax Analysts at 144-146.

This case is significant because it forecloses two arguments raised in the lower court. First, it elaborates on how a document authored by a third party that is possessed by the public body constitutes a public record, such as the restaurant videos obtained by the municipal government in this case. Second, even if the document could be obtained elsewhere, a requester such as Mr. Amberg is not required to exercise those alternatives under FOIA but may instead request it from the public body of his choosing.

As these federal cases revolving around what constitute a pubic record evolved, the federal courts refined this process further. One of the more recent federal cases to have dealt with this

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issue is ***Reich v United States DOE***, 811 F Supp 2d 542, 545 (2011), which summarizes the current federal FOIA law in this area:

> In order to be considered agency records, the requested materials must be under agency control at the time the FOIA request is made. *U.S. Dep't of Justice v Tax Analysts*, 492 U.S. 136, 145 (1989), 109 S. Ct. 2841, 106 L. Ed. 2d 112 ("Tax Analysts I"). Control means that the agency possessed the record "in the legitimate conduct of its official duties." *Id.* The agency's right to access or to obtain permanent custody, however, is not dispositive. *Forsham*, 445 U.S. at 185-86. Federal courts have looked at four factors to assess whether an agency exercises sufficient control over records:
>
> > (1) the intent of the document's creator to retain or relinquish control over the records;
> >
> > (2) the ability of the agency to use and dispose of the record as it sees fit;
> >
> > (3) the extent to which agency personnel have read or relied upon the document; and
> >
> > (4) the degree to which the document was integrated into the agency's record system or files.
>
> *Consumer Fed'n of Am. v Dep't of Agric.*, 455 F.3d 283, 288 n.7, 372 U.S. App D.C. 198 (D.C. Cir. 2006) (internal citations omitted). Courts consider the third and fourth factors to be the most important. See, e.g., *Judicial Watch, Inc. v Fed. Housing Fin. Agency*, 744 F. Supp. 2d 228, 234 (D.D.C. 2010); *Citizens for Responsibility & Ethics in Wash. v U.S. Dep't of Homeland Sec.*, 527 F. Supp. 2d 76, 97-98 (D.D.C. 2007) ("Citizens for Responsibility") ("an agency's actual use of a document is often more probative than the agency's subjective intent.").

Without delving further into this subject area, the above cases make it clear that the restaurant videos became public records subject to the FOIA once they were turned over to the municipal government. Because the Defendants-Appellees were in possession of the videos when Mr. Amberg made his request, they were required to disclose the document or prove an exemption. By failing to acknowledge possession of the videos in their letter pursuant **MCL 15.235**, the violated the Act. Furthermore, because no valid exemption applies to the videos, the municipal

government was required to turn over copies of the videos. The lower court erred when it determined as a matter of law that the videos were not public records.

II. THE LOWER COURT SHOULD HAVE DENIED SUMMARY DISPOSITION PENDING PLAINTIFF-APPELLANT'S RIGHT TO CONDUCT DISCOVERY

The Defendants-Appellees claimed that discovery was inappropriate in this case, and they refused to submit to a deposition despite continuing claims that some videos were improperly withheld. As detailed by the facts, it appears that there may have been some merit to Mr. Amberg's claim that additional videos existed because Defendants-Appellees' counsel filed a supplemental brief acknowledging an additional video but claiming that the missing video could not be duplicated. The lower court felt that this was not problem, holding that, "Well, the time to resolve it is now. The time to resolve it is to show that you have evidence that they, in fact, were in possession at the time of the request, and mere assertions or speculation are insufficient in response to a motion for summary disposition." [Tr. 11-12] Without discovery, however, the only thing a plaintiff can do is make assertions.

Cashel v Smith , 117 Mich App 405 (1982) was the singular case relied upon by the Defendants-Appellees for their proposition that discovery should not be permitted in a FOIA case. In that case, the governmental-defendant wanted to depose the plaintiff-FOIA requester. The Court held that it was not justified in that particular case because the deposition request was founded, in part, on an unlawful rule that prohibited FOIA requests based on "whim, fancy, or a purpose to harass. The idly or maliciously curious need not be accommodated under the Act." Despite that, the Court held that "we are not prepared to announce a general rule precluding depositions in all FOIA actions. Under certain circumstances a deposition may be necessary and appropriate even

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though it may delay proceedings." *Cashel* at 410. [Emphasis added.]

Numerous federal cases address discovery in FOIA cases, and there is no doubt that discovery is limited in FOIA cases. As set forth in *Cashel*, the government cannot use discovery to increase the cost of litigation or to delay the matter. But on the other side of the argument, a requestor may not perform an end-run around the FOIA by requesting disclosure of exempt documents through interrogatories. The various limitations on discovery in FOIA cases are discussed extensively by federal cases. See, e.g.***Schrecker v Dep't of Justice***, 217 F Supp 2d 29, 35 (DDC 2002), aff'd, 349 F3d 657 (DC Cir 2003); ***Judicial Watch, Inc. v Dep't of Justice***, 185 F Supp 2d 54, 65 (DDC 2002); ***Broaddrick v Executive Office of the President***, 139 F Supp 2d 55, 63-64 (DDC 2001); ***Kay v Fed. Commc'ns Comm'n*** , 976 F Supp 23, 33 (DDC 1997); ***Miscavige v Internal Revenue Serv***, 2 F3d 366, 369 (11th Cir 1993);***Meeropol v Meese***, 790 F2d 942, 960-61 (DC Cir 1986); ***Military Audit Project v Casey***, 656 F2d 724, 751-52 (DC Cir 1981); ***Murphy v FBI***, 490 F Supp 1134, 1136 (DDC 1980) (whether a case "warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits"); ***Ray v Turner***, 587 F2d 1187, 1195 (DC Cir 1978).

Contrary to the Defendants-Appellees' arguments, discovery was appropriate in this case, and their reliance on *Cashel* was wholly misplaced. A plaintiff need not simply accept a defendant's assertion as truthful. See, ***Ostoin v Waterford Twp. Police***, 189 Mich App 334 (1991) ("Michigan law is strongly committed to open and far-reaching discovery, and generally provides for discovery of any relevant, nonprivileged matter. See *Eyde v Eyde*,172 Mich App 49, 54-55; 431 NW2d 459 (1988); MCR 2.302(B)(1). Privilege is governed by the common law, except where modified by statute or court rule. MRE 501."). A motion for summary disposition is premature

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when discovery remains ongoing. See, e.g. ***Berlin v Superintendent of Public Instruction***, 181 Mich App 154, 159 (1989), ***Kassab v Michigan Basic Property Ins Ass'n***, 185 Mich App 206, 216 (1990), ***Tyler v Field***, 185 Mich App 386, 393 (1990), ***Kortas v Thunderbowl***, 120 Mich App 84, 87 (1982). Contested matters remained in this case that may have permitted the Defendants-Appellees to withhold additional documents and hide their motivations for refusing to disclose the documents. Simultaneously, Mr. Amberg was deprived his ability to develop the factual record against the Defendants-Appellees.

It was error for the lower court to grant summary disposition while Mr. Amberg was attempting to perform discovery in this case.

III. THE LOWER COURT ERRED IN GRANTING SUMMARY DISPOSITION ON THIS FOIA ACTION CLAIMING MR. AMBERG COULD HAVE INDEPENDENTLY OBTAINED TIM HORTON AND WENDY VIDEOS THAT WERE IN THE DEFENDANTS-APPELLEES POSSESSION THROUGH SUBPOENA

The lower court held that Mr. Amberg's FOIA lawsuit was precluded by the fact that he had equal access to the videos. The lower court held that Mr. Amberg could have used his own subpoena powers to compel Tim Horton's and Wendy's to produce the videos. This argument was misplaced for numerous reasons, and it failed to address the secret police report that Mr. Amberg successfully obtained through this FOIA litigation.

First, Mr. Amberg could not use a subpoena to compel a non-party to produce the videos arising out of the district court criminal case. **MCR 6.001(D)** states:

> (D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except
>
> (1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only, or

(3) when a statute or court rule provides a like or different procedure.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

[Emphasis added.]

A subpoena duces tecum is not permitted in criminal cases. Mr. Amberg could not have used a subpoena against Tim Horton's or Wendy's to obtain the videos, and he arguably would have engaged in unethical conduct if he had used this discovery mechanism in bad faith. See **MRPC 3.1**. Second, the provisions of **MCR 6.201** do not apply to misdemeanor cases, and the City of Dearborn regularly denies discovery requests based upon their interpretation of the law. See **Administrative Order (AO) No. 1999-3**, which reversed ***People v Sheldon***, 234 Mich App 68, 70-71; 592 NW2d 121 (1999); ***People v Greenfield (On Reconsideration)***, 271 Mich App 442, 447-448; 722 NW2d 254 (2006). See also, ***People v Mark Ryan Nickerson***, Docket No. 271459 (Unpublished March 13, 2007). This is not to suggest that the Defendants-Appellees' argument against discovery carry weight, but they regularly and routinely object to discovery in misdemeanor cases citing the above authority.

Third, it does not matter whether Mr. Amberg potentially could have received the videos and the additional 27-page police report through other channels. In fact, Mr. Amberg denies that he could have obtained these materials through other channels because he was diligently trying all along to obtain the materials through alternative means. That said, however, it simply does not matter and is not dispositive to this case. As the US Supreme Court held in *Tax Analysts*, supra,

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there is no requirement for a party to seek disclosure of public records from a particular source. Frankly, these records were otherwise unavailable to Mr. Amberg outside the context of a FOIA request directed at the Defendants-Appellees.

But the lower court's reasoning was misplaced when it turned to what Mr. Amberg could have done to secure the videos without exercising FOIA. This was made absolutely clear in ***Central Mich Univ Supervisory-Technical Ass'n MEA/NEA v Central Mich Univ Bd. of Trustees***, 223 Mich App 727 (1997). In *Central Mich Univ Supervisory-Technical Ass'n MEA/NEA*, the "Plaintiff made [a FOIA] request one day after filing suit against defendants in a prior case. Defendants denied plaintiff's FOIA request at that time on the basis that, because plaintiff had filed suit against defendants, plaintiff was not entitled to seek information pursuant to the FOIA, but rather had to follow proper court rule procedure, MCR 2.300 et seq., to obtain it." The circuit court granted summary disposition in favor of the defendants, holding that discovery was the plaintiff's exclusive manner to obtain documents. The Court of Appeals reversed, holding that:

> [W]e do not detect a conflict between the court rules and the FOIA. The FOIA is not a statutory rule of practice, but rather a mechanism for the public to gain access to information from public bodies regardless of whether there is a case, controversy, or pending litigation. The fact that discovery is available as a result of pending litigation between the parties does not exempt a public body from complying with the public records law. We refuse to read into the FOIA the restriction that, once litigation commences, a party forfeits the right available to all other members of the public and is confined to discovery available in accordance with court rule.

Central Mich Univ Supervisory-Technical Ass'n MEA/NEA v Central Mich Univ Bd. of Trustees, 223 Mich App 727, 730 (1997).

In a concurring opinion, Judge Holbrook clarified that:

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> Federal courts, in reviewing this issue pursuant to the federal FOIA, on which the Michigan FOIA was modeled, have indicated that the "FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided" under the court rules. One was never intended to replace of supplement the other. *NLRB v Robbins Tire & Rubber Co*, 437 US 214, 242; 98 S Ct 2311; 57 L Ed 2d 159 (1978); *NLRB v Sears, Roebuck & Co*, 421 US 132, 143, n 10; 95 S Ct 1504; 44 L Ed 2d 29 (1975). Thus, the discovery rules and the FOIA represent "two independent schemes for obtaining information" and an FOIA request contemplates a "separate action." *United States v Murdock*, 548 F2d 599 (CA 5, 1977). Here, plaintiff's request for information pursuant to the FOIA was denied by defendants solely on the basis of the ongoing civil litigation. This was error.

Id at 730-731 (HOLBROOK, J., concurring)

See also, ***Local 312, AFSCME v Detroit***, 207 Mich App 472; 525 NW2d 487 (1994); ***City of Troy v Lawrence***, Court of Appeals Docket No. 289509 (Unpublished June 23, 2009) (Prohibition against discovery provided for in MCR 2.302(A)(3), which pertains to discovery in civil infraction actions, did not preclude the ticketed motorist's brother from obtaining documents through FOIA); ***Seyler v City of Troy & Troy Police Dep't,*** Court of Appeals Docket No. 297573 (Unpublished Nov 8, 2011) ("Defendants argue that they were exempt from disclosing the information that plaintiff requested [relevant to his drunk driving case] because plaintiff could have obtained the information through criminal discovery. We reject this argument.") Michigan appellate decisions have repeatedly held that discovery provisions do not conflict with FOIA.

Fourth, and finally, all of these alternatives are meaningless and irrelevant because they all focus on what Mr. Amberg could have done, as opposed to what the government should have done. Under FOIA, the requester's identity and proposed use of the requested information is irrelevant when determining whether the information falls within an exemption. ***Taylor v Lansing Bd of Water & Light***, 272 Mich App 200, 205; 725 NW2d 84 (2006). By treating Mr. Amberg differently than any other member of the public, this Court improperly shifted the burden in this

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case. As previously stated by Mr. Amberg, the Michigan FOIA preamble states that, "15.231(2) that, "[i]t is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process." Mr. Amberg was not incarcerated in a state or local correctional facility, so he was entitled to the release of public information.

The lower court erred as a matter of law when it granted summary disposition by holding that Mr. Amberg could have independently obtained the restaurant videos that were in the Defendants-Appellees possession through subpoena.

IV. THE LOWER COURT ERRED BY RULING THAT SUMMARY DISPOSITION SHOULD BE GRANTED BECAUSE MR. AMBERG'S CLAIM WAS POSSIBLY A *BRADY* VIOLATION UNDER *BRADY V MARYLAND*, 373 U.S. 83 (1963), BUT WAS NOT A PROPER MATTER UNDER FOIA

The lower court held that summary disposition should be granted because Mr. Amberg's FOIA was improper and should have been resolved as a criminal discovery issue. As the lower court held, "That's a Brady versus Maryland criminal investigation issue as opposed to a FOIA matter." This is clearly contrary to the holding of *Central Mich Univ Supervisory-Technical Ass'n MEA/NEA* as discussed above, but it also reveals a flaw in the lower court's perception of the case. Mr. Amberg never had a due process right to discovery under ***Brady v Maryland***, 373 U.S. 83 (1963) because he was never charged with a crime. In this regard, the lower court was made aware that it had confused the legal issues presented in this case, equating Mr. Amberg's reasons for requesting access to public records with his misdemeanor criminal client, Towfeeg Muhsen. Mr.

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Muhsen might have claims under *Brady*, but that was totally irrelevant to the issues presented to the lower court. This was explicity addressed in Mr. Amberg's motion for reconsideration, which was denied by the lower court. As set forth in *Taylor v Lansing Bd of Water & Light*, supra, the requester's identity and proposed use of the requested information is irrelevant. The result in this case should not have turned on Mr. Amberg's profession or relationship to the district court criminal case.

The lower court erred as a matter of law when it held that summary disposition was appropriate because Mr. Amberg's claim was possibly a *Brady* violation under *Brady v Maryland*, 373 US 83 (1963), but was not a proper matter under FOIA.

V. THE FOIA LAWSUIT WAS NOT RENDERED MOOT WHEN THE DEFENDANTS/APPELLANTS TURNED OVER THE VIDEOS AND POLICE REPORTS AFTER THE LAWSUIT WAS FILED, AND IT WAS IMPROPER FOR THE LOWER COURT TO DENY ALL COSTS, ATTORNEY FEES, AND PUNITIVE SANCTIONS CONTRARY TO THE FOIA STATUTE WHEN THE FOIA WAS REASONABLY NECESSARY TO COMPEL PRODUCTION OF THE PUBLIC DOCUMENTS

The Defendants-Appellees' post-litigation disclosure of some of the documents did not render the case moot, and the case should not have been dismissed because the Defendants-Appellees decided to provide access to some of the documents following litigation on the FOIA claims. At hearing on this matter, this lower court failed to address Mr. Amberg's affidavit and arguments regarding the existence of additional documents that may exist that had gone undisclosed by Defendants-Appellees. Furthermore, the case was simply not rendered moot as a matter of law because the issue of costs, attorney fees, and punitive sanctions under the FOIA statute were not addressed.

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Obviously, if a municipal government could deny a FOIA request and only release documents if a lawsuit was filed, this would defeat the purpose of the FOIA. Numerous cases have addressed the mootness issue. See for example, ***Thomas v City of New Balt.***, 254 Mich App 196, 202 (2002) ("The mere fact that plaintiff's substantive claim under the FOIA was rendered moot by disclosure of the records after plaintiff commenced the circuit court action is not determinative of plaintiff's entitlement to fees and costs under MCL 15.240(6)"); *Walloon Lake Water System, Inc.*, ("An otherwise successful claimant should not assume the expenses of the litigation solely because it has been rendered moot by the unilateral actions of the public body. The trial court's order denying costs and attorney fees is therefore vacated."); and ***Local Area Watch v City of Grand Rapids***, 262 Mich App 136, 149-150 (2004) ("the disclosure of the records after plaintiff commenced the circuit court action rendering the FOIA claim moot as to the late-disclosed items does not void plaintiff's entitlement to fees and costs under § 10(6).")

The FOIA denial in this case occurred when Defendants-Appellees failed to disclose their secret documents on December 2, 2011, through the FOIA response drafted by Defendants-Appellees' attorney, Matthew Zalewski. It did not occur when Mr. Amberg subsequently learned that the Defendants-Appellees were hiding the materials. It did not occur at the district court pretrial on February 9, 2012, and it did not occur when Mr. Amberg learned of the additional police report once it was disclosed after he had filed his lawsuit. The denial occurred on December 2, 2011. As the Michigan Supreme Court held in ***State News v Mich State Univ***, 481 Mich 692, 703-704 (2008):

> The denial of a FOIA request occurs at a definite point in time. The public body relies on the information available to it at that time to make a legal judgment whether the requested public record is fully or partially exempt from disclosure. The determinative legal question

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for a judicial body reviewing the denial is whether the public body erred because the FOIA exemption applied when it denied the request.

The lower court erred as a matter of law when it held that the lawsuit was rendered moot by the post-litigation disclosure of responsive documents. Furthermore, it was error for the lower court to deny costs, attorney fees, and punitive damages as provided for under the FOIA.

VI. THE LOWER COURT ERRED WHEN IT RULED, SUA SPONTE WITHOUT BRIEFS OR ARGUMENTS, THAT THE RECORDS SOUGHT BY MR. AMBERG WERE EXEMPT UNDER FOIA BECAUSE THE RECORDS WERE RELATED TO A CRIMINAL INVESTIGATION

During the motion hearing, the lower court held that the materials sought by Mr. Amberg would be exempt if they related to a criminal investigation. As the transcript reveals the following exchange:

> THE COURT: But if they're subject to investigation, isn't there also exemption under FOIA?
>
> MR. PRAIN: No, your Honor.
>
> MR. ZALEWSKI: That is correct, your Honor. Yes.
>
> THE COURT: Yeah. And what case proposition, if it's under investigation and they're not subject to FOIA, what's the case you have that says that they would not?
>
> MR. PRAIN: I would ask what case they have that says that it is, your Honor. I don't know.
>
> THE COURT: All right. Go ahead.
>
> MR. ZALEWSKI: Your Honor, the FOIA law is specifically clear that law enforcement records obtained through the course of an investigation are exempt under the statute.
>
> [Tr. 8-9]
>
> MR. PRAIN: Interestingly -- I didn't mean to interrupt -- but interestingly, they're trying to characterize this as a criminal evidence matter, which I find interesting because, in fact,

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> they, through Mr. Zalewski's brief you can see that they distinguish how they process a FOIA request based on the stage of the criminal proceeding. So as much as they criticize –
>
> THE COURT: Well, that's, that's because if there is a criminal proceeding and there's an investigation, that's excluded under FOIA, all right. Clearly, all right. And so then, then we have that issue as well, which you've now also introduced into the case.
>
> [Tr. at 10]

The lower court was incorrect as a matter of law by issuing a blanket determination that anything related to a criminal investigation is automatically exempt. Exemptions are statutorily described in **MCL 15.243**, and the specific exemption that the lower court applicable to criminal investigations is **MCL 15.243(1)(b)**, which states:

> (b) **Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following**:
>
> (i) **Interfere with law enforcement proceedings.**
>
> (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
>
> (iii) Constitute an unwarranted invasion of personal privacy.

[Emphasis added.]

The exemption described in **MCL 15.243(1)(b)(i)** did not support summary disposition in favor of the Defendants-Appellees.

First and foremost, the Defendants-Appellees repeatedly denied that they ever "used" the videos in connection with the criminal investigation. The repeated claim that they did not "use" the videos in any "official function" is an admission that would defeat their burden of proving that the release of the video would compromise an ongoing law enforcement investigation. Investigating records are not simply exempt under the statute across-the-board. Investigating

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records are only exempt if, after a balancing test, a public body is able to prove that the release of those records would interfere with an ongoing investigation. That was not the case, since the Defendants-Appellees repeatedly claimed that they were not using the videos in connection with their investigation.

Second "The burden is on the public body to prove that a record is exempt under the FOIA, and that a record is exempt under the public-interest balancing test." ***Landry v City of Dearborn***, 259 Mich App 416, 420 (2003). Michigan Courts have been compelled on several occasions to deal with the exemption set forth and commonly referred to as the "law enforcement proceedings" exemption. In ***Evening News Association v Troy***, supra, the Michigan Supreme Court rejected a blanket denial of access to public records that merely recited the "law enforcement proceedings" provisions, holding:

> The threshold issue is whether under the FOIA the trial court can by a "generic determination" foreclose the right of a citizen to know what his government is doing. We hold that a "generic determination" does not satisfy the FOIA.

Evening News Asso., at 491-492 (1983).

The Court went on to hold that:

> In analyzing these provisions together, it is apparent that the exemptions require particularized justification. First of all, MCL 15.240(1); MSA 4.1801(10)(1) puts the burden of proof on the public body seeking exemption. Then MCL 15.243(1)(b)(i); MSA 4.1801(13)(1)(b)(i) specifies that the exemption applies "only to the extent that" there is interference. Finally, MCL 15.244(1); MSA 4.1801(14)(1) makes particularization explicit: "the public body shall separate the exempt and nonexempt material."

Id at 493-494.

Since 1983, and continuing for nearly three decades, the case law has been consistent. As set forth in ***Messenger Mich Consumer & Indus Servs***, 238 Mich App 524, 531-532 (1999):

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> Exemptions to disclosure under § 13 of the act, MCL 15.243; MSA 4.1801(13), are narrowly construed, and the agency bears the burden of proving that its refusal to disclose the information is compatible with the statute. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 231-232; 507 NW2d 422 (1993); *Manning v East Tawas*, 234 Mich App 244, 248; 593 NW2d 649 (1999). When ruling whether an exemption under the FOIA prevents disclosure of particular documents, a trial court must make particularized findings of fact indicating why the claimed exemption is appropriate. *Newark Morning Ledger Co v Saginaw Co Sheriff*, 204 Mich App 215, 218; 514 NW2d 213 (1994).

The materials were not exempt, especially since the Defendants-Appellees never claimed the materials were exempt and made repeated admissions to the contrary. In light of those admissions and the strong public policy in favor of disclosure, the Defendant-Appellees could not meet their burden of proving an exemption that contradicted their explicit claims to the contrary. The lower court erred as a matter law by entertaining this argument and summary disposition should not have been granted on this basis.

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CONCLUSION AND RELIEF SOUGHT

Plaintiff/Appellant requests that this Court reverse and remand this matter to the lower court for further proceedings consistent with the law, holding that the documents sought by Mr. Amberg constitute public records under the Act and that the defenses raised by Defendants/Appellees do not establish valid defenses to the claims in this case. Mr. Amberg further requests that this Court instruct the lower court that discovery should be permitted by the Plaintiff/Appellant against the Defendants/Appellees, further instructing the lower court that costs, attorney fees and sanctions are appropriate in this action.

William J. Maze
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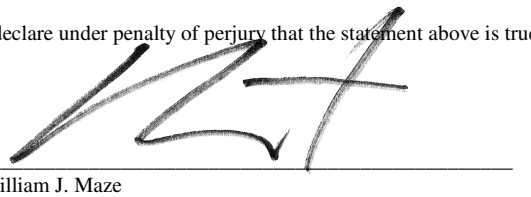
Dated: November 14, 2012

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause on November 14, 2012 by

☐Regular US Mail
☐Fed-Ex
☐Fax
☒Email
☒Eserve

I declare under penalty of perjury that the statement above is true to the best of my information, knowledge and belief.



William J. Maze

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CIVIL DIVISION

JAMES AMBERG,
Plaintiff,

vs.

Civil Action
No. 12-002188-CZ
Hon. Daniel P. Ryan

CITY OF DEARBORN and DEARBORN POLICE DEPARTMENT,

Defendants.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE DANIEL P. RYAN, CIRCUIT COURT JUDGE

Detroit, Michigan - Friday, June 22, 2012

APPEARANCES:

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Reported by: Kathleen M. Smith (CSR-4232)
Certified Shorthand Reporter

T A B L E O F C O N T E N T S

E X H I B I T S

Detroit, Michigan

Friday, June 22, 2012

At or about 9:31 a.m.

__ __ __

THE COURT: Amberg versus Dearborn. This is case 12-2188-CZ. Appearances for plaintiff and defense.

MR. ZALEWSKI: Good morning, your Honor. Matthew Zalewski on behalf of the defendants.

MR. PRAIN: Good morning, your Honor. Brian Prain on behalf of the plaintiff.

THE COURT: All right. This is Dearborn's motion for summary disposition. There are two particular videos which are at issue here. There is, I believe, no question that Dearborn provided everything but the videos. It's a Tim Horton's and Wendy's video that are the gravamen of this particular matter.

Dearborn originally claimed, or contends that those matters, those were private videos, they're not public record, they're not subject to FOIA, and the, and regardless, I believe you've subsequently produced those videos anyhow.

MR. ZALEWSKI: That's correct, your Honor.

THE COURT: And the basis for that was that you had to subpoena those videos from Tim Horton's and Wendy's, and I believe the copies, the originals remain with Tim Horton's and Wendy's, and they were likewise accessible to the plaintiff as well through a subpoena and so, therefore, there is no FOIA violation here and that the case ought to be dismissed.

The plaintiff, however, contends that once they become, or once they were subpoenaed -- albeit private, they are in the custody of the Dearborn Police Department, the City of Dearborn -- they do become public record and they ought to have been produced pursuant to the FOIA request; that the failure to produce it was willful and, therefore, the plaintiff is entitled to punitive damages.

Is there anything that the defense, Dearborn, wishes to add to this matter?

MR. ZALEWSKI: Judge, thank you, your Honor. Just very briefly. As to the plaintiff's allegation that the videos became public records at the time that they came into the City's possession, and I think it is, just to be clear, your Honor, I think one of them did come into the possession through Tim Horton's without a subpoena, but it was

later, after a ticket was cited. The case law that has been cited is very clear that there's a distinction between possession and use. In fact, the plaintiff's own case, the RCA case, notes that the mere fact that the document comes into the possession of the public agency doesn't turn it into a public record until it's used.

In this case, the only governmental acts that occurred in this case was the ticketing of Towfeeg Muhsen, and that occurred on September 28th of 2011; whereas the videos came into the City's possession thereafter. It's purely an evidence issue and, consequently, that's in further support of our position that it's not a public record and not subject to FOIA. Thank you.

THE COURT: All right. And the plaintiff's response?

MR. PRAIN: We do, your Honor. This case, I have to be clear, because what they, they charge in this case and what they're claiming is that because the charge didn't arise out of the videotapes, that that means that they don't have to disclose them under FOIA. Here's what they're saying, they're saying that if the FOIA request goes to the law department, then it goes to the police

department records bureau, at that point if a ticket is issued immediately, it only goes to the records department and it stays there. They're saying that if an investigation is done -- which clearly there was in this case, the 28-page police report tells us that -- that that means that they don't look at other videos, those wouldn't get submitted to the law department. But that's not the case, because we know for a fact that the Dearborn Police Department Detective Bureau was in possession of both of those tapes the day after the incident happened.

Now, Mr. Zalewski is claiming that when he got the FOIA request, and as of December 2nd when he responded to it, he had, that he simply didn't have to disclose them because he had no reason to believe they existed because the Dearborn Detective Bureau hadn't offered them to the law department.

THE COURT: Or hadn't used them in a prosecution of any sort.

MR. PRAIN: Well, and that's not -- the case of Hoffman, which relied on a portion of the U.S. Supreme Court case, makes it clear that use is not the distinction. They say that whereas the defendant's try to draw distinction based on whether the tapes were used or not, that's not the question.

It's the purpose of the FOIA.

THE COURT: There's no question, there's no question that these videos -- we're not talking about squad car videos where there, these are videos from Tim Horton's and Wendy's.

MR. PRAIN: Correct.

THE COURT: Clearly which are accessible by the same manner of which the City of Dearborn demand through subpoena, correct?

MR. PRAIN: That's partially correct, your Honor, but the case on point is Detroit News versus City of Detroit. This is the telephone records case. They tried to, similarly to the defendants in this case, they tried to draw a distinction based on the fact that they were produced by a third party and they said they weren't using them. Well, in that case the court, the trial court held against the plaintiffs and the Court of Appeals reversed saying that's not the case, this is not about a criminal case, this is about disclosure and the right of the public to be knowledgeable and participate in their government, and they had to disclose those telephone records. The moment they came into possession of those tapes they became public records. And that date in this case that we

know for certain that the Dearborn Police Department, who's a defendant, came into possession of both tapes was somewhere between November, or September 29th and November 11th, well before Mr. Amberg's FOIA. So there's no question in this case that they're not exempt to public records.

And they were using that, the Dearborn -- this is the most important fact perhaps -- the Dearborn Police Department Detective Bureau compiled a 28-page report explaining that they were conducting an in-depth investigation with multiple investigators. They are a defendant in this case. If you look on page five of their 28-page report, it says investigation, investigation, investigation. That's the public act. That's the public, the act of the public body that we're seeking and pursuing, and they don't have a case.

THE COURT: But if they're subject to investigation, isn't there also exemption under FOIA?

MR. PRAIN: No, your Honor.

MR. ZALEWSKI: That is correct, your Honor. Yes.

THE COURT: Yeah. And what case proposition, if it's under investigation and they're

not subject to FOIA, what's the case you have that says that they would not?

MR. PRAIN: I would ask what case they have that says that it is, your Honor. I don't know.

THE COURT: All right. Go ahead.

MR. ZALEWSKI: Your Honor, the FOIA law is specifically clear that law enforcement records obtained through the course of an investigation are exempt under the statute.

THE COURT: All right.

MR. ZALEWSKI: But of course, as far as defendants are concerned, we never even get to that point. There never was an exemption or denial because there wasn't, the videos weren't obtained in furtherance of a government function. It was part of the process of a prosecution post-ticket. It would be no different than asking to FOIA a gun in an assault case or a pair of jeans in a shoplifting case. These are videos from a third-party source --

THE COURT: And again --

MR. ZALEWSKI: It's an evidence issue.

THE COURT: Right.

MR. PRAIN: Your Honor, I must respond that by February 9th, they were in possession in the

prosecutor's office, which is also part of the Dearborn Law Department, because Mr. Amberg spotted them in Nicole Cabin's (ph) prosecution file to be used in the criminal case. His FOIA request was submitted on November 16th. And we know for certain that by February 9th -- I mean, really they became public records the day after this incident happened, but we know by February 9th --

THE COURT: Then we have a Brady versus a Maryland issue in a criminal case as opposed to a FOIA issue so --

MR. PRAIN: Interestingly -- I didn't mean to interrupt -- but interestingly, they're trying to characterize this as a criminal evidence matter, which I find interesting because, in fact, they, through Mr. Zalewski's brief you can see that they distinguish how they process a FOIA request based on the stage of the criminal proceeding. So as much as they criticize --

THE COURT: Well, that's, that's because if there is a criminal proceeding and there's an investigation, that's excluded under FOIA, all right. Clearly, all right. And so then, then we have that issue as well, which you've now also introduced into the case.

Is there anything else?

MR. PRAIN: Well, the only other thing, your Honor, that I would say right now, I would defer to the brief on other issues. The big question here is whether or not they were public records. We've cited Kestenbaum, MCL 15.232, Hoffman, Walloon -- which actually support us -- Detroit News, RCA and Weisenberg, and they show that those tapes were public records, and I think there's ample reason to believe that they were not just in the possession of the Dearborn -- and this is the point -- they're not just in the possession of the Detective Bureau, I think there's reason to believe that they were in possession in the law department --

THE COURT: Well, that's just speculation and conjecture.

MR. PRAIN: And that's why there's a material question that has to be resolved, your Honor.

THE COURT: Well, the time to resolve it is now. The time to resolve it is to show that you have evidence that they, in fact, were in possession at the time of the request, and mere assertions or speculation are insufficient in response to a motion

for summary disposition.

Is there anything else?

MR. PRAIN: Yes. Mr. Amberg's affidavit, your Honor, which shows that at the time of the arraignment in this case, which is part of the criminal case, they were dealing with the video tapes at that time.

THE COURT: That's a Brady versus Maryland criminal investigation issue as opposed to a FOIA matter.

Is there anything else.

MR. PRAIN: No, your Honor. I defer to the brief.

THE COURT: Okay. Anything else?

MR. ZALEWSKI: Your Honor, I have nothing beyond my brief. Thank you.

THE COURT: All right. Based upon what has been articulated here, based upon the briefs, the motion for summary disposition will be granted.

MR. ZALEWSKI: Thank you, your Honor. Your Honor, would the Court entertain my request for sanctions?

THE COURT: Denied.

MR. ZALEWSKI: Thank you.

(At or about 9:42 a.m., matter concluded)

CERTIFICATE OF COURT REPORTER

I certify that this transcript, consisting of 13 pages, is a complete, true, and correct transcript of the proceedings and testimony taken in this case on Friday, June 22, 2012.

_____
KATHLEEN M. SMITH (CSR-4232)
Certified Shorthand Reporter
1266 Tennyson Drive
Troy, Michigan 48083
Telephone: (248) 672-5989

Dated: September 6, 2012

Unpublished Cases Cited in Mr. Amberg's Brief

SEAN STEVEN SEYLER, Plaintiff-Appellant, v CITY OF TROY and CITY OF TROY POLICE DEPARTMENT, Defendants-Appellees.

No. 297573

COURT OF APPEALS OF MICHIGAN

2011 Mich. App. LEXIS 1955

November 8, 2011, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: [*1]
Oakland Circuit Court. LC No. 2009-105328-CZ.

JUDGES: Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

OPINION

PER CURIAM.

Defendants City of Troy and City of Troy Police Department denied plaintiff Sean Steven Seyler's request for public records under the Freedom of Information Act (FOIA), *MCL 15.231 et seq*. The trial court granted summary disposition for defendants. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I

Officers of the City of Troy Police Department arrested plaintiff for drunk driving. Two days after the arrest, plaintiff made a FOIA request with the police department to obtain copies of, or an opportunity to view, the following: patrol car and booking room video and audio regarding the arrest; calibration logs for the preliminary breathalyzer used in the arrest; the arresting officers' preliminary notes and police reports regarding the arrest; his booking room photographs; any 911 recording related to the arrest; all radio dispatch recordings and log summaries relating to the arrest; redacted police reports from the arresting officers' last ten drunk driving arrests; the police department's inventory, videotaping, and drunk driving [*2] procedures; performance standards regarding drunk driving arrests; field sobriety test training manuals; and training records summaries, citizen complaints, and disciplinary reports concerning the arresting officers. The next day, the police department sent plaintiff a letter stating that it was "denying [his] FOIA request as exempt under *MCLA 15.243 (1)(d)*." In addition to the letter, plaintiff received a City of Troy FOIA request form stating that his FOIA request was "denied in full due to exemption as Public Record as defined by State Law." The form also stated that "*MCL 15.243 (1)(d)* is the reason for non-disclosure." Plaintiff then filed this action. Defendants subsequently filed a motion for summary disposition under *MCR 2.116(C)(8)* and *(10)*, arguing that plaintiff's request circumvented criminal discovery and also that all of the requested information had been provided to plaintiff or was statutorily exempt from disclosure. The trial court granted defendants' motion.

II

We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood, 461 Mich 109, 118-120; 597 NW2d 817 (1999)*. [*3] A motion for summary disposition under *MCR 2.116(C)(8)* tests the legal sufficiency of the complaint, while a motion under *MCR 2.116(C)(10)* tests the factual sufficiency of the complaint. *Id. at 119*. Where a motion is brought under both *MCR 2.116(C)(8)* and *(10)* and both the parties and the trial court rely on matters outside the pleadings, as is the case here, *MCR 2.116(C)(10)* is the appropriate basis for review. *Driver v Hanley (After Remand), 226 Mich App 558, 562; 575 NW2d 31 (1997)*. "The reviewing court should evaluate a motion for summary disposition under *MCR 2.116(C)(10)* by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden, 461 Mich at 121*. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id. at 120*.

In appeals under the FOIA, we review a trial court's legal determinations de novo, findings of fact for clear error, and decisions committed to the trial court's discretion for an abuse of discretion. *Herald Co, Inc v E Mich Univ Bd of Regents, 475 Mich 463, 471-472; 719 NW2d 19 (2006)*. "Whether requested information fits within an exemption from [*4] disclosure under FOIA is a mixed question of fact and law." *Taylor v Lansing Bd of Water & Light, 272 Mich App 200, 205; 725 NW2d 84 (2006)*.

MCL 15.231(2) articulates the purpose of the FOIA:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

Thus, *MCL 15.233(1)* provides that a person has the right to inspect, copy, or receive copies of a public record "upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record." *Practical Political Consulting v Secretary of State, 287 Mich App 434, 449; 789 NW2d 178 (2010)*. "The FOIA 'presumes records are disclosable,' and a public body may deny a request only upon a showing that the requested information falls within one of the exemptions in § 13 of the act." *Hagen v Dep't of Ed, 431 Mich 118, 124; 427 NW2d 879 (1988)*. [*5] Exemptions to disclosure under § 13 (*MCL 15.243*) are narrowly construed, and the party seeking to invoke an exemption has the burden of demonstrating that nondisclosure accords with the intent of the Legislature. *Taylor, 272 Mich App at 204-205*; *Messenger v Consumer & Indus Servs, 238 Mich App 524, 532; 606 NW2d 38 (1999)*.

Turning to plaintiff's claims of error, we first find that the Troy City Attorney's Office sent plaintiff some of the records that he requested. An appeal under the FOIA becomes moot when a public body releases the requested public record. *State News v Mich State Univ, 481 Mich 692, 704 n 25; 753 NW2d 20 (2008)*; *Herald Co, Inc v Ann Arbor Pub Schs, 224 Mich App 266, 270-271; 568 NW2d 411 (1997)*. Therefore, whether these records were exempt from disclosure is moot, and we decline to address the issue as it relates to received documents. *State News, 481 Mich at 704 n 25*; *Herald Co, 224 Mich App at 270-271*.

Plaintiff argues, however, that the remainder of the requested information does not fall under any exemption and that the trial court erred by holding otherwise. The remaining information includes the following: the redacted police reports from the arresting officers' [*6] last ten drunk driving arrests; the police department's inventory, videotaping, and drunk driving procedures; performance standards regarding drunk driving arrests; field sobriety test training manuals; and training records summaries, citizen complaints, and disciplinary reports concerning the arresting officers.[1]

> 1 It is not clear in the record whether plaintiff received the citizen complaints and disciplinary reports. Defendants' brief in support of their motion for summary disposition and brief on appeal initially indicate that plaintiff received the information but then later indicate that such information is exempt under the FOIA. Therefore, we will address these records as if they were not

disclosed.

Initially, we note that the trial court erred by making a conclusory determination that defendants were exempt from complying with the FOIA. "When ruling whether an exemption under the FOIA prevents disclosure of particular documents, a trial court must make particularized findings of fact indicating why the claimed exemption is appropriate." *Messenger, 238 Mich App at 532*. Here, defendants denied plaintiff's FOIA request on the basis of *MCL 15.243(1)(d)*, which provides that a public [*7] body may exempt from disclosure "[r]ecords or information specifically described and exempted from disclosure by statute." In granting defendants summary disposition, the trial court simply stated: "[S]upplying all applicable balancing tests and public policy consideration the court finds the information is legislatively exempt from disclosure under the Freedom of Information Act at *MCL 15.231*."

Defendants argue that they were exempt from disclosing the information that plaintiff requested because plaintiff could have obtained the information through criminal discovery. We reject this argument. In *Central Mich Univ Supervisory-Technical Ass'n, MEA/NEA v Bd of Trustees of Central Mich Univ, 223 Mich App 727, 730; 567 NW2d 696 (1997)*, this Court held that the FOIA does not conflict with the court rules governing discovery. The Court explained:

> [W]e do not detect a conflict between the court rules and the FOIA. The FOIA is not a statutory rule of practice, but rather a mechanism for the public to gain access to information from public bodies regardless of whether there is a case, controversy, or pending litigation. The fact that discovery is available as a result of pending litigation between [*8] the parties does not exempt a public body from complying with the public records law. We refuse to read into the FOIA the restriction that, once litigation commences, a party forfeits the right available to all other members of the public and is confined to discovery available in accordance with court rule. [*Id.*]

The concurring opinion in *Central Michigan* further stated that "the discovery rules and the FOIA represent 'two independent schemes for obtaining information'" and "[o]ne was never intended to replace or supplement the other." *Id. at 730-731* (Holbrook, J., concurring) (citation omitted).

After *Central Michigan* was decided, the FOIA was amended by 1996 PA 553, which added the exemption currently listed under *MCL 15.243(1)(v)*. *MCL 15.243(1)(v)* is an exemption from disclosure for "[r]ecords or information relating to a civil action in which the requesting party and the public body are parties." But the amendment did not overrule *Central Michigan*; rather, it simply added to the list of exemptions provided by the FOIA. "Thus, the public body asserting the exemption in *MCL 15.243(1)(v)* must prove that it is a party to a civil action with the requesting party." *Taylor, 272 Mich App at 205*. [*9] Otherwise, this Court's ruling in *Central Michigan* applies. *Id*. For instance, in *Kent Co Deputy Sheriff's Ass'n v Kent Co Sheriff, 463 Mich 353, 364 n 18; 616 NW2d 677 (2000)*, our Supreme Court determined that *MCL 15.243(l)(v)* did not apply to a union's FOIA request because the underlying case was an arbitration and an arbitration is not a "civil action" as defined in *MCR 2.101*. The Court further held that the "presence of an alternative ground for obtaining public records does not preclude application of the FOIA." *Kent Co Deputy Sheriff's Ass'n, 463 Mich at 364*.

In this case, the exemption in *MCL 15.243(1)(v)* is not applicable. Courts of this state have not determined that a civil infraction action constitutes a "civil action" for purposes of *MCL 15.243(1)(v)*. Regardless, at the time plaintiff made his FOIA request, he had not yet been charged with any offense. Therefore, because the exemption in *MCL 15.243(l)(v)* does not apply here, this Court's holding in *Central Michigan* applies. The fact that discovery may or may not have been available to plaintiff does not exempt defendants from complying with the FOIA. See *Central Mich, 223 Mich App at 730*.

With respect to the police department's [*10] inventory, videotaping, and drunk driving procedures, performance standards regarding drunk driving arrests, and field sobriety test training manuals, defendants argue that the information is exempt from disclosure under *MCL 15.243(1)(s)*. We agree. *MCL 15.243(1)(s)* exempts public bodies from disclosing public records of a law enforcement agency if such release would "[d]isclose operational instructions for law enforcement officers or

agents," or "[r]eveal the contents of staff manuals provided for law enforcement officers or agents," unless the public interest in disclosure outweighs the public interest in nondisclosure. *MCL 15.243(1)(s)*(*v*)-(*vi*). "[W]hen an appellate court reviews a decision committed to the trial court's discretion, such as [balancing the public interest in disclosure and nondisclosure,] the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Herald Co, 475 Mich at 472*. Here, the police department's procedures and training manuals would certainly disclose "operational instructions" and the "contents of staff manuals . . . for [*11] law enforcement officers." *MCL 15.243(1)(s)*(*v*)-(*vi*). The public has an interest in such disclosure to the extent that it would serve the core purpose of the FOIA, i.e., for the people to be informed "so that they may fully participate in the democratic process." *MCL 15.231(2)*; see *Detroit Free Press, Inc v City of Southfield, 269 Mich App 275, 282; 713 NW2d 28 (2005)* (stating the public's "interest is best served through information about the workings of government or information concerning whether a public body is performing its core function"). But, plaintiff put forth no evidence that the public would otherwise benefit from disclosure of the requested information. As much as the public has a general interest in knowing the workings of its government, the public also has an interest in the effective performance of law enforcement. Defendants have asserted that disclosing the requested procedures and manuals of the City of Troy Police Department to the general public would weaken the overall performance of law enforcement, as it would, among other things, permit potential criminals to circumvent police procedures and techniques. See *Tobin v Mich Civil Serv Comm, 416 Mich 661, 669* & [*12] n 10; *331 NW2d 184 (1982)* (explaining that information specifically exempt from disclosure under the FOIA, such as law enforcement investigative techniques and procedures, would, by definition, cause harm if released). Thus, we affirm the trial court's determination that the public interest favors nondisclosure, as the determination did not fall outside the principled range of outcomes. See *Herald Co, 475 Mich at 472*; see also *Post-Newsweek Stations, Mich, Inc v Detroit, 179 Mich App 331, 337; 445 NW2d 529 (1989)* (holding that in determining whether a public body has met its burden of proving a claimed exemption, the trial court need not hold an *in camera* review of the contested information if the body's statements can adequately provide de novo review).

Defendants further argue that the arresting officers' training records and any citizen complaints and disciplinary reports concerning the arresting officers are exempt under *MCL 15.243(1)(s)*(*ix*) because they would "[d]isclose personnel records of law enforcement agencies." We disagree. While the information would disclose portions of the officers' personnel records, defendants have not met their burden of proving that a balancing of [*13] the public interests favored nondisclosure. See *MCL 15.243(1)(s)*. Defendants argue that plaintiff's request is self-serving and that disclosure would have no benefit to the public. However, disclosure would serve the core purpose of the FOIA. Records regarding the arresting officers' training and any complaints and disciplinary actions concerning them are informative of the workings of the City of Troy Police Department and whether the department is performing its core function. See *Detroit Free Press, 269 Mich App at 282*. Indeed, it is arguable that government transparency through the FOIA regarding the misconduct of law enforcement officers would increase public confidence in law enforcement. We reject defendants' additional argument that the FOIA does not require them to make summaries of the arresting officers' training records. See *MCL 15.233(4)*. While this is true, plaintiff did not request that defendants make such summaries or create a new record. See *MCL 15.233(4)-(5)*. Rather, plaintiff requested written summaries of the officers' training records *if such records exist*. Accordingly, because exemptions to disclosure must be narrowly construed and defendants failed to put forth [*14] any support for their assertion that the public interest favors nondisclosure and that nondisclosure accords with the intent of the Legislature, we find that the trial court's conclusion that the public interest favored nondisclosure of the information fell outside the principled range of outcomes. See *Herald Co, 475 Mich at 472*; *Taylor, 272 Mich App at 204-205*; *Messenger, 238 Mich App at 532*. We reverse the trial court's determination in regard to this issue and hold that the information may be disclosed.[2]

> 2 Defendants argued before the trial court that disclosure of the requested information could divulge the arresting officers' home addresses and family members, but defendants have abandoned that argument on appeal.

Finally, with regard to the redacted police reports for

the arresting officers' last ten drunk driving arrests, defendants present several arguments for nondisclosure. First, defendants restate their argument that public bodies are not required to "make a compilation, summary, or report of information." *MCL 15.233(4)*. But, again, plaintiff's request did not ask defendants to make a compilation, summary, or report. The request was for redacted copies of existing police reports. [*15] Second, defendants argue that the reports are exempt from disclosure because it "would be very time consuming to research all police reports to ascertain which documents are responsive to [plaintiff's] request, especially since there are no names or other limiting information provided in the request." Although this may be true, defendants have not provided this Court with a specific statutory exemption that permitted them to deny disclosure of the police reports on the basis that disclosure would be too burdensome. Indeed, no such exemption exists under section 13 of the FOIA. Third, defendants argue that the police reports were exempt from disclosure because defendants were "concerned about protecting the privacy of the individuals who [were] involved in each case." We disagree. Plaintiff specifically requested that defendants redact the police reports by "omitting the names and identifying information of the accused, witnesses, and other identifying information." Moreover, defendants did not indicate to plaintiff that they denied his FOIA request on the basis that the records contained information of a personal nature. Defendants' expression of "concern" did not meet their burden [*16] of proving "a clearly unwarranted invasion of an individual's privacy" sufficient to establish an exemption under *MCL 15.243(1)(a)*. See *Taylor, 272 Mich App at 204-205*; *Messenger, 238 Mich App at 532*. Accordingly, the redacted police reports were not exempt under the FOIA, and the trial court's decision in regard to this information is reversed.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Jane M. Beckering

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MARK RYAN NICKERSON, Defendant-Appellant.

No. 271459

COURT OF APPEALS OF MICHIGAN

2007 Mich. App. LEXIS 666

March 13, 2007, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Appeal denied by *People v. Nickerson, 2007 Mich. LEXIS 1282 (Mich., June 8, 2007)*

DISPOSITION: The decisions of the district court and the circuit court are reversed, and this case is remanded to the district court for further proceedings. We do not retain jurisdiction.

JUDGES: Before: Servitto, P.J., and Talbot and Schuette, JJ.

OPINION

MEMORANDUM.

Defendant appeals, by leave granted, a circuit court order denying his application for leave to appeal from a district court order granting plaintiff's motion to compel discovery. We reverse both orders, and remand this case to the district court for further proceedings. This appeal is being decidedwithout oral argument pursuant to *MCR 7.214(E)*.

Defendant was charged with the misdemeanor offenses of operating a motor vehicle while intoxicated, second offense, *MCL 257.625(9)(b)*, and possession of open intoxicants in a vehicle, *MCL 257.624a*. Plaintiff filed a motion to compel discovery in district court, arguing that the court had the inherent [*2] power to order discovery in a criminal case in order to prevent trial by "surprise and ambush." The district court granted the motion, and ordered defendant to provide plaintiff with a witness list not less than ten days before trial.

Defendant sought leave to appeal to the circuit court. He argued that *MCR 6.201*, which governs discovery in criminal cases, applies only to felony cases, and noted that our Supreme Court had clearly stated as much in Administrative Order (AO) No. 1999-3. The circuit court denied the application, reasoning that discovery aided the proper administration of justice, and noting that other jurisdictions had held that a trial court has the inherent authority to grant discovery beyond that allowed by statute in criminal cases.

We review a trial court's decision regarding discovery for an abuse of discretion, and review the interpretation of a court rule de novo. *People v Phillips, 468 Mich. 583, 587*; *663 NW2d 463 (2003)*.

MCR 6.201 governs discovery in a criminal case. *Id. at 589*; AO No. 1994-10. In *People v Sheldon, 234 Mich. App. 68, 70-71*; *592 N.W.2d 121 (1999)*, [*3] this Court noted that AO No. 1994-10 made no distinction between

felony and misdemeanor cases, and on that basis held that *MCR 6.201* applied to misdemeanor cases. Thereafter, our Supreme Court issued AO No. 1999-3, in which it stated that this Court's decision in *Sheldon, supra*, was based on an "erroneous" interpretation of AO No. 1994-10, and that "MCR6.201 applies only to criminal felony cases."

MCR 6.201(A)(1) mandates discovery of witness lists. However, because this rule applies only to felony cases (AO No. 1999-3; see also *People v Greenfield (On Reconsideration), 271 Mich. App. 442, 450 n 6*; *722 N.W.2d 254 (2006))*, the argument advanced by plaintiff, that a trial court has the inherent authority to order discovery even in the absence of a statute or court rule, is without merit. Furthermore, the circuit court's reliance on foreign authority was misplaced in light of the existence of clear Michigan authority on this issue. The district court thus abused its discretion by granting plaintiff's request for discovery. *Phillips, supra at 587.*

The decisions [*4] of the district court and the circuit court are reversed, and this case is remanded to the district court for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette

FRANK LAWRENCE, JR., Plaintiff-Appellant, v CITY OF TROY, Defendant-Appellee.

No. 289509

COURT OF APPEALS OF MICHIGAN

2009 Mich. App. LEXIS 1398

June 23, 2009, Decided

SUBSEQUENT HISTORY: Subsequent appeal at, Remanded by *Lawrence v. City of Troy, 2012 Mich. App. LEXIS 592 (Mich. Ct. App., Feb. 14, 2012)*

PRIOR HISTORY: [*1]
Oakland Circuit Court. LC No. 2008-095176-CZ.

JUDGES: Before: Borrello, P.J., and Meter and Stephens, JJ.

OPINION

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition for defendant in this action under the Freedom of Information Act (FOIA), *MCL 15.231 et seq*. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

Plaintiff filed a FOIA request stemming from a traffic citation issued to his brother, Thomas John Lawrence, for failing to provide proof of insurance and failing to change the address on his driver's license. Plaintiff sent a FOIA request to the Troy Police Department requesting the following information:

> 1. The full name of the officer who issued citation # 733389. Please also include the full name of the second officer who was at the scene;
>
> 2. Any and all voice or video recordings of the time directly before, during, and after the citation was issued. This should include, but not be limited to, any voice or video records taken of Thomas Lawrence, as well as any voice or video records depicting one or both of the two officers described in # 1 above, directly before, during, and after the citation was issued;
>
> 3. Any [*2] and all radio, cellular or text transmissions between the two officers described in # 1 above, directly before, during, and after the citation was issued. This should include, but not limited to [sic], any radio transmissions to the Troy Police Station;
>
> 4. Any records indicating that one or both of the officers described in # 1 above, between 6:00pm and 7:00pm, accessed or attempted to access information from a database operated by the Michigan

> Secretary of State as to whether Thomas Lawrence or his vehicle had valid insurance;
>
> 5. Any and all records that indicate whether one or both of the officers described in # 1 above are subject to any guidelines, goals, or expectations as to how many traffic citations they must issue in a given period (i.e., a quota);
>
> 6. Any and all records relating to whether one or both of the officers described in # 1 have ever been subject to any discipline or disciplinary proceedings for misconduct, misfeasance and/or malfeasance, including whether the officer(s) has ever been sued for official misconduct (i.e., civil rights claims under *42 U.S.C. § 1983*). [FOIA Request.]

Two days later, on October 6, 2008, defendant denied plaintiff's request, stating:

> The City [*3] of Troy Police Department has recently received your Freedom of Information Act request. Since that request is for reports or information related to a criminal charge or a civil infraction (traffic ticket) pending with the City of Troy, your letter should be directed to either the Troy City Attorney's Office or the Oakland County Prosecutor's Office, depending on which of those offices is prosecuting the matter.
>
> We are denying your FOIA request as exempt under *MCLA 15.243(1)(D)*....

Shortly thereafter, plaintiff filed this action alleging that defendant improperly denied his FOIA request. Plaintiff filed a motion for summary disposition arguing that he was entitled to disclosure of the requested information. Defendant requested summary disposition in its favor under *MCR 2.116(I)(2)*. On December 1, 2008, the trial court denied summary disposition for plaintiff and granted summary disposition for defendant without hearing oral argument. The trial court opined that plaintiff's request appears to be an attempt to circumvent the discovery preclusion in civil infraction actions set forth in *MCR 2.302(A)(3)*. [*4] The trial court further opined that the information sought is otherwise exempt, stating:

> *MCL 15.243(1)(b)* provides an exemption for investigating records compiled for law enforcement purposes, to the extent that disclosure as a public record interferes with law enforcement proceedings and would constitute an unwarranted invasion of personal privacy. Here, the information sought implicates personal information of officers and witnesses, and police investigation techniques and guidelines. Accordingly, Plaintiff is not entitled to damages based on his claim of "arbitrary and capricious" acts.

Therefore, the trial court granted summary disposition for defendant pursuant to *MCR 2.116(I)(2)*.

Plaintiff argues that the trial court erred by granting summary disposition for defendant under *MCR 2.116(I)(2)*. A "trial court properly grants summary disposition to the opposing party under *MCR 2.116(I)(2)* if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff, 240 Mich App 669, 672; 613 NW2d 405 (2000)*. Further, in FOIA cases, this Court reviews de novo a trial court's legal determinations and reviews for clear [*5] error a trial court's factual findings supporting the court's decision. *Herald Co, Inc v Eastern Michigan Univ Bd of Regents, 475 Mich 463, 471-472; 719 NW2d 19 (2006)*. This Court must defer to the trial court's factual findings unless it is left with a definite and firm conviction that a mistake was made. *Id. at 472*. Finally, when reviewing a decision within the trial court's discretion, this Court must affirm unless the decision falls outside the principled range of outcomes. *Id*.

MCL 15.231(2) articulates the purpose of the FOIA. That provision states:

> It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public

> employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process.

"Michigan courts have interpreted the policy of the FOIA as one of full disclosure of public records unless a legislatively created exemption expressly allows a state agency to avoid its duty to disclose the information." [*6] *Messenger, supra* at 531. Exemptions to disclosure under *MCL 15.243* of the FOIA are narrowly construed, and the party seeking to invoke an exemption has the burden of demonstrating its applicability. *Taylor v Lansing Bd of Water & Light, 272 Mich App 200, 204-205; 725 NW2d 84 (2006)*; *Messenger, supra* at 532. "Whether requested information fits within an exemption from disclosure under FOIA is a mixed question of fact and law[.]" *Taylor, supra at 205*.

Plaintiff argues that the trial court essentially relied on the exemption under *MCL 15.243(1)(v)* in granting summary disposition for defendant. He contends that this exemption is inapplicable because plaintiff and defendant are not involved in any other litigation and this Court in *Taylor, supra*, rejected the notion that this provision prohibits a person from obtaining information by proxy. *MCL 15.243(1)(v)* provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (v) Records or information relating to a civil action in which the requesting party and the public body are parties.

Plaintiff correctly contends that this exemption is inapplicable because, under the plain language of *MCL 15.243(1)(v)*, [*7] plaintiff is not seeking information regarding a civil action in which plaintiff and defendant are parties. Plaintiff also correctly argues that *Taylor, supra*, does not preclude him from seeking information regarding a civil action between defendant and plaintiff's brother. In *Taylor, supra at 206-207*, this Court held that a literal interpretation of *MCL 15.243(1)(v)* allows "a party to obtain information by proxy that he or she would otherwise not be entitled to receive through FOIA[.]" Therefore, *MCL 15.243(1)(v)* would not prohibit plaintiff from obtaining information from defendant through a FOIA request that the provision would prohibit plaintiff's brother from obtaining himself. [1]

> 1 We express no opinion regarding whether a civil infraction action constitutes a "civil action" within the meaning of *MCL 15.243(1)(v)*.

Despite the foregoing, the trial court did not rely on *MCL 15.243(1)(v)* in granting summary disposition for defendant and defendant did not rely on that exemption in denying plaintiff's request. Rather, the trial court relied in part on *MCR 2.302(A)(3)*, which pertains to discovery in civil infraction actions. The trial court opined that plaintiff's request was an attempt [*8] to circumvent the discovery preclusion in civil infraction actions enunciated in that court rule. *MCR 2.302(A)* provides:

> **(A) Availability of Discovery**.
>
> (1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.
>
> (2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.
>
> (3) Notwithstanding the provisions of this or any other rule, *discovery is not permitted* in actions in the small claims division of the district court or *in civil infraction actions*. [Emphasis added.]

In *Central Michigan Univ Supervisory-Technical Ass'n MEA/NEA v Central Michigan Univ Bd of Trustees, 223 Mich App 727, 730; 567 NW2d 696 (1997)*, this Court held that the "FOIA does not conflict with the court rules governing discovery, nor does it supplement or displace them." *Taylor, supra at 205*, citing *Central Michigan*. That case involved whether the plaintiff could seek information under the FOIA when it had already filed suit against the defendants. [2] *Central Michigan, supra at 729*. [*9] This Court opined that there existed no conflict between the court rules and the FOIA and the fact that a party may obtain information through

discovery does not forfeit that party's right to obtain the same information through the FOIA. *Id. at 730*. In a concurring opinion, Judge Holbrook opined that "the discovery rules and the FOIA represent 'two independent schemes for obtaining information[.]'" *Id. at 731* (HOLBROOK, JR., J., concurring).

> 2 The FOIA was amended by 1996 PA 553, effective March 31, 1997, to add the exemption currently listed under *MCL 15.243(1)(v)*. This Court decided *Central Michigan* under the preamendment version of the FOIA.

Accordingly, under the above authority, even though *MCR 2.302(A)(3)* precludes discovery in civil infraction actions, a party may nevertheless seek information related to such actions under the FOIA unless the FOIA specifically exempts the information sought from disclosure. The trial court thus erred by determining that plaintiff's FOIA request was properly denied because the information sought was not obtainable through discovery pursuant to *MCR 2.302(A)(3)*.

Defendant argues that it relied on *MCL 15.243(1)(d)* in conjunction with *MCL 600.223* and [*10] *MCR 2.302(A)(3)* to deny plaintiff's FOIA request. *MCL 15.243(1)(d)* provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (d) Records or information specifically described and exempted from disclosure by statute.

MCL 600.223 grants our Supreme Court "authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record[.]" Defendant apparently contends that because *MCL 600.223* authorized the Supreme Court to create the discovery preclusion articulated in *MCR 2.302(A)(3)*, records pertaining to civil infraction actions constitute "[r]ecords or information specifically described and exempted from disclosure by statute" as provided in *MCL 15.243(1)(d)*. However, the mere fact that *MCL 600.223* grants the Supreme Court authority to promulgate rules does not mean that the discovery preclusion in *MCR 2.302(A)(3)* "exempt[s] from disclosure by statute" information regarding civil infraction actions. Thus, defendant's argument, while creative, lacks legal merit.

Plaintiff next argues that the exemption under *MCL 15.243(1)(a)* is inapplicable because the requested information [*11] does not threaten any privacy interest.

MCL 15.243(1)(a) provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.

According to the language of the statute, the privacy exemption consists of two elements: (1) the information sought must be of a "personal nature," and (2) the disclosure of the information must amount to "a clearly unwarranted invasion of an individual's privacy." *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v Univ of Michigan, 481 Mich 657, 675; 753 NW2d 28 (2008)*.

Information is of a "personal nature" if it involves intimate, embarrassing, private, or confidential details of a person's life according to the moral standards and customs of the community. *Id. at 676*; *Detroit Free Press, Inc v City of Southfield, 269 Mich App 275, 282; 713 NW2d 28 (2005)*. Further, "[d]etermining whether the disclosure of such information would constitute a clearly unwarranted invasion of privacy requires a court to balance the public interest in disclosure against [*12] the interest the Legislature intended the exemption to protect." *Id*. "The only relevant public interest is the extent to which disclosure would serve the core purpose of the FOIA, which is to facilitate citizens' ability to be informed about the decisions and priorities of their government." *Id*. "This interest is best served through information about the workings of government or information concerning whether a public body is performing its core function." *Id*.

Defendant failed to provide any evidence, other than perfunctory assertions that plaintiff's FOIA request sought intimate, embarrassing, private, or confidential information. Defendant asserts that the information sought would interfere with law enforcement proceedings

and constitute an unwarranted invasion of privacy based on their belief that the information sought pertained to personal information of police officers and witnesses. Review of the request reveals that plaintiff requested information regarding a traffic stop and citation, whether the police officers involved are subject to a citation "quota," and whether the officers had ever been subject to any disciplinary proceedings or sued for official misconduct. The information [*13] sought regarding the officers pertains to their public employment and the information requested regarding plaintiff's brother pertains solely to his public traffic stop and civil infraction. The request does not seek intimate, embarrassing, confidential, or private details concerning the lives of plaintiff's brother or the police officers.

In addition, disclosure of the requested information would not amount to "a clearly unwarranted invasion of an individual's privacy." *Univ of Michigan, supra at 675*. Disclosure would serve the core purpose of the FOIA. As this Court has recognized, "[t]his interest is best served through information about the workings of government or information concerning whether a public body is performing its core function." *Detroit Free Press, supra at 282*. Plaintiff seeks information regarding what transpired immediately before, during, and after two Troy police officers stopped plaintiff's brother's vehicle and issued him a citation. The officers' reasons for stopping the vehicle, what occurred during the traffic stop, and any communications amongst the officers and the Troy Police Department shed light on the inner workings of the Troy Police Department and [*14] whether the department is fulfilling its duties to the public. Moreover, whether the officers accessed a Michigan Secretary of State database, whether they are subject to a citation "quota," and whether they have ever been subject to any disciplinary action or sued for official misconduct is indicative of whether Troy Police Department is performing its core function. As stated in *MCL 15.231(2)*, "all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees[.]" Therefore, disclosure of the information sought would not constitute a clearly unwarranted invasion of an individual's privacy and is not exempt under *MCL 15.243(1)(a)*.

Plaintiff also argues that the trial court erroneously determined that the information sought is exempt under *MCL 15.243(1)(b)*. That statute provides:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
>
> (i) Interfere with law enforcement [*15] proceedings.
>
> (ii) Deprive a person of the right to a fair trial or impartial administrative adjudication.
>
> (iii) Constitute an unwarranted invasion of personal privacy.
>
> (iv) Disclose the identity of a confidential source, or if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
>
> (v) Disclose law enforcement investigative techniques or procedures.
>
> (vi) Endanger the life or physical safety of law enforcement personnel.

The information that plaintiff sought cannot fairly be characterized as "[i]nvestigating records compiled for law enforcement purposes," as stated in *MCL 15.243(1)(b)*. For example, plaintiff requested the full names of the police officers, records indicating whether the officers were subject to a citation "quota," records indicating whether the officers accessed a Michigan Secretary of State database to determine whether the vehicle was insured, records pertaining to whether either of the officers has ever been subject to any discipline, a disciplinary proceeding, or sued for official misconduct, and voice, video, text, radio, or cellular transmissions or recordings [*16] that occurred immediately before, during, and after the traffic stop. Narrowly construing the exemption listed under *MCL 15.243(1)(b)*, as required pursuant to *Taylor, supra at 204-205*, and *Messenger*,

supra at 532, this information simply does not constitute investigating records compiled for law enforcement purposes. Therefore, defendant has not met its burden of demonstrating that the exemption under *MCL 15.243(1)(b)* is applicable, and the trial court erred by relying on this exemption in granting summary disposition for defendant.

Defendant contends that *MCL 15.243(1)(s)* provides an alternative basis for denying plaintiff's FOIA request. That provision states, in relevant part:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:
>
> * * *
>
> (v) Disclose operational instructions for law enforcement officers or agents.
>
> (vi) Reveal the contents of staff manuals provided for law enforcement officers or agents.
>
> (vii) Endanger the life [*17] or safety of law enforcement officers or agents or their families, relatives, children, parents, or those who furnish information to law enforcement departments or agencies.
>
> * * *
>
> (ix) Disclose personnel records of law enforcement agencies.

Defendant argues that the full names of the police officers are exempt under subsection (vii) because disclosure of the officers' full names would endanger their safety. Defendant also contends that any records indicating whether the officers are subject to guidelines, goals, or expectations regarding how many traffic citations they must issue within a certain time period is exempt under subsections (v) and (vi). Defendant further asserts that the disciplinary records of the officers are exempt from disclosure under subsection (ix). We note that Michigan courts have recognized that a law enforcement agency's records regarding internal investigations fall within the personnel records exemption under subsection (ix). *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff, 463 Mich 353, 365-367; 616 NW2d 677 (2000)*; *Herald Co, Inc v Kent Co Sheriff's Dep't, 261 Mich App 32, 37-38; 680 NW2d 529 (2004)*.

The information sought in paragraphs one, five, and six of [*18] plaintiff's FOIA request arguably falls under the exemptions on which defendant relies. "Once particular records qualify under a listed exemption for law enforcement agency records, the remaining inquiry is whether 'the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance.'" *Kent Co Deputy Sheriffs Ass'n, supra, 463 Mich at 365*, quoting *Kent Co Deputy Sheriffs Ass'n v Kent Co Sheriff, 238 Mich App 310, 331-332; 605 NW2d 363 (1999)*. The public body has the burden of proving that a particular record is exempt under the public-interest balancing test. *Landry v City of Dearborn, 259 Mich App 416, 420; 674 NW2d 697 (2003)*.

In its brief on appeal, defendant fails to advance any argument regarding why the public interest favors nondisclosure of the records under *MCL 15.243(1)(s)*. Defendant simply fails to properly address this issue. Because we conclude that the trial court erroneously granted summary disposition for defendant based on different exemptions, and failed to address defendant's argument regarding the applicability of *MCL 15.243(1)(s)*, we remand this case to the trial court to determine whether "the public interest in disclosure [*19] outweighs the public interest in nondisclosure in the particular instance" with respect to the information that plaintiff requested in paragraphs one, five, and six of his FOIA request.

Plaintiff next argues that he is entitled to reasonable fees, costs and disbursements pursuant to *MCL 15.240(6)* and punitive damages pursuant to *MCL 15.240(7)*. We review for an abuse of discretion a trial court's decision regarding an award of attorney fees to a prevailing party under the FOIA. *Messenger v Ingham Co Prosecutor, 232 Mich App 633, 647; 591 NW2d 393 (1998)*. Further, we review for clear error a trial court's findings regarding

whether a defendant acted arbitrarily and capriciously with respect to *MCL 15.240(7)*. *Meredith Corp v City of Flint, 256 Mich App 703, 717; 671 NW2d 101 (2003)*.

MCL 15.240(6) provides:

> If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, [*20] and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

Thus, "[t]he first criterion for an award of attorney fees in litigation under the FOIA is that a party 'prevails' in its assertion of the right to inspect, copy, or receive a copy of all or a portion of a public record." *Local Area Watch v City of Grand Rapids, 262 Mich App 136, 149; 683 NW2d 745 (2004)*. Further, "whether to award plaintiff reasonable attorney fees, costs, and disbursements when a party only partially prevails under the FOIA is entrusted to the sound discretion of the trial court." *Id. at 151*.

We direct the trial court to address on remand whether plaintiff is entitled to attorney fees, costs, and disbursements. Until the trial court reaches a decision on remand, it cannot be determined whether plaintiff is a prevailing party requiring an award of reasonable attorney fees, costs, and disbursements under *MCL 15.240(6)*. We note that even if the trial court determines on remand that the information sought in paragraphs one, five, and six of plaintiff's FOIA request is exempt from disclosure, plaintiff nevertheless partially prevailed in his FOIA action and an [*21] award of reasonable fees, costs, and disbursements would be within the trial court's discretion pursuant to *MCL 15.240(6)*. *Local Area Watch, supra at 151*.

Plaintiff also argues that he is entitled to punitive damages pursuant to *MCL 15.240(7)* because defendant's denial of his FOIA request was arbitrary and capricious. *MCL 15.240(7)* provides:

> If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of $ 500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.

Punitive damages in a FOIA case "may be assessed only if the court orders disclosure of a public record." *Michigan Council of Trout Unlimited v Dep't of Military Affairs, 213 Mich App 203, 221; 539 NW2d 745 (1995)*. Further, [*22] "[e]ven if defendant's refusal to disclose or provide the requested materials was a statutory violation, it was not necessarily arbitrary or capricious if defendant's decision to act was based on consideration of principles or circumstances and was reasonable, rather than whimsical." *Meredith Corp, supra at 717* (quotation marks and citations omitted).

Here, the trial court denied plaintiff's request for punitive damages under *MCL 15.240(7)* based on its erroneous determination that the information sought by plaintiff is not discoverable pursuant to *MCR 2.302(A)(3)* and its erroneous conclusion that the information is exempt from disclosure under *MCL 15.243(1)(b)*. Because we are reversing the trial court's determination with respect to paragraphs two, three, and four of plaintiff's FOIA request and have directed the trial court to determine on remand whether the information sought in paragraphs one, five, and six is exempt, we direct the trial court to address this issue on remand as well.

Plaintiff also argued that defendant waived its right to assert any FOIA exemptions in defense of this action by failing to assert them in its first responsive pleading. Plaintiff further contends that [*23] defendant waived its affirmative defenses by failing to "state the facts constituting" such defenses within the meaning of *MCR 2.111(F)(3)*. Although plaintiff asserted these arguments below, the trial court failed to address them.

Consequently they are not properly before this Court. *Polkton Charter Twp v Pellegroom, 265 Mich App 88, 95; 693 NW2d 170 (2005).* Considering our resolution of plaintiff's other arguments we decline to address this issue. Also in consideration of our resolution of the above issues, we need not address plaintiff's argument that the trial court denied him his right to due process by failing to provide him an opportunity to respond to the arguments that defendant raised in its response to plaintiff's motion for summary disposition. Courts should not address constitutional issues when a case can be decided on nonconstitutional grounds. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1, 468 Mich 722, 734; 664 NW2d 728 (2003), People v Riley, 465 Mich 442, 447; 636 NW2d 514 (2001).*

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Patrick M. Meter

/s/ Cynthia D. Stephens

Federal Cases Cited in Mr. Amberg's Brief

MILITARY AUDIT PROJECT FELICE D. COHEN MORTON H. HALPERIN, APPELLANTS v. WILLIAM CASEY, Director for Central Intelligence, et al .

No. 80-1110

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

656 F.2d 724*; *211 U.S. App. D.C. 135*; *1981 U.S. App. LEXIS 13659*; *7 Media L. Rep. 1708

3 February 1981, Argued
4 May 1981, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 75-2103).

COUNSEL: Allan S. Hoffman, Washington, D. C., with whom Robert A. Seefried, Washington, D. C., was on the brief for appellants.

Marc Richman, Atty. Dept. of Justice, Washington, D. C., with whom Alice Daniel, Asst. Atty. Gen., Charles F. C. Ruff, U. S. Atty., and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on the brief for appellees.

JUDGES: Before PECK *, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, MacKINNON and WILKEY, Circuit Judges.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by Circuit Judge WILKEY.

OPINION BY: WILKEY

OPINION

[*727] This case arises out of a Freedom of Information Act (FOIA or "the Act") request partially rejected by the government for reasons of national security. It is now before this court for the third time, already having commanded the attention of three district judges and outlasted three Directors of Central Intelligence. The appellants seek access to a wide variety of documents classified "Secret" regarding the Glomar Explorer project, ostensibly [**2] undertaken by the Central Intelligence Agency (CIA) for the purpose of raising a sunken Russian submarine from the floor of the Pacific Ocean. Having received almost two thousand pages of documentation in partial satisfaction of their request, the appellants now seek to compel the government to turn over much of what remains undisclosed. To justify withholding the requested documents the government has submitted to the district court extensive affidavits by high government officials detailing the nature of the material withheld and the implications for the national security should it be released. The district court found the affidavits sufficient to establish the government's right to withhold the documents under the Act, and therefore, without permitting further discovery by the appellants, granted summary judgment for the government. The present appeal followed.

[*728] The appellants' principal contention on appeal is that prior official disclosures by the government

about the Glomar Explorer, together with widespread but unofficial reports in the press, suggest both that much of the material still withheld is already in the public domain and that the release of what remains [**3] undisclosed would do little additional damage to the national security, if any. The government, on the other hand, contends that in spite of all the publicity the public may still not know even the true purpose of the Glomar Explorer mission, so that release of the withheld documents could pose a serious threat to the national security. The government argues that its affidavits are sufficient to establish that no genuine issues of material fact remain regarding whether the deleted documents are exempt from disclosure under the Freedom of Information Act. This case thus turns on the sufficiency of the government's affidavits to show that in the name of national security it is entitled to withhold the requested documents. Because these affidavits loom so large in the decision of this case, throughout this opinion we excerpt liberally from them as we consider their adequacy.

I. HISTORY OF THE CASE

The events which provide the motivation for the requests litigated here under the Freedom of Information Act are intriguing, involving, as they reportedly do, a covert CIA operation costing more than a third of a billion dollars, the billionaire recluse Howard Hughes, a sunken Soviet submarine [**4] carrying nuclear weaponry, the theft during a highly professional burglary of documents detailing the mission, and finally, tireless CIA efforts, for a time successful, to obtain the silence of many of the nation's most prestigious news organizations. For our purposes here, the briefest of summaries of what has been reported by the press but not officially confirmed by the government will suffice to provide the background necessary to an understanding of this case.

A. Background

According to reports widely publicized in 1975, [1] a Soviet submarine carrying nuclear missiles sunk sometime in 1968 in about three miles of water somewhere northwest of Hawaii. The location of the sunken craft was unknown to the Soviets, who tried unsuccessfully to find the remains. United States Navy sensors, however, managed to pinpoint the submarine's final resting place and an American electronics ship dispatched to the spot detected, scanned and photographed the sunken vessel.

1 The following summary is based principally on the reports which appeared in The New York Times; CIA Tried to Get Press to Hold Up Salvage Story, N.Y. Times, 20 Mar. 1975, at C31, col. 1, reprinted in Joint Appendix (hereinafter J.A.) at 9, and in Time magazine, The Great Submarine Snatch, Time, 31 Mar. 1975, at 20, reprinted in J.A. at 11.

[**5] Because when it went down the submarine took with it torpedoes, nuclear missiles, codes and code machines, communications gear and perhaps other equipment of intense interest to the American military and intelligence services, the Navy approached the CIA to develop the capability necessary to raise the vessel from its underwater grave for analysis by United States experts. The CIA, in turn, went to Hughes, who arranged for the construction of a 36,000-ton floating platform, the Hughes Glomar Explorer, and a huge submersible barge, designated the HMB-1 (an abbreviation for Hughes Mining Barge-1) to accompany it. Together these two vessels were designed to raise the Russian submarine under an elaborate cover story in which the Glomar Explorer's mission was said to be the recovery of manganese nodules from the ocean floor.

In June 1974 the Glomar Explorer and its companion barge sailed to the site of the sunken submarine and attempted to raise it by lowering giant claws to the bottom of the ocean, seizing the ship and winching it to the surface. Unfortunately, weakened by the corrosive influence of the deep and by the mishap that sent it to the bottom, the submarine broke in two [**6] about halfway to the surface. Only the forward third was [*729] successfully recovered; the remainder settled once more to the ocean floor. At this point, with the operation already having cost $ 350 million, arrangements were made to try again to lift from the bottom what still remained there.

But at about this time a mysterious burglary took place at a Hughes office in Los Angeles. Four or five armed men overwhelmed a guard, slipped past a sophisticated electronic alarm system and burned their way into a Hughes safe containing documents outlining the participation of the Hughes organization in the effort to raise the submarine. As a result the Los Angeles Times somehow came into the possession of incomplete and somewhat garbled information about the Glomar Explorer project and, on 8 February 1975, published what

it had learned.

Director William Colby and other CIA officials then scrambled to suppress the story. They met with temporary success: the New York Times, the Los Angeles Times, the Washington Post, the Washington Star, the three major television networks, the National Public Broadcasting System, Time magazine and Newsweek all agreed to "hold" the story at least [**7] until someone else published an account of the operation in exchange for briefings on the submarine raising efforts. But on 18 March 1975 columnist Jack Anderson decided to break the story and "the cat was out of the bag."

Or was it? Questions remain. As Time put it in its 31 March 1975 article:

> (T)here is the puzzle of why so many reporters for major newspapers, magazines and TV networks simultaneously stumbled upon the (Glomar Explorer project) trail. On the morning after, some journalists got the feeling that the CIA had actually been helpful all along in getting the story out, while at the same time it apparently tried to suppress the story. There are several theories .... The last theory goes off into the wild blue yonder, suggesting that raising a Soviet submarine was not (the project's) mission at all, but the supreme cover for a secret mission as yet safely secure. [2]

2 The Great Submarine Snatch, Time, 31 Mar. 1975, at 20, reprinted in J.A. at 11.

B. The FOIA Request and Ensuing Litigation

Three days after the Time story was published, on 3 April 1975, letters signed by Fritzi [**8] Cohen on behalf of the Military Audit Project were sent to the Department of Defense and to the Central Intelligence Agency requesting access under the Freedom of Information Act to "the contract and all other documents pertaining to the planning, design, construction, leasing, use and disposition of the Glomar Explorer, recently reported as used to recover the Soviet Submarine in the Pacific." [3] Invoking Exemptions 1 and 3 of the Freedom of Information Act (pertaining to classified records and documents exempted from disclosure by statute), [4] each agency was quick to reject the requests. [5] At the outset, neither agency was willing to confirm or to [*730] deny even the existence of such records. Both agencies stated that such an admission or denial could itself compromise national security. [6]

3 Letter from Fritzi Cohen to Department of Defense, OSD Public Affairs, Directorate, Freedom of Information (3 Apr. 1975), reprinted in J.A. at 16. A similar letter evidently was sent to the Central Intelligence Agency on the same date.

4 *5 U.S.C. § 552(b)(1), (3) (1976)*. Exemption 1 exempts from the operation of the Freedom of Information Act

> matters that are
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
>
> (B) are in fact properly classified pursuant to such Executive order;

Exemption 3 exempts matters that are

> specifically exempted from disclosure by statute ... provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

[**9]

5 Letter from Charles W. Hinkle, Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense for Public Affairs, to Fritzi Cohen (16 Apr. 1975), reprinted in J.A. at 19; Letter from Robert S. Young, Freedom of Information Coordinator, Central Intelligence Agency, to Fritzi Cohen (11 Apr. 1975), reprinted in J.A. at 17.

6 In support of its Exemption 1 claims each agency relied on Executive Order No. 11,652, 3 C.F.R. § 375 (1973) (superseded by Executive Order No. 12,065, 3 C.F.R. § 190 (1979), which went into effect on 1 Dec. 1978). Executive

Order No. 11,652 established the criteria then in effect for the classification of secret documents.

In support of its Exemption 3 claims each agency relied on section 102(d)(3) of the National Security Act of 1947, *50 U.S.C. § 403(d)(3) (1976)*. Section 102(d)(3) provides that the "Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Pursuant to section 102(d)(3), *50 U.S.C. § 403g* provides that "in order further to implement the proviso of *section 403(d)(3)* of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of section 654 of Title 5, and the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the agency ...."

[**10]

Cohen then pursued administrative appeals, but these also were denied by both agencies. [7] In October 1975 the Military Audit Project and Cohen, now joined by Mortin Halperin, requested reconsideration of these denials. [8] These requests were in turn denied, although by this time the CIA was at least willing to admit both that the Glomar Explorer belonged to the United States though not necessarily to the CIA and that a classified United States government contract provided evidence of that ownership. [9]

7 Letter from Joseph Laitin, Assistant Secretary of Defense, Public Affairs, to Fritzi Cohen (20 May 1975), reprinted in J.A. at 21; Letter from John F. Blake, Chairman, Information Review Committee, Central Intelligence Agency, to Fritzi Cohen (23 May 1975), reprinted in J.A. at 23.

8 Letter from William A. Dobrovir to Joseph Laitin and John Blake (7 Oct. 1975), reprinted in J.A. at 25.

9 Letter from John F. Blake, Chairman, Information Review Committee, Central Intelligence Agency, to William A. Dobrovir (12 Nov. 1975), reprinted in J.A. at 27.

[**11]

Unsatisfied, the Military Audit Project, joined by Cohen and Halperin individually, in December 1975 brought an action in the United States District Court for the District of Columbia to compel the production of

> the contract, and all other documents pertaining to the financial arrangements between or among the government of the United States, any agency thereof, Hughes Tool Co., Summa Corporation and Global Marine, Inc., or any of them, in particular such documents that reflect sums paid by the government of the United States or any agency thereof to any of the other entities named above, the profits earned by any of such other entities and any provisions for disposition by the government of the United States to any of the other named entities, with respect to the vessel "Glomar Explorer." [10]

10 Complaint, Military Audit Project v. Colby, No. 75-2103 (D.D.C., filed 13 Dec. 1975), reprinted in J.A. at 28-29.

Named as defendants were William Colby, who was then Director of Central Intelligence, the Central Intelligence Agency, and the Department of Defense. The complaint alleged that the [**12] Military Audit Project was an unincorporated association and a "person" within the meaning of the Freedom of Information Act. [11]

11 By written submission following oral argument we have been informed that the Military Audit Project was incorporated in the District of Columbia on 13 Oct. 1976 as a nonprofit organization. Letter from Stephen Daniel Keeffe, General Counsel, Military Audit Project, to Allan Hoffman (12 Feb. 1981) (submitted at the request of this court by counsel for the Military Audit Project, 13 Feb. 1981). The purpose of the organization is stated to be "the investigation of the expenditure of taxpayers' money as it relates to the maintenance of national security." Id. It is managed by a thirteen member Board of Directors. Appellant Felice (Fritzi) Cohen is its Executive Director. Id.

Under the Freedom of Information Act, the identity of the requester is immaterial; for

> example, there is no statutory bar to the military attache of the Soviet embassy filing FOIA requests for information from the CIA and the FBI on the same basis as a United States citizen. The only important limitations on the exercise of the rights provided by the Act arise from the nine exemptions. The fact that the FOIA is a liberal disclosure statute and that the identity of the requester is immaterial does not imply, however, that a nonexistent entity concocted out of thin air by the imagination of some single person can file a lawsuit in court and have it honored in the fictitious entity's name. Furthermore, the liberal disclosure policy behind the FOIA statute in no way alters a lawyer's obligations to know something about his client because what he says to the court in his pleadings and argument often implicitly are representations about his client's position and existence. Therefore, the nature of an entity suing under the FOIA is not without relevance, and the district court ought to satisfy itself as to the existence and organizational structure of unincorporated entities suing under the Act.

[**13]

[*731] The defendants continued to refuse to confirm or deny even the existence of the documents requested. Instead, they moved alternatively for a dismissal or for summary judgment; in support of these motions they submitted a very short affidavit by the Deputy Under Secretary for Management of the Department of State, Lawrence Eagleburger, and requested leave to submit two further affidavits in camera. [12] The district court denied the defendants' request to submit materials in camera on the basis of the Eagleburger affidavit alone, requiring the defendants first publicly to submit "(a)n adequate, complete affidavit justifying exemption ... reciting all pertinent facts short of those that reveal any fact which defendants believe is protected by the exemption claimed." [13]

> 12 Eagleburger's affidavit, after affirming his official position with the Department of State and his familiarity with the contents of the plaintiffs' complaint, contained only one sentence referring to the documents requested: "I am familiar with the facts and circumstances surrounding this case and can affirm that the information relevant to the United States Government case has been classified pursuant to Executive Order 11652, 3 C.F.R., Executive Order 11652 (1974 edition) on the ground that public disclosure would damage the national security, including the foreign relations of the United States." Affidavit of Lawrence S. Eagleburger, Deputy Under Secretary for Management, Department of State, Military Audit Project v. Colby, No. 75-2103 (D.D.C., sworn to 16 Jan. 1976), reprinted in J.A. at 31-32.

[**14]

> 13 Memorandum and Order, Military Audit Project v. Colby, No. 75-2103 (D.D.C., filed 5 Mar. 1976).

In response the defendants filed two additional affidavits, one by the CIA's Deputy Director for Science and Technology, Carl E. Duckett, and a second by the Assistant to the President for National Security Affairs, Brent Scowcroft. The Duckett affidavit stated that:

> Acknowledgment of the existence or nonexistence of the information requested could reasonably be expected to result in the compromise of important intelligence operations, significant scientific and technological developments relating to national security, and result in a disruption in foreign relations significantly affecting the national security.... If the CIA or DOD were responsible for the HUGHES GLOMAR EXPLORER Program, that fact itself would necessarily be classified because an official confirmation, in my judgment, would result in harm to the national security [14]

> 14 Affidavit of Carl E. Duckett, Deputy Director for Science and Technology of the Central Intelligence Agency, Military Audit Project v. Colby, No. 75-2103 (D.D.C., sworn to 19 Mar. 1976), reprinted in J.A. at 166-68.

[**15]

The Scowcroft affidavit went into somewhat greater detail about the project:

> In a document dated October 20, 1969, classified Top Secret, Executive Branch approval was given to the establishment of a classified United States Government

program to accomplish certain secret tasks in furtherance of national security objectives of the United States. A committee of the National Security Council (NSC) chaired by the Assistant to the President for National Security Affairs was assigned to supervision of the program. The program included the design, construction, operation, and use of a ship which came to be known as the HUGHES GLOMAR EXPLORER. United States Government documents produced in the course of executing the program were [*732] classified Top Secret or Secret pursuant to procedures and criteria of Executive Orders 10501 and 11652 based on determinations that disclosure of information concerning the program could cause exceptionally grave or serious damage to the national security ....

From the outset of the Program it was recognized that the revelation of the very existence of the Program and, specifically, the fact that the United States was the sponsor [**16] of the activity involving the HUGHES GLOMAR EXPLORER could provoke a foreign power to take countermeasures which would render the Program incapable of execution. Accordingly, it was decided that the United States Government should make arrangements with private corporations to provide a commercial base for the HUGHES GLOMAR EXPLORER undertaking. After several alternatives were considered, arrangements were made with the Hughes Tool Company to act as agent of the United States to sponsor the undertaking. This agreement evolved into a formal contractual relationship wherein the Hughes Tool Company and thereafter the Summa Corporation, its successor organization, undertook to carry out certain functions on behalf of the United States including holding bare record title to the HUGHES GLOMAR EXPLORER....

> For reasons unrelated to this case a committee of the NSC determined on 8 August 1975 that it had become necessary for the United States to acknowledge ownership of the HUGHES GLOMAR EXPLORER and to declassify certain portions of its contract with Summa Corporation and Global Marine, Inc. The NSC Committee directed that "no further facts" would be declassified and specifically [**17] directed that the fact of the involvement in the Program of any given United States Government Agency should not be disclosed. The Committee noted further "... a firm line would be drawn between the fact of Federal ownership and other matters relating to the Project." Those portions of documents which relate to the United States ownership and evidence the United States contractual relationship with Hughes Tool Corporation, Summa Corporation and Global Marine, Inc. have been declassified pursuant to the NSC Committee decision .... Official acknowledgment of the involvement of specific United States Government agencies would disclose the nature and purpose of the Program and could, in my judgment, severely damage the foreign relations and the national defense of the United States [15]

15 Affidavit of Brent Scowcroft, Assistant to the President for National Security Affairs, Military Audit Project v. Colby, No. 75-2103 (D.D.C., sworn to 19 Mar. 1976), reprinted in J.A. at 170-72.

After admitting that there had been a great deal of speculation in the press concerning the nature of the mission [**18] the Glomar Explorer was to carry out, the Scowcroft affidavit went on to describe why official confirmation of the involvement of the particular agencies in question was undesirable:

> While it is known and accepted that nations engage in secret activities, designed to promote their foreign and national defense policy interests,

> traditionally, and for sound practical reasons in the conduct of foreign affairs, governments do not officially acknowledge that they engage in such activities. In this context all nations are aware that they may be the objects of such operations and may even unofficially acknowledge this fact. No government, however, could tolerate the official acknowledgment by another government that such an operation has been conducted against it. When such official acknowledgment occurs, the nation that has been the object of such an operation must take some action in response. The nature of the retaliatory action taken by the offended nation will vary in proportion to the perceived offense. Depending on the nature and magnitude of the activity acknowledged, the offended nation may take strong measures ....
>
> [*733] Foreign countries who believe [**19] they would benefit by demeaning the United States would be able to use information about this Program to castigate the United States in an international forum. Fabrications or suggestions concerning our activities, which the United States would be unable to disprove, could be expected to develop from the disclosure of relatively limited information. The information sought in this case could be used as circumstantial evidence to substantiate false charges of United States interference in the affairs of other countries. This in turn could raise suspicions about and possibly endanger United States military and diplomatic personnel and businessmen overseas. [16]

16 Id. at 172-73.

Even after the Duckett and Scowcroft affidavits were submitted, however, the district court denied the defendants' motion for summary judgment, ordering instead an in camera proceeding in which the defendants would be required to produce an index of the documents covered by the request as well as the documents themselves, if any, and a document-by-document explanation of the harm to the national security release of the [**20] documents would entail. In addition, the defendants were ordered to produce witnesses capable of substantiating on their personal knowledge under oath on a transcript to be sealed the national security claims made in opposition to release. [17]

17 Memorandum and Order, Military Audit Project v. Colby, No. 75-2103 (D.D.C., filed 10 May 1976).

The defendants then requested relief from the order that they produce documents and an index in camera ; to comply, they claimed, would imply that they actually possessed such documents. In support of a renewed motion to dismiss, the defendants submitted yet another affidavit, this time by Director of Central Intelligence George Bush. [18] The Bush affidavit focused on the dangers of releasing information regarding the budget of the CIA:

18 Affidavit of George Bush, Director of Central Intelligence, Military Audit Project v. Bush, No. 75-2103 (D.D.C., sworn to 15 June 1976), reprinted in J.A. at 174-78.

[**21]

> It has been publicly disclosed that the annual CIA appropriation is contained in the annual appropriations to the Department of Defense, and that the funds involved are made available to the CIA under the transfer-of-appropriation provisions of the CIA Act of 1949. The annual CIA budget, however, is not now and never has been a matter of public knowledge. Neither have the details of that budget ever been matters of public knowledge. The non-disclosure of this information has a long record of approval by the Congress. For example, the CIA budget presentations have always been heard by the appropriate congressional committees in executive session. The resulting appropriations are not identified as such in any public document. Both the Senate and the House of Representatives have recently rejected, by substantial margins, legislation that would have

required, in one case, the publication of the aggregate budget for the Intelligence Community and, in the other case, publication of the CIA budget....

(A) demand for documents reflecting specific CIA expenditures, which is the nature of the demand stated in the complaint in this case, is even more difficult to accommodate, [**22] consistently with the need to protect intelligence activities and operations against disclosure, than a demand for the annual CIA budget figure. The nature and purpose of the intelligence projects or activities being funded could be deduced from knowledge of specific CIA expenditures. Moreover, if the disclosure of specific CIA expenditures could be compelled, a picture of the annual CIA budget would soon emerge.

Without admitting or denying the possession or custody of any documents of the kind described in the complaint in this case, it is obvious that, if CIA holds any [*734] such documents, they would reflect specific CIA expenditures, and it is my judgment that disclosure of any such documents would expose intelligence activities of a confidential nature [19]

19 Id. at 176-78.

On 30 June 1976 the district court once again denied the defendants' motion and set a date for an in camera proceeding. The district court refused to certify the question for an interlocutory appeal, and the defendants then brought to this court a petition for a writ of mandamus or prohibition, [**23] as well as an attempted appeal from the district court's ruling requiring an in camera proceeding. On 1 October 1976 in two per curiam orders this court denied the petition and dismissed the appeal. [20]

20 In re Bush, No. 76-1615 (D.C.Cir., filed 1 Oct. 1976); Military Audit Project v. Bush, No. 76-1624 (D.C.Cir., filed 1 Oct. 1976).

Upon remand to the district court, the defendants submitted in camera eight classified affidavits and presented the classified testimony of several unidentified witnesses. After hearing the in camera testimony and examining the classified affidavits, the district court on 20 October 1976 entered an order which states only that: "the complaint is dismissed for reasons stated in camera." [21]

21 Order, Military Audit Project v. Bush, No. 75-2103 (D.D.C., filed 20 Oct. 1976).

The case then came before [**24] this court for the second time, on an appeal by the plaintiffs from the decision of the district court. The plaintiff-appellants began by moving for "copies of affidavits filed ex parte by defendants-appellees and of a copy of a memorandum filed in camera by the district court." We denied this motion in a per curiam order with an accompanying memorandum issued on 14 January 1977. [22] The reason for this denial was our judgment that to compel service of the affidavits filed ex parte would be tantamount to granting the final relief sought by the appellants.

22 Memorandum and Order, Military Audit Project v. Bush, No. 76-2037 (D.C.Cir., filed 14 Jan. 1977), reprinted in J.A. at 182-88.

This court did find, however, that the appellants deserved a more specific explanation for the action of the district court upon which to base their appeal, because "the asserted exemptions for information concerning the identity of the agencies and the asserted exemptions for the contents of the requested documents total eight [**25] separate justifications, any one of which the District Court could have relied upon when dismissing the complaint." [23] As a result the appellants could not know the basis for the decision of the district court, leaving them in a position from which it would be difficult intelligently to argue an appeal. Concluding that "the District Court in this case should have endeavored to prepare a more informative opinion to be released to appellants and to the public; it should not have simply referred to "reasons stated in camera,' " [24] we disclosed that the holding of the district court: "in effect states (1) that the identity of the specific agencies involved is exempt under *5 U.S.C. § 552(b)(1)* and *(2)* that, whichever agencies were involved, the contents of the requested documents are exempt under the same section." [25]

23 Id. at 3, reprinted in J.A. at 185.
24 Id. at 4, reprinted in J.A. at 186.
25 Id. at 5, reprinted in J.A. at 187.

The appellants, now armed with an understanding of the reasons [**26] for the district court's ruling, were given forty days from the entry of our order in which to submit their briefs on appeal.

Then, on 8 June 1977, the defendants suddenly changed their position and moved to remand the action to the district court on the grounds that:

> It has now been determined that the fact that the Central Intelligence Agency, one of the defendants in this case, was involved in the Hughes Glomar Explorer Program may be made public. The District Court should have an opportunity to consider in the first instance what impact, [*735] if any, this fact has on the litigation. [26]

26 Appellees' Motion to Remand, Military Audit Project v. Bush, No. 76-2037 (D.C.Cir. 8 June 1977).

This change in the government's position apparently resulted from a shift in the perception of national security interests that occurred when the Carter administration took office. [27] Accordingly, this court ordered that the district court's dismissal of the complaint be vacated and remanded the case "for further proceedings pursuant to *Vaughn v. Rosen, 173 U.S. App. D.C. 187, 523 F.2d 1136* [**27] *(1975)*." [28] On remand when it became clear that the defendants intended to continue to resist disclosure of some of the requested documents, the district court judge disqualified himself from further proceedings in the case in view of his previous rulings in favor of the defendants' now-abandoned position.

27 In a letter to the district court, Assistant Attorney General Babcock of the Carter administration explained:

> In light of the passage of time, changing circumstances and the fact that a new Administration had taken office in the interim, the Chief of the Civil Division's Information and Privacy Section, early in 1977, requested the CIA to ascertain the views of the new Assistant to the President for National Security Affairs concerning the issue as to whether the fact of CIA's past involvement in the Glomar Explorer program still required protection from disclosure on national security grounds.
>
> After considering the matter, appropriate Executive Branch officials charged with responsibility for advising the President on national security matters determined that the disclosure at this time that the CIA had been involved in the Glomar program would not, in their judgment, damage the national security. That determination, of course, undercut the position previously asserted by the government that the fact of CIA involvement in the Glomar program could not be publicly disclosed.
>
> Letter from Barbara Allen Babcock, Assistant Attorney General, to the Honorable Gerhard A. Gesell (15 July 1977), reprinted in J.A. at 190-91.

[**28]

28 Order, Military Audit Project v. Bush, No. 76-2037 (D.C.Cir., filed 16 June 1977), reprinted in J.A. at 189.

The defendants then released about two thousand pages of materials within the scope of the plaintiffs' requests, although continuing to refuse to release certain information they considered still to be covered by Exemptions 1 and 3 of the Freedom of Information Act. At the same time the defendants filed an affidavit of a Contracting Officer in the Central Intelligence Agency's Directorate of Science and Technology, William S. Regan, in which the documents both those released and those withheld were described. [29]

29 Affidavit of William S. Regan, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 28 Sept. 1977), reprinted in J.A. at 192-200 (hereinafter cited as Regan Affidavit). The Regan Affidavit revealed that, in addition to the documents requested by the plaintiffs, the CIA had in its possession about 128,000 documents logged in accordance with the document security control systems established for the Glomar Explorer project. Id. at 6, reprinted in J.A. at 197. The affidavit also disclosed that the contractual documents created prior to February 1975 did not bear classification markings on their face because:

> As part of the extraordinary security procedures established for this Project, and in order to protect the commercial cover of the undertaking, an affirmative decision was made by a senior CIA official with classification authority who was responsible for establishing security for the HGE Project that normal classification markings would not be affixed to documents held by industrial contractors. Classification markings were not affixed to such documents because such markings would instantly reveal to any casual observer that these documents were, in fact, United States Government documents; and such disclosure would, of course, compromise the commercial cover nature of the arrangement. Nevertheless all documents, in the possession of the contractors, were controlled by contractor personnel who had requisite security clearances and who had been trained in established United States Government procedures for handling and storage of classified material.
>
> Id. at 8-9, reprinted in J.A. at 199-200.
>
> In addition to the Regan Affidavit, the defendants also filed an affidavit prepared by Deputy Assistant Secretary of Defense David O. Cooke, indicating that the Department of Defense had in its possession only one document fitting the description of the documents requested, and that that document was a duplicate of a CIA document listed in the Regan Affidavit. Affidavit of David O. Cooke, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 27 Jan. 1978), reprinted in J.A. at 214-15 (hereinafter cited as Cooke Affidavit).

[**29]

[*736] In March 1978 the defendants filed with the district court four affidavits justifying the continued exemption and deletion of the remaining material withheld. These were affidavits by Secretary of State Cyrus Vance, [30] Director of Central Intelligence Stansfield Turner, [31] the Director of Finance of the Central Intelligence Agency, Thomas B. Yale, [32] and the Associate Deputy Director of the Directorate of Science and Technology of the Central Intelligence Agency, Ernest J. Zellmer. [33] A month later, the Zellmer Affidavit was supplemented with a second affidavit in which the deleted information was divided into thirteen categories. [34]

30 Affidavit of Cyrus R. Vance, Military Audit Project v. CIA, No. 75-2103 (D.D.C., sworn to 2 Feb. 1978), reprinted in J.A. at 217-19 (hereinafter cited as Vance Affidavit).

31 Affidavit of Stansfield Turner, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 3 Mar. 1978), reprinted in J.A. at 229-36 (hereinafter cited as Turner Affidavit).

32 Affidavit of Thomas B. Yale, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 4 Mar. 1978), reprinted in J.A. at 237-43 (hereinafter cited as Yale Affidavit).

[**30]

33 Affidavit of Ernest J. Zellmer, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 23 Feb. 1978), reprinted in J.A. at 220-28 (hereinafter cited as First Zellmer Affidavit).

34 Supplemental Affidavit of Ernest J. Zellmer, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 4 Apr. 1978), reprinted in J.A. at 244-47 (hereinafter cited as Second Zellmer Affidavit).

After these affidavits were filed, however, the President promulgated an executive order [35] establishing new standards for the classification of government information. The defendants then reviewed the documents withheld to determine whether the withheld information was properly classified under the criteria of the new executive order. The defendants concluded that it was, and Zellmer submitted a third affidavit describing the reasons for the defendants' conclusions. [36]

35 Executive Order No. 12,065, 43 Fed.Reg. 28949, 3 C.F.R. § 190 (1979) (promulgated 3 July 1978 to go into effect 1 Dec. 1978), superseding Executive Order No. 11,652, 3 C.F.R. § 375 (1973).

[**31]

36 Third Affidavit of Ernest J. Zellmer, Military Audit Project v. Turner, No. 75-2103 (D.D.C., sworn to 4 Apr. 1979), reprinted in J.A. at 252-58 (hereinafter cited as Third Zellmer Affidavit).

It is the sufficiency of these eight affidavits, the Regan Affidavit, the Cooke Affidavit, the Vance Affidavit, the Turner Affidavit, the Yale Affidavit, and the three Zellmer Affidavits, which is the principal subject of this appeal. For on the basis of these affidavits

the defendants moved for summary judgment under FOIA Exemptions 1 and 3. In response, the plaintiffs noticed the depositions of Vance, Turner, Yale and Zellmer, but the district court granted a motion by the defendants for a protective order barring any further discovery by the plaintiffs. [37] After briefing and argument, the district court then granted summary judgment for the defendants. [38] After unsuccessfully moving for reconsideration, the plaintiffs brought this appeal.

37 Order, Military Audit Project v. Turner, No. 75-2103 (D.D.C., filed 16 May 1979), reprinted in J.A. at 266.

[**32]

38 Opinion and Order, Military Audit Project v. Colby, No. 75-2103 (D.D.C., filed 4 Oct. 1979), reprinted in J.A. at 267-70.

II. THE APPLICABLE LEGAL STANDARD

The operation of the Freedom of Information Act when classified documents are requested is by now familiar and well-established. This case thus does not require us to make new law but rather merely to apply the old.

We begin with Exemption 1, [39] which protects from disclosure under the Act [*737] "matters" "specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy" which "are in fact properly classified pursuant to such an Executive order." [40] Exemption 1 in this way establishes a specific exemption for defense and foreign policy secrets, and delegates to the President the power to establish the scope of that exemption by executive order.

39 Throughout this opinion we address the competing claims of the appellants and the government regarding Exemption 1 of the Freedom of Information Act, which protects classified information from disclosure. Much of the information at issue here, however, might also be exempt from disclosure under Exemption 3 which shields "matters" that are:

> specifically exempted from disclosure by statute (other than section 552b of this title), provided such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1976). Such a statute is *50 U.S.C. §§ 403(d)(3), 403g*. *Section 403(d)(3)* provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," while *section 403g* adds that:

> In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of *section 403(d) (3)* of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from ... the provisions of any other law which require(s) the publication or disclosure of the organization, functions, names, official titles, salaries, or number of personnel employed by the Agency ....

50 U.S.C. § 403g (1976). The Freedom of Information Act being an "other law" within the meaning of *§ 403g*, the CIA is plainly exempt from all the provisions of the FOIA as regards the classes of information described in that statute. We held in *Phillippi v. CIA, 178 U.S. App. D.C. 243, 546 F.2d 1009, 1015-16 n.14 (D.C.Cir.1976)*, that *section 403g* is not broad enough to cover the withholding by the agency of any information whatever, but exempts the agency only from any other statute "that would otherwise require the Agency to divulge information about its internal structure." Id. (emphasis added).

To summarize: (1) with regard to information about its "internal structure," the CIA is exempt from all the provisions of the FOIA; (2) with regard to information that might reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, the CIA is entitled to the protection of Exemption 3 of the FOIA, but is otherwise subject to the requirements of the FOIA; and (3) with regard to properly classified documents the CIA is entitled to the protection of Exemption 1 of the FOIA, but is

otherwise subject to the requirements of that statute.

All of the documents the CIA seeks to withhold in the case before us are classified; if properly classified, they then come within the scope of Exemption 1. Some of the categories of information withheld are not only classified, but also include information which could reasonably be expected to lead to the disclosure of intelligence sources and methods. In these cases Exemption 3 also applies and provides overlapping protection. In what follows, noting with the Phillippi court that "inquiries into the applicability of the two exemptions may tend to merge," Id., we will not distinguish further between Exemption 1 and Exemption 3, but will focus instead solely on Exemption 1.

[**33]

40 *5 U.S.C. § 552(b)(1) (1976)*.

The pertinent executive order now in force is Executive Order No. 12,065. [41] That order directs that the designation "Secret" shall apply only to "information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." [42] The order further directs that information may not be classified unless it concerns certain enumerated matters, including "intelligence activities, sources or methods" and "foreign relations or foreign activities of the United States." [43]

41 3 C.F.R. § 190 (1979). Executive Order No. 12,065 went into effect on 1 December 1978, superseding Executive Order No. 11,652, 3 C.F.R. § 375 (1973). At the time of the initial FOIA request in this case the documents at issue were classified under Executive Order No. 11,652. Since that time, however, the classification of these documents has been reevaluated under Executive Order No. 12,065. See Third Zellmer Affidavit. Therefore Executive Order No. 12,065 controls this litigation. *Lesar v. United States Dep't of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 479-81 (D.C.Cir.1980)*.

[**34]

42 Exec. Order No. 12,065, 3 C.F.R. § 190, sec. 1-103 (1976).

43 Id. at sec. 1-301(c)-(d).

The defendants assert that the information they have withheld from the appellants concerns such matters and has properly been classified "Secret." [44] The appellants do not contend that the documents they seek do not concern the "intelligence activities, [*738] sources or methods" [45] of the United States. The sole issue before us, then, is whether release of the requested documents "reasonably could be expected to cause serious damage to the national security."

44 See Part III infra.

45 Exec. Order No. 12,065, 3 C.F.R. § 190, sec. 1-103 (1976).

As in any FOIA case, we are required to "determine the matter de novo, and ... the burden is on the agency to sustain its action." [46] But the legislative history of the 1974 amendments to the Act nonetheless makes it clear that we "must recognize that the Executive [**35] departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of public disclosures of a particular classified record." [47] We are therefore required to "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." [48]

46 *5 U.S.C. § 552(a)(4)(B) (1976)*.

47 S.Rep.No. 93-1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S.Code Cong. & Admin.News 6267, 6290. In overriding President Ford's veto of the 1974 amendments to the FOIA, the legislature made it clear that it expected the judiciary to use its de novo review powers responsibly. In Senator Muskie's words: "I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides." 120 Cong.Rec. 36870 (1974) (Sen. Muskie).

48 S.Rep.No. 93-1200, 93d Cong., 2d Sess. 12 (1974), reprinted in 1974 U.S.Code Cong. & Admin.News 6290 (emphasis added).

[**36]

Furthermore, it is now well established that summary judgment on the basis of such agency affidavits is warranted if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld

logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. [49]

49 See, e. g., *Baez v. United States Dep't of Justice, 208 U.S. App. D.C. 199, 647 F.2d 1328 at 1335* (D.C.Cir. 25 Aug. 1980); *Lesar v. United States Dep't of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 481 (D.C.Cir.1980)*; *Hayden v. National Security Agency/Central Security Serv., 197 U.S. App. D.C. 224, 608 F.2d 1381, 1386-87 (D.C.Cir.1979)*, cert. denied, *446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790 (1980)*; *Ray v. Turner, 190 U.S. App. D.C. 290, 587 F.2d 1187, 1194-95 (D.C.Cir.1978)*; *Weissman v. CIA, 184 U.S. App. D.C. 117, 565 F.2d 692, 696-98 (D.C.Cir.1977)*.

Our task here is simply [**37] to review the decision of the trial court to satisfy ourselves that it is in accordance with these well-known standards.

III. THE SUFFICIENCY OF THE AFFIDAVITS FOR SUMMARY JUDGMENT

At issue in this case is whether the government's affidavits are sufficient to entitle it to summary judgment. Nine separate categories of information have been withheld; each category of nondisclosed information is separately contested on the basis of the government's affidavits and the appellants' responses. We therefore individually consider each category of information in turn. In so doing, we excerpt liberally from the affidavits whose sufficiency is questioned, for the convenience of those who, in requesting or responding to requests for information under the Act, may be guided by our decision. We address the categories in question in the order in which they were discussed in the briefs of the parties, not necessarily in the order of their importance.

A. Names, Initials, Pseudonyms, and Official Titles of CIA Personnel Not Publicly Known as Such [50]

50 This category of information was given the letter "A" in the Second Zellmer Affidavit.

[**38]

The appellants do not contest the defendants' refusal to release the identities of CIA employees whose connection with the CIA has not been publicly disclosed. [51] The appellants complain, however, that "it is not clear from defendants' submissions that the CIA affiliation of all personnel whose identities [*739] are being withheld has not heretofore been made public." [52]

51 Brief for Appellants at 31.

52 Id.

In response, the government has reaffirmed to us the assertion of the First Zellmer Affidavit that "(t)he names of CIA employees were deleted since the Agency does not disclose the identity and affiliation of those employees who do not come into public view in the course of their duties." [53] The government accordingly informs us that none of the names deleted were the names of CIA employees who have come into the public view in the course of their duties. [54] Thus this category of information is no longer at issue on appeal, because no such information has in fact been withheld.

53 First Zellmer Affidavit at 2, reprinted in J.A. at 221.

[**39]

54 Brief for Appellees at 38.

B. Identities of Corporations Other than Hughes Tool Company, Summa Corporation and Global Marine, Inc. [55]

55 This category of information was given the letter "D" in the Second Zellmer Affidavit.

The government's reasons for its deletions in this category were set forth in the First Zellmer Affidavit:

> The collection of foreign intelligence is increasingly dependent on sophisticated technology and the development of technological systems. The success of a technological intelligence collection device is in turn dependent on the extent of the secrecy that surrounds its characteristics and its deployment. In most cases, the technological research, development and production is the function of private industry in the United States.... While it has been determined that the participation in this Project by Summa Corporation, Hughes Tool Company and Global Marine, Inc. need no [**40] longer be concealed for reasons of national security, it is, in my judgment, still essential that the involvement of other corporations and entities and their

> employees not be disclosed.... If the CIA was (sic) precluded from entering or honoring confidential agreements for the production of covert nondomestic uses of technological intelligence gathering devices an extremely valuable means of gathering intelligence would be lost. The disclosure of the names of organizations and their employees who entered into such confidential agreements with the CIA, in connection with the HGE Project, would almost certainly impact negatively on the ability of the CIA to obtain the assistance of such entities and individuals in similar ventures in the future. Disclosure of these names would thrust the identified parties into public attention and would almost certainly cause them possible financial loss because many of the entities involved conduct business abroad. A disclosure that these entities had been engaged with the CIA in an intelligence operation could be harmful to their foreign business and possibly affect the safety of those of their employees who travel abroad. [56]

56 First Zellmer Affidavit at 4-6, reprinted in J.A. at 223-25.

[**41]

These allegations are inherently plausible; the difficulties an American concern doing business in some localities abroad could face once branded as a CIA "collaborator" are plain.

Nonetheless, the appellants contend that because the CIA has revealed the identities of some of the corporations involved in the Glomar Explorer project, it must reveal the identities of all. In particular, the appellants point to the government's disclosure of its involvement in the Glomar Explorer project with Hughes Tool Co., Summa Corp., and Global Marine, Inc., as well as the additional revelations apparently made by R. Curtis Crooke, a vice-president of Global Marine, Inc., while being deposed in a Los Angeles tax case that arose when Los Angeles attempted to tax the Glomar Explorer. In response to questions to which the government's tax counsel interposed no objections, Mr. Crooke identified Mechanics Research, Inc., Minneapolis-Honeywell, General Motors, Western Deer, Nordberg [*740] Engines, General Electric, Cooper-Bessemer, Fag Bearings (Germany), Sun Shipbuilding and Dry Dock Co., and Lockheed Corp. as having been contractors on the Glomar Explorer project. [57] The appellants argue that [**42] these revelations are tantamount to an admission by the government that the national security does not require that the identity of the firms with which the CIA does business be kept secret. [58]

57 Brief for Appellants at 33-35.

58 Id. at 35.

In further support of this argument the appellants suggest that these intended and perhaps unintended disclosures provide us with an opportunity to test the proposition that adverse consequences of the kind alleged in the First Zellmer Affidavit occur as a result of the release of the identities of participants in CIA projects. The appellants imply that the government's failure to allege that any concrete adverse consequences resulted from the disclosure of the participation of the companies just mentioned strongly suggests that there was no such harm. In their view: "If exposure of the prime contractors' participation in this CIA project did not have these adverse effects, it is impossible to conclude on the basis of the hypotheticals in defendants' submissions [**43] that revelation at this late date of the identities of other contractors could reasonably be expected to have such effects."

We find appellants' argument unpersuasive. The contractors on the Glomar Explorer project were given assurances of secrecy [59] and it is simply a matter of common sense that companies particularly companies doing business abroad would desire that their connections with the CIA be kept secret, if only to protect the personal security of their employees. If the CIA cannot be counted upon to keep the identity of its contractors secret when it has given assurances it will do so, potential contractors may either demand higher fees or refuse to do business with the CIA altogether. The fact that under the press of circumstances the CIA was forced to reveal its relationship with Hughes Tool Co., Summa Corp., and Global Marine, Inc., does not contradict this conclusion. It is worth noting that when the National Security Council declassified the fact that these companies had participated in the project it also determined that "no further facts" would be declassified. [60] Moreover, the Council's conclusion has since been reinforced by more

recent determinations that [**44] this information cannot be disclosed without compromising national security. [61]

59 The contract between the United States government, "the Sponsor," and Hughes Tool, the "Agent," for example, provided that: "Sponsor further agrees to utilize its best efforts to prevent any publicity from this program and its mission redounding against Agent." Reply Brief of Appellants at 14.

60 Affidavit of Brent Scowcroft, Assistant to the President for National Security Affairs, at 3, Military Audit Project v. Colby, No. 75-2103 (D.D.C., sworn to 19 Mar. 1976), reprinted in J.A. at 171.

61 See First Zellmer Affidavit at 4-6, reprinted in J.A. at 223-25; Third Zellmer Affidavit at 4-5, reprinted in J.A. at 255-56.

If the CIA could guarantee perfect security to its secret contractors it might well be able to entice more companies into doing business with it. Unfortunately, a contractor must consider the possibility that leaks may occur. But it is one thing for a company to assume the risks of unavoidable [**45] or inadvertent leaks and quite another to assume the risk that a stray Freedom of Information Act request will cause the CIA to reveal the link between the company and the Agency. The latter is a risk that need not be borne, and for the reasons set forth in the First Zellmer Affidavit, should not be borne.

We therefore must reject the appellants' suggestion that in order to establish that Exemption 1 protects the identity of CIA contractors whose connections with the Agency are still secret, the CIA must allege that specific harms have materialized as a result of earlier revelations. First, it is apparent that the extent to which the personnel employed by these companies have [*741] been subjected to augmented hazards abroad specifically because of past revelations would be hard to prove in a court of law no matter how real the dangers may be. But more importantly, the extent of actual injury flowing from the prior revelations by the CIA in this case is not critical to an evaluation of the plausibility of the allegations of the First Zellmer Affidavit. The key assertion of the First Zellmer Affidavit is that revelation of the identity of the CIA's secret contractors would [**46] "impact negatively on the ability of the CIA to obtain the assistance of such entities and individuals in similar ventures in the future." [62]

62 First Zellmer Affidavit at 6, reprinted in J.A. at 224-25.

This assertion is based on the entirely plausible proposition that secret CIA contractors seek to avoid assuming the risk that their connection with the Agency will be disclosed. That the threatened harm failed to materialize after any one particular disclosure does not prove that the risk is insignificant, and will not be likely to allay the insecurity felt by potential contractors. Thus, even if the appellants were somehow able to show that Hughes Tool Co., Summa Corp., and Global Marine, Inc., suffered no adverse consequences whatever from the disclosure of their participation in the Glomar Explorer project, that showing would not contradict the allegations of the First Zellmer Affidavit. The allegations of the First Zellmer Affidavit would be contradicted only by a showing that potential secret [**47] CIA contractors would not be dissuaded from participation in future CIA projects if they knew their identity would be revealed should it be the target of a Freedom of Information Act request.

The First Zellmer Affidavit claims to the contrary and is entitled to substantial weight. [63] In making this judgment the CIA is operating within the area of its expertise regarding the concerns of potential sources of technological and scientific assistance. Its assertions in the First Zellmer Affidavit are contradicted nowhere in the record. We affirm the district court's conclusion that summary judgment should be granted the defendants regarding this category of information.

63 E. g., *Hayden v. National Security Agency/Central Security Serv., 197 U.S. App. D.C. 224, 608 F.2d 1381, 1388 (D.C.Cir.1979)*, cert. denied, *446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790 (1980)*.

C. Information or Technology Which Would Reveal the Purpose of the Glomar Explorer Project [64]

64 This category of information was designated by the letter "F" in the Second Zellmer Affidavit.

[**48]

In the Second Zellmer Affidavit the defendants indicate that they rely on the Vance Affidavit to establish their right to withhold information in this category. [65] In its most pertinent part the Vance Affidavit stated that:

65 Second Zellmer Affidavit at 3, reprinted in J.A. at 246.

> To the best of my knowledge the United States Government has acknowledged only that the GLOMAR EXPLORER was owned by the United States, that it was on a mission related to the national security and, more recently, that the Central Intelligence Agency was involved in the program. I am aware of the numerous press reports concerning the purpose of the program and the identity of other governments that may have been involved. I nonetheless believe that any confirmation or denial of these reports, or the public disclosure by the United States Government of the purpose of the program ... could reasonably be expected to cause serious damage to the national security of the United States.
>
> In international affairs, [**49] one deals with intangibles and uncertainties. No one can predict with certainty what damage would flow from public disclosure of further official information about the GLOMAR program, but it is my judgment, shared by other senior officials in the Department, that such disclosures could reasonably be expected to cause serious damage to our national security.
>
> [*742] Even to speculate publicly about specific consequences that might flow from such disclosures would, in all likelihood, be damaging, as other governments might feel constrained to react to such speculation by comments or measures. [66]

66 Vance Affidavit at 2-3, reprinted in J.A. at 218-19.

The appellants argue, however, that the precise purpose of the Glomar Explorer project has already been revealed by both official and unofficial disclosures. They claim that: "the fact that the purpose of the Glomar Explorer program was to raise a sunken Russian submarine from the floor of the Pacific is so notorious that the defendants' rationale for withholding information which would reveal that fact cannot be given conclusive [**50] weight." [67] To buttress their claim the appellants refer to three official or semiofficial publications. First, they refer to a publication of the Senate Committee on Interior and Insular Affairs concerning the prospects for mining the ocean floor for minerals. [68] The publication contains the following summary concerning the Glomar Explorer:

67 Brief for Appellants at 37.

68 Congressional Research Service, Ocean Manganese Nodules, Committee on Interior and Insular Affairs, United States Senate, 94th Cong., 2d Sess. (2d ed. 1976), reprinted in part in J.A. at 33.

> In view of recent events, a U.S. firm that bears special mention with regard to the development of deep sea mining technology is the Summa Corporation owned by the billionaire recluse Howard Hughes. In 1968, a Russian diesel-powered submarine carrying torpedos and missiles armed with nuclear warheads sank about 750 miles northwest of Hawaii. The ship broke up as it sank to the ocean floor at a depth of 16,000 feet. Evidently, [**51] the Russian navy did not know the exact location of the mishap although U.S. listening devices had pinpointed the ship's location with accuracy. The U.S. Navy and Central Intelligence Agency (CIA) recognized this as a rare opportunity to gain valuable information about Soviet codes and nuclear capabilities. However, the means of retrieving the remains of the submarine were lacking. The CIA apparently provided the incentive for Howard Hughes to build the 618-foot, 36,000-ton Glomar Explorer, which was widely advertised as a deep seabed mining ship, with the recovery of the submarine in mind. In any event, deep seabed mining made a good cover for the secret activities of the CIA to recover the submarine. Consequently, the CIA became the owner and primary impetus for the development of the specialized deep sea recovery technology

through Summa Corporation, beginning about 1970. [69]

69 Id. at 32 (footnotes omitted), reprinted in J.A. at 34.

Second, the appellants point to a National Science Foundation "Memorandum to Science Writers and Editors" dated 24 November 1976 and signed by Ralph Kazarian, [**52] the Deputy Head of the Public Information Branch of the National Science Foundation. The Memorandum refers to a National Science Foundation study of the feasibility of "converting and operating the ship Glomar Explorer for deep sea scientific research." [70] The Glomar Explorer is referred to in the following words:

70 Memorandum to Science Writers and Editors from Ralph Kazarian, Deputy Head, Public Information Branch, National Science Foundation (24 Nov. 1976), reprinted in J.A. at 181.

> The 610-foot Explorer, built with U.S. Government funds, was unsuccessfully offered for lease in early 1976. The uncertainty of its final disposition and the decision to place it in mothballs has made recent news. Public attention was first drawn to the ship in 1974 when it was used in an attempt to lift a submarine from the floor of the Pacific Ocean. [71]

71 Id.

Third, and finally, the appellants point to the French edition [**53] of a book written by former CIA director William Colby describing his career with the CIA. Colby served as Director of Central Intelligence at the [*743] time of the Glomar Explorer's mission and was formerly a defendant in this suit. In the French edition of his book Colby wrote:

> A deep-sea exploratory submarine, built under cover of Howard Hughes's Summa Corporation, the Glomar, had been taken on sea trials in the spring of 1974. Represented to the world as a daring experiment by Howard Hughes in the possibility of mining manganese nodules from the depths of the ocean, it started sailing in the summer. In fact, its mission was to recover a Soviet submarine stranded some 16,500 feet deep at the bottom of the Pacific. The security of the project and its cover were a dazzling success. So much so that a Soviet ship, which had come to the area on a reconnaissance mission at the very moment when the Glomar was attempting to bring up the submarine, sailed away after a few days without its crew having noticed anything suspicious. But the refloating itself was less satisfactory. At a depth of 10,000 feet, the Glomar underwent some damage. The Soviet submarine itself [**54] was broken into two pieces and only the forepart about one-third of the ship was eventually brought back to the surface, while the aft fell to the bottom of the sea with its nuclear missiles, its guiding apparatus, its transmission equipment, its codes, in other words with all the things the CIA had hoped to recover through this unprecedented operation. [72]

72 W. Colby, 30 Ans de Cia 331-35 (Uncontroverted translation submitted by appellants), reprinted in J.A. at 206-10.

Taken together with the unofficial revelations in the press, the appellants suggest that these three rather detailed revelations, two unquestionably from government sources and one from a now-retired but formerly highly-placed official, are "tantamount to an official acknowledgement that the stories were substantially accurate." [73]

73 Brief for Appellants at 40.

As for the technology used in the Glomar Explorer project, the appellants point to [**55] a descriptive brochure prepared by the General Services Administration in 1976 entitled "the Hughes Glomar Explorer Deep Ocean Working Vessel Technical Description and Specification." [74] That document reveals in some considerable detail the capabilities of the Glomar Explorer, in particular that it can lift an object weighing

up to 8.5 million pounds from a depth of up to 17-thousand feet at a rate of at least six feet per minute while dynamically maintaining its position within forty feet of a point fixed on the ocean floor. In the view of the appellants, "this incredibly detailed document belies the notion that further revelations of the Glomar Explorer's technology would disclose anything about the purpose of its mission which cannot be deduced from information released by the government years ago." [75]

74 Reprinted in part in J.A. at 38.
75 Brief for Appellants at 45.

In sum, the appellants argue that the government already has disclosed the purpose of the Glomar Explorer project, as well as [**56] the technology with which it was carried out. With nothing left to hide, the government is no longer entitled to refuse to provide the appellants with the documents they have requested concerning the technology and purpose of the Glomar Explorer project.

The government responds by claiming that in fact the government has not officially confirmed the purpose of the Glomar Explorer project. First, the government dismisses the Senate Committee report on Ocean Manganese Nodules and the National Science Foundation brochure as being on a par with other unofficial press reports concerning the Glomar Explorer project: the government characterizes the Senate report as "nothing more than a compilation of speculation from non-governmental sources," [76] and the National Science Foundation brochure as a "passing reference in a memorandum from an agency not connected in any way with the Glomar Explorer project, and which apparently was based on [*744] reports in the news media." [77] Second, the statements in the French edition of Colby's book are described by the government as "not an official governmental pronouncement" [78] because Colby was not an agency official at the time the book was [**57] published. In addition, the government informs us that the CIA did not clear the French version before its publication in France. [79] Finally, with regard to the General Services Administration brochure about the Glomar Explorer, the government notes that "the brochure simply describes the equipment presently installed on the Explorer; it does not necessarily reveal what technological equipment is discussed in the documents released (with deletions) to plaintiffs or what was on the ship when it was performing its sensitive, intelligence-gathering mission." [80]

76 Brief for Appellees at 42.
77 Id. at 43.
78 Id.
79 Id. at 43 n.20.
80 Id. at 46.

The government's argument, then, is that there have in fact been no authoritative, official disclosures of the purpose and technology of the Glomar Explorer project, whatever speculation there may have been in the news media and in the publications of government agencies not responsible for the project. In effect, the government argues [**58] it still has something to hide; the reported purpose of the Glomar Explorer's mission may well be notorious, but, the government implicitly suggests, its actual purpose may well still be a secret, or, at the very least, unresolved doubt may still remain in the minds of the United States' potential and actual adversaries as to the true purpose of the mission.

What, then, are we to make of the government's claims and the appellants' response? Certainly, based on information publicly available from official sources, it seems undeniable that the Glomar Explorer project did involve the use of a specially designed vessel capable of precisely positioning itself over a given location and then deploying an underwater work platform from which a 17-thousand-foot tapered pipe string could be lowered to the ocean floor. We do not know what other abilities it may have had.

At different times two explanations have been provided for the development of this vessel. At first, the world was led to believe that the ship was designed to mine the seabed for manganese nodules. Later, the story changed and the world was led to believe that the purpose of the vessel was to raise a sunken Soviet submarine. [**59] Apparently, a vessel with the capabilities of the Glomar Explorer plausibly could be used for either of these two quite different purposes. If so, it does not take much imagination to speculate about other conceivable uses to which such a capacity could be put. For example, a vessel of this type perhaps could be used to tap a communications cable traversing the ocean floor for the purpose of intercepting communications carried by that cable. Such a vessel perhaps could install or repair some type of permanent subsea installation which might be used to monitor the comings and goings of ships and submarines. Or, perhaps such a ship could be used to

construct the underwater equivalent of a missile silo.

What should be obvious is that if it is both plausible that the Glomar Explorer was designed to mine the seabed and at the same time also plausible that the Glomar Explorer was designed to raise a Russian submarine, it is plausible that the Glomar Explorer was in fact designed to perform yet some still-secret third function. Someday, when the story is safe to tell, we may discover, in the words of Time Magazine, "that raising a Soviet submarine was not (the Glomar Explorer's) mission [**60] at all, but the supreme cover for a secret mission as yet safely secure." [81]

81 The Great Submarine Snatch, TIME, 31 March 1975, at 20, reprinted in J.A. at 15.

And even if the true purpose of the mission was in fact to raise a submarine from the floor of the ocean, there may be some advantage in leaving the Soviet intelligence [*745] agencies with lingering doubts whether some other purpose motivated the project. Whatever the truth may be, it remains either unrevealed or unconfirmed. [82] We cannot assume, as the appellants would have us, that the CIA has nothing left to hide. To the contrary, the record before us suggests either that the CIA still has something to hide or that it wishes to hide from our adversaries the fact that it has nothing to hide.

82 We cannot credit the passage in the French edition of Colby's book as an official confirmation. If we view this event from the point of view of an espionage analyst working for an adversary of the United States, it might seem passing strange that Colby, a former Director of Central Intelligence, should put in a manuscript submitted to a New York publisher information that would reveal anything important and hitherto undisclosed, and that this information should be cleansed from the manuscript by the CIA, but only after publication in a French version. Looking at this event rather quizzically, a foreign analyst might suspect that Colby's lapse was not a lapse at all. In fact, maybe it was not. Without official confirmation, a foreign intelligence organization could not be sure.

[**61]

The key premise on which the appellants base their argument that "the cat is already out of the bag" is unsupported by the record and contrary to the government's affidavits. The government's affidavits are entitled to substantial weight. There is no indication of bad faith on the government's part in the record; to the contrary, there is every indication that the government has attempted to comply with the appellants' requests to the maximum extent consistent with national security by releasing, for example, over two thousand pages of documents in this sensitive area.

The affidavits supplied by the government provide an understandable and plausible basis for the government's Exemption 1 claims. In Baez v. Department of Justice, [83] this court stated that "if the description in the affidavits demonstrates that the information logically falls within the claimed exemption and if the information is neither controverted by contrary evidence in the record nor by evidence of agency bad faith, then summary judgment for the government is warranted." [84] The appellants in this case have shown neither "contrary evidence" nor "bad faith." We therefore affirm the district court's conclusion [**62] that this category of information is exempt from disclosure under the Freedom of Information Act.

83 *208 U.S. App. D.C. 199, 647 F.2d 1328* (D.C.Cir., 1980).
84 *Id., at 1335*.

D. Dates on Which Certain Glomar Explorer Activities Were Conducted [85]

85 This category of information was referred to by the letter "G" in the Second Zellmer Affidavit.

The government's reasons for refusing to disclose this information are contained in part in the First Zellmer Affidavit:

> Certain dates, if disclosed, will reveal the CIA's method of covert funding of an intelligence operation by pinpointing specific times when substantial amounts of money were transferred from the federal government to the contractors. These dates, if revealed, could lead to the disclosure of the financial institutions which were involved and would thus [**63] disclose the CIA's method of covert funding. (See affidavit of Mr. Yale.)

The other instances in which dates were

> deleted were in the Program Master Schedule in Contract No. S-GM-4000 and further operational schedules dates in Contract HU-0900. The revelation of these programs and schedules for deployment of the ship for testing and operating would set forth specific locations of the ship at given dates, and indicate details of technical and operational capabilities bearing on the purpose of the mission. [86]

86 First Zellmer Affidavit at 6-7, reprinted in J.A. at 225-26.

The Yale Affidavit to which the First Zellmer Affidavit refers is quite detailed and too lengthy to reprint in full here. But it is worth excerpting the most material portions:

> [*746] Without secrecy in the attendant funding there is no chance that the secrecy of programs themselves can be maintained. Knowing the direction and volume of money flow can be every bit as revealing as knowing the commitment of manpower or hardware to a particular program. Knowledge of the fact that a certain dollar figure [**64] is being expended pursuant to a contract with a certain corporation, or division of a corporation, is often enough to reveal the nature of the project being undertaken. By way of example drawn from the circumstances of this litigation, it can be readily seen that public disclosure of the fact that the United States Government was engaged in a contract with a company by the name of Global Marine, Inc., or that large amounts of "drill string" were being purchased on behalf of the United States Government, would quickly lead to discovery and disclosure of the project itself.
>
> What may not be as readily seen, or what might be lost sight of in view of the limited disclosure regarding the Glomar Explorer Project that has taken place, is that the methods and procedures employed in accomplishing expenditures without government attribution must be safeguarded as well as the objects of these expenditures. The significance of this point is that it involves, not the success of a single secret project, but the success of all such projects. When a program is undertaken, the success of which depends on there being no attribution of any facet of the program to the United States Government, [**65] funds in support of the program must be moved in a manner such that their movement cannot be traced to their actual origin, i. e., the Treasury of the United States.... in order not to draw attention to the fact that something extraordinary is occurring, normal commercial practice must be employed as far as possible. Security procedures normally associated with the handling of "classified" information by the Government cannot be employed in the commercial world without drawing attention to the fact that it is a Government transaction, which is obviously self-defeating. Therefore, the security of the requisite financial transactions is made to depend on their being indistinguishable from the thousands of ordinary transactions with which they are enmeshed. In effect, the sensitive transactions are lost against the background of normal commercial traffic, and the ability to follow the trail of these sensitive transactions is possessed by only a few witting individuals who participated in this process. In the instant case, for the reasons set forth above, payments of the sums prescribed in the contracts were not made directly from the United States Government to the contractors. Rather, [**66] several intermediaries, individual and institutional, were used to conceal the true source of funds. While steps are thus taken to break the payor-payee chain, the chain of transactions, including the identities of the intermediaries used, could be laid bare by matching dates and amounts paid against the record of the

payee contractor....

> If the records in this case were released in their entirety, any person gaining access to them could determine the precise times at which particular amounts were paid and thus discover the sensitive channels used in these transactions. The records would identify a named bank as the depository of the Hughes Tool Company. The pertinent bank records are accessible to both bank employees and employees of the bank regulatory agencies, who, knowing what they were looking for, could identify the particular intermediary who effected the payment. Thus, in effect, a key to unlocking some very sensitive information would be placed in the hands of individuals not authorized to receive such information and over whom there is no control from a national security standpoint....
>
> ... The trail of financial transactions could also surface other [**67] CIA sponsored transactions, past or present. At this point the damage to operations of the Central Intelligence Agency would be difficult, or impossible, to contain.... [*747] These funding arrangements have not been used for the "Glomar Explorer" program alone. Financial trails associated with these financial transactions could lead to the identification of sensitive operations of the Central Intelligence Agency other than the one which is the subject of this lawsuit. [87]

87 Yale Affidavit at 2-6, reprinted in J.A. at 238-42.

The appellants' response to the detailed explanation provided in the Yale Affidavit only a portion of which was excerpted here amounts to a little more than speculation and conjecture. They argue once again, now in a different context, that the information the CIA seeks to withhold is in fact already in the public domain because the identity of the Hughes Tool Company's bank was not concealed at the time of the Glomar Explorer project. Therefore, they claim, disclosure of the information they seek would add nothing to the ability of bank or regulatory agency [**68] employees to uncover the secret transactions involved.

To say the least, this argument is implausible. It is public knowledge that the Hughes Tool Company was engaged in a secret operation which required that secret financial transactions be mixed with the usual transactions connected with the company's ordinary commercial business. But sorting from among all the myriad credits and debits charged to the Hughes Tool Company's accounts those that are related to the company's secret operations undoubtedly presents the intelligence analyst with a staggering task unless he has more information at his disposal.

As the Yale Affidavit reveals, the CIA relies on the large number of normal transactions to protect the secrecy of the few secret transactions occurring at the same time. It is a matter of simple common sense that the intelligence analyst's task is made simpler if he knows at the outset on which dates secret transactions took place. He then knows that transactions occurring on other dates were normal commercial operations he can ignore. With enough dates and enough transactions an analyst could begin to piece together a set of probabilities that certain transactions involved [**69] covert operations. Together with information obtained from other sources, or perhaps by itself, this information might be enough to crack the system used by the Agency to shield its secret financial dealings from view.

Even without the assertions of the Yale Affidavit, made by an individual who, as Director of Finance for the CIA, is in a position to know, it would seem obvious that a foreign intelligence agency would be in a better position to crack the CIA's funding system if it knew the dates on which secret transactions took place than it would be if it did not have this information. The appellants have not provided even a plausible argument to the contrary. Certainly they have not overcome the "substantial weight" we must give to the affidavits of the defendants.

We therefore affirm the district court's finding that summary judgment is warranted for this class of information on the basis of the affidavits provided by the defendants.

E. Locations of Classified CIA Installations [88]

88 This category of information was given the letter "H" in the Second Zellmer Affidavit.

[**70]

The government's basis for withholding this information is set out in the First Zellmer Affidavit: "the disclosure of the installation would reveal the identity of another company besides Summa Corp., Hughes Tool Company, and Global Marine, Inc., who worked with the CIA in confidence on the Project and who was the ostensible lessor of this particular site. To reveal the identity of this company would reveal the identity of an intelligence source and jeopardize current and future intelligence operations ...." [89] The basis for the deletion of this information is thus that it [*748] would disclose the identity of a secret contractor.

89 First Zellmer Affidavit at 7, reprinted in J.A. at 226.

The appellants' argument that this information is not covered by Exemption 1 or Exemption 3 is based on their conclusion that the government no longer has a right to withhold the identities of secret contractors who worked on the Glomar Explorer project. Because we have concluded above [90] that the identity of [**71] previously undisclosed secret contractors is properly withheld under Exemption 1, however, we must find that this category of information is also exempt. We therefore affirm the district court's grant of summary judgment for the defendants with regard to this category of information.

90 See notes 55 to 63 and accompanying text supra.

F. Cryptonyms [91]

91 This category of information was referred to by the letter "J" in the Second Zellmer Affidavit.

The reasons for the government's claim of exemption for this category of information were set out in First Zellmer Affidavit as follows:

> Cryptonyms are devised words that serve as a substitute for the identity of an activity or particular project, and are utilized as a defensive mechanism against unauthorized disclosure. A cryptonym carries significant meaning for those [**72] who are able to fit it into the proper cognitive framework and disclosure can only serve to endanger the protection afforded to intelligence sources and methods. If a document is lost or stolen, the use of cryptonyms prevents the breach of security from being more serious than it might otherwise be. The release of cryptonyms makes it possible to fit disparate pieces together and devine (sic) the nature or purpose of a project that may stand behind the cryptonym. In some instances the factual setting within which the cryptonyms appear is of such a descriptive nature that the documents could reveal to the knowledgeable reader the true identity of activity or project protected. [92]

92 First Zellmer Affidavit at 8, reprinted in J.A. at 227.

The appellants do not seek disclosure of the cryptonyms themselves. [93] They do seek, however, any information hidden behind the shield of a cryptonym which would otherwise be subject to disclosure under their FOIA request. In other words, the appellants merely suggest that information not properly classified cannot be withheld simply because it has been [**73] obscured by a classified cryptonym.

93 Brief for Appellants at 48.

The appellants, however, have not provided any grounds whatever for doubting the accuracy of the government affidavits affirming that the information shielded by cryptonyms has been properly classified. We therefore affirm the district court's grant of summary judgment for the government with respect to this category of information.

G. Information Which Would Identify Certain U.S. Government Agencies or Their Employees Which Could, in turn, Compromise Sensitive Intelligence Activities [94]

94 This category of information was given the letter "K" in the Second Zellmer Affidavit.

The government's basis for withholding this category

of information was set forth in the First Zellmer Affidavit:

> The names and identifying data of many present and former government [**74] officials and the identity of one government entity, the very existence of which is classified, has been deleted from the documents in this case. To reveal the name of a classified government entity would, of course, compromise its classified work. To reveal the names of those government officials, not associated with the CIA, who were involved in the HGE project, would signal to the world that these persons were and/or are engaged in highly sensitive intelligence activities and could lead to exposure of their cover and [*749] the cover used by a classified government entity. [95]

95 First Zellmer Affidavit at 8-9, reprinted in J.A. at 227-28.

In response, the appellants argue only that: "a brief, passing reference to such an unprecedented concept as a secret agency of the United States government is insufficient to establish defendants' right to withhold any and all information concerning such an agency's identity, functions, or role in the Glomar Explorer project." [96]

96 Brief for Appellants at 49.

[**75]

The appellants' argument is conclusory. For reasons given elsewhere in this opinion, we have upheld the district court's determination that documents that might disclose the names, initials, pseudonyms and official titles of CIA personnel [97] as well as documents that might disclose the identities of corporations involved in the Glomar Explorer project (other than those whose participation has already been officially acknowledged) [98] are properly withheld by the government. The basis for that conclusion obviously applies a fortiori to individuals and entities associated with an agency whose very existence is classified. The appellants' conclusory suggestion to the contrary in no way undercuts this conclusion. We therefore affirm the district court's grant of summary judgment to the defendants with regard to this category of information.

97 See notes 50 to 54 and accompanying text supra.

98 See notes 55 to 63 and accompanying text supra.

H. Dollar Amounts, or Derivative Data (Hours or Rates) [**76] Which Could Reveal Dollar Amounts Spent in Connection with the Glomar Explorer Project [99]

99 This category of information was given the letter "L" in the Second Zellmer Affidavit.

The government's basis for withholding documents in this category is found in the Turner Affidavit, a detailed document too long to reproduce here in full. The most salient and pertinent portions state that:

> It has been publicly disclosed that the annual CIA appropriation is contained in the annual appropriations to the Department of Defense, and that the funds involved are made available to the CIA under the transfer-of-appropriation provisions of the CIA Act of 1949. The annual CIA budget, however, is not now and never has been a matter of public knowledge. Neither have the details of that budget ever been matters of public knowledge. The nondisclosure of this information has a long record of approval by the Congress.... Both the Senate and House of Representatives have repeatedly rejected legislation that would [**77] have required the publication of the aggregate budget for the Intelligence Community or publication of the CIA budget.... And information which discloses detailed breakdown of expenditures made in connection with one specific intelligence operation, which this FOIA lawsuit involves, requires even greater protection in the interests of national security. Release of this information would be a valuable benefit to an intelligence service of a foreign country in that it would permit deductions to be made concerning the state of the art of intelligence collection in a certain area and the importance the United States attributed to particular collection activities. The existence of the technologies on which we

> depend, and to the level of their sophistication, could be compromised by such disclosure, and the risk of foreign countermeasures to nullify our advantage could be enhanced. [100]

100 Turner Affidavit at 4-5, reprinted in J.A. at 232-33.

In response to this argument, the appellants reiterate their by now familiar argument that "given the preexisting official disclosures of the detailed technical [**78] features and operational capabilities of the Glomar Explorer which plaintiffs have already described and documented, releasing [*750] the costs of the Glomar Explorer project would add nothing to anyone's ability to discern what is the state of the art and level of sophistication of the United States' intelligence capabilities embodied in the Glomar Explorer." [101] But as we have concluded above, [102] it is far from clear that either the purpose of the Glomar Explorer mission or the technology used to accomplish that mission are in fact known. We have been given two stories which purport to explain the Glomar Explorer's mission: first, we were told the Glomar Explorer was designed to mine manganese nodules from the ocean floor, and then, we were told that it was designed to lift a Russian submarine. Both stories, though very different, were plausible. The truth may lie in yet a third direction. In sum, neither we nor the appellants can be sure we know what intelligence capabilities and purposes were embodied in the Glomar Explorer. Therefore, we affirm the district court's grant of summary judgment for the defendants with respect to this category of information as well.

101 Brief for Appellants at 51-52.

[**79]

102 See notes 64 to 84 and accompanying text supra.

I. Information Pertaining to Methods Employed To Provide Secret Funding of the Glomar Explorer Project [103]

103 The information in this category was given the letter designation "M" in the Second Zellmer Affidavit.

The defendants rely on the Yale Affidavit to establish their right to withhold this category of information. The Yale Affidavit in pertinent part has already been discussed at some length above in connection with a closely related category of information: the dates on which certain Glomar Explorer activities were conducted. In short, the Yale Affidavit shows that revelation of the dates in question could lead an intelligence analyst to deduce the methods employed by the Agency in the secret funding of secret projects undertaken in the national interest. Having already concluded [104] that the Yale Affidavit is sufficient to support the district court's [**80] grant of summary judgment regarding the dates withheld from the appellants by the government, we must conclude a fortiori that the government is entitled to withhold the information whose continued secrecy required that the dates be withheld. For the same reasons given above, then, we affirm the district court with respect to its grant of summary judgment for the defendants concerning information pertaining to the methods employed to provide secret funding of the Glomar Explorer project.

104 See text accompanying notes 85 to 87 supra.

IV. THE TRIAL COURT'S REFUSAL TO PERMIT DISCOVERY

The appellants next argue that even if the government were entitled to summary judgment on the present state of the record, the trial judge abused his discretion in refusing to permit them to conduct discovery before he ruled on the defendants' summary judgment motion. [105] Had discovery been permitted, they contend, they may have been able to uncover evidence sufficient to controvert the government's affidavits and thereby [**81] have avoided the award of summary judgment against them.

105 Brief for Appellants at 25-27; Reply Brief for Appellants at 24-28.

After careful consideration of this contention, we find no abuse by the trial court of its discretion. [106] In support of their view the appellants argue that "the substantial questions which plaintiffs' filings raised concerning the substantive content of the affidavits relied upon by defendants ... demonstrated the need for discovery concerning [*751] the underlying bases for the conclusions expressed in the affidavits." [107] To satisfy this "need," for example, the appellants wanted to

question Secretary of State Vance's belief and judgment as expressed in his affidavit that confirmation or denial of news reports about the Glomar Explorer could cause harm to the national security. [108] As another example, they wanted to question the other affiants, including the Director of Central Intelligence, CIA Director of Finance Yale and CIA Deputy Director of the Directorate of [**82] Science and Technology Zellmer, about whether the adverse consequences predicted by the affidavits "ha(d) ever happened." [109] In concluding their motion to the trial court for authorization to take the depositions of the government's affiants, the appellants summed up their position as follows: "when the government attempts to make a record based on self-serving, conclusory assertions, the federal rules ... require allowing plaintiffs to test those assertions by way of deposition." [110]

106 The appellants do not suggest that the question whether to disallow discovery is not within the sound direction of the trial court. See, e. g., *Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (D.C.Cir.1978)* ("the district court has discretion to forgo discovery and award summary judgment on the basis of the affidavits"), cert. denied, *445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980)*.

107 Reply Brief for Appellants at 27.

108 Plaintiffs' Motion for a Continuance Pursuant to Rule 56(f) at 3-4, Military Audit Project v. Turner, No. 75-2103 (D.D.C., filed 27 April 1979), reprinted in Brief for Appellees at app. 3a, 5a-6a.

[**83]

109 Id. at 4, reprinted in Brief for Appellants at app. 6a.

110 Id. at 6, reprinted in Brief for Appellants at app. 8a.

We part company with the appellants because we do not share their premise that the government's assertions were inadequate to the task, let alone "conclusory." Had we been persuaded by the appellants' principal contention that so much already is known about the Glomar Explorer as to render the government's representations it has something left to hide inherently implausible, we might have reached a different conclusion on the issue of discovery. But we have rejected this line of argument. [111] We do not agree that the appellants succeeded in raising "substantial questions ... concerning the substantive content of the affidavits relied upon by defendants," [112] so we must conclude the trial court did not abuse its discretion in denying them "discovery concerning the underlying bases for the conclusions expressed in the affidavits"; [113] having rejected the premise, we are forced to reject the conclusion.

111 See, e. g., text and accompanying notes 80 to 83 supra.

[**84]

112 Reply Brief for Appellants at 27.

113 Id.

We are well aware of the advantages of adversary procedures in testing the strength of the government's position in FOIA cases even those involving claims of secrecy. [114] Nonetheless, the basic purpose of Exemption 1 of the Act is to ensure that FOIA requests will not result in the disclosure of sensitive materials if a court has satisfied itself that the materials have been properly classified. In national security cases, some sacrifice to the ideals of the full adversary process are inevitable. [115] It is natural that the appellants should seek discovery in the hope that they might turn up details of the government's position that might be turned to the appellant's advantage. In national security cases, however, more detailed information itself may compromise intelligence methods and sources. [116]

114 See *Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 610 F.2d 824, 832-33 (D.C.Cir.1979)*; *Cuneo v. Schlesinger, 157 U.S. App. D.C. 368, 484 F.2d 1086, 1091-92 (D.C.Cir.1973)*, cert. denied, *415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974)*; *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 823-26, 828 (D.C.Cir.1973)*, cert. denied, *415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974)*.

[**85]

115 *Hayden v. NSA/Central Security Serv., 197 U.S. App. D.C. 224, 608 F.2d 1381, 1385 (D.C.Cir.1979)*, cert. denied, *446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790 (1980)*.

116 *Baez v. United States Dep't of Justice, at 1336 (D.C.Cir.1980)*; *Lesar v. United States Dep't of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 482 (D.C.Cir.1980)*.

In the circumstances of the present case, we cannot find that the trial court abused its discretion in denying discovery to the appellants, when it appears that discovery would only have afforded an opportunity to

[*752] pursue a "bare hope of falling upon something that might impugn the affidavits." [117]

117 *Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 610 F.2d 824, 836-37 n.101 (D.C.Cir.1979).*

V. CONCLUDING OVERALL ANALYSIS

With the category-by-category analysis of the information at issue in this case behind us, we are now in a better position to [**86] comment more fully on two arguments by the appellants that are not limited to a particular deleted category and its accompanying affidavit.

A. Does Partial Disclosure of an Intelligence Mission Render Implausible the Claim that Full Disclosure Would Harm the National Security?

Throughout their briefs, the appellants suggest that affirmance by us of the district court's grant of summary judgment would be tantamount to a subversion of the statutory requirement that courts conduct de novo review of agency classification decisions. An affirmance, they claim, would de facto substitute the more deferential "reasonable basis" standard rejected by Congress over a presidential veto in 1974. [118] This is simply not so.

118 Brief for Appellants at 17, 28-30; Reply Brief for Appellants passim.

It is well established that summary judgment is properly granted in Exemption 1 cases without an in camera inspection or discovery by the plaintiffs when the affidavits submitted by the agency are adequate to the task. [119] [**87] We agree with the district court that the lengthy, detailed affidavits submitted by the defendants in this case satisfy the well-settled requirements for summary judgment. They describe the sensitive documents at issue with reasonably specific detail; the justifications for nondisclosure are detailed and persuasive; the affidavits plainly demonstrate that the information withheld logically falls within the claimed exemption; and far from there being evidence of agency bad faith, in this case the available evidence is that the agency acted in good faith, to the extent that, when it became possible to do so, it declassified and released more than two thousand pages of documentation previously withheld from the plaintiffs. Summary judgment for the defendants was therefore appropriate on the basis of our precedents.

119 See cases cited note 49 supra.

The principal claim advanced by the appellants in opposition to the trial court's grant of summary judgment is that there is evidence in the record that controverts [**88] the assertions in the affidavits. But, as our category-by-category analysis shows, such is not the case. The contrary evidence on which the appellants rely consists solely of the published reports about the Glomar Explorer project and the few official disclosures that already have been made. From this base, the appellants launch the argument that because some information about the project ostensibly is now in the public domain, nothing about the project in which the appellants have expressed an interest can properly remain classified. This theme is replayed with modest variations throughout the appellants' submissions to this court: because some of the previously-classified facts about the technological capabilities of the Glomar Explorer are now known, there is no danger to national security in revealing everything about the Glomar's abilities; because some of the contractors who did work on the project are known, there is no danger in revealing the identities of all who worked on the project; because the government has revealed some documents it previously considered too sensitive to release, it now must reveal all.

At the least, the appellants urge us to decide that whatever [**89] revelations there have been to date undercut the government's affidavits in this case to the extent that summary judgment is no longer proper. And the appellants' logic would appear to require us to decide that summary judgment on the basis of agency affidavits alone cannot be appropriate in an Exemption 1 case in which the public has, or thinks it has, partial knowledge of the outlines of a classified undertaking.

[*753] We reject this suggestion. We so rule without undue deference to the agency's position in this or any other case, as the history of this litigation should suggest. We are not acquiescing here in a jettisoning by the district court of the statutory requirement of de novo review. We simply do not believe the appellants have made the showing required to justify reversing the district court's grant of summary judgment for the defendants because we agree with the district court that they have failed in their effort to draw the affidavits of the government into question.

This is not the first case in which arguments of the type advanced by the appellants have been made. In Halperin v. Department of State, [120] for example, the district court ordered the release [**90] of a transcript of a background press conference held by the Secretary of State. On appeal, we found that the press conference excerpts sought had not even been properly classified in accordance with the applicable executive order. Moreover, we noted that the substance of the Secretary's remarks were not at issue, but only the attribution of those remarks to the Secretary; the press conference had been attended by thirty domestic and foreign representatives of the media, none of whom had a security clearance. The information at issue was therefore all public knowledge except for official confirmation that it was attributable to the Secretary of State. Even in these rather extreme circumstances, directly in the face of a failure by the Department of State to "effect the classification of the document in the only way which legally qualified it for the exemption," [121] we nonetheless stayed the judgment of the district court and remanded the case for consideration of the national security interest at stake.

120 *565 F.2d 699 (D.C.Cir.1977)*, cert. denied, *434 U.S. 1046, 98 S. Ct. 890, 54 L. Ed. 2d 796 (1978)*.

[**91]

121 *Id. at 706*.

Hayden v. National Security Agency/Central Security Service [122] provides another and more recent example of our rejection of the argument that an agency's rationale for nondisclosure is inherently implausible simply because the information at issue might already be a matter of public knowledge. In that case the NSA sought to conceal the fact that it had intercepted certain channels of communication by refusing to reveal messages obtained by means of such intercepts. The appellants argued that some of the channels monitored by the NSA are known to be under close scrutiny, that as a result no foreign government would send sensitive information over them, and that consequently the NSA could safely reveal information obtained from those channels. [123] We rejected this argument in affirming the district court's grant of summary judgment for the agency. Our explanation for our rejection of the argument in that case also applies to the present case:

122 *608 F.2d 1381 (D.C.Cir.1979)*, cert. denied, *446 U.S. 937, 100 S. Ct. 2156, 64 L. Ed. 2d 790 (1980)*.

[**92]

123 *Id. at 1388*.

> The Agency states that to reveal which channels it monitors would impair its mission; this is by no means an illogical or implausible assertion; indeed, it appears inherently logical that this assertion is true, although as a court we are not called upon to make such final determination. This is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency; for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review. [124]

124 In Hayden the district court received both public and sealed affidavits for in camera inspection, but did not inspect the contested documents themselves.

B. Does an Agency Change of Heart and Consequent Partial Document Release Render Implausible the Agency's Reasons for Refusing Full Release?

The appellants have contended at length that the Agency's decision about midway [*754] through the extended course of this litigation [**93] to declassify over two thousand pages of documents at the behest of the appellants vitiates the agency's continuing claims against the release of the remaining information. The appellants point out that the arguments the agency is using to justify nondisclosure are the same now as before the declassification. By releasing information to us, argue the appellants, the agency admitted that it was initially in error, from which it follows that the agency is fallible, and its affidavits, suspect. [125] Summary judgment was therefore unwarranted on the basis of those affidavits alone. [126]

125 Brief for Appellants at 16, 25, 27; Reply Brief for Appellants at 9-13.

126 The appellants further note that the government has failed to adduce evidence of specific harm of the type originally predicted, following in the wake of the declassification of

> the 2,000 pages released to the appellants. This we are urged to believe, renders implausible the government's affidavits which predict harm should the remaining documents be released. We have already dealt with arguments of this sort. See text and accompanying notes 58 to 63 supra.

[**94]

We emphatically reject this line of argument. If accepted, it would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously withheld. It would be unwise for us to punish flexibility, lest we provide the motivation for intransigence.

Furthermore, this argument is based on the perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency. The release of over two thousand pages of documents after a thorough review suggests to us a stronger, rather than a weaker, basis for the classification of those documents still withheld. During the course of this litigation, those documents have been considered too sensitive for release by the CIA under three Directors and as many Presidents. We find the agency's case strengthened by the massive declassification of documents it undertook at the appellants' behest.

VI. CONCLUSION

In sum, we find the extensive affidavits submitted by the government to satisfy the requirements for summary judgment under Exemption 1, and we hold that the trial court did not abuse its discretion by refusing to permit the appellants [**95] to conduct discovery before ruling on the government's motion for summary judgment. Accordingly, the judgment of the district court is

Affirmed.

MICHAEL MEEROPOL, a/k/a ROSENBERG, et al., Appellants v. EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, et al.

No. 84-5283

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

790 F.2d 942*; *252 U.S. App. D.C. 381*; *1986 U.S. App. LEXIS 25019

September 13, 1985, Argued
May 20, 1986

SUBSEQUENT HISTORY: [**1] As Amended May 28, 1986.

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia (Civil Action No. 75-1121).

COUNSEL: Marshall Perlin, for Appellants.

Freddi Lipstein, Attorney, Department of Justice, with whom Joseph E. DiGenova, United States Attorney, Richard K. Willard, Acting Assistant Attorney General and Leonard Schaitman, Attorney, Department of Justice, were on the brief for Appellees.

JUDGES: Bork and Scalia, Circuit Judges, and MacKinnon, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge Bork.

OPINION BY: BORK

OPINION

[*945] BORK, Circuit Judge:

On February 20, 1975, Michael and Robert Meeropol made a formal request under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552 (1982)*, to [**2] the Criminal Division of the Department of Justice ("DOJ"), the Offices of the Attorney General and Deputy Attorney General, the Federal Bureau of Investigation ("FBI"), the Central Intelligence Agency ("CIA"), the Energy Research and Development Administration ("ERDA"), and the Offices of the United States Attorneys in the District of New Mexico and in the Southern District of New York. The request to these agencies sought "all of the records relating directly or indirectly to investigation and prosecution of our parents," Letter from Michael and Robert Meeropol to the Office of the Deputy Attorney General (Feb. 20, 1975), Joint Appendix ("J.A.") at 60-62. The Meeropols' parents, Julius and Ethel Rosenberg, had been convicted in 1951 of conspiring to transmit information to the Soviet Union relating to the development of the atomic bomb, and were executed in 1953.

The FOIA request expressly included, but was not limited to, all records relating to any of eleven named persons [1] and the 100 persons on the prosecution's witness list at the Rosenberg trial. The scope of the request was therefore enormous. It was perhaps the most extensive FOIA request ever made. In an interoffice [**3] government memorandum, George Calhoun, the Deputy Chief of the Internal Security Section of DOJ, described it as "one of the most definitive requests I have ever seen." Calhoun noted, "I have no doubt in my mind what they want -- they want *everything* having to do with the Rosenberg case." Calhoun Memorandum, J.A. at 304 (emphasis in original).

1 The 11 named individuals were Ethel Rosenberg, Julius Rosenberg, Morton Sobell, Anatolai Yakovlev, Klaus Fuchs, Harry Gold, Ruth Greenglass, David Greenglass, Max Elitcher, Oscar Vago, and Abraham Brothman.

On July 14, 1975, plaintiffs filed in federal district court the complaint that initiated these proceedings, charging that the government was willfully failing to produce [*946] records to which they were legally entitled. In the ensuing ten years the defendant agencies, under court order, retrieved approximately 500,000 pages of records and released approximately 200,000 of those pages to the defendants. Judge June Green, who presided over the proceedings [**4] since their inception, eventually granted the motions for summary judgment filed by each of the defendants over the course of the last seven years. The plaintiffs' claims have now all been dismissed, save those for attorneys' fees and litigation costs. Plaintiffs appeal from the three orders granting summary judgments as well as from an additional order issued in 1984 denying a motion by plaintiffs to require the defendants to turn over certain specific records.

I.

In order to provide an outline of the course this extraordinarily complex litigation has taken, we will initially set out only the main features of its history. Additional details will be introduced at later points in the opinion, as they become relevant to the legal analysis. For ease of comprehension, we divide the litigation into three chronological phases.

1975-1977

The original complaint, filed in July of 1975, charged that the defendants were deliberately withholding records that were relevant under the terms of the request and subject to disclosure. The complaint asked that the defendants be ordered to produce an inventory of the documents in their possession encompassed by the request, with a view [**5] to the ultimate release of the documents not specifically exempt from disclosure under FOIA. The complaint also sought an interim order enjoining the defendants from destroying or in any way altering the documents requested. Complaint, J.A. at 3-48. On August 1, 1975, Judge Green issued an order enjoining the defendants from destroying or in any way altering the relevant documents, J.A. at 59, and on August 27, 1975, she issued a second order requiring each of the defendants, over the course of the next three months, to file inventories of all relevant documents in their possession along with itemized, detailed and cross-referenced refusal justifications for each relevant document claimed to be exempt from disclosure. J.A. at 63-67. [2]

2 Ten days before this order was issued, the then-Deputy Attorney General, Harold R. Tyler, Jr., issued a statement in which he directed his subordinates to follow a policy of "maximum possible disclosure of information" in response to FOIA requests concerning the Rosenberg case. The statement also indicated that the pending requests would be expedited, and that statutory exemptions would be invoked only when there was a "compelling reason to do so." Statement by Harold R. Tyler, Jr., Deputy Attorney General, Exhibits Submitted by Plaintiffs-Appellants and Defendants-Appellees.

[**6] Affidavits were filed in response to the August 27 order. Defendants then moved for partial summary judgment, asking the court to rule that their inventories were complete and that they were in compliance with the August 27 order. ERDA moved as well for a partial summary judgment that the ERDA documents the agency claimed to be exempt from disclosure had been properly withheld. Plaintiffs opposed these motions. Asserting that the inventories were incomplete and inadequate, they asked that the FBI be held in contempt. They also requested permission to conduct depositions of the FBI agents who had supervised the search as a means of examining the thoroughness of the inventories and the validity of the justifications for withholdings. The court responded to the accumulated motions in an order issued on January 20, 1976. Opinion and Order of Jan. 20, 1976, J.A. at 69-74. The court denied the motions for summary judgment, finding that "legitimate questions" had been raised about the completeness of the inventories, and that "given the complexity of this case," the affidavits alone did not establish that every deletion was proper. Therefore, material issues of fact remained. *Id.* [**7] at 2, J.A. at 70. "For similar reasons" -- *i.e.*, the breadth and complexity of the search requested -- the court denied [*947] the motion to hold the FBI in contempt. "This case involves an extensive request, and it appears that the defendants have made reasonable efforts to comply with the Court's orders." *Id.* at 3, J.A. at 71.

Plaintiffs had specifically complained in an affidavit accompanying their contempt motion that the FBI had searched only its headquarters, and not any field offices, and asked that the field offices be ordered searched as well. Affidavit of Marshall Perlin (Dec. 22, 1975) at 30-31, J.A. at 293-94. The court ruled that an inventory of all fifty-nine field offices would be "counterproductive," but ordered a search and inventory of the Albuquerque field office, since that office had conducted the investigation of one of the key principals, David Greenglass. Opinion of Jan. 20, 1976, at 4, J.A. at 72. Finally, the court held the request for depositions in abeyance and ordered that withheld documents be submitted for *in camera* inspection, so that the court could determine whether the statutory exemptions had been properly invoked. It [**8] was apparently the court's intention at the time to conduct an agency by agency *in camera* examination of withheld documents. It thus began by requiring ERDA to submit all withholdings claimed under *5 U.S.C. §§ 552(b)(6), 552(b)(7)(C)* and *552(b)(7)(D) (1982),* and indicated that an FBI submission would be requested next. *Id.* at 3, J.A. at 71. This method of examining documents withheld was discarded in later phases of the litigation and a sampling method employed instead.

In July of 1976, the court issued an order permitting the plaintiffs to depose six named FBI agents and one named DOJ official. Order of July 23, 1976, J.A. at 76. Two of those agents, Thomas Bresson and John Powers, were in fact deposed. Attorneys for the plaintiffs and the FBI then entered into settlement negotiations, which ended in December of 1977 without satisfactory resolution of the outstanding issues.

1978-1980

The FBI was the exclusive focus of this phase of the litigation. After the settlement negotiations broke down, Judge Green issued a new order, defining the scope of the search. Order of Jan. 12, 1978 ("1978 Order"), J.A. at 92-94. The purpose of this order [**9] was to set out exactly which files the FBI would be required to search in order to "end any debate over the scope of this action." *Id.* at 93. The FBI was ordered to search:

> (a) The main subject files in its New York field office for 97 named persons and organizations;
>
> (b) the "see references" in its New York field office for the eleven persons named in the original FOIA request; [3]
>
> (c) the main subject files in its headquarters for 83 named individuals, all of whom were also among the 97 listed in (a); and
>
> (d) the main subject files in the office of origin for each of the 83 named individuals listed in(c) whose office of origin was *not* New York. [4]

As amended one month later, the 1978 Order required the FBI to search, process documents at the rate of 40,000 pages per month and to release all "non-exempt, non-duplicative records." The district court held in abeyance the demand for detailed justifications for records claimed to be exempt. J.A. at 93, 99.

> 3 The "see references" are index cards that list cross-references. If one individual is mentioned in several different files but is not the subject of any of them, a list of those files can be found by looking up that individual's "see references."
>
> [**10]
>
> 4 An individual's office of origin is the field office that was primarily responsible for the investigation of his involvement in the case.

The 1978 Order is central to our review of this case. In defining the scope of the search required of the FBI, the district court established the standard by which the adequacy of the FBI's compliance would later be measured.

On November 19, 1979, the district court granted the FBI's motion for partial summary [*948] judgment, having concluded "that the FBI has complied substantially with the searching, processing and retrieval of documents ordered on January 12, 1978." Order of Nov. 19, 1979 ("1979 Order"), J.A. at 102. The 1979 Order is one of the four orders from which plaintiffs appeal.

Having determined that the FBI's search was adequate, the district court turned next to the validity of the exemptions claimed by the FBI as justifications for the documents it had retrieved but refused to release. The court ordered that "from the approximately 20,000 totally and substantially withheld documents" (this later turned

out to be too low an estimate), [**11] the FBI would be required to submit every one-hundredth document for *in camera* examination. Order of Feb. 8, 1980, J.A. at 104. The documents were to be selected at random, by counting out all documents withheld and removing each hundredth. In using the term "documents," the court was apparently referring to "pages." Thus every one-hundredth document would not necessarily be an entire individual record, but would often be one page of a larger record. In response to this order, the FBI filed a 301-page sample of pages totally or substantially withheld under FOIA exemptions, and moved for summary judgment. The court examined the sample *in camera* and concluded that the statutory exemptions had been properly invoked. On September 29, 1980, it therefore granted the motion for summary judgment, dismissing all of plaintiffs' claims against the FBI with prejudice. Order of Sept. 29, 1980 ("1980 Order"), J.A. at 105. The 1980 Order is the second order from which plaintiffs appeal.

1981-1984

In the final phase of this litigation, the court dealt with the claims against the remaining defendants, repeating the procedure it had used with respect to the FBI. Once again, the [**12] court issued an order defining the scope of the search, and once again, it used a sampling technique to judge the validity of the withholdings.

In January of 1981, the court issued the order -- one to which all parties stipulated -- defining the scope of the search with respect to the remaining defendants. Order of Jan. 13, 1981 ("1981 Order"), J.A. at 106-09. Just as the 1978 Order had defined the scope of the FBI's search so as to "end any debate over the scope of this action," so too did the 1981 Order "define[] the scope of the search for records which each . . . agency or component (except the FBI) shall have made in order to comply with plaintiff's (sic) pending request under the FOIA." *Id.* at 106. The court then listed, agency by agency, the records defendants would be required to search, specified again by the names of the persons to which the records pertained.

On January 7, 1983, the court ordered the remaining defendants to submit every one-hundredth page totally or substantially withheld for *in camera* examination, and defendants complied. Order of Jan. 7, 1983, J.A. at 114-15. On June 2, 1983, the court ordered released to plaintiffs a number of records [**13] that had been withheld, on the grounds that they were disclosable under the terms of the policy statement issued by the Deputy Attorney General, *see supra* note 2. Order of June 2, 1983, J.A. at 116-17.

On February 29, 1984, the court issued an eighty-two page memorandum dismissing all of the remaining claims against all of the remaining defendants, with the exception of those claims involving attorneys' fees and litigation costs. In the same memorandum, the court denied plaintiffs' motions seeking further depositions and asking that the 1979 Order and the 1980 Order be vacated. In addition, since the 1979 Order and the 1980 Order had not included findings of fact and conclusions of law, the relevant findings and conclusions were incorporated in this memorandum. Memorandum Opinion of Feb. 29, 1984 ("1984 Memorandum Opinion"), J.A. at 121-202.

The court indicated that further discovery was "not necessary," because the affidavits already submitted provided sufficient [*949] basis for a ruling. 1984 Memorandum Opinion at 3, J.A. at 123. The court went on to note:

> The Court recognizes the difficulties faced by plaintiffs in the early stages of this FOIA litigation [**14] as a result of inadequate searches by a number of defendants, most notably the FBI. A great deal of progress, however, has been made since that time. The affidavits, as well as the numerous documents that have been released to plaintiffs, indicate to the Court that finally, defendants have met their burden of conducting adequate searches for these documents and have provided the Court with sufficiently detailed affidavits to enable the Court to determine whether the FOIA exemptions were properly invoked.

Id. at 4, J.A. at 124.

After reviewing the elements of the search conducted by the FBI, the court reaffirmed its conclusions that the FBI had "complied substantially with the searching, processing, and retrieval of documents ordered in January 1978," 1984 Memorandum Opinion at 16, J.A. at 136,

and that the FBI had applied the exemption provisions of FOIA "diligently and in good faith to the approximately 450,000 pages of records that the FBI retrieved in response to the August 1975, January 1976, and January 1978 Orders." *Id.* at 80, J.A. at 200.

With respect to the other defendants, the court found that 13,000 records had been searched in 1975, with many additional [**15] records searched in response to the 1981 Order. The court held that the remaining defendants had conducted an adequate search in response to the 1981 Order, and that they "need not conduct any further searches for records responsive to plaintiffs' FOIA request." 1984 Memorandum Opinion at 81, J.A. at 201. Furthermore, after a detailed exemption-by-exemption analysis of the *in camera* submission, the court held that the exemptions had been properly applied. *Id.* at 82, J.A. at 202. Accordingly, all claims, except those involving fees and costs, were dismissed. Plaintiffs appeal from the order accompanying the 1984 Memorandum Opinion.

Finally, the court issued on the same day a separate Memorandum Order responding to a motion by plaintiffs for an order directing the FBI and the CIA to "deliver an itemized inventory and copies of documents in their care, custody, possession or control, dated or received from January 1, 1970, to the present, relating directly or indirectly to Alfred E. Sarant, a/k/a Alfred Sarant, and Joel Barr." Memorandum Order, J.A. at 118-20. The court denied the motion, finding that the defendants had already searched and processed the files in question. [**16] The court ruled that plaintiffs had not presented sufficiently specific evidence suggesting that relevant, undisclosed information remained in agency files, and characterized plaintiffs' claims that such files did exist as "conjecture." *Id.* at 2, J.A. at 119. Plaintiffs appeal from this order as well.

To summarize: The 1978 Order defined the scope of the search that would be required of the FBI. The 1979 Order granted partial summary judgment to the FBI, the court having found that the FBI's search constituted adequate compliance with the terms of the 1978 Order. The 1980 Order dismissed all claims against the FBI, the court having found -- after an *in camera* examination of a 301-page sample -- that the records that had been searched but withheld under FOIA exemptions were properly withheld. In the 1981 Order, the parties stipulated to a final definition of the search that would be required of the remaining (*i.e.*, non-FBI) defendants. In its 1984 Memorandum Opinion, the court found both that a search had been carried out sufficient to satisfy the terms of the 1981 Order, and -- after an *in camera* examination of sixty pages wholly or substantially withheld -- [**17] that the statutory exemptions had been properly invoked. In an order issued simultaneously, the court denied plaintiffs' motion for the production of additional records relating to Sarant and Barr. Plaintiffs appeal from the 1979 Order, the 1980 Order, the order accompanying the 1984 Memorandum Opinion and the [*950] order denying their motion for the records relating to Sarant and Barr. We discuss the grants of summary judgment to the FBI in Part II, and the other orders from which appeals have been taken in Part III.

II.

A.

All who participated in this litigation now agree that the searches conducted by the FBI between the years 1975 and 1978 were, as the district court said, "inadequate ". 1984 Memorandum Opinion at 4, J.A. at 124. Appellants regard the poor quality of those searches as constituting "willful . . . and gross disobedience" of the district court's orders, Affidavit of Marshall Perlin (Dec. 22, 1975) at 32, J.A. at 295, while appellees attribute the unsatisfactory attempts to the fact that "the FBI in 1975 lacked experience implementing FOIA and the 1974 FOIA amendments." Brief for the Defendants-Appellees at 3. Although the FBI during this period apparently [**18] did not search for records relating to the 100 witnesses at the Rosenberg trial, it did process the main subject files and see references at FBI Headquarters pertaining to the eleven named principals, *see supra* note 1. 1984 Memorandum Opinion at 10, J.A. at 130. As a result, approximately 72,000 pages from the main files were inventoried. Of those 72,000, approximately 28,000 were released to appellants (some with deletions), approximately 31,000 were determined to be not relevant to appellants' request, and approximately 13,000 were withheld pursuant to statutory exemptions. Seventh Affidavit of Thomas H. Bresson (Jan. 8, 1976) at 11, J.A. at 315. Additionally, the search of the see references led to the retrieval of approximately 9,000 other files. Eighth Affidavit of Thomas H. Bresson at 7, J.A. at 348A.

The inadequacy of these searches by the FBI coupled with the inability of the parties to reach a settlement prompted the district court to issue the 1978 Order

defining with specificity the scope of the search that the FBI would be required to complete. The Meeropols' original request sought all records "relating directly or indirectly" to the investigation and prosecution [**19] of the Rosenbergs and specified records relating to the eleven principals and the 100 witnesses, as well as records of any post-trial investigations that had been conducted. Letter from Michael and Robert Meeropol to the Office of the Deputy Attorney General (Feb. 20, 1975), J.A. at 60-62. The 1978 Order defined the scope of the required search by directing the FBI to search the main files in its New York field office on ninety-four individuals and three organizations, the ninety-four consisting of the eleven principals and most of those on the witness list, as well as names that fell in neither category (such as Judge Irving Kaufman, who had presided at the trial). It was directed to search the see references in the New York field office relating to the eleven principals. It was directed as well to search the main files at FBI Headquarters on most, but not all, of the names for which a search of the New York field office was required, and to search the main files at the office of origin for any of those in that group whose office of origin was not New York.

In so particularizing the original request, the trial judge inevitably narrowed to some degree the universe of records [**20] the FBI was required to process. Such an order was necessary both to focus the FBI on the files it would be required to examine and to provide a measure by which compliance would later be judged. In order to make this enormous task doable and the litigation controllable it was essential that a request without definable limits be given specificity. The issuance of an order of this sort, to be sure, means that some records arguably within the category originally requested -- in this case, "all of the records relating directly or indirectly to investigation and prosecution" of the Rosenbergs -- might now be outside the boundaries of the required search. That is inevitable, however, and does not render a search conducted under the terms of the order infirm, for in determining whether an agency has discharged its responsibilities [*951] "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate." Weisberg v. United States Department of Justice, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (D.C. Cir. 1984)* (emphasis in original). *Accord* [**21] *Goland v. CIA , 197 U.S. App. D.C. 25, 607 F.2d 339, 369 (D.C. Cir. 1978)* (on petition for rehearing), *cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980)*. As we have noted in the past, "the competence of any records-search is a matter dependent upon the circumstances of the case." *Founding Church of Scientology v. National Security Agency, 197 U.S. App. D.C. 305, 610 F.2d 824, 834 (D.C. Cir. 1979)*.

The request at issue here may well be the most demanding FOIA request ever filed; it has even been cited as an example of the substantial demands FOIA requests may make on an agency's resources. *See Long v. United States Internal Revenue Service, 596 F.2d 362, 367 (9th Cir. 1979)* (noting that sixty-five full-time and twenty-one part-time FBI employees were at one point assigned solely to the processing of the Meeropol request). The 1978 Order, issued to "end any debate over the scope of this action," 1978 Order at 2, J.A. at 93, reflected the district court's judgment that a search by the FBI that fulfilled the terms of the order would constitute a reasonable and sufficient search with respect to the [**22] request made in 1975. Neither party to this appeal has suggested in its briefs or its oral argument that the 1978 Order was in any way improper, and we do not ourselves see any grounds for reaching that conclusion independently. In reviewing the district court's grant of partial summary judgment to the FBI with respect to the adequacy of its search, we therefore evaluate that search in terms of its compliance with the 1978 Order.

The appellees filed below a detailed affidavit by Laurence E. Fann, Special Agent of the FBI, who had supervised the search of records in response to appellants' FOIA request. J.A. at 830-47. Fann explained that he had supervised the search of all the main files at FBI Headquarters required by the 1978 Order through alphabetical indices to the Central Records System, Third Affidavit of Laurence E. Fann (June 4, 1979) at 2, J.A. at 831, as well as the Electronic Surveillance ("ELSUR") Indices at Headquarters, at the New York field office, and at the required offices of origin, *id.* at 3, J.A. at 832. All files thus listed were retrieved and reviewed for relevance. *Id.* at 4, J.A. at 833. Additionally, the FBI reviewed Headquarters files to determine [**23] the office of origin of each of the named subjects, and directed the appropriate offices of origin to conduct the necessary searches of their main files. *Id.* at 5, J.A. at 834. Elaborate computer printouts were produced, providing an inventory of files, subjects, file numbers, sections and volumes, subfiles, bulky enclosures and exhibits, numbers of pages reviewed and numbers of

pages released. *Id.* at 8-10, J.A. at 837-39. Similar computer printouts were provided to list the see references, identifying the main subject files to which the see references were cross-referenced. *Id.* at 11, J.A. at 840. Copies of these computer printouts were furnished to appellants. Finally, the FBI responded to inquiries made to them by appellants' attorneys concerning 150 files to which references had been made in documents previously released, but which had not themselves been released. Of those 150, according to the Fann Affidavit, most had either in fact been produced or were not within the scope of the 1978 Order, or had been destroyed during routine destruction procedures. Ten of them were relevant and responsive, and were produced. *Id.* at 15-17, J.A. at 844-46. "As a result [**24] of the indices searches and the research efforts . . . a total of 198 main subject files responsive to the Court's Order were retrieved, processed and all non-exempt material released to the plaintiffs. This represents 1,386 sections or volumes, 257 subsections or volumes, 172 enclosures behind file (EBF) and 106 bulky exhibits." *Id.* at 17-18, J.A. at 846-47. The Special Agents delegated to supervise the search of the New York field office filed affidavits as well, attesting to their search of the files [*952] listed in the 1978 Order. Affidavit of Jerome O. Campane, J.A. at 825-26; Affidavit of Arcangelo Di Stefano, J.A. at 827-29.

The district court incorporated into its 1984 Memorandum Opinion its findings of fact relating to the FBI search, with respect to which it had granted partial summary judgment five years earlier. In those findings of fact, the court adopted the account given in the affidavits filed by appellees. 1984 Memorandum Opinion at 14, J.A. at 134. In so doing, the district court accorded those affidavits the "presumption of good faith" to which they are entitled, *Ground Saucer Watch, Inc. v. CIA, 224 U.S. App. D.C. 1, 692 F.2d 770, 771 (D.C. Cir. 1981)*. [**25] As we have previously held, such affidavits need not

> set forth with meticulous documentation the details of an epic search for the requested records. Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.

Perry v. Block, 221 U.S. App. D.C. 347, 684 F.2d 121, 127 (D.C. Cir. 1982). We turn, therefore, to the claims presented by appellants of "countervailing evidence" and "inconsistencies of proof."

Appellants have charged the FBI throughout this litigation with bad faith. While the district court's 1984 findings are to the contrary, it did characterize the FBI's behavior in 1975 as "intransigent," but found this explained, though not justified, by inexperience with the FOIA and the "extraordinary scope" of the request. 1984 Memorandum Opinion at 11 & n. 2, J.A. at 131. As we noted in Part I, the district court did not view the FBI's post-1978 search efforts as suffering from the same deficiency, and concluded that "reasonable searches [**26] had been conducted." *Id. at 37*, J.A. at 157. We agree with the district court that the earlier intransigence ought not count against appellees if their later behavior was characterized by cooperation. "In the absence of other evidence, the institution of a *de novo* search significantly undercuts appellant's argument that earlier noncooperation by the [agency] raises a substantial question of current bad faith on the part of the agency. Indeed, if the release of previously withheld materials were held to constitute evidence of present 'bad faith,' similar evidence would exist in every FOIA case involving additional releases of documents after the filing of the suit." *Ground Saucer Watch, Inc., 692 F.2d at 772*.

Appellants, however, detect no such change in the FBI's attitude. As proof of continuing bad faith, they describe occasions -- all *after* the FBI had claimed to have completed its search in response to the 1978 Order -- on which the FBI uncovered responsive files only because evidence of their existence was supplied by the Meeropols and their attorneys. Through meticulous research and examination of the files that were turned over to them, [**27] appellants were able in several instances to uncover references to other, seemingly relevant, files which had not been produced. Their inquiries concerning these files were forwarded to the FBI. Thus, for example, in response to appellants' report to the court of October 18, 1978, which had detailed some of the fruits of this research, the FBI discovered and produced twelve new main files and several new subfiles totalling 3,575 nonexempt pages, all within the scope of

the 1978 Order and never previously released to the appellants. Affidavit of Bonnie Brower (Nov. 19, 1978) at 2, J.A. at 776. Later submissions of a similar sort resulted in additional disclosure, with the FBI processing a total of 37,837 additional pages, 5,045 of which were released to appellants. Affidavit of Marshall Perlin (Aug. 8, 1979) at 17, J.A. at 864. To appellants, this indicates that the searches must have been conducted in bad faith, and that there are additional records yet to be found.

We are not prepared to suggest that there are no relevant records that have thus far remained undiscovered. As we have already explained, however, a search is not unreasonable simply because [*953] it fails [**28] to produce all relevant material; no search of this size, dating back four decades, will be free from error. And we find the incidents cited by appellants suggest not bad faith, but rather that the FBI was cooperating with appellants by meeting with them repeatedly, responding to their inquiries, conducting numerous additional searches, and producing records when error was discovered. *See* Third Affidavit of Laurence E. Fann (June 4, 1979) at 15, J.A. at 844. In *Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 754 (D.C. Cir. 1981)*, we "emphatically rejected" the notion that an agency's disclosure of documents it had previously withheld renders its affidavits suspect, and our reasoning in that case is applicable here as well. We observed that such a line of argument, if accepted, "would work mischief in the future by creating a disincentive for an agency to reappraise its position, and when appropriate, release documents previously withheld." *Id.* Were the court to thus "punish flexibility," it would "provide the motivation for intransigence"; the argument in favor of doing so is "based on the perverse theory that a forthcoming agency [**29] is less to be trusted in its allegations than an unyielding agency." *Id.* It would be unreasonable to expect even the most exhaustive search to uncover *every* responsive file; what is expected of a law-abiding agency is that it admit and correct error when error is revealed. This, the FBI has done. We find here, as in *Military Audit Project*, that the additional releases suggest "a stronger, rather than a weaker, basis" for accepting the integrity of the search, and we reject, as did the district court, appellants' allegations of bad faith. *Id.*

Appellants' other set of challenges to the adequacy of the FBI search consists in identifying files they believe to exist which have not been turned over. In most cases, their conclusion that such files exist stems either from their discovery of references to these files in other documents, or from a conviction that a particular subject was of such importance that a file on that subject *must* have been created. As we already have indicated, the FBI in fact released to appellants several previously undisclosed files about which they raised inquiries. Our survey of the record below convinces us that the remaining records [**30] sought are for the most part either records which are outside the scope of the 1978 Order or records whose existence remains purely hypothetical.

Appellants claimed below that there were at least 126 relevant main files which had not been produced. The existence of many of these main files has been deduced simply by virtue of their supposed subject matter. Thus, for example, appellants have received no main file on Ruth Greenglass, and asserted below that given her importance to the case it is "inconceivable" that no such file exists. They concluded as well that documents relating to Klaus Fuchs had been withheld from them because

> the earliest date of any document on Klaus Fuchs from the two files thus far searched and inventoried by the FBI is August 17, 1949. Yet Fuchs was a top nuclear scientist on the atomic bomb project in Los Alamos, subject to the closest security clearance procedures and to continuing investigation and surveillance. An escapee from Hitler's Germany, the United States government had documents in its possession in the early to mid-1940's indicating his communist activities in Germany. Further, his sister and brother-in-law have documents in [**31] *their* files indicating investigation and surveillance of them in 1945 and their relationship to Fuchs.

Plaintiffs' Report to the Court on the Status of Defendant FBI's Compliance with the Orders of this Court at 4, 6, J.A. at 682, 684 ("Plaintiffs' Report"). There are numerous other claims of similar tenor. These claims cannot be conclusively refuted, since to do so the government would have to prove a negative -- that the files in question do not exist. We agree with the district court that these assertions are insufficient to raise

material questions of fact with respect to the adequacy of the search. The FBI was able to address many [*954] of the inquiries with precision; for example, there was no separate file on Ruth Greenglass because she was carried "as a co-subject in the main subject file of her husband, David Greenglass." Second Affidavit of Laurence E. Fann (Nov. 9, 1978) at 10, J.A. at 722. In response to some of the other inquiries, such as that on Klaus Fuchs, the FBI has only been able to state that "[a] search of the FBI's alphabetical indices has been done for each individual or organization listed in the Court's orders, and the files so [**32] located have been processed for release *as they exist today." Id. at 7*, J.A. at 719 (emphasis in original). In the absence of more concrete evidence from appellants that such files actually exist, their speculative assertions cannot serve as the basis for vacating the grant of partial summary judgment. "Even if we assume that the documents plaintiffs posit were *created*, there is no reason to believe that the documents, thirty years later, still exist, or, if they exist, that they are in the possession of the [agency]." *Goland, 607 F.2d at 353* (emphasis in original).

With regard to the files that appellants believe to exist by virtue of references found in other documents, the FBI has provided a detailed serial-by-serial accounting. Second Affidavit of Laurence E. Fann (Nov. 9, 1978) at 26-60, J.A. at 738-73. Many of the designated files had been destroyed in the intervening decades. Other proffered serial numbers did not correlate with any files at all. In still other instances, appellants have discovered the existence of a particular file because one of the see references to which they were entitled came out of that file. In such cases, however, [**33] the entire file is not necessarily responsive to the 1978 Order, and appellants have properly been given only that material within the file that *is* responsive. *See Irons v. Levi, 451 F. Supp. 751, 753 (D. Mass. 1978)* (requester only entitled to that portion of the file listed in see references), *vacated and remanded on other grounds, 596 F.2d 468 (1st Cir. 1979)*. In sum, we think the affidavits supplied by the FBI describe an adequate and diligent search both as originally instituted in response to the 1978 Order and in the course of responding to the inquiries that subsequently were raised, and we see no countervailing evidence substantial enough to counter the "substantial weight" we traditionally accord agency affidavits in cases such as these. *Goland, 607 F.2d at 352*.

Most of our discussion of these main files is equally applicable to the other absent files to which appellants claim they are entitled. Appellants seek certain files designated "control files," which, we are told, are files used to coordinate major investigations. Appellants have received certain material within these control files -- through see references [**34] -- but seek the entire files. The FBI explained that

> control files are not created in each and every investigative matter or program. The search of our indices has not revealed any control file established to administrate the Rosenberg investigation. My review of the documents shows that this investigation was in fact directed, supervised, and controlled through the main subject case files. However, individuals listed on the Court's Order were mentioned (are "see references") in control files created to handle other matters. These references were in fact retrieved and processed and the non-exempt material furnished plaintiffs. The quotation set forth on pages 15 and 16 of Plaintiffs' Report to the Court is from a "see reference" in a control file captioned in *neither* the name of the Rosenbergs nor of any other individual or organization set forth in the Court's orders.

Second Affidavit of Laurence E. Fann (Nov. 9, 1978) at 20, J.A. at 732 (emphasis in original). Appellants, in contrast, claim that at least some of these control files carry as *subjects* persons encompassed in the 1978 Order. Affidavit of Bonnie Brower (Nov. 19, 1978) at 9, J.A. at [**35] 783. It appears to us, however, that appellants have in mind an overly expansive understanding of what it is that makes some individual the "subject" of a file. In elaborating on their claims to these control files, appellants assert that

> [*955] it is clear from the few documents that we have received from a number of these files, that persons named in the Court's orders are central subjects of the investigations in these control files, which the attached exhibits conclusively demonstrate are directly related to the Rosenberg-Sobell investigation. The fact that the "caption" or name of these control files may not be in the names of these

> persons is absolutely irrelevant to the importance of these control files in the Rosenberg-Sobell investigation, a fact that the FBI itself does not even deny. Never did plaintiffs restrict their request, nor the Court limit its orders, to files bearing only the names of the persons listed by plaintiffs.

Id. at 11, J.A. at 785. We read the district court's 1978 Order somewhat differently than do appellants. The 1978 Order required a search, *inter alia*, of the Headquarters, New York field office, and other offices [**36] of origin for the "main subject files for the persons and organizations listed." The possible existence of substantial amounts of generally relevant material in these control files does not entitle appellants to the entire files, for they are not "main subject files *for* the persons . . . listed." In other words, we think the file caption not at all "irrelevant" to the question whether a file fits within the scope of the 1978 Order. This may seem a mere semantic distinction, but it is not. The district court clearly distinguished between the long list of persons whose main subject files would be searched in their entirety and the much shorter list of persons whose see references would be searched as well. To hold that the FBI was deficient in not searching the entirety of files which had substantial numbers of see references inside them would be to rewrite what we have already held to be an entirely appropriate court order, an order to which the Meeropols did not object on appeal.

Appellants argue in addition that they are entitled to files on government informers involved in the Rosenberg investigation. According to appellants,

> the records of this case reveal literally [**37] hundreds of informers who were informing on the counsel, who were informing on the individuals encompassed by the Court's order as well as the two organizations. The sole informer files plaintiffs have obtained are those of Bentley and the Elitchers. The FBI has refused to process the file of Tartakow and other known informers as well as other informer files. . . .

Plaintiffs' Affirmation in Opposition at 23, J.A. at 870. Again, the fact that there were hundreds of informers does not demonstrate that hundreds of informer files were created, and even the assumption that hundreds of informer files were created in the 1940's does not, if accepted, demonstrate that they exist today. The term "informer files" does not denominate some separate category of files; appellants are merely referring to those main files the subjects of which are specific informers. These files were searched when the main files were searched. Appellants' specific interest in a file on Jerome Tartakow, "who has publicly proclaimed himself to be an informer against Julius Rosenberg during the trial," Affidavit of Bonnie Brower (Nov. 19, 1978) at 20, J.A. at 794, was not satisfied because Tartakow's name [**38] was not listed in the 1978 Order.

Appellants describe several other categories of files, the absence of which they cite as proof of the inadequacy of the search. For many of the same reasons, we find their remaining arguments unpersuasive. The district court had ordered the FBI in 1976 to search its Albuquerque field office, *see supra* slip op. at p. 5, but the FBI only partially complied. Appellants now seek full compliance -- a search not only for references to the eleven principals, which the FBI conducted upon issuance of that order, but for those records relating to the full witness list as well. They once again ignore the superseding 1978 Order, which defined those offices of origin whose search would be required. Appellants believe there exist electronic surveillance logs which they have not received, but the FBI agents attested to having searched the ELSUR [*956] indices in both Headquarters and the field offices. *See* Affidavit of Jerome O. Campane, J.A. at 825; Third Affidavit of Laurence E. Fann (June 4, 1979) at 3, J.A. at 832. Appellants have made reference as well to files labeled "62 and 66 Classification files" as well as "0 and 00 files," Brief [**39] for the Appellants at 26, but have provided no information either below or on appeal from which we could determine what precisely those files are or why appellants have reason to believe they may exist.

We recognize the difficulty a FOIA requester has in demonstrating that a file he has never seen in fact exists. That will often be almost as difficult a task as that the government faces when it seeks to demonstrate that a specific file does *not* exist. But a search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request. Several dozens of full-time and part-time FBI employees have worked over the course of several years,

searching and processing hundreds of thousands of pages of documents dating back to the early 1940's and located in FBI Headquarters and field offices across the country. The appellees' detailed affidavits attest to the breadth of the search. Appellants' claims of bad faith are unconvincing, and the files claimed to be missing for the most part are either documents outside the scope of the search, documents that had been destroyed under routine procedures, documents which have subsequently [**40] been turned over, or documents whose existence remains purely a matter of unsupported speculation. The search conducted by the FBI was therefore reasonable and adequate, and we affirm the district court's grant of partial summary judgment on that issue.

B.

In January of 1976, the district court ordered ERDA to submit for *in camera* inspection all ERDA records searched but withheld "on the grounds of invasion of personal privacy, or described as not pertinent or not relevant" to appellants' FOIA request. Order of Jan. 20, 1976, J.A. at 73-74. Two months later, the court ordered the FBI to submit the first 200 documents listed in its inventory that were withheld "in total or in part based on exemptions under *5 USC 552(b)*, except for those withheld under *5 USC 552(b)(1)* or *(b)(3)*, or because the material was described as not relevant or not pertinent." Order of Mar. 18, 1976, J.A. at 75.

The court was unable to judge the validity of the exemptions claimed, however, because it found the justifications submitted by the FBI to explain the exemptions inadequate. The justifications generally did little more than list the file number, [**41] subject, serial and date of the document, and indicate under which exemption it had been withheld. As Judge Green explained at one of the hearings:

> They do not particularize what they are leaving out. They do not say why they cannot be partially released with deletion. They do not do anything except make blanket statements, and it has been an inordinate job for this Court. The Court isn't going to do it anymore. It really doesn't believe it is its job to do the Government's work for it in that regard. We want and we insist upon having proper papers that show what it is and what they contain and why the government feels they are not releasable.

Hearing of July 22, 1976, at 13, J.A. at 447.

It was not until after the court had issued the 1978 Order defining the search, after the FBI had executed that new search, and after the court had granted the FBI partial summary judgment with respect to the adequacy of that search that the court returned to the question of the propriety of the withholdings. The number of documents at issue was now substantially greater. The court therefore devised a sampling procedure to test the validity of the exemptions claimed. The FBI [**42] was ordered to submit for *in camera* inspection one out of every 100 pages totally or substantially withheld. Those pages were chosen at random, by removing every hundredth from the pile of those withheld, [*957] organized alphabetically by subject matter. In addition to the sample, the FBI submitted public affidavits describing the exemptions claimed and correlating them with each page in the sample to which they related. [5] When the attorney for appellants suggested that a 1% sample was "much too small," the court responded:

> Let me say, Mr. Perlin, that it's a greater percentage than has ever been utilized. Furthermore, we have never had, even with the Martin Luther King papers, such volume, such an extended search granted by the courts, as a matter of fact, as in this case where we have given all of those people on the witness list and all that sort of thing.
>
> It's made an extensive job. It's also made it an extensive job not only for the attorneys in the case but also for the Court. Now it seems to the Court that to have this Court adequately study these things, not just rubber stamp it, 200 is quite a sizable undertaking to do, with everything else the Court [**43] has to do.
>
> And the Court does indicate it will do it personally.

Hearing of Dec. 18, 1979, J.A. at 969M. [6] Judge Green declined to review the documents that contained only partial deletions, believing that the compilation of totally

and substantially withheld documents would present "an adequate sampling of the whole situation." *Id. at 969L-969M*.

> 5 After the FBI was granted full summary judgment, the court turned its attention to the other defendant agencies. In the course of those searches, these agencies discovered FBI documents, which were referred to the FBI for processing. This led to the release of some additional FBI records. Approximately 500 pages of these records were withheld, and the FBI therefore submitted to the court in February of 1982 a five-page sample of the newly withheld documents, along with written justifications. Declaration of Richard C. Staver, J.A. at 1158.
>
> 6 The 200-page estimate proved to be incorrect. The sample consisted of 301 pages.

On the basis [**44] of the *in camera* sample and the public affidavits and justifications, the court granted summary judgment to the FBI with respect to the validity of the exemptions it had claimed. The findings of fact and conclusions of law on which this judgment was based were incorporated into the 1984 Memorandum Opinion. Documents had been withheld under the exemptions codified as *5 U.S.C. § 552(b)(1), (2), (3), (6), (7)(C),* and *(7)(D) (1982)*.

Under Exemption 1, which authorizes the withholding of documents classified under an Executive order "to be kept secret in the interest of national defense or foreign policy," *5 U.S.C. § 552(b)(1) (1982)*, the court found that the FBI had properly refused to disclose documents pertaining "to such things as the activities of the United States abroad; intelligence methods or techniques; cooperation of the United States with a foreign government; and foreign government documents." 1984 Memorandum Opinion at 42, J.A. at 162. Additionally, the court concluded that "all reasonably segregable material was released." *Id. at 43*, J.A. at 163. Exemption 2 protects from disclosure matters "related solely to the [**45] internal personnel rules and practices of an agency," *5 U.S.C. § 552(b)(2) (1982)*, and the court found appropriate the FBI's withholding under Exemption 2 of pages "which relate to the special handling or dissemination of sensitive intelligence data contained therein." 1984 Memorandum Opinion at 46, J.A. at 166.

Records "specifically exempted from disclosure by statute" are withheld under the authority of Exemption 3, *5 U.S.C. § 552(b)(3) (1982)*, and the court upheld the withholding of grand jury testimony and records on the basis of *Rule 6(e) of the Federal Rules of Criminal Procedure*, and the withholding of tax return information under *26 U.S.C. § 6103 (1982)*. "Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under *5 U.S.C. § 552(b)(6)*, and the district court held legitimate the government's reliance on Exemption 6 "to withhold various matters, including the identities of third persons [*958] named in Navy Loyalty Board proceedings; assessments of the character, trustworthiness, [**46] stability or other attributes of candidates for CIA security clearances; the names of scientists who were subjected to routine security investigations and cleared in connection with the *Rosenberg* case; and the names of individuals who were prompted by the *Rosenberg* case to contact the government." 1984 Memorandum Opinion at 64, J.A. at 184.

Exemption 7(C) protects "records compiled for law enforcement purposes" the disclosure of which would constitute an "unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C) (1982)*. The court found that the FBI had invoked Exemption 7(C) to delete material relating to third parties -- "individuals other than those whose records the FBI has been directed by this Court to process." 1984 Memorandum Opinion at 69, J.A. at 189. The material so deleted included medical records, employment records, information concerning the reputations, education, organizational affiliations and personal associations of these third parties, and other information having "nothing to do with the Rosenberg case" which might be "defamatory, embarrassing, or very personal." *Id. at 69-70*, J.A. at 189-90. Finally, the court upheld [**47] the refusal to produce certain records which might reveal the identity of a confidential source, withheld pursuant to *5 U.S.C. § 552(b)(7)(D) (1982)*. Additionally, the court agreed with the FBI that certain materials relating to congressional testimony were not "agency records" under FOIA, since the statute explicitly excludes Congress from its definition of "agency" in *5 U.S.C. § 551(1)(A) (1982)*. 1984 Memorandum Opinion at 78, J.A. at 198-99.

Appellants do not challenge the withholding under any of these exemptions in particular. Instead, they challenge the sampling procedure through which the

withholdings were analyzed.

A judge hearing a claim under FOIA is not obligated to conduct an *in camera* review of the documents withheld; the decision to do so is discretionary. *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)*. The court may grant summary judgment in favor of the government simply on the basis of the affidavits, if they "contain information of reasonable detail, sufficient to place the documents within the exemption category, and if the information is not [**48] challenged by contrary evidence in the record or evidence of agency bad faith." *Lesar v. United States Department of Justice, 204 U.S. App. D.C. 200, 636 F.2d 472, 481 (D.C. Cir. 1980)*. At the same time, a finding of bad faith or contrary evidence is not a prerequisite to *in camera* review; a trial judge may order such an inspection "on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination." *Ray v. Turner, 190 U.S. App. D.C. 290, 587 F.2d 1187, 1195 (D.C. Cir. 1978)*. While Judge Green did not indicate her reasons, we believe that both the inadequacy of the previous justifications and the size and significance of this FOIA request made some *in camera* review appropriate.

Sampling procedures have been held to be "appropriately employed, where as here the number of documents is excessive and it would not realistically be possible to review each and every one." *Weisberg, 745 F.2d at 1490. Accord Ash Grove Cement Co. v. FTC, 167 U.S. App. D.C. 249, 511 F.2d 815, 817 (D.C.Cir. 1975)*. Upon examining the sample, a court is then able "to extrapolate [**49] its conclusions from the representative sample to the larger group of withheld materials." *Fensterwald v. United States Central Intelligence Agency, 443 F. Supp. 667, 669 (D.D.C. 1977)*. Appellants do not believe that the submission ordered constituted a sufficiently representative sample. The district court examined 1% of the documents totally or substantially withheld, and appellants had argued below that "any preliminary random sampling would have to be in the 10-20% range." Plaintiffs' Memorandum in Response to Defendants' Supplementary Motion Papers dated July 8, 1980 and in Opposition to Defendants' Motion for Partial Summary Judgment [*959] at 7, J.A. at 1114. We think the 1% sample sufficient, and in line with -- indeed, larger than -- samples previously approved. *See Weisberg*. The affidavits and justifications were, as the district court found, "" relatively detailed" and nonconclusory.'" 1984 Memorandum Opinion at 3, J.A. at 123 (*quoting Goland, 607 F.2d at 352* (*quoting Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 826 (D.C. Cir. 1973))*). Those justifications relating to documents exempt on national [**50] security grounds were somewhat less detailed than the others, but that is inevitable; courts must "recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of public disclosure of a particular classified record," S. Rep. No. 1200, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6267, 6290, and the same holds true for detailed public descriptions of the contents of such records. We reject as well the contention that the district court erred in examining sample *pages*, rather than entire documents. Some of these documents were over 100 pages long. Since the pages sampled were from documents which were all totally or substantially withheld, the FBI was maintaining that no segregable, non-exempt material existed within them. Such claims may properly be tested through an examination of randomly selected pages.

The 301-page *in camera* sample included seventy-five pages of records that had been released in the first phase of this litigation, before the 1978 Order defined the scope of the search. Prior to submitting the sample to the [**51] court, the FBI reexamined those pages and determined that several of the claimed exemptions, while proper when claimed, would not have been applicable had the documents been processed in 1979. In many instances, this was a result of the increased disclosure permitted by Executive Order No. 12,065, 3 C.F.R. 190 (1979) (effective Dec.1, 1978), which articulated a standard for classifying matters relating to national security that superseded Executive Order No. 11,652, 3 C.F.R. 339 (1974), the policy in effect when the earlier records were withheld. Other records would have received different treatment in 1979 had they been processed at that time simply because the governing case law had evolved somewhat in the intervening years. The FBI released those pages in the sample which were newly disclosable, but did not reprocess the tens of thousands of other pages withheld. Had they done so, more records might well have been turned over to the appellants, for in addition to the documents processed in 1975 many of those documents processed in response to the 1978 Order had been processed before the effective date of the new Executive

Order.

The fact that there are documents which while [**52] properly withheld at the time the decision to withhold was made were nevertheless not exempt under *new* standards does not indicate error, as appellants suggest, and they are not entitled to an order directing the reprocessing of all documents under those new standards. The government cannot be expected to follow an endlessly moving target. With respect to changes in Executive Orders on national security classification, the rule was laid down some years after the sample was submitted: "the Executive order in effect at the time the classifying official acted states the relevant criteria for purposes of determining whether Exemption 1 properly was invoked." *Lesar, 636 F.2d at 480.* [7]

7 We note that Executive Order No. 12,065 has now itself been superseded by Executive Order No. 12,356, 3 C.F.R. 166 (1983).

We are more troubled, however, by the degree of *actual* error found in the documents processed in 1975. As amended in February of 1978, the January 1978 Order required the FBI to [**53] process only "non-duplicative" documents. Order of Feb. 6, 1978, J.A. at 99. The pages processed in 1975 were thus never reexamined by the FBI, save those seventy-five pages which found their way into the *in* [*960] *camera* sample. In reexamining those seventy-five pages, the FBI determined that nineteen of them had been improperly withheld *under the standards in effect at the time the original withholding decision had been made.* Nineteen mistakes out of seventy-five pages constitutes an error rate of 25%. [8] When coupled with the finding by the district court that the FBI had been "intransigent" in 1975, that error rate is unacceptably high, and suggests to us that many of the documents processed in 1975 were improperly withheld. It seems clear that the documents inventoried in 1975 have never been appropriately processed. The FBI has never been required to reexamine those documents, and only chose to reexamine those pages included in the sample. Therefore, while we affirm the remainder of the grant of summary judgment to the FBI with respect to the validity of the exemptions, we remand to the district court with instructions to order the FBI to reprocess the records [**54] withheld under claims of exemptions in 1975, and release those that are non-exempt. The operative standards for disclosure, of course, will be those in effect when the files are reprocessed (although Exemption 1 may still be invoked to withhold documents correctly classified at the time the decision to classify was made). The FBI should be ordered to reexamine not only those documents totally withheld, but those released with partial deletions as well, to determine whether those deletions were proper. The district court had declined to examine the partially deleted documents on the ground that the totally withheld documents would provide an accurate picture of the validity of the deletions as a whole. On that principle, we believe that the error rate of documents totally withheld in 1975 must be understood as calling into question the validity of all exemptions, total and partial, claimed during that time period and the FBI must therefore conduct a complete reexamination. The FBI also withheld records in 1975 as duplicative or as outside the scope of the request. We do not know whether the error rate as to claimed exemptions casts doubt upon these withholding decisions as well [**55] and we remand this issue to the district court for its determination of that question and choice of appropriate procedures, if any are required. After the 1975 documents withheld under claims of exemptions are reprocessed and any disclosable portions released, the district judge may wish to conduct a new *in camera* inspection of a representative sample of those documents to test again the validity of the withholding decisions. That is, of course, a matter within her discretion.

8 The government calculates the error rate somewhat differently. Since the government believes that the number of correct decisions includes not only 75% of the documents *withheld* but 100% of the documents *released* as well, it divides 3170 (25% of the number of pages totally or substantially withheld in 1975) by 156,476 (total pages released by the FBI during the course of litigation), and ends up with a 2% error rate. While this method may be useful in some contexts, it understates the situation with respect to documents withheld. Even if the "overall" error rate is taken to be 2%, we are still left with the implication that one out of four documents withheld in 1975 ought at that time to have been released, at least in part. If this extrapolation proves correct, and, of course, it may or may not, appellants will be entitled to approximately 3170 additional documents.

[**56] C.

Throughout the proceedings below, appellants repeatedly sought discovery in the form of depositions of FBI agents, as well as the appointment of a special master to supervise the litigation. In 1976, appellants were permitted to depose two FBI agents; since then, their motions for leave to conduct additional depositions have all been denied. The court below repeatedly declined as well to accede to the repeated requests for the appointment of a special master. Appellants urge that we remand with an order that additional discovery be allowed and a special master be appointed. We decline to do so.

A district court's refusal to allow discovery will be reversed only upon a finding that the court abused its discretion. No such finding can be made here. Since, as we have held, the record below was [*961] sufficient to support the grant of summary judgment to the FBI with respect to the adequacy of the search and the validity of the exemptions claimed concerning the documents processed after 1978, there is no reason to permit discovery on those matters. [9] *See Goland, 607 F.2d at 352* (where affidavits are sufficient, the judge "has discretion to forgo discovery"). [**57]

> 9 We note that the series of informal meetings and communications between the parties have served to resolve many of appellants' inquiries and concerns, and many additional records have been turned over as a result. These frequent exchanges have served many of the same functions in this litigation as would depositions. We recognize that appellants would prefer that the FBI agents be subjected to formal questioning under oath, but we do not believe the district court abused its discretion in denying appellants all that they sought. "In national security cases, some sacrifices to the ideals of the full adversary process are inevitable. It is natural that the appellants should seek discovery in the hope that they might turn up details of the government's position that might be turned to the appellant's advantage. In national security cases, however, more detailed information itself may compromise intelligence methods and sources." *Military Audit Project, 656 F.2d at 751* (footnotes omitted).

[**58] Neither do we see any reason to order the appointment of a special master. The decision whether to appoint a master lies within the discretion of the trial court. *Vaughn v. Rosen, 484 F.2d at 828*. Such appointments are "the exception and not the rule," *Fed. R. Civ. P. 53(b)*, and the decision not to name one will "very rarely" constitute an abuse of discretion. 5A J. Moore, *Moore's Federal Practice* para. 53.05[3] (2d ed. 1986). We are aware of no FOIA case -- and appellants have cited none -- in which an appellate court has ordered the appointment of a special master after the district judge decided against it. Indeed, in litigation of this size, the appointment of a special master will often present more problems than it will solve. If the master makes significant decisions without careful review by the trial judge, judicial authority is effectively delegated to an official who has not been appointed pursuant to article III of the Constitution; if the trial judge carefully reviews each decision made by the master, it is doubtful that judicial time or resources will have been conserved to any significant degree. We think the district court acted well within [**59] its discretion in maintaining direct personal supervision over this case, and we do not disturb its decision to do so.

III.

Our review of the grants of summary judgment to the remaining defendants will be much more concise. Appellants have touched upon these orders only casually in their briefs, and not at all during oral argument. Their focus, rather, has been on the FBI. Consequently, we have before us only the sketchiest of grounds on which we are asked to overturn the judgments below. We have reviewed the affidavits submitted in support of and in opposition to the motions for summary judgment, and on the basis of the legal principles we found controlling in Part II, we affirm the granting of those motions.

The remaining defendants had retrieved approximately 13,000 records in 1975. 1984 Memorandum Opinion at 10, J.A. at 130. With the exception of ERDA, these agencies apparently conducted little or no additional searches until 1981, when the parties stipulated to an order defining the scope of the search that would be required of these defendants. The 1981 Order was similar in purpose and structure to the 1978 Order that had applied to the FBI, although the lists of [**60] records specified were not identical. In response to the 1981 Order, the CIA retrieved approximately 300 additional records, the Department of Energy located approximately twenty, the Office of the United States Attorney in the Southern District of New

York produced two additional files, the Offices of the Attorney General and Deputy Attorney General found six pages, and the Criminal Division of the Department of Justice processed over 100 newly discovered records. *Id. at 21-25*, J.A. at 141-45. Many of the records retrieved had been originally generated by an agency other than that which [*962] discovered them, and those records were referred for processing to the agency responsible for their creation.

Appellants present few specifics in their challenges to the adequacy of these searches. They apparently do not press before us any claims at all with regard to the adequacy of the search conducted by the U.S. Attorney's Office in the Southern District of New York, or by ERDA. Their argument on the remaining searches rests primarily on the inadequacy of the searches those agencies conducted in 1975, a basis we have already rejected as applied to the FBI.

The one specific [**61] concern relating to these searches with which we have been presented is the appeal from the district court's denial of appellants' motion to produce records pertaining to Alfred Sarant and Joel Barr. While some such documents have been released, appellants claim that others are unaccounted for. They present no evidence, however, that such documents exist aside from their own description of the activities of these individuals abroad coupled with the assertion that "it is difficult to believe" that the FBI and the CIA do not themselves possess records containing this information. Affidavit of Marshall Perlin (Apr. 18, 1983) at 4, J.A. at 1819. Louis J. Dube, Information Review Officer for the Directorate of Operations of the CIA, has sworn that all relevant files have been searched for information pertaining to Sarant and Barr, Affidavit of Louis Dube, J.A. at 1838-40, and the district court correctly characterized appellants' claim to the contrary as "conjecture." Order of Feb. 29, 1984, J.A. at 118-19.

With regard to the exemptions claimed, we have reviewed the affidavits and accompanying Vaughn indices submitted by the defendants. We find them sufficiently detailed to justify [**62] the award of summary judgment, and appellants have presented us with no persuasive argument to the contrary. The district court adopted the same *in camera* procedure to test the validity of the exemptions, and examined a 60-page sample of every hundredth document totally or substantially withheld. Appellants presumably mean to incorporate into their appeal of these orders the reasoning that formed the basis of their challenge to this procedure as applied to the documents withheld by the FBI. We incorporate in response our approval of that procedure. *See* Part II-B *supra*. For substantially the reasons given by the district court, we affirm the grants of summary judgment to the remaining defendants.

IV.

This litigation has undoubtedly been difficult for all concerned. Appellants have been faced with the challenge confronting all who seek records under FOIA and believe that the government has not been sufficiently forthcoming -- the need to demonstrate both the existence of records to which they have no access and the inapplicability of exemptions claimed without the opportunity to view the material exempted. The defendants, particularly the FBI, have been faced with [**63] what we expect is the most daunting FOIA request yet made -- daunting both because of the volume of records involved and because of the sensitivity of their contents. They have devoted enormous amounts of time and manpower to responding to this request, and as a result have processed and released hundreds of thousands of pages of records dating back through several decades. Judge June Green, throughout the more than eight years during which she presided over this complex litigation, has assiduously sought to fulfill both the appellants' legitimate interest in the documents to which they are legally entitled and the government's legitimate interest in maintaining the secrecy of documents, the disclosure of which would threaten either valid national security concerns or the privacy interests of third parties. The careful and conscientious attention she has given this difficult case is evident from the record.

Because questions remain about whether appellants have received all that the law requires be given them among the records searched by the FBI before 1978, we remand [*963] to the district court with instructions that these records, both those totally withheld and those [**64] released with deletions, be reprocessed by the FBI under current disclosure standards. In all other respects, we affirm the orders of the district court: the grant of partial summary judgment to the FBI with respect to the adequacy of its search, the grant of summary judgment to the FBI with respect to the validity of the exemptions claimed for documents processed after 1978, the grant of summary judgment to the remaining

defendant agencies, and the denial of appellants' motion to order the production of further documents pertaining to Sarant and Barr.

It is so ordered.

JAMES A. KAY, JR., Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION, Defendant.

Civil Action No.: 96-0660 (RMU), Document Nos.: 12, 13, 20, 24 & 30

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

976 F. Supp. 23*; *1997 U.S. Dist. LEXIS 20075

August 21, 1997, Decided
August 21, 1997, Filed

DISPOSITION: [**1] Plaintiff's Motion for In Camera Review DENIED; Plaintiff's Motion to Strike DENIED; FCC's Motion to Quash GRANTED; FCC's Motion for Leave to File Under Seal GRANTED; FCC's Motion for Summary Judgment GRANTED; judgment entered in favor of defendant FCC and case DISMISSED.

COUNSEL: For JAMES A. KAY, JR., plaintiff: Barry Allen Friedman, THOMPSON, HINE & FLORY, L.L.P., Washington, DC.

For FEDERAL COMMUNICATIONS COMMISSION, federal defendant: Charles Francis Flynn, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: RICARDO M. URBINA, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICARDO M. URBINA

OPINION

[*30] ***MEMORANDUM OPINION AND ORDER***

Denying Plaintiff's Motion for *In Camera* Review, Denying Plaintiff's Motion to Strike, Granting Defendant's Motion to Quash, Granting Defendant's Motion for Leave to File Under Seal, and Granting Defendant's Motion for Summary Judgment

Plaintiff James A. Kay, Jr., brings this action against defendant Federal Communications Commission ("FCC") under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552 (1996)*, for disclosure of withheld records pertaining to the FCC's investigation of his activities. The present matter comes before the court on the following motions: (1) plaintiff's motion for *in camera* review; (2) plaintiff's motion to strike the third Wypijewski declaration; (3) the FCC's motion to quash subpoenas; (4) the FCC's motion for leave to file second declaration under [**2] seal; and (5) the FCC's motion for summary judgment.

The above motions raise three issues for the court to resolve. First, the court must determine whether an *in camera* inspection of the withheld documents is warranted. Second, the court must decide whether the FCC's *Vaughn* Indice are sufficiently adequate for the court to conduct a *de novo* review of the FCC's initial decision to withhold certain documents. Finally, the court must determine whether the FCC properly invoked FOIA Exemption 7(A) to withhold the remaining documents plaintiff seeks.

Upon consideration of the parties' submissions, the applicable law, and the record herein, the court concludes that an *in camera* review of the withheld documents is not warranted. The court further concludes that the

Vaughn Indices in conjunction with the two declarations submitted by the FCC are adequate for the court to conduct a *de novo* review. Finally, the court concludes that the FCC properly withheld the documents pursuant to Exemption 7(A). [1] As a result, the court grants defendant's motion for summary judgment, grants defendant's motion to quash subpoenas, denies plaintiff's motion for an *in camera* review [**3] and denies defendant's motion to strike.

1 The FCC also withheld the same documents pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), (b)(7)(D) and (b)(7)(F). *See* Defendant's Motion for Summary Judgment ("Def. Mot. for Summ. J.") at 4-5. However, since the court concludes that the FCC properly invoked Exemption 7(A) for all the records withheld, the court need not determine the applicability of the other invoked exemptions.

I. BACKGROUND

Plaintiff is currently under investigation by the FCC to determine whether his radio [*31] licenses should be revoked. [2] By letter dated February 4, 1995, plaintiff submitted a request to the FCC pursuant to the FOIA for documents at the FCC's Los Angeles office in connection with the investigation. [3] Plaintiff's request sought interviews, statements, declarations and/or depositions of numerous individuals concerning plaintiff's radio operations. [4] By letter dated February 14, 1995, plaintiff submitted a second FOIA request for documents relating to an Official [**4] Notice of Violation issued by the FCC to the plaintiff. [5] By letter dated February 18, 1995, plaintiff submitted a third FOIA request for documents pertaining to the FCC's inspection of several stations operated by the plaintiff. [6]

2 The FCC has been conducting an investigation to determine (1) whether plaintiff has violated the FCC's rules regarding the number of frequencies to which he is entitled; (2) whether plaintiff has made misrepresentations in applications and correspondence to the FCC; and (3) whether plaintiff's licenses should be revoked. *See* Declaration of Anne Marie Wypijewski ("Wypijewski Decl.") P 28. As a result, in December 1994, the FCC issued an *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("Show Cause/HDO") requesting plaintiff to demonstrate why the FCC should not revoke all of plaintiff's licenses, not deny his pending licenses, and/or not impose a civil fine. *Id.* at 29. On May 31, 1996, the Administrative Law Judge ("ALJ") ordered that plaintiff's licenses be revoked and imposed a fine. *Id.* at 36. On July 1, 1996, plaintiff appealed the ALJ's decision to the FCC. Defendant's Opposition to Motion to Strike, n.1. Accordingly, on February 20, 1997, the FCC overturned the ALJ's decision and remanded the case to the ALJ for a full evidentiary hearing. To date, the ALJ has not issued a final decision.

[**5]

3 Declaration of Lawrence C. Clance ("Clance Decl.") P 1 and Def. Mot. for Summ. J. at 1.

4 Plaintiff's Exhibit ("Pl. Exh.") 1.

5 Clance Decl. P 2; Def. Mot. for Summ. J. at 2.

6 *Id.*

Upon receipt of these three requests, the FCC conducted a record search and located a total of 521 pages responsive to plaintiff's requests. [7] By letter dated November 6, 1995, the FCC released 507 pages to plaintiff. [8] The remaining 14 pages were withheld pursuant to FOIA Exemption (b)(7)(A), to protect ongoing enforcement proceedings concerning plaintiff. [9] In particular, the FCC withheld two functional categories of documents to protect the pending investigation. [10] The first category contains three pages consisting of confidential complainant/informant exhibits to be used as part of the Show Cause/HDO proceeding. The second category contains eleven pages consisting of attorney work product notes. [11]

7 Clance Decl. P 2.

8 Clance Decl. P 4 and Defendant's Exhibit ("Def. Exh.") B.

[**6]

9 Def. Exh. B.

10 Clance Decl. P 9 and Def. Exh. B.

11 *Id.*

By letter dated November 20, 1995, plaintiff submitted a fourth FOIA request for documents pertaining directly to the pending Show Cause/HDO proceeding. [12] Plaintiff's fourth request sought several categories of documents that served as the basis for the FCC's allegations in the Show Cause/HDO. [13] Upon the FCC's requests, plaintiff made advance payments on two occasions, December 12, 1995 and February 20, 1996, to

process plaintiff's requests. [14] By letter dated February 7, 1996, the FCC released 650 pages to the plaintiff. [15] In that same letter, the FCC informed plaintiff that certain materials were being withheld pursuant to Exemption (b)(7)(A). [16] On February 20, 1996, the FCC released an additional 174 pages responsive to plaintiff's request.

12 Wypijewski Decl. P 2 and Def. Exh. A.
13 Wypijewski Decl. P 3 and Def. Exh. A.
14 Wypijewski Decl. PP 5-6, 9-10, & 15 and Def. Exh. B-C, E & G.
[**7]
15 Wypijewski Decl. P 11 and Def. Exh. F.
16 Wypijewski Decl. PP 12-13.

By letter dated February 27, 1996, plaintiff sought a review of the FCC's initial February [*32] 7 decision to withhold documents. [17] In that letter, plaintiff specifically requested that a *Vaughn* Index be provided, challenged the production fees assessed, and sought identifying information of the individual who conducted the search. [18] On March 25, 1996, the FCC denied plaintiff's application for review. [19] The FCC determined that plaintiff was not entitled to a *Vaughn* Index either at the administrative level or when Exemption 7(A) is invoked. [20] The FCC further determined that plaintiff failed to provide any basis for his fees claim. [21]

17 Wypijewski Decl. P 20 and Def. Exh. I.
18 *Id.*
19 Wypijewski Decl. P 21 and Def. Exh. J.
20 *Id.*
21 Wypijewski Decl. P 22.

On March 15, 1996, [**8] the FCC released another 933 pages. By letter dated March 18, 1996, the FCC invoked exemption (b)(7)(A) and withheld the remaining documents responsive to plaintiff's fourth FOIA request. [22] Specifically, the FCC withheld witness statements, exhibits, and other materials compiled as part of the hearing designated by the Show Cause/HDO for fear that release of such documents would interfere with the FCC's enforcement proceedings against plaintiff. [23] Ultimately, of the 2,736 pages responsive to plaintiff's four requests, the FCC released 2,278 pages and withheld 458 pages. [24] Moreover, the FCC attests that all reasonably segregable information has been released. [25]

22 Wypijewski Decl. P 16 and Def. Exh. H.
23 *Id.*
24 Clance Decl. PP 8-9 and Def. Exh. B.; Wypijewski Decl. P 33. More precisely, of the plaintiff's first three requests, the FCC released 521 pages and withheld 14 pages. As to the fourth request, the FCC released 1,757 pages and withheld 444 pages.
25 Clance Decl. P 10; Wypijewski Decl. P 35.

[**9] Plaintiff filed the instant action on April 4, 1996 requesting that the court: (1) order the FCC to make the requested records available to plaintiff; (2) expedite proceedings in this action to prevent plaintiff from incurring irreparable harm; (3) enjoin the FCC from improperly withholding the information requested by plaintiff; (4) order the FCC to refund all monies paid by plaintiff to the FCC for processing all FOIA requests subsequent to the issuance of the Show Cause/HDO; (5) award plaintiff his costs and attorneys' fees in this action; and (6) grant such other and further relief as the court may deem just and proper. [26]

26 Complaint at 4-5.

II. DISCUSSION

A. Legal Standard for Summary Judgment in FOIA Cases

In determining whether summary judgment is appropriate, the court must conduct a *de novo* review of the record. *5 U.S.C. § 552 (a)(4)(B)*. Summary judgment is appropriate where "there are no genuine issues as to any material fact" and "the moving party is entitled to judgment [**10] as a matter of law." *Fed. R. Civ. P. 56(c)*; *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. In FOIA cases, summary judgment may be granted solely on the basis of agency affidavits provided that they are clear, specific and reasonably detailed, and there is no contradictory evidence on the record or evidence of agency bad faith. *See Hayden v. Nat'l Sec. Agency, 197 U.S. App. D.C. 224, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937, 64 L. Ed. 2d 790, 100 S. Ct. 2156 (1980)*. In addition, the burden rests on the agency to justify non-disclosure of any document or portion thereof. *See DOJ v. Reporters Committee, 489 U.S. 749, 755, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)*; *see also Voinche v. FBI, 940 F. Supp. 323, 327 (D.D.C. 1996)* (citing *Nat'l Cable Television Ass'n, Inc. v. FCC, 156 U.S. App. D.C. 91, 479 F.2d 183, 186 (D.C. Cir. 1973))*. In this case, the court concludes that the FCC's *Vaughn* Indices and declarations are sufficiently adequate for the court to

conduct a *de novo* review, and that the FCC met its burden of justifying non-disclosure. Accordingly, the court grants the FCC's motion for summary judgment.

[**11] [*33] **B. *In Camera* Review**

Plaintiff requests an *in camera* review of the withheld documents claiming that the FCC acted in bad faith by not releasing documents responsive to his four FOIA requests. Plaintiff argues that he obtained several documents, in another litigation, which were allegedly responsive to his FOIA requests but were not released to him by the FCC as required under the FOIA.

The FOIA explicitly authorizes trial courts to conduct *in camera* review of agency materials to determine the applicablity of the invoked exemptions, thereby allowing trial courts to make case specific determinations. *See Quinon v. FBI, 318 U.S. App. D.C. 228, 86 F.3d 1222, 1228 (D.C. Cir. 1996)*. The court has "broad discretion" to conduct an *in camera* review, if after examining agency affidavits, the court finds them to be insufficient. *See Lam Lek Chong v. DEA, 289 U.S. App. D.C. 136, 929 F.2d 729, 735 (D.C. Cir. 1991)* (quoting *Carter v. Dep't of Commerce, 265 U.S. App. D.C. 240, 830 F.2d 388, 392 (D.C. Cir. 1987)*; *see also Quinon v. FBI, 86 F.3d at 1227*. In some cases, it "will plainly be necessary and appropriate" to conduct an *in camera* inspection in order [**12] to make a thorough *de novo* review. *See Quinon, 86 F.3d at 1227* (citing H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 8, U.S.C.C.A.N. 1974). Ultimately, the key criterion is "'whether the district judge believes that *in camera* inspection is needed in order to make a responsible *de novo* determination on the claims of exemption.'" *Carter, 830 F.2d at 392*, (quoting *Ray v. Turner, 190 U.S. App. D.C. 290, 587 F.2d 1187, 1195 (D.C. Cir. 1978)*); *Hayden v. NSA, 197 U.S. App. D.C. 224, 608 F.2d 1381, 1384 (D.C. Cir. 1979), cert. denied, 446 U.S. 937, 64 L. Ed. 2d 790, 100 S. Ct. 2156 (1980)*.

In *Allen v. CIA*, the D.C. Circuit set out several criteria for determining the need for *in camera* review in FOIA cases. *205 U.S. App. D.C. 159, 636 F.2d 1287, 1293 (D.C. Cir. 1980)*. These criteria do not limit the broad discretion of the trial courts but merely offer some factors trial courts should consider before exercising that discretion. *636 F.2d at 1297*. These criteria include: (1) judicial economy; (2) the conclusory nature of the agency affidavits; (3) possible bad faith on the part of the agency; (4) agency proposal of *in camera* review; (5) disputes concerning the contents of the [**13] document; and (6) strong public interest in disclosure. *Id. at 1297-99*.

In this case, without providing the court with any concrete evidence, plaintiff alleges that the FCC withheld the documents in bad faith. Agency affidavits, however, generally enjoy a presumption of good faith. *See Carter, 830 F.2d at 393*. As a result, a mere allegation of agency bad faith, without more tangible evidence supporting that allegation, will not suffice to undermine the sufficiency of agency submissions. *Id.; see SafeCard Services, Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200-1201 (D.C. Cir. 1991)*; *see also Ground Saucer Watch Inc. v. CIA, 224 U.S. App. D.C. 1, 692 F.2d 770, 771 (D.C. Cir. 1981)*. In FOIA cases, a requester may support an allegation of bad faith by presenting evidence that additional, releasable documents exist. *See Ground Saucer Watch, 692 F.2d at 771*. Speculative assertions that more documents exist will not cast doubt on the agency's affidavits and assertions. *See SafeCard Services, Inc. 926 F.2d at 1201*; *see also Ground Saucer Watch, 692 F.2d at 771*; *see also Grove v. DOJ, 802 F. Supp. 506, 518 (D.D.C. 1992)*; *see also Albuquerque Publishing* [**14] *Co. v. DOJ, 726 F. Supp. 851, 859 (D.D.C. 1989)*. Furthermore, assertions of bad faith must fail where the plaintiff has acquired documents through other means, such as formal discovery, because these procedures may differ from FOIA disclosure procedures. *See Campbell v. DOJ, 1996 U.S. Dist. LEXIS 14996, 1996 WL 554511*, *1. Finally, if the agency does not possess the documents at the time of the FOIA request, even though the documents may have existed at some earlier point in time, the agency is not improperly withholding them. *See SafeCard Services, Inc., 926 F.2d at 1201*.

In the present case, as evidence of bad faith, plaintiff asserts that he acquired five letters and a 1993 FOIA request submitted by Harold Pick ("Pick Request"), which the FCC withheld under various exemptions, through formal discovery in connection with a pending lawsuit in California. [27] Based on this assertion, plaintiff argues that the FCC [*34] unfairly denied him access to documents he needs to prepare for the pending Show Cause/HDO proceeding before the FCC and other litigation not involving the FCC. [28]

27 Plaintiff's Motion for *In Camera* Review at 4-5.

[**15]

28 *Id.*

In response, the FCC submitted a third declaration of Anne Marie Wypijewski ("Third Wypijewski Declaration") which provides detailed reasons for withholding the specific documents which plaintiff offers as "evidence" of the FCC's bad faith. [29] Specifically, the Third Wypijewski Declaration explains that the five letters, addressed to a former FCC employee, were forwarded to that employee in July 1995. [30] The Third Wypijewski Declaration states that, therefore, these letters were not in the FCC's files when it conducted a file search in response to plaintiff's fourth FOIA request. [31] As for the Pick Request, the FCC attests that it could not be located in any search because the request was defective. [32] Accordingly, the Third Wypijewski Declaration attests, the "request" was never received by the FCC. [33] Additionally, the Third Wypijewski Declaration states that, assuming this was indeed a FOIA request, it would not have been released because the FCC would have destroyed this request within two years pursuant to FCC procedures. [34]

29 *See generally* Third Wypijewski Declaration. Plaintiff filed a motion to strike the Third Wypijewski Declaration on grounds that (1) the declarant was not the proper individual to attest to the FCC's actions; (2) that her statements contain hearsay and are, therefore, not admissible; and (3) that the declaration is inherently unreliable. *See* Plaintiff's Motion to Strike at 2-8. For the reasons stated below, the court denies plaintiff's motion to strike.

Generally, declarations accounting for searches of documents that contain hearsay are acceptable. *See SafeCard Serv., Inc. v. SEC., 288 U.S. App. D.C. 324, 926 F.2d 1197, 1201 (D.C. Cir. 1991)*. In *SafeCard Services*, the plaintiff asserted that the affidavit contained second-hand statements thus rendering the affidavit inadmissible. The court, in upholding the affidavit, reasoned that the declarant's statements, although second-hand, were based upon an individual's actual knowledge. *Id.* Similar to the affidavit in *SafeCard*, Ms. Wypijewski's third declaration contains second-hand information. Specifically, Mr. Andary, the addressee of the five letters, confirmed to Ms. Wypijewski that the letters had been forwarded to him. *See* Third Wypijewski Declaration P 5. Therefore, the court concludes that Ms. Wypijewski's statements regarding these letters, although partly second-hand, are based on Mr. Andary's actual knowledge, and are thus reliable. The court further notes that plaintiff has previously attacked the credibility of Ms. Wypejewski in a previous FOIA action before this very court. *See Kay v. FCC, 867 F. Supp. 11, 24 (D.D.C. 1994)*. As in that case, the court concludes that plaintiff has offered no concrete evidence to doubt Ms. Wypijewski's credibility. Accordingly, the court denies plaintiff's motion to strike.

[**16]

30 Third Wypijewski Declaration PP 3-8.

31 *Id.*

32 *Id. at P 9.*

33 *Id.*

34 *Id. at P 10.*

Plaintiff fails to overcome the presumption of good faith afforded to the FCC's submissions in this case. Plaintiff's so-called "evidence" of FCC's bad faith is too speculative and conclusory. Plaintiff fails to offer a concrete basis upon which the court may conclude that the FCC has improperly withheld documents. The mere fact that plaintiff has acquired the documents through formal discovery in an unrelated litigation does not imply that the FCC improperly withheld documents from plaintiff in violation of the FOIA. The release of documents through formal discovery procedures pursuant to the Federal Rules of Civil Procedure differs substantially from the FOIA procedures governing the disclosure of documents. Moreover, the Third Wypejewski Declaration has established that the documents at issue did not exist at the time the FCC conducted a search to respond to plaintiff's FOIA requests. Accordingly, the court concludes that the FCC did not act in bad [**17] faith in withholding any documents, thus plaintiff's request for *in camera* review must be denied. [35]

35 In an effort to discredit Ms. Wypijewski's statements in her third declaration, plaintiff has subpoenaed two former FCC employees for depositions. The FCC subsequently filed a motion to quash subpoenas and a motion for a protective order asserting that the depositions of these two individuals is not relevant to the present action, and that plaintiff has failed to show bad faith on

the part of the FCC to warrant discovery. *See* Defendant's Motion to Quash Subpoenas and Motion for a Protective Order at 5-7.

A district court should deny discovery when the affidavits are sufficiently detailed and submitted in good faith. *See SafeCard Serv., 926 F.2d at 1200*. Further, discovery should be denied if the district court determines that plaintiff merely desires discovery as a means of finding "something that might impugn the affidavits" submitted by the agency. *Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979)*. In the present case, plaintiff states that he seeks to depose these two individuals "in an effort to determine whether the hearsay statements contained in the [third] Wypijewski Declaration are accurate." Plaintiff's Opposition to Defendant's Motion to Quash Subpoenas and for a Protective Order at 3. He further acknowledges that agency affidavits are provided with a good faith presumption but argues that he has submitted evidence of bad faith in his motion for *in camera* review to cast doubt on the FCC's submissions. *Id. at 5-6*. However, the court, as stated above, concluded that Ms. Wypejewski's declaration is sufficient. The court has further concluded that plaintiff failed to submit any concrete evidence of bad faith on the part of the FCC. Consequently, the court determines that plaintiff impermissibly seeks discovery as a means to discredit the FCC's declarations. Accordingly, the court grants defendant's motion to quash and motion for a protective order.

[**18] [*35] **C. Adequacy of the *Vaughn* Index**

In justifying non-disclosure, the government must submit a *Vaughn* Index and affidavits for the court to conduct a *de novo* review of the applicability of the exemption invoked. *See Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1994)*. Traditionally, a *Vaughn* Index is a single document describing the deletion, the exemption invoked, and the exemption's applicability. *Id.; see also Founding Church of Scientology v. Bell, 195 U.S. App. D.C. 363, 603 F.2d 945, 949 (D.C. Cir. 1979)*. In short, a *Vaughn* Index lists the withheld documents along with the agency's reasons for non-disclosure.

However, it is well established that the critical elements of the *Vaughn* Index lie in its function, and not its form. *See Keys v. DOJ, 265 U.S. App. D.C. 189, 830 F.2d 337, 349 (D.C. Cir. 1987)*. As a result, an agency may depart from the traditional *Vaughn* Index depending on the exemption invoked. *See Information Acquisition Corp. v. DOJ, 444 F. Supp. 458, 462 (D.D.C. 1978)*. Ultimately, the agency's submissions must enable the court to derive a clear [**19] explanation of why the agency invoked the particular exemption. *See Keys, 830 F.2d at 349*; *see also Vaughn v. U.S., 936 F.2d 862, 867 (6th Cir. 1991)*.

Courts have commonly approved of a departure from the traditional *Vaughn* Index where an agency invokes Exemption 7(A). *See NLRB v. Robbins Tire, 437 U.S. 214, 224, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)*; *see also Bevis v. Dep't. of State, 255 U.S. App. D.C. 347, 801 F.2d 1386, 1389-1390 (D.C. Cir. 1986)*; *see also Crooker v. ATF, 252 U.S. App. D.C. 232, 789 F.2d 64, 67 (D.C. Cir. 1986)*; *see also Campbell v. HHS, 221 U.S. App. D.C. 1, 682 F.2d 256, 265 (D.C. Cir. 1982)*; *see also Kay, 867 F. Supp. at 18*. Specifically, an agency is permitted to withhold records under Exemption 7(A) on a categorical basis and establish a generic showing of interference, rather than an individual showing of interference. *See Robbins Tire, 437 U.S. at 224*. Moreover, where an agency invoking Exemption 7(A) proceeds on a categorical basis, a traditional *Vaughn* Index is unnecessary. *See e.g., Church of Scientology of California v. IRS, 253 U.S. App. D.C. 78, 792 F.2d 146, 152 (D.C. Cir. 1986)*; *see also Lewis v. IRS*, [**20] *823 F.2d 375, 380 (9th Cir. 1987)*.

When an agency invokes Exemption 7(A) and relies on the categorical approach to withhold documents, it must undertake a three-fold task. *See Bevis, 801 F.2d at 1389-1390*. First and most importantly, the agency must define the categories functionally. *See id.* A proper functional category will allow the court to link the nature of the document and the alleged likely interference. *Id.* Second, the agency must conduct a document-by-document review in order to assign each document to a proper category. *Id.* Finally, the agency must explain to the court how the release of material in each category would interfere with enforcement proceedings. *Id.*

In the present case, the FCC relied on the categorical

approach to demonstrate the applicability of Exemption 7(A). To substantiate its decision to withhold the documents, the FCC submitted two declarations [*36] as well as two *Vaughn* Indices. [36] Plaintiff, however, challenges the adequacy of the FCC's submissions arguing that the categorical approach is improper because it fails to provide an explanation for each document withheld. [37] Plaintiff argues, therefore, that the FCC's submissions [**21] lack specificity to enable the court to review the applicability of the invoked exemptions. [38] Plaintiff's assertion, however, must fail because the *Vaughn* Indices and the declarations submitted by the FCC are sufficiently adequate for the court to conduct a *de novo* review of Exemption 7(A).

36 The FCC also submitted the Second Declaration of Anne Marie Wypijewski filed under seal. Plaintiff to this date has not responded to that motion. Since the FCC's motion is unopposed, the court hereby grants the motion to file the declaration under seal.

37 Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Pl. Opp. to Summ. J.") at 9.

38 *Id.*

First, the FCC defined its categories functionally. Specifically, the FCC withheld four categories of documents: (1) confidential complainant/informant exhibits to be used as part of the Show Cause/HDO proceeding; (2) attorney work product notes; (3) notarized statements of prospective witnesses; and (4) forest service documents [**22] to be used as potential exhibits in the Show Cause/HDO proceeding. [39] These categories allow the court to link the nature of the documents and the ensuing interference. For example, the category entitled confidential complainant/informant exhibits defines the nature of the information contained in the included documents. Specifically, this category contains documents submitted by confidential complainants/informants regarding plaintiff's activities. [40] This allows the court to assess the FCC's representations in the *Vaughn* Indices as well as the accompanying declarations of how the release of the documents would interfere with the Show Cause/HDO proceeding.

39 Clance Decl. and Def. Exh. B.; Wypijewski Decl. and Def. Exh. L.

40 Wypijewski Decl. P 31 and Def. Exh. L.

Second, the FCC conducted a document-by-document review and attests that it withheld 123 documents in the category of confidential complainant/informant exhibits; 57 documents in the category of attorney work product notes; 201 [**23] documents in the notarized statements of prospective witnesses category; and 77 documents in the category of forest service documents. [41] Finally, the *Vaughn* Indices in conjunction with the declarations provide the court with detailed explanations of how release of each category of documents would interfere with the Show Cause/HDO proceeding against plaintiff. Accordingly, the court concludes that the FCC's *Vaughn* Indices and the two accompanying declarations in the record are adequate to allow the court to conduct its *de novo* review. As such, the court now proceeds to conduct its *de novo* review of the invoked exemption.

41 Clance Decl. and Def. Exh. B; Wypijewski Decl. and Def. Exh. L.

D. *De Novo* Review of the Challenged Exemptions

It is well established that the mandate of the FOIA calls for broad disclosure of government records, yet it is also recognized that public disclosure is not always in the public interest. Consequently, Congress provided nine exemptions to the general [**24] disclosure provisions of the FOIA. *See CIA v. Sims, 471 U.S. 159, 166, 85 L. Ed. 2d 173, 105 S. Ct. 1881 (1985)*. In the present case, the FCC invokes one subcategory of law enforcement subsection (b)(7) ("Exemption 7") to withhold records responsive to plaintiff's FOIA requests: subcategory 7(A), interference with a pending enforcement proceeding. In order to properly invoke Exemption 7, the FCC must initially demonstrate that the records were compiled for a law enforcement purpose. For subcategory 7(A) to apply, the FCC must demonstrate that it is needed to protect a pending enforcement proceeding.

The court's *de novo* review of the record indicates that the FCC properly classified the withheld records as being compiled for [*37] law enforcement purposes under Exemption 7. The FCC has also properly invoked Exemption 7(A) to withhold documents concerning an enforcement proceeding. The court concludes that the FCC released all reasonably segregable material responsive to plaintiff's FOIA requests. The court will now address the threshold inquiry of Exemption 7 and then the invoked subcategory 7(A).

1. Exemption 7 -- The Law Enforcement Exemption

The FCC invokes Exemption 7 [**25] to withhold documents relating to law enforcement proceedings. Exemption 7 protects "records or information compiled for law enforcement purposes." *5 U.S.C. § 552(b)(7)*. In order to withhold documents under Exemption 7, the agency must, as a preliminary matter, demonstrate that the records were compiled for a law enforcement purpose. In order to meet this threshold, an agency must establish the existence of a "nexus between [its] investigation [of the individual] and one of [its] law enforcement duties." *Pratt v. Webster, 218 U.S. App. D.C. 17, 673 F.2d 408, 420-21 (D.C. Cir. 1982)*; *see also Keys v. DOJ, 830 F.2d at 340*. This nexus necessarily requires an agency to establish a connection between the individual under investigation and a possible violation of a federal law. *See Pratt, 673 F.2d at 420*. Once a law enforcement purpose is established, access to law enforcement records may be limited by any of the six subcategories delineated under Exemption 7.

In the present case, the FCC has met the threshold requirement by showing that the documents withheld pursuant to Exemption 7 were indeed compiled for law enforcement purposes. The FCC submitted a declaration which [**26] attests to the connection between its investigation of plaintiff and its law enforcement duties. This declaration confirms that the FCC's law enforcement duties stem from its established purpose "of regulating interstate and foreign commerce in communication by wire and radio . . ." [42] Ultimately, the FCC bears the responsibility of investigating violations of the Communication Act as well as other FCC rules. [43]

42 Wypijewski Decl. P 25.
43 *Id.*

In carrying out its duties, the FCC initiated an investigation into plaintiff's activities in 1993 to determine whether he had violated the FCC's rules regarding the number of frequencies to which plaintiff was entitled, and whether he had made misrepresentations in his FCC applications and correspondence. [44] This investigation alone clearly demonstrates that the FCC has established the necessary nexus between its investigation of plaintiff and one of its law enforcement duties. Accordingly, the court concludes that the information withheld under [**27] Exemption 7 does in fact contain information created for law enforcement purposes. The court will now determine whether the FCC has satisfied the requirements of Exemption 7(A).

44 Wypijewski Decl. P 28. The FCC confirms that the investigation is specifically geared towards determining whether plaintiff has violated the FCC's rules, including *47 C.F.R. §§ 90.623, 90.625, 90.631, 90.633, 90.155*, and *1.17*.

2. Exemption 7(A) -- Interference with Investigation or Enforcement Proceedings

An agency may invoke Exemption 7(A) when release of the requested information "could reasonably be expected to interfere with enforcement proceedings." *5 U.S.C. § 552(b)(7)(A)*. The applicability of Exemption 7(A) involves a two-step analysis: (1) whether a law enforcement proceeding is pending or prospective; and (2) whether release of information about it could reasonably be expected to cause some articulable harm. *See Bevis, 801 F.2d at 1388*.

a. Pending Enforcement Proceeding

An agency may invoke Exemption [**28] 7(A) to protect regulatory proceedings as well as criminal and civil actions. *See Alyeska Pipeline Serv. Co. v. EPA, 272 U.S. App. D.C. 355, 856 F.2d 309, 310 (D.C. Cir. 1988)*. Regardless of the type of enforcement proceeding an agency aims to protect, an agency may not simply withhold records found in an investigatory file. *See Robbins Tire, 437 U.S. at 232*. However, an agency may [*38] invoke Exemption 7(A) to protect pending investigations or actual enforcement proceedings. *Id. at 220*; *Campbell v. HHS, 682 F.2d at 264, n.20* (citing *Carson v. DOJ, 203 U.S. App. D.C. 426, 631 F.2d 1008, 1018 (D.C. Cir. 1980)*; *see also Kilroy v. NLRB, 633 F. Supp. 136, 142-143 (S.D. Ohio 1985), aff'd, 823 F.2d 553 (6th Cir. 1987)*. In addition, if the agency invokes Exemption 7(A) to withhold witness statements, the agency may continue to withhold those statements until the completion of all reasonably foreseeable administrative and judicial proceedings. *See Robbins Tire, 437 U.S. at 220*. Moreover, if the proceeding is not pending, an agency may continue to invoke Exemption 7(A) so long as the proceeding is regarded as prospective. *See Ehringhaus v. FTC, 525 F. Supp. 21,* [**29] *23 (D.D.C. 1980)* (quoting *Nat'l Public Radio v. Bell, 431 F. Supp. 509, 514 (D.D.C. 1977))*.

In the present case, the FCC invoked Exemption

7(A) to withhold records relating to an ongoing investigation of plaintiff's alleged violation of the FCC's rules and regulations. [45] Plaintiff, however, asserts that the investigation has been completed and that the case is in its trial phase. [46] Plaintiff argues, therefore, that the FCC must release the records he requested. [47] The court disagrees. Plaintiff fails to recognize the extent of the protection of Exemption 7(A). Although the FCC's investigation of plaintiff's activities may be completed, the FCC may continue to withhold those records until all reasonably foreseeable proceedings stemming from that investigation are closed. Specifically, the FCC may continue to invoke Exemption 7(A) to withhold the requested documents until the Show Cause/HDO proceeding regarding the revocation of plaintiff's licenses comes to a conclusion. The record indicates that plaintiff is waiting for a full evidentiary hearing before an ALJ regarding the revocation of his radio licenses. Initially, the ALJ recommended that plaintiff's licenses be revoked [**30] but the FCC overruled that decision and remanded the matter back to the ALJ for an evidentiary hearing. To date, that hearing has not yet concluded. As such, the FCC's enforcement proceeding against plaintiff is considered pending. Accordingly, the court concludes that the FCC properly invoked Exemption 7(A) to withhold the records at issue.

45 Clance Decl. P 7; Def. Mot. for Summ. J. at 7.
46 Pl. Opp. to Summ. J. at 7.
47 *Id.*

b. Interference

Once an agency establishes that an enforcement proceeding is pending, the agency must further demonstrate that release of the withheld documents is likely to cause some distinct harm. *See Campbell, 682 F.2d at 258*. An agency may invoke Exemption 7(A) when either the government's case in court could be harmed or the investigation for an imminent proceeding may be harmed. *Id.; see also North v. Walsh, 279 U.S. App. D.C. 373, 881 F.2d 1088, 1097 (D.C. Cir. 1989)*. Thus, an agency may not withhold responsive documents merely because [**31] they are related to an enforcement proceeding. *See Campbell, 682 F.2d at 259*. Moreover, the agency needs to establish a direct relationship between the agency records and the pending investigation to evidence the possible interference. *Id.* As a result, the agency must demonstrate that disclosure would "disrupt, impede or otherwise harm the enforcement proceeding or the investigation." *North, 881 F.2d at 1097*.

Generally, an agency may establish interference by showing that release of the records would reveal the scope, direction and nature of the its investigation. *See North, 881 F.2d at 1097* (citing *Alyeska Pipeline Service, 856 F.2d at 309*). Further, interference may be established by demonstrating that release of the records may give the requester earlier and greater access than otherwise possible. *See Robbins Tire, 437 U.S. at 241*; *see also North, 881 F.2d at 1097*. In this regard, FOIA cannot be used as a discovery tool. *See Robbins Tire, 437 U.S. at 242, n.23* (citing *EPA v. Mink, 410 U.S. 73, 86, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973))*. Specifically, a requester's rights in the withheld documents are neither diminished [*39] nor enhanced by any litigation-generated need for the documents. [**32] *Id.* An agency may further establish interference by demonstrating that premature release of the records could give a litigant the ability to construct defenses to avoid the charges entirely. *Id. at 241-242*; *see also North, 881 F.2d at 1097*. Finally, where an agency withholds witness statements, the agency may demonstrate interference by showing that premature release of witness statements could lead to possible witness intimidation, thereby chilling potential witnesses. *See Robbins Tire, 437 U.S. at 239-241*.

In the instant case, the FCC invokes Exemption 7(A) for fear that disclosure of the four categories of documents would significantly harm the Show Cause/HDO proceeding. [48] Plaintiff, however, argues that the FCC has improperly invoked Exemption 7(A) by denying him access to information necessary to defend against the Show Cause/HDO proceeding. [49] Plaintiff further argues that the FCC's concerns regarding witness intimidation are unfounded. [50] Specifically, plaintiff asserts that the "FCC has not even alleged that [plaintiff] has harassed or threatened any of the FCC's witnesses." [51]

48 Def. Mot. for Summ. J. at 7.
[**33]
49 Pl. Opp. to Summ. J. at 5-9.
50 *Id. at 13-15*.
51 *Id. at 14*.

Plaintiff's assertions, however, must fail because the FCC amply demonstrated that release of the withheld

records would interfere with the pending Show Cause/HDO proceeding. The FCC specifically established that release of any of the above four categories would give rise to the following harms: (1) give plaintiff insight into the FCC's evidence against him; (2) allow plaintiff to discern the narrow focus of the FCC's investigation; (3) potentially assist plaintiff in circumventing the investigation; and (4) potentially create witness intimidation and further discourage future witness cooperation. [52] In particular, the FCC attests that the notarized statements of prospective witnesses, the complainant/informant exhibits and the forest service documents were prepared precisely to be used as part of the Show Cause/HDO proceeding, either as testimony or exhibits. [53] As such, release of these categories could allow plaintiff to assess the FCC's evidence against him, revealing the scope, nature and focus [**34] of the FCC's investigation. As a result, plaintiff could potentially circumvent the Show Cause/HDO proceeding.

52 Def. Mot. for Summ. J. at 7-8.

53 Wypijewski Decl. P 31 and Def. Exh. L.

Furthermore, the FCC's fears regarding witness intimidation are not unfounded. The FCC has established that the possibility of witness intimidation exists by attesting that prospective witnesses have expressed their fear to the FCC. [54] The FCC need not establish that witness intimidation is certain to occur, only that it is a possibility. *See Robbins Tire, 437 U.S. at 239-241*. Accordingly, the court concludes that the FCC properly invoked Exemption 7(A) to withhold the records at issue.

54 Wypijewski Decl. P 33.

III. CONCLUSION

For the reasons stated above, the court denies plaintiff's motion for *in camera* review; [**35] denies plaintiff's motion to strike; grants the FCC's motion to quash; grants the FCC's motion for leave to file under seal; and grants the FCC's motion for summary judgment.

Accordingly, it is this 21 day of August 1997,

SO ORDERED.

A separate Order for Entry of Judgment accompanies this Memorandum Opinion and Order.

RICARDO M. URBINA

UNITED STATES DISTRICT JUDGE

ORDER

Denying Plaintiff's Motion for *In Camera* Review, Denying Plaintiff's Motion to Strike, Granting Defendant's Motion to Quash, Granting Defendant's Motion for Leave to File Under Seal, and Granting Defendant's Motion for Summary Judgment

This matter comes before the court on the following motions: (1) plaintiff's motion for [*40] *in camera* review; (2) plaintiff's motion to strike the third Wypijewski declaration; (3) the FCC's motion to quash subpoenas; (4) the FCC's motion for leave to file second declaration under seal; and (5) the FCC's motion for summary judgment. Upon consideration of the parties' submissions, the applicable law, and the record herein, the court denies plaintiff's motion for *in camera* review; denies plaintiff's motion to strike the third Wypijewski declaration; [**36] grants the FCC's motion to quash subpoenas; grants the FCC's motion for leave to file second declaration under seal; and grants the FCC's motion for summary judgment for reasons set forth in a Memorandum Opinion and Order issued on the 21st day of August, 1997.

Accordingly, it is this 21st day of August, 1997,

ORDERED that Plaintiff's Motion for *In Camera* Review be and is hereby **DENIED**; it is

ORDERED that Plaintiff's Motion to Strike be and is hereby **DENIED**; it is

ORDERED that FCC's Motion to Quash be and is hereby **GRANTED**; it is

ORDERED that FCC's Motion for Leave to File Under Seal be and is hereby **GRANTED**; it is

FURTHER ORDERED that FCC's Motion for Summary Judgment be and is hereby **GRANTED**; and it is

ORDERED that judgment be and is hereby entered in favor of defendant FCC; and it is

FURTHER ORDERED that the above-captioned case be and is hereby **DISMISSED.**

SO ORDERED.

RICARDO M. URBINA UNITED STATES DISTRICT JUDGE

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

Civil Action No. 99-1234 (PLF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

185 F. Supp. 2d 54*; *2002 U.S. Dist. LEXIS 1792*; *30 Media L. Rep. 1429

January 14, 2002, Decided

DISPOSITION: [**1] Defendant's motion for partial summary judgment GRANTED in part and DENIED in part without prejudice. Plaintiff's cross-motion for partial summary judgment DENIED. Plaintiff's request for discovery DENIED.

COUNSEL: For JUDICIAL WATCH, INC., plaintiff: Larry Elliot Klayman, JUDICIAL WATCH, INCORPORATED, Washington, DC.

For U.S. DEPARTMENT OF JUSTICE, federal defendant: Marina Utgoff Braswell, U.S. ATTORNEY'S OFFICE, Washington, DC.

JUDGES: PAUL L. FRIEDMAN, United States District Judge.

OPINION BY: PAUL L. FRIEDMAN

OPINION

[*57] Plaintiff Judicial Watch, Inc. filed suit pursuant to the Freedom of Information Act, *5 U.S.C. § 552*, seeking information regarding the trade missions of the United States Department of Commerce from 1993 to 1998. Defendant has filed a motion for partial summary judgment, contending that before it continues to search for records responsive to plaintiff's request, plaintiff must indicate its willingness to pay fees or to authorize a particular amount of fees it is willing to pay. Plaintiff argues that it is entitled to a fee waiver either because the disclosure of information it requested is in the public interest or because Judicial Watch is a "representative [**2] of the news media." Judicial Watch also argues that the search conducted by defendant was inadequate.

Upon consideration of the arguments presented by the parties, the Court grants defendant's motion for partial summary judgment in part and denies it in part. It denies plaintiff's cross-motion for partial summary judgment.

I. BACKGROUND

By its own account, Judicial Watch is a "non-profit, non-partisan, tax-exempt 501(c)(3) organization which as a public interest law firm specializes in deterring, monitoring, uncovering, and addressing public corruption in government." Complaint P 5 and Exhibit ("Ex.") 1, October 19, 1998, Letter from Larry Klayman, Judicial Watch, to Margaret A. Irving, Department of Justice ("Oct. 19 Letter") at 3. In its FOIA request, plaintiff requested that defendant release all documents relating [*58] to "United States Department of Commerce trade missions from January 1993 to [October 1998] and the decision of the Attorney General to not appoint an independent counsel to investigate the alleged sale of seats on said trade missions by the Clinton Administration and/or the Democratic National Committee." Complaint P 5; Oct. 19 Letter at 1. Plaintiff also requested [**3] a fee waiver as a "representative of the news media" under *5 U.S.C. § 552(a)(4)(A)(ii)(II)*

and/or because the disclosure of the documents would in the public interest under *5 U.S.C. § 552(a)(4)(A)*. See id. PP 7-9, 11; Oct. 19 Letter at 2-4.

In a letter dated November 10, 1998, the Justice Department informed plaintiff that the request for a fee waiver had been denied on both grounds. See Complaint PP 7, 8, Ex. 2, November 10, 1998, Letter from Charlene Wright Thomas, Department of Justice, to Larry Klayman ("Nov. 10 Letter") at 1-3. Defendant explained that Judicial Watch would be categorized as an "other" requester and therefore entitled to only two hours of search time and 100 pages of records free of any search or duplication charge under *28 C.F.R. § 16.11(d)*. See Nov. 10 Letter at 2-3. Defendant also explained that it had searched for responsive documents for two hours and intended to produce those documents responsive to plaintiff's request; before defendant conducted any further searches, however, plaintiff would need to indicate its willingness to pay the normal search and duplication fees. [**4] See id. Plaintiff administratively appealed the denial of its request for a fee waiver. See Complaint P 9, Ex. 3, January 11, 1999, Letter from Larry Klayman to the Office of Information and Privacy, Department of Justice ("Jan. 11 Letter") at 2-4.

The Office of Information and Privacy ("OIP") denied plaintiff's appeal, concluding that plaintiff's application for a fee waiver or fee reduction had been properly denied. See Complaint P 10, Ex. 4, February 19, 1999, Letter from Richard L. Huff, Department of Justice, to Larry Klayman ("Feb. 19 Letter") at 1. Plaintiff also appealed to the OIP on the grounds that the search conducted was inadequate; the OIP denied plaintiff's appeal on that ground as well. See Complaint PP 13-25, Exs. 5-12.

II. DISCUSSION

A. Fee Waiver: Representative of the News Media

The Freedom of Information Act provides that each agency of the federal government shall promulgate regulations specifying a schedule of reasonable fees for document searches, duplication and review to be charged to FOIA requesters. See *5 U.S.C. § 552(a)(4)(A)*. It directs that the regulations also shall include procedures and guidelines for [**5] determining when such fees should be waived or reduced. See *5 U.S.C. § 552(a)(4)(A)(i)*. The agency's regulations should establish that the fees are "limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media." *5 U.S.C. § 552(a)(4)(A)(ii)(II)*. The Department of Justice has promulgated regulations that define "representative of the news media" as "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." *28 C.F.R. § 16.11(b)(6)*. The D.C. Circuit has further defined a representative of the news media as "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *National Security Archive v. United* [*59] *States Dep't of Defense, 279 U.S. App. D.C. 308, 880 F.2d 1381, 1387 (D.C. Cir. 1989)*.

There is some disagreement as to the correct standard a court is to apply in considering [**6] a government agency's denial of a plaintiff's request for representative of the media status. Many of the judges of this Court have concluded that *5 U.S.C. § 552(a)(4)(A)(vii)* is applicable in this situation and, based on the express language of that section, therefore have conducted a *de novo* determination limited to the record before the agency. See *Judicial Watch, Inc. v. United States Dep't of Justice, 2000 U.S. Dist. LEXIS 19789*, Civil Action No. 99-2315, slip op. at 4-5 (D.D.C. Aug. 17, 2000) (Kollar-Kotelly, J.); *Judicial Watch, Inc. v. United States Dep't of Justice, 133 F. Supp. 2d 52, 53 (D.D.C. 2000)* (Robertson, J.); *Judicial Watch v. United States Dep't of Justice, 102 F. Supp. 2d 6, 2000 U.S. Dist. LEXIS 9485*, slip op. at 2 (D.D.C. 1998) (Urbina, J.). Judge Kennedy, however, has concluded that *Section 552(a)(4)(A)(vii)* is not applicable when determining whether the agency properly categorized the requester as a representative of the news media and that the more deferential arbitrary and capricious standard applies. See *Judicial Watch II, 122 F. Supp. 2d 5, 11-12 (D.D.C. 2000)*. This Court will determine *de novo* whether plaintiff is entitled [**7] to be classified as a representative of the news media based on the record before the agency. [1]

1 In cases similar to this one, two judges of this Court have denied Judicial Watch's application for a fee waiver or reduction. See *Judicial Watch, Inc. v. United States Dep't of Justice, 122 F. Supp. 2d 13 (D.D.C. 2000)* ("Judicial Watch I") (Kennedy, J.); *Judicial Watch, Inc. v. United*

States Dep't of Justice, 122 F. Supp. 2d 5 (D.D.C. 2000) ("Judicial Watch II") (Kennedy, J.); *Judicial Watch, Inc. v. United States Dep't of Justice, 2000 U.S. Dist. LEXIS 19789*, Civil Action No. 99-2315, slip op. at 6 (D.D.C. Aug. 17, 2000) ("Judicial Watch III") (Kollar-Kotelly, J.). A third granted Judicial Watch's request for a fee waiver as a representative of the news media but denied a blanket public interest waiver. See *Judicial Watch, Inc. v. United States Dep't of Justice, 133 F. Supp. 2d 52 (D.D.C. 2000)* ("Judicial Watch IV") (Robertson, J.). A fourth granted Judicial Watch's request for a blanket public interest fee waiver. See *Judicial Watch v. United States Dep't of Justice, 102 F. Supp. 2d 6, 2000 U.S. Dist. LEXIS 9485*, slip op. at 1-6 (D.D.C. 1998) ("Judicial Watch V") (Urbina, J.).

[**8] Plaintiff represents that when it obtains documents through FOIA requests, "it allows reporters into its offices to inspect the documents" and that these reporters may write stories based on the information reviewed. Oct. 19, Letter at 3. It also states that it disseminates information by posting electronic copies of the documents received through its FOIA requests on Judicial Watch's website and by preparing press releases that are "blast faxed" to radio and television stations and to newspapers across the country. Id. Finally, it points to the fact that representatives of Judicial Watch, including Larry Klayman, "frequently appear on nationally broadcast radio and television programs." *102 F. Supp. 2d 6, 2000 U.S. Dist. LEXIS 9485*, Id. at 4.

Judicial Watch does not characterize itself as an entity engaged in the broadcast and publication of news but rather as a non-profit public interest law firm specializing in "deterring, monitoring, uncovering and addressing public corruption in government." Complaint, Ex. 1 at 3; see also *Judicial Watch III, 2000 U.S. Dist. LEXIS 19789*, slip op. at 6. From plaintiff's own characterization of its activities, the Court concludes that plaintiff is at best a type of middleman or vendor of information that representatives [**9] of the news media can utilize when appropriate. This relationship with the news media, however, does not make Judicial Watch a representative of the news media or entitle it to be considered as such for the purposes of a fee waiver under the FOIA. As the D.C. Circuit has made plain, when a party acts as a private library, [*60] information vendor or middleman, the party does not qualify as a "representative of the news media" for purposes of the FOIA. See *National Secuirty Archive v. United States Dep't of Defense, 880 F.2d at 1386-87*. "Merely making available information to the public does not transform a requester into a representative of the news media." *Judicial Watch I, 122 F. Supp. 2d at 20* (citing *National Security Archive v. United States Dep't of Defense, 880 F.2d at 1386*); but see *Judicial Watch IV, 133 F. Supp. 2d at 53-54*. To be considered a representative of the news media, a requester must establish that it has "a firm intent to disseminate, rather than merely make available, the requested information." *Judicial Watch II, 122 F. Supp. 2d at 13*; see *Judicial Watch I, 122 F. Supp. 2d at 20-21*. [**10] This Court therefore concludes that Judicial Watch should not be classified as a representative of the news media for purposes of a fee waiver under the FOIA.

B. Fee Waiver: Public Interest

The FOIA also provides:

> Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) [*5 U.S.C. § 552(a)(4)(A)(ii)*] if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii). Thus, in considering a public interest fee waiver request, the Court must determine whether the disclosure of the responsive documents is (1) in the public interest, and (2) not primarily in the requester's commercial interest. The party requesting documents under the FOIA bears the burden of showing that these requirements are met. See *Larson v. CIA, 269 U.S. App. D.C. 153, 843 F.2d 1481, 1483 (D.C. Cir. 1988)*. Furthermore, requests for public interest fee waivers must be [**11] reasonably detailed and specific; they are evaluated on a case-by-case basis. See id. Conclusory statements that the disclosure of the requested documents will serve the public interest are not sufficient to meet this burden. See *McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987)*. The Court decides *de novo* whether to grant plaintiff's request for a public interest waiver, but the

Court's consideration of the matter is limited to the record before the agency. See *5 U.S.C. § 552(a)(4)(A)(vii)*; see also *Larson v. CIA, 843 F.2d at 1483*; *Judicial Watch I, 122 F. Supp. 2d at 16*.

With respect to the public interest prong, the Department of Justice has promulgated a regulation setting out four factors used to determine whether a party making a FOIA request is entitled to a public interest fee waiver. See *28 C.F.R. § 16.11(k)(2)(i)-(iv)*. Those factors are:

> 1. The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."
>
> 2. The informative value of the information [**12] to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.
>
> 3. The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."
>
> 4. The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

[*61] 1. Subject of the Request: Operations or Activities of Government

The first factor requires that "the subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated." *28 C.F.R. § 16.11(k)(2)(i)*. Under this factor, the requesting party bears the burden of "identifying, with reasonable specificity, the public interest to be served." *Fitzgibbon v. Agency for Int'l Dev., 724 F. Supp. 1048, 1050 (D.D.C. 1989)*; see also *Judicial Watch I, 122 F. Supp. 2d at 17*.

Plaintiff states in general terms that [**13] it will use the information sought (1) "to promote accountable government," (2) for the public's benefit "by identifying areas for future reform as well as deterring future abuses that could otherwise proliferate without scrutiny," and (3) "for promoting confidence in an honest democratic system, and furthering the integrity of the American national government by deterring and/or sanctioning corrupt activities." It also states that the failure to disclose the information "will result in the further compromise of important interests of the American people." Oct. 19, 1998, Letter at 3-4. At best, plaintiff's assertions merely restate Judicial Watch's organizational mission and thus could be invoked by Judicial Watch any time it seeks a public interest fee waiver for any of its FOIA requests. See *Judicial Watch I, 122 F. Supp. 2d at 17*; *Judicial Watch II, 122 F. Supp. 2d at 8-9*; *Judicial Watch III, 2000 U.S. Dist. LEXIS 19789*, slip op. at 8-10; *Judicial Watch IV, 133 F. Supp. 2d at 54*. Under the FOIA and the applicable regulation, "a requester seeking a fee waiver must do more than simply assert that its request somehow relates to government operations." *Judicial Watch I, 122 F. Supp. 2d at 17*. [**14] In order to obtain a fee waiver, the requesting party has the burden of explaining with reasonable specificity how and why the disclosure of this particular information will serve the public interest and not how it believes that, as an organization, it furthers the public interest more generally. The Court concludes that plaintiff has failed to meet this burden.

2. Informative Value of Information to be Disclosed

The requested information must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." *28 C.F.R. § 16.11(k)(2)(ii)*. Plaintiff asserts that its request is "likely to contribute significantly to public understanding of the activities of the Justice Department, the Democratic National Committee and the Clinton Administration." Jan. 11 Letter at 3. Once again, plaintiff fails to provide details specific to this FOIA request indicating how the information sought will contribute to an increased public understanding of government operations or activities. Plaintiff contends that its "past experience . . . demonstrates the success [**15] of Judicial Watch in uncovering important facts about government activities, integrity and operations . . . ." Oct. 19 Letter at 4. But, as both Judge Kollar-Kotelly and Judge Kennedy have stated, "Judicial Watch's past record in uncovering information is simply irrelevant." *Judicial Watch III, 2000 U.S. Dist. LEXIS 19789*, Civil Action No. 99-2315, slip op. at 9 (D.D.C. Aug. 17, 2000); see

Judicial Watch II, 122 F. Supp. 2d at 9. Moreover, such statements must be supported by facts in order to satisfy the burden placed on the requester of a fee waiver. See *Judicial Watch I, 122 F. Supp. 2d at 18*. Judicial Watch has not met the second part of the public interest prong of the public interest fee waiver test.

[*62] 3. Contribution to Public Understanding of the Subject Likely to Result from Disclosure

The party seeking a fee waiver next must show that the disclosure of the requested information will "contribute to the public understanding" of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." *28 C.F.R. § 16.11(k)(2)(iii)*. In assessing this factor, a court must consider the requester's [**16] "ability and intention to effectively convey" or disseminate the requested information to the public. Id; see *Judicial Watch I, 122 F. Supp. 2d at 18*.

Plaintiff states that it has several mechanisms for disseminating information, including allowing reporters to inspect its documents, "blast faxing" press releases, maintaining a website and appearing on radio and television programs. See Oct. 19, Letter at 3. It also states that it intends to use these mechanisms to make the information obtained through this FOIA request available to the public. See id. The Court concludes that this explanation of how Judicial Watch typically disseminates information and its intent to do so in this case is sufficient to satisfy this prong for purposes of a public interest fee waiver. Although the plaintiff has not gone into great detail about how it plans to disseminate the particular information obtained through this FOIA request. Judicial Watch has described several methods it uses to make information available to the public, it has a record of conveying to the public information obtained through FOIA requests, and it has stated its intent to do so in this case. The Court [**17] therefore concludes that plaintiff has met its burden under the third factor.

4. Significance of Contribution to Public Understanding of Government Operations or Activities

Finally, the Court must consider whether "the disclosure is likely to contribute 'significantly' to the public understanding of government operations or activities." *28 C.F.R. § 16.11(k)(2)(iv)*. The public's understanding of the subject, "as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent." Id. Plaintiff argues that the information sought "is likely to contribute significantly to public understanding of the activities of the Justice Department, the Democratic National Committee and the Clinton Administration." Jan. 11 Letter at 3. It further states that the requested information will "promote confidence in an honest democratic system" and further "the integrity of the American national government." Oct. 19 Letter at 4. As with the first two factors, however, plaintiff makes only conclusory statements about how the public's understanding will be furthered but does not describe with any specificity [**18] how the disclosure of these particular documents will "enhance" public understanding "to a significant extent."

Plaintiff has failed to meet its burden with respect to three of the four factors in the public interest prong of the fee waiver test, and the Court therefore concludes that plaintiff has not satisfied its burden of showing that the release of the requested documents will serve the public interest and therefore cannot qualify for a fee waiver. The Court therefore grants defendant's motion for partial summary judgment and denies plaintiff's cross-motion for summary judgment on this issue. [2]

2 Because the Court has concluded that plaintiff has not satisfied the requirements of the public interest prong of the public interest fee waiver test, the Court need not decide whether the requested information is "primarily in the commercial interest of the requester." *5 U.S.C. § 552(a)(4)(A)(iii)*.

[*63] *C. The Adequacy of DOJ's Search*

1. The Legal Standards

Before it can obtain summary [**19] judgment in a FOIA case, an agency "must show, viewing the facts in the light most favorable to the requester, that . . . [it] 'has conducted a search reasonably calculated to uncover all relevant documents.'" *Steinberg v. United States Dep't of Justice, 306 U.S. App. D.C. 240, 23 F.3d 548, 551 (D.C. Cir. 1994)* (quoting *Weisberg v. United States Dep't of Justice, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (D.C. Cir. 1985))*. In determining the adequacy of a FOIA search, the Court is guided by principles of reasonableness. See *Oglesby v. United States Dep't of the Army, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990)*; *Int'l Trade Overseas, Inc. v. Agency for Int'l*

Development, 688 F. Supp. 33, 36 (D.D.C. 1988). While there is no requirement that an agency search every record system, *Truitt v. United States Dep't of State, 283 U.S. App. D.C. 86, 897 F.2d 540, 542 (D.D.C. 1990)*, or that a search be perfect, *Meeropol v. Meese, 252 U.S. App. D.C. 381, 790 F.2d 942, 955-56 (D.C. Cir. 1996)*, the search must be conducted in good faith using methods that are likely to produce the [**20] information requested if it exists. See *Campbell v. United States Dep't of Justice, 334 U.S. App. D.C. 20, 164 F.3d 20, 27 (D.C. Cir. 1998)*.

The Court may award summary judgment solely on the basis of information provided by the agency in affidavits or declarations when the affidavits or declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir. 1981)*; see also *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 826-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974)*. Agency affidavits or declarations must be "relatively detailed and non-conclusory . . . ." *SafeCard Services, Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200 (D.C.Cir. 1991)* (quoting *Ground Saucer Watch, Inc. v. CIA, 224 U.S. App. D.C. 1, 692 F.2d 770, 771 (D.C.Cir. 1981))*. [**21] Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Services, Inc. v. SEC, 926 F.2d at 1200*. While the affidavits or declarations submitted by the agency need not "set forth with meticulous documentation the details of an epic search for the requested records," *Perry v. Block, 221 U.S. App. D.C. 347, 684 F.2d 121, 127 (D.C. Cir. 1982)*, they must "describe what records were searched, by whom, and through what processes," *Steinberg v. United States Dep't of Justice, 23 F.3d at 552*, and must show "that the search was reasonably calculated to uncover all relevant documents." *Weisberg v. United States Dep't of Justice, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983)*; see *Campbell v. United States Dep't of Justice, 164 F.3d at 27*.

2. Plaintiff's Arguments

Judicial Watch first argues that the search conducted in this case was inadequate because defendant improperly denied plaintiff a fee waiver based on the public interest exception and/or the [**22] exception for representatives of the news media. The Court already has denied Judicial Watch's request for a fee waiver. Thus, to the extent that any search conducted by defendant was limited to two hours, such a search was necessarily adequate -- at least until plaintiff pays or expresses its willingness and intent to pay a reasonable fee. See Defendant's Motion for Partial Summary [*64] Judgment ("Def's Mot."), Declaration of Melanie Ann Pustay ("Pustay Decl.") PP 9, 13 & Exs. F & J. [3]

3 With respect to the searches for responsive documents conducted within the Civil Division of the Department of Justice and the Office of Legal Counsel, the searches were not limited to two hours and instead complete searches were conducted. See Def's Mot., Declaration of James M. Kovakas ("Kovakas Decl.") PP 3, 6-8 & Ex. B (Civil Division); Declaration of Paul P. Colborn ("Colborn Decl.") P 2 (Office of Legal Counsel).

Based on the information provided by defendant in its declarations, plaintiff also contends that the searches [**23] were inadequate, or at least that the descriptions provided as to the nature and scope of the searches were so inadequate that the Court has insufficient information on which to consider defendant's motion for partial summary judgement.

With respect to the search conducted within the Civil Division, the Court rejects plaintiff's argument. Defendant explains that the records maintained in the Civil Division's electronic database are indexed according to party name, case caption or court docket number. See Kovakas Decl. P 6. Because plaintiff's request contained none of this information, defendant explains that it was unable to conduct any meaningful search of its records for documents responsive to plaintiff's request. See id. The FOIA does not impose an obligation on defendant to conduct searches that are not likely to uncover responsive documents, see *Oglesby v. United States Dep't of the Army, 920 F.2d at 68*, or to generate records in order to respond to a request. See *Yeager v. DEA, 220 U.S. App. D.C. 1, 678 F.2d 315, 321 (D.C. Cir. 1982)*. The Court concludes that defendant's search of the records in the Civil Division was an adequate response [**24] to the request made.

Defendant also conducted searches for responsive records within the Department of the Executive Secretariat, the Office of the Attorney General, and the Office of Legal Counsel. Defendant explains that these searches were updates of a prior request made by plaintiff on July 15, 1997 -- a characterization which plaintiff does not dispute. See Pustay Decl. PP 4, 7 & Ex. D. With respect to the search for responsive records within the files of the Office of the Attorney General, the Court concludes that this search was adequate. As explained in the Pustay Declaration, defendant conducted a search that actually resulted in the production of documents to the plaintiff. See id. Because the search uncovered responsive documents, the Court is able to conclude that the search conducted was reasonably calculated to uncover such documents. Although defendant did not continue to search for documents after the two hours of free search time had been exhausted, this decision was appropriate because plaintiff has not yet indicated its willingness to pay search and copying fees. See *id. P 8*. The Court concludes that the search of records contained within [**25] the Office of the Attorney General was adequate.

Defendant's search of the electronic database maintained by the Department's Executive Secretariat, which apparently is the official repository for the Attorney General's records, did not uncover any responsive documents. See Pustay Decl. PP 4-5. Defendant, however, provides no description of how the electronic index is organized or how the search was conducted. The Putsay declaration fails to explain whether key words were used and if so which key words were used to search for responsive documents. Without knowing these details regarding defendant's search, the Court cannot determine whether defendant's efforts were "reasonably calculated" to recover the responsive records. [*65] See *Valencia-Lucena v. United States Coast Guard, 336 U.S. App. D.C. 386, 180 F.3d 321, 325 (D.C. Cir. 1999)*. The description of the search of the files of the Office of Legal Counsel is similarly deficient. While defendant at least explains that the Office of Legal Counsel maintains a database with the complete text of documents and that the database is searchable by key words, it fails to explain what key word searches were conducted. See [**26] Colburn Decl. P 2. Based on the declarations submitted by defendant, the Court is unable to conclude that these searches were adequate and therefore denies defendant's motion for partial summary judgment on this issue.

Finally, plaintiff contends that it is entitled to discovery regarding the searches conducted by defendant because the supporting declarations lack the detail necessary to determine exactly how defendant searched for responsive documents. Discovery is not favored in lawsuits under the FOIA. Instead, when an agency's affidavits or declarations are deficient regarding the adequacy of its search, as they are here, the courts generally will request that the agency supplement its supporting declarations. See *Nation Magazine, Washington Bureau v. United States Customs Service, 315 U.S. App. D.C. 177, 71 F.3d 885, 892 (D.C. Cir. 1995)*; *Oglesby v. United States Dep't of the Army, 920 F.2d at 68*. As no reason exists to distinguish this case from the general rule, the Court will not grant plaintiff's request for discovery.

An Order consistent with this Opinion will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: [**27] 1-14-02

ORDER

Before the Court are defendant's motion for partial summary judgment and plaintiff's cross-motion for partial summary judgment. Upon consideration of the arguments of the parties and the entire record of the case, and for the reasons stated in the Court's Opinion issued this same day, it is hereby

ORDERED that defendant's motion for partial summary judgment is GRANTED in part and DENIED in part without prejudice to its renewal; it is

FURTHER ORDERED that plaintiff's cross-motion for partial summary judgment is DENIED; it is

FURTHER ORDERED that plaintiff's request for discovery is DENIED; it is

FURTHER ORDERED that on or before February 15, 2002, defendant shall file a renewed motion for summary judgment addressed to the adequacy of search issue, with supplemental affidavits or declarations demonstrating the adequacy of its search for records

responsive to plaintiff's FOIA request. Plaintiff may respond to any such motion and supplemental affidavits or declarations on or before March 4, 2002.

SO ORDERED.

PAUL L. FRIEDMAN

United States District Judge

DATE: 1-14-02

FORSHAM ET AL. v. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

No. 78-1118

SUPREME COURT OF THE UNITED STATES

445 U.S. 169*; *100 S. Ct. 977*; *63 L. Ed. 2d 293*; *1980 U.S. LEXIS 27*; *5 Media L. Rep. 2473

October 31, 1979, Argued
March 3, 1980, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: *190 U. S. App. D. C. 231, 587 F.2d 1128*, affirmed.

DECISION:

Written data generated, owned, and possessed by privately controlled organization as grantee of funds from HEW, held not accessible as "agency records" under Freedom of Information Act (*5 USCS 552(a)(4)(B)*) when HEW never obtained data.

SUMMARY:

A privately controlled organization composed of a group of physicians and scientists specializing in the treatment of diabetes conducted a study of the effectiveness of certain diabetes treatment regimens and received federal grants for its study from the National Institute of Arthritis, Metabolism and Digestive Diseases (NIAMDD), a federal agency which is one of several Institutes of the National Institutes of Health, which, in turn, is a component of the Public Health Service, which is itself a part of the Department of Health, Education and Welfare (HEW). Under pertinent federal regulations governing the grants, NIAMDD exercised some supervision over the study, such as by reviewing periodic reports and conducting on-site visits, but the day-to-day administration of the grant-supported activities was in the hands of the grantee. Additionally, although NIAMDD had a right of access to the data collected by the grantee pursuant to the grants and could obtain permanent custody of the grantee's data, NIAMDD neither exercised its right to review or to obtain custody of the data. Ultimately, the grantee's reports on the results of its study, indicating that the use of certain drugs for the treatment of diabetes increased the risk of heart disease, led to proceedings by the Secretary of HEW and by the Food and Drug Administration to control labeling and use of the drugs, and also prompted a national association of physicians who were critical of the grantee's study to request access to the raw data generated by the grantee in its study. After both the grantee and HEW had denied the physicians' association's requests for access to the data, the association brought an action in the United States District Court for the District of Columbia under the enforcement provision of the Freedom of Information Act (*5 USCS 552(a)(4)(B)*)--which empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access--to require HEW to make available all of the raw data compiled by the grantee under the federally funded study. The District Court refused to order access to the raw data, holding that HEW had properly denied the physicians' association's request for the raw data on the

ground that the data were not "agency records" under the Act. Thereafter, the United States Court of Appeals for the District of Columbia Circuit affirmed (*190 App DC 231, 587 F2d 1128*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and Stewart, White, Blackmun, Powell, and Stevens, JJ., it was held that the written data, which was generated, owned, and possessed by the privately controlled organization receiving federal funds from an agency subject to the Freedom of Information Act, were not "agency records" within the meaning of the enforcement provision of the Act, since the data had not at any time been obtained by the federal agency, and that the data were not "agency records" merely because the grantee was subject to some supervision by the agency in the use of the federal funds which the grantee received, because the agency had sufficient authority under the grant agreement to have obtained the data had it chosen to do so, or because the data had been the basis for reports of the grantee which had been relied upon by an agency subject to the Act.

Brennan and Marshall, JJ., dissenting, expressed the views that where the nexus between an agency subject to the Freedom of Information Act and information requested under the Act is close, and where the importance of the requested information to public understanding of the agency is great, such information is an "agency record" within the meaning of the Act's enforcement provision, and that on the facts of the case at bar, the raw data generated by the privately controlled organization under the federal grant constituted records of HEW accessible under the Act as "agency records."

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- enforcement provision -- "agency records" -- data of private organization receiving federal funds --

Headnote:[1A][1B]

For purposes of the enforcement provision of the Freedom of Information Act (*5 USCS 552(a)(4)(B)*), whereby federal courts are empowered to order agencies subject to the Act to produce "agency records improperly withheld" from an individual requesting access, written data that is generated, owned, and possessed by a privately controlled organization which receives, from a federal agency subject to the Act, grant funds under which the data is generated, do not constitute "agency records" accessible under the Act when the data has not at any time been obtained by the agency. (Brennan and Marshall, JJ., dissented from this holding.)

[***LEdHN2]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- enforcement action -- requirements for gaining access to documents --

Headnote:[2]

In order for an individual to obtain access to documents through an action under the Freedom of Information Act (*5 USCS 552(a)(4)(B)*), it must be established that an "agency" subject to the Act has "improperly withheld agency records" from the individual.

[***LEdHN3]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- access to "agency records" -- data generated under federal grant by private entity -- relevance of federal grant and federal supervision --

Headnote:[3A][3B]

Written data that is generated, owned, and possessed by a privately controlled organization do not become "agency records" accessible under the Freedom of Information Act provision (*5 USCS 552(a)(4)(B)*) empowering federal courts to order agencies to produce "agency records improperly withheld" merely because the data is generated under a federal grant received by the organization from a federal agency subject to the Act, and such agency may exercise some supervision, short of

government control, over the use of its funds by the organization.

[***LEdHN4]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- access to "agency records" -- data generated under federal grant by private entity -- relevance of federal agency's authority to obtain data --

Headnote:[4A][4B]

Written data that is generated, owned, and possessed by a privately controlled organization do not become "agency records" accessible under the Freedom of Information Act provision (*5 USCS 552(a)(4)(B)*) empowering federal courts to order agencies to produce "agency records improperly withheld" merely because a federal agency subject to the Act has sufficient authority under the grant agreement with the organization to obtain the data if it so desires.

[***LEdHN5]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- access to "agency records" -- data generated under federal grant by private entity -- relevance of use and reliance by agency subject to Act --

Headnote:[5A][5B]

Written data that is generated, owned, and possessed by a privately controlled organization do not become "agency records" accessible under the Freedom of Information Act provision (*5 USCS 552(a)(4)(B)*) empowering federal courts to order agencies to produce "agency records improperly withheld" merely because the data is reflected in published reports of the organization which are relied upon by a federal agency subject to the Act.

[***LEdHN6]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- what constitutes "agency record" -- relevance of agency reliance on document --

Headnote:[6A][6B]

For purposes of the Freedom of Information Act's empowering federal courts to order an agency subject to the Act to produce "agency records improperly withheld" from an individual requesting access to such records (*5 USCS 552(a)(4)(B)*), the mere fact that an agency subject to the Act relies upon a document does not make the document an "agency record" if the document has not been created or obtained by the agency, but an agency's reliance upon a document or use of a document may be relevant to the question of whether a record in the possession of the agency is an "agency record" if the agency has created or obtained the document.

[***LEdHN7]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- disclosure obligations -- "records" as limited to agency records --

Headnote:[7A][7B]

The disclosure obligations imposed under the Freedom of Information Act (*5 USCS 552(a)(3)*), directing that "each agency, upon any request for records ... shall make the records promptly available to any person," extend only to agency records.

[***LEdHN8]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- access to "agency records" -- private organization as "agency" -- relevance of organization's receiving federal funds --

Headnote:[8]

A private organization receiving a federal financial assistance grant under which it generates information is not an "agency" within the meaning of the Freedom of

Information Act's grant of power to federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access (*5 USCS 552(a)(4)(B)*) merely because the organization receives a federal financial assistance grant.

[***LEdHN9]

STATES §81

federal grantee -- characterization as federal instrumentality --

Headnote:[9]

A privately controlled organization which receives federal grants from a federal agency pursuant to federal law to conduct a scientific study cannot be viewed as a federal instrumentality where the federal agency exercises no extensive, detailed, and virtually day-to-day supervision over the grant-supported activities of the organization.

[***LEdHN10]

STATES §81

characterization of entity as "federal" -- necessity of substantial federal supervision --

Headnote:[10A][10B]

Before an entity receiving a federal grant to fund its activities can be characterized as "federal" for some purpose, there must be a threshold showing of substantial federal supervision over the activities, and not just the exercise of federal regulatory authority necessary to assure compliance with the goals of the federal grant.

[***LEdHN11]

LAW §64

INSPECTION §13.5

Freedom of Information Act -- nonagency records becoming agency records --

Headnote:[11]

Records of an entity that is not an "agency" within the meaning of the Freedom of Information Act's grant of power to federal courts to order an "agency" to produce "agency records improperly withheld" (*5 USCS 552 (a)(4)(B)*) may become, as well, records of an entity which is an "agency" under the Act.

SYLLABUS

Under federal grants awarded by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD) (a federal agency), the University Group Diabetes Program (UGDP), a group of private physicians and scientists, conducted a long-term study of the effectiveness of certain diabetes treatment regimens. Pertinent federal regulations authorized some supervision of UGDP and gave NIAMDD the right of access to, or permanent custody of, the raw data generated by UGDP. However, the day-to-day administration of grant-supported activities was in UGDP's hands, and NIAMDD did not exercise its right to review or obtain custody of the raw data, which remained at all times in UGDP's possession and under its ownership. The UGDP's reports on the results of its study, indicating that the use of certain drugs in diabetes treatment increased the risk of heart disease, ultimately resulted in proceedings by the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration (FDA) to restrict the labeling and use of the drugs. After both UGDP and HEW denied petitioners' request for access to the UGDP raw data underlying its published reports, petitioners filed suit in Federal District Court to require HEW to make the raw data available under the Freedom of Information Act (FOIA), which empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. The District Court granted summary judgment for respondents, holding that HEW properly denied the request on the ground that the data did not constitute "agency records" under the FOIA. The Court of Appeals affirmed.

Held: HEW need not produce the requested data because they are not "agency records" within the meaning of the FOIA. Data generated by a privately controlled organization which has received federal grants (grantee), but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA. Pp. 177-187.

(a) There is no merit to petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provide the close

connection necessary to render its records "agency records" as that term is used in the FOIA. While "agency record" is not defined in the Act, Congress excluded private grantees from FOIA disclosure obligations by excluding them from the Act's definition of "agency," an action consistent with its prevalent practice of preserving the autonomy of federal grantees and their records. Since Congress found that federal funding and supervision (short of Government control) did not justify direct access to the grantee's records, it cannot be concluded that those identical activities were intended to permit indirect access through an expansive definition of "agency records." Pp. 178-182.

(b) Nor may a broad definition of "agency records" be invoked so as to include all documents created by a private grantee to which the Government has access and which the Government has used. Such a broad definition is not supported by either the language, structure, or legislative history of the FOIA. Instead, Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. This conclusion is also supported by other Acts in which Congress has associated creation or acquisition with the concept of a governmental record. Although in this case HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records, in this context the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained. Without first establishing that the agency has created or obtained the document, the agency's reliance on or use of the document is similarly irrelevant. Pp. 182-186.

COUNSEL: Michael R. Sonnenreich argued the cause for petitioners. With him on the brief were Neil L. Chayet, Harvey W. Freishtat, and Michael X. Morrell.

Deputy Solicitor General Geller argued the cause for the federal respondents. With him on the brief were Solicitor General McCree, Acting Assistant Attorney General Daniel, William Alsup, Richard M. Cooper, and Michael P. Peskoe. Thomas E. Plank, Assistant Attorney General of Maryland, argued the cause for respondent Klimt. With him on the brief were Stephen H. Sachs, Attorney General, and David H. Feldman, Assistant Attorney General. *

* Sheldon Elliot Steinbach and Joseph Anthony Keyes, Jr., filed a brief for the American Council on Education et al. as amici curiae.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 187.

OPINION BY: REHNQUIST

OPINION

[*171] [***298] [**980] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A]The Freedom of Information Act, *5 U. S. C. § 552*, empowers federal courts to order an "agency" to produce "agency records improperly withheld" from an individual requesting access. *§ 552 (a)(4)(B)*. We hold here that written data generated, owned, and possessed by a privately controlled organization receiving federal study grants are not "agency records" within the meaning of the Act when copies of those data have not been obtained by a federal agency subject to the FOIA. Federal participation in the generation of the data by means of a grant from the Department of Health, Education, and Welfare (HEW) does not make the private organization a federal "agency" within the terms of the Act. Nor does this federal funding in combination with a federal right of access render the data "agency records" of HEW, which *is* a federal "agency" under the terms of the Act.

I

In 1959, a group of private physicians and scientists specializing in the treatment of diabetes formed the University Group Diabetes Program (UGDP). The UGDP conducted a long-term study of the effectiveness of five diabetes treatment regimens. Two of these treatment regimens involved diet control in combination with the administration of either tolbutamide, or phenformin hydrochloride, both "oral hypoglycemic" drugs. The UGDP's participating physicians were located at 12 clinics nationwide and the study was coordinated at the Coordinating Center of the University of Maryland.

[*172] [***299] The study generated more than

55 million records documenting the treatment of over 1,000 diabetic patients who were monitored for a 5- to 8-year period. In 1970, the UGDP presented the initial results of its study indicating that the treatment of adult-onset diabetics with tolbutamide increased the risk of death from cardiovascular disease over that present when diabetes was treated by the other methods studied. The UGDP later expanded these findings to report a similarly increased incidence of heart disease when patients were treated with phenformin hydrochloride. These findings have in turn generated substantial professional debate.

The Committee on the Care of the Diabetic (CCD), a national association of physicians involved in the treatment of diabetes mellitus patients, have been among those critical of the UGDP study. CCD requested the UGDP to grant it access to the raw data in order to facilitate its review of the UGDP findings, but UGDP has declined to comply with that request. CCD therefore sought to obtain the information under the Freedom of Information Act. The essential facts are not in dispute, and we hereafter set forth those relevant to our decision.

The UGDP study has been solely funded by federal grants in the neighborhood of $ 15 million between 1961 and 1978. These grants were awarded UGDP by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a federal agency, [1] pursuant to the Public Health Service Act, *42 U. S. C. § 241 (c)*. NIAMDD has not only awarded the federal grants to UGDP, but has exercised a certain amount [*173] of supervision over the funded activity. Federal regulations governing supervision of grantees allow for the review of periodic reports submitted by the grantee and on-site visits, and require agency approval of major program or budgetary changes. *45 CFR §§ 74.80-74.85 (1979)*; 42 CFR § 52.20 (b) (1979). It is undisputed, however, both that the day-to-day administration of [**981] grant-supported activities is in the hands of a grantee, and that NIAMDD's supervision of UGDP conformed to these regulations. [2]

1 The NIAMDD is one of several Institutes of the National Institutes of Health (NIH). It is authorized by statute to conduct and fund research on diabetes and other diseases. *42 U. S. C. §§ 289a*, *289c-1*. The NIH are a component of the federal Public Health Service, which is itself a part of the Department of Health, Education, and Welfare. See Reorg. Plan No. 3 of 1966, 3 CFR 1023 (1966-1970 Comp.), note following *42 U. S. C. § 202*, and Reorganization Order of April 1, 1968, 33 Fed. Reg. 5426.

2 Petitioners do contend that the federal supervision of the UGDP study was substantial and more extensive than that ordinarily exercised. They do not, however, maintain that there was day-to-day supervision. See *infra*, at 180, and n. 11.

The grantee has also retained control of its records: the patient records and raw data generated by UGDP have at all times remained in the possession of that entity, and neither the NIAMDD grants nor related regulations shift ownership of such data to the Federal Government. NIAMDD does, however, have a right of access to the data in order to insure compliance with the grant. *45 CFR § 74.24 (a) (1979)*. And the Government may obtain permanent custody of the documents upon request. *§ 74.21 (c)*. But NIAMDD has [***300] not exercised its right either to review or to obtain permanent custody of the data.

Although no employees of the NIAMDD have reviewed the UGDP records, the Institute did contract in 1972 with another private grantee, the Biometric Society, for an assessment of the validity of the UGDP study. The Biometric Society was given direct access to the UGDP raw data by the terms of its contract with NIAMDD. The contract with the Biometric Society, however, did not require the Society to seek access to the UGDP raw data, nor did it require that any data actually reviewed be transmitted to the NIAMDD. While the Society did review some UGDP data, it did not submit any raw data reviewed by it to the NIAMDD. The Society [*174] issued a report to the Institute in 1974 concluding that the UGDP results were "mixed" but "moderately strong."

An additional connection between the Federal Government and the UGDP study has occurred through the activities of the Food and Drug Administration. After the FDA was apprised of the UGDP results, the agency issued a statement recommending that physicians use tolbutamide in the treatment of diabetes only in limited circumstances. After the UGDP reported finding a similarly higher incidence of cardiovascular disease with the administration of phenformin, the FDA proposed changes in the labeling of these oral hypoglycemic drugs to warn patients of cardiovascular hazards. FDA Drug

Bulletin (June 23, 1971). The FDA deferred further action on this labeling proposal, however, until the Biometric Society completed its review of the UGDP study. [3]

3 Prior to the FDA's decision to defer action, petitioners in this case sued the FDA to enjoin the proposed labeling, contesting the validity of the UGDP study. The First Circuit remanded the case to the FDA for exhaustion of administrative remedies. *Bradley v. Weinberger, 483 F.2d 410 (1973).*

After the Biometric study was issued, FDA renewed its proposal to require a label warning that oral hypoglycemics should be used only in cases of adult-onset, stable diabetes that could not be treated adequately by a combination of diet and insulin. The FDA clearly relied on the UGDP study in renewing this position. 40 Fed. Reg. 28587, 28591 (1975). At the time the proposal was published, the FDA invited public comment. In response to criticism of the UGDP study and the Biometric Society's audit, the FDA conducted its own audit of the UGDP study pursuant to a delegation of NIAMDD's authority to audit grantee records. In conducting this audit, the FDA examined and copied a small sample of the UGDP raw data. This audit report has been made available for public inspection. 43 Fed. Reg. 52733 (1978).

Although this labeling proposal has not yet become final, other FDA regulatory action has been taken. On July 25, [*175] 1977, the Secretary of HEW suspended the New Drug Application for phenformin, one of the oral hypoglycemic medications studied by the UGDP. The decision was premised in part on the findings of the UGDP study. See Order of the Secretary of Health, Education, and [***301] Welfare, July 25, 1977. After the Secretary's temporary order of suspension was issued, proceedings before the [**982] FDA continued. The Administrative Law Judge ordered the FDA to produce all UGDP data in its possession. The FDA then produced those portions of the UGDP raw data which the agency had copied, abstracted, or directly transferred to Government premises during its audit. The ALJ found that the HEW suspension order was supported by the evidence. On November 15, 1978, the Commissioner of Food and Drugs affirmed the ALJ's finding that phenformin was not shown to be safe and ordered it withdrawn from the market. 44 Fed. Reg. 20967 (1979). This decision was not based substantially on the UGDP study. [4]

4 The order of the Commissioner discounts reliance on the UGDP study. The order states that the ALJ was correct in concluding that from "an evidentiary standpoint" the "lack of availability of underlying data casts considerable doubt on the reliability of the UGDP conclusions." 44 Fed. Reg. 20969 (1979). The ALJ did permit reference to the UGDP study as a basis for expert opinion. The Commissioner concluded that this use of the study was permissible since the data underlying expert opinions need not always be admitted to substantiate the opinions. Nearly 400 published articles were included in the record of the phenformin proceeding and none of the articles was accompanied by the raw data on which they were based. The Commissioner noted that the ALJ referenced the UGDP study in only one paragraph of his eight-page summary.

The Commissioner concluded that the agency was not required to submit the UGDP data since it had not relied upon that data, but only upon the actual study. *21 CFR § 12.85 (1979).* Nevertheless, the Commissioner stated that he "reviewed the testimony of the Bureau of Drug's expert witnesses and [found] that their reliance upon the UGDP study was not substantial and cannot reasonably be characterized as pivotal to the opinions expressed by those witnesses." 44 Fed. Reg. 20969 (1979).

[*176] Petitioners had long since initiated a series of FOIA requests seeking access to the UGDP raw data. On August 7, 1975, HEW denied their request for the UGDP data on the grounds that no branch of HEW had ever reviewed or seen the raw data; that the FDA's proposed relabeling action relied on the UGDP published reports and not on an analysis of the underlying data; that the data were the property of the UGDP, a private group; and that the agencies were not required to acquire and produce those data under the FOIA. [5] The following month petitioners filed this FOIA suit in the United States District Court for the District of Columbia to require HEW to make available all of the raw data compiled by UGDP. The District Court granted summary judgment in favor of respondents, holding that HEW properly denied the request on the ground that the patient data did not

constitute "agency records" under the FOIA.

5 The denial of this FOIA request preceded the FDA's audit of the UGDP data.

The Court of Appeals affirmed on the same rationale. *Forsham v. Califano, 190 U. S. App. D. C. 231, 587 F.2d 1128 (1978)*. The court found that although NIAMDD is a federal agency, its grantees are not federal agencies. The court rejected the petitioners' argument that the UGDP's records were nevertheless also the federal agency's records. Although HEW has a right of access to the documents, the court reasoned that this right did not render the documents "agency records" since the FOIA only applies to records which have been "created or obtained . . . in the [***302] course of doing its work." [6] *Id., at 239, 587 F.2d, at 1136*. The dissenting [*177] judge concluded that the UGDP data were "agency records" under the FOIA since the Government had been "significantly involved" in the study through its funding, access to the raw data, and reliance on the study in its regulatory actions.

6 The court opinion also suggested that a document is an "agency record" if the federal agency has a duty to obtain the record. *190 U. S. App. D. C., at 239*, and n. 18, *587 F.2d, at 1136*, and n. 18 (Leventhal, J.). Judge MacKinnon concurred separately to reserve the question of whether or not records which an agency had a duty to obtain were recoverable under the FOIA. We side with Judge MacKinnon on the breadth of the principle necessary to the decision in this case. *Id., at 242, 587 F.2d, at 1139*.

II

[***LEdHR2] [2] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A] [***LEdHR6A] [6A]As we hold in the companion case of *Kissinger* v. *Reporters Committee for* [**983] *Freedom of the Press, ante*, p. 136, it must be established that an "agency" has "improperly withheld agency records" for an individual to obtain access to documents through an FOIA action. We hold here that HEW need not produce the requested data because they are *not* "agency records" within the meaning of the FOIA. In so holding, we reject three separate but related claims of petitioners: (1) the data they seek are "agency records" because they were at least "records" of UGDP, and UGDP in turn received its funds from a federal agency and was subject to some supervision by the agency in its use of those funds; (2) the data they seek are "agency records" because HEW, concededly a federal agency, had sufficient authority under its grant agreement to have obtained the data had it chosen to do so; and (3) the data are "agency records" because they formed the basis for the published reports of UGDP, which in turn were relied upon by the FDA in the actions described above. [7]

[***LEdHR6B] [6B]

7 Petitioners maintain that the FDA has relied on all the raw data through reliance on the report and through reliance on information obtained pursuant to its audit of a sample of the data. The Court of Appeals found, however, that data reviewed by the FDA have been made available to petitioners. *Id., at 236, 587 F.2d, at 1133*. As we indicate *infra*, reliance on a document does not make it an agency record if it has not been created or obtained by a federal agency. Reliance or use may well be relevant, however, to the question of whether a record in the possession of an agency is an "agency record." See *Kissinger, ante*, at 157.

[*178] [***LEdHR1B] [1B] [***LEdHR7A] [7A]Congress undoubtedly sought to expand public rights of access to Government information when it enacted the Freedom of Information Act, but that expansion was a finite one. Congress limited access to "agency records," *5 U. S. C. § 552 (a)(4)(B)*, [8] but did not provide any definition of "agency records" in that Act. The use of the word "agency" as a modifier demonstrates that Congress contemplated some relationship between an "agency" and the "record" requested under the FOIA. With due regard for the policies and language of the FOIA, we conclude that data [***303] generated by a privately controlled organization which has received grant funds from an agency (hereafter grantee), [9] but which data has not at any time been obtained by the agency, are not "agency records" accessible under the FOIA.

[***LEdHR7B] [7B]

8 In *§ 552 (a)(3)* Congress did not use the term "agency records." That section provides: "[Each] agency, upon any request for records . . . shall make the records promptly available to any

person." Since the enforcement provision of the Act, *§ 552 (a)(4)(B)*, refers only to "agency records" it is certain that the disclosure obligations imposed by *§ 552 (a)(3)* were only intended to extend to agency records. That limitation is implicit throughout the Act.

9 We use the term "grantee" or "private grantee" to describe private recipients of federal funds not subjected to sufficient Government control to render them federal agencies. We do not suggest, by use of this term, that an organization receiving federal grant funds could never be found to be a federal agency. See *infra*, at 180, and n. 11.

A

[***LEdHR3B] [3B]We first examine petitioners' claim that the data were at least records of UGDP, and that the federal funding and supervision of UGDP alone provides the close connection necessary to render *its* records "agency records" as that term is used in the Freedom of Information Act. Congress did not define "agency record" under the FOIA, but it did define "agency." The definition of "agency" reveals a great deal about congressional intent as to the availability of records [*179] from private grantees under the FOIA, and thus, a great deal about the relevance of federal funding and supervision to the definitional scope of "agency records." Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of "agency," an action consistent with its prevalent practice of preserving grantee autonomy. It has, for example, disclaimed any federal property rights in grantee records by virtue of its funding. We cannot agree with petitioners in light of these circumstances [**984] that the very federal funding and supervision which Congress found insufficient to make the grantee an *agency* subject to the FOIA nevertheless makes its *records* accessible under the same Act.

[***LEdHR8] [8]Under *5 U. S. C. § 552 (e)* an "agency" is defined as

"any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government . . . , or any independent regulatory agency."

The legislative history indicates unequivocally that private organizations receiving federal financial assistance grants are not within the definition of "agency." In their Report, the conferees stated that they did "not intend to include corporations which receive appropriated funds but are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting." H. Conf. Rep. No. 93-1380, pp. 14-15 (1974), reprinted in Freedom of Information Act and Amendments of 1974 Source Book 231-232 (Jt. Comm. Print 1975). Through operation of this exclusion, Congress chose not to confer any direct public rights of access to such federally funded project information. [10]

10 Numerous bills seeking to extend the FOIA to federal grantees have been introduced in each Congress since the 92d, but none has yet been reported out of committee. See H. R. 11013, 92d Cong., 1st Sess. (1969); H. R. 1291, 93d Cong., 1st Sess. (1973); H. R. 1205, 94th Cong., 1st Sess. (1975); H. R. 3207, 95th Cong., 1st Sess. (1977); H. R. 1465, 96th Cong., 1st Sess. (1979).

[*180] [***LEdHR9] [9] [***LEdHR10A] [10A]This treatment of federal grantees under the FOIA is consistent with congressional treatment of [***304] them in other areas of federal law. Grants of federal funds generally do not create a partnership or joint venture with the recipient, nor do they serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision. *United States v. Orleans, 425 U.S. 807, 818 (1976)*. Measured by these standards, the UGDP is not a federal instrumentality or an FOIA agency. [11]

[***LEdHR10B] [10B]

11 Before characterizing an entity as "federal" for some purpose, this Court has required a threshold showing of substantial federal supervision of the private activities, and not just the exercise of regulatory authority necessary to assure compliance with the goals of the federal grant. See *United States v. Orleans, 425 U.S. 807 (1976)*. While the petitioners emphasize the Government's interest in monitoring the UGDP's study, they do not contend that this supervision is sufficient to render UGDP a satellite federal agency. The funding and supervision indicated by the facts of this case are consistent with the usual

grantor-grantee relationship and do not suggest the requisite magnitude of Government control. *Orleans, supra, at 815-816.*

Congress could have provided that the records generated by a federally funded grantee were federal property even though the grantee has not been adopted as a federal entity. But Congress has not done so, reflecting the same regard for the autonomy of the grantee's records as for the grantee itself. Congress expressly requires an agency to use "procurement contracts" when the "principal purpose of the instrument is the acquisition . . . of property or services for the direct benefit or use of the Federal Government. . . ." Federal Grant and Cooperative Agreement Act of 1977, § 4, 92 Stat. 4, 41 U. S. C. § 503 (1976 ed., Supp. II). In contrast, "grant agreements" must be used when money is given to a recipient "in order to accomplish a public purpose of support or stimulation authorized by Federal statute, rather than acquisition . . . of property or services. . . ." § 5, 41 U. S. C. § 504 (1976 ed., Supp. II). As in this case, where a grant was used, [*181] there is no dispute that the documents created are the property of the recipient, and not the Federal Government. See 45 CFR § 74.133 (1979). The HEW regulations do retain a right to acquire the documents. Those regulations, however, clearly demonstrate that unless and until that right is exercised, the records are only the "records of grantees." *45 CFR § 74.24* [**985] *(1979).* [12] Therefore, were petitioners to prevail in this action, they would have obtained a right of access to some 55 million documents created, owned, and possessed by a private recipient of federal funds. While this fact itself is not dispositive of the outcome, it is nonetheless an important consideration when viewed in light of these congressional attempts to maintain the autonomy of federal grantees and their records.

12 The particular grant agreement in issue similarly confers on the NIAMDD a limited right of access to "records of the grantee."

[***LEdHR11] [11]The fact that Congress has chosen not to make a federal grantee an "agency" or to vest ownership of the records in the Government does not resolve with mathematical precision the question of whether the granting agency's funding and supervisory activities nevertheless make the grantee's records "agency records." Records of a nonagency certainly could become records of an agency as well. But if [***305] Congress found that federal funding and supervision did not justify direct access to the grantee's records, as it clearly did, we fail to see why we should nevertheless conclude that those identical activities were intended to permit indirect access through an expansive definition of "agency records." [13] Such a conclusion [*182] would not implement the intent of Congress; it would defeat it.

13 Nor could this distinction be explained by a hypothetical congressional preference for placing the burdens of production on the agency rather than the private grantee. Although under the petitioners' construction of the Act the request would have to be made by the agency, the administrative burdens of searching and producing, or providing access, would necessarily accrue substantially to the party in possession, *i. e.*, the private grantee.

These considerations do not finally conclude the inquiry, for conceivably other facts might indicate that the documents could be "agency records" even though generated by a private grantee. The definition of "agency" and congressional policy towards grantee records indicate, however, that Congress did not intend that grant supervision short of Government control serve as a sufficient basis to make the private records "agency records" under the Act, and reveal a congressional determination to keep federal grantees free from the direct obligations imposed by the FOIA. In ascertaining the intended expanse of the term "agency records" then, we must, of course, construe the Act with regard both for the congressional purpose of increasing public access to governmental records and for this equally explicit purpose of retaining grantee autonomy.

B

[***LEdHR4B] [4B] [***LEdHR5B] [5B]Petitioners seek to prevail on their second and third theories, even though their first be rejected, by invoking a broad definition of "agency records," so as to include all documents created by a private grantee to which the Government has access, and which the Government has used. We do not believe that this broad definition of "agency records," a term undefined in the FOIA, is supported by either the language of that Act or its legislative history. We instead agree with the opinions of the courts below that Congress contemplated that an agency must first either create or obtain a record as a prerequisite to its becoming an "agency record" within the meaning of the FOIA. While it would be stretching

the ordinary meaning of the words to call the data in question here "agency records," we need not rest our conclusions solely on the "plain language" rule of statutory construction. The use of the term "record" by Congress in two other Acts, and the structure [*183] and legislative history of the FOIA alike support the same conclusion.

Although Congress has supplied no definition of agency records in the FOIA, it has formulated a definition in other Acts. The Records Disposal Act, in effect at the time Congress enacted the Freedom of Information Act, provides the following threshold requirement for agency records:

"'records' includes all books, papers, maps, photographs, machine readable materials, [**986] or other documentary materials, regardless of physical form or characteristics, *made or received* by an agency of the United States Government under Federal law or in connection [***306] with the transaction of public business. . . ." *44 U. S. C. § 3301*. [14] (Emphasis added.)

The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 23-24 (1967), S. Doc. No. 93-82, pp. 222-223 (1974), concludes that Congress intended this aspect of the Records Act definition to apply to the Freedom of Information Act.

> 14 The definition of "records" under the Records Disposal Act further requires that records made or received by the agency also be "preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." Government documents made or received by an agency that are not appropriate for preservation are referred to as "nonrecord materials." 41 CFR § 101-11.401-3 (d) (1979). It has not been settled whether the FOIA definition of agency records extends to "nonrecord materials." We need not reach that question since the documents sought by petitioners do not meet the threshold requirement that they be "made or received" by a federal agency.

The same standard emerges in the Presidential Records Act of 1978. The term "presidential records" is defined as "documentary materials . . . *created or received* by the President. . . ." *44 U. S. C. § 2201 (2) (1976 ed., Supp. II)*. (Emphasis added.) While these definitions are not dispositive [*184] of the proper interpretation of congressional use of the word in the FOIA, it is not insignificant that Congress has associated creation or acquisition with the concept of a governmental record. The text, structure, and legislative history of the FOIA itself reinforce that significance in this case.

The only direct reference to a definition of records in the legislative history, of which we are aware, occurred during the Senate hearings leading to the enactment of FOIA. A representative of the Interstate Commerce Commission commented that "[since] the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions." Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965). [15] The legislative history of the FOIA abounds with other references to records acquired by an agency. For example, the legislative Reports clarify that confidential information "submitted . . . to a Government . . . agency," "obtained by the Government," or "given to an agency" otherwise subject to disclosure, was made exempt. S. Rep. No. 813, 89th Cong., 1st Sess., 9 (1965), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93-82, p. 44 (Comm. Print 1974); H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Source Book, at 31.

> 15 It is interesting to note that the witness expressed concern that such an "all-expansive meaning" necessitated clear categorical exemptions.

Section 552 (b)(4) provides the strongest structural support for this construction. This section exempts trade secrets and commercial or financial information "obtained from a person." This exemption was designed to protect confidential information "submitted" by a borrower to a lending agency or "obtained by the Government" through questionnaires [***307] or other inquiries, where such information "would customarily not be released to the public by the person from whom it was [*185] obtained." S. Rep. No. 813, *supra*, at 9; H. R. Rep. No. 1497, *supra*, at 10. It is significant that

Congress did not include a similar exemption for confidential information contained in records which had never been "obtained from a person." It is obvious that this omission does not reflect a congressional judgment that records remaining [**987] in private control are not similarly deserving of this exemption, but rather a judgment that records which have never passed from private to agency control are *not* agency records which would require any such exemption. This possessory emphasis is buttressed by similar considerations implicit in the use of the word "withholding" in the statutory framework. See *Kissinger* v. *Reporters Committee for Freedom of the Press, ante,* p. 136. [16]

16 We certainly do not indicate, however, that physical possession, or initial creation, is by itself always sufficient. See *Kissinger, ante,* at 157.

The same focus emerges in a congressional amendment to the Securities Exchange Act of 1934. That Act had provided its own standards for public access to documents generated by the Act. Congress amended the Act to provide:

"For purposes of [the FOIA] the term 'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents *filed with* or otherwise *obtained* by the Commission pursuant to this chapter or otherwise." (Emphasis added.) *15 U. S. C. § 78x.*

We think that the weight this construction lends to our conclusion is overborne neither by an agency's potential access to the grantee's information nor by its reliance on that information in carrying out the various duties entrusted to it by Congress. The Freedom of Information Act deals with "agency records," not information in the abstract. Petitioners place great reliance on the fact that HEW has a right of access to the data, and a right if it so chooses to obtain permanent custody of the UGDP records. *45 CFR §§ 74.24,* [*186] *74.21 (1979).* But in this context the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained. [17] To construe the FOIA to embrace the latter class of documents would be to extend the reach of the Act beyond what we believe Congress intended. We rejected a similar argument in *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-162* [***308] *(1975),* by holding that the FOIA imposes no duty on the agency to create records. By ordering HEW to exercise its right of access, we effectively would be compelling the agency to "create" an agency record since prior to that exercise the record was not a record of the agency. Thus without first establishing that the agency has created or obtained the document, reliance or use is similarly irrelevant.

17 We need not categorize what agency conduct is necessary to support a finding that it has "obtained" documents, since an unexercised right of access clearly does not satisfy this requirement. Government access to documents clearly could not be the central component of the definition of agency records contemplated by Congress since the Federal Government has access to near astronomical numbers of private documents. A mere sampling of access statutes includes: Internal Revenue Code of 1954, *§ 7602, 26 U. S. C. § 7602* (taxpayers or potential taxpayers); *15 U. S. C. §§ 78q, 78u* (persons subject to the Securities Exchange Act of 1934); *29 U. S. C. § 657* (each employer subject to the Occupational Safety and Health Act of 1970).

Even if the Court were to accept petitioners' argument that only contractual access should give rise to "agency record" status, a limitation which does not appear readily supportable, the class of documents subject to FOIA disclosure would still be staggering. The record in this case indicates that NIAMDD alone has some 18,000 research grants outstanding.

We think the foregoing reasons dispose of all petitioners' arguments. We therefore conclude that the data petitioners seek are not "agency records" within the meaning of the FOIA. UGDP is not a "federal agency" as that term is defined in the FOIA, and the data petitioners seek have not been created or obtained by a federal agency. Having failed to establish [*187] this threshold requirement, petitioners' FOIA claim must fail, and the judgment of the Court of Appeals is accordingly

Affirmed.

DISSENT BY: BRENNAN

DISSENT

[**988] MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I agree with the Court that "[records] of a nonagency certainly could become records of an agency as well." *Ante*, at 181. But the Court does not explain why such a conversion does not occur in this case. [1] Because I believe we should articulate standards under which to analyze such cases and because I believe that under a proper test UGDP's data should be treated as "agency records," I dissent.

1 The Court suggests that if a federal grant created a partnership or joint venture between the agency and the grantee, the grantee might become an agency and, thus, its records might become agency records. *Ante*, at 180. Likewise, the Court might reach a different result where the agency has chosen to buy data through a procurement contract instead of a grant. *Ibid*. But neither of these is an instance involving records of a nonagency. In the first the grantee becomes an agency, and in the second the records do not belong to the nonagency.

I

The Court argues at length that UGDP is not an agency. But whether or not UGDP is an "agency" is simply not at issue in this case. Rather, the only question is whether data generated in the course of this UGDP study are "agency records."

The Court concedes, of course, that the statute itself does not define "agency records." [2] Therefore, our task is to construe [*188] the statutory language consistently with the purposes of FOIA. [3] As detailed in the dissenting opinion below, *Forsham v. Califano, 190 U. S. App. D. C. 231, 244-245,* [***309] *587 F.2d 1128, 1141-1142 (1978)* (Bazelon, J., dissenting), FOIA is a broad enactment meant to open the processes of Government to public inspection. It reflects a finding that if left to themselves agencies would operate in near secrecy. [4] FOIA was, therefore, enacted to provide access to information to enable "an informed electorate," so "vital to the proper operation of a democracy," to govern itself. S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Nothing whatever in the legislative history suggests that Congress meant to allow agencies to insulate important steps in decisionmaking on the basis of the technical niceties of who "owns" crucial documents.

2 Therefore, the Court surely overstates the fact in saying that Congress "clearly" found that federal funding and supervision are not relevant to whether direct access to grantee's records is justified, *ante*, at 181, and the Court does not explain why Congress' silence "[reflects] the same regard for the autonomy of the grantee's records as for the grantee itself," *ante*, at 180. Moreover, nothing whatever is cited in the legislative history to support the Court's claim that the "purpose of retaining grantee autonomy" was "equally explicit" as a purpose of FOIA as was increasing public access to governmental records. *Ante*, at 182.

3 I find the Court's references to other statutes unenlightening. The Records Disposal Act and Presidential Records Act of 1978 are properly limited to records created or received because the agencies or the Executive cannot physically dispose of what they do not possess. These Acts are aimed at monitoring the physical destruction of agency documents and settling claims of ownership of Presidential documents. The agencies and the Executive cannot destroy or take for private use what they have never possessed.

As for the "structural" argument drawn from *5 U. S. C. § 552 (b)(4)*, I cannot imagine that trade secrets or commercial information not submitted to the Government would have been created or used for governmental purposes or with governmental funds. In short, the Government would have no claim of any kind on the information if it had not been submitted.

4 FOIA was enacted because agencies had turned the predecessor statute on its head, transforming a public information statute into a secrecy statute. H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted in Freedom of Information Act Source Book, S. Doc. No. 93-82, pp. 22, 25-27 (Comm. Print 1974).

Where the nexus between the agency and the requested information is close, and where the importance of the information to public understanding of the decisions or the operation [*189] of the agency is great, I believe the congressional purposes require us to hold that the information sought is an "agency record" within the meaning of FOIA.

[**989] Admittedly, this test does not establish a bright line, but the evaluation of a calculus of relevant

factors is nothing new to the law. [5] The first such factor is the importance of the record to an understanding of Government activities. If, for instance, the significance of the record is limited to understanding the workings of the nonagency, the public has no FOIA-protected interest in access. The weight to be given this factor can be tested by examining the role accorded the material in agency writings and the extent to which the agency reached its conclusions in reliance upon the particular source.

5 The Court offers no manageable standards of any kind. No guidance is given to the decisionmaker as to how to determine at what point a relationship between an agency and another organization ripens into a "joint venture." And, of course, we are given no key to guide the determination of what nonagency records "become records of an agency as well." *Ante*, at 181.

Mere materiality of information, standing alone, of course, is not enough. [6] FOIA does not give the public any unrestricted right to examine all data relied on by an agency. Congress required that the information constitute an "agency record." Thus, another necessary [***310] factor is that there be a link between the agency and the record. [7] Nothing in FOIA or its history suggests, however, that the connection must amount to outright possession or creation. Instead, again drawing from the legislative purposes, I believe the link must be such that the agency has treated the record as if it were [*190] part of the regulatory process, as if it were in effect a record which exists to serve the regulatory process. Government by secrecy is no less destructive of democracy if it is carried on within agencies or within private organizations serving agencies. The value of the record to the electorate is not affected by whether the relationship between the agency and the private organization is governed formally by a procurement contract, a "joint venture" agreement, or a grant. [8] The existence of this factor can be tested by examining, *inter alia*, the degree to which the impetus for the creation of the record came from the agency or was developed independently, the degree to which the creation of the record was funded publicly or privately, the extent of governmental supervision of the creation of the record, and the extent of continuing governmental control over the record.

6 The Court, by insisting on analyzing petitioners' contentions separately, never addresses the full, combined force of the arguments. It is only in combination that the various factors alluded to by petitioners tell the full story of governmental reliance on and involvement with the data and, thus, the importance to the success of Congress' FOIA scheme of disclosing this information.

7 See Note, The Definition of "Agency Records" Under the Freedom of Information Act, 31 Stan. L. Rev. 1093, 1106-1114 (1979).

8 Certainly the agency cannot control the legal consequences simply by the label it attaches to a relationship.

II

On the facts of this case, I would conclude that UGDP's raw data are records of HEW. Both HEW and the FDA have taken significant actions in complete reliance on the UGDP study. The FDA has directly endorsed the study's conclusions and, in reliance thereon, sought mandatory labeling warnings on the drugs criticized by the UGDP. HEW cited the UGDP study as one of its basic sources when it suspended one of the drugs as an immediate hazard. The suggestion that these administrative actions relied solely on the published reports and not on the underlying raw data at issue here is unrealistic. The conclusions can be no stronger or weaker than the data on which they are based. One cannot even begin to evaluate an agency action without access to the raw data on which the conclusions were based, especially in a case such as this where the data are nonduplicable. The importance of the raw data in evaluating [**990] derivative conclusions was [*191] recognized by the FDA when it employed another independent organization, the Biometric Society, to check UGDP's work. FDA secured access for the Society to the raw data, and the Society used a sample of the data.

This case is set against the background of an intense, often bitter, [9] battle being waged in the medical community over the validity of the UGDP study and the correct treatment regimen for diabetes. By endorsing the UGDP study the Federal Government has aligned itself on one side of the fight and has all but outlawed the regimen recommended by the other side. Petitioners in this [***311] case are medical scientists seeking to resolve questions that have been raised about the

scientific and statistical methods underlying an agency's conclusions. This seems to me to be an archetypical instance of the need for public dissemination of the information.

> 9 One former UGDP investigator has challenged the scientific honesty of the research coordinator, who is also the current custodian of the raw data.

Even so, I doubt that the information could be held to be an "agency record" had the Government not been so deeply involved in its creation. Petitioners have argued that the National Institutes of Health, in effect, did create these records. The agency not only completely funded the project's operation, but initiated the project and took responsibility for developing its research protocol as well. See *Forsham v. Califano, 190 U. S. App. D. C., at 251, 587 F.2d, at 1148* (Bazelon, J., voting for rehearing). They contend further that, beyond the normal level of NIH involvement in its grantees' studies set out by the Court, *ante*, at 173, the NIH exercised continuing supervision over this study through a "Policy Advisory Board" as a condition of the grant renewals. [10] *Forsham v. Califano, supra.* Finally, as the Court also [*192] acknowledges, there is no question that the Government has full access to the data under the terms of the grant and under federal regulations. Indeed, if it so chose, the Government could obtain permanent custody of the data merely by requesting it from UGDP. Thus, the data remain with the grantee only at the pleasure of the Government. In my view the record abundantly establishes that these data were developed with public funds and with Government assistance and, in large part, for governmental purposes. Therefore, I would hold that they are agency records, and I respectfully dissent.

> 10 Because the case comes to us on affirmance of the grant of respondents' motion for summary judgment, we must accept petitioners' version of any disputed facts. Thus, for instance, we are not free to de-emphasize the extent of federal supervision of the UGDP study alleged by petitioners.

III

I emphasize that the standards I suggest do not mean opening to the public the files of all grantees or of all who submit information to the Government. In many cases grantees' records should not be treated as agency records. But the Court's approach must inevitably undermine FOIA's great purpose of exposing Government to the people. It is unavoidable that as the work of federal agencies mushrooms both in quantity and complexity the agencies must look to outside organizations to assist in governmental tasks. Just as the explosion of federal agencies, which are not directly responsible to the electorate, worked to hide the workings of the Federal Government from voters before enactment of FOIA, S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), the understandable tendency of agencies to rely on nongovernmental grantees to perform [**991] myriad projects distances the electorate from important information by one more step. If the records of such organizations, when drawn directly into the regulatory process, are immune from public inspection, then government by secrecy must surely return.

REFERENCES

66 Am Jur 2d, Records and Recording Laws 43

1 Federal Procedural Forms L Ed, Administrative Procedure 2:192

5 USCS 552

US L Ed Digest, Administrative Law 64; Discovery and Inspection 13.5

L Ed Index to Annos, Freedom of Information Act

ALR Quick Index, Freedom of Information Acts

Federal Quick Index, Freedom of Information Acts

Annotation References:

Scope of judicial review under Freedom of Information Act (*5 USCS 552(a)(3)*), of administrative agency's withholding of records. *7 ALR Fed 876.*

JUANITA BROADDRICK, Plaintiff, v. THE EXECUTIVE OFFICE OF THE PRESIDENT, ET AL.,

Civil Action 99-3381 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

139 F. Supp. 2d 55*; *2001 U.S. Dist. LEXIS 8269

March 27, 2001, Decided

DISPOSITION: [**1] EOP's motion to dismiss granted, Broaddrick's cross motion for partial summary judgment, denied. DOJ's motion to dismiss the denial of access claim, granted and DOJ's amended motion for summary judgment on all remaining claims granted. Case DISMISSED.

COUNSEL: For JUANITA BROADDRICK, plaintiff: Paul J. Orfanedes, KLAYMAN & ASSOCIATES, PC, Larry Elliot Klayman, JUDICIAL WATCH, INCORPORATED, Washington, DC.

For EXECUTIVE OFFICE OF THE PRESIDENT, U.S. DEPARTMENT OF JUSTICE, federal defendants: Stuart Alexander Licht, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES: Henry H. Kennedy, Jr., United States District Judge.

OPINION BY: Henry H. Kennedy, Jr.

OPINION

[*56] **MEMORANDUM OPINION**

Juanita Broaddrick ("Broaddrick") filed this suit against defendants The Executive Office of the President ("EOP") and the Department of Justice ("DOJ"), alleging that the EOP and DOJ violated the Privacy Act, *5 U.S.C. § 552a et seq.* Before the court are the EOP's motion to dismiss, Broaddrick's cross motion for partial summary judgment, DOJ's motion to dismiss, and DOJ's [*57] amended motion for summary judgment. Upon consideration of the motions, the opposition thereto, and the record of the case, [**2] the court grants the EOP's motion to dismiss, denies Broaddrick's cross motion for partial summary judgment, grants DOJ's motion to dismiss her denial of access claim, and grants DOJ's amended motion for summary judgment on all remaining claims.

I. BACKGROUND

On October 12, 1999, Broaddrick submitted a written request to the EOP pursuant to the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*, and the Privacy Act, *5 U.S.C. § 552a*, for any documents that refer or relate to Juanita Broaddrick. The White House Office, of which the Office of Counsel to the President is a part, [1] responded on October 27, 1999, denying Broaddrick's request on the grounds that the "President's immediate personal staff and units in the Executive Office of the President whose sole function is to advise and assist the President are not included within the term 'agency' under the FOIA and the Privacy Act." Compl. at Ex. 2. The White House Office also noted that the FOIA and the Privacy Act do not establish a statutory right to records Broaddrick seeks from the EOP, if such records exist. This suit followed.

1 The EOP comprises thirteen different components, one of which is the White House Office. The White House Office is itself made up of several units, including the Office of Counsel to the President (also known as the White House Counsel's Office). *See, e.g., National Sec. Archive v. Archivist of the United States, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990)*. The EOP contends that the only records at issue are those allegedly obtained by the White House Office's Office of the Counsel to the President because Flowers' Complaint only discusses the statements of a former Special Counsel to the President. *See* Defs.' Mot. to Dismiss at 1; Compl. PP 16-19. Flowers does not dispute this characterization, nor does she allege in her Complaint (or in her submissions) that other units of the EOP contain relevant records. *See infra* note 9.

[**3] In Count I of her Complaint, Broaddrick alleges that the EOP and DOJ violated the Privacy Act by maintaining records on Broaddrick as "part of a pattern of willful and intentional misconduct undertaken for purposes of attacking or threatening attacks on Plaintiff, and others similarly situated." Compl. P 22. Broaddrick contends that this maintenance of records is in violation of *5 U.S.C. §§ 552a(e)(1)* and *(g)(1)(D)*. Broaddrick also alleges that the EOP and DOJ disseminated information from her records in violation of *5 U.S.C. §§ 552a(e)(1)* and *(g)(1)(D)*. Finally, Broaddrick claims that the EOP and DOJ refused her request for access to records in violation of *5 U.S.C. §§ 552a(d)(1)* and *(g)(1)(B)*.

The EOP and DOJ filed motions to dismiss and for summary judgement. The EOP argues that the case against it should be dismissed because the EOP's White House Office is not an "agency" subject to the Privacy Act. DOJ argues that the claims against the FBI, a part of DOJ, should be dismissed because Broaddrick does not allege that she submitted a Privacy Act request to the FBI. Broaddrick filed a cross motion for partial summary [**4] judgment on these same issues. Finally, DOJ filed an amended motion for summary judgment. [2] In that motion, DOJ contends, *inter alia*, that Broaddrick's allegations against DOJ are unfounded in fact and in law.

2 DOJ's amended motion withdrew Part "II" of its motion for summary judgment, which related to claims other than Broaddrick's denial of access claim. The amended motion for summary judgment raised several arguments concerning Broaddrick's maintenance and dissemination claims.

II. ANALYSIS

The Privacy Act of 1974, *5 U.S.C. § 552a et seq.*, regulates the collection, maintenance, use, and dissemination of an individual's personal information by federal government agencies. *See 5 U.S.C. § 552a(e)*. The Privacy Act provides that each agency that maintains a "system of records" shall maintain "only such information [*58] about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by [**5] executive order of the President." *Id. § 552a(e)(1)*. The Privacy Act also states that "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system," the agency shall provide the individual with access to review such records. *Id. § 552a(d)(1)*. Finally, subject to certain exceptions, the Privacy Act requires that "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." *Id. § 552a(b)*.

Before addressing the parties' arguments, it is important to note that the Privacy Act applies only to an "agency" as defined by the FOIA. *See 5 U.S.C. § 552a(a)(1)* (expressly incorporating the FOIA's definition of "agency"). [3] Under the FOIA, "agency" includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), [**6] or any independent regulatory agency." *5 U.S.C. § 552(f)*. Though the Executive Office of the President is expressly mentioned in the FOIA definition of "agency," the Supreme Court has held that the FOIA's reference to "the 'Executive Office' does not include the Office of the President." *Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980)*. [4] The *Kissinger* Court also stated that "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Id.* (citing H.R. Conf. Rep. No.

93-1380, p. 15 (1974)).

3 The Privacy Act expressly incorporates the FOIA definition of "agency" by referring to "*section 552(e)* of this title." In 1986, *5 U.S.C. § 552* was amended, and *section 552(e)* was redesignated *section 552(f)*. *See* Pub. L. 99-570, § 1802(b). No subsequent revision of the Privacy Act was made.

4 The "Office of the President" is also known as the "White House Office." *See, e.g., Meyer v. Bush, 299 U.S. App. D.C. 86, 981 F.2d 1288, 1310 (D.C. Cir. 1993)* (Wald, J. dissenting) ("We and the Supreme Court have interpreted 'immediate personal staff to refer to the staff of the Office of the President, *also known as the White House Office*, one of the fourteen units within the Executive Office of the President.") (emphasis added).

[**7] A. The EOP's Motion to Dismiss

The EOP argues that the White House Office should not be considered an "agency" subject to the Privacy Act because it is not an agency subject to the FOIA. Broaddrick disagrees, suggesting that the statutory definition of the term "agency" and the Privacy Act's legislative history require that the Privacy Act be applied to the EOP without exception. In support of their positions, both Broaddrick and the EOP cite recent district court opinions from this court, which decided whether the EOP was subject to the Privacy Act. *Compare Alexander v. F.B.I., 971 F. Supp. 603, 607 (D.D.C. 1997)* (Lamberth, J.) (holding that the EOP was an "agency" subject to the Privacy Act), *with* Memorandum, *Barr v. Executive Office of the President*, No. 99-1695, (D.D.C. Aug. 9, 2000) (Green, J.L., J.) (holding that the EOP was *not* an "agency" subject to the Privacy Act). *See also Falwell v. Executive Office of the President, 113 F. Supp. 2d 967, 970 (W.D. Va. 2000)* (holding that the Office of the President is *not* subject to the Privacy Act). Despite suggestions to the contrary, [5] [*59] the *Alexander* and *Barr* opinions are [**8] not binding upon this court and do not establish the "the law of the district." *In re: Executive Office of President, 342 U.S. App. D.C. 20, 215 F.3d 20, 24 (D.C. Cir. 2000)*. The *Alexander* and *Barr* decisions do have persuasive value, however; and this court will evaluate Judge Lamberth's and Judge Green's analysis in making its own independent assessment of the law as it is applied to this case.

5 Before the *Barr* decision was issued, Broaddrick had argued that "this Court's prior decision in *Alexander* must be followed" on the grounds that coordinate courts should avoid issuing conflicting rulings. Pl.'s Opp. to Defs' Mot. to Dismiss and for Summ. J., and Pl.'s Cross Motion for Partial Summ. J. at 5-8. The court assumes that Broaddrick does not make this same argument with respect to the *Barr* opinion.

In *Alexander*, Judge Lamberth held that the Privacy Act's definition of "agency" includes the Executive Office of the President. Judge Lamberth reasoned that the purposes [**9] of the Privacy Act and the FOIA are quite different: the FOIA was enacted to provide citizens with better access to government records, while the Privacy Act was adopted to safeguard individuals against invasions of their privacy. *Alexander, 971 F. Supp. at 606*. Because of these different purposes, Judge Lamberth found that "there is no need to ignore the plain language of the [Privacy Act] statute and limit the word 'agency' as has been done under FOIA." *Id. at 606-07*. Judge Lamberth also reasoned that by providing exceptions to the FOIA disclosure requirements, Congress and the courts recognized that FOIA access must be limited given the intricate balance between the public interest in information and "countervailing public and private interests in secrecy." *Id. at 606*. However, Judge Lamberth noted that "there is no evidence that the privacy protections provided by Congress in the Privacy Act must also be necessarily limited." *Id.*

In *Barr*, Judge June L. Green addressed the same issue, but concluded that the EOP was *not* an "agency" subject to the Privacy Act. Judge Green stated that "it is a fair construction of the [**10] Privacy Act to exclude the President's immediate personal staff from the definition of 'agency.'" *Barr v. Executive Office of the President*, No. 99-1695 (JLG), slip op. at 6 (D.D.C. Aug. 9, 2000). Because the Privacy Act borrows the FOIA definition of "agency," Judge Greene reasoned that the Privacy Act should also borrow the FOIA's exceptions as provided in the legislative history and by judicial interpretation. *See id.* Judge Green also found merit in the EOP's argument that the term "agency" should be read to avoid constitutional questions, for reading "agency" to include the EOP might raise constitutional concerns about the President's ability to obtain information and maintain

Article II confidentiality. *See id.* at 5-6.

The Court of Appeals for the District of Columbia Circuit has not decided whether the EOP is an "agency" subject to the Privacy Act, but this Circuit's reasoning in other cases suggests that it is not. For example, in *Dong v. Smithsonian Institution, 326 U.S. App. D.C. 350, 125 F.3d 877, 878-80 (D.C. Cir. 1997), cert. denied, 524 U.S. 922, 141 L. Ed. 2d 169, 118 S. Ct. 2311 (1998)*, the Court of Appeals addressed whether [**11] the Smithsonian Institution ("Smithsonian") was an "agency" subject to the Privacy Act. The *Dong* court first recognized that the Privacy Act expressly "borrows the definition of 'agency' found in FOIA." *125 F.3d at 878*. "*Hence*, to be an agency under the Privacy Act, an entity must fit into one of the categories set forth either in [FOIA*] § 552(f)* or *§ 551(1)*." [6] *Id. at 879* (emphasis added). [*60] Finding that the Smithsonian did not fit within the FOIA's definition of "agency," [7] the court held that the Smithsonian was not an "agency" under the Privacy Act. *See id. at 878-80*.

> 6 *Section 551(1)* refers to the Administrative Procedure Act's definition of "agency." As this Circuit noted, however, Congress intended the FOIA's *§ 552(f)* "to encompass entities that might have eluded the APA's definition in *§ 551(1)*." *Energy Research Foundation v. Defense Nuclear Facilities Safety Board, 286 U.S. App. D.C. 359, 917 F.2d 581, 583 (D.C. Cir. 1990)*. Because the FOIA's *§ 552(f)* definition of "agency" is directly related to the entities described in this case, the court will focus exclusively on *§ 552(f)*.

[**12]

> 7 The *Dong* court also determined that the Smithsonian was not an "agency" as defined by the Administrative Procedure Act, *5 U.S.C. § 551(1). See Dong v. Smithsonian Institution, 326 U.S. App. D.C. 350, 125 F.3d 877, 880-83 (D.C. Cir. 1997)*.

Similarly, in *Rushforth v. Council of Economic Advisers, 246 U.S. App. D.C. 59, 762 F.2d 1038, 1040 (D.C. Cir. 1985)*, this Circuit addressed whether the Council of Economic Advisers was an "agency" subject to the disclosure requirements of the Sunshine Act, *5 U.S.C. § 552b*. Like the Privacy Act, the Sunshine Act expressly incorporates the FOIA definition of "agency." *See* Sunshine Act, *5 U.S.C. § 552b(a)(1)* ("The term 'agency' means any agency as defined in [FOIA*] section 552(e)* . . . ."). Using the same rationale as followed in *Dong*, the *Rushforth* court held that "inasmuch as the Council of Economic Advisers is not an agency for FOIA purposes, *it follows of necessity* that the CEA is, under the terms of the Sunshine Act, not subject to [**13] that statute either." *Rushforth, 762 F.2d at 1043* (emphasis added).

Applying this same reasoning and analysis, this court holds that inasmuch as the EOP is not an "agency" subject to the FOIA, the EOP is not an "agency" subject to the Privacy Act. The Privacy Act expressly incorporates the FOIA's definition of "agency," *see 5 U.S.C. § 552a(a)(1)*, and both the Supreme Court and this Circuit have held that the EOP's White House Office is not an "agency" under the FOIA. *See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980)*; *National Sec. Archive v. Archivist of the United States, 285 U.S. App. D.C. 302, 909 F.2d 541, 545 (D.C. Cir. 1990)*. The court sees no reason to reject this logic, particularly given that the Court of Appeals employed this same reasoning in *Rushforth* and *Dong*. [8] The court, therefore, grants the EOP's motion to dismiss, and denies Broaddrick's cross motion for partial summary judgment. [9]

> 8 The court's decision is further bolstered by the recent opinions of Judge Kollar-Kotelly, who also held that the EOP's White House Office is not subject to the terms of the Privacy Act. *See Jones v. EOP*, No. 00-307 (CKK), slip op. at 14-17 (D.D.C. Mar. 12, 2001); *Sculimbrene v. Reno*, No. 99-2010 (CKK), slip op. at 6-18 (D.D.C. Feb. 16, 2001).

[**14]

> 9 It is unclear to what extent Broaddrick seeks documents from EOP components other than the White House Office and the "President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." *Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156, 63 L. Ed. 2d 267, 100 S. Ct. 960 (1980)*. Consistent with this opinion, Broaddrick is free to request documents directly from those EOP components that are subject to the FOIA and the Privacy Act.

B. DOJ's Motion to Dismiss

In its motion to dismiss, DOJ argues that

Broaddrick's claim that DOJ denied her access to records should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(1)* and *12(b)(6)* because Broaddrick does not allege that she submitted a Privacy Act request to DOJ. DOJ contends that the Privacy Act requires federal agencies to provide access to records only "upon request by any individual." *5 U.S.C. § 552a(d)(1)*; *see also 5 U.S.C. § 552a(g)(1)(B)* (noting that civil remedies are available when [**15] an agency refuses to [*61] comply with "an individual request"). Because Broaddrick made no request to DOJ, there could be no refusal to comply with "an individual request," DOJ maintains. Broaddrick responds that she properly pled a claim for damages for the maintenance and dissemination of records under *5 U.S.C. § 552a(b)*, e(1), and g(1)(D). Broaddrick argues that there is no requirement that a plaintiff submit a Privacy Act request to an agency before filing a claim for damages under these subsections.

Both parties offer accurate statements of law. Broaddrick is correct that under the Privacy Act an individual need not request records from an agency as a prerequisite to filing a damages suit against that agency for the unlawful **maintenance and dissemination** of records. *See, e.g., 5 U.S.C. §§ 552a(e)(1)* and *(g)(1)(D)*; *see also Haase v. Sessions, 282 U.S. App. D.C. 163, 893 F.2d 370, 374-75 (D.C. Cir. 1990)* (citing *Nagel v. United States Dep't of Health Educ. & Welfare, 233 U.S. App. D.C. 332, 725 F.2d 1438, 1441 (D.C. Cir. 1984))*. However, this response does not address DOJ's equally-correct assertion [**16] that Broaddrick may not claim that DOJ unlawfully "refused to allow Plaintiff **access** to records" when Broaddrick did not even ask DOJ for access to records. Compl. P 23. Indeed, there can be no denial of access, when a request for such access was not made. Nowhere in Broaddrick's Complaint (or in her pleadings) does she allege that she submitted a Privacy Act request to DOJ. By not requesting such records, Broaddrick has failed to exhaust her administrative remedies with respect to the denial of access claim, and the court lacks subject matter jurisdiction to hear that issue. *See Muhammad v. United States Bureau of Prisons, 789 F. Supp. 449, 450 (D.D.C. 1992)* (dismissing Privacy Act claim because "plaintiff's failure to request the documents directly from the agencies constitutes a failure to exhaust administrative remedies."). Accordingly, DOJ's motion to dismiss the denial of access claim is granted.

C. DOJ's Amended Motion for Summary Judgment

Next, DOJ argues that it is entitled to summary judgment on Broaddrick's remaining claims for the unlawful maintenance and dissemination of files. Summary judgment should not be granted unless there is no genuine [**17] issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The moving party bears the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. If the moving party's motion for summary judgment is properly supported, the burden then shifts to the non-movant to "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*; *see Anderson, 477 U.S. at 248*. Pursuant to LCvR 7.1(h), each summary judgment motion and opposition must be accompanied be a statement of material facts as to which the party contends there is or is not a genuine issue. The statements must also include "references to the parts of the record relied on to support the statement(s)." LCvR 7.1(h).

Here DOJ has met its initial burden of production by providing a statement of undisputed material facts, which is supported [**18] by references to the record. *See* Def.'s Statement of Material Facts as to which There is No Genuine Issue ("Def.'s Statement"). In that statement, DOJ cites the sworn affidavits of Debra Anne O'Clair, Unit Chief of the FBI's Investigative [*62] Information Processing Unit, who states that she searched the FBI's Central Records System General Index and found "no references identifiable to the name 'Juanita Broaddrick' within the subject or the reference indices." Decl. of Debra O'Clair P 10 ("O'Clair Decl."). O'Clair explains that the fact that Broaddrick is not recorded within the "subject" index indicates that Broaddrick was not the subject of an FBI investigation and that there are no FBI "subject" files on her. *See id.* P 7; Def.'s Statement P 4. DOJ also cites the supplemental declaration of O'Clair, in which O'Clair states that she conducted a full text search of the FBI Electronic Case File ("ECF") system and found two documents that contain the name "Juanita Broaddrick." Suppl. Decl. of Debra O'Clair at P 8 ("O'Clair Suppl. Decl."). [10] Those two documents were located in Los Angeles, California, and Washington, D.C. With respect to these documents, DOJ presents sworn declarations [**19] from Luis G. Flores, FBI Chief Division Counsel, Los Angeles Division, and Edward L.

Williams, Jr., FBI Chief Division Counsel, Washington, D.C. Field Office, who each stated that:

> Based upon [the] manual search and my review of the physical files as well as the documents themselves, I have determined that neither the serial document, nor the file in which it is contained, have any indicia of dissemination outside the FBI as FBI policy would require had dissemination occurred.
>
> Decl. of Luis G. Flores P 6; Decl. of Edward L. Williams, Jr. P 6.

> 10 According to her supplemental affidavit, O'Clair did not search the ECF system initially because "full text searching of the ECF is not a complete search of FBI documents [and] it is used only in a limited number of cases as an investigative technique." O'Clair Suppl. Decl. P 7. But "at the request of the Office of the General Counsel," O'Clair performed this full ECF text search and found the two documents that contain Broaddrick's name. *Id.*

[**20] These sworn affidavits demonstrate that there is no genuine issue as to whether DOJ unlawfully maintained and disseminated files on Broaddrick. [11] The burden now shifts to Broaddrick to "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. In meeting this burden, Broaddrick must present "affirmative evidence" and may not "rest upon mere allegation or denials of [her] pleadings" *Laningham v. United States Navy, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1241 (D.C. Cir. 1987)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*; *see also Fed. R. Civ. P. 56(e)*. But Broaddrick seems to do just that -- relying exclusively on allegations of her pleadings -- when she responds that DOJ is not entitled to summary judgment because the "repeated flip-flopping by the Clinton-Gore DOJ demonstrates that its factual allegations regarding the documents it maintains on Plaintiff are unreliable." Pl.'s Opp'n to DOJ's Amended Mot. for Summ. J. at 12 ("Pl.'s Opp'n"). Broaddrick surmises that because O'Clair submitted a supplemental declaration, her sworn testimony must be [**21] unreliable: "Plaintiff naturally is, and the Court should be, skeptical of the FBI's claims in this regard." Pl.'s Opp'n at 12. However, an agency's efforts to correct or update the record should not be viewed as an indication of unreliability. *See Military* [*63] *Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 754 (D.C. Cir. 1981)*. Agency affidavits are accorded "a presumption of good faith" and cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents." *SafeCard Services, Inc. v. S.E.C., 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200 (D.C. Cir. 1991)* (citing *Ground Saucer Watch, Inc. v. CIA, 224 U.S. App. D.C. 1, 692 F.2d 770, 771 (D.C. Cir. 1981)*. Here Broaddrick has presented no evidence to rebut the presumption that DOJ's declarations were submitted in good faith. Neither has Broaddrick presented countervailing evidence suggesting that DOJ maintained and disseminated files on Broaddrick.

> 11 These affidavits also show that there is no genuine issue as to an essential element of Broaddrick's Privacy Act damages claim, namely that the government's conduct was "intentional or willful." *5 U.S.C. § 552a(g)(1)(4)*. This Circuit has interpreted "intentional or willful" to mean that the agency acted "without grounds for believing [its action] to be lawful, or by flagrantly disregarding others' rights under the Act." *Albright v. United States, 235 U.S. App. D.C. 295, 732 F.2d 181, 189 (D.C. Cir. 1984)*.

[**22] Broaddrick also argues that DOJ is not entitled to summary judgement because "discovery has yet to commence." Pl.'s Response to Def.'s Statement of Material Facts Not in Dispute ("Pl.'s Response") PP 1-6. The court notes that discovery is not typically a part of FOIA and Privacy Act cases, *see Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352-55 (D.C. Cir. 1978), cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980)*, and whether to permit discovery is within the sound discretion of the district court judge. *See SafeCard Services, Inc. v. S.E.C., 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200-01 (D.C. Cir. 1991)*. Moreover, merely stating that "discovery has yet to commence" is insufficient to respond to a properly-supported motion for summary judgement. Pl.'s Response PP 1-6. The party opposing summary judgment must indicate "what facts she intended to discover that would create a triable issue." *Carpenter v. Federal Nat'l Mortg. Ass'n, 335 U.S. App. D.C. 395, 174 F.3d 231, 237 (D.C. Cir. 1999)*. In addition, the party opposing

summary judgment must "state[] concretely why she could not, absent discovery, present by affidavit [**23] facts essential to justify her opposition to [the agency's] summary judgment motion." *Strang v. United States Arms Control and Disarmament Agency, 275 U.S. App. D.C. 37, 864 F.2d 859, 861 (D.C. Cir. 1989)*.

In her pleadings, Broaddrick suggests that she needs discovery in order to "cross-examine witnesses, such as Ms. O'Claire." Pl.'s Opp'n at 12. This response is inadequate. The Court of Appeals in *Strang* specifically rejected the plaintiff's argument that she needed discovery in a Privacy Act case in order to "test and elaborate" the affidavit testimony. *Strang, 864 F.2d at 861*. The court held that this justification was insufficient to require the district court to deny a summary judgment motion and grant discovery. *See id.* For the same reasons, Broaddrick's claim that she needs discovery to cross-examine DOJ's other affiants must also fail. *See, e.g., Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 610 F.2d 824, 836-37 n. 101 (D.C. Cir. 1979)* (noting that discovery should be denied if the plaintiff merely desires to find something that might cast doubt on the agency's affidavits).

Next, in a declaration [**24] from her attorney, Broaddrick claims that she is "unable to present affidavits concerning the FBI's search for records pursuant to Plaintiff's Privacy Act request, because facts concerning any such search remain solely within the purview of Defendants and third parties such as Lanny J. Davis, and Plaintiff has not has the opportunity to conduct discovery into any such search." *Rule 56(f)* Decl. of Paul J. Orfanedes, Esq. P 4. ("Orfanedes Decl."). [12] The problem [*64] with Broaddrick's statement, however, is that FOIA and Privacy Act plaintiffs are generally not entitled to conduct discovery into the adequacy of an agency's search when, as is here, the court is satisfied that the agency's affidavits are sufficient. The court may accept agency's affidavits, without pre-summary judgment discovery, if the affidavits are made in good faith and provide reasonably specific detail concerning the methods used to produce the information sought. *See SafeCard Servs., Inc. v. SEC, 288 U.S. App. D.C. 324, 926 F.2d 1197, 1200-02 (D.C. Cir. 1991)*. The court may also deny discovery requests when the plaintiff's efforts represent no more than "bare hope of falling upon something that might [**25] impugn the affidavits." *Founding Church of Scientology v. NSA, 197 U.S. App. D.C. 305, 610 F.2d 824, 836-37 n. 101 (D.C. Cir. 1979)*. This appears to be the situation here.

> 12 *Fed. R. Civ. P. 56(f)* states that "should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court *may* refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." (emphasis added).

The court finds that DOJ's affidavits are sufficiently detailed in setting forth the manner and terms the FBI used to search for files on Broaddrick. *See* O'Clair Decl. PP 3-9; O'Clair Suppl. Decl. PP 7-8. The affidavits also indicate in sufficient detail the manner in which FBI files are kept and the procedures used for their disclosure. Decl. of Luis G. Flores PP 3-6; Decl. of Edward [**26] L. Williams, Jr. PP 3-6. Given the adequacy of these affidavits and the fact that Broaddrick has produced no countervailing evidence to cast doubt on them, the court holds that Broaddrick is not entitled to discovery on this issue. *See Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352-56 (D.C. Cir. 1979)* (affirming district court's grant of summary judgment without discovery where agency affidavits were sufficient), *cert. denied, 445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980)*; *Master v. F.B.I., 926 F. Supp. 193, 195-97 (D.D.C. 1996)* (denying discovery on search issue where court determined agency's search for documents was adequate), *aff'd mem, 124 F.3d 1309 (D.C. Cir. 1997)*.

Furthermore, in response to DOJ's statement of undisputed material facts, Broaddrick **admits** that the two FBI documents that contain Broaddrick's name "do not bear any indicia of dissemination" and, in fact, "were not disseminated outside the FBI because FBI policy requires the entry of such indicia if a document is disseminated." Def.'s Statement P 5, P 6; Pl.'s Response P 5 ("not disputed"), P 6 ("not disputed"). Because [**27] these facts are "not disputed," the court accepts them as true for purposes of this motion. The fact that Broaddrick concedes that the two documents containing her name were not disseminated further supports DOJ's claim that it is entitled to summary judgment.

Still, Broaddrick argues -- in her pleadings -- that summary judgment should not be granted because there is a question of material fact as to "what documents [Lanny]

Davis was referring to when he stated on "Hannity & Colmes' that Plaintiff had denied to the FBI that the President made 'unwanted sexual advances' towards her." Pl.'s Opp'n at 3-4. First, as the court indicated above, a party opposing summary judgment may not "rest upon mere allegation or denials of [her] pleadings." *Laningham v. United States Navy, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1241 (D.C. Cir. 1987)*. Broaddrick seeks to do just that with this argument. Second, even if this court were inclined to entertain this argument, the court notes that Broaddrick's own transcript from the "Hannity & Colmes" television show, submitted as Exhibit 2 to her opposition motion, indicates that Davis says he was referring to information "in the Starr [**28] Report." Pl.'s Opp'n Mot. at Ex. 2, p. 7. Broaddrick's conjecture that Davis *might* have been referring instead to DOJ's 'secret files' on Broaddrick is too speculative to warrant discovery, especially given that DOJ's properly-supported affidavits [*65] indicate that no such files exist. [13] More importantly, Broaddrick's conclusory assertions -- offered without any factual basis for support -- do not satisfy her burden to set forth "affirmative evidence" showing a genuine issue for trial. *Laningham v. United States Navy, 259 U.S. App. D.C. 115, 813 F.2d 1236, 1241 (D.C. Cir. 1987)*. For it is "well settled that conclusory allegations unsupported by factual data will not create a triable issue of fact." *Exxon Corp. v. F.T.C., 213 U.S. App. D.C. 356, 663 F.2d 120, 126-27 (D.C. Cir. 1980)* (citation omitted).

> 13 Furthermore, the court does not have jurisdiction under the FOIA or the Privacy Act to permit either party to depose Lanny Davis, because he is a private citizen and was never employed by an "agency" as defined by the statutes. *See, e.g., Kurz-Kasch, Inc. v. United States Dep't of Defense, 113 F.R.D. 147, 148 (S.D. Ohio 1986)* (holding that the court did not have jurisdiction under the FOIA to grant discovery request against private citizen).

[**29] The United States Court of Appeals for the Fifth Circuit may have stated it best:

> Where a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment. Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact. A 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under *Rule 56(f) . . . . Rule 56(f)* cannot be relied upon to defeat a summary judgment motion 'where the result of a continuance to obtain further information would be wholly speculative.'
>
> *Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017, 1030 (5th Cir. 1983)* (internal quotations omitted).

In sum, Broaddrick has presented no factual support for her conspiracy allegations that the "Clinton-Gore DOJ" maintained and disseminated confidential files on her in order "to smear and destroy her [**30] reputation." Pl.'s Opp'n at 3; Compl. P 15. Broaddrick has also failed to fulfill her summary judgment burden to rebut DOJ's properly-supported evidence that the FBI did not maintain any subject files on Broaddrick and did not disseminate any documents that contain Broaddrick's name. *See* Def.'s Statement PP 3-6. Given the wholly speculative nature of Broaddrick's allegations, as compared to DOJ's properly-supported evidence, the court holds that DOJ is entitled to judgment as a matter of law.

III. CONCLUSION

For the foregoing reasons, the court grants the EOP's motion to dismiss, denies Broaddrick's cross motion for partial summary judgment, grants DOJ's motion to dismiss the denial of access claim, and grants DOJ's amended motion for summary judgment on all remaining claims. An appropriate order accompanies this memorandum opinion.

Henry H. Kennedy, Jr.

United States District Judge

Date: *March 27, 2001*

ORDER AND JUDGMENT

Pursuant to *Fed. R. Civ. P. 58* and for the reasons stated by the court in its memorandum docketed this same day, it is this *27Th* day of March, 2001, hereby

ORDERED and ADJUDGED that the complaint in this case is **DISMISSED** [**31] .

Henry H. Kennedy, Jr.

United States District Judge

BRADY v. MARYLAND

No. 490

SUPREME COURT OF THE UNITED STATES

373 U.S. 83; 83 S. Ct. 1194; 10 L. Ed. 2d 215; 1963 U.S. LEXIS 1615

March 18-19, 1963, Argued
May 13, 1963, Decided

PRIOR HISTORY: CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

DISPOSITION: *226 Md. 422, 174 A. 2d 167*, affirmed.

SUMMARY:

After the petitioner had been convicted in a Maryland state court on a charge of murder in the first degree (committed in the course of a robbery) and had been sentenced to death, he learned of an extrajudicial confession of his accomplice, tried separately, admitting the actual homicide. This confession had been suppressed by the prosecution notwithstanding a request by the petitioner's counsel to allow him to examine the accomplice's extrajudicial statements. Upon appeal from the trial court's dismissal of his petition for postconviction relief, the Maryland Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law, and remanded the case for a retrial of the question of punishment only. (*226 Md 422, 174 A2d 167*.)

On certiorari, the United States Supreme Court affirmed. In an opinion by Douglas, J., expressing the views of six members of the Court, it was held that (1) the prosecution's suppression of the accomplice's confession violated the *due process clause of the Fourteenth Amendment*, but (2) neither that clause nor the *equal protection clause* of that amendment was violated by restricting the new trial to the question of punishment.

White, J., concurred in a separate opinion, expressing the view that the Court should not have reached the due process question which it decided. He concurred in the Court's disposition of petitioner's equal protection argument.

Harlan, J., joined by Black, J., dissented, expressing the view that because of uncertainty in the pertinent Maryland law and because the Maryland Court of Appeals did not in terms address itself to the equal protection question, the judgment below should have been vacated and the case remanded to the Court of Appeals for further consideration.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

APPEAL §95

finality of state court judgment. --

Headnote:[1]

A decision of the highest court of a state in which the trial court's dismissal of a prisoner's petition for postconviction relief was reversed on the ground that suppression of the evidence by the prosecution denied petitioner due process of law, and by which the case was remanded for a retrial of the question of punishment, not the question of guilt, is a "final judgment" within the

meaning of *28 USC 1257(3)*, under which the United States Supreme Court may review a judgment of a state court only if it is final.

[***LEdHN2]

CONSTITUTIONAL LAW §840.5

due process -- prosecution's suppression of accomplice's confession. --

Headnote:[2]

The *due process clause of the Fourteenth Amendment* is violated by the prosecution's suppression--before and at the accused's state trial on a charge of murder committed in the course of robbery and after defense counsel's request to allow him examination of the extrajudicial statements of his accomplice--of a statement of the accomplice admitting that the latter committed the actual homicide.

[***LEdHN3]

CONSTITUTIONAL LAW §840

due process -- prosecution's suppression of evidence. --

Headnote:[3]

The suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

[***LEdHN4]

TRIAL §45

relative functions of court and jury -- admissibility of evidence. --

Headnote:[4]

Notwithstanding the provision in the Maryland Constitution that the jury in a criminal case are the judges of law, as well as of fact, under Maryland law it is the court and not the jury that passes on the admissibility of evidence pertinent to the issue of innocence or guilt of the accused.

[***LEdHN5]

CRIMINAL LAW §74

postconviction proceedings -- construction of state court judgment. --

Headnote:[5]

A statement in a state court judgment reversing the trial court's dismissal of a prisoner's petition for postconviction relief and remanding the case for a retrial of the question of punishment, that nothing in an accomplice's confession suppressed by the prosecution could have reduced the accused's offense below murder in the first degree, is a ruling on the admissibility of the confession on the issue of innocence or guilt.

[***LEdHN6]

CONSTITUTIONAL LAW §500

CONSTITUTIONAL LAW §840.5

prosecution's suppression of accomplice's confession -- restricting new trial to question of punishment. --

Headnote:[6]

Neither the due process clause nor the *equal protection clause of the Fourteenth Amendment* is violated by a state court's restricting to the question of punishment a new trial granted an accused because of the prosecution's suppression of an accomplice's confession, where the state court ruled that nothing in the suppressed confession could have reduced the accused's offense below murder in the first degree, thereby ruling on the admissibility of the confession on the issue of innocence or guilt, and under the law of the state this issue was for the court, not the jury, to determine.

SYLLABUS

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that

the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held*: Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the *Fourteenth Amendment*, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

COUNSEL: E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was John Martin Jones, Jr.

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were Thomas B. Finan, Attorney General, and Robert C. Murphy, Deputy Attorney General.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINION BY: DOUGLAS

OPINION

[*84] [***217] [**1195] Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. *220 Md. 454, 154 A. 2d 434*. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the *Maryland* [*85] *Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912*. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. *226 Md. 422, 174 A. 2d 167*. The case is here on certiorari, *371 U.S. 812*. [1]

1 [***LEdHR1] [1]

Neither party suggests that the decision below is not a "final judgment" within the meaning of *28 U. S. C. § 1257 (3)*, and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman v. United States, 302 U.S. 211, 212)* cannot be applied here. If in fact the *Fourteenth Amendment* entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling

below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547)* that "is fundamental to the further conduct of the case" (*United States v. General Motors Corp., 323 U.S. 373, 377)*. This question is "independent of, and unaffected by" (*Radio Station WOW v. Johnson, 326 U.S. 120, 126)* what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent v. Texas, 318 U.S. 418, 421-422*. Cf. *Local No. 438 v. Curry, 371 U.S. 542, 549*.

The [**1196] crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a [***218] federal right when the Court of Appeals restricted the new trial to the question of punishment.

[*86] [***LEdHR2] [2]We agree with the Court of Appeals that suppression of this confession was a violation of the *Due Process Clause of the Fourteenth Amendment*. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals -- *United States ex rel. Almeida v. Baldi, 195 F.2d 815,* and *United States ex rel. Thompson v. Dye, 221 F.2d 763* -- which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney v. Holohan, 294 U.S. 103, 112*, where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle v. Kansas, 317 U.S. 213, 215-216,* we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan, 294 U.S. 103*. "

[*87] The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. *195 F.2d, at 820*. In *Napue v. Illinois, 360 U.S. 264, 269*, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta v. Texas, 355 U.S. 28*; *Wilde v. Wyoming, 362 U.S. 607*. Cf. *Durley v. Mayo, 351 U.S. 277, 285* (dissenting opinion).

[***LEdHR3] [3]We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates [**1197] due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins [***219] its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made available, [*88] would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily

on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. *226 Md., at 427, 174 A. 2d, at 169*.

> 2 Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:
>
> "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .

"The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree*. We, therefore, see no occasion to retry that issue." *226 Md., at 429-430, 174 A. 2d, at 171*. (Italics added.)

[*89] If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal [**1198] cases "the Judges of Law" does not mean precisely what it seems to say. [3] The present status of that provision was reviewed recently in *Giles v. State, 229 Md. 370, 183 A. 2d 359*, appeal dismissed, *372 U.S. 767*, where the several [***220] exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." *229 Md., at 383, 183 A. 2d, at 365*. The cases cited make up a long line going back nearly a century. *Wheeler v. State, 42 Md. 563, 570*, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell v. State, 57 Md. 108, 120*. And see *Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045*; *Dick v. State, 107 Md. 11, 21, 68 A. 286, 290*. Cf. *Vogel v. State, 163 Md. 267, 162 A. 705*.

> 3 See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253-254.

[*90] [***LEdHR4] [4] [***LEdHR5] [5] [***LEdHR6] [6]We usually walk on treacherous ground when we explore state law, [4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles v. State, supra.*In the present case a unanimous Court of Appeals

has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a [*91] bifurcated trial (cf. *Williams v. New York, 337 U.S. 241*) denies him due process or violates the *Equal Protection Clause of the Fourteenth Amendment*.

4 For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co., 309 U.S. 4*, that replaced an earlier opinion in the same case, *309 U.S. 703*.

5 "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell v. State, supra, at 120*; *Vogel v. State, 163 Md., at 272, 162 A., at 706-707*.

Affirmed.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding [***221] by the State of material evidence exculpatory to an accused is a violation [**1199] of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause. * We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City v. Central Savings Bank, 306 U.S. 661*; *Minnesota v. National Tea Co., 309 U.S. 551*. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell v. Hood, 327 U.S. 678*, [*92] wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

* Md. Const., Art. 23; *Home Utilities Co., Inc., v. Revere Copper & Brass, Inc., 209 Md. 610, 122 A. 2d 109*; *Raymond v. State, 192 Md. 602, 65 A. 2d 285*; *County Comm'rs of Anne Arundel County v. English, 182 Md. 514, 35 A. 2d 135*; *Oursler v. Tawes, 178 Md. 471, 13 A. 2d 763*.

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rulemaking or legislative process after full consideration

by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

DISSENT BY: HARLAN

DISSENT

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's *Fourteenth Amendment* right to equal protection? [1] In my opinion an affirmative answer would [*93] [***222] be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

1 I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86-88 of its opinion.

The Court, however, holds that the *Fourteenth Amendment* was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as [**1200] well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, [2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. *226 Md., at 430, 174 A. 2d, at 171*. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive [*94] of the crucial issue here. *226 Md., at 427-429, 174 A. 2d, at 170*. [3]

2 Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

3 It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day v. State, 196 Md. 384, 76 A. 2d 729*. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt. [4]

4 In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been

admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

In [***223] this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms [*95] address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota v. National Tea Co., 309 U.S. 551*.

REFERENCES

Annotation References:

1. Suppression of evidence by prosecution in criminal case as vitiating conviction. *33 ALR2d 1421*.

2. Conviction on testimony known to prosecution to be perjured as denial of due process. 2 L ed 2d 1575, 3 L ed 2d 1991.

3. Obtaining conviction on perjured testimony known to prosecuting authorities to be perjured, as denial of due process. 98 ALR 411.

HAROLD WEISBERG v. U.S. DEPARTMENT OF JUSTICE, APPELLANT

No. 78-1641

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

631 F.2d 824*; *203 U.S. App. D.C. 242*; *1980 U.S. App. LEXIS 16941*; *207 U.S.P.Q. (BNA) 1080*; *Copy. L. Rep. (CCH) P25,169*; *29 Fed. R. Serv. 2d (Callaghan) 1010*; *6 Media L. Rep. 1401

June 6, 1979, Argued
June 5, 1980, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Columbia (D.C. Civil No. 75-1996).

COUNSEL: Michael Kimmel, Atty., Dept. of Justice, Washington, D. C., with whom Barbara Allen Babcock, Asst. Atty. Gen., Dept. of Justice, Earl J. Silbert, U. S. Atty. and Leonard Schaitman, Atty., Dept. of Justice, Washington, D. C., were on brief, for appellant.

James H. Lesar, Washington, D. C., for appellee.

JUDGES: Before BAZELON, Senior Circuit Judge, TAMM, Circuit Judge and PARKER [*] , United States District Court Judge for the District of Columbia.

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

OPINION BY: BAZELON

OPINION

[*825] In this case a novel question is presented: whether administrative materials copyrighted by private parties are subject to the disclosure provisions of the Freedom of Information Act (FOIA). [1] We hold that the mere existence of copyright, by itself, does not automatically render FOIA inapplicable to materials that are clearly agency records. However, because we find that the absence of the asserted copyright owner as a party to this action may subject the Government "to a substantial risk of incurring . . . inconsistent obligations," [**2] [2] we remand for further proceedings as required by *Rule 19 of the Federal Rules of Civil Procedure*. [3]

1 *5 U.S.C. § 552 (1976)*.

2 *Fed.R.Civ.Pro. 19(a)*.

3 *Fed.R.Civ.P. 19* (joinder of persons needed for just adjudication). See notes 33 & 44 infra ; *Fed.R.Civ.P. 21* (court may order addition of parties sua sponte).

I. BACKGROUND

Appellee Harold Weisberg brought this FOIA action to compel disclosure of all photographs in the Government's possession that were taken at the scene of the assassination of Dr. Martin Luther King, Jr. Included in the FBI's possession are 107 photographs taken by Joseph Louw, then employed by Life Magazine. [4] Louw sold the photographs to TIME, Inc., the parent company of Life Magazine, [5] and TIME submitted copies of the photos to the FBI for use in the assassination investigation.

4 Appellee contends on appeal that Mr. Louw

was actually "on assignment" to Public Television when he took the photographs, using this as a ground for disputing TIME's claim of copyright ownership. Appellee's Br. at 31. Nothing in the record, however, contradicts the basic fact of an employment relationship between TIME and Louw when the photographs were taken.

[**3]

5 The precise nature of the agreement between TIME and Louw is unclear. Apparently TIME holds the copyright in trust for Louw, who reserved all book publication rights to the photographs. Appellants' Br. at 4.

When the FBI advised TIME of Weisberg's FOIA request, TIME stated that it had no objection to having the photographs viewed, but that it would object if they were copied because such reproduction would violate its alleged copyright on the photos. [6] The FBI notified Weisberg accordingly, and advised him that he must obtain any copies of the photos directly from TIME since it owned the photos and had not granted the Bureau authority to [*826] release copies. The FBI further claimed that FOIA Exemptions 3 [7] and 4 [8] applied to the photographs.

6 Defendant's Exhibit No. 1, Joint Appendix at 50-51 (Letter of Sept. 13, 1977, from TIME, Inc. to Charles Matthews, FBI).

7 *5 U.S.C. § 552(b)(3)* (disclosure mandate not applicable to matter "specifically exempted from disclosure by statute").

[**4]

8 *5 U.S.C. § 552(b)(4)* (disclosure mandate not applicable to "commercial . . . information obtained from a person and privileged or confidential").

Thereafter, Weisberg learned from TIME that copies of the photos, without reproduction rights, would cost $ 10.00 per print. The cost for reproduction by the government under a FOIA request, according to Weisberg, would have been as little as forty cents per copy. [9] Motivated in part by this price differential, and in part by a belief that TIME was intentionally placing obstacles in his path, [10] Weisberg then pressed this FOIA claim to obtain copies of the photos from the FBI.

9 Appellee's Br. at 15. This was the fee charged by the FBI to reproduce various government photographs of the King assassination site. Appellant's Br. at 5 n.5.

10 Weisberg asserts that TIME's behavior during his attempts to obtain the photos directly from TIME demonstrated that TIME "would spare no effort to make obtaining the Louw pictures as expensive and time-consuming as possible." Appellee's Br. at 13.

[**5] On cross-motions, the district court entered summary judgment for Weisberg and ordered the FBI to provide him with "prints" of the requested photos. [11] The court first held that the photos were "agency records" subject to disclosure under FOIA. [12] It then decided that neither of the FOIA exemptions asserted by the Government applied to the photos. The court concluded that the Copyright Act [13] is not a statute exempting disclosure for the purposes of Exemption 3, [14] and that even if it were, only three of the 107 requested photos "have been registered for statutory copyright protection." [15] The district court [*827] further stated that even if all the photos were protected by statutory copyright, they would be subject to disclosure under the "fair use" doctrine because Weisberg intended to use them solely for scholarly purposes. [16] The court also determined the photos were not "confidential" or "privileged" by virtue of a copyright, and thus held the fourth exemption for commercial information inapplicable. [17] Although the parties and TIME were aware of TIME's interest in this litigation, they did not make any effort to bring TIME before the district court.

11 Weisberg v. U. S. Dep't of Justice, Civ. Action No. 75-1996 (D.D.C. Feb. 9, 1978) (District Court Opinion).

[**6]

12 District Court Opinion at 3-4. The district court cited three reasons for its conclusion: (1) the photographs relate to a "controversial matter ( ) of public concern," id. at 3; (2) Exemption 4 pertaining to commercial information "obtained from a person," *5 U.S.C. § 552(b)(4)*, shows that "Congress must have understood that the term "record' would encompass material submitted to the agency by outsiders," id. at 4; and (3) agencies retain discretion to release materials even if they are found to quality for an exemption. Id. at 4.

13 *17 U.S.C. §§ 101-810 (1976)*.

14 District Court Opinion at 3-5. An Exemption 3 statute must either "(A) require( ) that the matters (specifically exempted from disclosure)

be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish( ) particular criteria for withholding or refer( ) to particular types of matters to be withheld." *5 U.S.C. § 552(b)(3)*. The district court held that the Copyright Act does not satisfy either of these requirements because it "has traditionally been subject to the equitable doctrine of "fair use' and in 1976 the Law was amended to formally incorporate the doctrine." District Court Opinion at 5.

In ruling on the Exemption 3 issue, the court also made the following observation:

In addition, the Court notes that even if it had found the Freedom of Information Act's (b)(3) exemption to have been applicable, it would have exercised its discretion to make the photos available, given the substantial controversy surrounding both the assassination of Dr. King and the thoroughness of the government's investigation of the matter.

Id. at 6. The court did not cite any authority for the proposition that it retained discretion to order disclosure of the photos even if they came within a FOIA exemption. Although the Supreme Court in *Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 60 L. Ed. 2d 208, 1712-13 (1979)*, affirmed some agency discretion, the Court has not addressed whether reviewing courts may order disclosure of exempted materials. See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc. ("GTE"), *445 U.S. 375, 100 S. Ct. 1194, 63 L. Ed. 2d 467 (1980)* (under FOIA, courts may order release of records only if "improperly withheld").

[**7]

15 See District Court Opinion at 5. The district court apparently assumed that registration was a prerequisite for copyright protection under the 1909 Act in force when the photos were taken. We note that although copyright notice was required upon publication under the 1909 Act, see *17 U.S.C. § 10 (1970)*, registration apparently was not then, *Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 59 S. Ct. 397, 83 L. Ed. 470 (1939)*, nor is it now, see *17 U.S.C.App. § 408(a) (1976)*, a precondition for statutory copyright.

16 District Court Opinion at 5-6. See *17 U.S.C.App. § 107* (fair use provision). In support of its holding, the district court stated: "In light of plaintiff's pledge to use the pictures for scholarly work and not for publication, the effect of the use "upon the potential market for or value of the copyrighted work' will not be substantial. *17 U.S.C. § 107(4)*." District Court Opinion at 6. The court did not address separately whether the Government, by making copies of the photos in response to Weisberg's (and other citizens') requests, would itself be able to assert a "fair use" defense in subsequent copyright infringement actions. This question is raised by appellants. See Appellants' Br. at 10.

[**8]

17 District Court Opinion at 6-7. The court recognized that privileges under Exemption 4 may serve to protect the Government's ability to obtain necessary information in the future. But the court reasoned that an Exemption 4 privilege would serve no useful purpose in this case because most of the photos were unprotected by statutory copyright, and were subject, in any event, to disclosure under the fair use doctrine. Id. at 7.

II. COPYRIGHTED MATERIALS AS "AGENCY RECORDS"

The district court correctly recognized that the threshold issue in this case is whether the requested photographs are identifiable "agency records" subject to the disclosure provisions of FOIA. [18] The Government contends that because of TIME's copyright they are not, [19] and therefore urges dismissal.

18 *5 U.S.C. § 552(a)(3) (1976)*. See *Forsham v. Harris, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980)*.

19 Thus, the Government challenges the district court's finding that 104 of the 107 photos are not protected by statutory copyright. Appellant's Br. at 27-29.

[**9] The Government concedes, as it must, that generally materials obtained from private parties and in the possession of a federal agency may be agency "records" within the meaning of FOIA. [20] The Government argues, however, that if such materials are copyrighted by a private party [21] they should never be considered agency records because they constitute a

"valuable work product." [22] For this sweeping proposition, we are directed to a Ninth Circuit case, *SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976)*.

20 Appellant's Br. at 19. See, e.g., *Forsham v. Harris, supra, 445 U.S. at 183-187, 100 S. Ct. at 986-88*; *Chrysler Corp. v. Brown, 441 U.S. 281, 99 S. Ct. 1705, 1713, 60 L. Ed. 2d 208 (1979)*. The Government further concedes that if the photos sought in this case were not subject to a valid copyright, "the agency would be obliged to treat them as agency records." Appellant's Br. at 23 n.20.

21 The Government acknowledges that a different case would be presented where the government owns the copyright. See Appellant's Br. at 7 n.6.

22 Appellant's Br. at 17. The district court apparently misunderstood the Government's position to be that any material submitted to an agency by a third party including noncopyrighted material falls outside the scope of "agency records." See note 12 supra.

[**10] The plaintiff in SDC sought through FOIA to obtain copies of tapes containing computerized medical reference data compiled by the National Library of Medicine (Library). The statute establishing the Library [23] authorized it to charge the public for using such services and materials. [24] The established charge for the requested copies was $ 50,000. In an attempt to avoid this expense, the plaintiff submitted a FOIA request, tendering a $ 500 check to cover the direct cost of search and duplication. [*828] [25] The Ninth Circuit, affirming a grant of summary judgment for the Government, held FOIA unavailable in these circumstances because the tapes were not "agency records." See *542 F.2d at 1119-21*. In seeking to reconcile FOIA with the National Library of Medicine Act, the court focused on the type of material at issue:

23 National Library of Medicine Act, *42 U.S.C. §§ 275 to 280a-1 (1976)*.

24 Id. § 276(c)(2).

25 See *5 U.S.C. § 552(a)(4)(A) (1976)* (FOIA fees "shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication").

[**11]

> There is, then, a qualitative difference between the types of records Congress sought to make available to the public by passing the Freedom of Information Act and the library reference system sought to be obtained here. The library material does not directly reflect the structure, operation, or decision-making functions of the agency, and where, as here, the materials are readily disseminated to the public by the agency, the danger of agency secrecy which Congress sought to alleviate is not a consideration.

Id. at 1120.

The present case is readily distinguishable. Here the requested materials plainly "reflect the . . . operation, or decision-making functions of the agency," [26] because they will permit evaluation of the FBI's performance in investigating the King assassination. Further, absent a FOIA request, there is no guarantee that the photos would be disclosed. [27] Indeed, interpreting FOIA as the Government urges would allow an agency "to mask its processes or functions from public scrutiny" [28] simply by asserting a third party's copyright. [29] This sharply contrasts with SDC where dissemination of the medical reference data was assured by separate congressional [**12] mandate. Because FOIA was designed to provide public access to materials such as the photos requested here, [30] we agree with the district court that the photos are "agency records" within the meaning of FOIA.

26 *SDC Development Corp. v. Mathews, supra, 542 F.2d at 1120*.

27 Copyright holders are under no obligation to grant access to their works, even if they have previously made copies available to the Government or to other parties. See *17 U.S.C.App. §§ 102, 401(a) (1976)*.

28 *SDC Development Corp. v. Mathews, supra, 542 F.2d at 1120*.

29 If the materials are not "agency records," the FBI may be able to deny requests for access as well as reproduction. See, e.g., Forsham v. Harris, supra, 445 U.S. 169, 100 S. Ct. 978, 63 L. Ed. 2d 293 (because data compiled by private group receiving federal aid held not to constitute

"agency record," no access afforded).

30 See *Forsham v. Harris, supra*, where the Court looked to the following provision of the Records Disposal Act in defining FOIA's phrase "agency records":

> "records" includes all books, papers, maps, photographs, or other documentary materials regardless of physical form of characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business . . . . *44 U.S.C. § 3301*.

quoted at, *445 U.S. at 183, 100 S. Ct. at 986* (emphasis added).

[**13] III. PARTICIPATION BY THE ALLEGED COPYRIGHT HOLDER

Deciding that copyrighted materials are subject to FOIA, however, does not resolve whether any particular FOIA request should be granted, and if so, under what terms. The Government argues that copyrighted materials should never be subject to mandatory disclosure because of the effect of FOIA Exemptions 3 and 4. Even if neither exemption is applicable to copyrighted materials, the Government contends further that it can fulfill its responsibility under FOIA simply by making copyrighted materials available for inspection, rather than providing copies on request. [31] In opposition, [*829] appellee Weisberg argues, and the district court agreed, that FOIA requires the Government to furnish members of the public with copies of copyrighted materials on the same terms as any other "agency records." [32]

31 The Government emphasizes that the FOIA disclosure provision at issue merely requires agencies to make their general records "available," it does not expressly mandate duplication of the records. See *5 U.S.C. § 552(a)(3)*. Compare *5 U.S.C. § 552(a)(2)* (requiring each agency to "make available for public inspection and copying " final opinions, statements of policy and other specified agency materials) (emphasis added). The Government acknowledges, however, that in specifying applicable charges for fulfilling FOIA requests, the Act would seem to presume that records must be duplicated on request. See *5 U.S.C. § 552(a)(4)(A)*:

> In order to carry out the provisions of this section each agency shall promulgate regulations . . . specifying a uniform schedule of fees . . . . Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such and duplication. . . . (Emphasis added.)

The Government nevertheless proposes that under a "rule of reason," these provisions should be read in pari materia so as to permit agencies to disclose, but not duplicate, copyrighted materials. Appellant's Br. at 43-45. We do not reach this issue.

[**14]

32 It should be noted, however, that the district court was influenced by the public importance of the photos requested in this case, as well as the alleged applicability of the fair use doctrine to Weisberg's intended use of the photos. See notes 12 & 16 supra.

We intimate no view with respect to these contentions concerning the proper relationship between FOIA and the copyright laws. We conclude instead that the district court should have sought the presence of the alleged copyright holder under *Rule 19* before deciding this case. Because TIME was not a party, the district court has subjected the Government "to a substantial risk of incurring . . . inconsistent obligations." *Fed.R.Civ.P. 19(a)*. [33]

33 In full, *Rule 19(a)* provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence completed relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an

involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

[**15] The district court's rulings vitally affect the value of TIME's alleged copyright. [34] If TIME were to bring its own action challenging the Government's right to duplicate the photos, [35] the district court's determination would not necessarily serve as a bar. Non-parties generally can be bound by prior judgments only where they have been fairly represented by one of the parties in the earlier litigation. [36] And an agency's interest in FOIA suits is likely to diverge from those of private parties. [37] Indeed, the Government concedes in this case that it had no incentive to protect TIME's interests on at least one of the key copyright issues decided by the district court. [38] The possibility therefore remains that a separate action [*830] by TIME would be allowed to proceed, raising the prospect of conflicting legal obligations for the Government with respect to the disposition of TIME's photos. [39]

34 See at pages 826-827, supra.

35 By its literal terms, the Copyright Act gives a copyright holder the "exclusive" right to reproduce or authorize reproduction of the copyrighted work. *17 U.S.C.App. § 106(1) (1976)*. In actions for infringement, the courts are afforded a broad range of remedies, including: the imposition of statutory or actual damages, *17 U.S.C.App. § 504*; impoundment or destruction of "all copies . . . found to have been made or used in violation of the copyright owner's exclusive rights," *17 U.S.C.App. § 503*; and injunctive relief "operative throughout the United States," *17 U.S.C.App. § 502*. We, of course, express no view as to whether any of these remedies would be available in an infringement action following court-ordered disclosure.

[**16]

36 See generally F. James & G. Hazard, Civil Procedure 575-589 (1977).

37 Even an agency's self-interest may be unclear in a given case, since it often faces the conflicting pressures of disclosure to foster appearances of "openness," see, e.g., Note, Protection from Government Disclosure The Reverse FOIA Suit, 1976 Duke L.J. 330, 359, and of nondisclosure to protect itself from embarrassment or to further its institutional objectives, see, e.g., H.R.Rep.No. 1497, 89th Cong., 2d Sess. 5-6 (1966), reprinted in (1966) U.S.Cong. & Admin.News, pp. 2418, 2422-23.

38 The Government states that unless a copyright holder participates in litigation addressing the issue of fair use of his copyright, "the only entity with any direct personal interest in showing that reproduction would not be a fair use would not be present in the lawsuit. The government has no real or direct interest in that issue. . . ." Appellant's Br. at 35. As noted before, see note 16 supra, the district court's judgment in this case depended largely on its determination that Weisberg's intended use of TIME's photos fell within the fair use exception.

39 This prospect is not eliminated by the Supreme Court's decision in GTE, supra note 14. In GTE, the Court reversed this court's decision permitting a FOIA action to proceed despite a prior nondisclosure order by the District Court of Delaware under the Consumer Product Safety Act. 100 S. Ct. at 1202, reversing *Consumers Union of the United States v. Consumer Product Safety Comm'n, 192 U.S. App. D.C. 93, 590 F.2d 1209 (D.C.Cir.1978)*. The Court relied on the fact that FOIA authorizes judicially-mandated disclosure of agency records only where those records are "wrongly withheld." See *5 U.S.C. § 552(a)(4)(B)*. The Court ruled that when an agency refuses to disclose its records pursuant to a valid prior court order, the agency records are not "wrongly withheld" and thus courts lack power under FOIA to compel disclosure. Because the Delaware order preceded this court's ruling, the Court ordered the FOIA action in this circuit to be dismissed.

Unlike GTE, the instant case presents the possibility of an initial disclosure order under FOIA, followed by a later suit brought under a separate statute such as the Copyright Act to reverse or remedy that initial order. The Court's interpretation of the phrase "improperly withheld" in FOIA therefore does not resolve whether such subsequent actions will be permissible. Especially where, as here, an initial ruling does not merely address the relationship between FOIA and the statute underlying the second action, but actually invalidates or limits the scope of an interested

party's copyright, equitable considerations might favor granting the purported copyright holder its day in court.

We need not decide this question today, however. Under *Rule 19*, a trial court should seek joinder of interested parties when there otherwise would be a "substantial risk" of exposing one of the litigants to inconsistent obligations. See *Fed.R.Civ.Pro. 19(a)*; *Pegues v. Miss. State Employment Serv., 57 F.R.D. 102 (N.D.Miss.1972)*; *Hodgson v. School Bd., New Kensington-Arnold School Dist., 56 F.R.D. 393 (W.D.Penn.1972)*. We find that risk was present here for the government. The district court therefore should have sought to join TIME the purported copyright owner before disposing of the case on the merits.

[**17] We recognize that neither the parties nor TIME chose to invoke the procedures available to include TIME in the litigation. But under the Federal Rules, the district court has an independent responsibility to assure the just and final resolution of civil disputes. [40] Had TIME participated in the proceedings below whether by intervention, [41] joinder as a party, [42] or interpleader [43] the rights and liabilities of all interested persons would have been finally and consistently determined in one forum. As matters now stand, we are faced with the needless potential for duplicative litigation.

40 As we have said before with specific reference to *Rule 19*, "the rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible." *Consumers Union of the United States v. Consumer Product Safety Comm'n, supra, 590 F.2d at 1223* (emphasis added), rev'd on other grounds sub nom. GTE, supra, 100 S. Ct. 1202. See Advisory Committee's Note to *Fed.R.Civ.P. 19*, reprinted in *39 F.R.D. 89, 92 (1966)*. See also *Fed.R.Civ.P. 1* (The Federal Rules "shall be construed to serve the just, speedy, and inexpensive determination of every action."); *Fed.R.Civ.P. 21* ("Parties may be dropped or added by order of the court on . . . its own initiative at any stage of the action and on such terms as are just."). Cf. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 738, 19 L. Ed. 2d 936 (1968)* (court of appeals should take steps "on its own initiative" to fulfill *Rule 19* policies).

[**18]

41 *Fed.R.Civ.P. 24*; see *Fisher v. Renegotiation Bd., 355 F. Supp. 1171, 1173 (D.D.C.1973)* (reverse-FOIA advocate permitted to intervene as of right in FOIA action).

42 *Fed.R.Civ.P. 19*.

43 *Fed.R.Civ.P. 22*.

[*831] IV. CONCLUSION

For the foregoing reasons, we affirm the district court's determination that copyrighted materials may constitute agency records under FOIA, and vacate the remainder of the district court's judgment. The case is remanded for the district court to seek joinder of TIME, which claims copyright protection, under *Federal Rule of Civil Procedure 19(a)*. If joinder should prove infeasible, the district court must make the necessary determinations under *Rule 19(b)* to decide upon the future course of this litigation. [44] Consistent with our decision and disposition, we intimate no view with respect to the other issues presented on appeal.

44 *Rule 19(b)* provides:

If a person as described in (19(a)) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

We expressly do not determine at this stage what actions these factors might dictate should TIME's joinder prove infeasible.

[**19] It is so ordered.

UNITED STATES DEPARTMENT OF JUSTICE v. TAX ANALYSTS

No. 88-782

SUPREME COURT OF THE UNITED STATES

492 U.S. 136*; *109 S. Ct. 2841*; *106 L. Ed. 2d 112*; *1989 U.S. LEXIS 3137*; *57 U.S.L.W. 4925*; *89-1 U.S. Tax Cas. (CCH) P9386*; *63 A.F.T.R.2d (RIA) 1492*; *16 Media L. Rep. 1849

April 24, 1989, Argued
June 23, 1989, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: *269 U.S. App. D. C. 315, 845 F. 2d 1060*, affirmed.

DECISION:

Copies of Federal District Court decisions in Justice Department files held, under Freedom of Information Act, to be "agency records improperly withheld" from requester.

SUMMARY:

If one of the federal agencies covered by the Freedom of Information Act (FOIA) (*5 USCS 552*) denies a request for information, the FOIA, in 552(a)(4)(B), confers jurisdiction on the Federal District Courts "to order the production of any agency records improperly withheld." The Tax Division of the United States Department of Justice, as the representative of the Federal Government in nearly all civil tax cases in the Federal District Courts, receives copies of all opinions and orders issued by those courts in such cases. The Division sends the originals to official Department files and makes copies for Division use. An organization published (1) a weekly magazine including summaries of recent federal court decisions on tax issues, and (2) a daily electronic data base including summaries and full texts of recent federal court tax decisions. After the organization, in 1979, first filed with the Department a FOIA request for the Division's copies of District Court tax opinions, a compromise was arranged, whereby the request was withdrawn, while the organization obtained access to the Division's weekly log of tax cases. The organization then directly requested copies of the decisions noted on the log from the respective District Court clerks and from participating attorneys. However, the organization, frustrated by alleged delays and gaps in the process, initiated, in 1984-1985, a new, approximately weekly series of FOIA requests, in each of which the organization asked the Department to provide to make available copies of all District Court tax opinions and final orders identified in the Division's weekly logs. The Department denied the requests, and the organization's administrative appeal was unsuccessful. The organization then filed suit in the United States District Court for the District of Columbia and sought, under the FOIA, to compel the Department to provide the organization with access to such decisions, but the District Court granted the Department's motion to dismiss the complaint, on the ground that the decisions had not been "improperly withheld," under 552(a)(4)(B), because the decisions were already available on the public record from their primary sources, the *District Courts (643 F Supp 740)*. On appeal, the United States Court of Appeals

for the District of Columbia Circuit, reversing, expressed the view that (1) the District Court decisions had been "improperly withheld," even though the decisions were available elsewhere; (2) the decisions were "agency records," even though the decisions had originated in a part of the Federal Government not covered by the FOIA; and (3) on remand, the District Court was to enter an order directing the Department to provide some reasonable form of access to the decisions (*269 App DC 315, 845 F2d 1060*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Rehnquist, Ch. J., and Brennan, Stevens, O'Connor, Scalia, and Kennedy, JJ., it was held that the FOIA required the Department of Justice to make available the requested District Court decisions, because, under 552(a)(4)(B), the decisions were (1) "agency records," for (a) even though a District Court was not an "agency" under the FOIA, the Department had obtained the documents from the District Courts, (b) the Department controlled the decisions, where the requests referred to decisions in the agency's possession at the time of the requests, and the decisions were not the personal papers of agency employees, and (c) "agency records" are not limited, where materials originating outside the agency are concerned, to those documents prepared substantially to be relied upon in agency decisionmaking; (2) "withheld" by the Department, for (a) the decisions were in the Department's premises and otherwise in the Department's control when the requests were made, and (b) even though the decisions were available elsewhere, when the Department refused to grant the organization's requests for the decisions in its files, the Department "withheld" the decisions in any reasonable sense of the term; and (3) "improperly" withheld, for (a) without some express indication in the FOIA's text or legislative history that Congress--which chose, in 552(a)(1) and 552(a)(2), to craft narrow categories of previously published materials which need not be, in effect, disclosed twice by the agency--more broadly intended to exempt all publicly available materials from the FOIA's disclosure requirements, such an exemption would not be adopted, (b) even though the disclosure of District Court decisions was partially governed by other statutes such as *28 USCS 1914* and by rules set by the Judicial Conference of the United States, Congress did not intend that an agency may refuse to disclose materials whose disclosure is mandated by another statute, and (c) in the case at hand, as in a typical FOIA case, it was the Department's decision alone not to make the District Court decisions available.

White, J., concurred in the judgment without opinion.

Blackmun, J., dissented, expressing the view that (1) the language of the FOIA was not that clear or conclusive on the issues presented in the case at hand; and (2) the result the court reached could not be one that was within the intent of Congress when the FOIA was enacted, because the organization's demands added nothing whatsoever to public knowledge of government operations, where the organization, as a commercial enterprise, found it quicker and more convenient (a) to have the Department do the work and search its files to produce the decisions, than (b) to apply to the respective court clerks.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

ADMINISTRATIVE LAW §64

COURTS §538.12

STATUTES §102

Freedom of Information Act -- copies of Federal District Court decisions in Department of Justice files --

Headnote:[1A][1B][1C][1D][1E][1F][1G][1H][1I]

The Freedom of Information Act (FOIA) (*5 USCS 552*) requires the United States Department of Justice to make available, upon request, copies of Federal District Court decisions that the Department receives in the course of litigating civil tax cases on behalf of the Federal Government, because, under 552(a)(4)(B)--which authorizes an order for "the production of any agency records improperly withheld"--such decisions are (1) "agency records," for (a) even though a District Court is not an "agency" under the FOIA, the Department has obtained the documents from the District Courts, (b) the Department controls the decisions, where the request refers to decisions in the agency's possession at the time of the request, and the decisions are not the personal papers of agency employees, and (c) "agency records" are not limited, where materials originating outside the agency are concerned, to those documents prepared substantially to be relied upon in agency decisionmaking;

(2) "withheld" by the Department, for (a) the decisions are in the Department's premises and otherwise in the Department's control when the request is made, and (b) even though the decisions are available elsewhere, when the Department refuses to grant a request for the decisions in its files, the Department has "withheld" the decisions in any reasonable sense of the term; and (3) "improperly" withheld, for (a) without some express indication in the FOIA's text or legislative history that Congress--which chose, in 552(a)(1) and 552(a)(2), to craft narrow categories of previously published materials which need not be, in effect, disclosed twice by the agency--more broadly intended to exempt all publicly available materials from the FOIA's disclosure requirements, such an exemption will not be adopted, (b) even though the disclosure of District Court decisions is partially governed by other statutes such as *28 USCS 1914* and by rules set by the Judicial Conference of the United States, Congress did not intend that an agency may refuse to disclose materials whose disclosure is mandated by another statute, and (c) in the case at hand, as in a typical FOIA case, it is the Department's decision alone not to make the District Court decisions available. (Blackmun, J., dissented from this holding.)

[***LEdHN2]

ADMINISTRATIVE LAW §64

EVIDENCE §248

Freedom of Information Act -- purpose -- jurisdiction to review agency action -- burden of proof --

Headnote:[2A][2B][2C][2D]

A purpose of the Freedom of Information Act (FOIA) (*5 USCS 552*) is to open agency action to the light of public scrutiny, by requiring agencies to adhere to a philosophy of full disclosure, under a belief that such a philosophy, when put into practice, will help to insure an informed citizenry, vital to the functioning of a democratic society; pursuant to a FOIA provision (552(a)(4)(B)) which confers jurisdiction on the Federal District Courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," federal jurisdiction is dependent on a showing that an agency has (1) "improperly" (2) "withheld" (3) "agency records"; unless each of these three criteria--which are not defined either in the FOIA or in its legislative history--are met, a District Court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements; the burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not "agency records," or have not been "improperly" "withheld."

[***LEdHN3]

ADMINISTRATIVE LAW §64

STATUTES §102

Freedom of Information Act -- what constitute agency records --

Headnote:[3A][3B][3C][3D][3E][3F]

In order for requested materials to qualify as "agency records," for purposes of a Freedom of Information Act (FOIA) provision (*5 USCS 552(a)(4)(B)*) which authorizes an order for "the production of any agency records improperly withheld," the agency must (1) either create or obtain the requested materials, and (2) be in control of the requested materials at the time the FOIA request is made; thus, such "agency records" are not restricted to materials generated internally, given that (1) the legislative history abounds with references to records acquired by an agency, and (2) 552(b)(4) exempts from disclosure trade secrets and commercial or financial information "obtained from a person"; the relevant issue is not (1) whether the organization from which the documents originated is itself covered by the FOIA, but (2) whether an agency covered by the FOIA has created or obtained the material sought; the FOIA applies to records which have in fact been obtained and not to records which merely could have been obtained; the control requirement for "agency records" means that the materials must have come into the agency's possession in the legitimate conduct of the agency's official duties; such a control inquiry focuses on an agency's possession of the requested materials, not on the agency's power to alter the contents of the material the agency receives, because (1) agencies are generally not at liberty to alter the content of the materials that they receive from outside parties, and (2) an alteration-power requirement, which would essentially limit agency records to internally generated documents, is incompatible with the FOIA's goal of giving the public access to all nonexempted information received by the agency as it carries out its mandate; the "agency records" determination does not

turn on the intent of the creator of a document relied upon by an agency; although nonpersonal materials in an agency's possession may be subject to certain disclosure restrictions, this fact does not bear on whether the materials are within the agency's control, but rather on whether the materials are exempted from disclosure under 552(b)(3), which authorizes an agency to refuse a FOIA request when the materials sought are expressly exempted from disclosure by another statute.

[***LEdHN4]

ADMINISTRATIVE LAW §64

STATUTES §108.5

Freedom of Information Act -- what constitutes withholding of records --

Headnote:[4A][4B][4C][4D]

Under a provision of the Freedom of Information Act (FOIA) (*5 USCS 552(a)(4)(B)*) which authorizes an order for "the production of any agency records improperly withheld," even though the present-control inquiry for the determination of "withheld" records replicates part of the test for "agency records," the FOIA's structure and legislative history make clear that agency control over requested materials is a prerequisite to triggering any duties under the FOIA; a refusal to resort to legal remedies to obtain possession of a document which has been removed from possession of the agency is not conduct subsumed by the verb "withhold"; with respect to the FOIA's extension period, in *5 USCS 552(a)(6)(B)*--which gives agencies a 10-day extension of the normal 10-day period for responding to FOIA requests if there is a necessity to search or collect the requested materials from facilities separate from the office processing the request--the brevity of the extension period indicates that Congress did not expect agencies to resort to lawsuits to retrieve documents within that period; under the principle that Congress used the word "withheld" only in its usual sense, an agency has "withheld" a document under its control when, in denying an otherwise valid request, the agency directs the requester to a place outside the agency where the document may be publicly available.

[***LEdHN5]

ADMINISTRATIVE LAW §64

STATUTES §102

Freedom of Information Act -- exemptions -- improper withholding --

Headnote:[5]

Under the Freedom of Information Act (FOIA) (*5 USCS 552*), a covered agency must disclose agency records to any person under 552(a), unless such records may be withheld pursuant to one of the nine enumerated exemptions listed in 552(b); the nine exemptions (1) consistent with the FOIA's goal of broad disclosure, have a narrow compass, and (2) are explicitly exclusive; it follows from the exclusive nature of the 552(b) exemption scheme that agency records which do not fall within one of the exemptions are "improperly" withheld under 552(a)(4)(B), which authorizes an order for "the production of any agency records improperly withheld."

[***LEdHN6]

ADMINISTRATIVE LAW §64

Freedom of Information Act -- improper withholding --

Headnote:[6A][6B]

Under a Freedom of Information Act (FOIA) provision (*5 USCS 552(a)(4)(B)*) which authorizes an order for "the production of any agency records improperly withheld," even when an agency does not deny a FOIA request outright, the requester may still be able to claim "improper" withholding by alleging that the agency has responded in an inadequate manner.

[***LEdHN7]

ADMINISTRATIVE LAW §64

STATUTES §108.5

Freedom of Information Act -- previously published materials --

Headnote:[7A][7B]

With respect to the Freedom of Information Act (FOIA) (*5 USCS 552*)--even though, under the general provision (552(a)(3)) governing the disclosure of agency records, an agency need not make available those materials that have already been disclosed under the

552(a)(1) and 552(a)(2) obligations to publish specific materials or make such materials available for public inspection and copying--the 552(a)(1) and 552(a)(2) disclosure obligations are not properly viewed as additions to the nine disclosure exemptions set out in 552(b); for purposes of 552(a)(4)(B)--which authorizes an order for "the production of any agency records improperly withheld"--if an agency refuses to disclose agency records that indisputably fall within one of the 552(b) exemptions, the agency has "withheld" the records, albeit not "improperly" given the legislative authorization to do so; by contrast, once an agency has complied with the 552(a)(1) and 552(a)(2) disclosure obligations, the agency can no longer be charged with "withholding" the relevant records; in the determination whether documents have been "improperly" withheld, under 552(a)(4)(B), it is one thing to say that an agency need not disclose materials that have previously been released, and another thing to say that an agency need not disclose materials that some other person or group may have previously released.

[***LEdHN8]

ADMINISTRATIVE LAW §64

COURTS §153

Congress -- Freedom of Information Act --

Headnote:[8A][8B]

With respect to the Freedom of Information Act (FOIA) (*5 USCS 552*), it is not for the United States Supreme Court to add or detract from Congress' comprehensive scheme, which already balances and protects all interests implicated by Executive Branch disclosure; the FOIA invests courts with neither the authority nor the tools to engage, in every case, in balancing based on public availability and other factors, in order to determine whether there has been an unjustified denial of information.

[***LEdHN9]

APPEAL §1092

limited appeal -- effect on scope of decision --

Headnote:[9A][9B]

With respect to a Federal Court of Appeals' reversal of a Federal District Court's dismissal of an organization's Freedom of Information Act (*5 USCS 552*) complaint--which sought to compel the United States Department of Justice to provide the organization with access to Federal District Court decisions received by the Department's Tax Division--the Court of Appeals' remand to the District Court with instructions to enter an order directing the Department to provide some reasonable form of access to the decisions, as well as the United States Supreme Court's affirmance, on certiorari, of the Court of Appeals' judgment, is limited to the approximately 25 percent of the District Court decisions that the organization was unable to procure from court clerks or other sources, where the organization, on appeal, limited its request to that 25 percent of the decisions; however, the reasoning employed by the Supreme Court applies equally to all of the District Court decisions initially sought by the organization.

SYLLABUS

The Tax Division of the Department of Justice (Department) represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court, and receives copies of all opinions and orders issued by those courts in such cases. Respondent publishes a weekly magazine containing summaries of recent federal-court tax decisions, supplemented by full texts of those decisions in microfiche form. Respondent also publishes a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions. After the Department denied its request under the Freedom of Information Act (FOIA) to make available all district court tax opinions and final orders received by the Tax Division in a certain period, respondent appealed administratively. While the appeal was pending, respondent agreed to withdraw its request in return for access to the Tax Division's weekly log of federal-court tax cases. Eventually, however, respondent became frustrated with the process of obtaining copies of decisions from district court clerks and initiated a series of new FOIA requests for copies of all district court opinions and final orders identified in the Tax Division's weekly logs. The Department denied these requests and, on administrative appeal, sustained the denial. Respondent then filed suit in District Court seeking to compel the Department to provide it with access to district court decisions received by the Tax Division. The District Court granted the Department's motion to dismiss

the complaint, holding that *5 U.S.C. § 552(a)(4)(B)*, which confers jurisdiction in district courts when "agency records" have been "improperly withheld," had not been satisfied. The court reasoned that the decisions sought had not been "improperly withheld" because they were already available from their primary source, the district courts. The Court of Appeals reversed, holding that the decisions were "improperly withheld" and were "agency records" for purposes of the FOIA.

Held: The FOIA requires the Department to make available copies of district court decisions it receives in the course of litigating tax cases. Pp. 142-155.

(a) The requested district court decisions are "agency records." The Department obtained those documents from the district courts and was in control of the documents when the requests were made. Pp. 143-148.

(b) When the Department refused to comply with respondent's requests, it "withheld" the district court decisions for purposes of *§ 552(a)(4)(B)*, notwithstanding that the decisions were publicly available from the original source as soon as they were issued. Pp. 148-150.

(c) The district court decisions were "improperly" withheld despite their public availability at the original source, since they did not fall within any of the enumerated exemptions to the FOIA's disclosure requirements. While under *§ 552(a)(3)* an agency need not make available materials that have already been disclosed under *§§ 552(a)(1)* and *(a)(2)*, these latter subsections are limited to situations in which the requested materials have been previously published or made available by the *agency itself*. That disclosure of district court decisions may be partially governed by other statutes, in particular *28 U.S.C. § 1914*, and by rules of the Judicial Conference of the United States, does not entitle the Department to claim that the requested district court decisions were not "improperly" withheld, since Congress has enacted no provision authorizing an agency to refuse to disclose materials whose disclosure is *mandated* by another statute. Moreover, the decision in *GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375*, that agency records enjoined from disclosure by a district court were not "improperly" withheld even though they did not fall within any of the enumerated exemptions, was not meant to be an invitation to courts in every case to engage in balancing, based on public availability and other factors, to determine whether there has been an unjustified denial of information. The FOIA invests courts with neither the authority nor the tools to make such determinations. Pp. 150-155.

COUNSEL: *Deputy Solicitor General Wallace* argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Bryson, Acting Assistant Attorney General Knapp, Roy T. Englert, Jr., Jonathan S. Cohen*, and *Mary Frances Clark*.

William A. Dobrovir argued the cause and filed a brief for respondent. *

* *Jane E. Kirtley* filed a brief for the Reporters Committee for Freedom of the Press as *amicus curiae* urging affirmance.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Brennan, Stevens, O'Connor, Scalia, and Kennedy, JJ., joined. White, J., concurred in the judgment. Blackmun, J., filed a dissenting opinion, *post*, p. 156.

OPINION BY: MARSHALL

OPINION

[*138] [***121] [**2844] JUSTICE MARSHALL delivered the opinion of the Court.

[***LEdHR1A] [1A]The question presented is whether the Freedom of Information Act (FOIA or Act), *5 U.S.C. § 552 (1982 ed. and Supp. V)*, requires the United States Department of Justice (Department) to make available copies of district court decisions that it receives in the course of litigating tax cases on behalf of the Federal Government. We hold that it does.

I

The Department's Tax Division represents the Federal Government in nearly all civil tax cases in the district courts, the courts of appeals, and the Claims Court. Because it represents a party in litigation, the Tax Division receives copies of all opinions and orders issued by these courts in such cases. Copies of these decisions are made for the Tax Division's staff attorneys. The original documents are sent to the official files kept by the Department.

If the Government has won a district court case, the

Tax Division must prepare a bill of costs and collect any money judgment indicated in the decision. If the Government has lost, the Tax Division must decide whether to file a motion to alter or amend the judgment or whether to recommend filing an appeal. The decision whether to appeal involves not only the Tax Division but also the Internal Revenue Service (IRS) and the Solicitor General. A division of the IRS reviews the district court's decision and prepares a recommendation on whether an appeal should be taken. The court decision and the accompanying recommendation are circulated to the Tax Division, which formulates its own recommendation, and then to the Solicitor General, who reviews the district court decision [**2845] in light of the IRS and Tax Division's recommendations. If the Solicitor General ultimately approves an appeal, the Tax Division prepares a record and joint appendix, both of which must contain a copy of the district court decision, for transmittal to the court of appeals. If no appeal is [*139] taken, the Tax Division is responsible for ensuring the payment of any court-ordered refund and for defending against any claim for attorney's fees.

[***122] Respondent Tax Analysts publishes a weekly magazine, Tax Notes, which reports on legislative, judicial, and regulatory developments in the field of federal taxation to a readership largely composed of tax attorneys, accountants, and economists. As one of its regular features, Tax Notes provides summaries of recent federal-court decisions on tax issues. To supplement the magazine, Tax Analysts provides full texts of these decisions in microfiche form. Tax Analysts also publishes Tax Notes Today, a daily electronic data base that includes summaries and full texts of recent federal-court tax decisions.

In late July 1979, Tax Analysts filed a FOIA request in which it asked the Department to make available all district court tax opinions and final orders received by the Tax Division earlier that month. [1] The Department denied the request on the ground that these decisions were not Tax Division records. Tax Analysts then appealed this denial administratively. While the appeal was pending, Tax Analysts agreed to withdraw its request in return for access to the Tax Division's weekly log of tax cases decided by the federal courts. These logs list the name and date of a case, the docket number, the names of counsel, the nature of the case, and its disposition.

1 Tax Analysts also requested copies of tax decisions received from the Claims Court and the courts of appeals. Decisions from these courts are not at issue in this case.

Since gaining access to the weekly logs, Tax Analysts' practice has been to examine the logs and to request copies of the decisions noted therein from the clerks of the 90 or so district courts around the country and from participating attorneys. In most instances, Tax Analysts procures copies reasonably promptly, but this method of acquisition has proven [*140] unsatisfactory approximately 25% of the time. Some court clerks ignore Tax Analysts' requests for copies of decisions, and others respond slowly, sometimes only after Tax Analysts has forwarded postage and copying fees. Because the Federal Government is required to appeal tax cases within 60 days, Tax Analysts frequently fails to obtain copies of district court decisions before appeals are taken.

Frustrated with this process, Tax Analysts initiated a series of new FOIA requests in 1984. Beginning in November 1984, and continuing approximately once a week until May 1985, Tax Analysts asked the Department to make available copies of all district court tax opinions and final orders identified in the Tax Division's weekly logs. The Department denied these requests and Tax Analysts appealed administratively. When the Department sustained the denial, Tax Analysts filed the instant suit in the United States District Court for the District of Columbia, seeking to compel the Department to provide it with access to district court decisions received by the Tax Division.

The District Court granted the Department's motion to dismiss the complaint, holding that *5 U.S.C. § 552(a)(4)(B)*, which confers jurisdiction in the district courts when "agency records" have been "improperly withheld," [2] [***123] had not been satisfied. [**2846] *643 F. Supp. 740, 742 (1986)*. The court reasoned that the district court decisions at issue had not been "improperly withheld" because they "already are available from [*141] their primary sources, the District Courts," *id., at 743*, and thus were "on the public record." *Id., at 744*. The court did not address whether the district court decisions are "agency records." *Id., at 742*.

2 *Section 552(a)(4)(B)* provides:

"On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of

> business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

The Court of Appeals for the District of Columbia Circuit reversed. *269 U.S. App. D. C. 315, 845 F. 2d 1060 (1988)*. It first held that the district court decisions were "improperly withheld." An agency ordinarily may refuse to make available documents in its control only if it proves that the documents fall within one of the nine disclosure exemptions set forth in *§ 552(b)*, the court noted, and in this instance, "[n]o exemption applies to the district court opinions." *Id., at 319, 845 F. 2d, at 1064*. As for the Department's contention that the district court decisions are publicly available at their source, the court observed that "no court . . . has denied access to . . . documents on the ground that they are available elsewhere, and several have assumed that such documents must still be produced by the agency unless expressly exempted by the Act." *Id., at 321, 845 F. 2d, at 1066*.

The Court of Appeals next held that the district court decisions sought by Tax Analysts are "agency records" for purposes of the FOIA. The court acknowledged that the district court decisions had originated in a part of the Government not covered by the FOIA, but concluded that the documents nonetheless constituted "agency records" because the Department has the discretion to use the decisions as it sees fit, because the Department routinely uses the decisions in performing its official duties, and because the decisions are integrated into the Department's official case files. *Id., at 323-324, 845 F. 2d, at 1068-1069*. The court therefore remanded the case to the District Court with instructions to enter an order directing the Department "to provide some reasonable form of access" to the decisions sought by Tax Analysts. *Id., at 317, 845 F. 2d, at 1062*.

We granted certiorari, *488 U.S. 1003 (1989)*, and now affirm.

[*142] II

[***LEdHR2A] [2A]In enacting the FOIA 23 years ago, Congress sought "'to open agency action to the light of public scrutiny.'" *Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772 (1989)*, quoting *Department of Air Force v. Rose, 425 U.S. 352, 372 (1976)*.Congress did so by requiring agencies to adhere to "'a general philosophy of full agency disclosure.'" *Id., at 360*, quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). Congress believed that this [***124] philosophy, put into practice, would help "ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)*.

[***LEdHR2B] [2B]The FOIA confers jurisdiction on the district courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." *§ 552(a)(4)(B)*. Under this provision, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 150 (1980)*. Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply [**2847] with the FOIA's disclosure requirements. [3]

[***LEdHR2C] [2C]

> 3 The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not "agency records" or have not been "improperly" "withheld." See S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965) ("Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it"); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 9 (1966) (same); cf. *Federal Open Market Committee v. Merrill, 443 U.S. 340, 352 (1979)*.

In this case, all three jurisdictional terms are at issue. Although these terms are defined neither in the Act nor in its legislative history, we do not write on a clean slate. Nine Terms ago we decided three cases that explicated the meanings of these partially overlapping terms. *Kissinger v. Reporters Committee for Freedom of*

Press, supra; Forsham v. [*143] *Harris, 445 U.S. 169 (1980)*; *GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375 (1980)*. These decisions form the basis of our analysis of Tax Analysts' requests.

A

We consider first whether the district court decisions at issue are "agency records," a term elaborated upon both in *Kissinger* and in *Forsham. Kissinger* involved three separate FOIA requests for written summaries of telephone conversations in which Henry Kissinger had participated when he served as Assistant to the President for National Security Affairs from 1969 to 1975, and as Secretary of State from 1973 to 1977. Only one of these requests -- for summaries of specific conversations that Kissinger had had during his tenure as National Security Adviser -- raised the "agency records" issue. At the time of this request, these summaries were stored in Kissinger's office at the State Department in his personal files. We first concluded that the summaries were not "agency records" at the time they were made because the FOIA does not include the Office of the President in its definition of "agency." *445 U.S., at 156*. We further held that these documents did not acquire the status of "agency records" when they were removed from the White House and transported to Kissinger's office at the State Department, a FOIA-covered agency:

> "We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.' The papers were not in the control of the State Department at any time. They were not generated in the [***125] State Department. They never entered the State Department's files, and they were not used by the Department for any purpose. If mere physical location of papers and materials could confer status as an 'agency record' Kissinger's personal books, speeches, and all other memorabilia stored in his office would have [*144] been agency records subject to disclosure under the FOIA." *Id., at 157*.

[***LEdHR3A] [3A] Forsham, in turn, involved a request for raw data that formed the basis of a study conducted by a private medical research organization. Although the study had been funded through federal agency grants, the data never passed into the hands of the agencies that provided the funding, but instead was produced and possessed at all times by the private organization. We recognized that "[r]ecords of a nonagency certainly could become records of an agency as well," *445 U.S., at 181*, but the fact that the study was financially supported by a FOIA-covered agency did not transform the source material into "agency records." Nor did the agencies' right of access to the materials under federal regulations change this result. As we explained, "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained." *Id., at 186* [**2848] (emphasis in original; footnote omitted).

[***LEdHR3B] [3B]Two requirements emerge from *Kissinger* and *Forsham*, each of which must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials "as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." *Id., at 182*.In performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. See *Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979)*. To restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. See *id., at 290, n. 10*. As we noted in *Forsham*, "The legislative history of the FOIA abounds with [*145] . . . references to records *acquired* by an agency." *445 U.S., at 184* (emphasis added). [4]

[***LEdHR3C] [3C]

> 4 Title *5 U.S.C. § 552(b)(4)*, which exempts from disclosure trade secrets and commercial or financial information "obtained from a person," provides further support for the principle that the term "agency records" includes materials received by an agency. See *Forsham, 445 U.S., at 184-185*; see also *id., at 183-184* (noting that the definition of "records" in the Records Disposal Act, *44 U.S.C. § 3301*, and in the Presidential Records Act of 1978, *44 U.S.C. § 2201(2)*, encompassed materials "received" by an agency).

Second, the agency must be in control of the requested materials at the time the FOIA request is made.

By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. This requirement accords with *Kissinger*'s teaching that the term "agency records" is [***126] not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency. See *445 U.S., at 157*. This requirement is suggested by *Forsham* as well, *445 U.S., at 183*, where we looked to the definition of agency records in the Records Disposal Act, *44 U.S.C. § 3301*. Under that definition, agency records include "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government *under Federal law or in connection with the transaction of public business* . . . ." *Ibid.* (emphasis added). [5] Furthermore, the requirement that the materials [*146] be in the agency's control at the time the request is made accords with our statement in *Forsham* that the FOIA does not cover "information in the abstract." *445 U.S., at 185*. [6]

5 In *GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 385 (1980)*, we noted that Congress intended the FOIA to prevent agencies from refusing to disclose, among other things, agency telephone directories and the names of agency employees. We are confident, however, that requests for documents of this type will be relatively infrequent. Common sense suggests that a person seeking such documents or materials housed in an agency library typically will find it easier to repair to the Library of Congress, or to the nearest public library, rather than to invoke the FOIA's disclosure mechanisms. Cf. *Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 764 (1989)* ("[I]f the [requested materials] were 'freely available,' there would be no reason to invoke the FOIA to obtain access"). To the extent such requests are made, the fact that the FOIA allows agencies to recoup the costs of processing requests from the requester may discourage recourse to the FOIA where materials are readily available elsewhere. See *5 U.S.C. § 552(a)(4)(A)*.

6 Because requested materials ordinarily will be in the agency's possession at the time the FOIA request is made, disputes over control should be infrequent. In some circumstances, however, requested materials might be on loan to another agency, "purposefully routed . . . out of agency possession in order to circumvent [an impending] FOIA request," or "wrongfully removed by an individual after a request is filed." *Kissinger v. Reporters Committee for Freedom of Press, 445 U.S. 136, 155, n. 9 (1980)*. We leave consideration of these issues to another day.

[**2849] [***LEdHR1B] [1B] [***LEdHR3D] [3D]Applying these requirements here, we conclude that the requested district court decisions constitute "agency records." First, it is undisputed that the Department has obtained these documents from the district courts. This is not a case like *Forsham*, where the materials never in fact had been received by the agency. The Department contends that a district court is not an "agency" under the FOIA, but this truism is beside the point. The relevant issue is whether an agency covered by the FOIA has "create[d] or obtaine[d]" the materials sought, *Forsham, 445 U.S., at 182*, not whether the organization from which the documents originated is itself covered by the FOIA. [7]

7 This point is implicit in *Department of Justice v. Julian, 486 U.S. 1, 7, and n. 6 (1988)*, where it was uncontroverted that presentence reports, which had been prepared under district court auspices and turned over to the Department and the Parole Commission, constituted "agency records."

Second, the Department clearly controls the district court decisions [***127] that Tax Analysts seeks. Each of Tax Analysts' FOIA requests referred to district court decisions in the agency's possession at the time the requests were made. [*147] This is evident from the fact that Tax Analysts based its weekly requests on the Tax Division's logs, which compile information on decisions the Tax Division recently had received and placed in official case files. Furthermore, the court decisions at issue are obviously not personal papers of agency employees. The Department counters that it does not control these decisions because the district courts retain authority to modify the decisions even after they are released, but this argument, too, is beside the point. The control inquiry focuses on an agency's possession of the requested materials, not on its power to alter the content of the materials it receives. Agencies generally are not at liberty to alter the content of the materials that they receive from outside parties. An authorship-control

requirement thus would sharply limit "agency records" essentially to documents generated by the agencies themselves. This result is incompatible with the FOIA's goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate.

[***LEdHR1C] [1C] [***LEdHR3E] [3E]The Department also urges us to limit "agency records," at least where materials originating outside the agency are concerned, "to those documents 'prepared substantially to be relied upon in agency decisionmaking.'" Brief for Petitioner 21, quoting *Berry v. Department of Justice, 733 F. 2d 1343, 1349 (CA9 1984)*.This limitation disposes of Tax Analysts' requests, the Department argues, because district court judges do not write their decisions primarily with an eye toward agency decisionmaking. This argument, however, makes the determination of "agency records" turn on the intent of the creator of a document relied upon by an agency. Such a *mens rea* requirement is nowhere to be found in the Act. [8] Moreover, discerning the intent of the drafters of a [*148] document may often prove an elusive endeavor, particularly if the document was created years earlier or by a large number of people for whom it is difficult to divine a common intent.

[***LEdHR3F] [3F]

8 Nonpersonal materials in an agency's possession may be subject to certain disclosure restrictions. This fact, however, does not bear on whether the materials are in the agency's control, but rather on the subsequent question whether they are exempted from disclosure under *§ 552(b)(3)*.

B

[***LEdHR4A] [4A]We turn next to the term "withheld," which we discussed in *Kissinger*. Two of the requests in that case -- for summaries of all the telephone conversations in which Kissinger had engaged while serving as National Security Adviser and as Secretary [**2850] of State -- implicated that term. These summaries were initially stored in Kissinger's personal files at the State Department. Near the end of his tenure as Secretary of State, Kissinger transferred the summaries first to a private residence and then to the Library of Congress. Significantly, the two requests for these summaries were made only after the summaries had been physically delivered to the Library. We found this fact dispositive, concluding that Congress did not believe that an agency "withholds a document which has been removed [***128] from the possession of the agency prior to the filing of the FOIA request. In such a case, the agency has neither the custody nor control necessary to enable it to withhold." *445 U.S., at 150-151*. [9] We accordingly refused to order the State Department to institute a retrieval action against the Library. As we explained, such a course "would have us read the 'hold' out of 'withhold. . . . A refusal to resort to legal remedies to obtain possession is simply not conduct subsumed by the verb withhold.'" *Id., at 151*. [10]

[***LEdHR4B] [4B]

9 Although a control inquiry for "withheld" replicates part of the test for "agency records," the FOIA's structure and legislative history make clear that agency control over requested materials is a "prerequisite to triggering *any* duties under the FOIA." *Kissinger, 445 U.S., at 151* (emphasis added); see also *id., at 152-153*; *Forsham v. Harris, 445 U.S. 169, 185 (1980)*.

[***LEdHR4C] [4C]

10 *Kissinger*'s focus on the agency's present control of a requested document was based in part on the Act's purposes and structure. With respect to the former, we noted that because Congress had not intended to "obligate agencies to create or retain documents," an agency should not be "required to retrieve documents which have escaped its possession, but which it has not endeavored to recover." *445 U.S., at 152* (citations omitted). As for the Act's structure, we noted that, among other provisions, *§ 552(a)(6)(B)* gives agencies a 10-day extension of the normal 10-day period for responding to FOIA requests if there is a need to search and collect the requested materials from facilities separate from the office processing the request. The brevity of this extension period indicates that Congress did not expect agencies to resort to lawsuits to retrieve documents within that period. See *id., at 153*.

[*149] [***LEdHR1D] [1D] [***LEdHR4D]

[4D]The construction of "withholding" adopted in *Kissinger* readily encompasses Tax Analysts' requests. There is no claim here that Tax Analysts filed its requests for copies of recent district court tax decisions received by the Tax Division after these decisions had been transferred out of the Department. On the contrary, the decisions were on the Department's premises and otherwise in the Department's control, *supra, at 146-147*, when the requests were made. See n. 6, *supra*. Thus, when the Department refused to comply with Tax Analysts' requests, it "withheld" the district court decisions for purposes of *§ 552(a)(4)(B)*.

The Department's counterargument is that, because the district court decisions sought by Tax Analysts are publicly available as soon as they are issued and thus may be inspected and copied by the public at any time, the Department cannot be said to have "withheld" them. The Department notes that the weekly logs it provides to Tax Analysts contain sufficient information to direct Tax Analysts to the "original source of the requested documents." Brief for Petitioner 23. It is not clear from the Department's brief whether this argument is based on the term "withheld" or the term "improperly." [11] But, to the extent the Department relies on the [*150] former term, its argument is without merit. Congress used the word "withheld" only "in its usual sense." *Kissinger, 445 U.S., at 151*. When the Department refused [***129] to grant Tax Analysts' requests for the district court decisions in its files, it undoubtedly "withheld" these decisions in any reasonable sense of that [**2851] term. Nothing in the history or purposes of the FOIA counsels contorting this word beyond its usual meaning. We therefore reject the Department's argument that an agency has not "withheld" a document under its control when, in denying an otherwise valid request, it directs the requester to a place outside of the agency where the document may be publicly available.

> 11 The Court of Appeals believed that the Department was arguing "that it need not affirmatively make [the district court decisions] available to Tax Analysts because the documents have not been *withheld* to begin with." *269 U.S. App. D. C. 315, 319-320, 845 F. 2d 1060, 1064-1065 (1988)* (emphasis in original).

C

[***LEdHR2D] [2D]

The Department is left to argue, finally, that the district court decisions were not "improperly" withheld because of their public availability. The term "improperly," like "agency records" and "withheld," is not defined by the Act. We explained in *GTE Sylvania*, however, that Congress' use of the word "improperly" reflected its dissatisfaction with § 3 of the Administrative Procedure Act, *5 U.S.C. § 1002 (1964 ed.)*, which "had failed to provide the desired access to information relied upon in Government decisionmaking, and in fact had become 'the major statutory excuse for withholding Government records from public view.'" *445 U.S., at 384*, quoting H. R. Rep. No. 1497, 89th Cong., 2d Sess., 3 (1966). Under § 3, we explained, agencies had "broad discretion . . . in deciding what information to disclose, and that discretion was often abused." *445 U.S., at 385*.

[***LEdHR5] [5] [***LEdHR6A] [6A]In enacting the FOIA, Congress intended "to curb this apparently unbridled discretion" by "clos[ing] the 'loopholes which allow agencies to deny legitimate information to the public.'" *Ibid.* (citation omitted); see also *EPA v. Mink, 410 U.S. 73, 79 (1973)*.Toward this end, Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under *§ 552(a)*, "unless [*151] they may be withheld pursuant to one of the nine enumerated exemptions listed in *§ 552(b)*." *Department of Justice v. Julian, 486 U.S. 1, 8 (1988)*. Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass. See, *e. g., ibid.; FBI v. Abramson, 456 U.S. 615, 630 (1982)*. More important for present purposes, the exemptions are "explicitly exclusive." *FAA Administrator v. Robertson, 422 U.S. 255, 262 (1975)*; see also *Rose, 425 U.S., at 361*; *Robbins Tire & Rubber Co., 437 U.S., at 221*; *Mink, supra, at 79*. As Justice O'Connor has explained, Congress sought "to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the 'availability of records to the public' is not limited, 'except as *specifically* stated.'" *Abramson, supra, at 642* (dissenting opinion) (emphasis in original), quoting *§ 552(c)* (now codified at *§ 552(d)*); see also *456 U.S., at 637, n. 5*; H. R. Rep. No. 1497, *supra, at 1*. It follows from the exclusive nature of the *§ 552(b)* exemption scheme that agency records which do not [***130] fall within one of the exemptions are "improperly" withheld.

[***LEdHR6B] [6B]

12 Even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim "improper" withholding by alleging that the agency has responded in an inadequate manner. Cf. *§ 552(a)(6)(C)*; *Kissinger v. Reporters Committee for Freedom of Press, 445 U.S., at 166* (Stevens, J., concurring in part and dissenting in part). No such claim is made in this case. Indeed, Tax Analysts does not dispute the Court of Appeals' conclusion that the Department could satisfy its duty of disclosure simply by making the relevant district court opinions available for copying in the public reference facility that it maintains. See *269 U.S. App. D. C., at 321-322*, and n. 15, *845 F. 2d, at 1066-1067*, and n. 15.

[***LEdHR1E] [1E]The Department does not contend here that any exemption enumerated in *§ 552(b)* protects the district court decisions sought [**2852] by Tax Analysts. The Department claims nonetheless that there is nothing "improper" in directing a requester "to the principal, public source of records." Brief for Petitioner 26. The Department advances three somewhat related [*152] arguments in support of this proposition. We consider them in turn.

First, the Department contends that the structure of the Act evinces Congress' desire to avoid redundant disclosures. An understanding of this argument requires a brief survey of the disclosure provisions of *§ 552(a)*. Under subsection (a)(1), an agency must "currently publish in the Federal Register" specific materials, such as descriptions of the agency, statements of its general functions, and the agency's rules of procedure. Under subsection (a)(2), an agency must "make available for public inspection and copying" its final opinions, policy statements, and administrative staff manuals, "unless the materials are promptly published and copies offered for sale." Under subsection (a)(3), the general provision covering the disclosure of agency records, an agency need not make available those materials that have already been disclosed under subsections (a)(1) and (a)(2). Taken together, the Department argues, these provisions demonstrate the inapplicability of the FOIA's disclosure requirements to previously disclosed, publicly available materials. "*A fortiori*, a judicial record that is a public document should not be subject to a FOIA request." *Id., at 29.*

[***LEdHR1F] [1F] [***LEdHR7A] [7A] [***LEdHR8A] [8A]The Department's argument proves too much. The disclosure requirements set out in subsections (a)(1) and (a)(2) are carefully limited to situations in which the requested materials have been previously published or made available by the *agency itself*. It is one thing to say that an agency need not disclose materials that it has previously released; it is quite another to say that an agency need not disclose materials that some other person or group may have previously released. Congress undoubtedly was aware of the redundancies that might exist when requested materials have been previously made available. It chose to deal with that problem by crafting only narrow categories of materials which need not be, in effect, disclosed twice *by the agency*. If Congress had wished to codify an exemption for all publicly available materials, [*153] it knew perfectly well how to do so. It is not for us to add or detract from Congress' comprehensive scheme, which already "balances, and protects all interests" implicated by Executive Branch disclosure. *Mink, supra, at 80*, [***131] quoting S. Rep. No. 813, 89th Congress, 1st Sess., 3 (1965). [13]

[***LEdHR7B] [7B]

13 The obligations imposed under subsections (a)(1) and (a)(2) are not properly viewed as additions to the disclosure exemptions set out in subsection (b). If an agency refuses to disclose agency records that indisputably fall within one of the subsection (b) exemptions, the agency has "withheld" the records, albeit not "improperly" given the legislative authorization to do so. By contrast, once an agency has complied with the subsection (a)(1) and (a)(2) obligations, it can no longer be charged with "withholding" the relevant records.

[***LEdHR1G] [1G]It is not surprising, moreover, that Congress declined to exempt all publicly available materials from the FOIA's disclosure requirements. In the first place, such an exemption would engender intractable fights over precisely what constitutes public availability, unless the term were defined with precision. In some sense, nearly all of the information that comes within an agency's control can be characterized as publicly available. Although the form in which this material comes to an agency -- *i. e.*, a report or testimony -- may

not be generally available, the information included in that report or testimony may very well be. Even if there were some agreement over what constitutes publicly available materials, Congress surely did not envision agencies satisfying their disclosure obligations under the FOIA simply by handing requesters a map and sending them on scavenger expeditions throughout the Nation. Without some express indication in the Act's text or legislative history [**2853] that Congress intended such a result, we decline to adopt this reading of the statute.

The Department's next argument rests on the fact that the disclosure of district court decisions is partially governed by other statutes, in particular *28 U.S.C. § 1914*, and by rules [*154] set by the Judicial Conference of the United States. The FOIA does not compel disclosure of district court decisions, the Department contends, because these other provisions are "more precisely drawn to govern the provision of court records to the general public." Brief for Petitioner 30. We disagree. As with the Department's first argument, this theory requires us to read into the FOIA a disclosure exemption that Congress did not itself provide. This we decline to do. That Congress knew that other statutes created overlapping disclosure requirements is evident from *§ 552(b)(3)*, which authorizes an agency to refuse a FOIA request when the materials sought are expressly exempted from disclosure by another statute. If Congress had intended to enact the converse proposition -- that an agency may refuse to provide disclosure of materials whose disclosure is *mandated* by another statute -- it was free to do so. Congress, however, did not take such a step. [14]

14 It is unclear, moreover, whether *28 U.S.C. § 1914* permits a private cause of action to compel disclosure of a court decision.

The Department's last argument is derived from *GTE Sylvania*, where we held that agency records sought from the Consumer Products Safety Commission were not "improperly" withheld even though the records did not fall within one of subsection (b)'s enumerated exemptions. The Commission had not released the records in question because a district court, in the course of an unrelated lawsuit, had enjoined the Commission from doing so. In these circumstances, [***132] we held, "[t]he concerns underlying the Freedom of Information Act [were] inapplicable, for the agency . . . made no effort to avoid disclosure." *445 U.S., at 386*. We therefore approved the Commission's compliance with the injunction, noting that when Congress passed the FOIA, it had not "intended to require an agency to commit contempt of court in order to release documents. Indeed, Congress viewed the federal courts as the necessary protectors of the public's right to know." *Id., at 387*.

[*155] Although the Department is correct in asserting that *GTE Sylvania* represents a departure from the FOIA's self-contained exemption scheme, this departure was a slight one at best, and was necessary in order to serve a critical goal independent of the FOIA -- the enforcement of a court order. As we emphasized, *GTE Sylvania* arose in "a distinctly different context" than the typical FOIA case, *id., at 386*, where the agency decides for itself whether to comply with a request for agency records. In such a case, the agency cannot contend that it has "no discretion . . . to exercise." *Ibid.*

[***LEdHR1H] [1H] [***LEdHR8B] [8B]The present dispute is clearly akin to those typical FOIA cases. No claim has been made that the Department was powerless to comply with Tax Analysts' requests. On the contrary, it was the Department's decision, and the Department's decision alone, not to make the court decisions available. We reject the Department's suggestion that *GTE Sylvania* invites courts in every case to engage in balancing, based on public availability and other factors, to determine whether there has been an unjustified denial of information. The FOIA invests courts neither with the authority nor the tools to make such determinations.

III

[***LEdHR1I] [1I]

[***LEdHR9A] [9A]For the reasons stated, the Department improperly withheld agency records when it refused Tax Analysts' requests for copies of the district court tax decisions in [**2854] its files. [15] Accordingly, the judgment of the Court of Appeals is

[***LEdHR9B] [9B]

15 On appeal, Tax Analysts limited its requests to the approximately 25% of the district court decisions that it was unable to procure from court clerks or other sources. See *269 U.S. App. D. C., at 318, n. 5, 845 F. 2d, at 1063, n. 5*; Brief for

Respondent 8, n. 7. The Court of Appeals' remand thus was limited to these decisions, as is our affirmance. However, the reasoning we have employed applies equally to all of the district court decisions initially sought by Tax Analysts.

Affirmed.

DISSENT BY: BLACKMUN

DISSENT

[*156] JUSTICE BLACKMUN, dissenting.

The Court in this case has examined once again the Freedom of Information Act (FOIA), *5 U.S.C. § 552*. It now determines that under the Act the Department of Justice on request must make available copies of federal district court orders and opinions it receives in the course of its litigation of tax cases on behalf of the Federal Government. The majority holds that these qualify as agency records, [***133] within the meaning of *§ 552(a)(4)(B)*, and that they were improperly withheld by the Department when respondent asked for their production. The Court's analysis, I suppose, could be regarded as a fairly routine one.

I do not join the Court's opinion, however, because it seems to me that the language of the statute is not that clear or conclusive on the issue and, more important, because the result the Court reaches cannot be one that was within the intent of Congress when the FOIA was enacted.

Respondent Tax Analysts, although apparently a nonprofit organization for federal income tax purposes, is in business and in that sense is a commercial enterprise. It sells summaries of these opinions and supplies full texts to major electronic data bases. The result of its now-successful effort in this litigation is to impose the cost of obtaining the court orders and opinions upon the Government and thus upon taxpayers generally. There is no question that this material is available elsewhere. But it is quicker and more convenient, and less "frustrat[ing]," see *ante*, at 140, for respondent to have the Department do the work and search its files and produce the items than it is to apply to the respective court clerks.

This, I feel, is almost a gross misuse of the FOIA. What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of Government operations. That, I had thought, and the majority acknowledges, see *ante*, at 142, was the real purpose of the FOIA and the [*157] spirit in which the statute has been interpreted thus far. See, *e. g., Forsham v. Harris, 445 U.S. 169, 178 (1980)*; *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242-243 (1978)*. I also sense, I believe not unwarrantedly, a distinct lack of enthusiasm on the part of the majority for the result it reaches in this case.

If, as I surmise, the Court's decision today is outside the intent of Congress in enacting the statute, Congress perhaps will rectify the decision forthwith and will give everyone concerned needed guidelines for the administration and interpretation of this somewhat opaque statute.

REFERENCES

2 Am Jur 2d, Administrative Law 232; 34 Am Jur 2d, Federal Taxation (1989) 9260; *66 Am Jur 2d, Records and Recording Laws 32-34*

15 Federal Procedure, L Ed, Freedom of Information 38:36-38:40

1 Federal Procedural Forms, L Ed, Administrative Procedure 2:53.3, 2:175, 2:175.5, 2:192; 11 Federal Procedural Forms, Internal Revenue 43:381, 43:382, 43:386

2 Am Jur Trials 409, Locating Public Records

5 USCS 552

RIA Federal Tax Coordinator 2d T-10302

US L Ed Digest, Administrative Law 64

Index to Annotations, District Courts; Freedom of Information Acts; Taxes

Annotation References:

What issues will the Supreme Court decide, though not, or not properly, raised by the parties. *42 L Ed 2d 946*.

Meaning of term "agency "for purposes of Freedom of Information Act (*5 USCS 552*). *57 ALR Fed 295*.

What are "records" of agency which must be made available under the Freedom of Information Act (*5 USCS 552(a)(3)*). *50 ALR Fed 336*.

What statutes specifically exempt agency records from disclosure, under *5 USCS 552(b)(3)*. *47 ALR Fed 439*.

What constitutes "trade secrets and commercial or financial information obtained from a person and privileged or confidential," exempt from disclosure under Freedom of Information Act (*5 USCS 552(b)(4)*). *21 ALR Fed 224*.

Scope of judicial review under Freedom of Information Act (*5 USCS 552(a)(3)*), of administrative agency's withholding of records. *7 ALR Fed 876*.

ELLEN W. SCHRECKER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

Civil Action No. 95-0026 (RCL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

217 F. Supp. 2d 29; 2002 U.S. Dist. LEXIS 15255

August 7, 2002, Decided
August 7, 2002, Filed

SUBSEQUENT HISTORY: Motion denied by *Schrecker v. DOJ, 2003 U.S. App. LEXIS 6070 (D.C. Cir., Mar. 28, 2003)*
Affirmed by Schrecker v. United States DOJ, 2003 U.S. App. LEXIS 23425 (D.C. Cir., Nov. 18, 2003)

PRIOR HISTORY: *Schrecker v. United States DOJ, 349 U.S. App. D.C. 85, 254 F.3d 162, 2001 U.S. App. LEXIS 14234 (2001)*

DISPOSITION: [**1] Defendant's Motion for Summary Judgment GRANTED, and plaintiff's Motion for Summary Judgment DENIED. Action DISMISSED WITH PREJUDICE.

COUNSEL: FOR Plaintiff: James H. Lesar, Washington, D.C.

FOR Defendant: Michael J. Ryan, Assistant U.S. Attorney, Washington, D.C.

JUDGES: HONORABLE ROYCE C. LAMBERTH, UNITED STATES DISTRICT JUDGE.

OPINION BY: ROYCE C. LAMBERTH

OPINION

[*32] **MEMORANDUM OPINION**

This matter returns to the Court on the parties' fourth set of cross-motions for summary judgment. Defendant moves for summary judgment on the adequacy of its search for ticklers and the adequacy of its attempts to determine whether individuals are alive or dead for the purpose of balancing privacy interests versus public interests pursuant to exemption 7(C). Plaintiff, on the other hand, requests discovery and a deposition of Scott Hodes to determine whether the FBI engaged in an adequate search for ticklers. Specifically, plaintiff seeks to depose Scott Hodes [1] and plaintiff also seeks an order instructing the FBI to engage in a more extensive search for ticklers. Based upon the parties' memoranda in support of and in opposition to these motions, the entire record herein, and the applicable law, plaintiff's [**2] motion will be denied and defendant's motions will be granted.

1 Scott Hodes is the Acting Chief of the Litigation Unit, Freedom of Information-Privacy Acts (FOIPA) Section, Records Management Division at FBI Headquartes (FBIHQ) in Washington, D.C. Mr. Hodes has provided affidavits discussing the FBI's activities.

I. BACKGROUND

A. Factual and Procedural History

Ellen Schreker, a history professor, initiates this action under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*, seeking information from the FBI regarding Gerhardt Eisler and Clinton Jencks. Both Jencks and Eisler were investigated by the Justice Department during the McCarthy era. Jencks was indicted for violating the Taft-Hartley act. He was an official within the Mine, Mill and Smelter Workers International Union in New Mexico. Eisler was a German communist who resided in the U.S. from the late 1930's to 1949. Ms. Schrecker initiated her request for information in 1988. In 1995 she filed the instant FOIA [**3] claim with this Court.

A comprehensive history of the litigation is recorded in this Court's and the Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") prior opinions. *See Schrecker v. U.S. Dep't of Justice, 14 F. Supp. 2d 111, 113 (D.D.C. 1998)* (partially granting and partially denying plaintiff's motion for summary judgment, and denying defendant's motion for summary judgment); *Schrecker v. U.S. Dep't of Justice, 74 F. Supp. 2d 26, 28 (D.D.C. 1999)* (granting defendant's motion for summary judgment); *Schrecker v. Dep't of Justice, 254 F.3d 162, 164 (D.C. Cir. 2001)* (partially reversing this Court's Nov. 29, 1999 opinion, remanding on the two issues addressed in the present opinion).

This Court granted summary judgment for the FBI in 1999. *See Schrecker, 74 F. Supp. 2d 26*. In particular, the Court granted summary judgment on the following claims for the FBI: that the EOUSA did not need to reprocess any documents, that the FBI adequately searched for ticklers, and that the FBI had properly invoked the following FOIA exemptions: 1, 2, 3, 6, 7(C) 7(D). *Id.* Professor Schrecker appealed this [**4] Court's previous decision. *See Schrecker, 74 F. Supp. 2d at 28*. On Appeal, the D.C. Circuit found that the FBI did not adequately search for ticklers and did not adequately balance the public interest versus privacy interests under exemption 7(C). *See Schrecker, 254 F.3d 164*. The D.C. Circuit held that the FBI must search for ticklers once their existence was established. *254 F.3d at 164-5*. The FBI admitted that ticklers were created [*33] but had refused to search for them because ticklers are not indexed to the Central Records System. *Id.* The D.C. Circuit also instructed the FBI to confirm that it had taken or would undertake certain basic steps to demonstrate that it had adequately balanced the public interest and privacy interests implicated under 7(C). *254 F.3d at 167*. The D.C. Circuit could not confirm that the FBI consulted the Social Security Death Index or any other readily available sources to determine whether individuals whose third-party information was being kept confidential under exemption 7(C) were alive or dead. *254 F.3d at 167*. Thus the remaining issues in this case are the FBI's search for ticklers [**5] and exemption 7(C).

II. ARGUMENT

A. Summary Judgment and The Freedom of Information Act

The Federal Bureau of Investigation moves for summary judgment, stating that it has completely abided by the June 26, 2001 decision of the D.C. Circuit with regards to searching adequately for ticklers and adequately assessing the relevant privacy interests of individuals under exemption 7(C). *See Schrecker v. United States Dep't of Justice, 254 F.3d 162, 164 (D.C. Cir. 2001)*. Professor Schrecker, in contrast, contends that the FBI has not adequately searched for ticklers and that the FBI has not acceptably sought to determine the relevant privacy interests under exemption 7(C) and therefore she seeks discovery and to depose Mr. Hodes with regards to the remaining two issues.

Courts have long recognized that summary judgment is appropriate when the declarations together with the pleadings substantiate that there is no genuine issue of material fact and that the moving party as a matter of law is entitled to summary judgment. *See Fed.R.Civ.P. 56(C)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. It is equally [**6] clear that, summary judgment under FOIA is only appropriate, however, when the agency seeking summary judgment engages in an adequate search for all relevant documents. *See Weisberg v. Dep't of Justice, 240 U.S. App. D.C. 339, 745 F.2d 1476, 1485 (D.C. Cir. 1984)*. The adequacy of an agency's search may be determined by relying upon non-conclusory, detailed agency affidavits that have been given in good faith. *See Steinberg v. U.S. Dep't of Justice, 306 U.S. App. D.C. 240, 23 F.3d 548, 551 (D.C. Cir. 1994)*. The Court may award summary judgment relying only upon an agency's affidavits or declarations. *See Blanton v. United States Dep't of Justice, 182 F. Supp. 2d 81, 84 (D.D.C. 2002)*. The declarations and affidavits must contain sufficient detail, not be controverted by contrary evidence, and be given in good faith. *Id.* (citing *Military Audit Project v. Casey, 211 U.S. App. D.C. 135, 656 F.2d 724, 738 (D.C. Cir.*

1981)).

B. Adequacy of Search for Ticklers

The D.C. Circuit ordered the FBI to perform an adequate search for ticklers. *See Schrecker v. U.S. Dep't of Justice, 254 F.3d at 164-65*. [**7] Ticklers are duplicate copies of FBI documents that may be of value to requesters because they have survived the original or they may contain unique annotations that provide information not present on the original. This Court must judge the adequacy of an agency's search on the basis of what is reasonable under the circumstances. *See Steinberg, 23 F.3d at 551*. An agency may use affidavits to demonstrate the adequacy of its search. *Id.* An agency's affidavits need not be precise but they must provide basic information on what records were searched, by whom, and in what manner. *Id. at 552*. A search need not be unreasonably burdensome to be considered adequate. [*34] *See Nation Magazine v. U.S. Customs Service, 315 U.S. App. D.C. 177, 71 F.3d 885, 892 (D.C. Cir. 1995)*. "The agency must show that it made a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *See Campbell v. U.S. Dep't of Justice, 334 U.S. App. D.C. 20, 164 F.3d 20, 27 (D.C. Cir. 1998)* (citing *Oglesby v. U.S. Dep't of the Army, 287 U.S. App. D.C. 126, 920 F.2d 57 (D.C. Cir. 1990)*. [**8] An agency can not avoid searching a records system if it believes it contains responsive documents. *See Campbell, 164 F.3d at 28*. Reasonableness should guide the Court's determination of whether a search was adequate under FOIA. *Oglesby v. United States Dep't of the Army, 287 U.S. App. D.C. 126, 920 F.2d 57, 68 (D.C. Cir. 1990)*; *Weisberg 745 F.2d at 1485*.

DOJ and Ms. Schrecker disagree over the adequacy of the FBI's search for ticklers pertaining to Jencks and Eisler. *Compare Plaintiff's Memo. in support of Cross-motion*, March 27, 2002, at 1-2; *With Def. Renewed Motion.* Feb 2, 2002, at 8.

Ms. Schrecker provides several reasons for her assertion that the FBI's search for ticklers was inadequate: first the FBI failed to search for ticklers in the files of Assistant Directors D.M. Ladd and Gordon Nease, second that it has only searched for ticklers that were mentioned in *Vaughn* documents, and finally the FBI refuses to investigate and use the methods that discovered ticklers associated with the King and Kennedy assassinations. *See Plaintiff's Reply*, June 6, 2002, at 11-12. Ms. Schrecker also argues that the FBI's affidavits [**9] regarding ticklers are conclusory and are also inadmissible as hearsay because Mr. Hodes did not conduct the searches himself. *Id.* at 8.

DOJ argues that the FBI has adequately searched for ticklers as demonstrated by its physical search of the National Security Division, which houses the former Domestic Intelligence Division, and the field offices of: Albuquerque, New York, and El Paso field offices. *See 5th Hodes Dec'l*, at 4; *6th Hodes Dec'l*, at 6. The Domestic Intelligence Division is the part of the FBI that conducted investigations on Eisler and Jencks. *Id. See Defendant's Renewed Motion for Summary Judgment, Fifth Dec'l of Scott Hodes* at 4, Feb. 1, 2002; *Def. Opp.*, May 8, 2002, at 3. The FBI chose offices where the investigation originated or where it was probable that ticklers might be found. *Id.* The FBI argues that it has fully complied with the D.C. Circuit's instructions regarding the search for ticklers. *See Fifth Hodes Dec'l* at 8. The FBI asserts that a search of its Central Records Facility is unreasonable as there are 576,726 linear feet of FBI file records located at the Central Records Facility. *Id.* at 3. Moreover, since ticklers are [**10] not indexed a search of the Central Records Facility would require the FBI to hand-search through millions of documents. *Id.* Mr. Hodes in his declaration states that ticklers for all responsive documents were searched rather than only ticklers for *Vaughn* documents. *See 6th Dec'l of Scott Hodes* at 8.

This Court finds that the FBI searched for ticklers in places that the FBI believed were most likely to contain responsive ticklers. The FBI's search for ticklers in locations most likely to lead to discovery of ticklers is reasonable and therefore adequate. *See Weisberg, 745 F.2d at 1485*. The FBI's affidavit stating that it tasked its National Security Division to physically search its offices evinces no evidence of bad-faith nor does the FBI's reasoning for not searching its off-site Central Records storage facility. *See 5th Hodes Decl.* at 3. The Court does not find sufficient merit in Ms. Schrecker's argument regarding the adequacy of Mr. [*35] Hodes affidavit relating to the search for ticklers. *See Plaintiff's Reply*, June 6, 2002 at 8-9. Mr. Hodes described where the searches had occurred, how, and who conducted the searches. *6th Hodes Dec'l.* at [**11] 2. Ticklers are not indexed and therefore a search of the FBI's off-site facility would require a hand-search through 574,726

linear feet of FBI file records. *Id.* This Court finds that to require an agency to hand search through millions of documents is not reasonable and therefore not necessary; here the agency reasonably chose to search the most likely place responsive documents would be located. *See Oglesby 920 F.2d at 68*. In *Oglesby* the court held that an agency must explain why it chose to search certain record system's and not others. *Id.* Here the FBI has explained why it chose to search the offices it searched: National Security Division (NSD), Albuquerque, New York, and El Paso and not the Central Records System or other facilities. *See Opposition to Plaintiff's Cross-Motion,* at 3. The FBI found the NSD, Albuquerque, New York and El Paso locations to have the greatest possibility of containing responsive documents because the investigations began there or individuals who worked on the investigations had worked in these offices. *Id.* at 5-7.

The Court also finds Ms. Schrecker's argument that Mr. Hodes's affidavit is inadmissible as hearsay [**12] to be without merit. Mr. Hodes in his present capacity is a representative of the FBI and is able to relay information regarding the activities of the FBI. *See Safecard v. United States Dep't of Justice, 926 F.2d 1197, 1201 (D.C. Cir. 1991)*. In *Safecard* the court determined that an affidavit of an SEC employee could be relied upon as evidence of what happened to missing documents. *Id.* The court held that the employee, who provided the affidavit, was responsible for the recovery of the boxes and was therefore an appropriate individual to provide a statement about the missing documents, even though she had not physically touched the boxes. *Id.* In this case Mr. Hodes is responsible for the FBI's compliance with FOIA litigation and is therefore not merely speculating about the FBI's activities.

This Court also finds Ms. Schrecker's argument that the search was inadequate because the FBI did not search the files of Assistant Directors D.M. Ladd and Gordon Nease to be without merit. The FBI has stated that these files do not exist and Ms. Schrecker has not provided any evidence to refute the FBI's assertion.

In accordance with the foregoing analysis, the Court [**13] will grant the FBI's motion for summary judgment on the issue of an adequate search for ticklers. The FBI has adequately demonstrated that it performed the search ordered by the D.C. Circuit. *See Schreker, 254 F.3d at. 162*. The Court finds no genuine issues of material fact and has relied upon the FBI's declarations and affidavits, which demonstrate that the FBI has conducted a reasonable and adequate search, undertaken in good-faith, for responsive documents.

C. Plaintiff's Motion for Discovery to Determine Adequacy of FBI's Search for Ticklers.

Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains. *See Judicial Watch, v. U.S. Dep't of Justice, 185 F. Supp. 2d 54, 65 (D.D.C. 2002)*. Discovery is only appropriate when an agency has not taken adequate steps to uncover responsive documents. *See Safecard v. United States Dep't of Justice, 926 F.2d 1197, 1202 (D.C. Cir. 1991)*. [*36]

Ms. Schrecker argues that based upon the FBI's resistence to the search for tickler files she should be allowed discovery and the opportunity [**14] to depose Mr. Hodes and the expert at the FBI's Central Records System in order to determine the adequacy of the FBI's search. *Plaintiff's Cross-Motion* at 13.

Ms. Schrecker has not filed any evidence supporting her contention that discovery is warranted regarding the adequacy of the FBI's search. *See Campbell v. United States v. Dep't of Justice, 193 F.Supp 2d. 29, 35 (D.D.C. 2001)*. The court in Campbell held that discovery was appropriate since the FBI utterly failed to carry its burden of demonstrating that it undertook a reasonably calculated search to uncover relevant documents. *Id. at 35*. In the present case the FBI reasonably searched for documents in a manner calculated to locate responsive documents. This Court finds that neither discovery nor a deposition of Mr. Hodes is warranted as the FBI met its burden of demonstrating it had adequately searched for responsive documents.

Ms. Schrecker argues that the FBI should use the methods used to find ticklers regarding the Kennedy assassination. *See Plaintiffs Cross-Motion* at 12. The standard for searching for responsive documents is a standard of reasonableness and here the FBI has conducted [**15] a reasonable search and therefore it is not necessary for FBI to copy the same search methodology as other cases, which are unrelated to the present case.

D. Balancing of Interests

Exemption 7(C) authorizes an agency to withhold information that was gathered for law enforcement purposes and "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* U.S.C. 552(b)(7)(C). Invocation of exemption 7(C) is appropriate when the privacy interest is greater than the public interest in disclosure. An agency claiming exemption 7(C) must engage in a balancing of the public interest in disclosure versus the privacy interest in withholding information in order to justify adequately withholding information under 7(C). *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)*.

Whether or not the subject of the withheld information is still alive should be considered in balancing the privacy interests versus the public interest in disclosure of information. Death does not extinguish a privacy interest but it does affect the weight accorded the privacy interest. [**16] *Schrecker, 254 F.3d at 166*. An agency must make a "reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7(C)." *See Campbell, 334 U.S. App. D.C. 20, 164 F.3d, 33* (Citing *Summers v. Dep't of Justice, 329 U.S. App. D.C. 358, 140 F.3d 1077, 1084-85 (D.C.Cir.1998))*. In *Campbell* the court held that the FBI's efforts to determine whether or not an individual was alive or dead for the purposes of exemption 7(C) were satisfied. *Campbell, 193 F. Supp 2d 29, 40*. In *Campbell* the case was remanded on the issue of adequately balancing the privacy interests versus public interest and the court held that the FBI justified its burden of balancing the interests by adopting the 100-yr test, consulting *Who Was Who,* and employing general institutional knowledge regarding whether someone was alive or dead. *Id.* The 100-yr test assumes that individuals who would be over 100 years old are dead for the purposes of balancing private versus public interests. *Id.*

This Court must determine whether defendant FBI did all that it should have in balancing the public interest versus the [*37] privacy interests of individuals. [**17] *See Schrecker, 254 F.3d at 165*. The D.C. Circuit stated that it was unable to determine whether the FBI reasonably balanced the privacy interests. *Id.* The D.C. Circuit found that it was unclear what the FBI had done to determine whether an individual was alive or dead, and therefore the Court remanded with instructions for the FBI to document what was done and specifically to clarify whether it had consulted the Social Security Death Index ("SSDI"). *254 F.3d at 167*.

The FBI argues that it undertook adequate measures to determine whether or not individuals were still alive. *See 6th Hodes Decl.* at 12; *5th Hodes Decl,* at 6-8. The FBI employed the 100 year rule; if a birth-date was available within a responsive document and that person would be over 100 years old then the individual's name and other identifying information were released. *Id.* at 7. If the FBI had institutional knowledge of an individual's death or an individual was named in *Who Was Who,* that individual's death was taken into account for 7(C) purposes. *Id.* If a social security number was revealed within a responsive document then the FBI consulted the Social Security [**18] Death Index to determine if an individual was still alive. *Id.* The FBI stated that following the August 12, 1998 remand the FBI employed all of the above methods on all responsive documents in an attempt to determine whether individuals were over 100 years of age or deceased. *Id.* at 12.

Ms. Schrecker moves for summary judgment on the issue of the FBI's efforts to conduct an adequate search to determine whether individuals were alive or dead for the purposes of exemption 7(C). *See Plaintiff's Cross-Motion,* at 2-8. Ms. Schrecker argues that the FBI has not complied with the June 26, 2001 decision of the D.C. Circuit. *Id.* at 2.

This Court finds that Mr. Hodes's declarations indicate a good faith attempt to disclose as much information as possible and that the FBI adequately balanced privacy interests versus public interests. *See Campbell, 193 F. Supp. 2*.d at 40-41. Whether an individual is alive or dead affects this calculus. In *Campbell* the court found that the FBI met its burden under Exemption 7(C) by consulting *Who Was Who,* and using internal sources to determine whether an individual was alive or dead. *Id.* An inquiry into the mortality [**19] status of individuals is particularly important in the present case where events occurred over fifty-years ago. Therefore, to gauge accurately whether the FBI did in fact adequately balance these interests it is necessary to evaluate how the FBI sought information regarding the mortality of individuals whose personal information was being withheld from Ms. Schrecker. Here the FBI has employed several methods to try and determine whether an individual is alive or dead. The FBI consulted *Who Was Who,* internal sources, and where possible the SSDI and previous FOIA requests. *5th Hodes Dec'l,* at 6-8; *6th*

Hodes Dec'l at 9. The fact that institutional information and the responsive documents themselves do not contain sufficient information to warrant a release does not mean that the FBI's methodology is flawed. Here the FBI has attempted to ascertain whether individuals were alive for the purposes of balancing privacy versus public interests under 7(C); whether or not the FBI released any information is not a factor in determining whether their actions were adequate under FOIA. *See Steinberg v. U.S. Dep't of Justice, 306 U.S. App. D.C. 240, 23 F.3d 548, 551 (D.C. Cir. 1994)*. [**20]

Professor Schrecker argues that the FBI should use the SSDI with names when social security numbers are not available. *Plaintiff's Reply*, at 4-5. Professor [*38] Schrecker argues that in a previous FOIA request regarding Joseph Fischetti, a Chicago organized crime figure, the FBI accepted SSDI print-outs to determine his mortality status for the purposes of FOIA. *Id.* at 4-5. [2] This Court is unpersuaded by Professor Schrecker's argument. Mr. Fischetti was the subject of the FOIA inquiry, he was not subject to the third-party privacy interest that is under debate at the moment. *See Plaintiff's Reply*, at 5. In the case regarding Mr. Fischetti, the FBI looked at internal documents to verify that the correct individual was deceased. *Id.* There is no basis for the FBI to have to search through unresponsive documents to determine the mortality status of third-parties to FOIA requests. It would be unduly burdensome to hunt-down the social security number for every third-party mentioned in a responsive document. *See Nation Magazine, 71 F.3d at 892*. This Court is unpersuaded by Professor Schrecker's argument that the name of the individual provides enough information. [**21] *See Plaintiff's Reply*, at 5. Using the SSDI with only a name does not resolve the need for a social security number to verify the identity of the individual. The FBI needs a social security number to verify the individual in the database is indeed the individual who is deceased. Therefore, if the social security number is not available in a responsive document, it would require the FBI to consult other internal sources to determine the social security number. This Court does not find that "readily available information" includes scouring through unresponsive files to try and determine whether third-parties are alive or dead. *See Schrecker 254 F.3d at 167*. The court directed the FBI to confirm or to take certain basic steps to determine whether individuals are alive or dead. *Id.* The D.C. Circuit could not confirm that the FBI had used the SSDI. In the 6th *Hodes Dec'l* the FBI states that the *SSDI* was implemented if a social security number was available. *6th Hodes Dec'l*, at 10.

> 2 In another FOIA litigation case Professor Schrecker's counsel, Mr. Lesar, submitted an SSDI print-out to the FBI for the purposes of releasing information regarding Chicago organized crime figure, Joseph Fischetti. The print-out contained social security numbers and birth dates for individuals by the name of Joseph Fischetti. The FBI referenced its internal files to determine if the Joseph Fischetti in their files matched one of the names on the SSDI print-out; the FBI found the social security number and released responsive documents.

[**22] On remand, this Court is to decide if the government did all it should have done to balance the privacy interests versus public interests in disclosure. *See Schrecker, 254 F.3d at 167*. Under the 100-year rule, the FBI has asserted that if a person's age was determined to be over 100 based on the information in the responsive documents, then it would be assumed that the individual was deceased and this would be taken into consideration for balancing purposes. *See Def. Renewed*, at 6-8. Exemption 7(C) protects third-parties even after death although the weight of the interest is lessened, but if there is little to no public interest in revealing the information, then the privacy interest will outweigh the release of the information. *See U.S. Dep't of Justice v. Reporter's Committee for Freedom of Press, 489 U.S. 749, 756, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)*. The search for documents under is FOIA is based on a reasonable standard and therefore this Court finds that a search for ascertaining a person's mortality should also be based upon a reasonable effort. Here the FBI has documented what it looked for and the fact it did not release additional [**23] information does not mean that the search was inadequate. *Steinberg, 306 U.S. App. D.C. 240, 23 F.3d 548*. [*39]

III. Conclusion

This Court finds that the FBI has met its burden of complying with the D.C. Circuit's June 26, 2001 decision. *See Schrecker, 254 F.3d 162*. The FBI has demonstrated that no genuine issues of material fact exist. The FBI has adequately searched for ticklers by physically searching both field offices where the investigation of Jencks and Eisler occurred and by physically searching the portions of NSD where responsive files would be located.

Therefore the Court finds that the FBI is entitled to summary judgment regarding the adequacy of its search for ticklers. This Court also finds that the FBI has adequately balanced the public versus privacy interests under 7(C) by attempting to ascertain, by several methods, whether individuals are alive or dead. Therefore the FBI's motion for summary judgment regarding the adequacy of balancing public interests versus privacy interests is granted. A separate Order consistent with the foregoing opinion has been entered this day.

Date: 8/7/02

Royce C. Lamberth

UNITED STATES DISTRICT [**24] JUDGE

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's Motion for Summary Judgment is GRANTED, and plaintiff's Motion for Summary Judgment is DENIED.

This action shall stand DISMISSED WITH PREJUDICE.

SO ORDERED.

Date: 8/7/02

Royce C. Lamberth

UNITED STATES DISTRICT JUDGE

EUGENIE SAMUEL REICH, Plaintiff, v. U.S. DEPARTMENT OF ENERGY and OAK RIDGE NATIONAL LABORATORY, Defendants.

Civil Action No. 09-10883-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

811 F. Supp. 2d 542; 2011 U.S. Dist. LEXIS 93600

August 19, 2011, Decided
August 19, 2011, Filed

PRIOR HISTORY: *Reich v. United States DOE, 2011 U.S. Dist. LEXIS 79746 (D. Mass., July 8, 2011)*

COUNSEL: [**1] For Eugenie Samuel Reich, Plaintiff: David B. Smallman, LEAD ATTORNEY, PRO HAC VICE, Smallman Law PLLC, New York, NY; Michael A. Pezza , Jr., LEAD ATTORNEY, Boston, MA.

For U.S. Department of Energy, Defendant: Mark J. Grady, Rayford A. Farquhar, LEAD ATTORNEYS, United States Attorney's Office, Boston, MA.

For Oak Ridge National Laboratory, Defendant: Rayford A. Farquhar, LEAD ATTORNEY, United States Attorney's Office, Boston, MA.

For UT-Battelle, Defendant: Julia M. Beckley, McKenna Long & Aldridge LLP, Los Angeles, CA.

JUDGES: Nathaniel M. Gorton, United States District Judge.

OPINION BY: Nathaniel M. Gorton

OPINION

[*543] **MEMORANDUM & ORDER**

GORTON, J.

Plaintiff Eugenie Samuel Reich ("Reich") seeks an order, pursuant to the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*, requiring defendants to produce an investigation report ("the Investigation Report") regarding allegations of research fraud and misconduct by certain scientists working at defendant Oak Ridge National Laboratory ("Oak Ridge"). The facts of the case are stated in the Court's prior memorandum and order entered March 17, 2011 (Docket No. 53) ("March, 2011 M&O") and will not be repeated here. *Reich v. U.S. Dep't of Energy, Civ. A. No. 09-10883, 784 F. Supp. 2d 15, 2011 U.S. Dist. LEXIS 27317, 2011 WL 977602 (D. Mass. Mar. 17, 2011).*

I.Procedural [**2] **Background**

In March, 2011, the Court allowed defendants' motion for summary judgment. Id. Reich subsequently moved for reconsideration of that motion on the ground that the Court had ruled on defendants' motion for summary judgment before she had had an opportunity to oppose it. The Court treated her lengthy memoranda in support of her motion for discovery pursuant to *Fed. R. Civ. P. 56(f)* as not only supporting her request for discovery but also as an opposition to the motion for summary judgment. Recognizing that its previous order may have been ambiguous with respect to the filing of

plaintiff's opposition to the motion for summary judgment, the Court allowed plaintiff's motion for reconsideration with respect to its ruling on the summary judgment motion only and afforded [*544] plaintiff the opportunity to file an opposition. *Reich v. U.S. Dep't of Energy, Civ. A. No. 09-10883, 2011 U.S. Dist. LEXIS 79746, 2011 WL 2747524 (D. Mass. July 8, 2011)*. The summary judgment motion is now fully briefed and ripe for adjudication. In addition, defendants have moved to strike portions of plaintiff's declaration and statement of facts for failure to comply with *Fed. R. Civ. P. 56(c)(4)*.

II.Defendants' Motion to Strike

Defendants [**3] move to strike portions of plaintiff's Second Declaration and Statement of Facts for failure to comply with *Fed. R. Civ. P. 56(c)(4)*, which provides that:

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Defendants object to certain paragraphs in plaintiff's Second Declaration primarily on the grounds that they are not based on personal knowledge or constitute hearsay. Although the Court declines to address many of the objections that defendants raise and will deny the motion to strike, it will disregard any statements made in plaintiff's declaration which do not conform to the requirements of *Fed. R. Civ. P. 56(c)(4)*.

The Court also agrees with defendants that plaintiff's Statement of Facts is unreasonably verbose and contains improper legal argument. The statement of material facts is intended to be "concise" and may not be used to circumvent the 25-page limitation on summary judgment memoranda. D. Mass. Loc. R. 56.1. Thus, the Court will deny defendants' motion to strike but declines to consider any improper [**4] legal argument made in plaintiff's Statement of Facts.

III.Defendants' Motion for Summary Judgment

A. Summary Judgment Standard

The role of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)* (quoting *Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)*). The burden is upon the moving party to show, based upon the pleadings, discovery and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "Factual disputes that are irrelevant or unnecessary will not be counted." Id. A genuine issue of material fact exists where the evidence with respect to the material fact in dispute "is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Once the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth specific facts showing that there is [**5] a genuine, triable issue. *Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court must view the entire record in the light most hospitable to the non-moving party and indulge all reasonable inferences in that party's favor. *O'Connor v. Steeves, 994 F.2d 905, 907 (1st Cir. 1993)*. Summary judgment is appropriate if, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

[*545] **B. Standard for FOIA Orders**

The FOIA gives district courts jurisdiction to order a federal agency to produce improperly withheld agency records. *5 U.S.C. § 552(a)(4)(B)*. The agency bears the burden of justifying its withholding of documents. Id.; *Hayden v. N.S.A., 608 F.2d 1381, 1386, 197 U.S. App. D.C. 224 (D.C. Cir. 1979)*. The Court is to determine the matter de novo. *5 U.S.C. § 552(a)(4)(B)*.

C. Oak Ridge as a Defendant

The defendants contend that Oak Ridge is not a proper defendant because it is not a federal agency or even a legal entity. For the reasons set forth in its March, 2011 M&O, the Court finds that Oak Ridge is not an appropriate defendant in this action and will allow defendants' motion for summary [**6] judgment with respect to that entity.

D. Whether the Requested Materials are Agency Records

The DOE maintains that the Investigation Report is not an agency record subject to the FOIA. In order for a record to be considered an "agency record", the agency must first create or obtain that record. *Forsham v. Harris, 445 U.S. 169, 182, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980)*. Here, the DOE obtained a copy of the Investigation Report by email on August 15, 2006 and a hard copy on March 1, 2007. [1] Thus, it is clear that the DOE obtained the Investigation Report at some point. Consequently, the Court will concentrate its inquiry on the second criterion for an agency record, i.e. agency control.

> 1 Plaintiff argues that there is a genuine issue of material fact with respect to whether the emailed copy was a draft or a final version of the Investigation Report. The Court concludes, nevertheless, that such a distinction is immaterial because neither version is an agency record.

In order to be considered agency records, the requested materials must be under agency control at the time the FOIA request is made. *U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 145 (1989), 109 S. Ct. 2841, 106 L. Ed. 2d 112* ("Tax Analysts I"). Control means that the agency possessed [**7] the record "in the legitimate conduct of its official duties." Id. The agency's right to access or to obtain permanent custody, however, is not dispositive. *Forsham, 445 U.S. at 185-86*. Federal courts have looked at four factors to assess whether an agency exercises sufficient control over records:

> (1) the intent of the document's creator to retain or relinquish control over the records;
>
> (2) the ability of the agency to use and dispose of the record as it sees fit;
>
> (3) the extent to which agency personnel have read or relied upon the document; and
>
> (4) the degree to which the document was integrated into the agency's record system or files.

Consumer Fed'n of Am. v. Dep't of Agric., 455 F.3d 283, 288 n.7, 372 U.S. App. D.C. 198 (D.C. Cir. 2006) (internal citations omitted). Courts consider the third and fourth factors to be the most important. See, e.g., *Judicial Watch, Inc. v. Fed. Housing Fin. Agency, 744 F. Supp. 2d 228, 234 (D.D.C. 2010)*; *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec., 527 F. Supp. 2d 76, 97-98 (D.D.C. 2007)* ("Citizens for Responsibility") ("an agency's actual use of a document is often more probative than the agency's subjective intent.").

In her opposition, plaintiff [**8] argues that there are genuine issues of material fact relating to agency control that preclude summary judgment. Defendants respond, and the Court agrees, that the parties [*546] only disagree with respect to the legal implications of the undisputed facts and, as such, summary judgment is appropriate here. Without reiterating the analysis set forth in its March, 2011 M&O, the Court will allow defendants' motion for summary judgment for the reasons enunciated in that decision and elaborated upon below.

1. Intent

Reich first argues that UT-Battelle, the private company which manages Oak Ridge, intended to relinquish control of the Investigation Report to the Department of Energy ("DOE"), as evidenced by the fact that James Roberto, Director of Strategic Capabilities at Oak Ridge and Senior Vice President of UT-Battelle, sent a copy to Patricia Dehmer at the DOE Office of Science, where it remained for eight days. As stated in its March, 2011 M&O, the Court agrees that those facts weigh in favor of a finding that the Investigation Report, or at least that version of it, is an agency record.

2. Ability to Use and Dispose of the Document

With respect to the second factor, Reich maintains that statements [**9] made to her in an email on November 22, 2007 by Michael Bradley, an employee of UT-Battelle at Oak Ridge, demonstrate that UT-Battelle placed no restrictions on the DOE's ability to access, review or copy the Investigation Report. Those statements, however, are contradicted by the written notice included with each copy of the Investigation Report explicitly stating that the Investigation Report

> contains confidential-business sensitive information belonging to UT-Battelle and [was] not to be copied or disclosed to

> others without written authorization from UT-Battelle.

Moreover, an agency's right to access or to obtain permanent custody of a document does not necessarily indicate that the document is an agency record. *Forsham, 445 U.S. at 185-86*.

Reich contends that the case upon which this Court relied in its March, 2011 M&O, *Tax Analysts v. U.S. Department of Justice, 913 F. Supp. 599, 607 (D.D.C. 1996)* ("Tax Analysts II"), is distinguishable from this case and that this case is more analogous to *Citizens for Responsibility, 527 F. Supp. 2d at 93-94*. The Court disagrees. In Citizens for Responsibility, the documents at issue were used by the United States Secret Service on a daily basis [**10] and were disposable by that agency as it saw fit. *527 F. Supp. 2d at 97*. In contrast, the Investigation Report at issue here was scanned by one DOE employee only, who claims that she did not use or rely on the report at all. Moreover, in Tax Analysts II, similar to this case, the documents at issue were subject to an explicit, contractual provision stating that those documents were not agency records. *913 F. Supp. at 607*. Thus, the Court finds that the second factor weighs against a finding that the Investigation Report is an agency record.

3. Extent to Which Agency Personnel Read or Relied Upon the Document

Plaintiff's third assertion is that there is a genuine issue of material fact with respect to whether DOE personnel read or relied upon the Investigation Report. Reich points to the facts that Patricia Dehmer received an email and hard copy of the Report, scanned it and commented that it "reflected the discussions she had with [Oak Ridge]". Dehmer also attended two meetings where copies of the report were available and the findings were presented orally.

Reich argues that the DOE's involvement with the Investigation Report was more significant than 1) the agency's involvement in *Judicial Watch, Inc., 744* [*547] *F. Supp. 2d at 235*, [**11] in which the Court held that the documents at issue were not under agency control because no agency employee had read them, and 2) the situation in *Consumer Federation of America, 455 F.3d at 293*, in which the Court found that an employee's electronic appointment calendar stored on an agency computer was not under agency control because it was not distributed to other employees. The Court respectfully disagrees and, instead, concludes that the DOE's use of the Investigation Report was so minimal as to be analogous to no use at all because Dehmer merely scanned the document and did not distribute it to other employees. See *Consumer Fed'n of Am., 455 F.3d at 293*.

4. Degree to Which the Document was Integrated into the Agency's Record System or Files

With respect to the fourth factor, Reich points out that the DOE retains a copy of the Investigation Report in its archives and was able to submit that copy to the Court for in camera review. She also contends that there is a genuine issue of material fact with respect to the sufficiency of the DOE's search for any copies of the Investigation Report in its possession.

Reich's arguments do not change the Court's earlier analysis. An agency's [**12] possession of a copy of a document does not automatically mean that the document is an agency record. See *Citizens for Responsibility, 527 F. Supp. 2d at 96*.

When viewed together, the several pertinent factors lead the Court to conclude that the Investigation Report is not an agency record. Consequently, the Court lacks jurisdiction to order the DOE to produce the Investigation Report pursuant to the FOIA and the defendants' motion for summary judgment will be allowed.

E. FOIA Exemptions

Even if the Investigation Report were to be considered an agency report, however, it falls within a number of the FOIA exemptions. First, the Court finds that the Investigation Report is protected from disclosure by *FOIA Exemption 7(C)* because it was created for a law enforcement purpose and its disclosure would "reasonably be expected to constitute an unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(7)(C)*; see *McCutchen v. U.S. Dep't of Health & Human Servs., 30 F.3d 183, 187-88, 308 U.S. App. D.C. 121 (D.C. Cir. 1994)* (applying *Exemption 7(C)* to withhold the identities of targets of research misconduct investigations because allegations of professional misconduct "carry a stigma and can damage a career."); see [**13] also *Dunkelberger v. Dep't of Justice, 906 F.2d 779, 781, 285 U.S. App. D.C. 85 (D.C. Cir. 1990)* (upholding the Federal Bureau of Investigation's refusal to disclose employment records because "a government employee

has at least a minimal privacy interest in his own employment record and evaluation history").

The Investigation Report is also shielded by *FOIA Exemption 6* which protects

> personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(6). That is particularly so here, where the Investigation Report relates to dismissed allegations of misconduct by individuals employed by a privately-operated facility and does not elaborate upon the operations of the DOE. See *Carter v. U.S. Dep't of Commerce, 830 F.2d 388, 394, 265 U.S. App. D.C. 240 (D.C. Cir. 1987)* (attorney misconduct investigation files properly withheld under *Exemption 6* because they implicated privacy interests outweighing the public interest in transparency of government operations.)

Plaintiff claims that UT-Battelle waived any basis for claiming a privacy-related FOIA exemption because someone [*548] at UT-Battelle or Oak Ridge gave copies of the Investigation Report to editors [**14] at two scientific journals and posted a summary of the investigation on the Oak Ridge website. That website includes the names and biographies of the panel members. First, Reich has proffered no credible evidence that copies of the Investigation Report were disclosed to editors of scientific journals. Second, the fact that some information about the investigation was released to the public does not indicate that the privacy of the entire document was waived. *Wolf v. C.I.A., 473 F.3d 370, 378, 374 U.S. App. D.C. 230 (D.C. Cir. 2007).*

In sum, the Court finds that defendants have met their burden of justifying the withholding of the Investigation Report.

ORDER

In accordance with the foregoing, defendants' motion for summary judgment (Docket No. 35) is **ALLOWED** and defendants' motion to strike (Docket No. 78) is **DENIED.**

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated August 19, 2011

RCA GLOBAL COMMUNICATIONS, INC., Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION, et al., Defendants.

Civil Action No. 81-74

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

524 F. Supp. 579; 1981 U.S. Dist. LEXIS 18583; 50 Rad. Reg. 2d (P & F) 1093

October 16, 1981, Decided

DISPOSITION: [**1] FCC's summary judgment motion will be denied.

COUNSEL: Henry A. Wise, Jr., Esquire of Wilmington, Delaware, Alexander P. Humphrey, IV, Esquire, Robert F. Heath, Esquire of Washington, D.C., Attorneys for Plaintiff.

Joseph J. Farnan, United States Attorney, John X. Denney, Jr., Assistant U.S. Attorney, Wilmington, Delaware, Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, Vincent M. Garvey, Esquire, Dina R. Lassow, Esquire, Department of Justice, Washington, D.C., Lawrence S. Schaffner, Assistant General Counsel, Nancy E. Stanley, Assistant General Counsel, John P. Greenspan, Esquire, Mark S. Hayes, Esquire of Federal Communications Commission, Washington, D.C., Attorneys for Defendants.

Somers S. Price, Jr., Esquire of Potter, Anderson & Corroon, Wilmington, Delaware, William R. Weissman, Esquire of Wald, Harkrader & Ross, Washington, D.C., Attorneys for Western Union.

JUDGES: STAPLETON, District Judge

OPINION BY: STAPLETON

OPINION

[*580] OPINION

Wilmington, Delaware

October 16, 1981

STAPLETON, District Judge.

On February 20, 1981, RCA Global Communications, Inc. ("RCA Globcom") filed suit against the Federal Communications Commission ("FCC") [1] to [**2] compel the Commission to disclose some three thousand pages of documents. The documents are the fruits of a subpoena issued to the Western Union Telegraph Company ("Western Union"), which is the target of an ongoing FCC investigation. Along with its Freedom of Information Act ("FOIA") [2] Complaint, RCA Globcom submitted a request for a *Vaughn v. Rosen* [3] index of the disputed records. Because the FCC offered two generic grounds for withholding the Western [*581] Union documents, the Court agreed to entertain the Commission's motion for summary judgment as to those grounds before requiring it to prepare an index.

1 The Complaint also names the Chairman of the FCC and Western Union as parties.

2 *5 U.S.C. § 552 (1978).*

3 *484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974).*

I

A. The Western Union Investigation

Western Union provides domestic Telex and TWX service as a regulated monopoly. Western Union's [**3] lines also "interconnect" with those of International Record Carriers ("IRCs") which carry Telex messages abroad. According to complaints filed with the FCC, Western Union refused to provide interconnect service to IRCs in several "gateway" cities in which the FCC had authorized the international carriers to operate. By an Order dated July 17, 1980, the Commission initiated an investigation of Western Union's interconnection practices. The Order provided that the investigation would be "non-public," and that information obtained in the investigation would only be released upon notice to the party which had supplied the information to be disclosed, or upon completion. The purpose of the notice provision was to guarantee to the "supplying party" its rights to seek confidential treatment under FCC regulations. *47 C.F.R. § 0.459*.

To further its inquiry, the FCC issued a subpoena duces tecum to Western Union requesting:

> 1. All documents regarding, referring or relating to interconnection between Western Union's Telex and TWX networks and the Telex networks of the international record carriers from May 1975 to the present.
>
> 2. All documents regarding, referring or relating to [**4] Western Union's costing and pricing (including discounts) of the domestic-haul portion of the inbound public message service from June 1977 to the present.
>
> 3. Document(s) demonstrating the organization of the Western Union Telegraph Company, including, but not limited to, major operational and administrative divisions and identification of supervisory personnel in those divisions from May 1975 to the present.
>
> 4. Documents constituting current formal and informal file indices of the Western Union Telegraph Company.

Western Union cooperated with the subpoena and delivered some three thousand pages of documents to the Commission.

B. RCA Globcom's FOIA Request

In a letter dated November 21, 1980, RCA Globcom filed a request to inspect the Western Union documents pursuant to the FOIA and *47 C.F.R. § 0.461*. The FCC's Common Carrier Bureau, which regulates Telex service, denied the request on December 19, 1980. The Bureau explained that the material which RCA Globcom sought was exempt from disclosure under *5 U.S.C. § 552(b) (4)* and *(7)(A)*. Although it did not conduct a document by document review, the Bureau asserted a (b)(4) exemption because a "large number" [**5] of the Western Union documents contained "commercial or financial information [which was] privileged or confidential." It justified the (7)(a) exemption, protecting "investigatory records compiled for law enforcement purposes" release of which "would interfere with enforcement proceedings", because disclosure would inform RCA Globcom of the "scope, limits, and method" of an investigation in which RCA Globcom was potentially involved. Further, the Bureau ruled, release of subpoenaed documents might impair the FCC's ability to obtain voluntary compliance with its subpoenas in the future.

RCA Globcom appealed this ruling to the full Commission. While its administrative appeal was pending, RCA Globcom filed the present suit. The FCC's Order, released on March 24, 1981, affirmed the Common Carrier Bureau's claim to exemptions 4 and 7A, and adopted a third, new, rationale to justify withholding the Western Union documents. Relying on recent authority in the Court of Appeals for the District of Columbia Circuit, the Commission concluded that the Western Union files were not "agency records," and hence not subject to FOIA disclosure at all. The present Motion for Summary Judgment presents [**6] only the "agency records" and 7A exemption claims.

[*582] II

Agency Records Under FOIA

The Freedom of Information Act requires public disclosure of agency records, upon request, with the exception of records exempted under *Section 552(b)*. The

Act nowhere defines an "agency record." [4] The FCC urges me to apply a "control" test to determine whether a document created by a third party but within the physical possession of agency is an agency record within the compass of the FOIA.

> 4 *See generally*, Note, The Definition of "Agency Records" Under the Freedom of Information Act, 31 Stan.L.Rev. 1093 (1979); Developments Under the Freedom of Information Act--1980, 1981 Duke L.J. 338, 349-354.

The first case to adopt the control analysis was *Goland v. CIA, 607 F.2d 339, 197 U.S. App. D.C. 25 (D.C. Cir. 1978), cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980)*. Goland requested, among other things, the transcript of a 1948 House Committee hearing held in Executive Session. [**7] The agency refused to release the transcript because it remained under the control of the Congress, notwithstanding that it had been in the physical custody of the CIA for almost thirty years. The question, according to Judge Wilkey,

> whether a congressionally generated document has become an agency record, . . .depends on whether under all the facts of the case the document has passed from the control of Congress and become property subject to the free disposition of the agency with which the document resides.

607 F.2d at 347. The secrecy of the hearing, the "Secret" marking on the transcript, and the fact that the CIA used the transcript only for internal reference led the Court to the conclusion that the transcript remained under Congressional control. [5] *See also, Holy Spirit Association v. CIA, 636 F.2d 838, 205 U.S. App. D.C. 91 (D.C. Cir. 1981)*.

> 5 The Court in *Goland* emphasized Congress's constitutional authority to keep its records secret. U.S.Const.Art. I § 5. Private parties, like Western Union, have no such inherent power to modify the disclosure provisions of the FOIA.

[**8] The D.C. Circuit required disclosure in two subsequent FOIA cases which modify the *Goland* principle. In *Ryan v. Department of Justice, 617 F.2d 781, 199 U.S. App. D.C. 199 (D.C. Cir. 1980)*, the Court found none of the indicia of control which determined the outcome in *Goland*. The Department of Justice solicited information from Senators regarding the process of selecting federal judicial nominees. Neither the questionnaires themselves, nor the responses by the Senators "indicated that the Senators would have the perogative to maintain secrecy." *Id. at 786*. Furthermore, unlike the *Goland* transcript, the information contained in the questionnaires related to the "regular business" of the Department of Justice. *See, Id. note 17 at 787*.

In *Carson v. Department of Justice, 631 F.2d 1008, 203 U.S. App. D.C. 426 (D.C. Cir. 1980)*, the Court rejected the argument that presentence investigation reports were not agency records of the United States Parole Commission. Like the *Goland* transcript, a presentence report is created by a non-agency, the probation office of the sentencing court. Nevertheless, the Parole Commission's organic statute required it to [**9] consider the presentence report in making its release decisions. [6] Noting that "the presentence report is, after all, central to the Parole Commission's primary function," Judge Wald found it "somewhat anamalous to hold that such reports do not constitute agency 'records' for purposes of the FOIA." *Id. at 1015*. In both *Ryan* and *Carson*, the Court adopted *Goland* to take into consideration the function of the document in the administrative process.

> 6 *18 U.S.C. § 4208, 28 C.F.R. § 2.19*.

Although the Supreme Court has not directly addressed the *Goland* test, two recent decisions establish the importance of a document's function to the determination of its status as an agency record. In *Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980)*, William Safire, a newspaper columnist, requested FOIA disclosure [*583] of the former Secretary of State's telephone logs. Kissinger maintained those logs while he was National Security [**10] Adviser to President Nixon, then transported them to his new office when he became Secretary of State. In denying Safire's request, the Court emphasized that "mere location of papers and material" did not "confer status as an agency

record." *Id. at 157*. The telephone logs, like Kissinger's other personal records and memorabilia, played no part in State Department decisionmaking. Since close personal advisers to the President were not part of an "agency" under FOIA, the State Department had no duty to disclose the logs to the public.

In *Forsham v. Harris, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980)*, a case involving records maintained by hospitals at the instance of the Department of HEW, the Court remarked that "mere possession" would not suffice to transform a document created outside an agency into an agency record. *Id. note 16 at 185*. Justice Rehnquist, for the Court, went on to note with approval the only direct reference to the definition of "agency record" in the legislative history:

> A representative of the Interstate Commerce Commission commented that "since the word 'records' . . . is not defined we assume it includes all papers which an agency [**11] maintains in the performance of its functions." Administrative Procedure Act: Hearings on S.1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong. 1st Sess. 244 (1965).

Id. at 184. This emphasis on the function of the document in the agency's decisionmaking process conforms to the legislative purpose of the FOIA, which 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, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)*.

I read the more recent cases applying *Goland*, and the Supreme Court's language in *Kissinger* and *Forsham*, to suggest a "function" rather than a "control" oriented definition of "agency record." [7] The Western Union documents involved in this case are in the possession of the FCC in order to help it determine what if any action to take to regulate Western Union's interconnection with the IRCs. That decision is one to be made in the regular course of the FCC business under its enabling legislation and public scrutiny, subject [**12] to appropriate exemptions, of how that decision is made was an objective of the FOIA. These facts alone are sufficient to make these documents "agency records."

> 7 No court, to my knowledge, has applied *Goland* to records created by private parties, as opposed to a coordinate branch of government. Two circuits declined to decide this issue because it was unripe for adjudication. *Exxon Corp. v. FTC, 588 F.2d 895 (3d Cir. 1978)*; *FTC v. Owens-Corning Fiberglas Corp., 626 F.2d 966, 200 U.S. App. D.C. 102 (D.C. Cir. 1980)*. The plaintiffs in those cases sought judicial protection against the disclosure of their corporate records by the FTC. Congress has since mooted that controversy, at least with respect to the FTC, by exempting material submitted to the FTC under subpoena from the FOIA. Developments, 1981 Duke L.J. 362-67.
>
> I also note that in *Weisberg v. Department of Justice, 631 F.2d 824, 828, 203 U.S. App. D.C. 242 (D.C. Cir. 1980)*, the court held privately created photographs to be "agency records" without reference to *Goland*. Judge Bazelon, for the Court, emphasized that the requested materials "plainly 'reflect the. . . operation, or decision-making functions of the agency.'" (footnote omitted). This bolsters my conclusion that function, not control, is decisive in this case.
>
> *See also*, Note, 31 Stan.L.Rev. at 1111.

[**13] Even applying the more restrictive "control" standard articulated in *Goland*, however, I would have to conclude that the documents sought by RCA Global Communications are "agency records" under the FOIA. The FCC cites two features of its Order which had the effect, in the Commission's view, of reserving control of the documents to Western Union. The investigation was to be "non public," and the Commission expressly reserved Western Union's right to request confidentiality before it made any information publicly available before the completion of the investigation. [*584] While I have serious doubt whether a private party can demand or receive sufficient restrictions on agency use of its documents to preclude their classification as "agency record," I may make that assumption in analyzing the Commission's argument because its order in this case

clearly reserved no control for Western Union. I do not read the Commission's Order to do anything more than allow Western Union to assert the confidentiality of its documents consistent with FOIA itself. That is precisely what the regulation upon which the FCC leans so heavily provides. Section 0.459 of Title 47 is part of a subchapter [**14] entitled "Public Information and Inspection of Records" which establishes the procedures of FOIA and Privacy Act disclosures. Related regulations establish two categories of documents, those which are routinely non-disclosable, and those which are not disclosed until after a special request. *47 C.F.R. §§ 0.457, 0.459*. Documents are withheld under Section 0.459 only if the supplying party "presents a clear and convincing case for non-disclosure consistent with the provisions of the Freedom of Information Act." *47 C.F.R. § 0.459(d)*. Plainly, this refers to the agency's discretionary authority to disclose material which is FOIA exempt. [8]

8 Section 0.457 reinforces this construction:

> (d) . . . Under [the exemption for trade secrets, *5 U.S.C. § 552(b)(4)*] the Commission is authorized to withhold from public inspection materials which would be privileged as a matter of law if retained by that person who submitted them, and materials which would not customarily be released to the public by that person whether or not such materials are protected from disclosure by a privilege.
>
> * * *
>
> (1) The materials listed in this subsection have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to *5 U.S.C. 552(b)(4)*. To the extent. . . indicated in each case. The materials are not routinely available for public inspection. If the protection afforded is insufficient, it is necessary for person submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required for inspection of such materials under § 0.461.

See, Note, A Procedural Framework for the Disclosure of Business Records under the Freedom of Information Act, 90 Yale L.J. 400, 404-406, Note 39 at 408 (1981) (describing similar regulations).

[**15] In short, rather than creating any substantive right to confidentiality beyond that afforded by the FOIA exemptions and the Trade Secrets Act, *18 U.S.C. § 1905 (1976)*, Section 0.459 and the Commission's Order simply give Western Union an opportunity to be heard in opposition to disclosure of material which the FCC could withhold under those statutes.

Western Union's concerns in this context are understandable. But neither Western Union nor the Commission advance any interests to be served by non-disclosure which were not considered by Congress in formulating the statutory scheme with its "general philosophy of full agency disclosure" [9] and its specific exemptions. If there are interests involved here which Congress intended to override the public interest in being able to evaluate an agency's performance, those interest will be adequately protected under the exemptions. I decline to create a further exemption in the guise of a restrictive definition of "agency records."

9 H.Rep. 1497, 89th Cong. 2d.Sess., 6 (1966), *quoted* in *Conoco v. DOE, 521 F. Supp. 1301*, mem.op. (D.Del. 1981).

[**16] III

The Investigatory Records Exemption

The FCC proposes that all of the documents which it obtained from Western Union are exempt from disclosure under *5 U.S.C. § 552(b)(7)(A)*. Exemption 7A protects investigatory records release of which might jeopardize law enforcement proceedings. Here, the Commission posits three potential sources of prejudice to future enforcement. First, the FCC fears that companies such as Western Union will no longer cooperate with its subpoenas. [10] The result, the agency predicts, will be unnecessary delay.

10 The litigation against the FTC to obtain protection against disclosure suggests that this fear may have some substance. *See* note 7, *supra*.

[*585] While the FCC's argument has surface appeal, it does not withstand analysis. The FCC's access to the documents at issue in this case does not rest on voluntary cooperation, but on its statutory subpoena power. If a party lacks a substantial ground upon which to resist a subpoena one can reasonably expect it [**17] to do as Western Union did in this case, comply with the

FCC demand. If a party in that position balks, the FCC may require some minimal effort to secure full compliance, but brief delays occasioned by summary pleadings were not the kind of injury which Congress intended to thwart public disclosure, any more than delays in agency enforcement resulting from the processing of FOIA requests themselves.

The FCC's argument, therefore, reduces to two possible claims. The first is that there may be firms with good faith defenses to a subpoena who will or will not press those claims depending on what assurance the firm can extract from the Commission with respect to FOIA disclosure. This claims must be evaluated, however, in light of the limited authority of the FCC to give such assurance. Unless the subpoenaed material is "routinely not available for public inspection" under *47 C.F.R. § 0.457* because it is exempt under *5 U.S.C. § 552(b)(4)* or covered by the Trade Secrets Act, the FCC, under the regulations discussed above, cannot provide assurance against disclosure in advance. It is authorized only to give the assurance that it gave Western Union in this instance, that the subpoenaed [**18] party will have the opportunity to supply clear and convincing evidence of eligibility for an exemption before the FCC decides that issue. *47 C.F.R. § 0.459*. Given this limitation, I find it unlikely that decisions on whether or not to litigate possibly meritorious defenses will turn on agency assurances with respect to FOIA disclosures.

The only other alternative is that the FCC claims that it must have the authority to promise confidentiality to sources of information in order effectively to conduct its investigations. Plainly the FOIA does not authorize a blanket exemption for confidential sources in civil cases, as it does for criminal investigations. [11] I do not rule out the possibility that an agency may demonstrate that confidentiality may be required in a particular investigation in order to obtain the cooperation of an important witness, but the FCC has not done so in this case.

> 11 *Compare 5 U.S.C. § 552(b)(7)(D)* which exempts all information obtained from confidential sources in the course of criminal or national security investigations.

[**19] The Commission's second claim is that release of the Western Union documents would inform RCA Globcom of the scope of the investigation. This cannot support a blanket exemption. The FCC itself delineated the scope of the material it sought in its subpoena, which is in the public record as well as the record of this case. Release of the documents themselves do not add new information about the scope or purpose of the FCC's inquiry.

The Commission's third argument is more substantial. RCA Globcom's interest in the Western Union investigation stems from its own commercial stake in interconnection. The Affidavit of Theodore D. Kramer avers that the Commission may decide to expand the investigation in order to examine in detail the interconnection strategies of the IRCs, "including RCA Globcom," and that if the Commission should so decide, "officials of these companies may be called as witnesses." Mr. Kramer goes on to express a concern that release of documents to RCA Globcom will enable it to impede the investigation by tailoring its answers to questions. I agree that if the FCC does indeed plan to call on RCA Globcom to furnish information as a witness, premature disclosure of Western [**20] Union data might harm "the Government's case," *NLRB v. Robbins Tire & Rubber, 437 U.S. 214, 232, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1977)*. But the operative word here is "if." Fairly read, the Kramer Affidavit does nothing more than suggest that an investigation of Globcom's affairs is a *possibility*. The agency has the burden of showing that withheld documents are within the scope of an exemption and this burden is not met in the [*586] context of Exemption 7A when it offers no affirmative reason to believe that a relevant investigation is likely to occur. *See Coastal States Energy Corporation v. DOE, 617 F.2d 854, 870, 199 U.S. App. D.C. 272 (D.C. Cir. 1980)*.

Even if the record were expanded to fill this gap, however, it would still be insufficient to show that the FCC may withhold all of the Western Union documents. The Kramer Affidavit categorizes those records as:

> revenue forecasts, business stragies (proposals for Western Union's corporate response to current situations and in the event of certain regulatory decisions and actions by the IRCs), summaries of meetings of policy groups, marketing plans, analyses of current marketplace situations and Western [**21] Union's relative position in given markets, technical data such as call completion ratios and correspondence with other

common carriers.

Congress amended the FOIA in 1974, substituting "records" for "files" to make it

> clear that the courts had to consider the nature of the particular documents as to which exemption is claimed in order to avoid impermissible "commingling" by an agency's placing in an investigatory file material that does not legitimately have to be kept confidential.

NLRB v. Robbins Tire & Rubber, supra, 437 U.S. at 229-30. Although generic claims are permissible, the record must be sufficient to demonstrate the Government's right to exemption as to each category of document. *Coastal States Gas Corp. v. DOE, 644 F.2d 969, 978 (3d Cir. 1981). See also, Moorefield v. Secret Service, 449 U.S. 909, 101 S. Ct. 283, 66 L. Ed. 2d 139* (White, J. dissenting from denial of cert.). A document by document index is not required, but the agency's justification of its claim to exemption "must not consist of 'conclusory and generalized allegations of exemptions.'" What is required is "'a fairly detailed analysis in manageable segments.'" [**22] *Ferri v. Bell, 645 F.2d 1213 at 1213-1222 (3d Cir. 1981), quoting Vaughn v. Rosen, supra*, 484 F.2d at 826. The record in this case does not meet that standard. Contrary to the Commission's assertion, it is not apparent on this record that RCA Globcom's exposure to each of the documents poses a threat of tailored evidence in relevant areas.

Some form of index will accordingly be necessary. It must be sufficiently specific to permit RCA Globcom to respond meaningfully to the FCC's claim to exemption, and to permit this Court to make the findings required by law.

IV

Conclusion

Because I am satisfied neither by the FCC's showing that disclosure to RCA Globcom will endanger a law enforcement proceeding, nor by its demonstration that all of the documents within each of the eight broad categories it has described are entitled to a 7A exemption, the FCC's summary judgment motion will be denied.

ELLEN L. RAY; WILLIAM H. SCHAAP, APPELLANTS v. STANSFIELD TURNER, Director Central Intelligence Agency

No. 77-1401

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

587 F.2d 1187*; *190 U.S. App. D.C. 290*; *1978 U.S. App. LEXIS 9387

January 17, 1978, Argued
August 24, 1978, Decided

SUBSEQUENT HISTORY: [**1] As Amended August 25, 1978.As Amended November 15, 1978.

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia (D.C.Civil 76-0903).

COUNSEL: James E. Drew, Washington, D. C., for appellants.

Michael F. Hertz, Atty., Dept. of Justice, Washington, D. C., with whom Barbara Allen Babcock, Asst. Atty. Gen., Earl J. Silbert, U. S. Atty., and Morton Hollander and Leonard Schaitman, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee. Harry R. Silver and William Kanter, Attys., U. S. Dept. of Justice, Washington, D. C., also entered appearances for appellee.

Ira M. Lowe and Martin S. Echter, Washington, D. C., were on the brief for amicus curiae Baez, Hayden and Fonda.

JUDGES: Before WRIGHT, Chief Judge, and TAMM and LEVENTHAL, Circuit Judges.Opinion Per Curiam.Opinion filed by WRIGHT, Chief Judge, concurring in the remand.

OPINION BY: PER CURIAM:

OPINION

[*1189] This appeal presents the question whether the district court erred in dismissing a lawsuit under the Freedom of Information Act (FOIA) upon the basis of affidavits supplied by an official of the Central Intelligence Agency (CIA). We find there was error and remand.

[**2] I. PROCEDURAL BACKGROUND OF LITIGATION.

Plaintiffs (appellants) Ellen Ray and William Schaap sent identical letters to the CIA requesting "a copy of any file you may have on me." The CIA replied that while it did not have files on plaintiffs, there were documents in CIA files that referred to plaintiffs. The CIA refused to release those documents, and after administrative appeals were exhausted, plaintiffs brought this action under the FOIA. The CIA subsequently released portions of the withheld documents, and the government then moved for summary judgment, relying principally on affidavits of one Eloise Page. The critical affidavit, set out in the appendix, purports to describe the documents at issue and the grounds for the government's claims of exemption. [1]

1 The affidavit states that document 1 has been provided to plaintiffs with only minor deletions that include location of CIA overseas installations, cryptonyms (words used as a

substitute for the identity of a person or activity), a pseudonym and CIA organizational data. Plaintiffs do not appeal from the district court's refusal to order the CIA to release the remainder of document 1. This appeal involves documents 2-10.

[**3] The district court granted the government's motion for summary judgment and denied plaintiffs' motion for In camera inspection. [2] It found that the withheld documents were exempt from disclosure under the FOIA on the basis of Exemption 1 alone, Exemption 3 alone, or the two exemptions coupled together. As to Exemption 1, *5 U.S.C. § 552(b)(1)*, [3] the court found that the affidavit showed that the documents were properly classified under Executive Order 11,652, 3 C.F.R. 339 (1974). As to Exemption 3, *5 U.S.C. § 552(b)(3)*, [4] the court found that the affidavits stated that the release of the information could reasonably be expected to reveal intelligence sources and methods as well as organizational data, and that *50 U.S.C. §§ 403(d)(3), 403g* justified the CIA invocation of Exemption 3.

2 Memorandum Opinion, filed January 25, 1977, Appendix at 65.

3 *5 U.S.C. § 552(b)(1) (1976)* provides:

(b) This section does not apply to matters that are

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . .

[**4]

4 *5 U.S.C. § 552(b)(3) (1976)* provides:

(b) This section does not apply to matters that are

(3) specifically exempted from disclosure by statute (other than *section 552b* of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

In a key passage, the district court's opinion stressed that "there has been no credible challenge to the veracity of these averments (in the affidavits) and nothing appears to raise the issue of bad faith." In denying In camera inspection, the district court relied on *Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977)*. Specifically, the court found with respect to Exemption 1 that

> [*1190] (t)he affidavits in this record are specific and detailed. The record further indicates that the Agency dealt with plaintiffs' requests in a conscientious manner and released segregable portions of the material. [**5] No abuse of discretion has been shown.

Memorandum Opinion at 3.

Regarding Exemption 3, it ruled:

> With respect to documents withheld under exemption 3, in camera inspection is seldom, if ever, necessary or appropriate. * * * Exemption 3 differs from other FOIA exemptions in that its applicability does not depend on the factual content of specific documents.

Id. at 4.

On appeal, the government insists that the pertinent documents are exempt under Exemption 1 and are also exempt under Exemption 3. [5] Plaintiffs assert that discovery and In camera inspection by the district court was required, because documents 2 through 10 contain segregable material that is not exempt, and because neither document 2 nor document 10 is exempt under Exemption 1.

5 The government acknowledges an exception for two items in document 10 that it claims are exempt under Exemptions 6 and 7(F). On remand, the district court is to make rulings with regard to these exemptions.

II. RELEVANT CONSIDERATIONS IN FOIA [**6] CASES INVOLVING NATIONAL SECURITY ISSUES.

The FOIA was passed in 1966, as an amendment to the Administrative Procedure Act, in order to increase

disclosure of government information to the American people. Agencies were required to disclose all records that did not come within one of nine explicit exemptions specified by Congress. [6] In the event of agency nondisclosure, the Act provided for court review. In any such case, "the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action." [7]

6 *5 U.S.C. § 552(c) (1976)*; *EPA v. Mink, 410 U.S. 73, 79, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*.

7 *5 U.S.C. § 552(a)(3) (1976)*. Courts were given authority to review de novo any denial of access "in order that the ultimate decision as to the propriety of the agency's action is made by the court and (to) prevent (review) from becoming meaningless judicial sanctioning of agency discretion." S.Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[**7] A. Judicial Interpretations and Legislative Modifications.

In *EPA v. Mink, 410 U.S. 73, 81-84, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*, the Court considered Exemption 1, which at that time covered matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." *5 U.S.C. § 552(b)(1) (1970)*. It held that a court should not review the substantive propriety of the classification or go behind an agency affidavit stating that the requested documents had been duly classified pursuant to Executive order. [8] The Court said that "Congress chose to follow the Executive's determination in these matters," and In camera inspection to test the propriety of the classification was not authorized. *410 U.S. at 81, 93 S. Ct. at 833*.

8 Mink involved a request for documents prepared by various government officials for the President in connection with a scheduled nuclear test. The documents were withheld under Exemptions 1 and 5. Those seeking the information had not disputed the government's claim that proper classification procedures had been followed, *410 U.S. at 84, 93 S. Ct. 827*, and the Court held that the substantive propriety of the classification had been committed by Congress to Executive discretion. The Court therefore reversed the order of the court of appeals that the district court examine the documents In camera and release any segregable nonsecret portions. With regard to Exemption 5 the Court held that a reviewing court should allow an agency the opportunity to prove by detailed affidavits and other evidence that material withheld is exempt before requiring In camera inspection. The Court accordingly modified the "unnecessarily rigid" remand ordered by the court of appeals in order to provide the government a chance to meet its burden. *Id. at 92-93, 93 S. Ct. 827*.

[**8] In 1974 Congress overrode a presidential veto and amended the FOIA for the express [*1191] purpose of changing this aspect of the Mink case. [9] Exemption 1 was modified to exempt only matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *5 U.S.C. § 552(b)(1) (1976)*.

9 S.Rep. No. 93-1200, 93d Cong., 2d Sess. 11-12 (1974), U.S.Code Cong. & Admin.News 1974, p. 6267; See Pub.L. 93-502, §§ 1-3, 88 Stat. 1561 (1974).

Furthermore, the 1974 revision changed the FOIA language describing the role of a reviewing court considering Any claim of exemption. It provided that "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of [**9] this section, and the burden is on the agency to sustain its action." *5 U.S.C. § 552(a)(4)(B) (1976)*. The Conference Report accompanying the amendments explained that "(w)hile In camera examination need not be automatic, in many situations it will plainly be necessary and appropriate." S.Rep. No. 93-1200, 93d Cong., 2d Sess. 9 (1974), U.S.Code Cong. & Admin.News 1974, p. 6287.

Exemption 3 originally exempted matters "specifically exempted from disclosure by statute." *5 U.S.C. § 552(b)(3) (1970)*. In *FAA Administrator v. Robertson, 422 U.S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975)*, the Court held that a statute could "specifically exempt" matters from disclosure even if the statute gave an agency broad discretion to determine whether the information should be withheld. [10] Concerned about excessive agency discretion, Congress in 1976 passed an amendment to change the result reached in Robertson.

Exemption 3 now authorizes nondisclosure of matters "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion [**10] on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *5 U.S.C. § 552(b)(3) (1976).*

10 The statute relied on by the government in Robertson empowered the Administrator or the Board of the Federal Aviation Administration, upon written application of "any person", to withhold agency records if "in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." 49 U.S.C. § 1504 (1976).

B. The Nature of De Novo Review.

Procedures to be observed

In *Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973)* Cert. denied, *415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974)*, this court sought to cope with the difficulty of providing de novo review of exemptions claimed by the government. It initiated procedures designed to mitigate the administrative burden on the courts and ensure [**11] that the burden of justifying claimed exemptions would in fact be borne by the agencies to whom it had been assigned by Congress.

The court took its cue from a portion of the Supreme Court's Mink opinion that was not overruled by Congress the portion discussing how a court should proceed when there is a factual dispute concerning the nature of the materials being withheld. [11] "Expanding" on the Supreme Court's "outline," the court established the following procedures: (1) A requirement that the agency submit a "relatively detailed analysis (of the material withheld) in manageable segments." "Conclusory and generalized allegations of exemptions" would no longer be accepted by reviewing courts. *157 U.S.App.D.C. at 346, 484 F.2d at 826*. (2) "An indexing system (that) would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." [*1192] *Id. 157 U.S.App.D.C. at 347, 484 F.2d at 827*. This index would allow the district court and opposing counsel to locate specific areas of dispute for further examination and would be an indispensible aid to the court of appeals reviewing [**12] the district court's decision. (3) "Adequate adversary testing" would be ensured by opposing counsel's access to the information included in the agency's detailed and indexed justification and by In camera inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous. *Id. 157 U.S.App.D.C. at 348, 484 F.2d at 828*. [12]

11 See *EPA v. Mink, 410 U.S. at 92-94, 93 S. Ct. at 838-839*. At the time this court decided Vaughn Congress had not yet enacted the 1974 amendments to the FOIA, and both aspects of the Mink case were still good law.

12 A remaining problem noted by the court in Vaughn the failure of the district court's opinion to reveal the court's reasoning was dealt with in *Schwartz v. IRS, 167 U.S.App.D.C. 301, 305, 511 F.2d 1303, 1307 (1975)*. Schwartz held that the district court had abused its discretion by not granting a plaintiff/appellant's request for a clarification of the legal grounds of its opinion affirming the agency's refusal to disclose information sought under the FOIA. See also *Fisher v. Renegotiation Board, 153 U.S.App.D.C. 398, 401, 473 F.2d 109, 112 (1972)*; *Bristol-Meyers Co. v. FTC, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938*, Cert. denied, *400 U.S. 824, 91 S. Ct. 46, 27 L. Ed. 2d 52 (1970)*; *Ackerly v. Ley, 137 U.S.App.D.C. 133, 138-39, 420 F.2d 1336, 1341-42 (1969)*.

[**13] In proposing the 1974 amendments, the Senate Committee outlined the ruling in Vaughn and added, "The committee supports this approach. . . ." [13]

13 S.Rep. No. 93-854, 93d Cong., 2d Sess. 15 (1974).

The judicial function as emphasized by 1974 amendments

In some of the decisions involving national security issues, there has been confusion about the nature of the evidentiary burdens and the scope of the district judge's discretion. This uncertainty is due to a misunderstanding of the legislative history of the 1974 amendments. [14] There were differences in 1974 between the Senate Committee and the House, between the Senate and its Committee, and between the Legislative and Executive

Branches. For an authoritative exposition of the purpose and effect of the 1974 amendments, it suffices for present purposes to quote a few key paragraphs of the Conference Committee report: [15]

> 14 The original decision in *Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977)*, contained views from the legislative history on the scope and methods of review in national security cases that had been expressly rejected in the actual statute passed over President Ford's veto. See *Weissman v. CIA, 565 F.2d 692*, D.C.Cir. decided 1977, slip op. at 10-11 & n.10. The opinion was corrected by amendment. See Order, D.C.Cir. No. 76-1566, April 4, 1977. Unfortunately, some courts, including the district court in this case, relied on the original version of Weissman before the amendments were published.
>
> The original opinion in Weissman stated that Congress had recognized the lack of judicial expertise by indicating "that the court was not to substitute its judgment for that of the agency." *Weissman v. CIA, supra*, slip op. at 10 (preamendment version). In fact, Congress expressly refused to approve such deference.
>
> In *Bell v. United States, 563 F.2d 484 (1st Cir. 1977)*, the First Circuit relied in part on a portion of a Senate Report, S.Rep. No. 93-854, 93d Cong., 2d Sess. 16 (1974), that describes a provision in the Senate Bill as reported from committee that was later deleted on the floor of the Senate because it was considered too deferential to the agencies. To the extent that any language in Bell is inconsistent with the approach outlined in this opinion, we must respectfully decline to depart from our understanding of the mandate of Congress.
>
> The result in Bell may be justified on the particular circumstances of that case. It was a suit to release over 500,000 documents gathered by the Allied Intelligence Service during World War II under the ULTRA program. The Secretary of Defense had exempted these documents from the automatic declassification schedule pending completion of a specific program designed to review individually the classification of all the documents by 1980.

[**14]

> 15 S.Rep. No. 93-1200, 93d Cong., 2d Sess. 9, 12 (1974), U.S.Code Cong. & Admin.News 1974, pp. 6267, 6287, 6290.

> The conference substitute follows the Senate amendment, providing that in determining De novo whether agency records have been properly withheld, the court may examine records In camera in making its determination under any of the nine categories of exemptions under *section 552(b)* of the law. In *Environmental Protection Agency v. Mink, et al.,* [*1193] *410 U.S. 73, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*, the Supreme Court ruled that In camera inspection of documents withheld under *section 552(b)(1)* of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such In camera examination at the discretion of the court. While In camera examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders In camera inspection, the Government should be given the opportunity [**15] to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.
>
> When linked with the authority conferred upon the Federal courts in this conference substitute for In camera examination of contested records as part of their De novo determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al., supra*, with respect to In camera review of classified documents.

> However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making De novo determinations in *section 552(b)(1)* cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

The legislative history underscores that the intent of Congress regarding de novo review [**16] stood in contrast to, and was a rejection of, the alternative suggestion proposed by the Administration and supported by some Senators: that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document. [16] In proposing a "reasonable basis" standard, the Administration and supporting legislators argued that de novo responsibility and In camera inspection could not properly be assigned to judges, in part because of logistical problems, and in part because of their lack of relevant experience and meaningful appreciation of the implications of the material involved. [17] Those who prevailed in [*1194] the legislature both resisted the Administration proposal on first consideration and voted to override President Ford's veto of the bill containing the provision for de novo review and In camera inspection. They stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security. [18] They emphasized that in reaching [**17] a de novo determination the judge would accord substantial weight to detailed agency affidavits and take into account that the executive had "unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record." [19]

16 See, e. g., Message from President Gerald R. Ford Vetoing H.R. 12471, H.Doc. No. 93-383, 93d Cong., 2d Sess. (1974):

> As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles, and give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.
>
> I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an In camera examination of the document.

[**18]

17 See, e. g., 2 Freedom of Information, Executive Privilege, Secrecy in Government: Hearings before the Subcomm. on Administrative Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. 218-220 (1973) (testimony of Attorney General Richardson); letter from Malcolm D. Hawk, Acting Assistant Attorney General, to Hon. Chet Holifield, Chairman, House Comm. on Governmental Operations, Feb. 20, 1974, Reprinted in Staffs of Senate Comm. on the Judiciary and House Comm. on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents (Comm. Print 1975) (hereinafter cited as Source Book); letter from L. Niederlehner, Acting General Counsel, Department of Defense, to Hon. Chet Holifield, Feb. 20, 1974, Reprinted in Source Book, Supra, at 143-144.

18 See 120 Cong.Rec. 36870 (1974) (Sen. Muskie):

> As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would

substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

Id. at 17030 (Sen. Ervin):

The court ought not to be required to find anything except that the matter affects or does not affect national security. If a judge does not have enough sense to make that kind of decision, he ought not to be a judge. We ought not to leave that decision to be made by the CIA or any other branch of the Government.

Id. at 17028 (Sen. Chiles):

If, as the Senator from Mississippi said, there is a reason, why are judges going to be so unreasonable? We say that four-star generals or admirals will be reasonable but a Federal district judge is going to be unreasonable. I cannot buy that argument, especially when I see that general or that admiral has participated in covering up a mistake, and the Federal judge sits there without a bias one way or another. I want him to be able to decide without blinders or having to go in one direction.

[**19]

19 S.Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974), U.S.Code Cong. & Admin.News 1974, p. 6290.

The salient characteristics of de novo review in the national security context can be summarized as follows: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing this, it must first "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." [20] (4) Whether and how to conduct an In camera examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. [21] To these observations should be [*1195] added an excerpt from our opinion in Weissman (as revised): "If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated." [22]

20 Id.

[**20]

21 The Senate Committee Report on the 1974 amendments emphasizes the procedural flexibility available to a district judge.

In making this (exemption) determination, the court must First attempt to resolve the matter "on the basis of affidavits and other information submitted by the parties." If it does decide to examine the contested records in camera, the court may consider further argument by both parties, may take further expert testimony, and may in some cases of a particularly sensitive nature decide to entertain an ex parte showing by the government.

S.Rep. No. 93-854, 93d Cong., 2d Sess. 15-16 (1974) (emphasis added).

During the House debates that led to an override of President Ford's veto of the 1974 amendments, Representative William Moorhead, the cognizant Subcommittee Chairman, made the following observation on available court procedure under the bill.

(The court) can discuss the affidavit with Government attorneys in camera, or employ other similar means to obtain sufficient information needed to make a judgment. Only if such means cannot provide a clear justification for the classification markings would the court order an in camera inspection of the document itself. If the examination and subsequent discussions of the affidavit from the agency indicate that the classification assigned to the particular document is reasonable and proper under the Executive order and implementing regulations, the court would clearly rule for the Government and order the requested document withheld from the plaintiff. But if the examination and subsequent discussions of the affidavit from the agency could not resolve the issue, the court could then order the production of the document and examine it in camera to determine if the classification marking

was properly authorized.

Source Book, note 17 Supra, at 405-06.

[**21]

22 *Weissman v. CIA, 184 U.S.App.D.C. 117, 122, 565 F.2d 692, 697 (1977)*. Whether there is a "sufficient description" to establish the exemptions is, of course, a key issue.

In part, the foregoing considerations were developed for Exemption 1. They also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests.

In camera inspection

In the case at bar, the district court observed: "With respect to documents withheld under exemption 3, in camera inspection is seldom, if ever, necessary or appropriate." [23] The legislative history does not support that conclusion. Congress left the matter of In camera inspection to the discretion of the district court, without any indication of the extent of its proper use. The ultimate criterion is simply this: Whether the district judge believes that In camera inspection is needed in order to make a responsible de novo determination on the claims of exemption.

23 Memorandum Opinion at 4.

[**22] In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt." When an agency affidavit or other showing is specific, there may be no need for In camera inspection.

On the other hand, when the district judge is concerned that he is not prepared to make a responsible de novo determination in the absence of In camera inspection, he may proceed In camera without anxiety that the law interposes an extraordinary hurdle to such inspection. The government would presumably prefer In camera inspection to a ruling that the case stands in doubt or equipoise and hence must be resolved by a ruling that the government has not sustained its burden.

The issue of bad faith merits a word. The memorandum of the district court noted that there was no evidence of bad faith on the part of the Agency's officials. Where the record contains a showing of bad faith, the district court would likely require In camera inspection. But the government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. Reasonable specificity in affidavits connotes a quality of reliability. When [**23] an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertion of claims of bad faith or misrepresentation.

In camera inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order In camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account.

III. RULINGS FOR THE CASE AT BAR

Two affidavits were executed by Eloise Page, Chief, Operations Staff of the Directorate of Operations of the CIA. The first is a general statement about the dangers at large of disclosure, background and local color rather than any attempt to link these concerns with specific documents. It is of little aid in the task of deciding whether the nine specific documents now sought come within the claimed exemptions.

[*1196] Documents 2-6

Page's second affidavit, set out in the appendix, purports to link [**24] specific exemptions to specific documents. A glaring defect is that it lumps the exemptions together and fails to identify whether different exemptions are claimed as to different parts of each document. The statement for document 2 reads:

> This document is a three-page memorandum the subject of which is "Rennie Davis and Friends." It is essentially the debriefing report of a sensitive intelligence source. The majority of the information concerns individuals other than the plaintiffs.
>
> This document has been denied in its entirety, primarily to protect intelligence sources and methods since the release of any meaningful portion would disclose the identity of the source, and further, to

> protect cryptonyms, names of CIA personnel and CIA organizational data. Thus exemptions (b)(1), (b)(3) and (b)(6) apply.

The statement for documents 3, 4 and 5 reads:

> These documents are one-page cables from an overseas CIA installation which advise Headquarters of the receipt of documents and information from a foreign intelligence service and which concern the plaintiffs and other individuals.
>
> They are denied in their entirety pursuant to Freedom of Information Act exemptions [**25] (b)(1), (b)(3) and (b)(6).

In reviewing the judgment on documents 2-6, we encounter a complex of difficulties. Exemption 3 permits a withholding under the provisions of *50 U.S.C. § 403g (1970)*, which specifies that "in order further to implement the proviso of *section 403(d)(3)* of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from . . . the provisions of any . . . law which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency . . . ." *Goland v. CIA,607 F.2d 339*, slip op. at 16-17 (D.C.Cir., 1978); (1978); Cf. *Weissman v. CIA, 184 U.S.App.D.C. 117, 119, 565 F.2d 692, 694 (1977)*. However, in Goland, the affidavit demonstrated "in nonconclusory and detailed fashion" (slip op. at 21), that the deleted material disclosed intelligence sources and methods. The CIA's affidavit as to documents 2-6 is not a specific presentation such as that in Goland. The statement that the release of any meaningful portion [**26] of document 2 would disclose the identity of a "sensitive intelligence source" has some particularity, but it runs into a failure to address specifically whether the disclosure of substantive information may be possible without the disclosure of source, and if not why not.

As to Exemption 1, the information that document 2 relates to "Rennie Davis and Friends," might be some indication that it was reasonable for the official involved to have classified it in the first instance. But that mere reference is not enough information to permit a judge to make an independent ruling that the classification was proper.

Finally, what overhangs and in a sense pervades this case, more vivid as to document 2 but implicit as to the other documents, is the real possibility that what animates the CIA's broadsword withholding is the fact that the documents contain commentary on a group of persons, with the CIA's position being that Exemption 6 prohibits any revelation from its files about individuals other than appellants. We discuss Exemption 6 further below. It suffices here to say that we do not have any analysis of Exemption 6 by the district court, and the problem is complex.

Overall, we have [**27] a critical problem of segregability, that some portion of the document(s) may be exempt, but that the FOIA might contemplate disclosure in part. The difficulty arises from the CIA's proffer of multiple exemptions for each withheld document, and is maintained by the district court's conclusory rulings.

[*1197] The reviewing court should not be required to speculate on the precise relationship between each exemption claim and the contents of the specific document. The district judge is not called upon to take on the role of censor going through a line-by-line analysis for each document and removing particular words. If, however, the problematic material appears in a particular place or places that can be manageably identified, indexing is not to be bypassed because it is something of a chore.

Documents 7-9

Page's affidavit describes document 7 as follows:

> Document No. 7 is a three-page cable from CIA Headquarters to the Director, FBI, which provides information on an individual under investigation for the bombing of the United States Capitol on March 1, 1971. It is the report of a highly sensitive, foreign intelligence source.

Page's affidavit identifies documents [**28] 8 and 9 as intra-agency cables concerning the same matter. It

continues: "Each of these documents contains a single, peripheral and non-substantive reference to the Plaintiff Schaap. In each case, that portion has been provided to the plaintiff."

Documents 7-9 identify a particular subject: information concerning an individual under investigation for the 1971 bombing of the Capitol. There are manifest disclosure problems under Exemption 6 in view of the privacy interests of that individual, as well as under Exemptions 1 and 3. However, the CIA affidavit does not specifically claim that all of the documents (7-9) are exempt under Exemption 6, and that there are no other portions that may be reasonably segregable. And the district court's ruling was solely on Exemptions 1 and 3.

Apparently the only direct reference to Schaap in these three documents is the material that CIA has furnished to him, a bare mention of his name and address in document 7, plus the information in documents 8 and 9 that he is a partner in a law firm that has represented the Black Panther party.

The CIA does not take the position that the furnishing of these references is fully responsive to Schaap's request. [**29] It has properly refrained from an approach whereby FOIA applications are read technically and narrowly, like a common law pleading.

However, the CIA again has not been responsive to the requirement that it provide specific affidavits that segregate each of its claims. The "exemption by document" approach has been rejected by our opinions, notably *Vaughn, 157 U.S.App.D.C. at 345-46, 484 F.2d at 825-26*, and *Mead Data Central, Inc. v. Dept. of the Air Force, 184 U.S.App.D.C. 350, 367-70, 566 F.2d 242, 259-62 (1977)*. The agency may not rely on that approach even in a national security context. The agency must provide a reasonable segregation as to the portions of the document that are involved in each of its claims for exemption. As indicated in Mead, it is important that the affidavit indicate the extent to which each document would be claimed as exempt under each of the exemptions. The courts cannot meaningfully exercise their responsibility under the FOIA unless the government affidavits are as specific as possible.

Document 10

The withholding of document 10 cannot be disposed of on the basis of Exemptions 1 and 3, as the district court held. The government [**30] concedes that some of the information in that document is not within the ambit of those exemptions. It argues instead that there is justification for withholding under Exemptions 6 and 7. However, the district court did not rule on these exemptions. We think that their applicability should be considered in the first instance by the district court and remand for that purpose.

The applicability of Exemption 6 depends, as the Supreme Court, held in *Department of Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)*, on a particularized balancing of privacy interests and the " "public's right to governmental information.' " *Id. at 372, 96 S. Ct. 1592* (quoting [*1198] S.Rep. No. 813 89th Cong., 1st Sess. 9 (1965)). An Exemption 6 claim was raised by the CIA for all the documents sought by plaintiffs and its position was set forth in a paragraph of the first Page affidavit. [24] The first sentence of that paragraph suggests that the CIA conducts its own balancing test to determine whether the disclosure of the names of others would involve a "clearly unwarranted invasion of privacy." The remainder of the paragraph tends to indicate that [**31] the CIA has a broad policy that prohibits disclosures from CIA files of references to individuals other than the applicant as an invasion of privacy. The point is made that many of these references are innocent yet would reflect disparagingly on the individuals due to the climate of opinion concerning the CIA and its activities. This application of Exemption 6 would be more far-reaching than our conclusion that privacy interests protected by Exemption 6 are brought into play by a stigmatizing disclosure of another individual as linked to a bombing of the Capitol.

> 24 Appendix at 39: "Information concerning individuals other than the plaintiffs in these documents was withheld in those instances in which release of the information would result in a clearly unwarranted invasion of the personal privacy of persons named in the document. The fact that an individual is mentioned in a record maintained by the CIA, or is the subject of a CIA file, is easily misunderstood by the general public although the inclusion of such a person's name in CIA records does not in any way necessarily imply that such individual is viewed in any negative context. Such record may be created because an individual may be a CIA employee applicant, furnished information to the CIA and

> was thus an intelligence source or a potential intelligence source, etc. Accordingly, and particularly in view of the current publicity and controversy surrounding the CIA, the identity of individuals who are subjects of CIA files or are mentioned in CIA records is not disclosed under the authority of exemption (b)(6) of the Freedom of Information Act on the grounds that disclosure would constitute a clearly unwarranted invasion of an individual's personal privacy."

[**32] The problem requires a balancing analysis. Before the district court considers the matter on remand, it will be able to obtain clarification as to CIA policy and approach.

We remand for reconsideration of the CIA's exemption claims in light of clarification of the affidavits and for further proceedings not inconsistent with this opinion.

So ordered.

APPENDIX

SUPPLEMENTAL AFFIDAVIT

Eloise Page, being first duly sworn, deposes and says:

1. I am Chief, Operations Staff of the Directorate of Operations of the Central Intelligence Agency (CIA). I have personal knowledge of the facts set forth herein, which were obtained by me in my official capacity.

2. Pursuant to the above-captioned litigation, I have again examined documents number 1 through 10 and make the following additional statements as to their contents, the information withheld and the reasons therefore.

> 1 This document is a one-page dispatch from an overseas CIA installation to Headquarters. It transmitted a United States Army report which has been referred to the Department of the Army for their action and direct response to the plaintiff.
>
> This document has been provided to the plaintiffs with only minor [**33] deletions. The material deleted includes the location of CIA overseas installations, cryptonyms, a pseudonym and CIA organizational data. Thus exemptions (b)(1) and (b)(3) apply.
>
> 2 This document is a three-page memorandum the subject of which is "Rennie Davis and Friends." It is essentially the debriefing report of a sensitive intelligence source. The majority of the information concerns individuals other than the plaintiffs.
>
> This document has been denied in its entirety, primarily to protect intelligence sources and methods since the release of any meaningful portion would disclose [*1199] the identity of the source, and further, to protect cryptonyms, names of CIA personnel and CIA organizational data. Thus exemptions (b)(1), (b)(3) and (b)(6) apply.
>
> 3, 4, 5 These documents are one-page cables from an overseas CIA installation which advise Headquarters of the receipt of documents and information from a foreign intelligence service and which concern the plaintiffs and other individuals.
>
> They are denied in their entirety pursuant to Freedom of Information Act exemptions (b)(1), (b)(3) and (b)(6).
>
> 6 This document is a one-page [**34] dispatch which transmits to Headquarters the above-described matter received from a foreign intelligence service.
>
> It is denied in its entirety pursuant to Freedom of Information Act exemptions (b)(1), (b)(3) and (b)(6).
>
> 7, 8, 9 Document No. 7 is a three-page cable from CIA Headquarters to the Director, FBI, which provides information on an individual under investigation for the bombing of the United States Capitol

on March 1, 1971. It is the report of a high sensitive, foreign intelligence source.

Document No. 8 is a two-page cable from an overseas CIA installation to ICA Headquarters concerning the same matter.

Document No. 9 is a two-page cable from CIA headquarters to the same overseas CIA installation concerning the same matter.

Each of these documents contains a single, peripheral and non-substantive reference to the Plaintiff Schaap. In each case, that portion has been provided to the plaintiff. The remainder of each document may not be released pursuant to Freedom of Information Act exemptions (b)(1), (b)(3) and (b)(6).

10 This document consists of a one-page memorandum which transmits a copy of a notebook containing [**35] a list of names. This list was secured by the United States Customs Service from an individual at a border checkpoint in a search incident to his arrest for importation of narcotics into the United States. The memorandum was provided to the Plaintiff Schaap with only minor deletions (names of CIA employees, organizational data concerning the CIA, name of a United States Customs Agent). Only that portion of the list containing plaintiff's name was provided. Thus exemptions (b)(1), (b)(3), (b)(6) and (b)(7)(F) apply.

/s/ Eloise Page

ELOISE PAGE

CONCUR BY: WRIGHT

CONCUR

J. SKELLY WRIGHT, Chief Judge, concurring in the remand: [1]

1 I concur in the court's conclusions (1) that the CIA's affidavits in support of its claims of exemption are ambiguous and unsatisfactory; (2) that the District Court erred in recognizing presumptions against In camera examination (a) in national security cases and (b) in cases involving claims of Exemption 3; and (3) that the case must therefore be remanded to the District Court for further proceedings consistent with the mandate of Congress and the precedents of this court. The Per curiam's changes, in the light of experience, in the advice given the District Courts in earlier cases, such as *Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977)*, are obvious and significant. Nevertheless, I am disturbed by the terse and at times conclusory fashion in which these important conclusions are rendered. The Per curiam opinion fails, in my view, to address adequately the arguments that agencies have used and will no doubt continue to use in their attempts to undermine the positions the court now embraces. Furthermore, the court's discussion of the legislative history leaves out much of the information that District Courts should have before them when they structure their De novo reviews of FOIA claims. For these reasons, and because of the importance of the issues involved, I have decided to set forth in full my views on them and on their application to the facts of this case.

[**36] In passing the Freedom of Information Act (FOIA) the Congress made a national [*1200] commitment to public scrutiny of the federal departments and agencies, and it entrusted the federal courts with implementation of this commitment. *Department of the Air Force v. Rose, 425 U.S. 352, 360-362, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)*. In authorizing but nine exemptions from public disclosure of bureaucratic records, Congress made clear that the accent must be on disclosure, not suppression; that the exemptions should be narrowly construed to prevent subversion of the national commitment to public disclosure. [2]

2 Under the FOIA Congress ultimately decides what kinds of information may be withheld and the courts ultimately decide whether the information sought in a particular case fits the criteria laid down by Congress. See text and notes at notes 10-13 Infra.

Nevertheless, the federal bureaucracy has been extremely reluctant to embrace the principle of public disclosure on which the FOIA is [**37] founded and, with significant help from the federal courts interpreting the exemptions broadly, not narrowly, has succeeded in frustrating much of its implementation so much so that Congress has repeatedly overruled court decisions restricting disclosure by amending the Act. [3] It is against this legislative, judicial, and bureaucratic background, which will be outlined in detail herein, that I consider the issues which this case presents.

3 See Part I-A Infra.

This case involves an area in which courts have been especially cautious in assuming the supervisory role assigned them by Congress: requests for information whose release would allegedly endanger national security. Appellants Ellen Ray and William Schaap, stating individually their belief that they might be among "the approximately 10,000 American civilians on whom (the Central Intelligence Agency (CIA)) had concededly maintained files," sought from the CIA "any file you may have on me." [4] The Agency responded that although it did not have a "file" [**38] on either appellant it had located several documents that mentioned each of them. The CIA refused to release these documents, however, claiming they were exempt from disclosure under Exemptions 1 and 3 of the FOIA, *5 U.S.C. §§ 552(b)(1), (b)(3) (1976)*, because some were classified pursuant to Executive order and others would reveal intelligence sources and methods. [5] The initial denial of appellants' requests was affirmed on appeal within the CIA, primarily on the basis of [*1201] Exemption 3. [6] Appellants then brought this suit under the FOIA to compel disclosure. *5 U.S.C. § 552(a)(4)(B) (1976)*. When forced to support its denial with detailed affidavits, [7] the CIA revealed that it controlled 10 documents that referred to one or both appellants and released portions of five of these. The Agency continued to withhold most of the information, however, relying on Exemptions 1, 3, 6, and 7(F). [8] The CIA then moved for summary judgment on the basis of its affidavits, and appellants moved for an In camera inspection of the disputed information. Before any discovery had taken place the District Court denied appellants' motion and granted [**39] summary judgment for the CIA on the ground that all the information still being withheld was exempt from disclosure under Exemptions 1 and 3. [9] The court found it unnecessary to determine whether any other exemptions applied. Ray and Schaap then appealed to this court, challenging the grounds on which the District Court had granted summary judgment and the sufficiency of the CIA affidavits.

4 Letters from Ellen L. Ray and William H. Schaap to Angus M. Thuermer, Assistant to the Director, CIA, March 14, 1975, Joint Appendix (JA) 15, 16.

5 Letters from Robert S. Young, Freedom of Information Coordinator, CIA, to Ellen L. Ray, April 4, 1975, JA 17, and William H. Schaap, April 11, 1975, JA 18.

Exemption 1 covers matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *5 U.S.C. § 552(b)(1) (1976)*. Exemption 3 covers matters that are "specifically exempted from disclosure by statute (other than *section 552b* of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *5 U.S.C. § 552(b)(3) (1976)*. The CIA also claimed that one document relating to appellant Schaap was an interagency memorandum covered by Exemption 5, *5 U.S.C. § 552(b)(5) (1976)*.

The letter to appellant Schaap illustrates the lack of specificity in the Agency's response:

The Agency does not have a file on you. A search of various indices has located eight Agency items which appear to pertain to you. Seven of these documents, which reference your foreign travel and association with other individuals, are classified properly and/or they contain information the disclosure of which would divulge intelligence sources and methods. Therefore, they cannot be released to you in accord with exemptions (b)(1) and (b)(3) of the Freedom of Information Act. One item is an inter-agency memorandum which is exempt under (b)(3) and (b)(5).

Letter from Young to Schaap, Supra, at JA

18.

[**40]

6 Letters from John F. Blake, Chairman, CIA Information Review Committee, to Ellen L. Ray, May 16, 1975, JA 21, and William H. Schaap, May 16, 1975, JA 22. Appellants had questioned the Agency's initial response on grounds that information relating to their foreign travels or to their associations with others would be quite unlikely in their opinion to be properly classifiable or to reveal intelligence sources, and that there must be some segregable portions of the documents. Letter from Ellen L. Ray to Robert S. Young, April 9, 1975, JA 19; letter from William H. Schaap to CIA Information Review Committee, April 15, 1975, JA 20. The relevant portion of the letter to appellant Schaap reads:

> After reviewing the CIA documents involved it has been determined that neither the entire documents, nor meaningful portions of them, could be released without revealing confidential intelligence sources. We are, therefore, prohibited from releasing the documents under the provisions of section 102(d) (3) of the National Security Act of 1947. Exemption 3 of the Freedom of Information Act exempts such documents from disclosure.
>
> In addition, some of the documents are validly classified pursuant to Executive order and it has been determined that they may not be declassified at this time.
>
> One of the documents considered by the Committee pursuant to your appeal originated with another Government agency. This document is being referred to the other agency for their determination as to whether it may be released.

Letter from Blake to Schaap, Supra, at JA 22

[**41]

7 See *Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973)*. I note that appellants had to bring this suit before the Agency would provide this more detailed description of the information being withheld, and that once the description was prepared the Agency realized that there were, indeed, at least some segregable portions that could be released. See Affidavits of Robert S. Young, August 13, 1976, JA 27-30, and Eloise Page, August 13, 1976, JA 31-41, with attachments, JA 42-53 (portions released).

8 See Affidavit of Eloise Page, Supra note 7, at JA 40-41; Supplemental Affidavit of Eloise Page, September 27, 1976, JA 62-64. For texts of Exemptions 1 and 3, See note 5 Supra. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5 U.S.C. § 552(b)(6) (1976)*. Exemption 7(F) covers "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * endanger the life or physical safety of law enforcement personnel." *5 U.S.C. § 552(b)(7)(F) (1976)*.

[**42]

9 Ray v. Bush, Civil Action No. 76-0903 (D.D.C. Jan. 25, 1977), JA 65-70.

I. THE EVOLUTION OF FOIA REVIEW

In 1966 Congress amended the Administrative Procedure Act (APA) to increase disclosure of government information to the American people. [10] Congress had determined that the previous "public information" section of the APA, *5 U.S.C. § 1002 (1964)*, was "of little or no value to the [*1202] public in gaining access to records of the Federal Government" because it allowed "any Government official * * * under color of law (to) withhold almost anything from any citizen under the vague standards or, more precisely, lack of standards in (*Section 1002*)." S.Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). *Section 1002* gave the agencies broad and effectively unreviewable discretion to determine whether information should be withheld "for good cause" or "in the public interest," and Congress found that as a result "innumerable times * * * information is withheld only to cover up embarrassing mistakes or irregularities * * *." Id. at 3.

10 The Senate Report explained the purpose of the FOIA by quoting the following words of James Madison, which had also been quoted by Senator Long when he introduced one of the predecessor bills in Congress:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular

information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

S.Rep. No. 813, 89th Cong., 1st Sess. 2-3 (1965).

[**43] The Freedom of Information Act sought to remedy these defects by transferring from the agencies to Congress and the courts primary responsibility for determining whether information could be withheld. Several specific provisions accomplished this transfer: (1) agencies were required to disclose all records that did not come within one of nine specific exemptions written by Congress; [11] (2) courts were given authority to review De novo any denial of access "in order that the ultimate decision as to to the propriety of the agency's action is made by the court and (to) prevent (review) from becoming meaningless judicial sanctioning of agency discretion"; [12] and (3) in any review proceeding an agency denying disclosure, rather than enjoying a presumption of correctness, was saddled with the burden of proving that its action was proper. [13]

11 *5 U.S.C. § 552(c) (1976)*; *EPA v. Mink, 410 U.S. 73, 79, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*.

12 S.Rep. No. 813, *Supra note 10, at 8*; See *5 U.S.C. § 552(a)(3) (1970)*.

13 * * * In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. * * *

5 U.S.C. § 552(a)(3) (1970).

[**44] A. Restrictive Interpretation and Corrective Legislation: Mink And Robinson

The ambitious scheme established by the FOIA was not without its difficulties. The agencies were quick to discover ambiguities in the language of the nine exclusive exemptions, and courts have often proved too sensitive to the potential burdens of De novo review and to their alleged lack of expertise. Indeed, in two of its first FOIA cases the Supreme Court interpreted the two exemptions relied on by the District Court in this case in ways that restricted the reviewing court's role and preserved the discretion of the withholding agency. In each case Congress soon reversed the Court's interpretation by legislation.

First, in *EPA v. Mink, 410 U.S. 73, 81-84, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973)*, the Court held that when an agency relied on Exemption 1, which at that time covered matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," *5 U.S.C. § 552(b)(1) (1970)*, a reviewing court could affirm the nondisclosure solely on the basis of an agency affidavit stating that the requested documents had been [**45] duly classified pursuant to Executive order. [14] According to the Court, "Congress chose to follow the Executive's determination in these matters," and In camera inspection to test the propriety of the classification was neither authorized nor permitted. *410 U.S. at 81, 93 S. Ct. at 833*. Within two years Congress [*1203] overrode a presidential veto to amend the FOIA with the express purpose of overruling this aspect of the Mink case. [15] Exemption 1 was modified to exempt only matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." *5 U.S.C. § 552(b)(1) (1976)*. Furthermore, the language describing the role of a reviewing court considering Any claim of exemption was amended to provide that "the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on [**46] the agency to sustain its action." *5 U.S.C. § 552(a)(4)(B) (1976)*. The Conference Report accompanying the amendments explained that "(w)hile In camera examination need not be automatic, In many situations it will plainly be necessary and appropriate." S.Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974) (emphasis added).

14 Mink involved a request for documents prepared by various government officials for the President in connection with a scheduled nuclear test. The documents were withheld under Exemptions 1 and 5. Those seeking the information made no challenge to the government's claim that proper classification Procedures had been followed, *410 U.S. at 84, 93 S. Ct. 827*, and the Court held that the Substantive propriety of the classification had been committed by Congress to Executive discretion. The Court therefore reversed the order of the Court of Appeals that the District Court examine the documents In camera and release any segregable

nonsecret portions. With regard to Exemption 5 the Court held that a reviewing court should allow an agency the opportunity to prove by detailed affidavits and other evidence that material withheld is exempt before requiring In camera inspection. The Court accordingly modified the "unnecessarily rigid" remand ordered by the Court of Appeals in order to provide the government a chance to meet its burden by other methods before the court resorted to In camera inspection. *Id. at 92-93, 93 S. Ct. 827.*

[**47]

15 S.Rep. No. 1200, 93d Cong., 2d Sess. 11-12 (1974); See Pub.L. 93-502, §§ 1-3, 88 Stat. 1561 (1974). See text and notes at notes 26-37 Infra.

The second Supreme Court case involved Exemption 3, which originally exempted matters "specifically exempted from disclosure by statute." *5 U.S.C. § 552(b)(3) (1970)*. In *FAA Administrator v. Robertson, 422 U.S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975)*, the Court held that a statute could "specifically exempt" matters from disclosure even if the statute gave an agency broad discretion to determine whether the information should be withheld. [16] As noted above, congressional concern about excessive agency discretion to withhold information had been a prime stimulus to enactment of the FOIA. Alarmed by the threat to the purposes of the FOIA created by the Robertson decision, Congress acted within 15 months to overrule the case by legislation. [17] Exemption 3 now authorizes nondisclosure of matters "specifically exempted from disclosure by statute * * * Provided that such statute (A) requires that the matters be [**48] withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *5 U.S.C. § 552(b)(3) (1976)* (emphasis added).

16 The statute relied on by the government in Robertson empowered the Administrator or the Board of the Federal Aviation Administration to withhold agency records if "any person" made a written objection to disclosure and "when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public." 49 U.S.C. § 1504 (1976).

17 House Conference Report No. 94-1441, 94th Cong., 2d Sess. 25 (1976); See Government in the Sunshine Act, Pub.L. No. 94-409, § 5(b), 90 Stat. 1247 (1976).

B. Creative Judicial Responses: Vaughn v. Rosen

Not all judicial decisions involving the FOIA have suffered from the restrictive attitude apparent in the aspects [**49] of the Mink and Robertson cases overruled by Congress. [18] Courts have sometimes shown a willingness to assume the initiative in developing creative solutions to the problems associated with De novo review of refusals to disclose information. In *Vaughn v. Rosen, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973)*, for example, this court acknowledged the difficulty of reviewing the record before it, but then attempted to do something to correct the situation. The Civil Service Commission had withheld documents totalling "many hundreds of pages" and had supported its action with an affidavit [*1204] stating only in general terms that the material was exempt under three exemptions to the FOIA. [19] The appellants challenged not only the claim that the exemptions covered the material withheld but also the agency's description of the nature of the material. De novo review under these circumstances would have required an enormous expenditure of judicial energy, not only to inspect all the material In camera, but to determine which portions were exempt under which exemptions. *157 U.S.App.D.C. at 345, 484 F.2d at 825*. The District Court had granted summary judgment in [**50] favor of the agency, but had not stated any grounds for its action, thus leaving the Court of Appeals with nothing to review except the conclusory affidavit and the withheld materials.

18 In *Department of the Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)*, the Supreme Court interpreted Exemptions 2 and 6 in a way that cut back on expansive interpretations of these exemptions and encouraged fuller disclosure. Congress expressly approved the Court's action in Rose with regard to Exemption 6 when it passed the Government in the Sunshine Act later in the year. See House Conference Report No. 94-1441, *Supra note 17, at 15*.

19 Vaughn was a suit by a law professor seeking disclosure of reports by the Bureau of Personnel Management of the Civil Service Commission. In defense of its refusal to disclose the information the CSC had submitted to the

District Court an affidavit setting "forth in conclusory terms the Director's opinion (based on Exemptions 2, 5, and 6) that the evaluations were not subject to disclosure under the FOIA." *Vaughn v. Rosen, 157 U.S.App.D.C. 340, 343, 484 F.2d 820, 823 (1973)*.

[**51] This court noted the irony that, while the FOIA placed an "overwhelming emphasis upon disclosure," the facts relevant to judicial review of nondisclosure were totally within the control of the party refusing disclosure. *Id., 157 U.S.App.D.C. at 343, 484 F.2d at 823*. Even an In camera inspection by the court is an Ex parte proceeding conducted without the adversarial assistance of the party seeking disclosure. [20] Thus, although the statute specified that the Agencies were to bear the burden of sustaining their refusals to disclose requested materials, the greatest burden was in practice being placed on the Courts.

20 *Id., 157 U.S.App.D.C. at 345, 484 F.2d at 825*. Commentators have also pointed out the disadvantages of In camera inspection as a technique for reviewing denials of FOIA requests. See, e. g., Comment, In Camera Inspections Under the Freedom of Information Act, 41 U.Chi.L.Rev. 557, 559-561 (1974) (disadvantages include: no opportunity for party seeking information to present informed interpretation of the facts, a defect that is aggravated when a trial court's decision is appealed; lack of precedential value of decisions based on In camera inspection; and burdens on courts and agencies).

[**52] To bring practice more into line with the statutory mandate, this court initiated procedures designed to shift the burden of justifying nondisclosure back to the agencies and to give the party seeking disclosure a greater chance to participate in the review proceeding. The court took its cue from a portion of the Supreme Court's Mink opinion that was not overruled by Congress the portion discussing how a court should proceed when there was a factual dispute concerning the nature of the materials being withheld. [21] "Expanding" on the Supreme Court's "outline," the court established the following procedures: (1) A requirement that the agency submit a "relatively detailed analysis (of the material withheld) in manageable segments." "Conclusory and generalized allegations of exemptions" would no longer be accepted by reviewing courts, *157 U.S.App.D.C. at 346, 484 F.2d at 826*. (2) "An indexing system (that) would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." *Id., 157 U.S.App.D.C. at 347, 484 F.2d at 827*. This index would allow the District Court and opposing counsel [**53] to locate specific areas of dispute for further examination and would be an indispensable aid to the Court of Appeals reviewing the District Court's decision. (3) "Adequate adversary testing," to be insured by opposing counsel's having the information included in the agency's detailed and indexed justification and by In camera inspection, guided by the detailed affidavit and using special masters appointed by the court when the burden was especially [*1205] onerous. *Id., 157 U.S.App.D.C. at 348, 484 F.2d at 828*. [22]

21 See *EPA v. Mink, supra* note 11, *410 U.S. at 92-94, 93 S. Ct. at 835*; note 13 Supra. At the time this court decided Vaughn Congress had not yet enacted the 1974 amendments to the FOIA, and both aspects of the Mink case were still good law.

22 A remaining problem noted by the court in Vaughn the failure of the District Court's opinion to reveal the court's reasoning was dealt with in *Schwartz v. IRS, 167 U.S.App.D.C. 301, 305, 511 F.2d 1303, 1307 (1975)*. Recognizing the particularly difficult position of FOIA plaintiffs, this court held in Schwartz that the District Court had abused its discretion by not granting a plaintiff/appellant's request for a clarification of the legal grounds of its opinion affirming the agency's refusal to disclose information sought under the FOIA. See also *Fisher v. Renegotiation Board, 153 U.S.App.D.C. 398, 402, 473 F.2d 109, 113 (1972)*; *Bristol-Myers Co. v. FTC, 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938 (1970)*; *Ackerly v. Ley, 137 U.S.App.D.C. 133, 138-139, 420 F.2d 1336, 1341-1342 (1969)*.

[**54] The Vaughn procedures were an innovative step toward making De novo review a reality, but even this court has recognized that they are no panacea. See, e. g., *Cuneo v. Schlesinger, 157 U.S.App.D.C. 368, 374, 484 F.2d 1086, 1092 (1973)* (Bazelon, J., concurring). Commentators generally have applauded the decision, [23] but some have raised troublesome questions about whether the new procedures would be enough to achieve the "adversariness" and real De novo review required by the FOIA. [24]

23 See, e. g., Note, The Investigatory Files Exemption to the FOIA: The D.C. Circuit Abandons Bristol-Myers, 42 Geo.Wash.L.Rev. 869, 880-884, 890-893 (1974); Comment, Toward True Freedom of Information, 122 U.Pa.L.Rev. 731 (1974).

24 The Vaughn procedures do not provide that the plaintiff or his counsel may analyze the disputed documents a step that seems essential if the plaintiff is to challenge the accuracy of the government's characterization of the documents in true "adversary" fashion. See 87 Harv.L.Rev. 854, 858-859 (1974). Some FOIA plaintiffs have asked that their counsel and/or experts of their choosing be granted access to the disputed material under a protective court order. See Hayden v. CIA, Civil Action No. 76-284 (D.D.C. Oct. 8, 1976). This court has approved an analogous procedure in a special context, See *United States v. AT&T, 185 U.S.App.D.C. 254, 266, 567 F.2d 121, 133 (1977)*, and Congress has also approved this procedure "whenever possible." See text and note at note 50 Infra.

[**55] C. Special Problems in Cases Involving National Security

While achieving the goals of the FOIA may well demand more than Vaughn requires, implementing even the minimal procedures outlined in Vaughn has proven difficult in cases that, like the one before us, involved claims of danger to national security. Persistent controversy has surrounded the question whether FOIA cases involving national security claims should be treated differently from other FOIA cases. Arguments have focused on the proper standard of judicial review and on the use of certain techniques primarily In camera inspection in the review process.

The Supreme Court sought to resolve this controversy when it held in Mink that courts could not question the substantive propriety of agency classifications in suits involving refusals to disclose based on Exemption 1 and that In camera inspection was therefore improper in such cases. [25] In response to the Mink case, however, Congress specifically considered the standard of review and the propriety of In camera inspection in cases involving national security issues (primarily Exemption 1 cases) when it developed and passed the 1974 FOIA amendments. Provisions concerning [**56] these issues were a major focus not only of congressional debate on these amendments, but also of President Ford's veto message. As noted above, [26] Congress overrode the President's veto and expressly provided for De novo review and permissive In camera examination in All FOIA cases, including those involving national security claims, thus rejecting the Nixon and Ford Administrations' attempts to salvage the Mink case's special limits on the scope and methods of review in national security cases. Nevertheless, some recent court decisions reveal a confusion over several passages in the legislative history of the 1974 amendments, [27] [*1206] and a somewhat detailed examination of the legislative history is therefore in order to clarify congressional intent.

25 See text and note at note 14 Supra.

26 See text and note at note 15 Supra.

27 This confusion was evident in this court's own decision in *Weissman v. CIA, supra* note 1. The original decision in that case contained views from the legislative history on the scope and methods of review in national security FOIA cases that had been expressly rejected in the actual statute passed over President Ford's veto. See *Weissman v. CIA, 565 F.2d 692*, D.C. Cir. 1977, slip op. at 10-11 & n.10. The opinion had to be amended to correct this confusion. See Order, D.C. Cir. No. 76-1566, April 4, 1977. Unfortunately, some courts, including the District Court in this case, relied on the original version of Weissman before the amendments were published. See text and note at note 82 Infra. The opinion of the First Circuit in *Bell v. United States, 563 F.2d 484 (1st Cir. 1977)*, also indicates some confusion over the legislative history of the 1974 amendments. The First Circuit relied heavily on a portion of Senate Report No. 93-854, 93d Cong., 2d Sess. 16 (1974), that describes a provision in the Senate bill as reported from committee that was later deleted on the floor of the Senate because it was considered too deferential to the agencies. See *563 F.2d at 487*; text and notes at notes 31-33 Infra. The result in Bell may be justified by the particular circumstances of that case (a suit to release over 500,000 documents gathered by the Allied Intelligence Service in World War II under the ULTRA program which the Secretary of Defense had exempted from the automatic declassification

> schedule pending completion of a specific program designed to review individually the classifications of all the documents by 1980). To the extent that any language in Bell is inconsistent with the approach outlined in this opinion, I must respectfully decline to depart from my understanding of the unambiguous mandate of Congress.

[**57] 1. Legislative History of the 1974 FOIA Amendments

During committee consideration of the legislation that was to become the 1974 FOIA amendments, the Nixon Administration, asserting that the courts lacked the expertise to determine what information should be classified, vigorously resisted any attempt to overrule the restrictive holding of the Mink case. [28] The House Committee on Government Operations nevertheless refused to accord special treatment to national security cases and reported a bill providing for De novo review and permissive In camera inspection in all FOIA cases. [29] The full House overwhelmingly approved the reported bill with only a minor technical amendment. [30]

> 28 See, e. g., 2 Freedom of Information, Executive Privilege, Secrecy in Government: Hearings before the Subcomm. on Administrative Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. 218-220 (1973) (testimony of Attorney General Richardson); letter from Malcolm D. Hawk, Acting Assistant Attorney General, to Hon. Chet Holifield, Chairman, House Comm. on Governmental Operations, Feb. 20, 1974, Reprinted in Staffs of Senate Comm. on the Judiciary and House Comm. on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents (Comm. Print 1975) (hereinafter cited as Source Book); letter from L. Niederlehner, Acting General Counsel, Department of Defense, to Hon. Chet Holifield, Feb. 20, 1974, Reprinted in Source Book, Supra, at 143-144.

[**58]

> 29 See H.R. 12471, 93d Cong., 2d Sess. (1974), Reprinted in Source Book, Supra note 28, at 145-149; H.R.Rep. No. 93-876, 93d Cong., 2d Sess. 7-8 (1974), Reprinted in Source Book, Supra note 28, at 127-128.
>
> 30 Source Book, Supra note 28, at 274-279. The final vote was 383 to 8. *Id. at 276-278*.

The bill reported by the Senate Committee on the Judiciary, on the other hand, reflected to some degree the influence of the Administration's arguments. It provided:

> (ii) In determining whether a document is in fact specifically required by an Executive order or statute to be kept secret in the interest of national defense or foreign policy, * * * if there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by statute or Executive order referred to in subsection (b)(1) of this section, the court Shall sustain such withholding unless, following its in camera examination, It finds the withholding is without a reasonable [**59] basis under such criteria.

[*1207] S. 2543, 93d Cong., 2d Sess., § b(2), Reprinted in Staffs of Senate Committee on the Judiciary and House Committee on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents (Committee Print 1975) (hereinafter cited as Source Book), at 282 (emphasis added). The Committee Report accompanying the bill explained:

> This standard of review does not allow the court to substitute its judgment for that of the agency as under a De novo review but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released.

S.Rep. No. 93-854, 93d Cong., 2d Sess. (1974), Reprinted in Source Book, Supra, at 168.

This partial victory for the Administration's viewpoint was short-lived. When the bill reported by the Committee reached the Senate floor, Senator Muskie, challenging the "outworn myth that only those in possession of [**60] military and diplomatic confidences can have the expertise to decide with whom and when to share their knowledge(,)" introduced an amendment to delete the provision establishing a special "reasonable basis" standard of judicial review in national security cases. [31] The Muskie amendment passed easily [32] despite continued arguments from Administration supporters that requiring De novo review with the burden on the government would be unconstitutional and would risk exposing "classified material which the judicial branch is unprepared to properly evaluate." [33]

31 120 Cong.Rec. 17023 (1974); See id. at 17022-17032. Senator Ervin, Chairman of the Senate Committee on Government Operations and a co-sponsor of Senator Muskie's amendment, explained the need for the amendment to the bill as follows:

> The bill provides that a court cannot reverse an agency even though it finds it was wrong in classifying the document as being one affecting national security, unless it further finds that the agency was not only wrong, but also unreasonably wrong.
>
> Why not let the judge determine that question, because national security is information that affects national defense and our dealings with foreign countries? That is all it amounts to.
>
> If a judge does not have enough sense to make that kind of judgment and determine the matter, he ought not to be a judge * * *.
>
> Id. at 17030.

[**61]

32 The vote was 56 to 29. 120 Cong.Rec. 17031-17032 (1974).

33 Letter from Attorney General William B. Saxbe to Hon. Roman L. Hruska, May 29, 1974, Reproduced at 120 Cong.Rec. 17027 (1974) (remarks of Sen. Hruska).

After the Senate had passed the amended version of its bill, the Senate and House bills were referred to a Conference Committee to iron out the differences. During the Conference deliberations President Nixon resigned and was succeeded by President Ford, who wrote to the Conference Committee to express his reservations about certain aspects of the proposed legislation. President Ford objected in particular to placing the burden on the government to justify its classification of documents in a De novo proceeding. His proposed alternative indicated the areas of controversy:

> I could accept a provision with an express presumption that the classification was proper and with In camera judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court [**62] could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. * * *

Letter from President Gerald R. Ford to Honorable William S. Moorhead, August 20, 1974, Reprinted in Source Book, Supra, at 380.

The Conference Committee did not adopt the President's proposal. Instead it followed the language of the Senate bill providing [*1208] for De novo review with the burden on the government and permissive In camera inspection in all FOIA cases, regardless of the exemption claimed. The Conference Report described the Committee's position as follows:

> The conference substitute follows the Senate amendment, providing that in determining De novo whether agency records have been properly withheld, the court may examine records In camera in making its determination under any of the nine categories of exemptions under *section 552(b)* of the law. In *Environmental Protection Agency v. Mink, et al., 410 U.S. 73 (93 S. Ct. 827, 35 L. Ed. 2d 119) (1973),* the Supreme Court ruled that In camera inspection of documents withheld under *section 552(b)(1)* of the law, authorizing the withholding of classified information, [**63] would ordinarily be precluded in Freedom of Information cases, unless Congress

> directed otherwise. H.R. 12741 amends the present law to permit such In camera examination at the discretion of the court. While In camera examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders In camera inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

S.Rep. No. 1200, *Supra, at 9*.

With regard to Exemption 1 in particular, the Conference combined the language of the House and Senate bills to ensure that "(w)hen linked with the authority conferred upon the Federal courts in this conference substitute for In camera examination of contested records as part of their De novo determination in Freedom of Information cases, (the new language of Exemption 1) clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v. Mink, et al., supra*, with respect to In camera review of classified documents." *Id. at 12*. Then, without shifting [**64] the burden of proof or weakening the requirement of De novo review or curtailing the propriety of In camera examination, the Conference Report added the following qualification with respect to judicial review in cases involving national defense and foreign policy matters:

> However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (Sic) might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making De novo determinations in *section 552(b)(1)* cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Id.

This qualification was apparently designed to allay the fears expressed by President Ford, but the President was unwilling to accept legislation that still clearly placed the burden on the government under a De novo standard of judicial review. The President therefore vetoed the bill after both Houses of Congress had passed the Conference version. [34] In his veto message [**65] the President offered a final proposal, quite similar to the bill originally reported by the Senate Committee on the Judiciary and rejected by the full Senate:

> 34 Message from the President of the United States Vetoing H.R. 12471, An Act to Amend *Section 552 of Title 5, United States Code*, Known as the Freedom of Information Act, H.R. Doc. No. 93-983, 93d Cong., 2d Sess., Reprinted in Source Book, Supra note 28, at 483-485. The President also objected to provisions of the amendments tightening the exemption for investigatory law enforcement files and establishing strict time limits for responding to FOIA requests, but his veto message gave primary consideration to his attack on De novo review in cases involving national security.

> I propose, therefore, that where classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider [**66] [*1209] all attendant evidence prior to resorting to an In camera examination of the document.

Message from the President of the United States Vetoing H.R. 12471, H.Doc. No. 93-983, 93d Cong., 2d Sess., Reprinted in Source Book, Supra, at 484.

The debate on whether to override the President's veto rehearsed for one last time the arguments over the need for and the danger of De novo judicial review in cases involving issues of national security. In the wake of Watergate the sentiments of both Houses of Congress were perhaps most succinctly summarized by Senator Baker:

> In short, recent experience indicates that the Federal Government exhibits a proclivity for overclassification of information, especially that which is embarrassing or incriminating; and I believe that this trend would continue if judicial review of classified documents applied a presumption of validity to the classification as recommended by the President. De novo judicial determination based on in camera inspection of classified documents as provided by the Freedom of Information Act amendments passed by the Congress insures confidentiality for genuine military, intelligence, and foreign policy information [**67] while allowing citizens, scholars, and perhaps even Congress access to information which should be in the public domain.
>
> In balancing the minimal risks that a Federal judge might disclose legitimate national security information against the potential for mischief and criminal activity under the cloak of secrecy. I must conclude that a fully informed citizenry provides the most secure protection for democracy.

Source Book, Supra, at 460-461. [35] The House overrode the President's veto by a vote of 371 to 31; [36] the Senate followed by a vote of 65 to 27. [37]

> 35 Senator Muskie recognized that his amendment, See text and notes at notes 31-33 Supra, was at the crux of the President's objection to the bill and summarized the issue in this way:
>
> The conflict on this particular point boils down to one basic concern trust in the judicial system to handle highly sensitive material. * * *
>
> I cannot understand why we should trust a Federal judge to sort out valid from invalid claims of executive privilege in litigation involving criminal conduct, but not trust him or his colleagues to make the same unfettered judgments in matters allegedly connected to the conduct of foreign policy.
>
> As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.
>
> On the contrary, if we construct (constrict) the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.
>
> Source Book, Supra note 28, at 449. See also *id. at 437-438, 459-460* (remarks of Sen. Kennedy), 466-467 (remarks of Sen. Cranston), 404-406 (remarks of Rep. Moorhead), 413 (remarks of Rep. Reid).

[**68]

> 36 Source Book, Supra note 28, at 431-434.
>
> 37 *Id. at 480*.

2. Basic Principles Governing Judicial Review of FOIA Cases Involving National Security Claims

The basic thrust of the amendments is clear on the face of the bills passed by both Houses of Congress and the statute passed over the President's veto: claims of exemption from FOIA based on national security are, like all other claims of exemption, to be subject to De novo judicial review with the burden on the government and with permissive In camera examination. This court's task one that the court's Per curiam opinion in my view fails to perform adequately is to explain what these general directions mean in practical terms and to take proper account of certain language inserted into the Conference Report in an unsuccessful attempt to compromise with the Ford Administration.

a. De Novo Review With the Burden on the Government and Permissive In Camera Inspection.

The appropriate standard of review was at the core of the controversy between Congress [*1210] and President over the 1974 amendments. Both the Nixon and the Ford [**69] Administrations urged Congress to replace the De novo review applied in other FOIA cases with some lesser degree of scrutiny in cases allegedly involving sensitive national security materials. The major argument made in favor of this special treatment was that judges lack the knowledge and expertise necessary to

make decisions about disclosure in such cases. [38] Congress soundly rejected this contention, however, and refused to create a presumption in favor of agency classifications or to retreat from full De novo review. [39]

38 See authorities cited in note 28 Supra.

39 When the Senate was considering whether to override the President's veto, Senator Kennedy called attention to the numerous cases in which judges were currently "examining extremely sensitive information and carrying out that judicial review responsibility very well." Source Book, Supra note 28, at 459. He also quoted the following passages from the Supreme Court's opinion in *United States v. United States District Court, 407 U.S. 297, 320, 92 S. Ct. 2125, 2138, 32 L. Ed. 2d 752 (1972)* (the Keith case):

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

This is important:

> If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Source Book, Supra note 28, at 460. See also *Zweibon v. Mitchell, 170 U.S.App.D.C. 1, 48-50, 516 F.2d 594, 641-643 (1975)* (En banc), Cert. denied, *425 U.S. 944, 96 S. Ct. 1684, 48 L. Ed. 2d 187 (1976).*

The Conference Report did register an "expectation" that agency affidavits would be given "substantial weight." This passage of the Conference Report is discussed in Part I-C-2-b Infra.

[**70] The statutory requirement that review be De novo is intended to "prevent it from becoming meaningless judicial sanctioning of agency discretion." S.Rep. No. 813, *Supra, at 8*. Congress feared more than "bad faith" in the exercise of agency discretion to withhold government information. Even "good faith" interpretations by an agency are likely to suffer from the bias of the agency, particularly when the agency is as zealous as the CIA has been in its responsibility to protect "national security." [40] Being aware of the dangers of relying too much on agency "expertise," Congress required the courts to take a fresh look at decisions against disclosure as a check against both intentional misrepresentations and inherent biases.

40 See, e. g., Mail Opening: Hearings Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, 94th Cong., 1st Sess. (1975); Final Report of the Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, S.Rep. No. 94-755, 94th Cong., 2d Sess. (1976); U.S. Intelligence Agencies and Activities: Domestic Intelligence Programs: Hearings Before the House Select Comm. on Intelligence, 94th Cong., 1st Sess., Part 3 (1975); The Nelson Rockefeller Report to the President by the Commission on CIA Activities 9-10, 20-25, 32-33, 130-159 (June 1975).

[**71] In order to take the "fresh look" required for De novo review, a District Court must not only be aware of the relevant provisions in statutes and Executive orders, but must also know enough about the specific factual situation involved to enable it to decide for itself whether the materials are properly exempt from disclosure. The government, which bears the burden of proving that any exemption applies, can provide the District Court with the information necessary for its De novo determination in several ways. The Conference Report, in a passage responding in part to President Ford's objections, suggests that an agency should first be given "the opportunity to establish by means of testimony or detailed affidavits that the documents are Clearly exempt from disclosure." [41] These methods of supplying the relevant data also comport with the concern of this court in Vaughn to get as much information as possible into the public record in order to aid the adversary process. [*1211] [42] Nevertheless, the Conference Report also recognizes that affidavits and testimony will not always provide the court with sufficient information to make such a "clear" determination for example, in [**72] cases where affidavits sufficient to allow De novo review would reveal the very information that the agency claims is exempt, or in cases where the court suspects the agency of bad faith or overzealousness and that In camera

inspection will therefore "in many situations * * * plainly be necessary and appropriate." S.Rep. No. 1200, *Supra, at 9.* [43]

41 S.Rep. No. 1200, *Supra note 15, at 9* (emphasis added); See 190 U.S.App.D.C., at -- , 587 F.2d at 1208, Supra.

42 See text and notes at notes 18-24 Supra.

43 In order to supply the court with the information necessary for De novo review when it fears that public affidavits containing such information would reveal too much, an agency may also provide more detailed affidavits to the court In camera. See *Phillippi v. CIA, 178 U.S.App.D.C. 243, 546 F.2d 1009 (1976)*; S.Rep. No. 93-854, 93d Cong., 2d Sess., Reprinted in Source Book, Supra note 28, at 168. The lack of adversariness in this procedure presents special dangers, however, especially if it is not accompanied by at least some form of In camera inspection. In addition, In camera affidavits, unlike In camera inspection, provide no real check on the accuracy of an agency's representations. It is therefore not surprising that the authorities suggesting use of In camera affidavits have always cautioned that the procedure must be reserved for unusual and especially sensitive circumstances. As a check against agency abuse of the In camera affidavit procedure, a court should require the agency to explain why the information in its In camera submission should not have been included in a public affidavit, and should make available to all parties any portions of the In camera affidavits that it determines, after full consideration of the agency's arguments, do not warrant a protective order.

[**73] By expressly endorsing In camera examination as a technique in the De novo review of All claimed exemptions, Congress rejected the various arguments that had been raised against this technique in the hearings and during the debates. The most frequently voiced objection to In camera inspection was the familiar argument against De novo review mentioned above: that judges lack the knowledge and expertise to evaluate the effects of releasing allegedly sensitive documents. Congress responded to this concern by noting that the reviewing court would have the benefit of the agency's affidavits possibly including additional In camera affidavits "in some cases of a particularly sensitive nature" when making its In camera examination [44] and by expressing its expectation that the reviewing court would accord "substantial weight" to agency affidavits reflecting special knowledge or expertise. [45] Congress steadfastly refused, however, to modify the language of the statute endorsing permissive In camera inspection in national security cases because of a fear of judicial incompetence that it considered "unfounded." [46]

44 S.Rep. No. 93-854, Supra note 43, Reprinted in Source Book, Supra note 28, at 167-168. See note 43 Supra.

[**74]

45 See Part I-C-2-b Infra.

46 Letter from Senator Edward M. Kennedy and Representative William S. Moorhead, Chairmen of the Conference Committee, to President Gerald R. Ford, Sept. 23, 1974, Reprinted in Source Book, Supra note 28, at 381.

Opponents of In camera examination also warned that court personnel and procedures presented a high risk of unauthorized leaks. In response to this fear the Senate Report suggested initiation of reasonable precautions, including "limiting access by court personnel to those obtaining appropriate security clearances" or appointing a "special master who may be required by the court to obtain such security clearance as had been previously required for access to the contested documents." [47]

47 S.Rep. No. 93-854, Supra note 43, Reprinted in Source Book, Supra note 28, at 168.

Congress likewise recognized and encouraged the development of flexible responses to eliminate a third [**75] objection to In camera examination: the potential burden on the courts. The Senate Report approved Vaughn's suggestion that special masters be appointed in cases involving numerous documents. [48] Courts have also avoided the [*1212] burden of conducting a "line-by-line" analysis of thousands of pages by requiring indices and detailed affidavits and then examining only random samples of the contested material In camera as a check on the general accuracy and adequacy of the agency's analysis. [49]

48 *Id. at 167*; See *Vaughn v. Rosen, supra* note 7, *157 U.S.App.D.C. at 348, 484 F.2d at 828.* See also *Irons v. Gottschalk, 179 U.S.App.D.C. 37, 42, 548 F.2d 992, 997 (1976).*

49 See, e.g., *Mead Data Central, Inc. v.*

Department of the Air Force, 184 U.S.App.D.C. 350, 370 & n.59, *566 F.2d 242, 262 & n.59 (1977)*; *Ash Grove Cement Co. v. FTC, 167 U.S.App.D.C. 249, 252, 511 F.2d 815, 818 (1975)*; *Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C.1977)*.

[**76] Finally, In camera examination has been criticized because it is conducted Ex parte, without the benefit of an adversarial proceeding. The Senate Report recognized this deficiency and encouraged such procedures as requiring Vaughn indices and affidavits In addition to in camera examination and even allowing plaintiffs' counsel to have access to the contested documents In camera under special agreement "whenever possible." [50] Notably, the party usually opposing In camera inspection is not the plaintiff seeking disclosure, but, as in this case, the agency seeking suppression even from the court. Since the purpose of In camera inspection is to allow the court to determine the facts De novo without revealing the requested documents to the plaintiff, as a true adversary proceeding would require, it is difficult to imagine a legitimate reason for the agencies' resistance to this technique that is essentially designed for their benefit. It goes without saying that covering up an agency's "mistakes" is not an acceptable reason for denying disclosure under the FOIA. In any event, where the affidavits and index are available and there is still a dispute of fact concerning the nature or contents [**77] of the documents sought to be produced under the FOIA, an In camera inspection Increases the "adversariness" of the proceeding or at least provides a minimal substitute for true "adversariness" by allowing the court to test the accuracy of the agency's representations.

50 S.Rep. No. 93-854, Supra note 43, Reprinted in Source Book, Supra note 28, at 166-167. See also United States v. AT&T, Supra note 24, *185 U.S.App.D.C. at 256, 567 F.2d at 133*.

Congress' resistance to these objections and its encouragement of flexible responses to overcome them reflect its recognition that the possibility of an In camera inspection is "in many situations" essential to De novo review and is an indispensable incentive to assure the accuracy of agency affidavits and testimony. [51]

51 S.Rep. No. 1200, *Supra note 15, at 9*. In this case, for instance, it was only after this suit was brought with the attendant threat of In camera inspection that the CIA, which had Twice before found no segregable portions among the requested materials (JA 17-18, 21-22) once even flatly stating that no such portions existed (JA 21-22) eventually discovered that there were indeed segregable portions (See JA 27-30, 42-52; See also text at notes 7-9 and note 7 Supra). Furthermore, it was only under the additional specific threat of plaintiff's motion for In camera inspection that the Agency submitted the "supplemental affidavit" of Eloise Page, giving more detailed, but still inadequate, descriptions of the items withheld (JA 62-64).

Another recent case also underscores the vital role that the threat of In camera inspection can play, perhaps especially with respect to the CIA. In that case, *Goland v. CIA, 607 F.2d 339 (D.C.Cir. 1978)*, plaintiffs "requested documents from the (CIA) relating to the legislative history of the Agency's organic statutes. slip op. at 2." Not convinced of the thoroughness with which the Agency had searched for responsive documents, and questioning the Agency's refusal to make available concededly responsive materials, plaintiffs brought suit under the FOIA. The District Court granted summary judgment in favor of the CIA; the opinion of this court affirming the District Court issued on May 23, 1978. One week later, on May 30, 1978, the CIA for the first time disclosed to plaintiffs' counsel and to this court the existence of various other documents that had been determined by the Agency six months earlier to be potentially relevant to the Goland case. These documents totaled 321, and were supplied to plaintiffs in June 1978. The CIA thus withheld from the plaintiffs and from the judicial process until after the opinion of the appellate court had issued the existence of over 300 documents of at least potential relevance to the Goland case. By so doing the CIA has again amply demonstrated the need for incentives such as In camera inspection to ensure compliance with the requirements of the FOIA. Similarly, in Marks v. CIA (D.C.Cir. No. 77-1225, decided this day). (slip op. at 1 n. 4). (Wright, C. J., concurring and dissenting), the Agency, subsequent to the District Court's opinion and to that court's refusal to conduct an In camera inspection of disputed materials, although prior to this court's judgment, released information that previously had been withheld.

> Even in a case in which a specific finding of the Agency's good faith had been made, In camera inspection resulted in disclosure of additional information, thus emphasizing the difficulties that inhere in permitting an agency to be the final judge of its own cause. See *Halperin v. CIA, 446 F. Supp. 661, 666-667 (D.D.C.1978).*

[**78] [*1213] b. According "Substantial Weight to an Agency's Affidavit Concerning the Details of the Classified Status of the Disputed Report."

Although Congress refused to alter the statutory provisions calling for De novo review with the burden on the government and permissive In camera inspection, the Conference Committee did include language in its report designed to assuage the President's "unfounded" [52] fears without compromising on these fundamental issues. These passages are a legitimate part of the legislative history and should influence the conduct of the courts to the extent that they are compatible with the fundamental directions on the face of the statute itself. One such passage, providing that agencies should be given the chance to prove that requested materials are "clearly exempt" using detailed affidavits or testimony, has already been discussed. [53]

52 See text and note at note 46 Supra.

53 See text and notes at notes 41-43 Supra.

A second passage, located in a portion of the [**79] Report referring to Exemption 1, expresses the Committee's recognition that agencies "responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record" and the Committee's expectation "that Federal courts, in making de novo determinations in *section 552(b)(1)* cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S.Rep. No. 1200, *Supra, at 12.* These words responded to the image of uninformed judges recklessly exposing sensitive information an image cultivated by the opponents of De novo review and In camera examination. [54] The Conference Committee countered this image by registering its anticipation that rational judges conducting De novo reviews would naturally be impressed by any special knowledge, experience, and reasoning demonstrated by agencies with expertise and responsibility in matters of defense and foreign policy. As Senator Muskie remarked:

54 See, e. g., Source Book, Supra note 28, at 316-317, 322-323 (remarks of Sen. Hruska); sources cited in notes 28 and 33 Supra.

[**80]

> As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secrets, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

Source Book, Supra, at 449. This logical interpretation of the Conference Report passage is perfectly consistent with the actual words of the 1974 amendments.

It is important to recognize the limits, as well as the value, of this language in the Conference Report. Stretching the Conference Committee's recognition of the "substantial weight" deserved by demonstrated expertise and knowledge into a broad presumption favoring all agency affidavits in national security cases would contradict the clear provisions of the statute and would render meaningless Congress' obvious intent in passing these provisions over the President's specific objections. An affidavit explaining in detail the factors about particular material that have convinced the agency that the material should be classified should and will be quite influential with a reviewing court. On the other hand, an affidavit stating only in [**81] general or conclusory terms why the agency in its wisdom has determined that the criteria for nondisclosure are met should not and cannot be accorded "substantial weight" in a De novo proceeding. To substitute a presumption favoring conclusory agency affidavits for [*1214] the courts' responsibility to make a De novo determination With the burden on the government would repeal the very aspects of the 1974 amendments that made it necessary for the Congress to override the President's veto.

3. Summary

Congress has already reversed overly restrictive judicial interpretations of the FOIA twice, See Part I-A Supra, and congressional intent is by now sufficiently clear that a third legislative reversal should not be

necessary. In FOIA cases involving exemptions based on national security, as in other FOIA cases, the government bears the burden of proving in a De novo proceeding before a court that any material not disclosed comes within one of the statutory exemptions. The government should be given the opportunity to establish by detailed affidavits or testimony that the requested material is clearly exempt from disclosure, and in conducting its De novo review in a national security [**82] case the court should give substantial weight to the agency's affidavits insofar as they reflect the agency's special knowledge and expertise. However, if the government fails to demonstrate by these means that the material is Clearly exempt and that no segregable portions remain, or if the court has any suspicion of bad faith on the part of the agency, [55] some form of In camera examination will be "necessary and appropriate."

55 A court might suspect bad faith if an agency failed to correct deficiencies in its affidavits when given a second chance to be more specific, or if an agency submitted affidavits in the first instance that suffered from defects pointed out in previous court decisions. The District Court, of course, has discretion to employ In camera examination whenever it feels a need to check the accuracy of the agency's representations to meet its responsibility in conducting a De novo review. See per curiam, 190 U.S.App.D.C. at -- , 587 F.2d at 1195.

D. Outline of the Review Process

[**83] My examination of the provisions and purposes of the FOIA and of the relevant judicial precedents suggests that a District Court reviewing an agency's claim that requested material falls within an exemption should generally proceed as follows:

1. Requirements of Index and Detailed Affidavits

As outlined in Vaughn, the court should require the agency to support its claim of exemption with (1) an index dividing the material into manageable segments and identifying what parts of it are withheld under which exemptions, and (2) detailed affidavits describing the matters withheld and giving any other evidence relevant to the particular exemptions claimed. To enhance the adversary process, the affidavits should be as detailed as possible without revealing the information claimed to be exempt. [56] This requirement may be modified, but only under extreme circumstances. [57]

56 A detailed index and affidavits are necessary even if the court conducts an In camera examination, since these public explanations of the agency's action give the plaintiff at least some material on which to base its adversary role. Furthermore, these documents provide essential assistance to the court by focusing on the relevant issues and arguments. See *Mead Data Central, Inc. v. Department of the Air Force, supra* note 49, *184 U.S.App.D.C. at 358-359, 372-374, 566 F.2d at 250-251, 260-262*; *Vaughn v. Rosen, supra* note 7, *157 U.S.App.D.C. at 345-348, 484 F.2d at 825-828*.

[**84]

57 See, e. g., *Phillippi v. CIA, supra* note 43 (affidavits submitted under seal for In camera inspection when government alleged that even admission that requested information existed would endanger national security).

2. Questions for the Court

Once the index and affidavits have been submitted, the court must undertake several different types of inquiry.

a. The Legal Issues.

The court must first determine the legal criteria for applying the exemption claimed by the agency. The words of the statute and the relevant precedents establish the kinds of matters that are exempt and any necessary procedural steps that are required for exemption. This aspect of the court's inquiry is fully open and adversarial.

[*1215] b. The Factual Issues.

The court must then determine the facts of the particular case: the nature of the matters withheld and other relevant issues, such as the purposes for which the information was created, [58] whether requisite procedures were followed, [59] and the possible effects of disclosure. [60] Deciding these issues may be difficult because of the absence [**85] of normal adversary procedures. The court may rely on affidavits and testimony, whose usefulness is directly related to their detail; discovery, which may be particularly useful in determining whether requisite procedures have been followed; and In camera inspection. The court's task will be easiest where the

parties stipulate to the relevant facts. [61] Adequately detailed affidavits and opportunities for discovery may encourage such stipulations. When factual issues are disputed, the burden of proof is on the government. If the burden cannot be Clearly met by detailed affidavits and testimony, or when there is any indication of bad faith on the part of the agency, the court may not, in my view, sustain the agency's action without conducting an In camera inspection of the matters withheld. A court may appoint a special master or inspect portions of the record at random when the burden of inspection is significant.

58 This issue may be relevant, for example, in determining whether Exemption 5 applies in a particular case. See, e. g., *Mead Data Central, Inc. v. Department of the Air Force, supra* note 49, *184 U.S.App.D.C. at 360-367, 566 F.2d at 252-259*.

[**86]

59 This issue may be relevant in determining whether the conditions of applying Exemption 1 have been met. See, e. g., *Halperin v. Department of State, 184 U.S.App.D.C. 124, 565 F.2d 699 (1977)*.

60 This issue may be relevant, for example, in determining the application of Exemptions 1, 3, and 6.

61 See, e. g., *Baker v. CIA, 188 U.S.App.D.C. 401, 580 F.2d 664 (1978)*. Baker presents an easy case because the plaintiff's request by its own terms sought only types of information that are specifically exempted from disclosure by a statute that qualifies under Exemption 3.

C. Application of Law to Facts.

Finally, the court must decide whether the claimed exemption applies on the facts of the particular case. The statutory language and relevant precedents will often provide a clear answer, but, inevitably, some cases will present ambiguities that must be resolved. When such ambiguity is present courts should be guided by FOIA's emphasis on increasing disclosure and Congress' decision to place the burden on the party withholding information. If the government [**87] is unable to establish that the material withheld meets all the legal requirements necessary to qualify for one of the nine statutory exemptions, the material must be released. [62] If the court sustains the agency's refusal to disclose the requested information, it must provide a statement of its conclusions as to the relevant law and facts to assist the plaintiff in deciding whether and on what grounds to appeal the decision and to assist the Court of Appeals if the plaintiff appeals. [63]

62 See, e. g., *EPA v. Mink, supra* note 11, *410 U.S. at 79, 93 S. Ct. 827*; *Getman v. NLRB, 146 U.S.App.D.C. 209, 216-219, 450 F.2d 670, 677-680 (1971)*. But cf. *Halperin v. Department of State, supra* note 59, *184 U.S.App.D.C. at 131-132, 565 F.2d at 706-707* (where materials fail to qualify for Exemption 1 because of agency's failure to follow proper procedures and government alleges that disclosure would constitute grave danger to national security, court should examine materials In camera to determine whether they may be withheld according to exacting standard employed in *First Amendment* cases involving prior restraints).

[**88]

63 See note 22 Supra.

With this framework in mind, I now turn to the particular circumstances of this case.

II. REVIEW IN THIS CASE

A. Adequacy of Index and Affidavits

An examination of the record in this case immediately reveals a problem: the CIA's affidavits are ambiguous about what exemptions apply to what portions of the withheld information. The affidavits specify that ten documents are involved, give a brief description of each document, and [*1216] enumerate the exemptions pursuant to which each document has been withheld. [64] One affidavit also explains the rationales of the exemptions relied on and describes the general types of materials for which each exemption is claimed. [65] The affidavits do not, however, indicate what portions of each document are allegedly covered by each of the multiple exemptions listed as grounds for nondisclosure. For example, the affidavits assert that Document 2 has been withheld pursuant to Exemptions 1, 3, and 6; but the affidavits fail to specify whether any one of these three exemptions covers the whole document or whether, on the contrary, [**89] each exemption covers different parts and all three exemptions are thus necessary to justify withholding the entire document. [66] The Agency's description of the document and its reliance on multiple exemptions based on quite different criteria suggest that

the latter situation is more likely. [67] The same problem infects the Agency's affidavits with respect to at least nine of the ten documents in this case. [68]

64 See Affidavit of Robert S. Young, Supra note 7, at JA 29-30; Affidavit of Eloise Page, Supra note 7, at JA 40-41; Supplemental Affidavit of Eloise Page, Supra note 8, at JA 62-64.

65 Affidavit of Eloise Page, Supra note 7, at JA 31-39.

66 Supplemental Affidavit of Eloise Page, Supra note 8, at JA 62-63.

67 The affidavit states that "(t)he Majority of the information concerns individuals other than the plaintiffs," Id. at JA 62 (emphasis added) suggesting a partial reliance on Exemption 6. It then states that the document was withheld "Primarily to protect intelligence sources and methods," Id. at JA 63 (emphasis added) indicating reliance on Exemption 3 for most, but not necessarily all, of the material. The affidavit does not indicate how much, if any, of the document is covered by Exemption 1.

[**90]

68 The Agency relied on Exemptions 1, 3, and 6 for Documents 2-9 and on Exemptions 1, 3, 6, and 7(F) for Document 10. The Agency's statements concerning Documents 3-9 are even less enlightening than its statement concerning Document 2. The statement for Documents 3, 4, and 5, for example, reads:

> These documents are one-page cables from an overseas CIA installation which advise Headquarters of the receipt of documents and information from a foreign intelligence service and which concern the plaintiffs and other individuals.
>
> They are denied in their entirety pursuant to Freedom of Information Act exemptions (b)(1), (b)(3) and (b)(6).

Id. at JA. The Agency released most of Document 1, deleting only "the location of CIA overseas installations, cryptonyms, a pseudonym and CIA organizational data" on the basis of Exemptions 1 and 3. Id. at JA 62.

This ambiguity as to which exemptions are claimed for which material is one of the very problems that led this court in Vaughn to require adequate indexing and detailed affidavits. The value of the Vaughn procedures is evident in this case. The ambiguity [**91] caused by the CIA's failure adequately to follow Vaughn caused the District Court to make an error that requires this court to reverse it. Apparently interpreting the ambiguous affidavit to assert that all the nondisclosed material could be withheld under Exemption 1 alone or under Exemption 3 alone, the District Court upheld the Agency's action on the alternative grounds of "exemption 1 alone, on the basis of exemption 3 alone, or on the basis of the two exemptions coupled together," [69] without [*1217] even reaching Exemptions 6 or 7. The government itself now admits that its own description of Document 10 indicates that it is withholding material to which Exemptions 1 and 3 do not apply. [70] An examination of the affidavits indicates that this same defect is probably also present with respect to Documents 2-9. [71]

69 Ray v. Bush, supra note 9, at JA 67 & n.2. The District Court quoted language from *Phillippi v. CIA, supra* note 43, *178 U.S.App.D.C. at 249-250* & n.14, *546 F.2d at 1015-1016* & n.14, recognizing that the "applicability of (Exemptions 1 and 3) may tend to merge," and from *Weissman v. CIA, supra* note 1, *184 U.S.App.D.C. at 123, 565 F.2d at 698*, noting that "exemption (b)(3) alone, or coupled with other exemptions, (could be) sufficient to protect the document from disclosure." Exemptions 1 and 3 may cover similar types of material, but the requirements for operation of each exemption are quite distinct, and neither agencies nor reviewing courts should make the incorrect assumption that using the two exemptions in combination relieves the government's burden of proving that each applies on its own terms to any portion of material for which it is claimed.

[**92]

70 See brief for appellee at 17, 19. The CIA's affidavit makes the following statement concerning Document 10:

> This document consists of a one-page memorandum which transmits a copy of a notebook containing a list of names. This list was secured by the United States Customs Service from an individual at a border checkpoint in a search incident to his arrest for importation of

narcotics into the United States. The memorandum was provided to the Plaintiff Schaap with only minor deletions (names of CIA employees, organizational data concerning the CIA, name of a United States Customs Agent). Only that portion of the list containing plaintiff's name was provided. Thus exemptions (b)(1), (b)(3), (b)(6) and (b) (7)(F) apply.

Supplemental Affidavit of Eloise Page, Supra note 8, at JA 63-64.

71 The Agency now claims that it did not rely on Exemptions 1 and 3 to withhold the name of the Customs agent and the names of other individuals in Document 10, brief for appellee at 19, yet it continues to rely on Exemptions 1 and 3 to withhold the names of other individuals and information relating to them contained in other documents, *Id. at 10-19*. This distinction, which the government makes in its brief on appeal, is certainly not so clear on the face of the affidavit. Compare the statement concerning Document 10, Supra note 70, With the statement concerning Documents 3, 4, and 5, Supra note 68.

[**93] B. Exemption 1

As the court's Per curiam opinion briefly recognizes, [72] the District Court's opinion does not reflect an adequate examination of either the law or the facts relevant to the CIA's claim based on Exemption 1. As a result of congressional amendments designed to override the restrictive holding of the Mink case, Exemption 1 now applies only if the District Court determines that (1) the material withheld is properly classifiable under the substantive criteria set forth in the relevant Executive order, and (2) the material has in fact been properly classified according to procedures outlined in the Executive order. [73] The substantive and procedural criteria relevant to this case are established by Executive Order 11652 and a National Security Council directive of May 17, 1972. [74] The threshold substantive test for determining whether material may be classified under Executive Order 11652 is "whether its unauthorized disclosure could reasonably be expected to cause * * * damage to the national security." Procedural requirements cover such matters as the authority and identification of the original classifier, the proper time for classification, the conspicuous marking [**94] of classified material, the identification and segregation of nonclassifiable segments of classified material, and mandatory review and declassification at set time intervals. [75] Failure to comply with proper procedures, just like failure to employ the proper substantive standard, can make Exemption 1 inapplicable. See *Halperin v. Department of State, 184 U.S.App.D.C. 124, 565 F.2d 699 (1977)*.

72 Per curiam, 190 U.S.App.D.C. at -- , -- , 587 F.2d at 1196.

73 See text at note 15 Supra.

74 See *Halperin v. Department of State, supra* note 59, *184 U.S.App.D.C. at 128-129, 565 F.2d at 703-704*.

75 See Executive Order 11652, 3 C.F.R. 678 (1971-1975 Compilation), Reprinted in *50 U.S.C. § 401 (Supp. V 1975)*; National Security Directive of May 17, 1972, *37 Fed.Reg. 10053 (1972)*.

In this case the government submitted affidavits of Eloise Page, Chief of the Operations Staff of the Directorate of Operations [**95] of the CIA, who swore that she had "determined that some of these documents, or portions thereof, may not be released because * * * (t)hey are currently properly classified pursuant to the criteria and procedures set forth in Executive Order 11652 * * *." Affidavit of Eloise Page, [*1218] August 13, 1976, JA 31. After describing in general terms some of the major substantive and procedural requirements for application of Exemption 1, Ms. Page asserted:

> 5. The determination was made by me that, in the case of each document, or portion thereof, which is withheld because it is currently and properly classified, release of that document, or portion thereof, at a minimum, could reasonably be expected to cause damage to the national security. In each case a document determined to contain classified information bears the appropriate markings on its face to evidence its classified status.

Id. at 33. On the basis of this statement and some general description of the types of information contained in the documents, [76] the District Court concluded that "(t)he affidavits on file herein clearly show that the documents in question were properly classified under Executive Order [**96] 11,652," and sustained the Agency's withholding of all the information on the basis of

Exemption 1 alone. [77]

76 See Affidavit of Eloise Page, *Supra note 7, PP 6-10*, at JA 33-35.

77 Ray v. Bush, supra note 9, at JA 66.

Appellants and Amicus curiae raise several convincing objections to the District Court's conclusion. First, appellants point out that the affidavits do not indicate that all the material being withheld is exempt under Exemption 1. Ms. Page's affidavit is deliberately ambiguous, stating that the material is being withheld under Exemptions 1 "and or" 3 "and/or" 6 [78] ; and the CIA has admitted on appeal that it cannot rely solely on Exemption 1. [79] The District Court's failure to recognize this problem with the affidavit raises serious doubts about the adequacy of its De novo review.

78 Affidavit of Eloise Page, Supra note 7, at JA 31-32.

79 See text and note at note 70 Supra.

[**97] Second, appellants emphasize that summary judgment was granted before any discovery took place. Interrogatories and depositions are especially important in a case where one party has an effective monopoly on the relevant information. Discovery may be particularly useful to appellants in testing whether the procedural requirements of Exemption 1 have been met in this case. [80]

80 See text and note at note 75 Supra. For example, Ms. Page's affidavit states that She has determined that each document or portion thereof for which Exemption 1 is claimed meets the substantive criteria of Executive Order 11652 and "bears the appropriate markings." Affidavit of Eloise Page, Supra note 7, at JA 33. The affidavit does not indicate, however, when this determination was made or whether Ms. Page was the one who originally classified all the documents.

Finally, Amicus draws attention to the conclusory nature of the affidavit, which often merely parrots the language of the statute or Executive order. According to Amicus, [**98] the CIA has developed "standard form" affidavits to handle cases such as this one. The CIA replies that its standard language reflects the typical nature of FOIA cases, and claims that any more particular descriptions might reveal the very information the Agency seeks to protect. While this concern may explain an agency's failure to produce sufficiently detailed affidavits in a particular case, it does not relieve either the agency or the court of its statutory responsibilities. When an agency cannot get beyond generalities in its affidavits for fear of revealing too much, De novo review requires the court to employ additional techniques, such as In camera inspection and more detailed In camera affidavits. [81]

81 The court may in some cases require the agency to submit under protective seal affidavits that are more detailed than those made available to the plaintiff. These affidavits can assist the court in conducting its In camera inspection by, for example, pointing out what source or technique would be revealed if the material were disclosed. After its examination the court may order release of any portions of these In camera affidavits that it determines will present no danger of unauthorized disclosure. See *Phillippi v. CIA, supra* note 43; notes 43 & 44 Supra.

[**99] Faced with the conclusory affidavits produced in this case, appellants requested In camera examination, but the District Court [*1219] denied appellants' motion, citing this court's opinion in *Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977)*. The version of the Weissman opinion relied on by the District Court was later amended after a motion for rehearing. Order, D.C.Cir. No. 76-1566, April 4, 1977. Passages in the original version that suffered from an excessive deference to agency "expertise" may explain the District Court's unacceptably deferential approach to this case. [82] Today's Per curiam opinion reaffirms Congress' intent to require independent De novo review, Per curiam, 190 U.S.App.D.C. at -- - -- , 587 F.2d at 1193-1194, and clearly holds that there is no presumption against In camera examination in national security cases, *Id., 190* U.S.App.D.C., at -- - -- , 587 F.2d at 1194-1195, thus reducing the likelihood of excessive deference in this case on remand and in future cases.

82 The original opinion in Weissman stated that Congress had recognized the lack of judicial expertise by indicating "that the court was not to substitute its judgment for that of the agency." *Weissman v. CIA, supra* note 1, slip op. at 10 (pre-amendment version). In fact, Congress expressly refused to "indicate" this procedure. See

text and notes at notes 31-33 Supra. A more careful scrutiny of the Agency's claims would have revealed the ambiguities in the affidavits and would have prevented the court from relying exclusively on Exemptions 1 and 3.

[**100] C. Exemption 3

The Per curiam also finds the District Court's approach to Exemption 3 unsatisfactory. Per curiam, 190 U.S.App.D.C. at -- , 587 F.2d at 1196. Following its amendment in 1976 to overrule the result in Robertson, Exemption 3 applies to matters that are "specifically exempted from disclosure by statute," but only if the exempting statute either leaves no room for agency discretion to determine whether the information is to be disclosed or establishes effective guidelines for agency discretion by specifying "particular criteria for withholding" or "particular types of matters to be withheld." *5 U.S.C. § 552(b)(3) (1976)*. The 1976 amendment thus removed the Robertson loophole by insuring that no agency could rely on an "exempting" statute unless the statute contained clear guidelines upon which a court could rely in reviewing the agency's refusal to disclose requested information.

Proper judicial review of an Exemption 3 claim involves several steps: (1) determining whether the alleged exempting statute qualifies under Exemption 3 as amended, See *American Jewish Congress v. Kreps, 187 U.S.App.D.C. 413, 574 F.2d 624 (1978)*, [**101] (2) determining what matters the exempting statute covers what substantive and procedural requirements must be met before it permits nondisclosure, and (3) determining the facts of the particular case and whether the specific information withheld qualifies for nondisclosure under the alleged exempting statute. As with review of other claimed exemptions, the courts must consider each of these questions De novo. See *Brandon v. Eckard, 187 U.S.App.D.C. 28, 32-35, 569 F.2d 683, 687-690 (1977)*; S.Rep. No. 1200, *Supra, at 8-9*.

The CIA's Exemption 3 claim in this case is based on the applicability of *50 U.S.C. §§ 403(d)(3)* (directing the Director of the CIA to protect "intelligence sources and methods from unauthorized disclosure") & 403g (exempting the CIA from any law requiring "disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency") (1970). The District Court, following unanimous pre-1976 precedents from this circuit, [83] found that these statutes qualified under the pre-amendment version of Exemption 3, but did not address the effect of the 1976 changes in the FOIA. This court has [**102] recently held that these statutes still qualify under the new language because they " "refer( ) to particular types of matters to be withheld' namely, information respecting intelligence sources and methods." *Goland v. CIA, 607 F.2d 339 (D.C.Cir. 1978)*(slip op. at 18). Nevertheless, while the "particular types of matters" listed in *Section 403g* (E. g., names, official titles, salaries) are fairly specific, [84] *Section 403(d)(3)*"s language of protecting "intelligence sources and methods" is potentially quite expansive. To fulfill Congress' intent to close the loophole created in Robertson, courts must be particularly careful when scrutinizing claims of exemptions based on such expansive terms. A court's De novo determination that releasing contested material could in fact reasonably be expected to expose intelligence sources or methods is thus essential when an agency seeks to rely on *Section 403(d)(3)*. [85]

83 See, e. g., *Weissman v. CIA, supra* note 1, *184 U.S.App.D.C. at 119, 565 F.2d at 694*; *Phillippi v. CIA, supra* note 43, *178 U.S.App.D.C. at 249 n.14, 546 F.2d at 1015 n.14*.

[**103]

84 See *Baker v. CIA, supra* note 61, *188 U.S.App.D.C. at 406, 580 F.2d at 669*; *Phillippi v. CIA, supra* note 43, *178 U.S.App.D.C. at 249 n.14, 546 F.2d at 1015 n.14*.

85 The special knowledge and expertise of agencies concerned with defense or foreign policy is equally relevant whether the agency relies on Exemption 1 or on Exemption 3 and a national security statute such as *50 U.S.C. § 403(d)(3)*. The Conference Committee's "expectation" that federal courts would accord "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record," S. Rep. No. 1200, *Supra note 15, at 12*, in their De novo review of Exemption 1 claims therefore applies with equal force to De novo review of Exemption 3 claims based on such statutes. Review of such Exemption 3 claims should thus be conducted in accordance with the principles set out above with regard to the "Special Problems in Cases Involving National Security." Part I-C Supra.

Since the District Court's review of the CIA's

[**104] affidavits in this case was based on the pre-amendment language of Exemption 3, it understandably does not demonstrate the kind of "hard look" necessary to assure adherence to congressional purpose. The District Court's extreme deference to the Agency's interpretation of what constitutes an "intelligence source or method" is evident in such passages as the following:

> Affidavits on file herein state that documents 2 through 9 contain information regarding intelligence sources and methods. There has been no credible challenge to the veracity of these statements and nothing appears to raise the issue of bad faith. The Court therefore concludes that release of this information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods, and that the Agency may rely on exemption 3 and *50 U.S.C. § 403(d)(3)* to withhold this information.

Ray v. Bush, Civil Action No. 76-0903 (D.D.C. Jan. 25, 1977), at JA 66-67. This is hardly the De novo review mandated by Congress, with the Government having the burden of proof.

The District Court denied appellants' motion for In camera inspection with the comment that "with respect [**105] to documents withheld under exemption 3, in camera inspection is seldom, if ever, necessary or appropriate." Id. at JA 68. The court apparently based this conclusion on language in cases under the pre-amendment version of Exemption 3 to the effect that in review of an Exemption 3 claim "the only question "to be determined in a district court's De novo inquiry is the factual existence of (a specific statute of the kind described in Exemption 3), regardless of how unwise, self-protective, or inadvertent the enactment might be.' " [86]

> 86 Ray v. Bush, supra note 9, at JA 68, Quoting *FAA Administrator v. Robertson, 422 U.S. 255, 269-270, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975)* (Stewart, J., concurring), Quoting in turn *EPA v. Mink, supra* note 11, *410 U.S. at 95* n.*, *93 S. Ct. 827* (Stewart, J., concurring). See also National Airlines v. CAB, Civil Action No. 75-614 (D.D.C. Oct. 10, 1975).

This court today definitively rejects this position as inconsistent with [**106] the language and legislative history of the FOIA. [87] The 1976 amendments to the language of Exemption 3 provide conclusive support for the court's position. To be sure, a court must abide by Congress " statutory decision that certain criteria should govern disclosure and that particular types of information should be exempt. But when courts review an agency's claim of Exemption 3 based on the Agency's interpretation of [*1221] what Congress has done in a particular statute, they must not only decide whether the statute qualifies under Exemption 3, but also determine the facts of the particular case and decide whether the statute applies to the contested materials under the circumstances. Without De novo review of all these issues by the courts, Congress' effort to check agency discretion in the 1976 amendment would be reduced to an impotent formality. [88] The propriety and necessity of In camera examination as part of the court's De novo review of the relevant factual issues in Exemption 3 cases is therefore essentially the same as in De novo review of Exemption 1 cases. See Part I-C-2 Supra.

> 87 Per curiam, 190 U.S.App.D.C. at -- , 587 F.2d at 1195.

[**107]

> 88 In *Phillippi v. CIA, supra* note 43, *178 U.S.App.D.C. at 249 n.14, 546 F.2d at 1015 n.14*, this court indicated the active role appropriate for a court reviewing an Exemption 3 claim based on *§ 403(d)(3)* when we explained that the exemption would apply only "if the Agency can demonstrate, See *5 U.S.C. § 552(a)(4)(B) (Supp. V 1975)*, that release of the requested information can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods."

An effective De novo review using In camera inspection of material claimed to reveal "intelligence sources and methods" when appropriate will achieve the goal Congress intended in amending Exemption 3. Courts will be able to insure that agencies do not impermissibly expand by unreviewed interpretations the "particular types of matters" Congress has exempted from disclosure. Although precedents detailing what May be withheld to protect intelligence sources or methods may not be possible, courts will be able to declare in published opinions what is Not an acceptable interpretation [**108] of "protecting intelligence sources and methods." [89]

89 A court may determine, for example, that the terms "intelligence sources and methods," like the terms "investigative techniques and procedures" in Exemption 7(E), "should not be interpreted to include routine techniques and procedures already well known to the public." H.R.Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974).

D. Exemptions 6 and 7(F)

The CIA's affidavit also relied on Exemptions 6 and 7(F) to withhold certain parts of the documents sought by appellants. [90] The Agency relied on Exemption 6, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," to withhold the names of private individuals other than appellants and information relating to such other individuals. Exemption 7(F), which exempts "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * endanger [**109] the life or physical safety of law enforcement personnel," was used to withhold the name of a United States Customs officer who was the source of one of the ten documents sought.

90 The extent of the CIA's reliance on these exemptions is ambiguous on the face of the Agency's affidavits. See text and notes at notes 66-71 Supra.

As mentioned above, the District Court failed to reach these claims because it misinterpreted the Agency's ambiguous affidavit. The court's Per curiam opinion remands for a more specific affidavit and recognizes that once the Agency has specified which material is allegedly exempt under which exemptions the District Court may well have to consider Exemptions 6 and 7. Per curiam, 190 U.S.App.D.C. at -- , 587 F.2d at 1197.

In ruling on an Exemption 6 claim, a court must determine De novo (1) whether the material requested falls within the type of matter covered by the exemption, I. e., "personnel and medical files and similar files," And (2) whether disclosure would constitute [**110] a "clearly unwarranted invasion of personal privacy." Unless the documents in question are indeed "personnel and medical files and similar files," the latter inquiry becomes unnecessary. "Personnel" files, as the Supreme Court wrote in *Department of the Air Force v. Rose, supra*, ordinarily contain information such as "where (an individual) was born, the names of his parents, where he has lived from time to time, [*1222] his high school or other school records, results of examinations, evaluations of his work performance." *425 U.S. at 377, 96 S. Ct. at 1606*. In that case the Court also provided an indication of what is intended by "similar" files, as it held Air Force Academy case summaries "relating to the discipline of cadet personnel" to be similar to personnel files in the sense intended by Congress in Exemption 6. *Id. at 376-377, 96 S. Ct. at 1606*. Moreover, the Court has stated, also in Rose, that it is " "only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of (the) sixth exemption.' " *Id. at 371, 96 S. Ct. at 1604* (Quoting the District Court in [**111] Rose). If material is found to fall within the language "personnel and medical files and similar files," the second inquiry required by Exemption 6 whether disclosure would constitute a "clearly unwarranted invasions of personal privacy" should be undertaken. This inquiry proceeds on a case-by-case basis, balancing the privacy interests of the individual against the public's right to governmental information. *Id. at 370-382, 96 S. Ct. 1592*; *Getman v. NLRB, 146 U.S.App.D.C. 209, 212-216, 450 F.2d 670, 673-677 (1971)*.

Consideration of an Exemption 7(F) claim likewise requires a court to determine De novo (1) whether the material involved consists of "investigatory records compiled for Law enforcement purposes " [91] (emphasis added) And (2) whether its production would "endanger the life or physical safety of law enforcement personnel." The District Court, of course, has not yet addressed any of these issues. If on remand it finds that both conditions for Exemption 6 or 7(F) are met with regard to any of the material for which these exemptions have been claimed, the District Court must also, as the Per curiam indicates, Per curiam, 190 U.S.App.D.C. at -- [**112] - -- , 587 F.2d at 1197, assure itself that any segregable material is released.

91 As the Supreme Court recently stated, "The thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file." *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 230, 98 S. Ct. 2311, 2321, 57 L. Ed. 2d 159 (1978)*. The Court found further in Robbins Tire & Rubber Co. that the legislative history indicates

"the release of information in investigatory files prior to the completion of An actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against." Id. (emphasis added). It seems clear that the CIA, as an intelligence as distinguished from a law enforcement agency, should not, ordinarily at least, be able to avail itself of Exemption 7.

For a discussion of why the CIA, in order to avail itself of Exemption 7, must have acquired the information sought in a lawful national security investigation, See Marks v. CIA, supra note 51, slip op. at 5-16 (Wright, C.J., concurring and dissenting).

[**113] III. CONCLUSION

Effective De novo review by the courts is essential to assure that government agencies comply with Congress' commitment to compel disclosure of information that is being "withheld only to cover up embarrassing mistakes or irregularities * * *." [92] My opinion in this case is an effort to consolidate some of the wisdom of prior cases and the legislative history regarding what courts must do to make De novo review a reality. The evolution of the review process must continue; additional creative innovations by counsel, the courts, and Congress are necessary to solve the problems that persist. For the time being, however, the courts can at least see to it that the progress that has already been made is not lost.

92 S.Rep. No. 813, *Supra note 10, at 3*.

CONGRESSMAN JOHN M. MURPHY, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, ET AL., Defendants.

Civ. A. No. 80-518

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

490 F. Supp. 1134*; *1980 U.S. Dist. LEXIS 11670*; *30 Fed. R. Serv. 2d (Callaghan) 547

March 25, 1980

COUNSEL: [**1] Michael E. Tigar, Samuel J. Buffone, Tigar & Buffone, Washington, D. C., for plaintiff.

Barbara L. Gordon, Dept. of Justice, Civil Division, Federal Programs Branch, Washington, D. C., for defendants.

OPINION BY: FLANNERY

OPINION

[*1135] MEMORANDUM AND ORDER

This matter comes before the court on the defendants' motion for a protective order. The defendants urge the court to prohibit the plaintiff from deposing the director of the Federal Bureau of Investigation, or an appropriate authorized agent. For the reasons set forth below, the court will grant the defendants' motion. But the court will entertain a lifting of the Order should factual disputes arise subsequent to the filing of the defendants' dispositive motion.

[*1136] BACKGROUND

This is a Freedom of Information Act case. *5 U.S.C. § 552*. The plaintiff, a United States congressman, seeks the release of aural and video recordings presently in the custody of the defendants. These materials stem from the defendants' ABSCAM investigation.

The plaintiff filed the instant suit on February 25, 1980. The court, interested in proceeding as quickly as possible, held a status call on March 7, 1980. At the hearing, [**2] counsel for the defendants indicated the government's willingness to file a dispositive motion on the day their answer is due, March 26. The court accepted this date as a good-faith effort to expedite disposition of the case. The plaintiff agreed to respond and file his own motion on April 1. The court set a hearing date of April 3, 1980.

The instant dispute arises from the plaintiff's attempt to depose a representative of the FBI. The plaintiff served notice to depose on March 7, and scheduled the deposition for March 27, 1980. The government, seeking a protective order, claims: 1) absent factual issues, no discovery is needed; 2) if discovery is necessary, it should await this court's ruling upon a dispositive motion; and 3) whatever discovery is necessary may be achieved through the use of interrogatories. The plaintiff argues that discovery is needed to prepare his cross-motion. Plaintiff's reply brief at 6-7.

DISCUSSION

It is beyond question that discovery is appropriate and often necessary in a FOIA case. But such discovery is limited to factual disputes. These include whether the agency engaged in a good-faith search for all materials, whether the agency indexed [**3] all documents, and whether the agency did, in fact, classify documents it

seeks to withhold on national security grounds.

Factual disputes as to the adequacy of the agency search and index must be distinguished from the thought processes of the agency in deciding to claim a particular FOIA exemption or to classify a specific document. The latter constitutes predecisional thought processes of agency officials. They are protected from disclosure by *United States v. Morgan, 313 U.S. 409, 422, 61 S. Ct. 999, 1004, 85 L. Ed. 1429 (1941).* [1] The Morgan decision establishes "that those legally responsible for a decision must in fact make it, but that their method of doing so . . . is largely beyond judicial scrutiny." *KFC National Management Corp. v. NLRB, 497 F.2d 298, 304 (2d Cir. 1974)*. Hence, Morgan and its progeny disallow discovery addressing the thought processes that lead to an exemption claim. Morgan fails to preclude, however, an inquiry into whether the government itemized all documents or engaged in a good-faith search to locate all materials requested by the FOIA plaintiff.

1. Exemption (b)(5) of the FOIA protects from disclosure predecisional thought processes reduced to writing. *5 U.S.C. § 552(b)(5).*

[**4] Whether the instant case warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits. The plaintiff's notice of deposition is therefore premature. The plaintiff cannot know at this time whether discovery is necessary; he cannot know whether the government's papers and affidavits will suggest an inadequate search or factual discrepancy.

The cases cited by the plaintiff buttress the conclusion that his notice of deposition is premature. For example, in *Schaffer v. Kissinger, 164 U.S. App. D.C. 282, 505 F.2d 389 (1974)* (per curiam), the plaintiff questioned whether the defendant agency effectuated a security classification for withheld documents. The plaintiff thus presented a factual dispute: were the documents at issue, in fact, marked "confidential?" This is the type of question in which, "without discovery he could not present verified facts to justify his opposition." *Id. at 390*. But this issue arose [*1137] only after the State Department filed its affidavits and represented that the withheld reports constituted classified documents.

Similarly, in *Weisberg v. Department of Justice,* [**5] *177 U.S. App. D.C. 161, 543 F.2d 308 (1976),* the plaintiff sought investigatory data relating to the assassination of President Kennedy. After the government furnished data to the plaintiff, it claimed the case was moot. It alleged it had turned over all information relevant to the plaintiff's FOIA request. The district court agreed and dismissed the case on mootness grounds. This Circuit Court of Appeals, however, found that factual questions remained over whether the FBI did, in fact, hand over all data requested in the FOIA petition. It therefore held the plaintiff entitled to use depositions to determine the existence or non-existence of the requested material. The factual dispute in Weisberg thus arose after the government responded to the plaintiff's FOIA request. The government's release of the data, along with its affidavits claiming complete compliance with the FOIA request, created the factual dispute that necessitated discovery.

Finally, in *Exxon Corp. v. FTC, 384 F. Supp. 755 (D.D.C.1974),* Exxon sought the production of documents in the possession of the agency. Exxon questioned statements in the Secretary of the Commission's affidavit that alleged a complete search [**6] had been made. The district court allowed discovery, through interrogatories, to test the veracity of these statements. The interrogatories further inquired into the adequacy and completeness of the document search. *Id. at 758-59*. Like the Schaffer and Weisberg cases, the factual issue in Exxon arose only after the government agency submitted its responsive papers.

These cases uniformly establish that discovery may proceed in a FOIA controversy when a factual issue arises concerning the adequacy or completeness of the government search and index. But they further establish a self-evident principle: a factual issue that is properly the subject of discovery can arise only after the government files its affidavits and supporting memorandum of law.

In the instant case, the government has yet to file its affidavits. The plaintiff therefore cannot possess the prescience to predict whether a factual issue will emerge. This court likewise cannot prejudge the government's response; to deny the government's motion for a protective order would require an expectation that the government answer will raise factual issues. This we cannot do.

PROCEDURES AFTER GOVERNMENT RESPONSE

Once the [**7] government files its answer, the plaintiff may again seek discovery if, in good faith, he finds that it creates issues of fact. As with all other matters in this case, the court will rule as expeditiously as possible.

Assuming, arguendo, that the plaintiff requests lifting the protective order, the standards for adjudicating the discovery request are clear. If the government affidavits satisfy the court that the search was adequate and complete, then the court may deny discovery. *Goland v. CIA, 197 U.S. App. D.C. 25, 607 F.2d 339, 352 (1978).* In Goland, the affidavit on its face indicated that the defendant agency effectuated a complete search. "For this reason, the district court's grant of a summary judgment without discovery was within its discretion." *Id. at 355*. If, however, the record demonstrates a factual dispute as to the adequacy of search or completeness of the index, discovery may ensue. Association of National Advertisers v. FTC, CCH 1976-1 Trade Cas. P 60835 (D.D.C.1976) at 68,644.

CONCLUSION

Case law establishes that discovery is appropriate in FOIA cases to resolve factual disputes. A factual issue, however, cannot arise until after the government files its [**8] response. The court therefore grants the defendants' motion for a protective order. The order is to remain in effect until further notice. Should the affidavits [*1138] filed by the defendants create a factual issue that is properly the subject of discovery, the court would then look favorably upon a motion to lift the order [2] and to proceed with discovery through deposition. [3] Until such time, the plaintiff's attempt to depose can only be viewed as premature.

2. If this occurs, it may require rescheduling. The court would take every step possible to ensure a minimal delay in setting a new hearing date.

3. Where, as here, the exigencies of time are paramount, discovery through the use of deposition is appropriate.

Therefore, in accordance with the foregoing, it is, by the court, this 25th day of March, 1980,

ORDERED that the defendants' motion for a protective order be, and the same hereby is, granted.

David MISCAVIGE, Plaintiff-Appellant, v. INTERNAL REVENUE SERVICE, Defendant-Appellee.

No. 92-8659

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2 F.3d 366; 1993 U.S. App. LEXIS 23848; 72 A.F.T.R.2d (RIA) 6298; 7 Fla. L. Weekly Fed. C 811

September 17, 1993, Decided

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Georgia. (No. 1:91-cv-1638-RHH). Robert H. Hall, District Judge.

DISPOSITION: AFFIRMED.

COUNSEL: For Plaintiff-Appellant: Kendrick L. Moxon, BOWLES & MOXON, Hollywood, CA.

For Defendant-Appellee: Sharon D. Stokes, AUSA, Atlanta, Ga. David Katinsky, USDOJ, Tax Division, Washington, DC. Gary L. Allen, Chief, Murray S. Horwitz, Brian C. Griffin, Jonathan S. Cohen, Appellate Division, USDOJ, Washington, DC.

JUDGES: Before BLACK and CARNES, Circuit Judges, and RONEY, Senior Circuit Judge.

OPINION BY: RONEY

OPINION

[*366] RONEY, Senior Circuit Judge:

David Miscavige sued the Internal Revenue Service ("IRS") to enjoin them from withholding records concerning himself that he had sought under the Freedom of Information Act ("FOIA"), *5 U.S.C. § 552*. The IRS claimed that the documents were within various statutory exceptions to FOIA and submitted affidavits saying so. Miscavige argued that the affidavits were insufficient to establish the documents' exemption and that the IRS had to submit a *Vaughn* Index to the district court or allow the court to conduct [*367] an *in camera* review of the documents. The district court found the affidavits sufficient and granted summary judgment to the IRS. Miscavige appealed.

Since we affirm the decision that the affidavits are sufficient factually to carry the government's burden of proof, we are faced with the question of whether this Circuit has adopted a per se rule requiring a so-called Vaughn Index or an *in camera* [**2] inspection of the documents in every FOIA case so that affidavits, regardless of their content, are insufficient. We think not, and therefore affirm the decision of the trial court denying relief without a *Vaughn* Index or an in camera inspection. We further hold that the court did not err in denying leave to take discovery depositions.

Freedom of Information Act cases are peculiarly difficult. As a general proposition, a person is entitled to access to government records about himself or herself unless the records are exempt. Some exemptions turn on protected information contained in the records. But the information in the records or documents that requires the government to withhold them cannot be made known to

the citizen seeking access, who therefore can never accurately make a judgment that such records are in fact exempt. To accommodate this problem certain procedures have been worked out.

Once a person has shown that the government has records that should be produced under the FOIA, absent an exemption, the burden of proof is on the government to establish that a given document is exempt from disclosure. *United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755, 109 S. Ct. 1468, 1472, 103 L. Ed. 2d 774 (1989)*. [**3] In reviewing determinations by the district court under FOIA, we must decide whether the district court had an adequate factual basis to render a decision that is not clearly erroneous. *Stephenson v. IRS, 629 F.2d 1140, 1144 (5th Cir.1980)*.

Shortly after this suit commenced and before an answer was filed, the plaintiff filed a motion to require the government to submit a *Vaughn* Index. This is a detailed index showing justification for withholding each document. *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), on appeal from remand, 523 F.2d 1136, 173 U.S. App. D.C. 187 (D.C.Cir.1975)*. The government opposed the motion on the grounds that a *Vaughn* Index is expensive, would not be needed if the affidavits are sufficient, and was, in any event, premature. The court denied the motion without citing a reason.

Subsequently, the district court granted summary judgment in the government's favor, finding that the documents at issue were properly withheld. In granting summary judgment, the court [**4] relied solely upon the declarations contained in various affidavits submitted by IRS officers, agents, and attorneys. In particular, the court relied upon the declaration and supplemental declaration of IRS attorney Julie Schwartz, which enumerated the withheld documents and stated the statutory basis for each withholding.

The first question then is whether affidavits can *never* furnish an adequate factual basis for a decision that documents are exempt under FOIA. It is well established in this Circuit that in most situations blanket objections and mere conclusory allegations or affidavits will not suffice for disposition of FOIA claims. *Stephenson v. IRS, 629 F.2d at 1144, fn. 9*.

There are some opinions in this Circuit that contain language suggesting that affidavits alone may never suffice. The question is whether these are holdings by which this panel is bound, or either dictum or decisions based on the distinctive facts of the case under consideration. Upon review of the pertinent cases, it appears that they fall within the latter categories.

In *Currie v. I.R.S., 704 F.2d 523 (11th Cir.1983)*, we upheld the denial [**5] of relief on the basis of affidavits, rejecting the necessity of a *Vaughn* Index. In that case, however, the district court made an *in camera* inspection of the documents. In fact, Judge Kravitch concurred in the failure to require a *Vaughn* Index only "in light of *in camera* inspection of all relevant documents." *Id. at 532*. It cannot be said with certainty, however, [*368] what the court would have done if the trial court had relied only on affidavits that set forth sufficient facts to support its finding the documents were exempt.

In *Ely v. F.B.I., 781 F.2d 1487 (11th Cir.1986)*, the court stated that "an agency must, at a minimum, submit to either of two methods of review by the district court in order to determine if the claim of privilege is properly made." The court then discussed *in camera* review and the *Vaughn* Index. That case cannot be deemed to be binding authority that affidavits will never be sufficient, however, because the district court there "required no *Vaughn* Index, no *in camera* inspection, no hearing, not even the filing of an affidavit to support the government's claim." *Id. at 1494*. [**6]

In *Stephenson v. IRS, 629 F.2d 1140, 1144 (5th Cir.1980)*, the court, noting the authority which holds that "resort to *in camera* review is discretionary ... as is resort to a *Vaughn* index," nevertheless held in that case that a *Vaughn* Index was required. The court noted that "where records do not exist, affidavits are probably not only sufficient but possibly the best method of verification. However, once it is established that records and documents are in possession of the governmental agency, more is required." *Id. at 1145*. *Stephenson* cannot have held that affidavits alone will always be insufficient because the affidavits in that case were clearly insufficient. Counsel for the IRS (who also is counsel for the IRS in the instant appeal) had admitted that the district court's finding of exemption had an inadequate basis and was therefore clearly erroneous. *Id. at 1144, fn. 10*. The court concluded that the district court had been

"led astray in its determination by factual conclusions founded in an affidavit which described the withheld documents in fairly detailed but generic [**7] terms." *Id. at 1145*. No such situation is present here.

Only in a case where the affidavits are specific and detailed enough to provide the necessary information, but there was no *Vaughn* Index or *in camera* review, could a panel decision establish a rule that affidavits alone are insufficient.

Absent a binding decision holding otherwise, we hold that in certain cases, affidavits can be sufficient for summary judgment purposes in an FOIA case if they provide as accurate a basis for decision as would sanitized indexing, random or representative sampling, *in camera* review, or oral testimony. *Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). See Vaughn v. United States, 936 F.2d 862, 867, 869 (6th Cir.1991).*

Given that affidavits *can* be used to meet the government's burden, the next question is whether the affidavits here contain sufficient information or whether a *Vaughn* Index or an *in camera* inspection should have been required. The government has furnished this court with [**8] sample *Vaughn* Indexes it prepared in other cases, and we conclude, upon examining those materials, that a *Vaughn* Index in this case would not be of particular help to the court in making its decision. *Vaughn* Indexes are most useful in cases involving thousands of pages of documents. The number of documents in question here, however, never exceeded more than 231, excluding the 208 pages that the district court correctly held are outside of the request, and on this appeal, number only about 50.

Moreover, under the circumstances presented in this case, although an *in camera* inspection of the documents by the trial court would have furnished further support for the trial court's decision, we cannot hold there was reversible error in failing to conduct such an inspection. We suggest that when there are so few documents involved, an *in camera* inspection might be the preferred procedure, but it is discretionary and not required, absent an abuse of discretion.

A close examination of the supporting affidavits submitted by Julie Schwartz shows that her declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document [**9] at issue. We are convinced therefore that the district court had an ample factual base and was not clearly erroneous in finding that the documents withheld were exempt under the applicable provisions of the FOIA.

[*369] The court's denial of discovery and leave to plaintiff to take the deposition of IRS agents was within the discretion of the court. Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified. The plaintiff's early attempt in litigation of this kind to obtain a *Vaughn* Index and to take discovery depositions is inappropriate until the government has first had a chance to provide the court with the information necessary to make a decision on the applicable exemptions.

AFFIRMED.