FEDERAL LAW RESEARCH
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5 USCA § 552 (FOIA)

Brian DICKERSON, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE,
Defendant-Appellee.
No. 92-1458.
United States Court of Appeals,
Sixth Circuit.
Argued Jan. 19, 1993.
Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇦ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.
See publication Words and Phrases for other judicial constructions and definitions.

[2] RECORDS ⇦ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇦ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇦ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to

interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⇐ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

***1427** Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the

investigatory files were not protected *1428 from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this

investigation."
The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief

suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

FN4. Even where exemption (7)(A) has

become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement

records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III
A

[5] The district court was correct, we believe,

in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind *1433 of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than *1434 by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865

(6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

> FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that

> disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law

enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

> ***1438** also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the

Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

> FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may

approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

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871406-JASO,ERIC H

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DATE AND TIME PRINTING ENDED:	12/01/93	10:20:45 am (Central)
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FOIA

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Brian **DICKERSON**, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 92-1458.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 19, 1993.

Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇦ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.

See publication Words and Phrases for other judicial constructions and definitions.

[2] RECORDS ⇦ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇦ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇦ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. §

552(b)(7)(A).

[6] RECORDS ⇐ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

*1427 Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the investigatory files were not protected *1428 from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit

and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation."

The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public

disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

> FN4. Even where exemption (7)(A) has become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by

the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III

A

[5] The district court was correct, we believe, in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind *1433 of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than ***1434** by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865 (6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481,

103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

> FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against

government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the

documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

*1438 also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may

haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

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In re DEPARTMENT OF JUSTICE, Petitioner.
Barbara Ann CRANCER, Appellee,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Appellant.

Nos. 91-2080, 91-2164.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1992.

Decided Aug. 5, 1993.

Freedom of Information Act (FOIA) suit was brought. The United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., required government to provide Vaughn index covering each document sought. Appeal was taken. The Court of Appeals, 950 F.2d 530, affirmed. En banc rehearing was granted. The Court of Appeals, Wollman, Circuit Judge, held that Vaughn index could not be required.

Writ of mandamus issued, orders vacated, and case remanded.

McMillian, Circuit Judge, dissented and filed opinion joined by Arnold, Chief Judge.

[1] FEDERAL COURTS ⇐ 524
170Bk524
Court of Appeals had jurisdiction under All Writs Act to decide whether district court committed usurpation of power by directing Department of Justice to produce Vaughn index when invoking Freedom of Information Act (FOIA) exemption for law enforcement records; if district court lacked authority, writ would be proper remedy, and issue of availability of writ was intertwined with merits of the interlocutory matter. 5 U.S.C.A. § 552(b)(7)(A); 28 U.S.C.A. § 1651(b).

[2] RECORDS ⇐ 50
326k50
Consistent with policy of broad disclosure under Freedom of Information Act (FOIA), government is required to release all requested information upon demand of any number of public. 5 U.S.C.A. § 552.

[3] RECORDS ⇐ 62
326k62
Once information is requested under Freedom of Information Act (FOIA), government must provide the information, unless it determines that specific exemption applies. 5 U.S.C.A. § 552.

[4] RECORDS ⇐ 62
326k62
Vaughn index could not be required for law enforcement records allegedly exempt from disclosure under Freedom of Information Act (FOIA); thus, district court should not have required government, after identifying each document, to provide detailed justification statement covering each refusal to release agency records or portions. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇐ 65
326k65
Government need not produce fact-specific and document-specific Vaughn index in order to satisfy burden of establishing application of Freedom of Information Act (FOIA) exemption for law enforcement records; contents of requested documents are irrelevant, and court must focus on particular categories of documents and likelihood that release of documents in those categories could reasonably be expected to threaten enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⇐ 65
326k65
To satisfy burden with regard to Freedom of Information Act (FOIA) exemption for law enforcement records, government must define functional categories of documents, conduct document-by-document review to assign documents to proper categories, and explain to court how release of each category would interfere with enforcement proceeding. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⇐ 65
326k65
If generic index submitted by government is not sufficient to sustain Freedom of Information Act (FOIA) exemption for law enforcement records, then district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with

enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[8] RECORDS ⇐ 66
326k66
District court may examine disputed documents in camera to make firsthand determination of application of Freedom of Information Act (FOIA) exemption for law enforcement records if categories submitted by government remain too general after district court requests more specific, distinct categories. 5 U.S.C.A. § 552(b)(7)(A).

[9] RECORDS ⇐ 63
326k63
While district court may not order Vaughn index as aid to review of claim for exemption under Freedom of Information Act (FOIA) exemption for law enforcement records, court must satisfy itself that requested documents have been properly withheld. 5 U.S.C.A. § 552(b)(7)(A).

***1304** Scott R. McIntosh, Washington, DC, argued (Stuart M. Gerson, Stephen B. Higgins, Leonard Schaitman and Scott R. McIntosh, on the petition for rehearing), for appellant.

Richard E. Greenberg, Clayton, MO, argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

In In re Department of Justice, 950 F.2d 530 (8th Cir.1991) (Crancer I), a panel of this court upheld the district court's order requiring the government to provide a Vaughn [FN1] index after the government had invoked Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988). We granted the government's suggestion for rehearing en banc and vacated the panel's decision. We now issue a writ of mandamus, vacate the challenged order, and remand the case to the district court for further proceedings.

FN1. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

I.

In 1987, Barbara Ann Crancer filed a Freedom of Information Act (FOIA) request with the Department of Justice. Crancer sought the release of certain information uncovered during the investigation conducted by the Federal Bureau of Investigation into the disappearance of her father, Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. The FBI's investigation has resulted in the accumulation of more than 13,800 pages of records relating to Hoffa's disappearance.

The Department denied Crancer's request on the basis of Exemption 7(A), contending that the Hoffa FBI file contains "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

After exhausting her administrative remedies, Crancer brought suit to compel the Department to provide her with the documents she had requested. During the pendency of her suit, Crancer filed a second, broader request seeking any and all materials relating to the FBI's investigation into Hoffa's disappearance. After this request was administratively denied by the Department, also on the basis of Exemption 7(A), Crancer amended her complaint to include her second request.

The Department moved for summary judgment on the basis of the claimed exemption. The district court ordered the Department to provide Crancer with a Vaughn index so that she could effectively oppose the government's pending motion. The court's order required the Department to produce an "itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request," together with a "detailed justification statement covering each refusal to release [an] agency record[ ] or portions thereof." D.Ct. Order of July 27, 1990, at 1. The Department asked the court to reconsider its order directing the production of the Vaughn index. This request was denied. The Department then requested that the district court modify its earlier order and allow the Department to provide a categorical description of the documents contained in the Hoffa FBI file. The Department submitted a list of nine categories of documents and

an affidavit describing the potential interference with enforcement proceedings that would result if it were required to compile a Vaughn index. The district court denied this request and ordered the Department to submit the Vaughn index to a magistrate judge for in camera review.

In lieu of submitting a Vaughn index, the Department asked the magistrate judge to review the actual documents in camera. The magistrate judge denied this request, but extended the time period in which the Vaughn index was to be submitted. The Department then asked the district court to ***1305** reconsider the magistrate judge's order or, in the alternative, to certify the matter for interlocutory appeal. These requests were also denied.

The Department then sought relief from this court, asserting jurisdiction under the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), or the All Writs Act, 28 U.S.C. § 1651(b).

In Crancer I, the panel asserted jurisdiction under the All Writs Act and upheld the district court's order requiring the preparation of a Vaughn index. The panel first determined that the Department could not be required to provide a specific factual showing and explanation describing why each document is exempt. It went on to hold, however, that the Department could be required to make a specific factual showing to demonstrate why each document belongs in a certain category, along with an explanation describing why the category itself is exempt from disclosure.

II.

[1] We first examine whether, and the basis upon which, we have jurisdiction to hear this case.

We possess discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b). As noted by the panel in Crancer I, mandamus is "available only in those exceptional circumstances amounting to a judicial usurpation of power." In re Ford Motor Co., 751 F.2d 274, 275 (8th Cir.1984).

The panel determined that:

> [The Department's] argument is a novel one and has not been directly addressed by any court. If [the Department] is correct in its contention that the district court lacked authority to order a Vaughn index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a Vaughn-type index in these circumstances.

Crancer I, 950 F.2d at 532 (citation omitted). We agree with the panel's analysis and believe that this case presents a unique situation. Thus, we conclude that we have jurisdiction to decide the question whether the district court's order directing the Department to produce a Vaughn index in the face of the Department's invocation of Exemption 7(A) constituted a judicial usurpation of power.

III.

[2] "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Consistent with this policy of broad disclosure, the government is required to release all requested information upon the demand of any member of the public. Id. at 221, 98 S.Ct. at 2316; see also Curran v. Department of Justice, 813 F.2d 473 (1st Cir.1987); Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987). Congress fashioned certain explicit exemptions from disclosure, however, in order to preserve vital government policies and, in some cases, to protect individuals. See 5 U.S.C. § 552(b)(1)-)9; see also Robbins Tire, 437 U.S. at 220-21, 98 S.Ct. at 2316 ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests.").

[3] Once information is requested under FOIA, therefore, the government must provide the information unless it determines that a specific exemption applies. Likewise, the government bears the burden of demonstrating that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). The district court must determine de novo whether the government has satisfied its burden. Id.

In the face of a claimed statutory exemption, district courts have sometimes required the

government to provide a Vaughn index. "This indexing procedure is perceived as necessary to permit the district court and the requesting party to evaluate the [government's] decision to withhold records and to ensure its compliance with the mandates of the FOIA." Barney v. IRS, 618 F.2d 1268, 1272 (8th Cir.1980) (per curiam).

***1306** A Vaughn index provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. Crancer I, 950 F.2d at 533. "For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided." Id.; see also Barney, 618 F.2d at 1272.

[4] Exemption 7(A) of FOIA provides that the act "does not apply to matters that are--* * * (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). The government contends that the courts have interpreted this exemption differently from other FOIA exemptions, with the result that a district court may not order the production of a Vaughn index when Exemption 7(A) is invoked.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), the Supreme Court addressed the burden that the government must bear when asserting Exemption 7(A). In that case, the FOIA requester, an employer, sought from the National Labor Relations Board all statements made by potential witnesses prior to a Board hearing on the employer's unfair labor practices. Id. at 216, 98 S.Ct. at 2314. On appeal, the employer argued that the district court had erred by not requiring the government to make an individualized showing that each withheld document fit within the limits of Exemption 7(A). The Supreme Court rejected this argument, interpreting Exemption 7(A) of FOIA to require the government to prove that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324.

In support of its ruling, the Supreme Court noted that:

> [t]here is a readily apparent difference between [Exemption 7(A)] and [Exemptions 7(B)-(D)]. The latter [exemptions] refer to particular cases ... and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since [Exemption 7(A)] speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24, 98 S.Ct. at 2318. The Court then examined Exemption 7's legislative history, which appeared to confirm the Court's observation regarding the distinguishing characteristic of Exemption 7(A). Id. at 224-34, 98 S.Ct. at 2318. The Court further noted that had Congress intended that "the Government in each case show a particularized risk to its individual 'enforcement proceedin[g],' " it could have done so. Id. at 234, 98 S.Ct. at 2323.

The Court also addressed Congress's 1974 amendment of Exemption 7(A). This amendment was designed "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 236, 98 S.Ct. at 2324. The Court's discussion of President Ford's veto of the 1974 amendment and the subsequent congressional override is instructive for our present analysis. The President was concerned that the 1974 amendment to Exemption 7(A) "would require the Government to 'prove ...--separately for each paragraph of each document--that disclosure "would" cause' a specific harm" to enforcement proceedings. Id. at 235, 98 S.Ct. at 2323 (citation omitted). Congressional supporters of the amendment termed the President's interpretation of the amendment " 'ludicrous,' " stating that the " 'burden is substantially less than we would be led to believe by the President's message.' " Id. (citation omitted). [FN2]

> FN2. For further discussion of the legislative history of the 1974 amendment to Exemption 7(A), see Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 626, 102 S.Ct. 2054, 2061, 72 L.Ed.2d 376 (1982); Campbell v. Department of

Health and Human Serv., 682 F.2d 256, 261-63 (D.C.Cir.1982).

The Court concluded that although the 1974 amendment to Exemption 7(A) was designed ***1307** to eliminate blanket exemptions for records found in investigatory files, Congress did not intend that generic determinations of those materials entitled to Exemption 7(A) protection could never be made. Rather, the government must demonstrate, and courts must determine, whether "disclosure of particular kinds of investigatory records ... would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. In other words, Congress intended that certain types or categories of investigatory records be withheld under Exemption 7(A) because disclosure of documents within those categories generally would interfere with enforcement proceedings.

With this understanding, post-Robbins Tire courts have made these determinations generically, category-of-document by category-of-document. In Barney v. IRS, for example, we were confronted with the question whether, in the wake of Robbins Tire, the government was required to provide a Vaughn index after the government invoked Exemption 7(A). 618 F.2d 1268 (8th Cir.1980) (per curiam). We held that "[t]o sustain its burden of showing documents were properly withheld under exemption 7(A) the government had to establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." Id. at 1272-73. The Barney court bolstered its conclusion by emphasizing that "[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." Id. at 1273 (citing Robbins Tire, 437 U.S. at 234-35, 98 S.Ct. at 2323).

Congress amended Exemption 7 in 1986 to lessen the burden on the government in establishing the application of Exemption 7(A). Freedom of Information Reform Act of 1986 (FIRA), Pub.L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). Whereas under the 1974 version of Exemption 7(A), the government bore the burden of showing that the production of the requested law enforcement records "would interfere with enforcement proceedings," under the 1986 version the government need only show that the production of law enforcement records or information "could reasonably be expected to interfere with law enforcement proceedings."

In 1989, the Supreme Court revisited the government's burden under Exemption 7, this time focusing on the use of categorical determinations under Exemption 7(C), which covers documents whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("Reporters Committee "). In Reporters Committee, a group of journalists requested that the FBI disclose an individual's computerized criminal history file, known colloquially as the person's "rap sheet." The Supreme Court held that the production of rap sheets "as a categorical matter" could reasonably be expected to constitute an unwarranted invasion of a citizen's privacy. Id. at 780, 109 S.Ct. at 1485.

The Court discussed its earlier approval of a categorical approach to Exemption 7(A) in Robbins Tire. The Court noted that it had based its ruling in Robbins Tire on the perception that Exemption 7(A)'s reference to the plural "enforcement proceedings" supported a categorical approach when 7(A) was invoked, in contrast to the singular references in the other subsections of Exemption 7, which seemed to suggest a case-by-case balancing. Finding that "[j]ust as one can ask whether a particular rap sheet is a 'law enforcement record' that meets the requirements of [Exemption 7(C)], so too can one ask whether rap sheets in general ... are 'law enforcement records' that meet the stated criteria," the Court concluded that its approval of a categorical approach for Exemption 7(A) applied with equal force to the other subsections in Exemption 7. Id. at 779, 109 S.Ct. at 1485. Because the Court found that the disclosure of computerized compilations of an individual's criminal history could always be expected to constitute an invasion of an individual's privacy, it held that rap sheets as a category are exempted from disclosure under FOIA. Id. at 780, 109 S.Ct. at 1485.

The Court also supported its holding that a

categorical approach was appropriate for Exemption 7(C) as well as 7(A) by pointing to *1308 the 1986 amendment. The Court stated that the amended 7(C), which like 7(A) had changed from the more stringent "would" to the more flexible "could reasonably be expected to," was enacted "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." Id. at 777 n. 22, 109 S.Ct. at 1484 n. 22. The Court further noted that the amendment was designed to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness ... based on an objective test.' " Id. This reasonableness standard, the Court concluded, "amply supports a categorical approach to the balance of private and public interests in Exemption 7(C)." Id. The Court's conclusion concerning the effect of the amendment applies with equal force to Exemption 7(A), given the Court's conclusion that all of the Exemption 7 subsections should be interpreted similarly with respect to the use of categorical justifications.

Recently, the Court further explained its categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). Seeking to support a claim that the government had failed to disclose exculpatory evidence in his earlier criminal case, Landano sought all of the FBI files connected with the police officer's murder for which Landano had been convicted. After releasing a portion of its files, the FBI withheld certain documents on the grounds that they were exempt under Exemption 7(D), which applies to law enforcement records or information whose production "could reasonably be expected to disclose the identity of a confidential source." The district court largely rejected the government's categorical explanations and held that the FBI had to articulate "case-specific reasons for non-disclosure" of all information other than records pertaining to regular FBI informants. Id., --- U.S. at ----, 113 S.Ct. at 2018. The Court of Appeals for the Third Circuit affirmed, holding that the government had to provide detailed explanations relating to each alleged confidential source in order to justify nondisclosure under Exemption 7(D). Id., ---U.S. at ----, 113 S.Ct. at 2019.

The Supreme Court reversed and remanded. The Court first rejected the government's argument that it is entitled to a presumption under FOIA that all FBI sources are confidential and that any records relating to FBI sources should be presumptively exempt from disclosure. The Court noted that the government's proposed presumption was not rebuttable, as argued by the government, but amounted to an irrebuttable presumption or blanket exemption that found no support in the language or legislative history of Exemption 7(D). Id., --- U.S. at ----, 113 S.Ct. at 2023.

The Court, however, did not agree with the Third Circuit's requirement that the government must provide a detailed justification relating to each alleged confidential source. To the contrary, the Court stated that the government could point to categories of documents, the circumstances surrounding which would support the inference that the sources to whom they pertained were confidential. Id., --- U.S. at ----, 113 S.Ct. at 2023. For example, the Court suggested that "paid informants normally expect their cooperation with the FBI to be kept confidential," implying that the government need only present a category of documents relating to paid informants, whose production could reasonably be expected to disclose the informant's identity, in order to justify nondisclosure under Exemption 7(D). Id. As a second example, the Court opined that eyewitnesses to a gang-related murder could also probably be presumed to be confidential. Id. The Court concluded that such a generic, categorical approach best articulated Congress's intent "to provide ' " 'workable' rules" ' of FOIA disclosure." Id. (citing Reporters Committee, 489 U.S. at 779, 109 S.Ct. at 1485).

Thus, we conclude that the Supreme Court has consistently interpreted Exemption 7 of FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis in order to justify nondisclosure under one of Exemption 7's subsections. See Landano, --- U.S. at ---- - ----, 113 S.Ct. at 2023-24; Reporters Committee, 489 U.S. at 779-80, 109 S.Ct. at 1485; Robbins Tire, 437 U.S. at 241-43, 98 S.Ct. at 2326-27. The Court's interpretation *1309 of Exemption 7 and Congress's intent in enacting it has been strengthened by the 1986 amendment, which provided for greater flexibility and lessened the government's burden. See Reporters Committee, 489 U.S. at 777 n. 22, 109 S.Ct. at 1484 n. 22.

Our interpretation of Exemption 7(A) in Barney mirrors the Supreme Court's interpretation. Moreover, consistent with the teachings of Robbins Tire, our analysis in Barney is in accord with the principle that " 'the inherent nature of the requested documents is irrelevant to the question of exemption.' " Curran, 813 F.2d at 474 (quoting Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987)). This interpretation is consistent with decisions from other circuits. See, e.g., Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987); Curran, 813 F.2d at 475; Church of Scientology of Calif. v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986); Campbell, 682 F.2d at 265. [FN3]

FN3. The panel attempted to distinguish these cases on the ground that the appellate courts were reviewing district court decisions that had found Vaughn indices not to be required. Crancer I, 950 F.2d at 534. We find this reasoning unpersuasive. Whatever the procedural posture, the Supreme Court has made clear that the government does not have to provide fact-specific information with respect to each document to justify its claim that Exemption 7(A) applies. As demonstrated, the actual contents of the documents are not relevant when the propriety of Exemption 7(A) is in dispute. See Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2323. Rather, the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation. Id.

The District of Columbia Circuit, which originally developed the Vaughn index, has succinctly explained the relationship between Exemption 7(A), as interpreted by Robbins Tire, and the use of Vaughn indices:

> [w]hen ... a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a Vaughn index is futile. Thus, in NLRB v. Robbins Tire & Rubber Co., [citation omitted], the Supreme Court upheld, without any provision of a Vaughn index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A Vaughn index would have served no purpose since ... [Exemption 7(A)] did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.).

In light of the above discussion, the district court's order for a Vaughn index in the present case appends an additional requirement to Exemption 7(A) that exceeds the bounds of the statute as interpreted by the Supreme Court and this court. The district court's order required the government, after identifying each document, to provide a "detailed justification statement covering each refusal to release said agency records or portions thereof." D.Ct. Order of July 27, 1990, at 1. This goes beyond the categorical explanations that the Supreme Court in Robbins Tire held to be sufficient to justify nondisclosure under Exemption 7(A).

[5] In sum, the government bears the burden of establishing that Exemption 7(A) applies. And under Robbins Tire, Exemption 7(A) does not require that the government produce a fact-specific, document-specific, Vaughn index in order to satisfy that burden. The contents of the requested documents are irrelevant. It is the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings, on which the court must focus. The district court, therefore, acted beyond the scope of its authority when it ordered the Department to produce a Vaughn index.

IV.

[6] "Although generic determinations are permitted, and the government need not justify its 7(A) refusal on a document-by-document basis, there must nevertheless be some minimally sufficient showing." Curran, 813 F.2d at 475. To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents; ***1310** it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings. [FN4] See Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986).

FN4. We express no opinion as to whether the

> categorical index submitted by the Department in this case satisfies the Bevis paradigm. The proceeding below was, for all intents and purposes, focused only on whether the district court could order a Vaughn index. On remand, the Department should submit its categorical index and affidavits in accordance with the principles set forth in this opinion.

[7] If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with enforcement proceedings. See Campbell, 682 F.2d at 265. Indeed, this is what the court ordered in Bevis, 801 F.2d at 1390. "The chief characteristic of an acceptable taxonomy should be functionality--that is, the classification should be clear enough to permit a court to ascertain 'how each .. category of documents, if disclosed, would interfere with the investigation.' " Curran, 813 F.2d at 475 (citing Campbell, 682 F.2d at 265).

[8] If the categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); Lewis, 823 F.2d at 378; see also Cleary v. FBI, 811 F.2d 421, 423 (8th Cir.1987) (in camera examination in 7(C) and (D) exemption case); Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir.1984); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir.1978).

In **Dickerson v. Department of Justice, 992 F.2d 1426** (6th Cir.1993), the plaintiff sought the release of information from the Hoffa FBI file and requested a Vaughn index. The district court accepted the government's categorical index, examined certain documents in camera, and granted summary judgment to the government on the basis of Exemption 7(A). The court stated that it was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422 (E.D.Mich. July 31, 1991).

On appeal, the Court of Appeals for the Sixth Circuit reviewed the file that had been submitted to the district court and concluded that the district court had not abused its discretion in ruling that there was no need to go beyond the documents that the FBI had submitted. **Dickerson, 992 F.2d at 1431-32.** The court of appeals also held that the district court was correct in finding that the FBI's investigation remains active and that it was directed toward the institution of criminal proceedings. **Id. at 1432.** Further, the Sixth Circuit held that the district court was correct "in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution." **Id. at 1433.**

[9] In the present case, the district court was apparently of the belief that the Department was not asserting Exemption 7(A) in good faith or that it had not individually reviewed the requested documents to place them in their functional categories. While the district court may not order a Vaughn index as an aid to its review, it still must satisfy itself that the requested documents have been properly withheld. The Department's failure to demonstrate that the sought-after documents relate to an ongoing investigation or could reasonably be expected to interfere with future law enforcement proceedings will carry with it the loss of the 7(A) exemption. In that regard, we note that although the Sixth Circuit's affirmative holding on that issue in Dickerson will not be binding on the district court on remand, that holding does give credence to the Department's assertion of the 7(A) exemption in the present case.

In summary, Congress enacted Exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in Robbins Tire to allow generic category-by-category classifications in Exemption 7(A) cases, rather than detailed fact- ***1311** specific explanations on a document-by-document basis, serves an important interest: "[p]rovision of the detail which a satisfactory Vaughn Index entails would itself probably breach the dike." Curran, 813 F.2d at 475. "Withal, a tightrope must be walked [in Exemption 7(A) cases]: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." Id. In short, we will not allow the cure, Exemption 7(A), to "become the carrier of the disease." Id.

The writ of mandamus prayed for is issued. The

orders directing the production of a Vaughn index are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, joins, dissenting.

"Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

As discussed below, although I agree with much of the analysis in the majority opinion, I do not agree that the district court exceeded the scope of its authority when it ordered the Department of Justice (hereinafter the government) to prepare a Vaughn index of FBIHQ file 9-60052, the FBI's investigatory file concerning the investigation into the disappearance and presumed murder of Teamsters president Jimmy Hoffa in July 1975. Accordingly, I would deny the petition for writ of mandamus.

COLLATERAL ORDER

First, I do not agree that we have appellate jurisdiction to review the government's appeal, No. 91-2164. As discussed below, the term "Vaughn index" is derived from 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), and a Vaughn index is typically a detailed affidavit which "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information." Id., 484 F.2d at 826. In my view, the district court order in the present case requiring the preparation of a Vaughn index was essentially a discovery order in this FOIA litigation. Discovery orders are "generally not appealable as collateral orders even when they are attacked as burdensome." Hinton v. Department of Justice, 844 F.2d 126, 131 (3d Cir.1988). The Vaughn index is not an end in itself; by definition, the Vaughn index does not itself disclose anything of substance. "[A] Vaughn index does not accord a requester any of the substantive relief [the requester] seeks.... Rather, the [Vaughn] index is a tool for determining the requester's substantive rights [under FOIA]." Id. at 130.

It is true that "[the Freedom of Information Act (FOIA)] was not intended to supplement or displace rules of discovery." John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989). However, the present case involves only the FOIA requests themselves. It is a discrete civil action. The FOIA is not being used here as a discovery tool to supplement or displace discovery in connection with other litigation, for example, other criminal or civil proceedings. In discovery proceedings the issue is whether the information sought is relevant and necessary; however, in FOIA litigation the only issue is whether the agency has properly withheld the information sought under one of the specific statutory exemptions. See, e.g., North v. Walsh, 279 U.S.App.D.C. 373, 881 F.2d 1088, 1095 (1989) (FOIA request seeking documents from Office of Independent Counsel concerning on-going criminal investigation of plaintiff).

I also do not agree that the district court order is appealable under the final collateral order exception. Hinton v. Department of Justice, 844 F.2d at 131. Collateral orders are appealable if (1) the order conclusively decides the disputed issue, (2) the issue is entirely distinct from the merits of the case, and (3) the order would be effectively unreviewable if the appeal were postponed until the issuance of a final order. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). At this point in the present case, the district court has only ordered the preparation of a Vaughn index and has yet to ***1312** conclusively decide the merits of the government's claim of exemption under Exemption 7(A). The district court agreed to consider the Vaughn index in camera; the district court has not even decided whether or not to disclose the Vaughn index itself to the public or counsel for plaintiff. As noted above, the preparation of a Vaughn index "does not accord a requester any of the substantive relief [he or she] seeks." Id. at 130. The substantive relief the requester wants is access to the government's records, not the preparation of or access to the Vaughn index of those records. The preparation of a Vaughn index is only a preliminary or preparatory step. As was noted by the panel majority opinion,

the present case

> is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclosure. [The present] case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

950 F.2d at 533.

MANDAMUS

In the present case the government does not argue the district court abused its discretion in ordering a Vaughn index; the government argues the district court lacked the authority to order a Vaughn index. The government has thus presented the issue in terms of the power or authority of the district court. The government argues that Exemption 7(A) is different from other FOIA exemptions and that the district court can never require the preparation of a Vaughn index when the government agency invokes Exemption 7(A). As noted by the panel majority opinion, this is a novel argument that squarely challenges the authority of the district court to act. 950 F.2d at 532. Because the government has presented its argument in terms of the district court's authority to act, and not in terms of whether or not the district court abused its discretion, I agree that, under these unique circumstances, we have jurisdiction to review the district court order by petition for writ of mandamus.

THE VAUGHN INDEX

A healthy distrust of government, and a corresponding suspicion of government secrecy, is the underlying premise of FOIA. FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978) (Robbins). FOIA's "general philosophy [is] 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Department of Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), citing S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). " 'Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,' and therefore provided the 'specific exemptions under which disclosure could be refused.' " John Doe Agency v. John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475, citing FBI v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376 (1982). The statutory exemptions are to be narrowly construed, Department of Air Force v. Rose, 425 U.S. at 361, 96 S.Ct. at 1599, the district courts review the claim of exemptions de novo, and the burden of justifying nondisclosure, that is, the burden of establishing that the information requested is protected from disclosure by a specific exemption, is on the agency. See 5 U.S.C. § 552(a)(4)(B).

As noted by the panel majority opinion, the district court's responsibility to review de novo the government's claimed exemptions is complicated by the fact that "ordinarily a government agency, and not the court, has access to the documents in question." 950 F.2d at 533. "The party requesting the disclosure must rely upon his [or her] adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding ***1313** agency's arguments." Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992). This is the precise difficulty at the heart of the present case and it is also what precipitated the invention of the Vaughn index.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure....
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation.

Vaughn v. Rosen, 484 F.2d at 823-24. Thus, in FOIA litigation, the plaintiff, the party seeking disclosure, is placed in the awkward and frustrating position of speculating about the likely contents of documents that it has never seen.

In Vaughn v. Rosen the plaintiff was a law professor doing research on the Civil Service Commission. The professor sought disclosure of the evaluations of certain government agencies' personnel management programs and certain other special reports of the Bureau of Personnel Management. The government claimed that the documents contained information of a personal nature about the government agency employees and that disclosure would constitute an invasion of the employees' personal privacy. The court of appeals noted that the plaintiff's lack of knowledge necessarily meant that he quite literally did not know, and therefore could not inform the court, whether or not the government's factual characterization of the documents as containing information of a personal nature was accurate. Id., 484 F.2d at 824. The court of appeals observed that the plaintiff's lack of knowledge not only hampered his ability to litigate in the district court (he was essentially limited to arguing that the exemption is very narrow and that the general nature of the documents sought made it unlikely that they contained personal information), but

> [t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, ... and hence the typical process of dispute resolution is impossible....
>
> The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to [FOIA]. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously, an appellate court is even less suited to making this inquiry than is a trial court.

Id., 484 F.2d at 824-25. The FOIA requester in the present case is in the same position as the law professor in Vaughn v. Rosen.

The Vaughn v. Rosen court concluded that, contrary to the intent of Congress, FOIA "actually encourage[d] the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." Id., 484 F.2d at 826. Not only did FOIA contain "no inherent incentives that would affirmatively spur government agencies to disclose information," id., but "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, ... [FOIA] encourage[d] agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information." ***1314** Id. These concerns compelled the Vaughn v. Rosen court to develop what has become known as the Vaughn index in order to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." Id.

As noted by the panel majority opinion,

> [t]here is no prescribed form for a Vaughn index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. Regardless of form, however, certain components are integral parts of any Vaughn index. Specifically, Vaughn indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

950 F.2d at 533 (citations omitted). "Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment [upholding the government's claimed

exemption] if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.' " King v. United States Department of Justice, 265 U.S.App.D.C. 62, 830 F.2d 210, 219 (1987) (footnotes omitted). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review.' " Id. Whether the government's affidavit or affidavits constitute an adequate Vaughn index is a question of law reviewed de novo. Wiener v. FBI, 943 F.2d at 978, citing Binion v. United States Department of Justice, 695 F.2d 1189, 1193 (9th Cir.1983).

Preparation of the Vaughn index does more than require the government agency to review and classify the documents in question. The resulting Vaughn index is more than a litigation tool that the FOIA requester can use to challenge the government's withholding of those documents. It is important to remember that requiring the government agency to prepare a Vaughn index

> forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he [or she] can present his [or her] case to the trial court.

Lykins v. Department of Justice, 233 U.S.App.D.C. 349, 725 F.2d 1455, 1463 (1984). "The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." Wiener v. FBI, 943 F.2d at 977-78; see also Davis v. CIA, 711 F.2d 858, 861 (8th Cir.1983), cert. denied, 465 U.S. 1035, 104 S.Ct. 1307, 79 L.Ed.2d 705 (1984).

ROBBINS DECISION

As has already been discussed, Exemption 7(A) is the law enforcement exemption and provides that disclosure is not required of "matters that are ... investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In the present case the government argues the district court lacked the authority to require the preparation of a Vaughn index because a Vaughn index is not required when Exemption 7(A) is invoked, citing Robbins, 437 U.S. at 223-24, 234-36, 98 S.Ct. at 2317-18, 2323. In Robbins the FOIA plaintiff was an employer seeking disclosure of witness statements prior to an unfair labor practice hearing. Following a contested representation election, the regional director of the NLRB filed an unfair labor practice charge against the employer for pre-election actions. A hearing was scheduled. Prior to the hearing, the employer sought disclosure of all potential witnesses' statements collected by the NLRB during its investigation. The regional director denied the request on the ground that the witness statements were exempt from disclosure under several FOIA exemptions, ***1315** in particular Exemption 7(A). The employer appealed to the NLRB General Counsel. However, before the expiration of FOIA's 20-day response period, 5 U.S.C. § 552(a)(4)(B), the employer filed a FOIA action in federal district court, seeking disclosure of the witness statements and an injunction against holding the hearing until the documents had been disclosed. The NLRB argued that witness statements were exempt from disclosure under Exemption 7(A) because their production would interfere with an enforcement proceeding, the pending unfair labor practice hearing. The district court disagreed and ordered the NLRB to produce the witness statements.

The issue whether Exemption 7(A) was generic, or categorical, or case-specific emerged on appeal. The court of appeals rejected the NLRB's categorical or generic approach and concluded that the 1974 legislative history demonstrated that Exemption 7(A) was available only after a specific evidentiary showing of the possibility of actual interference in an individual case. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 728 (5th Cir.1977). The court of appeals rejected the NLRB's arguments that the premature revelation of its case through the production of the witness statements before the hearing was the kind of interference that would justify nondisclosure and that pre-hearing production of witness statements would discourage potential witnesses from making statements at all. Id. at 729-31. The court of appeals acknowledged that the possibility of "interference" in the form of witness intimidation by the employer during the period between disclosure

of the witness statements to the employer and the hearing, but held that the NLRB had failed to demonstrate that the witness statements were exempt because it had not introduced any evidence that witness intimidation was likely in this particular case. Id. at 732. But see, e.g., Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.) (holding statements of employees and union representatives obtained in NLRB investigation exempt from disclosure under Exemption 7(A) until completion of administrative and judicial proceedings), cert. denied, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

The Supreme Court reversed. The Court endorsed the generic, or categorical, interpretation of Exemption 7(A) and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." 437 U.S. at 236, 98 S.Ct. at 2324. First, the Court noted that the language of the exemption, specifically the plural reference to "enforcement proceedings," suggested that "certain generic determinations" might be made under Exemption 7(A). Id. at 224, 98 S.Ct. at 2318. The Court concluded that the early legislative history supported this interpretation, id. at 225-26, 98 S.Ct. at 2318-19 (referring to Sen. Humphrey's concerns in 1966 about the need to protect statements of agency witnesses from disclosure prior to agency proceedings, specifically witnesses in unfair labor practice proceedings), as well as the reported decisions until 1974. Id. at 226, 98 S.Ct. at 2319 (citing cases). The Court also noted that the legislative history of the 1974 amendment of Exemption 7 showed "[t]hat the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings." Id. at 232, 98 S.Ct. at 2322; see id. at 226-32, 98 S.Ct. at 2319-22 (noting background of 1974 amendment, particularly Congressional disapproval of several D.C.Cir. decisions upholding "blanket exemptions" for all government records contained in investigatory files that had been compiled for law enforcement purposes; 1974 amendment changed scope of exemption from "files" to "records" and enumerated specific purposes and objectives of exemption).

The Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of law enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. The Court agreed that "[t]he most obvious risk of interference with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony ***1316** or not testify at all." Id. at 239, 98 S.Ct. at 2325. In addition, prehearing disclosure of witnesses' statements "would disturb the existing balance of relations in unfair labor practice proceedings," id. at 236, 98 S.Ct. at 2324, especially since, "[h]istorically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case." Id. The Court also noted that the use of FOIA as the mechanism for providing a litigant with earlier and greater access to the agency's case than the litigant would otherwise have was likely to cause substantial delays in the administrative process and thus interfere with enforcement proceedings. Id. at 237-38, 98 S.Ct. at 2324. [FN5]

FN5. As noted by the majority opinion, at 1307 supra, the Supreme Court recently affirmed the Robbins categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, ----, ---- - ----, 113 S.Ct. 2014, 2021, 2023-24, 124 L.Ed.2d 84 (1993) (rejecting blanket exemption for "all" FBI sources as confidential for purposes of Exemption 7(D); however, "more narrowly defined circumstances" may support inference of confidentiality, for example, generic category of paid informants). See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (holding "rap sheets" constituted generic category of law enforcement records which could reasonably be expected to constitute an unwarranted invasion of privacy within meaning of Exemption 7(C)). I do not dispute the continued validity of the Robbins categorical approach. What is in dispute in the present case is whether, as a threshold matter, we know enough about the nature of the records in question to review the accuracy of the government's

> classification of the records into generic categories. I submit that we do not.

APPLICATION OF EXEMPTION 7(A)

I do not think Robbins supports the government's argument in the present case. As noted by the panel majority opinion, after Robbins endorsed the generic, or categorical, application of Exemption 7(A), many courts of appeals

> altered their views on the need for a Vaughn index when Exemption 7(A) is involved. The rationale underlying these post-Robbins decisions has been that a Vaughn index is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. E.g., Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986) (Scalia, J.); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir.1980) (per curiam). Moreover, in each of these cases, the appellate court was reviewing a district court's decision not to require a Vaughn index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings.
>
> At no time, however, has an appellate court suggested that Robbins alters the district court's statutory obligation to review the claimed exemption's applicability. Robbins does not allow for exemption merely because documents appear in a law enforcement agency's file. When an agency relies upon Robbins and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually.... The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this task by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings. Robbins merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the government to justify its chosen categorization on a document-by-document basis. 950 F.2d at 533-34 (parenthetical omitted from Barney citation; citations omitted; footnote omitted).

In Robbins it was not disputed that the documents in question were in fact witness ***1317** statements. Nor was it disputed in Robbins that, at least in general, disclosure of witness statements prior to the unfair labor practice proceeding could interfere with that proceeding. What was disputed was whether the agency could rely on that generality or whether the agency had to make a specific factual showing that disclosure of those particular witness statements would interfere with that particular proceeding. Similarly, in Barney v. IRS, there was no dispute about the categorization of the documents in question; the district court and this court were "satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure." 950 F.2d at 534, citing 618 F.2d at 1272-73 (witness statements, documentary evidence, IRS agent's work papers, internal agency memoranda). See Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir.1987) (apparent from agency affidavit that agency conducted individualized, document-by-document search, subdivided records into types and then into functional categories).

The same cannot be said in the present case. Here, the parties disputed not only the nature of the individual documents, but also the type of category used by the government, as well as the appropriate categorization or placement of the documents into particular categories. This basic lack of agreement about the nature and categorization of the documents distinguishes the present case from Robbins and Barney.

In the present case, the district court required preparation of a Vaughn index, and in response the government filed several public affidavits or declarations and a document which it captioned a "categorical index." The district court was clearly not satisfied with the government's response. As noted by the penal majority opinion, "[t]he district court's dissatisfaction [with the government's

response was] understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages." Id. at 535; cf. Wiener v. FBI, 943 F.2d at 978 (noting the FBI's use of "boilerplate" explanations drawn from a "master" FOIA response). Furthermore, the district court believed that the FOIA requester had raised serious questions about the validity of the government's search and categorization of the documents. Id. Compare Curran v. Department of Justice, 813 F.2d at 476 (district court found no reason to impugn good faith of agency). The district court also concluded that it needed additional information "about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government." 950 F.2d at 535.

By requiring the preparation of a Vaughn index in the present case, the district court was attempting to develop an adequate record. Only the government knows what is in the Hoffa file; the FOIA requester and the district court do not know, much less this court. As noted above, the record indicates only that the file consists of at least 13,800 pages in 70 volumes; the file is almost certainly larger now. Some of these pages are public source material which the government has already made available to the FOIA requester. According to the categorical index, which consists of a total of five double-spaced pages, each and every page falls within one of nine categories, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings. The district court's dissatisfaction with the categorical index was directed more at the procedural and substantive accuracy of the government's classification of individual pages than at the categories identified by the government. (The majority opinion expresses no opinion on the sufficiency of the Baker affidavit and the categorical index. See supra at 1309 n. 4 supra.) In any event, as noted by the panel majority opinion, the district court's concern about whether all the documents are described by the government's categories cannot be resolved merely by requiring more specific or more detailed categories. 950 F.2d at 535.

In my view, assuming for purposes of analysis that the government's categories are sufficiently specific, the district court acted within its authority in requiring the government to verify that it had actually examined and accurately categorized each document. ***1318** Indeed, it was its duty to do so. King v. United States Department of Justice, 830 F.2d at 219 (acceptance of inadequately supported exemption claim "would constitute abandonment of the trial court's obligation under FOIA to conduct a de novo review"). The district court did not know (and we do not know) whether the government's categorization of the documents was correct or, for that matter, whether the government had examined each document individually. The district court decided that, without a Vaughn index, it could not verify whether there was a correlation between the documents and the categories. Because all the documents necessarily fall into exempt categories, unless the district court can verify that each document has been examined and accurately categorized, the Robbins categories will become "no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendments of FOIA." Bevis v. Department of State, 255 U.S.App.D.C. 347, 801 F.2d 1386, 1389 (1986), citing Robbins, 437 U.S. at 236, 98 S.Ct. at 2324.

As noted by the panel majority opinion, preparation of a Vaughn index in the present case does not require the government to demonstrate document-by-document how disclosure of each document could reasonably be expected to interfere with pending law enforcement proceedings. 950 F.2d at 535. Like the district court and the panel majority, I accept the category-by-category approach. What I do not accept is the government's conclusory assertions that each and every document in the Hoffa file falls within one of its nine categories. In other words, what is disputed, and what the district court sought to verify by requiring the preparation of a Vaughn index, is whether the government's categorization of each document is accurate. Without such a record, the FOIA requester cannot test the government's claim of exemption, the district court cannot conduct the required de novo review of the government's decision not to disclose (without undertaking the arduous task of actually reviewing the documents itself), and this court cannot conduct a meaningful review of the district court's decision.

It should be noted that the district court could decide to modify its order requiring the government to prepare a Vaughn index for the entire Hoffa file. In the proceedings before the district court, the government argued that preparation of a Vaughn index for the entire Hoffa file would be inordinately time-consuming and would necessarily divert scarce resources from other law enforcement activities. The district court could require the government to prepare a Vaughn index for a representative sample of the documents in the Hoffa file. "Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved." Bonner v. United States Department of State, 289 U.S.App.D.C. 56, 928 F.2d 1148, 1151 (1991); accord The Washington Post v. United States Department of Defense, 766 F.Supp. 1, 15 (D.D.C.1991).

Alternatively, the district court could decide to conduct an in camera review of a representative sample of the documents in the Hoffa file. In camera review is discretionary. Robbins, 437 U.S. at 224, 98 S.Ct. at 2318. Limited in camera review might be particularly helpful in the present case. "[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 [the judge] wants satisfied before [taking] responsibility for a de novo determination.' " Meeropol v. Meese, 252 U.S.App.D.C. 381, 790 F.2d 942, 958 (1986), citing Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187, 1195 (1978). One district judge and one appellate panel have examined in camera a selection made by the government of the documents contained in the Hoffa file and concluded that those documents established that the criminal investigation into Hoffa's disappearance is active and continuing and that production of those records could reasonably be expected to interfere with enforcement proceedings. Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422, slip op. at 5-6 (E.D.Mich. July 31, 1991), aff'd, **992 F.2d 1426** (6th Cir.1993).

For the reasons set forth above, I would hold the district court has the authority to require the government to prepare a Vaughn index even when Exemption 7(A) is invoked ***1319** and would deny the government's application for writ of mandamus.

END OF DOCUMENT

WASHINGTON POST COMPANY, Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al.

No. 88-5037.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 17, 1988.

Decided Dec. 16, 1988.

Newspaper sought access to report compiled by outside directors of drug selling company from Department of Justice under the Freedom of Information Act. The United States District Court for the District of Columbia, Norma Holloway Johnson, J., granted the Government summary judgment on its claims the report was protected from disclosure under FOIA exemptions, and the newspaper appealed. The Court of Appeals, Mikva, Circuit Judge, held that: (1) FOIA exemption shielding material specifically exempted from disclosure by another statute did not preclude disclosure of the report based on federal criminal rule prohibiting government attorney from disclosing matters occurring before grand jury; (2) FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy did not preclude disclosure of the report, as none of the privacy interests encompassed by that exemption would be implicated by disclosure of the report; and (3) to withstand challenge to applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government bears burden of showing that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of the material sought would seriously interfere with fairness of those proceedings.

Reversed in part; remanded with directions in part.

[1] RECORDS ⇦ 55

326k55

FOIA exemption shielding material specifically exempted from disclosure by another statute did not justify denying newspaper access to report compiled by outside directors of drug selling company from Department of Justice, based on criminal rule prohibiting government attorney from disclosing matters occurring before grand jury, although the report had been subpoenaed by grand jury, had been used by government lawyers to question witnesses before jury, and was available to jurors. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[2] RECORDS ⇦ 60

326k60

FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, did not justify precluding newspaper's access to report compiled by outside directors of drug selling company from Department of Justice, as none of the privacy interests encompassed by the exemption would be implicated by disclosure of the report. 5 U.S.C.A. § 552(b)(7)(C).

[3] RECORDS ⇦ 60

326k60

FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, does not shield information relating to business judgments and relationships even if disclosure might tarnish someone's professional reputation. 5 U.S.C.A. § 552(b)(7)(C).

[4] RECORDS ⇦ 60

326k60

Protection accorded reputation by FOIA exemption shielding information compiled for law enforcement purposes, but only to extent production of such information could reasonably be expected to constitute unwarranted invasion of personal privacy, would generally shield material when disclosure would show that individual was target of law enforcement investigation. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇦ 65
326k65
To withstand challenge to applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government bears burden of showing that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of the material sought would seriously interfere with fairness of those proceedings. 5 U.S.C.A. § 552(b)(7)(B).

[6] RECORDS ⇦ 60
326k60
Where Government was denying access to material generated by someone else pursuant to FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, Government must be able to confirm to its own satisfaction that trial or adjudication is pending or truly imminent and that it is more probable than not that disclosure of material sought would seriously interfere with fairness of those proceedings. 5 U.S.C.A. § 552(b)(7)(B).

[7] RECORDS ⇦ 63
326k63
Whether prerequisites for application of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication were satisfied would be remanded to district court for determination; whether prerequisites were satisfied was for district court to ascertain in first instance, and record did not contain factual findings necessary to resolve whether the prerequisites were satisfied. 5 U.S.C.A. § 552(b)(7)(B).

[8] RECORDS ⇦ 60
326k60
Unsupported assertion from nongovernment party that there was unspecified litigation pending did not satisfy prerequisite for applying FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication, as that unsupported assertion did not show trial or adjudication was pending or truly imminent. 5 U.S.C.A. § 552(b)(7)(B).

[9] RECORDS ⇦ 60
326k60
Even if drug seller were faced with current litigation arising from its marketing of particular drug, it would not automatically follow that disclosure of report compiled by outside directors of selling company would deprive seller of fair trial, for purposes of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication. 5 U.S.C.A. § 552(b)(7)(B).

[10] RECORDS ⇦ 60
326k60
Prerequisite requiring showing that it is more probable than not that disclosure of material sought would seriously interfere with fairness of trial or adjudication required separate findings from other prerequisite, requiring showing that trial or adjudication is pending or truly imminent, in determining applicability of FOIA exemption shielding information compiled for law enforcement purposes to extent production would deprive person of right to fair trial or impartial adjudication. 5 U.S.C.A. § 552(b)(7)(B).

***98 **192** Barbara P. Percival, with whom Boisfeuillet Jones, Jr. and Denise E. Holmes, Washington, D.C., were on the brief, for appellant.

Thomas J. McIntyre, Atty., Dept. of Justice, with whom Jay B. Stephens, U.S. Atty., and John D. Bates and R. Craig Lawrence, Asst. U.S. Attys., were on the brief, for appellee, U.S. Dept. of Justice, Washington, D.C., John Facciala, Asst. U.S. Atty., and Miriam M. Nisbet and Timothy J. Reardon III, Attys., Dept. of Justice, Washington, D.C., also entered appearances for appellee.

Charles F.C. Ruff, Richard F. Kingham and Bruce N. Kuhlik, Washington, D.C., were on the brief for appellee, Eli Lilly and Co.

Before WALD, Chief Judge, and MIKVA and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

The Washington Post Company ("Post") is pursuing access to a report, compiled by outside directors of Eli Lilly and Company ("Lilly"), from the Department of Justice ("Department") under the Freedom of Information Act ("FOIA"). The Department claims that the document is protected from disclosure under four of the Act's exemptions, 5 U.S.C. § 552(b)(3), (4), (7)(B), (7)(C) (1982 & Supp.1988). The district court granted the government summary judgment on all four grounds, and the Post appeals. We reverse the court's decision ***99 **193** as to the applicability of exemption (3) and (7)(C), remand the record for a determination of whether the requirements of (7)(B), as discussed below, are met in this case, and retain the case as to exemption (4). The district court concluded that the report was commercial information that fell within exemption (4) because it was confidential or, in the alternative, privileged as a "self-evaluative report." We need not address this less precedent-bound question unless exemption (7)(B) is found not to be applicable. If, however, it is determined that the report is not shielded under exemption (7)(B), we will decide the exemption (4) question at that time.

I. BACKGROUND

In 1982, Eli Lilly introduced an arthritis drug, benoxaprofen, under the brand name Oraflex, but withdrew it a few months later, after reports of deaths and other severe adverse reactions. The company faced several product liability suits, an investigation by the Food and Drug Administration ("FDA") and a threatened shareholder derivative suit. In December 1982, Lilly's board of directors established a special committee of outside directors which, with the help of an outside law firm, began an investigation. The committee was charged with evaluating the company's development and marketing of the drug and determining whether the company had any claims against employees or others and, if it did, whether it would be in its best interests to pursue them.

Soon after, the Department, at the request of the FDA, began its own investigation. There apparently had been numerous deaths and other severe reactions in other countries attributed to Oraflex. Lilly did not report these reactions to the FDA, either in its application for permission to distribute Oraflex in this country or afterward. Nor did Lilly include liver failure, kidney failure or jaundice--the reactions that had occurred overseas--in its Oraflex labels as possible adverse reactions. If Lilly knew of these deaths and other severe reactions, through reports from its foreign subsidiaries or otherwise, it was subject to federal prosecution for not reporting this information to the FDA and for not including it on labels of Oraflex distributed in the United States.

On July 8, 1983, the Department made a written request to Lilly for certain documents, including any investigations conducted by Lilly that concerned reports of adverse reactions made by Lilly's foreign subsidiaries to its U.S. headquarters or that concerned Lilly's reporting of these adverse reactions to the FDA. Lilly decided to cooperate with the Department, after the Department assured it in writing that material made available would remain confidential and any third-party requests, including FOIA ones, would be resisted. When the special committee's report, entitled "Report and Recommendations of the Special Committee of the Board of Directors of Eli Lilly and Company Concerning the Development and Marketing of Oraflex," was completed in October 1983, Lilly submitted it to the Department. The Department's investigation proceeded apace, and in March 1984, the Department impanelled a grand jury to consider indictments of the company and possibly individuals.

Lilly's open letters and reports to shareholders announced the special committee's report and the Department and grand jury investigations. A Post reporter, covering the Oraflex story, first requested a copy of the report under FOIA in April 1984. The Department denied the request on exemption (3), (7)(A) and 7(C) grounds, but on administrative appeal, the department refused to disclose the report on exemption (4) and 7(B) grounds. The Post filed this suit to compel production, but the district court below granted summary judgment for the Department on all four grounds asserted in its motion: exemptions (3), (4), (7)(B) and (7)(C).

II. DISCUSSION

A. Exemption (3)

[1] Exemption (3) shields material that is "specifically exempted from disclosure by [another]

statute." 5 U.S.C. § 552(b)(3). The court below found that Federal Rule of *100 **194 Criminal Procedure 6(e) protects Lilly's report because it prohibits an attorney for the government from disclosing "matters occurring before the grand jury." Fed.R.Crim.P. 6(e). The court found that the report was a matter occurring before the grand jury because the report was subpoenaed by the grand jury in September 1984, was used by government lawyers to question witnesses before the jury, and was available to the jurors. Our review compels the conclusion that exemption (3) has no bearing on this case.

This court has consistently held that Rule 6(e) does not draw a "veil of secrecy" over all documents about activity investigated by the grand jury or even all documents revealed to the grand jury. SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1382 (D.C.Cir.), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). The relevant inquiry is whether the document would reveal the inner workings of the grand jury, such as witness names, or the substance of testimony or the direction and strategy of the investigation. See Fund for Constitutional Government v. National Archives, 656 F.2d 856, 869-70 (D.C.Cir.1981). Moreover, the document itself must reveal the inner workings; the government cannot immunize a document by publicizing the link. See Senate of Puerto Rico v. Department of Justice, 823 F.2d 574, 583 (D.C.Cir.1987).

The report at issue here was in existence almost five months before the grand jury was impanelled. It had a purpose wholly separate from grand jury deliberations, as it was commissioned by a private corporation to evaluate that corporation's past conduct, defenses, liabilities and potential civil claims against others. Nor would the report have revealed anything whatsoever about the grand jury's deliberations had the government not disclosed the report's role in those deliberations. When the Post first requested disclosure of the report, it was not yet before the grand jury. That the grand jury subpoenaed it five months later and that it used the report to question witnesses would not be known by the Post today had the Department not recounted the report's grand jury role in this litigation.

Therefore, we hold that exemption (3) does not constitute a ground for denying the Post's FOIA request. We find not only that the Department has failed to show that disclosure would reveal the grand jury's inner workings; we find that such a showing could not be made on these facts. The government's decision to persist in arguing this basis for denial, on appeal, despite this court's 1987 decision in Senate of Puerto Rico v. Department of Justice, was questionable at best.

B. Exemption (7)(C)

[2] Exemption (7)(C) exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). We need not dwell on whether the special committee's report is information compiled for law enforcement purposes. The Post concedes that it is. But we find that none of the privacy interests encompassed by (7)(C) would be implicated by disclosure of the special committee's report.

[3] The disclosures with which the statute is concerned are those of "an intimate personal nature" such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation. Sims v. CIA, 642 F.2d 562, 574 (D.C.Cir.1980). Information relating to business judgments and relationships does not qualify for exemption. See id. at 575. This is so even if disclosure might tarnish someone's professional reputation. See Cohen v. EPA, 575 F.Supp. 425, 429 (D.D.C.1983). The report that the Post seeks here would not reveal anything of a private nature about any employees mentioned, as it is an investigation and assessment of the business decisions of Lilly employees during the development and marketing of a commercial product. It may be that such a report, if it accused *101 **195 individual employees of having committed a crime, would implicate the privacy interest of personal honor. But there is no reason to assume that this report accuses anyone of breaking the law and the government does not so allege.

[4] Nonetheless, it is true that the protection accorded reputation would generally shield material when disclosure would show that an individual was the target of a law enforcement investigation. See

Fund for Constitutional Government v. National Archives, 656 F.2d 856, 866 (D.C.Cir.1981). The report in question does not, however, in itself identify any particular employees as targets of the Department's investigation. Since the report was prepared by Lilly for its own business purposes, the inclusion of a name in the special committee's report does not divulge whether the individual was a target of any law enforcement investigation or even whether the individual was considered, by law enforcement personnel, to have any relevance to their inquiry.

C. Exception (7)(B)

Exemption (7)(B) exempts "records or information compiled for law enforcement purposes" to the extent that production "would deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). It is settled that the report satisfies the first part of this definition. The legitimacy of the Department's invoking (7)(B) turns on the meaning and applicability of the second portion of the exemption.

What is required to establish that production of a document being sought under FOIA would deprive a person of a right to a fair trial is a question of first impression for this court. In framing a test, we write on a virtually clean slate. Few courts have decided (7)(B) questions and the legislative history on this provision is scant. The wording of the statute is all Congress has given us to work with. See United States Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 8 (1975) [hereinafter "A.G. Mem."], reprinted in House Comm. on Gov. Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Source Book, at 518 (1975) [hereinafter "Sourcebook"]. The exemption was enacted as part of the FOIA amendments of 1974. Congress replaced the old section (7), which protected any investigatory record not otherwise available, with the six tightly drawn categories of protection listed in § 552(b)(7). The wording of the second of those categories, now (7)(B), survived intact and without debate from the floor amendment by Senator Philip Hart.

We begin this analysis, as we must, within the framework that precedent does provide. FOIA is to be interpreted with a presumption favoring disclosure and exemptions are to be construed narrowly. See Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). The burden of proof rests on the party who seeks to prevent disclosure. See EPA v. Mink, 410 U.S. 73, 79, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). That burden cannot be met by mere conclusory statements; the agency must show how release of the particular material would have the adverse consequence that the Act seeks to guard against. See Campbell v. HHS, 682 F.2d 256, 259 (D.C.Cir.1982).

The Attorney General's Memorandum on the 1974 Amendments, of interest whether or not due deference, interpreted the exemption as protecting the rights of private persons, including corporations, and applying to both civil and criminal proceedings as well as agency adjudications. The exemption, according to the Attorney General, was meant to prevent disclosures from conferring an unfair advantage upon one party to an adversary proceeding or leading to prejudicial publicity in pending cases that might inflame jurors or distort administrative judgment. See A.G. Mem. at 9, Sourcebook at 519.

The few cases that have addressed (7)(B) as a ground for withholding documents have rejected it as inapplicable because one or another threshold element was not established. ***102 **196** In Playboy Enterprises, Inc. v. Department of Justice, 516 F.Supp. 233, 246 (D.D.C.1981), aff'd in pertinent part, 677 F.2d 931 (D.C.Cir.1982), the district court rejected the ground because no proceedings were pending. Two district courts have found (7)(B) grounds inapplicable because the government failed to show that publicity would be so prejudicial as to deprive someone of a fair trial or impartial adjudication. See Associated General Contractors of America v. Small Business Administration, 1 Gov't Disclosure Cas. (P-H) ¶ 79,119, at 79,158 (D.D.C. Oct. 1, 1979) (finding proffer inadequate to show extent of publicity and prejudice that would result); Education/Instruccion, Inc. v. Department of Housing and Urban Development, 471 F.Supp. 1074, 1078 (D.Mass.1979) (holding that administrative adjudicator's seeing investigative report could not vitiate impartiality as law permits investigator to sit as adjudicator on same matter).

Perhaps the major value of the Attorney General's Memorandum, in conjunction with this sparse case law, is to emphasize the wide variety of persons and proceedings but narrow range of situations to which (7)(B) applies. As with all FOIA exemptions, (7)(B) is limited to protecting material only where release would bring about the adverse consequence that Congress sought to prevent.

[5][6] Today, we hold that to withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings. Where the government is denying access to material generated by someone else, as here, the government must be able to confirm, to its own satisfaction, whether by affidavit or otherwise, that (1) and (2) above are satisfied.

[7][8] Whether the first and second prong of this test are satisfied is, in the first instance, for the district court to ascertain. The record before us in this case does not contain the factual findings necessary to resolve the question, and we therefore remand the record for a determination of this point. The court below did find that there were no longer any criminal proceedings pending or imminent, as the Department of Justice had accepted a guilty plea from Lilly and a nolo contendere plea from the Chief Medical Officer of Lilly Research Laboratories and planned no further indictments. The court also found that the parties asserted that four civil product liability cases were pending. But the status of those or other civil cases at this point is not clear. The Department's brief deferred entirely to Lilly on this question. Lilly merely asserted, in a footnote, that there was litigation pending, without specification. Such an unsupported assertion, from a non-government party, does not rise to the level of proof necessary to satisfy the first prong of a (7)(B) exemption.

[9][10] Even if Lilly were faced with current litigation arising from its marketing of Oraflex, it would not automatically follow that disclosure of the report would deprive Lilly of a fair trial. The second prong is not a redundancy but requires separate findings. Congress made the threshold of (7)(B) higher than for most of the other exemptions for law enforcement material. Whereas (7)(A), (C), (D) and (F) permit records to be withheld if release "could reasonably be expected to" cause a particular evil, (7)(B) requires that release "would" deprive a person of fair adjudication. § 552(b)(7)(A)-(F). It may be that release of the document to the Post could be expected to lead to publicity which was not just disadvantageous to Lilly but of a nature and degree that judicial fairness would be compromised. It may be that disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties. The trial court, on remand, is best situated to consider whether the facts here are sufficient to meet (7)(B)'s second prong.

*103 **197 III. CONCLUSION

Accordingly, we remand the record to the district court for a determination of whether the Department of Justice is entitled, under 5 U.S.C. § 552(b)(7)(B), to withhold the "Report and Recommendations of the Special Committee of the Board of Directors of Eli Lilly and Company Concerning The Development and Marketing of Oraflex" which was requested by The Washington Post. In addition, we reverse the district court's findings that exemptions (3) and (7)(C) permit the Department of Justice to resist The Washington Post's FOIA request.

The record is forthwith remanded to the district court for further proceedings, consistent with this opinion.

It is so ordered.

END OF DOCUMENT

Elmer G. PRATT,
v.
William H. WEBSTER, Director, Federal Bureau of Investigation, et al.,
Appellants.
Elmer G. PRATT
v.
William H. WEBSTER, Director, Federal Bureau of Investigation, et al.,
Appellants.

Nos. 81-1907, 81-1922.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 19, 1981.

Decided Jan. 22, 1982.

Plaintiff filed a proceeding against the Federal Bureau of Investigation relying on provisions of the Freedom of Information Act and the Privacy Act. The United States District Court for the District of Columbia, 508 F.Supp. 751, Barrington D. Parker, J., held that certain documents were not the result of any legitimate law enforcement purpose, and thus ordered their disclosure. The FBI appealed. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that federal agencies, including the FBI, must meet the threshold requirements of the exemption from disclosure for investigatory records compiled for law enforcement purposes before they may withhold requested documents on the basis of any of its subparts, and that the FBI sufficiently established that those documents were exempt from disclosure as investigatory records, even though methods used by the FBI in its counterintelligence program may have been improper.

Reversed and remanded.

[1] RECORDS ⇦ 60
326k60
Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes requires agency, including Federal Bureau of Investigation, to establish that material is investigatory record, was compiled for law enforcement purposes and satisfy requirements of one of the six subparts of exemption. 5 U.S.C.A. §§ 552, 552(b)(7).

[2] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation records do not per se meet threshold criterion of exemption from disclosure for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[3] RECORDS ⇦ 60
326k60
Although Freedom of Information Act makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions for purposes of exemption for investigatory records compiled for law enforcement purposes, it would be unnecessarily "wooden" to treat both groups identically when they claim that exemption as basis for withholding documents. 5 U.S.C.A. §§ 552, 552(b)(7).

[4] RECORDS ⇦ 60
326k60
When mixed-function agency seeks to withhold disclosure of documents under exemption for investigatory records compiled for law enforcement purposes, court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under that exemption. 5 U.S.C.A. §§ 552, 552(b)(7).

[5] RECORDS ⇦ 65
326k65
Court can accept less exacting proof from agency whose principal mission is criminal law enforcement than from mixed-function agency for purposes of Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[6] RECORDS ⇦ 60
326k60
For federal law enforcement agency to pass threshold of Freedom of Information Act exemption from disclosure for investigatory records compiled for law enforcement purposes, agency's investigatory activities that give rise to document sought must be related to enforcement of federal laws or to maintenance of national security and nexus between investigation and agency's law enforcement duties must be based on information

sufficient to support at least "a colorable claim" of its rationality. 5 U.S.C.A. §§ 552, 552(b)(7).

[7] RECORDS ⇐ 60
326k60
Location of non-exempt document in investigatory file does not necessarily make that document exempt from disclosure under Freedom of Information Act exemption for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[8] RECORDS ⇐ 60
326k60
Even if counterintelligence activities of Federal Bureau of Investigation included questionable, and at times illegal, methods, that did not mandate that records concerning counterintelligence program were not exempt from disclosure under Freedom of Information Act exemption for investigatory records compiled for law enforcement purposes. 5 U.S.C.A. §§ 552, 552(b)(7).

[9] RECORDS ⇐ 65
326k65
Although affidavit stating that certain records compiled as part of Federal Bureau of Investigation's counterintelligence program were investigatory records compiled for law enforcement purposes and were collected in course of lawful national security investigation or other mandated investigations imposed by law was only "minimal showing" for purposes of Freedom of Information Act exemption for investigatory records, affidavit was sufficient to establish FBI's concern for possible violations or security risks. 5 U.S.C.A. §§ 552, 552(b)(7).

[10] RECORDS ⇐ 60
326k60
In Freedom of Information Act action seeking FBI records, district court incorrectly distinguished documents concerning FBI's counterintelligence program from other documents for which it found law enforcement purpose, even though methods frequently used by FBI in its counterintelligence activities offered ready distinction from more typical means of law enforcement, since exemption for investigatory records compiled for law enforcement purposes refers to purposes rather than to methods. 5 U.S.C.A. §§ 552, 552(b)(7).

[11] RECORDS ⇐ 54
326k54
Formerly 326k53
Freedom of Information Act requires disclosure of government records to fullest extent possible and allows withholding of only so much of document as fits squarely within enumerated exception. 5 U.S.C.A. § 552.

[12] RECORDS ⇐ 50
326k50
Proper and effective means of redress for allegedly improper methods attributed to FBI's counterintelligence program is not Freedom of Information Act action, even though FOIA is important mechanism for discovering malfeasance of government agencies, since it can do no more than reveal those actions. 5 U.S.C.A. § 552.

***409 **18** Appeals from the United States District Court for the District of Columbia (D.C.Civil Action No. 78-1688).

Susan Sleater, Dept. of Justice, Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., and Leonard Schaitman, Dept. of Justice, Washington, D. C., were on the brief for appellants.

Jonathan W. Lubell, New York City, for appellee. David G. Lubell, Newark, N. J., and William H. Schaap, Washington, D. C., also entered appearances for appellee.

Before MacKINNON, ROBB and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

This case is a logical sequel to the decision of this Circuit a little more than a year ago in Abramson v. Federal Bureau of Investigation, 658 F.2d 806 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981) (No. 80-1735). In Abramson we held, inter alia, that documents in the possession of the Federal Bureau ***410 **19** of Investigation ("FBI") must satisfy the threshold language of Exemption 7 of the Freedom of Information Act ("FOIA") [FN1]-"investigatory records compiled for law enforcement purposes"-

before any of the constituent parts of Exemption 7 may be asserted as a basis for nondisclosure of agency records requested under the Act.[FN2] Abramson, 658 F.2d at 811-12. Because the District Court in Abramson found that certain of the requested records (i.e., "name check" summaries) were compiled solely for political purposes, and because the Government did not challenge that finding on review, see id. at 810-11, that case presented the question of whether the threshold language of Exemption 7 was to have any application to the FBI. Based on the plain meaning of section (b)(7) of FOIA, we held that it did.

FN1. 5 U.S.C. s 552 (1976 & Supp. IV 1980).

FN2. Exemption 7 of the Freedom of Information Act provides: (b) This section does not apply to matters that are-.... (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. 5 U.S.C. s 552(b)(7) (1976) (emphasis added).

The decision in Abramson, however, did not reach one of the principal questions raised by this appeal. Because the Government did not challenge the finding in Abramson that the records at issue were not compiled for law enforcement purposes, we had no occasion to pass upon the appropriate judicial test for determining whether documents held by the FBI are indeed "investigatory records compiled for law enforcement purposes." This case, however, requires us to express and apply such a test.

In this case, Elmer G. ("Geronimo") Pratt, a former officer of the Black Panther Party, requested from the FBI all documents and records filed under his name and all other records containing his name or pertaining to him. Through his original request to the FBI, administrative appeals within the agency, and his action in the District Court, Pratt has obtained over 1,200 documents in whole or in part. At issue on this appeal is the proper treatment to be accorded twenty documents, all of which were generated by the FBI's Counter-Intelligence Program ("COINTELPRO") activities directed at the Black Panther Party.

The District Court held that the disputed documents were not the result of "any legitimate law enforcement purpose," Pratt v. Webster, 508 F.Supp. 751, 761 (D.D.C.1981), and hence did not satisfy the Exemption 7 threshold. Although we note that certain of these documents evince illegal FBI practices, we are constrained to find that the records sought derived at least in part from a purpose to enforce and prevent violations of the criminal laws. In light of this finding, we must reverse the decision of the District Court denying the Government's requests for nondisclosure. We remand so that the District Court may consider the proper application of the subparts of Exemption 7 to the twenty documents in question.

I. BACKGROUND

A. Factual Background

During the late 1960s, plaintiff-appellee Pratt was the Deputy Minister of Defense for the Southern California Branch of the Black Panther Party ("BPP"). During the late 1960s and early 1970s the Black Panther Party was the object of intensive scrutiny by the FBI as an allegedly subversive, and potentially violent, domestic organization.[***411** FN3] ****20** Pratt's position in the BPP made his activities a likely subject of concern and surveillance by the FBI.

FN3. See generally Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Final Report, S.Rep.No.755, 94th Cong., 2d Sess., Book III at 185-223 (1976) (hereinafter cited as Church Committee Report) (chapter titled "The FBI's Covert Action Program To Destroy The Black Panther Party"), reprinted in Jt.App. at 316-34.

On July 28, 1972, Pratt was found guilty of murder and robbery in a California state court and,

on August 28, 1972, he was sentenced to a term of life imprisonment, which he is presently serving in San Quentin Prison.[FN4] The murder for which Pratt was convicted occurred on December 18, 1968, in Santa Monica, California. Pratt has consistently maintained his innocence of that crime, claiming that on the night of the murder he was attending a meeting with BPP officials in Oakland, California, several hundred miles from Santa Monica.

FN4. The fact that Pratt is presently incarcerated, of course, in no way alters or diminishes his rights under FOIA. See 5 U.S.C. s 552(a)(3) (1976); Moorefield v. Secret Service, 611 F.2d 1021, 1023 n.2 (5th Cir.), cert. denied, 449 U.S. 909, 101 S.Ct. 283, 66 L.Ed.2d 139 (1980).

Based in part on his belief that the FBI possessed documents that would verify his presence in Oakland on December 18, 1968, and thus substantiate his alibi, Pratt filed two FOIA requests with the FBI. Complaint PP 3, 8, 12, 25, reprinted in Jt.App. at 7-9, 12. On June 5, 1976, Pratt requested then FBI Director Clarence Kelley to provide him with:

> All files, records, memoranda, or other data or materials filed under my name or obtainable by your agency by searching through other files and materials for documents which contain my name.

On May 20, 1977, the FBI released 499 partially expurgated pages to Pratt. Pratt appealed certain deletions within the agency and, on September 8, 1977, he made a supplemental request for "any records pertaining to him which may be contained in the Bureau's files concerning" five named organizations and twenty-two named individuals.

Through his supplemental request and the processing of his administrative appeals, Pratt eventually obtained access to over 1,000 documents, totaling several thousand pages. The FBI deleted portions of many of these documents, claiming that the deletions were justified by Exemptions 1, 2, 7(C), 7(D), 7(E) and 7(F) of FOIA.[FN5] Because Pratt and his counsel believed that the deletions made in the released documents did not comply with FOIA and that the FBI had not fully searched its files, Pratt instituted this action in the District Court seeking to compel a further search and full disclosure.

FN5. FOIA Exemptions 1 and 2 provide: (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; (2) related solely to the internal personnel rules and practices of an agency. 5 U.S.C. s 552(b)(1), (2) (1976). (Exemption 7 is set out in note 2 supra.)

B. Proceedings in the District Court

The District Court directed the FBI to submit affidavits, pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), indexing and explaining the agency's deletions. The court determined that the first Vaughn index was inadequate and ordered the FBI to submit new and more detailed Vaughn filings. These were submitted in November 1979.

On April 6, 1979, while the District Court proceedings were pending, Congressman Paul McCloskey requested the FBI "to determine whether there is any evidence in the files to indicate the possibility of Pratt's innocence or doubt as to Pratt's guilt" of the December 18, 1968 Santa Monica murder. In response to Congressman McCloskey's request, the FBI conducted a search ***412 **21** of its California field offices.[FN6] On June 18, 1980, as a result of this search, the FBI released to Pratt 1,290 pages of previously withheld documents.

FN6. The FBI searched only its Washington, D. C. Headquarters files in response to Pratt's FOIA requests. Because Pratt was advised of this during the processing of his administrative appeals and did not make a separate disclosure request to each field office, the District Court held that the FBI's failure to expand its original search to all field offices did not make the search irresponsive. Pratt v. Webster, 508 F.Supp. 751, 762 (D.D.C.1981).

On February 15, 1980, the FBI moved for summary judgment based on its second Vaughn index and the completeness of its document production. On February 12, 1981, the District Court denied the FBI's motion for summary judgment. Pratt v. Webster, 508 F.Supp. 751 (D.D.C.1981). The District Court ordered all

documents containing redactions based on Exemptions 1 and 7(E) submitted for in camera review. 508 F.Supp. at 756-58, 760-61. The deletions from partially disclosed documents based on Exemptions 2, 7(C) and 7(D) were upheld, id. at 758-60, with the exception of nine documents generated by COINTELPRO activities. The District Court held that these COINTELPRO documents could not "reasonably be considered or interpreted as generated through any legitimate law enforcement purpose," and hence could not "be redacted pursuant to exemption (b)(7)." Id. at 761. Finally, the District Court ordered the agency to explain certain inadequacies in its search of FBI Headquarters files and expanded the scope of Pratt's FOIA suit to include all documents generated by COINTELPRO concerning Pratt. Id. at 762-64.

In response to an Order of the District Court, dated February 13, 1981, the FBI identified for the court sixteen COINTELPRO documents contained in the June 1980 release of documents from the search of FBI California field offices. The FBI also submitted an affidavit and index seeking to justify deletions from twelve of these documents. The agency sought reconsideration of the court's earlier ruling that COINTELPRO documents were not "compiled for law enforcement purposes" and hence not within Exemption 7's purview; in the alternative, the agency claimed that Exemption 6 of FOIA [FN7] justified the deletions in the additional sixteen and in the original nine COINTELPRO documents.

FN7. FOIA Exemption 6 provides: This section does not apply to matters that are-.... (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. s 552(b)(6) (1976).

In a June 16, 1981 Memorandum Opinion, the District Court ordered the release of material from five documents that had been expurgated based on an Exemption 1 claim. Deletions from fifty-seven other documents based on Exemption 1 and from two documents based on Exemption 7(E) were approved after in camera review. Pratt v. Webster, --- F.Supp. ----, Civ. No. 78-1688, Memorandum Opinion at 2-4 (D.D.C. June 16, 1981), reprinted in Jt. App. at 336-38. The District Court also sought further explanation of the scope of the agency's document search. Id. at 5-9, reprinted in Jt.App. at 339-43. Finally, the District Court refused to alter its previous ruling on the applicability of Exemption 7 to COINTELPRO documents, accepted a deletion from one COINTELPRO document based on Exemption 6, and sought further description of the proposed deletions from four other COINTELPRO documents. Id. at 9-12, reprinted in Jt.App. at 343-46.

On August 7, 1981, the District Court approved the deletion of identifying information from one additional COINTELPRO document based on the FBI's Exemption 6 claim. The District Court also ordered release of the remaining COINTELPRO documents in their entirety, denied the Government's request for a stay of disclosure pending appeal, and granted summary judgment to the defendants in all remaining aspects of the case. Pratt v. Webster, --- F.Supp. ----, Civ. No. 78-1688 (D.D.C. Aug. 7, 1981), reprinted in Jt.App. at 377-80.

***413 **22** The Government appealed to this court from the District Court's Memorandum Opinion and Order of June 16, 1981 and from its Order of August 7, 1981. We issued a stay of the ordered disclosure of the COINTELPRO documents pending appeal. Pratt v. Webster, No. 81-1907 (D.C.Cir. Aug. 14, 1981) (per curiam). On appeal the Government challenges only the District Court's disclosure order with respect to the twenty disputed COINTELPRO documents. [FN8] Thus, the proper treatment of these twenty documents under FOIA Exemptions 6 and 7 is the only issue before us.

FN8. The COINTELPRO documents at issue on appeal are document numbers 22, 519, 520, 521, 521a, 522, 522a, 524, COINT-2, COINT-3, COINT-4, COINT-6, COINT-7, COINT-8, COINT-10, COINT-11, COINT-12, COINT-13, COINT-14, and COINT-15. Document numbers 523, COINT-1, COINT-5, COINT-9, and COINT-16, also generated by COINTELPRO activities, have been released in their entirety. Documents COINT-7 and COINT-12 are apparently identical. Finally, because Pratt has not cross-appealed, the deletions of individual identities from documents 22 and COINT-4 approved by the District Court on the basis of Exemption 6 are not before us.

II. LEGAL ANALYSIS OF THE EXEMPTION 7 THRESHOLD

A. The Existence of an Exemption 7 Threshold for Law Enforcement Agencies

The Freedom of Information Act was enacted by Congress in 1966, and substantively amended in 1974 and 1976, in order to provide a statutory right of public access to documents and records held by agencies of the federal government. As such, FOIA embodies "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S.Rep.No.813, 89th Cong., 1st Sess. 3 (1965). Subsection (a)(3) of the Act, under which Pratt has proceeded in this case, requires "each agency" to make available upon request any records it possesses "to any person." 5 U.S.C. s 552(a)(3) (1976).

The broad right of access and disclosure under FOIA is subject to nine exemptions set out in subsection (b), 5 U.S.C. s 552(b) (1976). See 5 U.S.C. s 552(c) (Supp. IV 1980). Like the rest of the Act, all but two of these exemptions on their face apply with equal force and effect to all federal agencies.[FN9]

FN9. One exemption and a part of another apply only to a limited set of agencies. Exemption 8 applies only to agencies "responsible for the regulation or supervision of financial institutions." 5 U.S.C. s 552(b)(8) (1976). Exemption 7(D) allows all agencies to refuse to disclose the identity of a confidential source (if the exemption's threshold criterion is met), but also allows "a criminal law enforcement authority" conducting a criminal investigation and "an agency conducting a lawful national security intelligence investigation" to withhold all confidential information provided only by a confidential source. 5 U.S.C. s 552(b)(7)(D) (1976). See note 39 infra. These two exemptions with specific agency applications are the exceptions that prove the rule of the general applicability of the other exemptions.

(1) In this case we are primarily concerned with the appropriate interpretation of one exemption, Exemption 7, as applied to a single agency, the FBI. There is no indication in the threshold language of Exemption 7 that it does not apply to documents held by the FBI. Rather, in all cases Exemption 7 protects from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that" one of the exemption's subparts applies. This statutory language on its face prescribes a three-part test for withholding information under Exemption 7: In order to be withheld, the material (1) must be an "investigatory record," (2) must have been "compiled for law enforcement purposes," and (3) must satisfy the requirements of one of the six subparts of Exemption 7.[FN10]

FN10. Abramson v. FBI, 658 F.2d 806, 811-12 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, which was written to guide executive departments and agencies in the application of FOIA, adopted a similar separation between the Exemption 7 threshold and the exemption's subparts: Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act 6-7 (Feb. 1975) (emphasis added), reprinted in House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents 516-17 (Jt.Comm.Print 1975) (hereinafter cited as 1975 Source Book).

***414 **23** The Government contends, however, that the FBI need not establish a law enforcement purpose for its investigatory files in order to qualify its records for redaction under the subparts of Exemption 7. It argues that "the threshold Exemption 7 criterion of 'investigatory records compiled for law enforcement purposes' was meant to define the FBI's files rather than limit the Bureau's potential access to the exemption." Appellants' Brief at 20. The Government primarily relies on two decisions by the First and Eighth Circuits, Kuehnert v. FBI, 620 F.2d 662 (8th Cir. 1980); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979).[FN11] In those cases, the courts held:

FN11. The Government also relies on Abrams v. FBI, 511 F.Supp. 758 (N.D.Ill.1981), and on language in Church of Scientology v. Department of the Army, 611 F.2d 738, 748 n.5 (9th Cir. 1979), and Larouche v. Kelley, 522 F.Supp. 425, 437 (S.D.N.Y.1981). The Government frankly concedes, however, that the language in Church of Scientology and in Larouche is dicta. Appellants' Brief at 21, 26-27; see also note 30 infra.

> The character of the materials excluded under Exemption 7 at least suggests that "law enforcement purpose" is as much a description of the type of agency the exemption is aimed at as it is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties.

Irons, 596 F.2d at 474, quoted in part in Kuehnert, 620 F.2d at 666.

(2) The simplest response to the Government's contention that FBI records per se meet the threshold criterion of Exemption 7 is that that argument has been rejected by this Circuit in Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).[FN12] In Abramson we were confronted with a FOIA request to the FBI for a group of "name checks," i.e., "summaries of information from FBI files on certain public personalities which had been prepared pursuant to requests received from the White House." 658 F.2d at 808. The District Court in Abramson had held that the name checks were not compiled pursuant to any law enforcement purpose, but nevertheless applied Exemption 7(C) to prevent disclosure as "an unwarranted invasion of personal privacy." 5 U.S.C. s 552(b)(7)(C) (1976). We reversed, holding, inter alia, that documents in the possession of the FBI must nevertheless pass the Exemption 7 threshold before any of the six subparts in Exemption 7 may be applied to prevent disclosure. Id. at 811-12.

FN12. The issue directly before the Supreme Court this Term in FBI v. Abramson, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951, is not the question of the effect of FOIA Exemption 7's threshold language on documents held by the FBI. The Solicitor General's petition for certiorari to the Court identified the question presented as: "Does information contained in records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of FOIA lose that exempt status when it is incorporated into records compiled for purposes other than law enforcement?" 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981). Thus, the Court is principally concerned in Abramson with the "pass through" issue of whether information once contained in an exempt document loses its exempt status when it is recompiled in an otherwise non-exempt document. Of course, the question presented in a petitioner's brief before the Supreme Court does not operate as a jurisdictional limit on the Court's authority to reach a proper disposition of a case. See Piper Aircraft Co. v. Reyno, --- U.S. ----, 102 S.Ct. 252, 261 n.12, 70 L.Ed.2d 252 (1981). Nevertheless, even if the Court should reach beyond the "pass through" issue in Abramson and decide that Exemption 7's threshold language has no application to FBI records, that decision would not affect the outcome of this case. See section III infra.

The Government argues that Abramson does not foreclose their contention that records held by the FBI per se satisfy the Exemption 7 threshold. Appellants' Brief ***415 **24** at 39-41. That argument is simply untenable. If the panel in Abramson had accepted the Government's per se argument, the documents held by the FBI would have passed the Exemption 7 threshold despite their lack of law enforcement purpose, and the court would have had to consider whether the District Court correctly ruled that Exemption 7(C) justified nondisclosure. Quite the contrary, the Abramson court did not reach the Exemption 7(C) question and reversed the District Court because, failing the Exemption 7 threshold, the "name check" summaries were improperly withheld under FOIA. See Abramson, 658 F.2d at 812. Thus, the Government's per se argument is foreclosed by the plain holding of this court in Abramson.[FN13]

FN13. The two arguments that the Government makes in an attempt to distinguish Abramson are wholly unconvincing. First, the Government notes that three months before the decision in Abramson this Circuit had stated that the question whether Exemption 7 applies to documents of a law enforcement agency not compiled pursuant to any law enforcement purpose was an open issue in this Circuit. Lesar v. Department of Justice, 636 F.2d 472, 486 n.83 (D.C.Cir.1980) (citing Irons v. Bell

and Kuehnert v. FBI). Based on this observation the Government argues that the Abramson panel could not have intended to answer this open question since it failed to cite Lesar or the decisions of other Circuits in its written opinion. Appellants' Brief at 39-40. However, to contend that the issues a court decides are determined by the cases it fails to cite is absurd. Second, the Government argues that Abramson decided a different question than the one it now presents about the Exemption 7 threshold criterion. The Government observes that the Abramson panel decided the "pass through" question and that this issue is the one now pending before the Supreme Court. See note 12 supra. While this Circuit did decide the "pass through" question in Abramson, that was not the only issue presented. In fact, Abramson's brief in this court stated: The issue is whether the court and/or the government can withhold documents under any subpart of Section b(7) after a court has ruled that there was no law enforcement purpose with respect to the compilation of documents being withheld. Brief for Appellant at 14, Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980). The Supreme Court's review of only a single issue (in fact, the only issue pursued by the Government) does not deny the presence of others in this court's decision in the case. Notably, the Government has made no attempt to reconcile its per se argument in this case with either the language or the holding in Abramson.

The three-pronged test for Exemption 7 claims that the Abramson opinion sets out, 658 F.2d at 811-12, follows from the plain meaning of the statute, [FN14] is consistent with ***416 **25** this Circuit's judicial interpretations of Exemption 7 both before and after the 1974 amendments,[FN15] and was even adopted as the appropriate interpretation of the exemption in the Attorney General's Memorandum on the 1974 Amendments.[FN16] If the Government is now suggesting that arguments of public policy require that FOIA be rewritten, those arguments should be directed not to us, but to the Congress. [FN17] We continue to hold that federal agencies, including the FBI, must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts.

FN14. As we recently noted, "(r)esort to the legislative history of a statutory provision is not necessary when the meaning of the provision is plain from its language." Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1056 (D.C.Cir.1981) (en banc); accord, NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223, 98 S.Ct. 2311, 2317, 57 L.Ed.2d 159 (1978). Even if we look beyond the statutory language to the legislative history, we find the Government's arguments unconvincing. The Government cites occasions in the legislative history in which the FBI's investigatory files are mentioned as examples of material covered by Exemption 7. Appellants' Brief at 30-34. This is not surprising, since the FBI's investigatory records are typically compiled for a law enforcement purpose, and since there is perhaps no better example of the usual application of Exemption 7. "No reference to the FBI or any other particular agency appears in the Act itself, however, and there is no indication that any agency is to be treated differently from another with respect to the (b)(7) exemption." Note, The Investigatory Files Exemption to the FOIA: The D. C. Circuit Abandons Bristol-Myers, 42 Geo.Wash.L.Rev. 869, 874 (1974) (footnote omitted). Moreover, the Government has not cited and we have not found any direct suggestion in the legislative history that FBI records generated without any law enforcement purpose may be withheld under Exemption 7. The Government's legislative history argument-that Congress meant to describe FBI files by the threshold language of Exemption 7 rather than to limit the FBI's access to the exemption-further loses credibility on a close reading of the history. In 1973 committee hearings, for example, Assistant Attorney General Robert G. Dixon, Jr. of the Department of Justice Office of Legal Counsel suggested amending Exemption 7 to expand its reach: "If the act is to be amended, perhaps the time has come to put in an exemption expressly covering the files of the FBI and other Federal investigators working with the FBI." Hearings on H.R. 5425 and H.R. 4960 Before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 1st Sess. 152 (1973). In 1974, of course, Congress did amend Exemption 7, but it did not expand the exemption's coverage as desired by Assistant Attorney General Dixon. In this case the Department of Justice now argues, without any explanation of Dixon's remarks, that Exemption 7 means exactly what Assistant Attorney General Dixon suggested and what Congress never enacted. We are unpersuaded.

FN15. See, e.g., Lesar v. Department of Justice, 636 F.2d 472, 486-87 (D.C.Cir.1980); Weissman v. CIA, 565 F.2d 692, 694-96 (D.C.Cir.1977); Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73, 79-82 (D.C.Cir.1974); Weisberg v. Department of Justice, 489 F.2d 1195, 1198, 1202 (D.C.Cir.1973) (en banc), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1974). See also Demetracopoulos v. FBI, 510 F.Supp. 529, 531-32 (D.D.C.1981); Fonda v. CIA, 434 F.Supp. 498, 506-07 (D.D.C.1977).

FN16. See note 10 supra.

FN17. The First Circuit in Irons noted that there were "strong policy reasons" for accepting the Government's per se argument for FBI documents. Irons v. Bell, 596 F.2d 468, 474 (1st Cir. 1979). To the extent that the First Circuit reached its result based on arguments of public policy, we must respectfully disagree with its approach. This Circuit has consistently held that whether any government document should be disclosed or protected against disclosure is a matter of public policy for legislative determination. It is not for this court to rewrite a statute. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1066-1067, 1075 (D.C.Cir.1981) (en banc).

B. The Definition of the Exemption 7 Threshold Test for Law Enforcement Agencies

Our conclusion that a threshold test exists for the application of FOIA Exemption 7 to documents held by law enforcement agencies is, however, only the beginning of our inquiry. The resolution of this case necessarily requires the expression of that threshold test and its application to the COINTELPRO documents presented here.[FN18]

FN18. The panel in Abramson was not required by the facts of that case to enunciate a test for the Exemption 7 threshold and did not attempt to do so. The District Court in that case declared that "there has been absolutely no showing that these particular records were compiled for law enforcement purposes." Abramson v. FBI, Civ. No. 77-2206, Order at 2 (D.D.C. Nov. 30, 1979), quoted in Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980). The Government did not contest that conclusion on appeal, Brief for Appellees at 8 n.5, Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980), and did not pursue that issue after the panel's decision. Petition for Rehearing and Suggestion for Rehearing en banc at 2 n.1, 4 n.5, Abramson v. FBI, 658 F.2d 806 (D.C.Cir.1980).

1. The Deference Accorded Law Enforcement Agencies Claiming a "Law Enforcement Purpose"

(3) While FOIA makes no distinction on its face between agencies whose principal function is criminal law enforcement and agencies with both law enforcement and administrative functions, it would be unnecessarily wooden to treat both groups identically when they claim Exemption 7 as a basis for withholding. In fact, courts often accord different treatment to Exemption 7 claims from different agencies. E.g., Church of Scientology v. Department of the Army, 611 F.2d 738, 748 (9th Cir. 1979); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1979); Ramo v. Department of the Navy, 487 F.Supp. 127, 130-31 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson); see Note, FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations, 65 Minn.L.Rev. 1139, 1145-49 (1981). This judicial development, most often taking the form of more exacting scrutiny of Exemption 7 claims by agencies whose principal function is not law enforcement, is well-grounded in congressional purpose, common ***417 **26** sense, and notions of judicial economy.[FN19] Three related justifications for the differential review can be posited.

FN19. The different treatment accorded to criminal law enforcement agencies under the Exemption 7 threshold is not inconsistent with our rejection of the Government's suggested per se approach for these agencies' Exemption 7 claims. The per se approach would totally eliminate any threshold requirement for criminal law enforcement agencies and make a mockery of the plain wording of the exemption. In contrast, treating law enforcement and mixed-function agencies differently under Exemption 7 does not judicially erase words from the statute.

First, Congress amended Exemption 7 of FOIA in 1974 in response to a series of decisions by this Circuit that had interpreted the exemption rigidly.[FN20] These decisions, if left to stand,

threatened to exempt large portions of agency files whenever a label of "law enforcement purpose" and "investigatory file" could be attached to agency records.[FN21] In the view of the Congress, this result would have substantially undercut the Act's disclosure requirements, especially in the context of agencies with both general administrative and law enforcement functions. Congress' amendment of Exemption 7 in 1974 was intended to overrule those judicial decisions and, therefore, evinced in part an intent that the exemption not be read too broadly in its application to agencies with general administrative and regulatory functions. [FN22]

FN20. A brief exchange on the Senate floor between Senator Kennedy, the Floor Manager of the FOIA Amendments, and Senator Hart, the sponsor of the amendment to Exemption 7, identified the decisions as Weisberg v. Department of Justice, 489 F.2d 1195 (D.C.Cir.1973) (en banc), cert. denied, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772 (1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C.Cir.1973); Ditlow v. Brinegar, 494 F.2d 1073 (D.C.Cir.) (per curiam), cert. denied, 419 U.S. 974, 95 S.Ct. 238, 42 L.Ed.2d 188 (1974); and Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370 (D.C.Cir.1974). 120 Cong.Rec. 17,039-40 (1974), reprinted in 1975 Source Book, supra note 10, at 349.

FN21. On the floor of the Senate Senator Hart quoted from Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 372 (D.C.Cir.1974) (footnote omitted): Recent decisions of this court construing exemption 7 have considerably narrowed the scope of our inquiry. The sole question before us is whether the materials in question are "investigatory files compiled for law enforcement purposes." Should we answer that question in the affirmative, our role is "at an end." See 120 Cong.Rec. 17,034 (1974), reprinted in 1975 Source Book, supra note 10, at 335-36.

FN22. In a Memorandum Letter inserted in the Congressional Record, Senator Hart sought to relieve opposing Senators' concerns about his proposed amendment's effect on the FBI and identified his primary concern as the unnecessary withholding of information by other regulatory agencies. Thus, my amendment more than adequately safeguards against any problem which might be raised for the (Federal) Bureau (of Investigation). The point is that the "law enforcement" exemption has been broadly construed to include any investigation by a government agency of a federally funded or monitored activity. The courts only require that the investigation might result in some government "sanction" such as a cutoff of funds-and not necessarily a prosecution. The investigations of auto defects, harmful children's toys, or federally-assisted hospitals could all be hidden completely from public view, and from criticism of government inaction or favoritism, unless my amendment is adopted. This is the danger which the ABA proposal seeks to correct. These are rarely FBI investigations. 120 Cong.Rec. 17,040 (1974), reprinted in 1975 Source Book, supra note 10, at 351. See also 120 Cong.Rec. 36,626 (1974), reprinted in 1975 Source Book, supra note 10, at 413-14 (remarks of Rep. Reid).

Second, in its 1974 amendment to Exemption 7, Congress set out six subparts to the exemption representing the potential harms that it believed justified nondisclosure of government investigatory records. These subparts, perhaps predictably, apply more extensively in criminal than in civil law enforcement. [FN23] Thus, the language of the exemption itself suggests a greater congressional concern with the secrecy of documents ***418 **27** held by agencies, such as the FBI, principally committed to criminal law enforcement. [FN24]

FN23. The language of FOIA Exemption 7 is set out in note 2 supra. Exemption 7(D), for example, explicitly allows more information to be withheld from documents compiled in the course of a criminal investigation than in a civil investigation, and Exemption 7(F), which seeks to protect law enforcement personnel, has more obvious application in the criminal context.

FN24. The Conference Committee on the 1974 amendments added to Exemption 7(D) the language that allows all information from a confidential source as well as the source's identity to be withheld in the case of criminal and lawful national security investigations. See note 39 infra. It also added Exemption 7(F), which exempts information that might endanger law enforcement personnel. These changes were made "to accommodate unusual requirements of some agencies such as the

Federal Bureau of Investigation," 120 Cong.Rec. 34,162 (1974), reprinted in 1975 Source Book, supra note 10, at 378 (remarks of Rep. Moorhead, House Floor Manager), in response to concerns expressed by President Ford. See Letter from President Ford to Senator Kennedy (Aug. 20, 1974), and Letter from Senator Kennedy and Representative Moorhead to President Ford (Sept. 23, 1974), reprinted in 120 Cong.Rec. 33,158-59 (1974), and 1975 Source Book, supra note 10, at 368-72; H.R.Rep.No.1380, 93d Cong., 2d Sess. 12-13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 229-30. The Congress' special concern for criminal law enforcement agencies was similarly expressed in other passages from the legislative history of the 1974 FOIA amendments. See, e.g., note 22 supra.

Third, courts can usually assume that government agencies act within the scope of their legislated authority. This assumption is not the product of wishful judicial thinking, but instead results from our observations over time that, despite occasional and regrettable lapses, government agencies typically go about their intended business. This experience has specific application to the court's consideration of FOIA Exemption 7 claims by different types of federal agencies.

(4) On the one hand, the assumption that a mixed-function agency is acting within the scope of its authority tells a court nothing about whether it has met the Exemption 7 threshold requirement of a "law enforcement purpose." Law enforcement, indeed, is often one of such an agency's proper functions, but other functions are also a major part of the agency's day-to-day business. Thus, a court must scrutinize with some skepticism the particular purpose claimed for disputed documents redacted under FOIA Exemption 7. Ramo v. Department of the Navy, 487 F.Supp. 127, 131 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson). If courts accept a mixed-function agency's claims of "law enforcement purpose" without thoughtful consideration, the excessive withholding of agency records which Congress denounced and sought to avoid with the 1974 amendments might well result.

(5) On the other hand, the generally accurate assumption that federal agencies act within their legislated purposes implies that an agency whose principal mission is criminal law enforcement will more often than not satisfy the Exemption 7 threshold criterion.[FN25] Thus, a court can accept less exacting proof from such an agency that the purpose underlying disputed documents is law enforcement. This less exacting judicial scrutiny of a criminal law enforcement agency's purpose in the context of the FOIA Exemption 7 threshold is further bolstered by Congress' concern that inadvertent disclosure of criminal investigations, information sources, or enforcement techniques might cause serious harm to the legitimate interests of law enforcement agencies. [FN26]

FN25. The FBI is certainly one of the most obvious examples of such an agency. See 28 U.S.C. ss 531-537 (1976).

FN26. In support of Senator Hart's floor amendment that eventually became Exemption 7, Senator Kennedy commented: "(I)t seems to be that the amendment itself has considerable sensitivity built in to protect against the invasion of privacy, and to protect the identities of informants, and most generally to protect the legitimate interests of a law enforcement agency to conduct (a criminal) investigation ...." 120 Cong.Rec. 17,040 (1974), reprinted in 1975 Source Book, supra note 10, at 350.

Thus, we conclude that a court may apply a more deferential attitude toward the claims of "law enforcement purpose" made by a criminal law enforcement agency. The result of this conclusion is that our prior precedent identifying the standard for ascertaining law enforcement purpose vel ***419 **28** non of general regulatory and administrative agencies, while instructive, is not necessarily determinative of the issue for criminal law enforcement agencies. These specialized agencies require a separate standard of judicial review.

2. The "Law Enforcement Purpose" of Law Enforcement Agencies

On one of the few occasions that required this Circuit to ascertain the presence or absence of a "law enforcement purpose" for FOIA Exemption 7, in a case involving a mixed-function agency, the court drew a line between general agency oversight (including program monitoring) and agency

investigations specifically directed at allegedly illegal activity. Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 81-82 (D.C.Cir.1974).[FN27] At issue in Rural Housing Alliance was the disclosure of portions of a report by the Department of Agriculture's Inspector General regarding allegations of governmental housing discrimination in Florida. In expressing the "law enforcement purpose" test for the District Court to apply on remand, the court identified law enforcement investigations as "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." Id. at 81 (footnote omitted). The panel further stated: "The purpose of the 'investigatory files' is thus the crucial factor.... If the purpose of the investigation was ... an inquiry as to an identifiable possible violation of law, then such inquiry would have been 'for law enforcement purposes' whether the individual were a private citizen or a government employee." Id. at 82.[FN28]

FN27. While Rural Housing Alliance is of the same vintage as the four decisions of this Circuit that Congress overruled with the 1974 amendment of Exemption 7, see note 20 supra and accompanying text, it has retained its precedential value. Congress did not change the "law enforcement purpose" language in Exemption 7 that was the subject of Rural Housing Alliance ; instead Congress codified the exemption's policy concerns so that once a law enforcement purpose was found, the judicial inquiry was not "at an end." See note 21 supra.

FN28. This means of distinguishing investigations for law enforcement purposes from more routine oversight and monitoring has been termed the "special intensity" test. See, e.g., Gregory v. FDIC, 470 F.Supp. 1329, 1333-34 (D.D.C.1979), rev'd on other grounds, 631 F.2d 896 (D.C.Cir.1980) (per curiam); Note, FOIA Exemption 7 and Broader Disclosure of Unlawful FBI Investigations, 65 Minn.L.Rev. 1139, 1147 (1981).

Because we believe that a court may apply a more deferential standard with respect to claims of "law enforcement purpose" made by a criminal law enforcement agency, the test enunciated in Rural Housing is not adequate to dispose of the question at issue here. We must, therefore, consider alternative tests suggested by other courts.

The various courts that have rejected the per se argument, i.e., that all law enforcement agency files manifest a law enforcement purpose, have, quite naturally, each phrased their tests in slightly different language. For example, Judge Weinfeld has opined: "The appropriate test is whether the records indicate that the agency was gathering information with the good faith belief that the subject may violate or has violated federal law, or was merely monitoring the subject for purposes unrelated to enforcement of federal law." Lamont v. Department of Justice, 475 F.Supp. 761, 773 (S.D.N.Y.1979) (footnote omitted). The Northern District of California announced "a liberal test that would require that the FBI show a sufficient connection between the conduct of the investigation and legitimate concerns for maintaining national security or preventing criminal activity." Ramo v. Department of the Navy, 487 F.Supp. 127, 131 (N.D.Cal.1979), appeal docketed, No. 79-4791 (9th Cir. Aug. 6, 1981) (submission vacated pending Supreme Court decision in FBI v. Abramson).[FN29] ***420 **29** Shortly after the decision in Ramo, the Ninth Circuit stated that: "An agency which has a clear law enforcement mandate, such as the FBI, need only establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed." Church of Scientology v. Department of Defense, 611 F.2d 738, 748 (9th Cir. 1979).[FN30] Chief Judge Peckham interpreted the language from Church of Scientology as requiring "that an agency with a clear law enforcement purpose ... need only be held to a minimal showing that the activity which generated the documents was related to the agency's function." Dunaway v. Webster, 519 F.Supp. 1059, 1076 (N.D.Cal.1981). Finally, Judge Weinfeld has tersely commented: "To meet this requirement an agency must demonstrate at least 'a colorable claim of a rational nexus' between activities being investigated and violations of federal law." Malizia v. Department of Justice, 519 F.Supp. 338, 347 (S.D.N.Y.1981) (footnote omitted).[FN31]

FN29. The Court in Ramo apparently was willing to go further than some other courts have in discarding the "special intensity" test's requirement of a specific, alleged violation or a particular,

suspected person. "To invoke the exemption, the (FBI) need not show that the files reflect a specific suspected violation of the law; however, it must show that the investigation was based on some legitimate law enforcement purpose." 487 F.Supp. at 131.

FN30. While the language from Church of Scientology quoted above clearly requires some Exemption 7 threshold test, even for FBI documents, the Government has cited a footnote from the same page of the opinion which suggests that the Ninth Circuit accepted the per se approach of Irons v. Bell and Kuehnert v. FBI. The footnote states in part: "Koch, however, is not persuasive because the agency involved was the FBI, for whom (sic) a separate showing of 'law enforcement purpose' is unnecessary." 611 F.2d at 748 n.5. As did the court in Dunaway v. Webster, 519 F.Supp. 1059, 1075-76 (N.D.Cal.1981), we interpret this apparent inconsistency in favor of the textual language.

FN31. Ironically, the language most often cited or quoted as part of the appropriate test for measuring the law enforcement purpose of a law enforcement agency-"a colorable claim of a rational nexus between the organizations and activities being investigated and violations of federal laws"-originated in Irons v. Bell, 596 F.2d 468, 472 (1st Cir. 1979). When the documents presented in Irons failed to meet even this threshold test, the First Circuit concluded that a criminal law enforcement agency need not meet any threshold requirement in order to avail itself of Exemption 7's subparts. Id. at 474. For the reasons noted above, we reject this position of the First Circuit as patently inconsistent with Exemption 7.

(6) As we read these various tests, however phrased, and consider the applicable language of FOIA (and the related legislative history), it appears inescapable to us that there are two critical conditions that must be met for a law enforcement agency to pass the Exemption 7 threshold. First, the agency's investigatory activities that give rise to the documents sought must be related to the enforcement of federal laws or to the maintenance of national security. To satisfy this requirement of a "nexus," the agency should be able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law. The possible violation or security risk is necessary to establish that the agency acted within its principal function of law enforcement, rather than merely engaging in a general monitoring of private individuals' activities. While Congress intended that "law enforcement purpose" be broadly construed,[FN32] it was not meant to include investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to the national security and violations of the criminal ***421 **30** laws and of apprehending those who do violate the laws. See Lamont v. Department of Justice, 475 F.Supp. 761, 774-76 (S.D.N.Y.1979) (seventeen years of generalized monitoring unrelated to law enforcement).

FN32. The Exemption 7 "law enforcement purpose" includes both civil and criminal investigations and proceedings within its scope. See, e.g., Rural Hous. Alliance v. Department of Agriculture, 498 F.2d 73, 81 & n.46 (D.C.Cir.1974). Exemption 7(D)'s reference to "lawful national security intelligence investigation(s)" makes clear that it also extends beyond typical civil and criminal law enforcement. The Conference Report on the 1974 FOIA amendments commented: "(N)ational security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974), reprinted in 1975 Source Book, supra note 10, at 230. See Stein v. Department of Justice, 662 F.2d 1245, 1260-61 (7th Cir. 1981).

Second, the nexus between the investigation and one of the agency's law enforcement duties must be based on information sufficient to support at least "a colorable claim" of its rationality. This second condition is deferential to the particular problems of a criminal law enforcement agency. Such an agency, in order to carry out its functions, often must act upon unverified tips and suspicions based upon mere tidbits of information. A court, therefore, should be hesitant to second-guess a law

enforcement agency's decision to investigate if there is a plausible basis for its decision. Nor is it necessary for the investigation to lead to a criminal prosecution or other enforcement proceeding in order to satisfy the "law enforcement purpose" criterion. E.g., Bast v. Department of Justice, 665 F.2d 1251, 1254 (D.C.Cir.1981); Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 82 n.48 (D.C.Cir.1974); cf. Founding Church of Scientology, Inc. v. Regan, 670 F.2d 1158, 1161 (D.C.Cir.1981) (enforcement proceeding not required for operation of Exemption 7(D)).[FN33] Of course, the agency's basis for the claimed connection between the object of the investigation and the asserted law enforcement duty cannot be pretextual or wholly unbelievable. See Abramson v. FBI, 658 F.2d 806, 811 (D.C.Cir.1980), cert. granted, 452 U.S. 937, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981) (asserting appointment functions of Nixon White House as basis for "name checks" of individuals prominently associated with liberal causes).

FN33. We believe that the Third Circuit's conclusion that " 'law enforcement purposes' must relate to some type of enforcement proceeding, and one that is pending," Committee on Masonic Homes v. NLRB, 556 F.2d 214, 219 (3d Cir. 1977) (footnote omitted), has no application to an agency whose principal function is criminal law enforcement. Therefore, we also dismiss the First Circuit's concern, expressed in Irons v. Bell, 596 F.2d 468, 474 (1st Cir. 1979), that the need to shield legitimate law enforcement efforts from harmful FOIA disclosures might lead to frivolous prosecutions.

Thus, while our measure of a criminal law enforcement agency's "law enforcement purpose" is necessarily deferential, in recognition of the realities of these agencies' duties and the importance of their functions, it is not vacuous. In order to pass the FOIA Exemption 7 threshold, such an agency must establish that its investigatory activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached. Either of these concerns must have some plausible basis and have a rational connection to the object of the agency's investigation.

III. APPLICATION OF THE EXEMPTION 7 THRESHOLD IN THIS CASE

In this case the FBI averred that all of the records responsive to Pratt's FOIA request were "investigatory records compiled for law enforcement purposes." Affidavit of David S. Byerly at 7-10, 35 (Nov. 21, 1979), reprinted in Jt.App. at 79-82, 111. The District Court accepted this statement of purpose for all of the documents in the original production except for nine COINTELPRO documents, which it held "cannot reasonably be considered or interpreted as generated through any legitimate law enforcement purpose." Pratt v. Webster, 508 F.Supp. 751, 761 (D.D.C.1981). The District Court's February 13 Order led to the inclusion of sixteen additional COINTELPRO documents in this litigation, all of which had previously been identified during the field office search requested by Congressman McCloskey.[FN34] The District Court similarly concluded that none of these COINTELPRO documents satisfied the Exemption 7 threshold. With the exception of two passages deleted under Exemption 6 as "clearly unwarranted invasions of personal privacy," [FN35] the District Court ordered that ***422 **31** all twenty-five COINTELPRO documents be released in their entirety. With all respect for the District Court's otherwise exemplary handling of this case, we must disagree.

FN34. See note 6 and accompanying text supra.

FN35. See text at notes 7-8 supra.

At the outset, it is clear that the District Court singled out this handful of documents only because they were designated as "COINTELPRO" documents. See id. Document 22, labeled as a COINTELPRO document, was the only document found to lack a law enforcement purpose out of a particular file of 156 documents. This entire file was a national security file generated by an investigation "instituted as a result of the FBI receiving information that (Pratt) was engaged in activities which could involve a violation of" 18 U.S.C. ss 2383-2385 (1976), Affidavit of David S. Byerly at 8 (Nov. 21, 1979), reprinted in Jt.App. at 80. Documents 519 to 524 include eight documents, see note 8 supra, out of more than 400 referring to Pratt that were collected from investigatory files of other individuals or

organizations by means of the FBI's "see" or cross references. The FBI averred that "(a)ll 'see' reference documents herein are investigatory records compiled for law enforcement purposes and were collected in the course of lawful national security investigations or other mandated investigations imposed by law." Affidavit of David S. Byerly at 35 (Nov. 21, 1979), reprinted in Jt.App. at 111. The District Court accepted the FBI's claim of law enforcement purpose for all of these documents except for the eight bearing the appellation "COINTELPRO." Pratt v. Webster, 508 F.Supp. at 759-61.

(7) We recognize, of course, that Exemption 7 refers to "records" rather than files, 5 U.S.C. s 552(b)(7) (1976), and that the location of a non-exempt document in an investigatory file does not necessarily make that document exempt from FOIA's disclosure requirements. See 5 U.S.C. s 552(b) (1976). We believe, however, that the District Court distinguished these nine documents from the other documents contained in the same files not on the FOIA grounds of law enforcement purpose, but on the grounds of law enforcement method.

(8) The FBI's Counter-Intelligence Program has been the subject of congressional inquiry, see Church Committee Report, note 3 supra, and of individual litigation, see, e.g., Black Panther Party v. Smith, 661 F.2d 1243 (D.C.Cir.1981); Hobson v. Wilson, Civ. No. 76-1326 (D.D.C. Dec. 23, 1981) (judgment on verdict to anti-war demonstrators); Stern v. Richardson, 367 F.Supp. 1316 (D.D.C.1973). Those proceedings have established that COINTELPRO activities included the use of questionable, and at times illegal, methods. The documents at issue in this case also reveal questionable actions by the FBI to foment distrust and suspicion and to create and enhance dissension within the Black Panther Party. See Pratt v. Webster, 508 F.Supp. at 761; Jt.App. at 104-06, 113-41, 229-83. But whatever we may think of the FBI's methods, we cannot conclude therefrom that the COINTELPRO activities involved in this case lacked any law enforcement purpose.

The Church Committee Report's discussion of the FBI's actions against the BPP (offered by Pratt as Exhibit 1 to his May 21, 1981 Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, reprinted in Jt.App. at 316-34) quoted from a February 1968 FBI memorandum expanding the agency's program against what it termed "black nationalist groups," including the BPP. That memorandum described the program's goals as follows:

> 1. Prevent a coalition of militant black nationalist groups....
> 2. Prevent the rise of a messiah who could unify and electrify the militant nationalist movement ... Martin Luther King, Stokely Carmichael and Elijah Muhammad all aspire to this position....
> 3. Prevent violence on the part of black nationalist groups....
> 4. Prevent militant black nationalist groups and leaders from gaining respectability by discrediting them....
> 5. ... prevent the long-range growth of militant black nationalist organizations, especially among youth.

***423 **32** Church Committee Report, supra note 3, Book III at 187, reprinted in Jt.App. at 316. While many of the FBI's goals and methods in its COINTELPRO activities against the BPP give us serious pause, we believe that the third goal on this list-the prevention of violence-establishes that law enforcement was a "significant aspect" of the FBI's overall purpose. See Koch v. Department of Justice, 376 F.Supp. 313, 315 (D.D.C.1974).

(9) In particular, we believe that the documents at issue in this case evince law enforcement as a "significant aspect" of the FBI's purpose.[FN36] Document 22 is part of an investigatory file based on FBI concerns that Pratt might violate three specific provisions of the Criminal Code. From the record before us, we cannot conclude that that concern was implausible or irrational, especially since the District Court recognized the validity of that concern with respect to the other 155 documents in the file. Documents 519 to 524 were all found in the FBI's "see" reference files and, according to the Government's affidavits, were "investigatory records compiled for law enforcement purposes and were collected in the course of lawful national security investigations or other mandated investigations imposed by law." Affidavit of David S. Byerly at 35 (Nov. 21, 1979), reprinted in Jt.App. at 111. While this affidavit is indeed a "minimal showing," it appears sufficient to establish the FBI's concern for possible violations or security risks. See Dunaway v. Webster, 519 F.Supp. 1059,

1076 (N.D.Cal.1981). Our conclusion again is bolstered by the District Court's acceptance of the FBI's law enforcement purpose with respect to all other "see" reference documents.

FN36. We do not intimate that all COINTELPRO documents would pass the Exemption 7 threshold, or even that all COINTELPRO documents concerning the Black Panther Party would necessarily meet this test. Those issues simply are not before us. We are concerned in this case only with a handful of COINTELPRO documents located in general investigatory files of the FBI.

Documents COINT-1 to COINT-16 were located through the FBI's supplemental search for records concerning Pratt in the agency's California field offices. Several of these COINTELPRO documents are directly related to the documents disclosed from the previous search of FBI Headquarters. For example, document COINT-5 was apparently a supplement by the Los Angeles office to its previously dispatched document 520. See Jt.App. at 117-24, 240-41. In addition, the subject matter of these sixteen COINT documents is often the same as is found in documents 519 to 524. In short, these documents, but for their COINTELPRO label, are indistinguishable from other FBI documents for which the District Court found a law enforcement purpose. Moreover, these documents provide independent support for a claim of law enforcement purpose. Document COINT-1, for example, discusses cooperation with the Los Angeles Police Department in identifying violations of state and local laws, reports on the arrest of a BPP member for firearms violations, and identifies Pratt "as a possible bomb suspect." Jt.App. at 229-30.

(10) Thus, we conclude that the District Court incorrectly distinguished COINTELPRO documents from other documents for which it found a law enforcement purpose. While the methods frequently used by the FBI in its COINTELPRO activities offer a ready distinction from more typical means of law enforcement, FOIA Exemption 7 refers to purposes rather than to methods. Because law enforcement was a significant aspect of the FBI's purpose, we conclude that the District Court erred in holding that these documents failed to pass the Exemption 7 threshold. Accordingly, we reverse its holding in this regard.[FN37]

FN37. In defense of the District Court's decision, Pratt raises an issue not addressed by the court below. He contends that the COINTELPRO documents are not "investigatory records" and therefore fail to meet the Exemption 7 threshold criterion on this ground. Appellee's Brief at 19-27. Pratt takes an unusually narrow view of the meaning of "investigatory records," however, and his view was not shared by Congress. The Conference Report on the 1974 FOIA amendments noted that the term "intelligence" in Exemption 7(D) "is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions." H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 230. Exemption 7(D), of course, is operable only when a document satisfies both parts of the threshold and part 7(D) itself. Hence, Congress' definition of "intelligence" necessarily implies that the term "investigatory records" includes within its scope records generated by positive intelligence-gathering and counter-intelligence, as well as by a more typical criminal investigation. On this basis we conclude that the COINTELPRO documents at issue in this appeal, like the documents which surrounded them in the FBI's files, are "investigatory records" within the meaning of the Exemption 7 threshold.

***424 **33** Our conclusion that the twenty COINTELPRO documents at issue in this appeal [FN38] meet the Exemption 7 threshold criterion requires us to return the case to the District Court. On remand the District Court must determine whether the withholding of portions of the contested documents, which the Government seeks on the basis of Exemptions 7(C) and 7(D),[FN39] is justified.[FN40]

FN38. See note 8 supra.

FN39. Exemption 7(D) allows the deletion of the name of a confidential source and any information that would disclose the identity of a confidential source whenever a document is an "investigatory record ( ) compiled for law enforcement purposes." If the record was "compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation,"

Exemption 7(D) also allows the withholding of "confidential information furnished only by the confidential source." 5 U.S.C. s 552(b)(7)(D) (1976); see Radowich v. United States Attorney, 658 F.2d 957, 959 (4th Cir. 1981); Duffin v. Carlson, 636 F.2d 709, 712 (D.C.Cir.1980) (distinguishing two clauses of Exemption 7(D)). These additional requirements are more exacting than the threshold requirement of "law enforcement purpose," Dunaway v. Webster, 519 F.Supp. 1059, 1076, 1080 (N.D.Cal.1981), and, in the case of a national security intelligence investigation, may require a determination of the lawfulness of the investigation's methods. See H.R.Rep.No.1380, 93d Cong., 2d Sess. 13 (1974) (Conference Report), reprinted in 1975 Source Book, supra note 10, at 230; 120 Cong.Rec. 34,167 (1974), reprinted in 1975 Source Book, supra note 10, at 391-92 (colloquy of Rep. Horton and Rep. Moorhead). We leave these issues for the District Court to consider on remand.

FN40. Our disposition of this case on Exemption 7 grounds makes it unnecessary for us to consider the Government's Exemption 6 claims. The Government has asserted Exemption 7(C) or Exemption 7(D) or both as a basis for the deletions from each of the thirteen documents for which it also asserts Exemption 6. Because everything that can be withheld on the basis of Exemption 6 as "a clearly unwarranted invasion of personal privacy" can also be withheld on the basis of 7(C) (if the threshold is met) as "an unwarranted invasion of personal privacy," Exemption 6's application would not allow the deletion of any additional information from these COINTELPRO documents.

IV. CONCLUSION

Because of public interest in the effective disclosure of malfeasance by government agencies, we feel compelled to add a few words about the practical effect of our decision and about the means for redress of any alleged wrongs committed by federal agencies.

(11) FOIA requires disclosure of government records to the fullest extent possible and allows the withholding of only so much of the document as fits squarely within an enumerated exemption. In this case, for example, the Government primarily seeks only to delete the names of its FBI Special Agents and the identities of its confidential sources; the FBI's plans to increase discord within the Black Panther Party and to discredit its leaders have been revealed. The public's interest in the disclosure of government malfeasance is therefore not defeated by the FOIA exemptions or by our interpretation in this case of the reach of one of them.

Of course, nothing we say or hold represents our approval of the measures attributed to the FBI's Counter-Intelligence Program by the Church Committee Report, note 3 supra. The use of government force and deception to quash lawful political dissent and expression is antithetical to a democratic society. Where substantiated, we find these actions reprehensible.

(12) The proper and most effective means of redress for these actions, however, is not a FOIA action. While a suit under the Freedom of Information Act is an important mechanism for discovering the malfeasance of government agencies, see, e.g., Stern v. Richardson, 367 F.Supp. 1316 (D.D.C.1973) (disclosing existence of COINTELPRO), it can do no more than reveal these actions. FOIA is thus a useful supplement to, but not a substitute for, private damage actions by aggrieved individuals and political action by concerned citizens and their representatives. The Church Committee Report is a prime example of the latter, and ***425 **34** a recent case in the District Court for the District of Columbia exemplifies the former, Hobson v. Wilson, Civ. No. 76-1326 (D.D.C. Dec. 23, 1981).[FN41] Our holding in this case in no way limits access to either of these remedies.[FN42]

FN41. In Hobson a jury awarded more than $700,000 to seven community activists and an anti-war organization that had sued the FBI and the District of Columbia Police Department for illegal harassment and surveillance under COINTELPRO. See Jury Awards $711,937.50 to Demonstrators, Washington Post, Dec. 24, 1981, at 1, col. 3.

FN42. Although he does not disagree with the views expressed in the last two paragraphs of this section IV, Judge Robb believes the expression of these views is unnecessary to the decision.

V. DISPOSITION

For the foregoing reasons, we hold that the twenty COINTELPRO documents at issue in this appeal meet the "law enforcement purpose" criterion of the FOIA Exemption 7 threshold. As a result, we reverse the decision of the District Court in this regard and remand the case to the District Court for its consideration of the Government's claims for nondisclosure under Exemptions 7(C) and 7(D) and for any other proceedings consistent with this opinion.

So ordered.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96

INSTA-CITE

CITATION: 673 F.2d 408

Direct History

1 Pratt v. Webster, 508 F.Supp. 751 (D.D.C., Feb 12, 1981)
(NO. CIV. 78-1688)
Decision Reversed by
=> 2 **Pratt v. Webster,** 673 F.2d 408, 218 U.S.App.D.C. 17
(D.C.Cir., Jan 22, 1982) (NO. 81-1907, 81-1922)

Negative Indirect History

Declined to Follow by
3 Shaw v. F.B.I., 749 F.2d 58, 242 U.S.App.D.C. 36
(D.C.Cir., Dec 05, 1984) (NO. 84-5084)
4 Hopkinson v. Shillinger, 866 F.2d 1185, 27 Fed. R. Evid. Serv. 919
(10th Cir.(Wyo.), Jan 23, 1989) (NO. 86-2571), rehearing denied
(Dec 01, 1989) (Additional History)
5 Jones v. F.B.I., 41 F.3d 238 (6th Cir.(Ohio), Nov 17, 1994)
(NO. 92-3962) (Additional History)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS DCT

Lenny EPPS, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.

Civ. A. No. 89-84 SSH.

United States District Court,
District of Columbia.

Sept. 15, 1992.

Action was brought under Freedom of Information Act (FOIA) to compel disclosure of documents relating to requester's federal prosecution and resulting conviction. On motion of United States Attorney's Office (USAO) to dismiss complaint and Federal Bureau of Investigation's (FBI's) and Drug Enforcement Administration's (DEA's) motions for summary judgment, the District Court, Stanley S. Harris, J., held that: (1) District Court did not have subject matter jurisdiction over action to compel USAO to disclose documents, and (2) FBI and DEA records were exempt from disclosure under FOIA.

Motions granted.

[1] RECORDS ⇦ 53
326k53
There are nine exemptions to Freedom of Information Act's (FOIA's) general rule of disclosure, and burden is on government to show that requested information which it declines to produce is exempt. 5 U.S.C.A. § 552.

[1] RECORDS ⇦ 65
326k65
There are nine exemptions to Freedom of Information Act's (FOIA's) general rule of disclosure, and burden is on government to show that requested information which it declines to produce is exempt. 5 U.S.C.A. § 552.

[2] RECORDS ⇦ 65
326k65
In determining whether agency has satisfied burden of showing that requested documents are exempt from disclosure under Freedom of Information Act (FOIA), court may rely solely on agency affidavits. 5 U.S.C.A. § 552.

[3] RECORDS ⇦ 52
326k52
Because primary purpose of Freedom of Information Act (FOIA) is to allow people to know what their government is doing, each requester is treated equally, regardless of his or her reason for requesting information. 5 U.S.C.A. § 552.

[4] RECORDS ⇦ 63
326k63
District court did not have subject matter jurisdiction over action to compel United States Attorney's Office (USAO) to disclose documents relating to criminal investigation pursuant to Freedom of Information Act (FOIA), where direct request for documents had not been made to USAO. 5 U.S.C.A. § 552.

[5] RECORDS ⇦ 63
326k63
Under the Freedom of Information Act (FOIA), administrative remedies must be exhausted prior to judicial review. 5 U.S.C.A. § 552.

[6] RECORDS ⇦ 57
326k57
Federal Bureau of Investigation (FBI) records involving specific payments made by FBI to nongovernment informants were not "predominantly internal" and were not protected from disclosure under Freedom of Information Act (FOIA) exemption for documents relating solely to internal personnel records and practices of agency. 5 U.S.C.A. § 552(b)(2).

[7] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records involving specific payments made by FBI to nongovernment informants were exempt from disclosure under Freedom of Information Act (FOIA) exemption for records that would disclose techniques and procedures for law enforcement investigations or prosecutions. 5 U.S.C.A. § 552(b)(7)(E).

[8] RECORDS ⇦ 57
326k57
Internal Drug Enforcement Administration (DEA) markings and phrases regarding treatment of and distribution of DEA documents were exempt from disclosure under Freedom of Information Act (FOIA) exemption for documents related solely to

internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[9] RECORDS ⇦ 55
326k55
Information developed by Federal Bureau of Investigation (FBI) before grand jury, including identities of witnesses and strategy or direction of criminal investigation, were exempt from disclosure under Freedom of Information Act (FOIA) exemption for documents specifically exempted from disclosure by statute, in view of rule prohibiting government attorney from disclosing grand jury matters. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e)(2), 18 U.S.C.A.

[10] RECORDS ⇦ 55
326k55
Information obtained by Federal Bureau of Investigation (FBI) through interception of wire or oral communications was exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552(b)(3); 18 U.S.C.A. §§ 2511(2)(a)(ii), 2517.

[11] RECORDS ⇦ 57
326k57
Draft affidavit in possession of Federal Bureau of Investigation (FBI) containing United States Attorney work product was exempt from disclosure under Freedom of Information Act (FOIA) as interagency memorandum which would not be available to party other than agency in litigation with agency. 5 U.S.C.A. § 552(b)(5).

[12] RECORDS ⇦ 58
326k58
Federal Bureau of Investigation (FBI) autopsy photographs were not subject to disclosure under Freedom of Information Act (FOIA) exemption for disclosures that would constitute clearly unwarranted invasion of privacy. 5 U.S.C.A. § 552(b)(6).

[13] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) felony arrest records were categorically exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records, the disclosure of which would constitute unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(7)(C).

[14] RECORDS ⇦ 60
326k60
Identities of Federal Bureau of Investigation (FBI) employees, identities of other federal government employees, identities or information about third parties mentioned in FBI investigative files, identities or information about individuals who were of investigative interest to FBI, identities or information about third parties who provided information to FBI, and identities of state or local law enforcement personnel were exempt from disclosure under Freedom of Information Act (FOIA) exemption for law enforcement records whose disclosure could be expected to constitute unwarranted invasion of personal privacy. 5 U.S.C.A. § 552(b)(7)(C).

[15] RECORDS ⇦ 64
326k64
Freedom of Information Act (FOIA) exemption for law enforcement records whose disclosure would constitute unwarranted invasion of personal privacy requires court to balance privacy interests in nondisclosure against public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[16] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) records concerning identities and information about confidential sources, and information provided under assurance of confidentiality, were exempt from disclosure under Freedom of Information Act (FOIA) exemption for records or information compiled for law enforcement purposes to extent that production could reasonably be expected to disclose identity of confidential source. 5 U.S.C.A. § 552(b)(7)(D).

[17] RECORDS ⇦ 60
326k60
Federal Bureau of Investigation (FBI) polygraph charts and lists of polygraph questions, techniques used to protect or relocate witnesses, and mechanics of investigation techniques were exempt from disclosure under Freedom of Information Act (FOIA) exemption permitting withholding of records or information compiled with law enforcement purposes to extent disclosure would reveal techniques and procedures for law

enforcement investigations or prosecutions. 5 U.S.C.A. § 552(b)(7)(E).

[18] RECORDS ⇐ 60
326k60
Names or initials of Federal Bureau of Investigation (FBI) employees, other government employees, and state and local law enforcement officers, together with names and identities of Drug Enforcement Administration (DEA) special agents, supervisory special agents and other law enforcement officers were exempt from disclosure under Freedom of Information Act (FOIA) exemption for disclosures of law enforcement records that could reasonably be expected to endanger life or physical safety of any individual, where party requesting records and his associates had demonstrated violent tendencies. 5 U.S.C.A. § 552(b)(7)(F).

***789** Lenny Epps, pro se.

Claire M. Whitaker, Asst. U.S. Atty., Office of the U.S. Atty., Washington, D.C., for defendants.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiff filed suit in January 1989 under the Freedom of Information Act (FOIA) to compel disclosure of documents relating to his federal prosecution and resulting conviction. Defendant United States Attorney's Office (USAO) moves to have plaintiff's complaint dismissed, and defendants the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) seek summary judgment against plaintiff Epps. Upon consideration of defendants' motion, plaintiff's opposition, defendants' reply, and plaintiff's surreply, the Court grants the motion of the USAO, the FBI, and the DEA.

Background

Plaintiff seeks documents relating to a 1986 conviction. He argues that he was wrongly convicted and that he has a heightened need to obtain certain government documents to attempt to prove his innocence. In March of 1988, Epps sent a FOIA request to the Department of Justice requesting:

> from all law enforcement agenicies [sic] such as the F.B.I., D.E.A. and the Baltimore, [ ]City Police Dept. and any other agencies that participated in the investigations of case NO. Y-85-0547 that obtain any information such as papers Notes (rough) or transcribed in this investigation of U.S. v. Maurice C. Proctor and Lenny Epps Case No. Y-85-0547.

The USAO moves for dismissal of the portion of the complaint against it based on plaintiff's failure to have sought documents through the administrative process prior to filing this action. Defendants the FBI and the DEA, who have already responded to plaintiff's request, argue that they have produced all unprotected documents and portions of documents as required under the FOIA. Accordingly, the FBI and the DEA move for summary judgment with respect to the portions of the complaint against them.

Discussion

[1] The purpose of the FOIA, 5 U.S.C. § 552 is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." National Labor Relations Bd. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Accordingly, the FOIA represents "a general philosophy of full agency disclosure." Department of the Air Force v. Rose, 425 U.S. 352, 360, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976) (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). However, there are nine exemptions to this general rule of disclosure, Baldrige v. Shapiro, 455 U.S. 345, 352, 102 S.Ct. 1103, 1108, 71 L.Ed.2d 199 (1982), and the burden is on the government to show that the requested information which it declines to produce is exempt. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755, 109 S.Ct. 1468, 1472, 103 L.Ed.2d 774 (1989).

[2] To be entitled to summary judgment, each movant agency must "prove [ ] that no substantial and material facts are in dispute and that [it] is entitled to judgment as a matter of law." Weisberg v. Department of Justice, 627 F.2d 365, 368 (D.C.Cir.1980). To meet this burden, the agency must "prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements." National Cable

Television Ass'n v. Federal Communications Comm'n, 479 F.2d 183, 186 (D.C.Cir.1973). In determining whether the agency has ***790** satisfied this burden, the Court may rely solely on agency affidavits. See Goland v. CIA, 607 F.2d 339, 352 (D.C.Cir.), vacated in part on other grounds, 607 F.2d 339 (D.C.Cir.1978), cert. denied, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). The affidavits, however, "must be 'relatively detailed' and nonconclusory." Id. (quoting Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974)).

[3] Because the primary purpose of the FOIA is to allow people to know what their government is doing, National Labor Relations Bd., 437 U.S. at 242, 98 S.Ct. at 2327, each requester is treated equally, regardless of his reason for requesting the information. National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 875 (D.C.Cir.1989), cert. denied, 494 U.S. 1078, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990).

I. United States Attorney's Office

[4] Although the USAO acknowledges assisting the FBI with plaintiff's FOIA request as to USAO-originated information, it argues that plaintiff did not make a direct request to it. Until this suit was filed, the USAO was unaware that plaintiff wished to obtain documents from it. Wright Declaration ¶ 3-5. Accordingly, the USAO moves that plaintiff's complaint be dismissed as to it because plaintiff seeks judicial review of a FOIA request that was never made. However, the USAO also states that it will now treat plaintiff's letter of March 15, 1988, as a request and respond accordingly. Wright Declaration ¶ 6.

[5] Under the FOIA, administrative remedies must be exhausted prior to judicial review. American Fed'n of Gov't Employees v. Department of Commerce, 907 F.2d 203, 209 (D.C.Cir.1990); Spannaus v. Department of Justice, 824 F.2d 52, 58 (D.C.Cir.1987); Stebbins v. Nationwide Mut. Ins. Co., 757 F.2d 364, 366 (D.C.Cir.1985). Accordingly, the USAO's motion is granted, and plaintiff's complaint against it is dismissed without prejudice for lack of subject matter jurisdiction. Hymen v. Merit Sys. Protection Bd., 799 F.2d 1421, 1423 (9th Cir.1986), cert. denied, 481 U.S. 1019, 107 S.Ct. 1900, 95 L.Ed.2d 506 (1987); see Dettmann v. Department of Justice, 802 F.2d 1472, 1477 (D.C.Cir.1986).

II. Federal Bureau of Investigation/Drug Enforcement Administration

A. Exemption (b)(2)

[6] Exemption (b)(2) allows agencies to withhold documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The FBI cites exemption (b)(2) to justify its deletion of "dates, amounts and method of payment on behalf of witnesses." Superneau Declaration ¶ 20. Plaintiff argues that payments to witnesses do not fall under exemption (b)(2) because witnesses are not personnel, and the payments are not internal.

To support its position, the FBI relies on Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C.Cir.1981) (en banc). In Crooker, the court defined the limits of exemption (b)(2) in a two-part test, holding that a document does not have to be disclosed if (1) it is "predominantly internal," and (2) "if disclosure significantly risks circumvention of agency regulations or statutes." Crooker, 670 F.2d at 1074. The exemption was further expanded in National Treasury Employees Union v. Customs Serv., 802 F.2d 525 (D.C.Cir.1986), in which the court stated that "[w]here disclosure of a particular set of documents would render those documents operationally useless, the Crooker analysis is satisfied whether or not the agency identifies a specific statute or regulation threatened by disclosure." National Treasury Employees Union, 802 F.2d at 530-31.

In the present case, the FBI has specifically stated that "this exemption was asserted where it was logically determined that harm could result to the FBI's investigative function." Superneau Declaration ¶ 20. From this statement it is reasonable to conclude that the FBI has met the "circumvention" test. However, it does not satisfy the "predominantly internal" requirement. ***791** Crooker does not discuss payments to witnesses, nor do any of the District of Columbia Circuit cases which Crooker cites. Instead, Crooker addresses law enforcement training manuals and discusses cases which involve documents of a more internal

nature than the witness payments in this case. See, e.g., Lesar v. Department of Justice, 636 F.2d 472 (D.C.Cir.1980) (concerning symbols used to refer to FBI informants); Cox v. Department of Justice, 601 F.2d 1 (D.C.Cir.1979) (per curiam) (concerning United States Marshals' manual giving details concerning weapons, handcuffs, and transportation of prisoners); Jordan v. Department of Justice, 591 F.2d 753 (D.C.Cir.1978) (en banc) (involving documents relating to guidelines for prosecutorial discretion); Vaughn v. Rosen, 523 F.2d 1136 (D.C.Cir.1975) (involving reports prepared by the Civil Service Commission to provide advice to agencies on how to improve their personnel programs). For this reason, the Court finds that the records requested involving specific payments made by the FBI to non-government informants are not "predominantly internal," and cannot be protected by exemption (b)(2).

[7] However, this does not end the inquiry. In 1986, Congress codified the "circumvention" test in Crooker, adding it to exemption (b)(7)(E). See Kaganove v. Environmental Protection Agency, 856 F.2d 884, 888-89 (7th Cir.1988), cert. denied, 488 U.S. 1011, 109 S.Ct. 798, 102 L.Ed.2d 789 (1989). The Court finds that exemption (b)(7)(E) applies here and that the FBI can withhold the requested information. Revealing the dates amounts and methods of making payments to witnesses

> would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions [and] such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E). See also Superneau Declaration ¶ 20; Summary Judgment Motion, p. 9.

[8] In addition, the DEA has asserted exemption (b)(2) to protect Geographical Drug Enforcement Program (G-DEP) and Informant Identifier codes, and Narcotics and Dangerous Drugs Information System (NADDIS) numbers. These codes and numbers are "internal DEA markings and phrases regarding the treatment of and distribution of DEA documents.... Suspects could easily decode this information and change their patterns of drug activities, so as to evade detection by the Drug Enforcement Administration." Magruder Declaration ¶ 20. These types of internal markings clearly are exempt under (b)(2). See Lesar, 636 F.2d at 485-86; Maroscia v. Levi, 569 F.2d 1000, 1001-02 (7th Cir.1977); Struth v. FBI, 673 F.Supp. 949, 959 (E.D.Wis.1987); Texas Instruments, Inc., v. Customs Service, 479 F.Supp. 404, 406-07 (D.D.C.1979).

B. Exemption (b)(3)

[9] Next, the FBI argues that information relating to the grand jury, including the identities of witnesses, the deliberations and questions of the jurors, and the strategy or direction of the investigation, should be protected under exemption (b)(3). [FN1] The FBI further argues that information obtained through the interception of a wire or oral communication is protected under the same exemption. Exemption (b)(3) permits nondisclosure of documents

> FN1. The Court notes that plaintiff denies any interest in material originating from the grand jury. Plaintiff's Opposition at 4.

> 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.

5 U.S.C. § 552(b)(3).

Under Rule 6(e)(2) of the Federal Rules of Criminal Procedure,

> ***792** an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Fed.R.Crim.P. 6(e)(2). This rule has been found to satisfy the "statute" requirement of exemption (b)(3). Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C.Cir.1981). Therefore, the FBI does not have to reveal the information developed before the grand jury, including the identities of witnesses and the strategy or direction of the investigation. Fund for Constitutional Gov't, 656 F.2d at 869.

[10] As to the intercepted communications, the FBI argues that 18 U.S.C. 2511(2)(a)(ii) mandates

nondisclosure. In Lam Lek Chong v. Drug Enforcement Admin., 929 F.2d 729 (D.C.Cir.1991), this Circuit found that 18 U.S.C. § 2517 exempts intercepted communications from disclosure under exemption (b)(3). Although it is unclear to the Court why the FBI focuses on § 2511(2)(a)(ii), which does not appear specifically to restrict disclosure by the FBI, the Court nevertheless finds withholding the information proper. Since §§ 2511 and 2517 broadly prohibit disclosure of this type of information, and the entire chapter was discussed generally in Lam Lek Chong, the Court is satisfied that this information is properly exempt from disclosure under (b)(3).

C. Exemption (b)(5)

[11] The FBI further argues that a draft affidavit containing United States Attorney work product can be withheld under exemption (b)(5). Exemption (b)(5) states that the government can withhold documents such as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

This type of material is protected under exemption (b)(5), which is designed to protect the "decision making process of government agencies," National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 1516, 44 L.Ed.2d 29 (1975), and to encourage "frank discussion of legal and policy issues." Wolfe v. Department of Health and Human Servs., 839 F.2d 768, 773 (D.C.Cir.1988) (en banc). This Circuit stated in Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565 (D.C.Cir.1987), that

> the key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.

Dudman, 815 F.2d at 1568. Disclosing the materials being withheld here, a draft affidavit, could have the effect that Dudman sought to avoid. Therefore, this document is properly exempt from disclosure under (b)(5).

D. Exemption (b)(6)

[12] The FBI also argues that autopsy photographs and felony arrest records should be protected from disclosure by exemption (b)(6), which allows the government to withhold "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).

Unlike most FOIA exemptions, exemption (b)(6) requires a balancing of interests. Specifically, a court must weigh an individual's privacy interests in nondisclosure against the public's interest in disclosure to decide whether to allow the withholding of information under (b)(6). Horner, 879 F.2d at 874. To do this the Court must first decide whether or not a substantial privacy interest is involved. Horner, 879 F.2d at 874. If the Court finds such an interest, then it

> must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure ***793** would work a clearly unwarranted invasion of personal privacy.

Horner, 879 F.2d at 874-75.

In this case, an individual's interest in not having his or her autopsy photographs released to the public is substantial. Furthermore, the individual's family also has a substantial privacy interest in keeping their deceased relative's photographs out of the public realm. On the other hand, the public's interest in gaining access to these photographs is practically nonexistent when considered in light of the FOIA's purpose of exposing agency action to the public. Horner, 879 F.2d at 878-79. Therefore, the Court finds that the government may refuse to release the autopsy photographs. [FN2]

> FN2. The Court also notes that, in his opposition to the government's summary judgment motion, plaintiff denied any interest in autopsy photographs. Plaintiff's Opposition at 4.

[13] Although felony arrest records might also be properly withheld under exemption (b)(6), the Supreme Court has recently held that rap sheets categorically can be withheld under exemption (b)(7)(C). Reporters Comm., 489 U.S. at 780, 109 S.Ct. at 1485. Finding that the records requested here are essentially the same as the rap sheets requested in Reporters Comm., the Court has no need to analyze the disclosure of the felony arrest records under exemption (b)(6). Instead, the Court

finds that this material is categorically exempt from disclosure under (b)(7)(C). Reporters Comm., 489 U.S. at 780, 109 S.Ct. at 1485.

E. Exemption (b)(7)(C)

[14] Next, the FBI argues that it does not have to reveal (1) the identities of FBI employees, (2) the identities of other federal government employees, (3) the identities and/or information about third parties who are mentioned in FBI investigative files, (4) the identities and/or information about individuals who are of investigative interest to the FBI, (5) the identities and/or information about third-parties who provided information to the FBI, and (6) the identities of state or local law enforcement personnel. Superneau Declaration ¶¶ 30-41. The DEA seeks protection for similar information including Epps's "accomplices, other defendants, informants, innocent third-parties, non-agent DEA personnel and third-parties [in] whom DEA has an investigative interest." Magruder Declaration ¶ 22. Both agencies rely on exemption (b)(7)(C), which excludes

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C).

[15] Exemption (b)(7)(C) requires the Court to balance the privacy interests in nondisclosure against the public interest in disclosure. Reporters Comm., 489 U.S. at 762, 109 S.Ct. at 1475. Case law from this and other circuits supports the exclusion of the type of information requested here. Lesar, 636 F.2d at 487-88 (exempting identities of agents, informants, and information about victims' family and associates); Johnson v. Department of Justice, 739 F.2d 1514, 1518-19 (10th Cir.1984) (exempting identities of FBI agents); New England Apple Council v. Donovan, 725 F.2d 139, 142-44 (1st Cir.1984) (exempting identities of Department of Labor Office of Inspector General officials and persons who gave information); Maroscia, 569 F.2d at 1002 (exempting identities of third-parties, FBI agents, and other law enforcement personnel). As one court has stated:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Nix v. United States, 572 F.2d 998, 1006 (4th Cir.1978). Furthermore, plaintiff's unsubstantiated accusations of wrongdoing do not alter this result. Miller v. Bell, 661 F.2d 623, 630 (7th Cir.1981), cert. denied, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 484 ***794** (1982). Accordingly, the Court finds that the information requested was compelled for law enforcement purposes and could reasonably be expected to constitute an unwarranted invasion of privacy. Therefore, the information was properly withheld.

F. Exemption (b)(7)(D)

[16] In addition, the FBI wants to withhold identities and information about confidential sources, and information provided under an assurance of confidentiality. It argues that exemption (b)(7)(D) allows this result. Exemption (b)(7)(D) allows nondisclosure of

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D).

The FBI contends that the sources were confidential sources, arguing that the methods used by the agency when conducting interviews make it clear to the source that the information is being given confidentially.

> Based on my experience as an FBI agent, these factors almost universally create a situation during interviews in which it is clearly, albeit tacitly, understood by all concerned that the information to be provided during the interview is to be afforded maximum confidentiality.

Superneau Declaration ¶ 46. Although plaintiff

disputes the sufficiency of this language, contending that the author lacks personal knowledge, his arguments must fail. This circuit recently analyzed the (b)(7)(D) exemption in Dow Jones & Co. v. Department of Justice, 917 F.2d 571 (D.C.Cir.1990), clarifying any doubt as to the application of the exemption.

> "The law of this circuit is that in the absence of evidence to the contrary, promises of confidentiality are inherently implicit when the FBI solicits information." As long as the department can show "that the information was solicited during the course of law enforcement investigations, the FBI raises the presumption that assurances were given" in exchange for the information.... Since the FBI typically promises confidentiality and rarely--if ever--will a source not desire it, only the starkest and most conclusive evidence of nonconfidentiality will rebut the presumption.

Dow Jones, 917 F.2d at 576-77 (citations omitted) (quoting Schmerler v. FBI, 900 F.2d 333, 337 (D.C.Cir.1990)). Therefore, the fact that the sources were interviewed by the FBI in the course of a law enforcement investigation raises the presumption that they were promised confidentiality, and it is plaintiff's burden to rebut this conclusion. Plaintiff has not met this burden.

Therefore, since the FBI acquired information from these sources during its investigation of Epps's criminal activities, both the names of the confidential sources and the information furnished by them can be withheld.

G. Exemption (b)(7)(E)

[17] The FBI further argues that under exemption (b)(7)(E) it can withhold (1) polygraph charts and lists of polygraph questions, (2) techniques used to protect and/or relocate witnesses, (3) information that, if revealed, would be tantamount to identifying the use of a technique, and (4) mechanics of investigation techniques. Superneau Declaration ¶¶ 53-57. The DEA argues that investigative techniques that are not commonly known to the general public, and that cannot be explained on the public record without being compromised, are also protected by (b)(7)(E). Magruder Declaration ¶ 26. Exemption (b)(7)(E) permits the withholding of

> ***795** records or information compiled for law enforcement purposes, but only to the extent that the production ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

5 U.S.C. § 552(b)(7)(E).

This exemption is designed to allow the withholding of the type of information involved here. It protects law enforcement agencies from being required to provide information that might help criminals avoid apprehension. See American Soc'y of Pension Actuaries v. Internal Revenue Serv., 746 F.Supp. 188, 190 (D.D.C.1990). Revealing this information could reasonably be expected to compromise the effectiveness of the techniques and hamper law enforcement. Therefore, the FBI can withhold such information.

H. Exemption (b)(7)(F)

[18] Lastly, the FBI relies on exemption (b)(7)(F) to withhold the names and/or initials of FBI employees, other government employees, and state and local law enforcement officers. Superneau Declaration ¶¶ 58-63. The DEA seeks to withhold the "names and identities of DEA Special Agents, Supervisory Special Agents and other law enforcement officers" under the same exemption. Magruder Declaration ¶ 28. Exemption (b)(7)(F) provides nondisclosure of

> records or information compiled for law enforcement purposes, but only to the extent that the production ... (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. 552(b)(7)(F).

The same information withheld under exemption (b)(7)(C) may be withheld under exemption (b)(7)(F) to protect against risk of personal injury. Maroscia, 569 F.2d at 1002. Plaintiff and his associates have demonstrated violent tendencies, Superneau Declaration ¶ 59, and revealing the identities of federal agents and other law enforcement personnel could expose those people to harassment or physical injury. Superneau Declaration ¶ 60. These names and/or initials can be withheld to protect the safety of those involved in the Epps investigation.

Conclusion

For the reasons stated above, the Court grants the motion of the USAO, the FBI, and the DEA. The complaint is dismissed without prejudice as to the USAO for lack of subject matter jurisdiction for failure to exhaust administrative remedies. Because the Court finds that the affidavits of the FBI and the DEA adequately support that each item withheld is exempted from disclosure, the Court grants their summary judgment motion. Accordingly, the case is dismissed.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS CTA

NOTICE: D.C. Circuit Local Rule 11(c) states that unpublished orders, judgments, and explanatory memoranda may not be cited as precedents, but counsel may refer to unpublished dispositions when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Lenny EPPS, Appellant,
v.
DEPARTMENT OF JUSTICE; Janet Reno; U.S. Attorney's Office; Federal Bureau of Investigation; and Drug Enforcement Administration.

No. 92-5360.

United States Court of Appeals, District of Columbia Circuit.

April 29, 1993.

D.D.C., 801 F.Supp. 787.

AFFIRMED.

Before: WALD, RUTH B. GINSBURG and SILBERMAN, Circuit Judges.

ORDER

PER CURIAM.

**1 Upon consideration of the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for summary affirmance be granted as to that portion of the September 15, 1992 order (the "September 15 order") which grants summary judgment as to the materials withheld by the Drug Enforcement Agency. The record supports the finding that the information withheld by this agency falls within the applicable exemptions to the Freedom of Information Act, 5 U.S.C. § 552, et seq. It is

FURTHER ORDERED that the motion for summary affirmance be denied as to that portion of the September 15 order which grants summary judgment as to the materials withheld by the Federal Bureau of Investigation ("FBI"). It is

FURTHER ORDERED, on the court's own motion, that the portion of the September 15 order which grants summary judgment as to the information withheld by the FBI be vacated. The Vaughn index (Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977 (1974)) submitted by the FBI is conclusory, and, particularly with respect to those documents withheld in their entirety, does not contain sufficient detail to render the district court's decision capable of meaningful review on appeal. See King v. U.S. Dept. of Justice, 830 F.2d 210, 218 (D.C.Cir.1987). It is

FURTHER ORDERED that the portion of the case pertaining to the information withheld by the FBI be remanded for further proceedings in accordance with this court's direction in Proctor v. United States Department of Justice, et al., Nos. 91-5305, et al. (D.C.Cir. Dec. 9, 1992) (case remanded based on FBI's representation that it intended to file a revised Vaughn index).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C.Cir.Rule 15.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS DCT

Thomas FARESE, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.

Civ. A. No. 83-0938.

United States District Court, District of Columbia.

Dec. 22, 1987.

On remand from the Court of Appeals, 826 F.2d 129 (memorandum decision), and Freedom of Information Act case, the District Court, John Garrett Penn, J., held that documents relating to witness protection program were exempt from disclosure as documents compiled for law enforcement purposes.

Ordered accordingly.

RECORDS ⇐ 60
326k60
Material relating to witness protection funding of several individuals who cooperated with the government in criminal law enforcement process and identifying individual who would be subject to unwarranted public attention, harassment, and criticism for having been associated with an official criminal investigation of the document where disclosed were exempt from disclosure under the Freedom of Information Act as documents compiled for law enforcement purposes. 5 U.S.C.A. § 552(b)(7)(C).

***274** Thomas Farese, pro se.

Patricia Carter, Asst. U.S. Atty., Washington, D.C., for defendants.

MEMORANDUM

JOHN GARRETT PENN, District Judge.

The plaintiff filed this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The case is now before the Court on the motion to dismiss filed by the United States Marshals Service (USMS). After giving careful consideration to the motion, the opposition thereto, and the record in this case, the Court concludes that the motion should be granted.

This Court had entered an opinion and order granting the motions filed by the various defendants and dismissing the case. The Court of Appeals affirmed in part and reversed in part. See Farese v. United States Department of Justice, 826 F.2d 129 (D.C.Cir.1987) (Memorandum and Order). The appellate court affirmed with respect to all agencies named as defendants except for USMS and the Federal Bureau of Investigation. The present motion relates only to the USMS.

With respect to the plaintiff's request addressed to the USMS, the Court of Appeals noted that the plaintiff had limited his claim to eleven pages being withheld by USMS. The agency had contended that the documents are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) ("personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy") and (7)(C) ("investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would ... constitute am unwarranted invasion of personal privacy") (Exemptions 6 and 7C).

The appellate court noted that USMS "neither submitted a Vaughn index to the eleven pages nor offered any more specific justification for the withholding of the documents." Court of Appeals Memorandum at 11. The court noted further that "[t]he mere fact that Farese was not referred to in the documents is not a reasonable basis for refusing to release the documents; indeed, the record indicates that Farese had requested documents referring to a named third party." Id.

In the present motion, captioned "Motion to Dismiss", but perhaps better described as a motion for partial summary judgment, USMS has filed two affidavits by Florastine P. Graham, Freedom of Information/Privacy Officer of the USMS. Ms. Graham has identified the eleven pages, setting forth their dates. After reading the Graham Affidavit dated October 20, 1987, and the attachments thereto [FN1], the Court is satisfied that the documents were compiled for law enforcement purposes. Ten of the pages relate to witness protection funding of several third party individuals who cooperated with the government in the criminal law enforcement process and one page relates to another third party

individual. The one page refers to the *275 name, identifying data and arrest history of a third party individual. There is no reference to the plaintiff in the document. Ms. Graham notes that the disclosure of the document would subject the person to unwarranted public attention, harassment and criticism for having been associated with an official criminal investigation.

FN1. See in particular an earlier Graham Affidavit dated September 21, 1984 in which she describes the documents and states that they were compiled for law enforcement purposes. The September 21, 1984 affidavit was filed in Case No. 84-6179-CIV-JAG, United States District Court for the Southern District of Florida.

The remaining ten pages contain similar information reflecting "the names of several Witness Security Program participants, their entry dates into the Program, the number of family members, and the specific funds authorized and disbursed for the different services provided for the physical security of these witnesses and their families." Ms. Graham states that only three of the pages refer to a protected witness previously referred by name by the plaintiff. She goes on to note that the disclosure of the pages would reveal the identities of several persons who cooperated with the government in criminal law enforcement activities.

Nothing in the record of this case suggests that the Graham Affidavits are submitted in bad faith. Moreover, the Court can discern no public interest in disclosure which would outweigh the privacy interest in nondisclosure of the documents.

The plaintiff contends that the affidavits fail to fall within the standard required in these cases. This Court disagrees. USMS has described the documents and given the date of each document. The agency has set forth the nature of the documents and stated why the documents should be exempt from disclosure.

After weighing the above factors, the Court concludes that the USMS motion should be granted. There is simply no basis on which the Court can disagree with the defendant's contention that release of the documents would pose a possible danger to the persons named therein, or that release of the information might subject those persons to harassment. The potential danger is highlighted by the fact that the persons named therein participated with the government in criminal law enforcement and participated in the Witness Security Program.

The motion filed by USMS is granted and an appropriate order has been entered.

END OF DOCUMENT

Ricky DURHAM, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Defendant.

Civ. A. No. 91-2636 (CRR).

United States District Court, District of Columbia.

Aug. 17, 1993.

Prisoner convicted of murdering former Postal Service carrier sought records pertaining to carrier's murder from Executive Office for United States Attorneys (EOUSA) under Freedom of Information Act (FOIA). EOUSA moved for summary judgment. The District Court, Charles R. Richey, J., held that: (1) documents prepared by attorneys and other government personnel working under prosecuting attorney's direction and supervision in prisoner's criminal case fell within FOIA exemption for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, and (2) prisoner was not entitled to waiver of fees under FOIA.

Motion granted.

[1] FEDERAL CIVIL PROCEDURE ⇦ 2539
170Ak2539
District court would accept Executive Office for United States Attorneys' (EOUSA) uncontradicted factual assertions, regarding withheld documents' contents, as true with respect to EOUSA's motion for summary judgment in Freedom of Information Act (FOIA) action filed by prisoner, convicted of murder, seeking records pertaining to homicide; prisoner failed to submit his own affidavits or other documentary evidence to contradict EOUSA's factual assertions, declarations submitted by EOUSA were detailed and nonconclusory, and there was no evidence in the record that agency was acting in bad faith. 5 U.S.C.A. § 552; Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

[2] RECORDS ⇦ 31
326k31
Prisoner could not receive records under Privacy Act pertaining to homicide for which he was convicted since information prisoner requested was contained in criminal law enforcement records and such information was exempt under Act. 5 U.S.C.A. § 552a(j)(2).

[3] RECORDS ⇦ 57
326k57
Freedom of Information Act (FOIA) exemption for materials related to internal personnel rules and practices of agency permits withholding of information when disclosure would permit circumvention of statute or agency regulation. 5 U.S.C.A. § 552(b)(2).

[4] RECORDS ⇦ 57
326k57
Symbol numbers of informants fall within Freedom of Information Act (FOIA) exemption for materials related to internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[5] RECORDS ⇦ 57
326k57
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to symbol number of informant used in murder investigation since informant's symbol number fell within FOIA exemption for internal personnel rules and practices of agency. 5 U.S.C.A. § 552(b)(2).

[6] GRAND JURY ⇦ 41.30
193k41.30
The 355 pages of grand jury records, consisting of 256 pages of transcripts of grand jury testimony, 96 grand jury subpoenas, two letters to grand jury witnesses and one page draft memo from grand jury foreman requesting evidence for inspection by grand jury, were within reach of grand jury secrecy rule since these records would enable identification of witnesses or jurors and would show substance of testimony and direction of murder investigation and thus, these records fell within Freedom of Information Act (FOIA) exemption for matters specifically exempted from disclosure by statute. 5 U.S.C.A. § 552(b)(3); Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[7] GRAND JURY ⇦ 41.30
193k41.30
Grand jury rule pertaining to recording and disclosure of proceedings prohibits disclosure of grand jury records which would tend to reveal some secret aspect of grand jury's investigation, such as identities of witnesses or jurors, substance of

testimony, strategy or direction of investigation and deliberations or questions of jurors. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[8] RECORDS ⇐ 55
326k55
Certificate of official record, prepared by Internal Revenue Service employee, regarding individual income tax account of third-party taxpayer, and pages containing printed transcripts of account information of third-party taxpayer, including taxpayer's name, address, social security number, adjusted gross income, taxable income and exemptions, fell within reach of statute limiting disclosure of tax return information and thus, these documents fell within Freedom of Information Act (FOIA) exemption for matters specifically exempted from disclosure by statute. 26 U.S.C.A. § 6103(a), (b)(1, 2); 5 U.S.C.A. § 552(b)(3).

[9] RECORDS ⇐ 57
326k57
Freedom of Information Act (FOIA) exemption, for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency, encompasses all civil discovery rules and includes records not discoverable in litigation due to attorney work product privilege and, thus, any document prepared in anticipation of litigation. 5 U.S.C.A. § 552(b)(5).

[10] FEDERAL CIVIL PROCEDURE ⇐ 1600(3)
170Ak1600(3)
Attorney work product privilege exists even where information has been shared with third party so long as party holds a common interest.

[11] RECORDS ⇐ 57
326k57
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to documents prepared by attorneys and other government personnel working under prosecuting attorney's direction and supervision in prisoner's criminal case since documents fell within FOIA exemption for interagency or intraagency memorandums or letters which would not be available by law to a party in litigation with the agency; documents reflected trial preparation, trial strategy, interpretations and personal evaluations and opinions regarding events pertinent to criminal case. 5 U.S.C.A. § 552(b)(5).

[12] RECORDS ⇐ 60
326k60
Prisoner convicted of murder was not entitled under Freedom of Information Act (FOIA) to names of third parties mentioned in Executive Office for United States Attorneys' (EOUSA) investigatory files regarding murder of former Postal Service carrier and names and initials of employees and special agents of Federal Bureau of Investigation (FBI), names of Postal Service inspectors and clerical employees of EOUSA since this information fell within FOIA provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy; although names of these individuals were of interest to prisoner, they were not of interest to the general public and the personal privacy interests far outweighed the public interest in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[13] RECORDS ⇐ 64
326k64
Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy requires balancing of named individual's personal privacy interest and interest of the public in disclosure of information. 5 U.S.C.A. § 552(b)(7)(C).

[14] RECORDS ⇐ 50
326k50
Goal of Freedom of Information Act (FOIA) is to permit the public to scrutinize activities of government; it is not intended to foster dissemination of information gathered by government about private citizens for use of other citizens. 5 U.S.C.A. § 552.

[15] RECORDS ⇐ 60
326k60
Law enforcement agencies are "sources" within meaning of Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to disclose identity of confidential "sources" or information furnished by confidential "sources." 5 U.S.C.A. § 552(b)(7)(D).

See publication Words and Phrases for other judicial constructions and definitions.

[16] RECORDS ⇐ 60
326k60
Records containing identities of private citizens and law enforcement authorities who provided information under assurances of confidentiality to Executive Office for United States Attorneys (EOUSA), in connection with murder investigation of former Postal Service carrier, and information provided by confidential sources that could enable identification of those sources were exempt from disclosure under Freedom of Information Act (FOIA) provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to disclose identity of confidential source or information furnished by confidential source. 5 U.S.C.A. § 552(b)(7)(D).

[17] RECORDS ⇐ 60
326k60
Prisoner convicted of murder of former Postal Service carrier was not entitled under Freedom of Information Act (FOIA) to names of, and information that could be used to identify, third parties since names and information fell within FOIA provision exempting from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to endanger the life or physical safety of any individual; third parties had knowledge about murder and some had requested placement in Federal Witness Protection Program and given prisoner's past violent behavior, disclosure of identity, or information enabling identification, of individuals who assisted government in its case against prisoner could reasonably endanger their lives. 5 U.S.C.A. § 552(b)(7)(F).

[18] RECORDS ⇐ 68
326k68
Person requesting waiver of fees under Freedom of Information Act (FOIA) has initial burden of identifying the public interest in the information. 5 U.S.C.A. § 552(a)(4)(A)(iii).

[19] RECORDS ⇐ 68
326k68
Prisoner convicted of homicide of former Postal Service carrier was required under Freedom of Information Act (FOIA) to pay costs for copying 2,340 pages of public court records, absent showing of how it was in the public interest for Executive Office of United States Attorneys (EOUSA) to provide him with free copies of documents that were easily accessible and available to everyone else for a fee. 5 U.S.C.A. § 552(a)(4)(A)(iii).

[20] RECORDS ⇐ 68
326k68
Indigency alone does not constitute adequate grounds for waiver of fees under Freedom of Information Act. 5 U.S.C.A. § 552(a)(4)(A)(iii).

***430** Ricky Durham, pro se.

David L. Dougherty, Dept. of Justice, Civ. Div., with J. Ramsey Johnson, U.S. Atty., and John D. Bates, Asst. U.S. Atty., for defendant.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

Before the Court are the Defendant's Motion for Summary Judgment and the Plaintiff's Cross-Motion for Summary Judgment in this case under Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. [FN1] After consideration of the filings by both parties, the applicable law, and the record herein, the Court shall grant the Defendant's Motion.

FN1. The above-captioned action was dismissed without prejudice on August 24, 1992, because the Plaintiff indicated that records involved in this action were the same records in dispute in another FOIA action brought by the Plaintiff in which the Court granted Summary Judgment for the Defendant. See Durham v. United States Postal Service, Civil Action No. 91-2234 (D.D.C. Nov. 25, 1992) (order granting summary judgment for the Defendant), aff'd No. 92-5511, 1993 WL 301151 (D.C.Cir. July 27, 1993) (order granting summary affirmance). The Plaintiff subsequently informed the Court that the two cases were not the same and this action was reopened. All motions filed before the dismissal are now properly before the Court.

***431** I. BACKGROUND

The Plaintiff is a prisoner in jail for the homicide

of Kenneth Clark, a former Postal Service Carrier. He is requesting records pertaining to Clark's murder from the Defendant Executive Office for United States Attorneys ("EOUSA") under FOIA. He asks for all investigative records that pertain to himself relating to Clark's murder, the names of all suspects (including criminology reports on one particular suspect), and a waiver of any copying fees.

[1] In response to the Plaintiff's requests, EOUSA provided the Plaintiff with 103 pages in full. EOUSA released 62 pages with some information excised and withheld approximately 1,488 pages in full under certain FOIA Exemptions. See Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Partial Summary Judgment. The Defendant has submitted three detailed declarations which describe the documents that were withheld and indicated under which FOIA exceptions those records fall. See Defendant's Motion for Partial Summary Judgment, Declaration of Virginia L. Wright ("Wright Declaration"); Declaration of Special Agent James L. Vermeersch ("Vermeersch Declaration"); and Declaration of Mary Otto ("Otto Declaration"). [FN2]

FN2. In its Order of July 1, 1992, the Court advised the Plaintiff that he needed to submit his own affidavits or other documentary evidence to contradict the factual assertions in Defendant's Motion for Summary Judgment which were supported by documentary evidence. The Court indicated that if the Plaintiff failed to do so, the Court would adopt the Defendant's uncontradicted factual assertions as true. See Fed.R.Civ.P. 56(e); Neal v. Kelly, 963 F.2d 453, 456 (D.C.Cir.1992). To date, the Plaintiff has not submitted any affidavits or documentary evidence. The declarations submitted by the Defendant are detailed and non-conclusory, and the Court finds no evidence in the record that the agency is acting in bad faith. Therefore, the Court shall accept the Defendant's factual assertions as to their contents. See PHE, Inc. v. Department of Justice, 983 F.2d 248, 252-3 (D.C.Cir.1993).

[2] Because the Defendant has demonstrated that the withheld documents and information fall within FOIA Exemptions (b)(2), (b)(3), (b)(5), (b)(7)(C), (b)(7)(D), (b)(7)(F), the Court shall grant summary judgment for the Defendant. [FN3]

FN3. In his Complaint, the Plaintiff also requests this material under the Privacy Act of 1974, 5 U.S.C. § 552a (1988). However, the Plaintiff does not mention the Privacy Act in his other papers and the Defendants only briefly addresses that statute in their papers. The Court concludes that the Plaintiff also cannot receive the information he requested under the Privacy Act, as the information is contained in criminal law enforcement records. See Vermeersch Declaration, ¶ 21; Wright Declaration, ¶ 13. Such information is therefore exempt under 5 U.S.C. § 552a(j)(2), as implemented by 28 C.F.R. § 16.96 (1991) (FBI), and 28 C.F.R. § 16.81 (1991) (EOUSA).

II. EXEMPTION 2

[3][4][5] The Defendant invokes Exemption 2 to withhold from disclosure an informant's symbol number. [FN4] Under FOIA Exemption 2, material "related solely to the internal personnel rules and practices of an agency" is exempted from disclosure. 5 U.S.C. § 552(b)(2). Exemption 2 permits withholding of information when disclosure would permit circumvention of a statute or agency regulation. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1074 (D.C.Cir.1981). It is established law that the symbol numbers of informants fall within Exemption 2. See Lesar v. Department of Justice, 636 F.2d 472, 485-86 (D.C.Cir.1980) (informant codes "plainly fall within the ambit of Exemption 2"); Watson v. United States Department of Justice, 799 F.Supp. 193, 195 (D.D.C.1992) (DEA protection of Informant Identifier codes properly withheld as internal markings). Accordingly, the Court finds that the Defendant here properly withheld the informant source numbers under FOIA Exemption 2. [FN5]

FN4. Informant symbol numbers are used both to protect the confidentiality of an informant's identity, a precaution necessary in order for the agency to maintain the ability to attract informers, and to facilitate the routing of investigative documents to the proper files. Vermeersch Declaration, ¶ 23.

FN5. The Defendant alternatively claims FOIA exemption 7(C) for the informant source number. However, as the Court finds that such information

is exempt under FOIA exemption 2, it is unnecessary to consider the applicability of 7(C).

*432 III. EXEMPTION 3

[6] The Defendant invokes Exemption 3 to justify its refusal to release 355 pages of grand jury records. Exemption 3 permits the withholding of information where:

> [a statute] requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or ... establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). The Defendant cites Rule 6(e) of the Federal Rules of Criminal Procedure as its justification for withholding "256 pages of transcripts of grand jury testimony, 96 grand jury subpoenas, 2 letters to grand jury witnesses, and a one-page draft memo from the grand jury foreman requesting evidence for inspection by the grand jury." Defendant's Motion for Partial Summary Judgment, Wright Declaration, ¶ 17.

[7] Rule 6(e) prohibits the disclosure of grand jury records which would "tend to reveal some secret aspect of the grand jury's investigation[;] such matters as 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.' " Senate of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 582 (D.C.Cir.1987) (quoting SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1382 (D.C.Cir.1980), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289); see Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 867 (D.C.Cir.1981). The Court agrees that the information withheld by the Defendant here would enable the identification of witnesses or jurors, and would show the substance of testimony and the direction of the investigation. Accordingly, the Court finds that the grand jury records were properly withheld under FOIA Exemption 3.

[8] In addition to the grand jury records, the Defendant has also withheld three pages of tax records under this Exemption. [FN6] The relevant statute limiting disclosure of tax return information is 26 U.S.C. § 6103(a), which provides, inter alia, that returns and return information shall be confidential, and shall not be disclosed except as authorized by that title. As the tax information refers to a person other than the Plaintiff, there is no exception in that statute for its disclosure and the Court concludes that this material was properly withheld by the Defendant under this Exemption.

FN6. "Return information," as defined in 26 U.S.C. § 6103(b)(1)(2), encompasses the types of information included here. These records are a Certificate of Official Record, prepared by an Internal Revenue Service employee, regarding the individual income tax account of a third-party taxpayer; and two pages containing printed transcripts of account information of a third-party taxpayer including the taxpayer's name, address, social security number, adjusted gross income, taxable income, and exemptions. Otto Declaration, ¶¶ 8, 11.

IV. EXEMPTION 5

[9][10][11] The Defendant has invoked Exemption 5 to protect 507 pages of documents as work-product prepared by attorneys and other government personnel working under the prosecuting attorney's direction and supervision in the Defendant's criminal case. Wright Declaration, ¶ 18. [FN7] Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 U.S.C. § 552(b)(5). The Exemption encompasses "all civil discovery rules," Martin v. Office of Special Counsel, 819 F.2d 1181, 1185 (D.C.Cir.1987), and has been held to extend to criminal matters as well as civil. See Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir.1983). The Exemption includes records not discoverable in litigation due to attorney work-product privilege, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 1515-16, 44 L.Ed.2d 29 (1975), and thus any document prepared in anticipation of *433 litigation. See Hickman v. Taylor, 329 U.S. 495, 509-10, 67 S.Ct. 385, 392-93, 91 L.Ed. 451 (1947). The work-product privilege exists even where the information has been shared with a third party so long as the party holds a common interest with the agency. See United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C.Cir.1980).

FN7. Such documents include 1) a potential witness

list, 2) interviews, 3) telephone messages, 4) opening and closing arguments, 5) trial notes, 6) evidentiary notes, 7) internal memoranda relating to the use of grand jury testimony and potential witness trial testimony, 8) letters to other Federal agencies and Departmental components regarding third-parties and their safety, and 9) draft pleadings. Wright Declaration, ¶¶ 18, 19.

The Defendant here represents that the materials withheld under this Exemption "reflect trial preparation, trial strategy, interpretations and personal evaluations and opinions regarding events pertinent to the criminal litigation in United States v. Ricky Durham." Wright Declaration, ¶ 19. As the documents withheld by the Defendant would not be available to a party in litigation with the Defendant agency, the Court concludes that these documents were properly withheld under FOIA Exemption 5. [FN8]

FN8. The Defendant claims that the documents are also protected under Exemptions 7(C), 7(D), and 7(F). However, as the Court finds that the records properly fall under Exemption 5, it need not reach the alternate claim.

V. EXEMPTIONS 7(C), (D), AND (F)

Pursuant to Exemption 7, the Defendant has withheld the names of confidential sources, agents, agency employees, and third parties mentioned in its investigatory files, and withheld 594 pages of records which it asserts contain information provided by confidential sources that might reveal their identities. Wright Declaration, ¶¶ 20, 22, 24; Vermeersch Declaration, ¶¶ 26, 36.

To qualify under Exemption 7, a document must 1) have been "compiled for law enforcement purposes" and 2) fall into one of six categories enumerated by that section. 5 U.S.C. § 552(b)(7). The Defendant maintains that it compiled the information in the course of investigating the Plaintiff for the murder of the Postal Service employee, Kenneth Clark; for unlawful flight to avoid prosecution; and for drug trafficking. Wright Declaration, ¶ 12; Vermeersch Declaration, ¶¶ 15, 16. Therefore, the Court concludes that the Defendant has demonstrated that this material meets the first requirement that it was "compiled for law enforcement purposes."

As to the second prong, the Defendant claims that the withheld material here falls under 7(C), 7(D), and 7(F); the Court will consider each claim separately.

A. EXEMPTION 7(C)

[12] Under Exemption 7(C), the Defendant has withheld 29 pages of information to protect the names of third parties mentioned in its investigatory files. Vermeersch Declaration, ¶ 26; Wright Declaration, ¶ 20. Exemption 7(C) provides protection when the investigatory material "could reasonably be expected to constitute an unwarranted invasion of personal privacy...." 5 U.S.C. § 552(b)(7)(C).

[13][14] Exemption 7(C) requires a balancing of the named individual's personal privacy interest and the interest of the public in the disclosure of the information. United States Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774 (1989); Stern v. FBI, 737 F.2d 84, 91 (D.C.Cir.1984). "It is generally recognized that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." Branch v. FBI, 658 F.Supp. 204, 209 (D.D.C.1987); see also Lesar, 636 F.2d at 488. The names of these individuals, while perhaps of interest to the Plaintiff, are not of interest to the general public. See Simon v. United States Department of Justice, 752 F.Supp. 14, 19, n. 5 (D.D.C.1990). Further, the goal of FOIA is to permit the public to scrutinize the activities of government; it is not intended to foster the dissemination of information gathered by the government about private citizens for the use of other citizens. KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir.1990).

The Defendant has also cited this Exemption to withhold the names and initials of employees and Special Agents of the FBI, the names of Postal Service Inspectors, and clerical employees of EOUSA. Vermeersch Declaration, ¶ 29; Wright Declaration, ¶ 20. Exemption 7(C) has been widely held to apply to the identities of federal, state and local law enforcement personnel mentioned in investigatory *434 files to protect such individuals from the potential harassment that could result from

disclosure. See Lesar, 636 F.2d at 487-88; Johnson v. United States Department of Justice, 739 F.2d 1514, 1518-19 (10th Cir.1984); New England Apple Council, Inc. v. Donovan, 725 F.2d 139, 142 (1st Cir.1984); Nix v. United States, 572 F.2d 998, 1006 (4th Cir.1978).

For all these reasons, the Court concludes that the private privacy interests far outweigh the public interest in disclosure, and the Defendant properly withheld this information under Exemption 7(C).

B. EXEMPTION 7(D)

[15][16] The Defendant withheld 594 pages of records under this Exemption which it asserts contain 1) the identities of private citizens and law enforcement authorities who provided information to the Defendant under assurances of confidentiality, and 2) information provided by confidential sources that may enable identification of those sources. Wright Declaration, ¶ 22; Vermeersch Declaration, ¶ 36. [FN9]

FN9. Law enforcement agencies are "sources" within the meaning of 5 U.S.C. § 552(b)(7)(D). See Shaw v. Federal Bureau of Investigation, 749 F.2d 58, 62; Weisberg v. United States Department of Justice, 745 F.2d 1476, 1492 (D.C.Cir.1984); Lesar, 636 F.2d at 491.

Exemption 7(D) provides protection for investigatory material which "could reasonably be expected to disclose the identity of a confidential source, ... or ... information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). The Defendant has indicated, and the Plaintiff has not contested, that the exchange of confidential information will be jeopardized if such confidentiality were breached, which in turn would cause damage to the agencies' ability to perform their tasks. Vermeersch Declaration, ¶ 39, Wright Declaration, ¶ 23. See Lesar, 636 F.2d at 491. Furthermore, the identity of a source is protected if, as is the case here, the source provides information under an express promise of confidentiality or under circumstances under which such a promise could be inferred. See Schmerler v. FBI, 900 F.2d 333, 337 (D.C.Cir.1990).

Accordingly, the Court concludes that these materials were properly withheld under Exemption 7(D).

C. EXEMPTION 7(F)

[17] The Defendant invokes this Exemption to delete the names of, and information that may be used to identify, third-parties. Wright Declaration, ¶ 24. Exemption 7(F) provides that investigatory information need not be disclosed if it "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). The Defendant alleges, and the Plaintiff does not refute, that these third-parties have knowledge about the crime in which the Plaintiff was involved, and that some have requested placement in the Federal Witness Protection Program. Given the Plaintiff's past violent behavior, the Court agrees with the Government that disclosure of the identity, or information enabling identification, of the individuals who assisted the government in its case against the Plaintiff could reasonably endanger their lives or physical safety. Accordingly, the Court finds that this material was properly withheld by the Defendant pursuant to this Exemption.

VI. PUBLIC RECORDS

[18][19][20] Finally, the Plaintiff has requested that the Defendant provide him with copies of 2,340 pages of public court records and to waive the copying fees because he is indigent. Even assuming, arguendo, that these records are subject to FOIA, the Plaintiff is not entitled to a waiver of the copying costs. FOIA provides for a waiver of fees where it is determined that disclosure 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). The requester of the waiver has the "initial burden of identifying the public interest" in the information. National Treasury Employees Union v. Griffin, 811 F.2d 644, 647 (D.C.Cir.1987). The Plaintiff has failed to identify how it is in the public interest for the Defendant to provide him with free copies of documents that are easily accessible and available to everyone *435 else for a fee. [FN10] Accordingly, the Court determines that the Defendant is not required to provide the Plaintiff with copies of these court documents unless the Plaintiff remits the

requisite fees.

FN10. The Court also notes that indigency alone does not constitute adequate grounds for a fee waiver. See Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C.Cir.1985).

VII. CONCLUSION

Upon consideration of the Defendant's Motion for Summary Judgment, the Plaintiff's Cross-Motion for Summary Judgment, and the applicable law, the Court finds that the Defendant is entitled to Judgment against the Plaintiff. The Court shall issue an order of even date herewith consistent with the foregoing Memorandum Opinion.

ORDER

Upon consideration of the Defendant's Motion for Summary Judgment, the Plaintiff's Cross-Motion for Summary Judgment, and the applicable law, the record herein, and for the reasons articulated in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 17th day of August, 1993,

ORDERED that the Defendant's Motion for Summary Judgment shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Plaintiff's Cross-Motion for Summary Judgment shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that all other outstanding motions in the above-captioned case shall be, and are hereby, rendered MOOT; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED from the dockets of this Court.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS CFR

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.4 Responses by Components to Requests.

(a) In General. Except as otherwise provided in this section, the component that: (1) First receives a request for a record; and (2) has possession of the requested record is the component ordinarily responsible for responding to the request.

(b) Authority to Grant or Deny Requests. The head of a component, or his designee, is authorized to grant or deny any request for a record of that component.

(c) Initial Action by the Receiving Component. When a component receives a request for a record in its possession, the component shall promptly determine whether another component, or another agency of the Government, is better able to determine: (1) Whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and (2) whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion. If the receiving component determines that it is the component or agency best able to determine whether or not to disclose the record in response to the request, then the receiving component shall respond to the request. If the receiving component determines that it is not the component or agency best able to determine whether or not to disclose the record in response to the request, the receiving component shall either:

(i) Respond to the request, after consulting with the component or other agency best able to determine whether or not to disclose the record and with any other component or agency having a substantial interest in the requested record or the information contained therein; or

(ii) Refer the responsibility for responding to the request to the component best able to determine whether or not to disclose the record, or to another agency that generated or originated the record, but only if that other component or agency is subject to the provisions of the FOIA.

Under ordinary circumstances, the component or agency that generated or originated a requested record shall be presumed to be the component or agency best able to determine whether or not to disclose the record in response to the request. However, nothing in this section shall prohibit a component that generated or originated a requested record from referring the responsibility for responding to the request to another component, if the component that generated or originated the requested record determines that the other component has a greater interest in the requested record or the information contained therein.

(d) Law Enforcement Information. Whenever a request is made for a record containing information which relates to an investigation of a possible violation of criminal law or to a criminal law enforcement proceeding and which was generated or originated by another component or agency, the receiving component shall refer the responsibility for responding to the request to that other component or agency; however, such referral shall extend only to the information generated or originated by that other component or agency.

(e) Classified Information. Whenever a request is made for a record containing information which has been classified, or which may be eligible for classification, by another component or agency under the provisions of Executive Order 12356 or any other Executive Order concerning the classification of records, the receiving

component shall refer the responsibility for responding to the request to the component or agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request to the component or agency that classified the underlying information; however, such referral shall extend only to the information classified by the other component or agency.

(f) Notice of Referral. Whenever a component refers all or any part of the responsibility for responding to a request to another component or to another agency, it ordinarily shall notify the requester of the referral and inform the requester of the name and address of each component or agency to which the request has been referred and the portions of the request so referred.

(g) Agreements Regarding Consultations and Referrals. No provision of this section shall preclude formal or informal agreements between components, or between a component and another agency, to eliminate the need for consultations or referrals of requests or classes of requests.

(h) Separate Referrals of Portions of a Request. Portions of a request may be referred separately to one or more components or to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(i) Processing of Requests that Are Not Properly Addressed. A request that is not properly addressed as specified in s 16.3(a) of this subpart shall be forwarded to the FOIA/PA Section, Justice Management Division, which shall forward the request to the appropriate component or components for processing. A request not addressed to the appropriate component will be deemed not to have been received by the Department of Justice until the FOIA/PA Section has forwarded the request to the appropriate component and that component has received the request, or until the request would have been so forwarded and received with the exercise of reasonable diligence by Department personnel. A component receiving an improperly addressed request forwarded by the FOIA/PA Section shall notify the requester of the date on which it received the request.

(j) Date for Determining Responsive Records. In determining records responsive to a request, a component ordinarily will include only those records within the component's possession and control as of the date of its receipt of the request.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.4

28 CFR s 16.4

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.5 Form and content of component responses.

(a) Form of Notice Granting a Request. After a component has made a determination to grant a request in whole or in part, the component shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the component. The component shall inform the requester in the notice of any fees to be charged in accordance with the provisions of s 16.10 of this subpart.

(b) Form of Notice Denying a Request. A component denying a request in whole or in part shall so notify the requester in writing. The notice must be signed by the head of the component, or his designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the component has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under s 16.8(a) and a description of the requirements of that subsection.

(c) Record Cannot be Located or Has Been Destroyed. If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the component shall so notify the requester in writing.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.5

28 CFR s 16.5

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Current through August 31, 1995; 60 FR 45646

s 16.8 Appeals.

(a) Appeals to the Attorney General. When a request for access to records or for a waiver of fees has been denied in whole or in part, or when a component fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to the Attorney General within 30 days of his receipt of a notice denying his request. An appeal to the Attorney General shall be made in writing and addressed to the Office of Information and Privacy, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530. Both the envelope and the letter of appeal itself must be clearly marked: "Freedom of Information Act Appeal." An appeal not so addressed and marked will be forwarded to the Office of Information and Privacy as soon as it is identified. An appeal that is improperly addressed will be deemed not to have been received by the Department until the Office of Information and Privacy receives the appeal, or would have done so with the exercise of reasonable diligence by Department personnel.

(b) Action on Appeals by the Office of Information and Privacy. Unless the Attorney General otherwise directs, the Director, Office of Information and Privacy, under the supervision of the Assistant Attorney General, Office of Legal Policy, shall act on behalf of the Attorney General on all appeals under this section, except that:

(1) In the case of a denial of a request by the Assistant Attorney General, Office of Legal Policy, the Attorney General or his designee shall act on the appeal, and

(2) A denial of a request by the Attorney General shall constitute the final action of the Department on that request.

(c) Form of Action on Appeal. The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART A--PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT > >

Source: 49 FR 12254, March 29, 1984, unless otherwise noted.

28 C. F. R. s 16.8

28 CFR s 16.8

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 28--JUDICIAL ADMINISTRATION
CHAPTER I--DEPARTMENT OF JUSTICE
PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION
SUBPART B--PRODUCTION OR DISCLOSURE IN FEDERAL AND STATE PROCEEDINGS

Current through August 31, 1995; 60 FR 45646

s 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(2) Disclosure would violate a specific regulation,

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1)-(b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1)-(b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4)-(b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved,

(2) The past history or criminal record of the violator or accused,

(3) The importance of the relief sought,

(4) The importance of the legal issues presented,

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, United States attorneys, the Director of the EOUST, United States trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

< < PART 16--PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION > >

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Source: 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987, unless otherwise noted.

< < SUBPART B--PRODUCTION OR DISCLOSURE IN FEDERAL AND STATE PROCEEDINGS > >

Source: Order No. 919-80, 45 FR 83210, Dec. 18, 1980, unless otherwise noted.

28 C. F. R. s 16.26

28 CFR s 16.26

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96

INSTA-CITE

CITATION: 999 F.2d 1302

Direct History

1 In re Department of Justice, 950 F.2d 530, 60 USLW 2377 (8th Cir.(Mo.), Dec 02, 1991) (NO. 91-2080, 91-2164), rehearing granted and opinion vacated (Feb 12, 1992) (Additional Negative Indirect History)
On Rehearing
=> 2 **In re Department of Justice,** 999 F.2d 1302, 62 USLW 2105 (8th Cir.(Mo.), Aug 05, 1993) (NO. 91-2080, 91-2164)
Certiorari Denied by
3 Crancer v. Department of Justice, 114 S.Ct. 1186, 127 L.Ed.2d 537, 62 USLW 3571, 62 USLW 3573 (U.S., Feb 28, 1994) (NO. 93-700)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

326K! /P EXIST! /S RECORD /S REQUEST!

Leona WEBER, Plaintiff-Appellant,
v.
T. R. CONEY, U.S. Marshall, and J. A. "Tony" Canales, U.S. Attorney, etc., Defendants-Appellees.

No. 80-1656
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 9, 1981.

In Freedom of Information Act case, the United States District Court for the Southern District of Texas, Hugh Gibson, J., granted summary judgment in favor of the government, and plaintiff appealed. The Court of Appeals held that: (1) plaintiff did not make the required strong showing of necessity so as to be entitled to a writ of mandamus commanding district judges to vacate a docket entry transferring her case from one division to another; (2) plaintiff was not entitled to a de novo hearing on her complaint; (3) government's failure to answer the complaint within 30 days did not entitle plaintiff to a default judgment; and (4) district court properly granted government's motion for summary judgment, where government submitted affidavits that all the records in its possession had been delivered to plaintiff and plaintiff did not submit any affidavit or other response to the government's affidavits.

Affirmed.

[1] MANDAMUS ⇐ 1
250k1
Mandamus is an extraordinary remedy as it lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions.

[1] MANDAMUS ⇐ 27
250k27
Mandamus is an extraordinary remedy as it lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions.

[2] MANDAMUS ⇐ 168(4)
250k168(4)
Plaintiff in Freedom of Information Act case failed to make the required strong showing of necessity so as to be entitled to a writ of mandamus commanding district judges to vacate docket entry transferring her case from one division to another.

[3] JUDGES ⇐ 51(2)
227k51(2)
In Freedom of Information Act case, plaintiff's motion to disqualify judge, which was filed about one year after the case was assigned to the judge, about four months after the case was transferred to another judge, and three days after the second judge rendered a final judgment, was untimely, moot and frivolous. 28 U.S.C.A. §§ 144, 1391(e)(4), 1404.

[4] FEDERAL COURTS ⇐ 101
170Bk101
District court has wide discretion to determine whether to transfer venue for the convenience of parties and in the interest of justice. 28 U.S.C.A. § 1404.

[5] FEDERAL COURTS ⇐ 92
170Bk92
In Freedom of Information Act case, district court did not abuse its discretion in transferring the case from one division to another within the same district. 5 U.S.C.A § 552(a)(4)(B); 28 U.S.C.A. § 1404.

[6] FEDERAL COURTS ⇐ 95
170Bk95
Plaintiff's voluntary appearance in Freedom of Information Act action waived the defects, if any, as to venue. 5 U.S.C.A. § 552(a)(4)(B); 28 U.S.C.A. § 1404.

[7] RECORDS ⇐ 68
326k68
Formerly 326k67
In a Freedom of Information Act case award of attorney fees is not automatic but is left to the sound discretion of the trial court.

[8] RECORDS ⇐ 68
326k68
Formerly 326k67
Having dismissed plaintiff's Freedom of Information Act action and taxed its costs against her, district court did not abuse its discretion in denying her

claim for attorney fees.

[9] RECORDS ⇐ 63
326k63
Plaintiff was not entitled to de novo hearing on her Freedom of Information Act complaint, where the government denied the existence of any requested records. 5 U.S.C.A. § 552(a)(4)(B).

[10] FEDERAL CIVIL PROCEDURE ⇐ 2415
170Ak2415
Government's failure to file an answer to Freedom of Information Act complaint within 30 days did not entitle plaintiff to a default judgment, where government sought and obtained an extension of time to answer, after which it filed a motion for summary judgment which was granted. 5 U.S.C.A. § 552(a)(4)(C).

[11] FEDERAL CIVIL PROCEDURE ⇐ 2539
170Ak2539
District court properly granted government's motion for summary judgment in Freedom of Information Act case, where government filed affidavits indicating that all records in its possession had been delivered to plaintiff and plaintiff chose not to submit any affidavit or other response to the government's affidavits. Fed.Rules Civ.Proc. Rule 56(e), 28 U.S.C.A.

***92** Leona Weber, pro se.

J. A. "Tony" Canales, U. S. Atty., Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RUBIN and RANDALL, Circuit Judges.

PER CURIAM:

Some months ago appellant Weber requested, under the Freedom of Information Act (FOIA), a copy of all records kept by the United States Marshall and the "U.S. Justice Department" at Houston, Texas. Receiving replies that she deemed unsatisfactory, she filed suit, pro se, seeking injunctive relief directing defendants to disclose the requested information. The government's oral motion for an extension of time until January 1, 1979, in which to answer was granted on October 27, 1978. On December 29, 1978, the government filed a motion to dismiss or for summary judgment. After a hearing, the motion was granted. On this appeal, she seeks relief of various kinds. We deal with her claims seriatim.

I. Writ of Mandamus.

In her brief to us, Ms. Weber petitions the court to issue a writ of mandamus commanding District Judges Black and Gibson to vacate a docket entry transferring her case from Houston to the Galveston Division. She contends that Judge Black should be disqualified from hearing her case, that her case was improperly transferred by Judge Black to Judge Gibson's court in Galveston, that Judge Gibson's court lacks subject-matter jurisdiction, and that the judgment does not terminate the action because Judge "Gibson refuse(d) to hear the remaining issues."

[1][2] Mandamus is an extraordinary remedy that lies only to confine a lower court within its jurisdiction or to compel it to perform ministerial, not discretionary, functions. In re Evans, 524 F.2d 1004, 1007 (5th Cir. 1975). We have uniformly declined to issue the writ except upon a strong showing of necessity for its use. Steward v. West, 449 F.2d 324, 325 (5th Cir. 1971). For the reasons given below, such a showing has not been made here.

A. Disqualification of Judge Black.

[3] Ms. Weber's complaint to us that Judge Black should have disqualified himself in the case is wide of the mark in several respects. It is untimely because she filed the motion to disqualify about one year after the case was assigned to Judge Black, about four months after the case was transferred to Judge Gibson, and three days after Judge Gibson rendered a final judgment. See 28 U.S.C. s 144. It is moot and ***93** frivolous because Judge Black did not decide her case.

B. Improper Transfer and Subject-Matter Jurisdiction.

[4][5][6] Next Ms. Weber contends, in essence, that the Gibson court lacked jurisdiction because a venue statute or local rule was violated in assigning

the case there. Neither statute nor rule is jurisdictional. The FOIA places jurisdiction in the judicial district where complainant resides, not to particular courts within that district. 5 U.S.C. s 552(a)(4)(B). Any district court in the Southern District of Texas would have had jurisdiction to hear the complaints and proper venue under 28 U.S.C. s 1391(e)(4) or s 1404. Ms. Weber misconstrues section 1404. That section clearly provides that, for the convenience of parties and in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Ms. Weber's action might have been brought in the Galveston Division. Moreover, the district court has wide discretion to determine whether to transfer for the convenience of parties and in the interest of justice. Bearden v. United States, 320 F.2d 99, 101 (5th Cir. 1963), cert. denied, 376 U.S. 922, 84 S.Ct. 679, 11 L.Ed.2d 616 (1964). Our review discerns no abuse of discretion. Finally, Ms. Weber's voluntary appearance in the action waives the defects, if any, as to venue. Murphy v. Travelers Insurance Co., 534 F.2d 1155, 1159 (5th Cir. 1976). Although she protested the venue change in general terms when she appeared before the court, she concluded by stating, "I don't really oppose the venue because I would like to have a hearing in this case." She was granted a hearing forthwith.

C. Attorney's Fees.

[7][8] Ms. Weber argues that her claim is still pending because Judge Gibson failed to adjudicate her claim for attorney fees. She is mistaken; these were necessarily denied when the court dismissed her action and taxed its costs against her and when the court denied her motion for a hearing on that express subject and others by order of June 12, 1980. Such an award is not automatic but is left to the sound discretion of the trial court. Chamberlain v. Kurtz, 589 F.2d 827, 842 (5th Cir.), cert. denied, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1979). Ms. Weber had the opportunity to present her claims and did so at the hearing before Judge Gibson and in her reply to defendants' motion for summary judgment. The record neither indicates, nor has Ms. Weber shown, any abuse of discretion.

II. Appellate Issues.

Before us Ms. Weber claims a mandatory right to a de novo hearing, that the government must file an answer to her FOIA complaint, that she is entitled to a default judgment, and that the government was not entitled to summary judgment.

[9] The FOIA provides for a de novo determination on the issue of withholding records. 5 U.S.C. s 552(a)(4)(B). However, that provision presupposes the existence of records, and here the government, by affidavits, denies the existence of any requested records. In these circumstances summary judgment was appropriate, as we discuss below.

The FOIA also provides generally that, notwithstanding any other provision of law, a defendant must serve an answer within 30 days. 5 U.S.C. s 552(a)(4) (C). The key words are "30 days," not "answer." See H.R.Rep.No.93-876 and Conf.Rep.No.93-1200, 93d Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 6267 and 6285. Ms. Weber misunderstands section 552(a)(4)(C).

[10] Nor is Ms. Weber entitled to a default judgment because the government failed to "answer" in 30 days. Under 5 U.S.C. s 552(a)(4)(C), a defendant must answer or otherwise plead within 30 days unless the court otherwise directs for good cause shown. Ms. Weber claims that the court erred in not granting her show-cause order. As pointed out above, an "answer" is not the only response permitted under the FOIA. The government sought and obtained ***94** an extension of time to answer, after which it filed a motion for summary judgment, which was granted. No "answer" was required.

[11] Ms. Weber next complains that the court erred in granting the motion for summary judgment. She contends generally that the court's order has a fatal inconsistency, that she was denied her right to take depositions, that the affidavits were defective, that the court violated Fed.R.Civ.P. 56(c) and (f), that there were fact issues in dispute, and that the hearing was "tainted." These complaints lack merit. The grant of summary judgment was correct because there was no genuine issue of material fact. All of the agencies involved stated, under oath, that all of the records in their possession had been delivered to Ms. Weber. Under Fed.R.Civ.P. 56(e), Ms. Weber may not rest on mere allegations or denials of pleadings; she must, by affidavit or other

appropriate means, set forth specific facts establishing the existence of a genuine issue for trial or at the least showing why she cannot do so. For whatever reasons, Ms. Weber chose not to submit any affidavit or other appropriate response to the government's affidavits. The granting of the motion was proper.

Finally, Ms. Weber, by separate motion, asks that her appeal take precedence on the docket. Under Local Rule 19, a writ of mandamus and a FOIA request are to be given some preference in processing and disposition, and we have sought to act expeditiously.

AFFIRMED.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 02/05/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

326K! /P "NOT EXIST" /S DOCUMENT RECORD FILE

Jack URBAN, Appellant,
v.
UNITED STATES of America; Kansas Bureau of Investigation, Appellees.

No. 95-2386.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 6, 1995.

Decided Dec. 27, 1995.

Inmate sought results of his polygraph test under Freedom of Information Act (FOIA) from United States Attorney and was informed they did not have records. Inmate commenced action under FOIA. The United States District Court for the District of South Dakota, Richard H. Battey, Chief Judge, dismissed action as moot without requiring service on government. Inmate appealed. The Court of Appeals, Loken, Circuit Judge, held that: (1) action was not moot, and (2) United States Attorney's response was inadequate.

Reversed and remanded.

[1] RECORDS ⇦ 63
326k63
In Freedom of Information Act (FOIA) cases, mootness occurs when requested documents have already been produced, and when question is whether requested document exists, or is outside government's possession or control, FOIA action is not moot and dismissal prior to service will almost never be appropriate. 5 U.S.C.A. § 552 et seq.

[2] RECORDS ⇦ 62
326k62
Freedom of Information Act (FOIA) obligates government to produce documents within its possession or control and when government agency claims that it does not possess or control a requested document, agency must show it fully discharged its statutory obligation by conducting a search reasonably calculated to uncover all relevant documents. 5 U.S.C.A. § 552 et seq.

[3] RECORDS ⇦ 62
326k62
Under Freedom of Information Act (FOIA) request by inmate for results of his polygraph test, United States Attorney's affidavit that he did not produce requested documentation because it did **not exist** in office **files** was inadequate answer; Kansas Bureau of Investigation administered test and reported to United States Attorney, test was part of plea agreement with United States Attorney, and inmate's early requests got no response or cryptic brush off and inmate was never told why he was not entitled to **documents.** 5 U.S.C.A. § 552 et seq.

***94** Appellant was not represented by counsel.

Bonnie P. Ulrich, Assistant U.S. Attorney, Sioux Falls, South Dakota, for appellees.

Before FAGG, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

LOKEN, Circuit Judge.

South Dakota inmate Jack Urban appeals the district court's dismissal of his action to enforce a Freedom of Information Act (FOIA) request. The court dismissed Urban's complaint, prior to service, because "[n]onexistent records are impossible to produce." At least some of the requested materials almost certainly exist--the question is ***95** whether they are in the possession or control of the United States Department of Justice. Because the government has not met its burden to demonstrate that it has complied with the statute, see Miller v. United States Dep't of State, 779 F.2d 1378, 1382-83 (8th Cir.1985), we reverse.

Urban took a polygraph test in February 1994 as part of a plea agreement with the United States Attorney for the District of Kansas. The Kansas Bureau of Investigation (KBI) administered the test and reported to the U.S. Attorney that the test results indicated truthful cooperation with the government. In July 1994, Urban informally asked KBI for information and documents relating to the test results. KBI forwarded Urban's request to the U.S. Attorney, who wrote Urban's attorney advising "[t]he materials he requested will not be forthcoming."

Urban then sent a FOIA letter to the U.S. Attorney requesting "the results of my polygraph test" and "the polygrapher's resume." The U.S. Attorney did not answer this or a follow-up letter

but instead forwarded the FOIA request to the Executive Office for the United States Attorneys. That Office responded to Urban that a search of the U.S. Attorney's office "has revealed no records." The Department of Justice Office of Information and Privacy rejected Urban's subsequent appeal on the ground that "appeals can only be taken from denials of access to records which exist and can be located in Department of Justice files." Acting pro se, Urban then commenced this action under FOIA, 5 U.S.C. §§ 552 et seq., which the district court dismissed as moot, without requiring service on the government.

[1][2] "In FOIA cases, mootness occurs when requested documents have already been produced." In re Wade, 969 F.2d 241, 248 (7th Cir.1992). That has not occurred in this case. Instead, the government claims it cannot locate the requested documents. FOIA obligates the government to produce documents within its "possession or control." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 150-51, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980). When a government agency claims that it does not possess or control a requested document, the agency must show it fully discharged its statutory obligations by "conduct[ing] a search reasonably calculated to uncover all relevant documents." Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1351 (D.C.Cir.1983), followed in Miller, 779 F.2d at 1382. Thus, when the question is whether a requested document exists, or is outside the government's possession or control, an FOIA action is not moot, and dismissal prior to service will almost never be appropriate.

[3] In this case, the actions of KBI strongly suggest that one or more requested documents exist and are within the possession or control of the U.S. Attorney for the District of Kansas. In response to our order to show cause, the responsible Assistant U.S. Attorney submitted an affidavit stating that he "did not produce the requested documentation because it did not exist in the files of the United States Attorney's office." That is an inadequate answer. Urban has now spent nearly eighteen months seeking a copy of seemingly innocuous test results. His early requests got no response or a cryptic brush off. He has never been told why he is not entitled to the documents. And his attempt to invoke FOIA, a statute intended to foster greater access to government records, has instead fostered more paper shuffling and lame excuses.

There may be a legitimate reason why Urban is not entitled to the materials he requests, but none appears in this record. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings consistent with this opinion, including, if necessary, an evidentiary hearing at which the responsible Assistant U.S. Attorney can testify as to whether the Department of Justice has possession or control of one or more of the requested documents.

END OF DOCUMENT

Charles V. STEPHENSON, Plaintiff-Appellant,
v.
INTERNAL REVENUE SERVICE, Atlanta, Georgia, and John W. Henderson, District Director, IRS Georgia, Defendants-Appellees.

No. 79-2685.

United States Court of Appeals, Fifth Circuit.

Nov. 7, 1980.

Taxpayer who was subject of civil and criminal investigation brought Freedom of Information Act suit seeking release of documents. The United States District Court for the Northern District of Georgia, William C. O'Kelley, rendered summary judgment for Internal Revenue Service, and taxpayer appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) government affidavit describing the withheld documents in fairly detailed but generic terms and claiming that release would interfere with enforcement proceedings was insufficient basis on which to deny taxpayer's motion for detailed justification, itemization and indexing of the documents and summary judgment for the government; (2) where records do not exist, affidavits are probably not only sufficient but possibly the best method of verification; and (3) once it is shown that records and documents are in possession of the governmental agency, more is required and alternative procedures should be used, such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof.

Vacated and remanded with directions.

[1] RECORDS ⇐ 63
326k63
An appellate court has two duties in reviewing determinations under Freedom of Information Act, in that it must determine whether the district court had an adequate factual basis for the decision rendered and whether on such basis the decision reached was clearly erroneous. 5 U.S.C.A. § 552(a)(4)(B).

[2] RECORDS ⇐ 63
326k63
In most situations, blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of Freedom of Information Act claims. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[2] RECORDS ⇐ 65
326k65
In most situations, blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of Freedom of Information Act claims. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[3] RECORDS ⇐ 65
326k65
Affidavit of IRS special agent conducting civil and criminal investigation of taxpayer was an insufficient basis on which to deny taxpayer's motion for a Vaughn index and to find that production of subject documents would interfere with enforcement proceedings, especially as district court was led astray by factual conclusions founded in the affidavit, which described the withheld documents in fairly detailed but generic terms, and although 209 pages were deemed exempt as tax return information of third parties, in fact, 156 pages consisted of checks and deposit slips of third parties possibly exempt, if at all, only under another exemption provision. 5 U.S.C.A. § 552(a), (a)(4)(B), (b)(3), (b)(7)(A, C).

[4] RECORDS ⇐ 63
326k63
In view of disadvantages of an in camera review of documents requested in Freedom of Information Act suit, flexibility in methods of substantiating government claim of exemption is consistent with purposes of the Act and role of the trial court in such actions. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[5] RECORDS ⇐ 66
326k66
Resort to in camera review is discretionary in Freedom of Information Act suits, as is resort to a Vaughn index. 5 U.S.C.A. § 552(a)(4)(B).

[6] RECORDS ⇐ 65
326k65
In Freedom of Information Act suits where it is determined that **records** do exist, the district court must do something more to assure itself of the factual basis and bona fide of the agency's claim of

exemption than rely solely on an affidavit; however, in situations where **records do not exist,** affidavits are probably not only sufficient but possibly the best method of verification. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[7] RECORDS ⇐ 65
326k65
In the area of Freedom of Information Act disclosure of national security or classified information there appears to be a stronger presumption in favor of reliance on agency affidavits, although such affidavits must still meet a number of criteria and be subjected to critical analysis. 5 U.S.C.A. § 552(a)(3), (a)(4)(B).

[8] RECORDS ⇐ 65
326k65
Once it is established that records and documents are in possession of a governmental agency more than filing of an affidavit claiming an exemption under Freedom of Information Act is required; in view of dangers inherent in reliance on an agency affidavit in an investigative context, resort should be had to alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

[8] RECORDS ⇐ 66
326k66
Once it is established that records and documents are in possession of a governmental agency more than filing of an affidavit claiming an exemption under Freedom of Information Act is required; in view of dangers inherent in reliance on an agency affidavit in an investigative context, resort should be had to alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or combinations thereof. 5 U.S.C.A. § 552(a), (a)(4)(B), (b).

***1141** Scott McLarty, Decatur, Ga., for plaintiff-appellant.

Gilbert E. Andrews, Chief, M. Carr Ferguson, Asst. Atty. Gen., Robert A. Bernstein, Murray S. Horwitz, Tax Div., Dept. of Justice, Washington, D. C., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, HILL and FAY, Circuit Judges.

FAY, Circuit Judge:

Appellant, Charles Stephenson, seeks reversal of the District Court's entry of summary judgment in favor of the Internal Revenue Service (IRS) in appellant's action for release of documents pursuant to the Freedom of Information Act (FOIA) 5 U.S.C. s 552(a) (1978). He also seeks reversal of the District Court's denial of appellant's ***1142** motion for a detailed justification, itemization and indexing of all Internal Revenue Service documents withheld from disclosure to appellant pursuant to claimed exemptions under 5 U.S.C. s 552(b)(3), 7(A), 7(C) (1978). We conclude here that the affidavits submitted by the Service provide an insufficient basis for such determinations. Therefore, the judgment of the trial court must be reversed and remanded.

I.

Appellant is the subject of civil and criminal investigations into his tax liabilities for the years 1975 through 1977. While these ongoing investigations by the Internal Revenue Service have not reached the prosecutorial stage, a substantial file has been developed.[FN1] The Service released 390 pages of documents covered by appellant's request under the Freedom of Information Act, 5 U.S.C. s 552 (1978).[FN2] Exemptions from release were asserted under 5 U.S.C. s 552(b)(3), (7)(A), (7)(C) (1978) [FN3] as to some 313 pages of documents. Appellant then sought injunctive and declaratory relief in District Court.[FN4] The court initially granted appellant's motion under Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) and ordered the filing of a detailed justification and index for the withholding of each document. However, on the Service's motion for reconsideration, supported by an affidavit of the IRS Special Agent conducting the ongoing investigations of appellant,[FN5] the District Court reversed its ***1143** previous decision and denied appellant's motion for a Vaughn index.[FN6] Subsequently, the District Court granted appellee's motion for summary judgment [FN7] and denied appellant's

motion for relief from judgment [FN8] and partial summary judgment. We have jurisdiction for this appeal pursuant to 28 U.S.C. s 1291 (1978).

FN1. The I.R.S. indicated that appellant's file consisted of 703 pages of documents. Brief for appellee at 2.

FN2. 5 U.S.C. s 552 (1978) provides: (a) Each agency shall make available to the public information as follows: (3) Except with respect to the records made available under paragraph (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

FN3. 5 U.S.C. s 552(b) (1978) 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. (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

FN4. 5 U.S.C. s 552(a)(4)(B) (1978) 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.

FN5. The affidavit provides in part: 1. I, Richard J. Gutierriz, am a special agent in the Criminal Investigation Division (formerly the Intelligence Division) of the Atlanta District Office of the Internal Revenue Service. 2. My responsibilities as a special agent in the Criminal Investigation Division include investigating the possibility of criminal violations of the Internal Revenue laws and related offenses. 4. In connection with my duties as a special agent, in November 1977, I was assigned the tax investigation of Charles V. Stephenson for the years 1975 and 1976. In May 1978, this investigation was expanded to include the 1977 tax year. The ongoing criminal tax investigation of Charles V. Stephenson is presently being conducted jointly with the assistance of a revenue agent in the Examination Division. 5. The joint investigation of Charles V. Stephenson involves potential criminal liability for possible violations of section 7203 of Title 26, 26 U.S.C. s 7203, involving the failure to file Federal income tax returns for the years 1975, 1976, and 1977. 6. I am familiar with the FOIA request made by Charles v. Stephenson, and with the documents which he has requested. 7. The documents requested by Charles V. Stephenson (those which were generated during the course of the joint investigation) which are presently in issue in this lawsuit consist of (1) memoranda of interviews with third parties, (2) records and information received from third parties relative to financial transactions with Charles V. Stephenson, (3) summonses and other documentary requests made to third parties, (4) internal memoranda requesting review of summonses, (5) internal memoranda which analyze the scope and direction of the investigation and reveal the strengths and weaknesses of the Government's case, such as fraud referral reports and investigative work plans, (6) revenue agent's workpapers, (7) special agent's workpapers, and (8) sworn statements of third parties. 8. I personally reviewed all of the documents requested by Charles V. Stephenson with Becky Brannan of the Disclosure Office.

Based on this review, it was determined that about 390 of the 650 pages of documents could be released without interfering with the joint investigation of Charles V. Stephenson. 9. I determined that the release of the documents referred to in # 7 above would interfere with the joint investigation of Charles V. Stephenson and with any potential criminal prosecution, by revealing the evidence against Charles V. Stephenson and the reliance placed by the Government on that evidence, the names of likely witnesses for the Government should Stephenson ultimately be indicted, the transactions being investigated, the direction of the investigation, and the scope and limits of the Government's investigation. To reveal the identity of third parties and potential witnesses contacted during the course of my investigation could subject these third parties and potential witnesses to harassment. Access to potential evidence could allow plaintiff to construct defenses and tamper with the evidence. 10. In addition to the documents referred to in # 7 above, the investigatory files on Charles V. Stephenson contained certain documents, which are also in issue in this litigation, reflecting the tax affairs of unrelated third parties. These documents consist of the Federal income tax returns (Form 1040) of a third taxpayer, checks and deposit slips reflecting financial information about third parties, and transcripts of account which contain tax information about third parties, including the taxpayer's identity, his social security number, and information about the taxpayer's account such as payments, credits, refunds, extensions filed, collection action and audit activity. Record, vol. I at 46-48.

FN6. The District Court's order denied appellant's motion based upon the exemption from disclosure in 5 U.S.C. s 552(b)(7)(A) (1978) and the Supreme Court's decision in N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). The order only refers to 260 pages of undisclosed documents and does not address any other exemptions under FOIA.

FN7. This motion was also supported by the affidavit of Special Agent Gutierrez. The order of the court found that, based upon this affidavit, 209 pages in question were exempt under 5 U.S.C. s 552(b)(3) (1978) since disclosure would have been prohibited under 26 U.S.C. s 6103(b)(1), (b)(2)(A) (1979). Record, vol. I, at 155-56. This section of the I.R.C., in general, protects tax returns and return information from disclosure to third parties. The order, further found that, based on the same affidavit, the remaining 104 pages are exempt from disclosure pursuant to 5 U.S.C. s 552(b)(7)(A) (1978). Record, vol. I, at 156-58.

FN8. The District Court, because appellant was proceeding pro se, disregarded appellant's improper denomination of his motion under Fed.R.Civ.P. 60(b) and addressed it as a motion for reconsideration.

*1144 II.

[1][2][3] An appellate court has two duties in reviewing determinations under FOIA. [FN9] (1) We must determine whether the district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached was clearly erroneous. See Church of Scientology v. U.S. Department of Defense, 611 F.2d 738, 742 (9th Cir. 1979). We find that based upon this record the District Court did not have an adequate basis and consequently that the court's factual conclusions and subsequent determinations were clearly erroneous, as admitted in the appellee's brief.[FN10]

FN9. Counsel advise, and it appears, that this is a case of first impression in the Circuit. However, several opinions of this Court have indicated the result we reach in this case, that in most situations blanket objections, mere conclusory allegations or affidavits will not suffice for disposition of FOIA claims. See Moorefield v. United States Secret Service, 611 F.2d 1021, 1023 (5th Cir. 1980); Sladek v. Bensinger, 605 F.2d 899, 907-08 (5th Cir. 1979) (Hill J., concurring in part and dissenting in part); Chamberlain v. Kurtz, 589 F.2d 827, 835 (5th Cir. 1979), cert. denied, 444 U.S. 842, 100 S.Ct. 82, 62 L.Ed.2d 54 (1980); Kent Corp. v. N.L.R.B., 530 F.2d 612, 624 n.30 (5th Cir.), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976).

FN10. We note with appreciation the candor of appellee's counsel in disclosing, in his brief and at oral argument, the erroneous basis for the District Court's decision as to 209 pages of documents held exempt under 5 U.S.C. s 552(b)(3) (1978). Brief for Appellee at 11. This disclosure was consistent

with the high ethical standards expected of counsel as officers of the Court.

FOIA provides that the district court shall determine de novo whether claimed exemptions are applicable.[FN11] The Act also leaves to the court's discretion whether to order an examination of the contents of the agency records at issue, in camera, in making this determination.[FN12] However, the legislative intent for exercise of this discretion is relatively clear.

FN11. See note 4 supra.

FN12. Id.

(t)he 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 ... 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, 93d Cong., 2d Sess. 9 (1974), reprinted in (1974) U.S.Code Cong. & Admin.News, pp. 6267, 6287-88 (Conference Report).[FN13]

FN13. This language substantially tracks the Supreme Court's opinion in E.P.A. v. Mink, 410 U.S. 73, 93, 93 S.Ct. 827, 839, 35 L.Ed.2d 119 (1973) the result of which, however, was specifically disapproved of in the conference report. In Mink the Supreme Court also noted that selective in camera inspection might be another method by which the District Court could apprise itself of the bona fides of the agency's claim of exemption. Id.

Appellant's contention that the court should order the IRS to submit a detailed index and justification for the withholding of the documents, as well as conduct an in camera review, derives from a line of D.C. Circuit opinions initiated by Vaughn v. Rosen, 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 (D.C.Cir.1975). The sole support initially offered by the government in Vaughn was a conclusory affidavit of the Director of the Bureau of Personnel Management Evaluation claiming exemption under 5 U.S.C. s 552(a)(3) (1970). 484 F.2d at 824. The use of affidavits created difficult problems of procedure and proof for the Vaughn court since the resolution of most FOIA disputes centers around the factual nature of the information sought and the statutory category asserted in response. Id. The Vaughn court observed that factual characterizations in affidavits may or may not be accurate. Id. at 824. Such concern has been conclusively justified in the present action.

***1145** Of the 209 pages deemed exempt by the District Court as tax return information of third parties under 5 U.S.C. s 552(b)(3) (1978) and 28 U.S.C. s 6103 (1979), Record, vol. I, at 155-56, it was subsequently discovered that, in fact, 156 pages consisted of checks and deposit slips comprising financial information (not related to tax returns) of third parties possibly exempt, if at all, only under 5 U.S.C. s 552(b)(7)(C) (1978). Brief for Appellee at 11. Therefore, the District Court was led astray in its determination by factual conclusions founded in an affidavit which described the withheld documents in fairly detailed but generic terms.[FN14]

FN14. See note 5 supra.

To avoid such a result, and mindful of the disadvantages of in camera review, the Vaughn court articulated an intermediate approach by requiring from the withholding agency an index and detailed justification for their claim. 484 F.2d at 825, 826-28. Subsequent decisions approved of variations on this basic approach such as, index and court examination of sample reports stipulated by both parties to be representative, see, e. g. Vaughn v. Rosen, 523 F.2d at 1139-40, use of detailed justifications alone where indexing would be inappropriate, see, e. g. Pacific Architects & Engineers, Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C.Cir.1974), and random sample inspection of documents listed and described in an affidavit see, e. g. Ash Grove Cement Co. v. F. T. C., 511 F.2d 815, 816 (D.C.Cir.1975). See also, Lead Industries Association v. OSHA, 610 F.2d 70, 88 (2nd Cir. 1979) (affidavit and index without in camera inspection).

[4][5][6][7][8] Such flexibility is consistent with

the purposes of the Act and the role of the trial court in such actions. Resort to in camera review is discretionary, N. L. R. B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 224, 98 S.Ct. 2311, 2318, 57 L.Ed.2d 159, 167 (1978), as is resort to a Vaughn index. However, as this case clearly demonstrates, in instances where it is determined that records do exist, the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit.[FN15] While we are aware of eminent decisions arguably to the contrary,[FN16] we remain unpersuaded. In situations 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 the possession of the governmental agency, more is required. The facts of this case amply demonstrate the dangers inherent in reliance upon agency affidavit in an investigative context when alternative procedures such as sanitized indexing, random or representative sampling in camera with the record sealed for review, oral testimony or ***1146** combinations thereof would more fully provide an accurate basis for decision.

FN15. In the area of FOIA disclosure of national security or classified information there appears to be a stronger presumption in favor of reliance upon agency affidavits. See, e. g. Weissman v. Central Intelligence Agency, 565 F.2d 692, 696-98 (D.C.Cir.1977); Bell v. United States, 563 F.2d 484, 486-87 (1st Cir. 1977). However, such affidavits must still meet a number of criteria and be subjected to critical analysis by the court. See, e. g. Hayden v. National Security Agency, 608 F.2d 1381, 1386-88 (D.C.Cir.1979) (appeal pending); Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 832-33 (D.C.Cir.1979); Church of Scientology v. U. S. Department of Defense, 611 F.2d 738, 742-743 (9th Cir. 1979). See also, Commentary, Freedom of Information: Judicial Review of Executive Security Classifications, 28 U.Fla.L.Rev. 551 (1976). We express no view on this point.

FN16. Appellee contends that Barney v. I. R. S., 618 F.2d 1268 (8th Cir. 1980) is precisely on point upholding a District Court's determination on facts and affidavits indistinguishable from the present case. Id. at 1270-73. However, the clearest point of distinction is that in the instant case the affidavit submitted resulted in a misunderstanding and led the District Court into error. With respect to the decisions of Crooker v. Office of Pardon Attorney, 614 F.2d 825, 828 (2nd Cir. 1980); Cox v. U. S. Department of Justice, 576 F.2d 1302, 1310-12 (8th Cir. 1978); Harvey's Wagon Wheel, Inc. v. N. L. R. B., 550 F.2d 1139, 1141-42 (8th Cir. 1976) in so much as they indicate reliance upon affidavit alone outside the area of national security classifications is adequate, we respectfully disagree. See also Irons v. Bell, 596 F.2d 468, 471, 476 (1st Cir. 1979).

III.

In light of the foregoing, we vacate the summary judgment and remand the case to the District Court with directions to conduct a fuller development of the factual basis for decision consistent with this opinion and its obligations under 5 U.S.C. s 552(a)(4)(B) (1978).

VACATED AND REMANDED.

END OF DOCUMENT

Gary TRIESTMAN, Plaintiff,
v.
UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Defendant.

No. 94 Civ. 5108 (JGK).

United States District Court, S.D. New York.

March 5, 1995.

Claimant desiring to collaterally attack his conviction sought to compel Drug Enforcement Administration (DEA) to disclose whether certain DEA agents had been investigated for perjury, mishandling information, or supplying false evidence. The District Court, Koeltl, J., held that: (1) under Freedom of Information Act (FOIA) exemption, no substantial public interest in disclosure existed to weigh against DEA agents' privacy interests; (2) to the extent claimant sought publicly available information, DEA had no duty under FOIA to compile such information; and (3) to the extent claimant sought publicly available information, DEA offered sufficient proof that no such information existed.

Summary judgment for defendant granted.

[1] RECORDS ⇦ 58
326k58
For Freedom of Information Act (FOIA) purposes, government employees have privacy interest in not having their names disclosed in connection with investigations in which they are or were under scrutiny. 5 U.S.C.A. § 552(b)(7)(C).

[2] RECORDS ⇦ 58
326k58
For Freedom of Information Act (FOIA) purposes, government employees have privacy interests in their employment histories and performance evaluations and strong privacy interest in not being wrongfully associated with criminal activity. 5 U.S.C.A. § 552(b)(7)(C).

[3] RECORDS ⇦ 58
326k58
Personal privacy exemption under Freedom of Information Act (FOIA) applies only if disclosure could reasonably be expected to lead to unwarranted invasion of privacy. 5 U.S.C.A. § 552(b)(7)(C).

[4] RECORDS ⇦ 58
326k58
Question of whether reasonably expected invasion of privacy is warranted under Freedom of Information Act (FOIA) is to be resolved by determining whether the invasion is justified by weightier public interests in disclosure. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇦ 58
326k58
Privacy interests of Drug Enforcement Administration (DEA) agents were not outweighed by any public interest so as to justify disclosure of information where the only interest significantly served by disclosure was the personal interest of the party seeking disclosure, who sought information for his own use in collateral challenge to his conviction. 5 U.S.C.A. § 552(b)(7)(C).

[5] RECORDS ⇦ 64
326k64
Privacy interests of Drug Enforcement Administration (DEA) agents were not outweighed by any public interest so as to justify disclosure of information where the only interest significantly served by disclosure was the personal interest of the party seeking disclosure, who sought information for his own use in collateral challenge to his conviction. 5 U.S.C.A. § 552(b)(7)(C).

[6] RECORDS ⇦ 58
326k58
Personnel and medical files exemption under Freedom of Information Act (FOIA) requires balancing of privacy interests against public interests in disclosure. 5 U.S.C.A. § 552(b)(6).

[6] RECORDS ⇦ 64
326k64
Personnel and medical files exemption under Freedom of Information Act (FOIA) requires balancing of privacy interests against public interests in disclosure. 5 U.S.C.A. § 552(b)(6).

[7] RECORDS ⇦ 58
326k58
Personal privacy exemption under Freedom of Information Act (FOIA) is more protective of privacy interests than is personnel and medical files

exemption. 5 U.S.C.A. § 552(b)(6), (b)(7)(C).

[8] RECORDS ⇦ 58
326k58
Purpose for which Freedom of Information Act (FOIA) request is made does not determine whether the invasion of privacy is warranted, although the interests to be served by that purpose may be probative of whether disclosure would serve public interest. 5 U.S.C.A. § 552(b)(7)(C).

[9] RECORDS ⇦ 52
326k52
Finding that no substantial public interest would be served by disclosure of information on Drug Enforcement Administration (DEA) agents pursuant to Freedom of Information Act (FOIA) request by convict seeking to collaterally challenge his conviction was supported by lack of evidence that either DEA itself or the agents in question had engaged in wrongdoing in either convict's case or in others. 5 U.S.C.A. § 552(b)(7)(C).

[10] RECORDS ⇦ 62
326k62
To require agency to collect and produce information that already has been made public would not further the general purpose of the Freedom of Information Act (FOIA), which is to provide the general public with information as to the workings of its government. 5 U.S.C.A. § 552.

[11] RECORDS ⇦ 62
326k62
Information that is available to any generally interested party or concerned citizen is information that is sufficiently available to relieve agency of any duty to produce it pursuant to Freedom of Information Act (FOIA) request. 5 U.S.C.A. § 552.

[12] RECORDS ⇦ 62
326k62
Request made pursuant to Freedom of Information Act (FOIA) for information on particular Drug Enforcement Administration (DEA) agent was premature and was necessarily denied where requesting party's complaint did not mention agent and there was no evidence that requesting party had exhausted administrative procedures with respect to that agent. 5 U.S.C.A. § 552.

[13] RECORDS ⇦ 65
326k65
In case in which requesting party seeks disclosure under Freedom of Information Act (FOIA), government affidavits attesting to thoroughness of agency search of its records and its results are presumptively valid. 5 U.S.C.A. § 552.

[14] FEDERAL CIVIL PROCEDURE ⇦ 2481
170Ak2481
In case in which requesting party seeks disclosure under Freedom of Information Act (FOIA), government affidavits attesting to thoroughness of agency search of its records and its results are adequate to merit grant of summary judgment in government's favor, unless requesting party makes showing of bad faith, based on more than mere speculation, sufficient to impugn the affidavits. 5 U.S.C.A. § 552.

[15] RECORDS ⇦ 65
326k65
Declaration by Drug Enforcement Administration (DEA) paralegal under penalty of perjury that DEA checked its **records** for information requested pursuant to Freedom of Information Act (FOIA) and that it found that none of the DEA agents about whom requesting party asked had been convicted of any wrongdoing, publicly disciplined, or publicly investigated for misconduct, was sufficient evidence that public **documents** sought by requesting party did **not exist.** 5 U.S.C.A. § 552.

***669** Gary Triestman, pro se.

Mary Jo White, U.S. Atty., Beth E. Goldman, Asst. U.S. Atty., S.D. of N.Y., New York City, for defendant.

OPINION & ORDER

KOELTL, District Judge.

Each party has moved the Court for an order granting summary judgment. The complaint seeks information about several Drug Enforcement Administration ("DEA") agents pursuant to the Freedom of Information Act ("FOIA"). Prior to commencement of this action, the plaintiff, Gary Triestman, sought this information by administrative means, beginning in November, 1993. He seeks to know which, if any, of thirteen DEA agents have

been "investigated in any capacity for alleged perjurious statements or mishandling of evidence, or the supplying of false evidence or testimony; and ... the particulars and outcome of those investigations." [FN1] Triestman seeks the information for use in a collateral attack on his conviction. Apparently, his position is that he pleaded guilty to a crime for which he is presently incarcerated, because, among other reasons, DEA agents fabricated evidence.

FN1. Triestman made this request in a letter dated November 1, 1993 to the Department of Justice and in two letters dated December 23, 1993 to the DEA.

On May 25, 1994, the Office of Information and Privacy ("OIP") issued a final denial of Triestman's FOIA request, after his appeal of an initial, undated denial by the DEA. Both denials refused either to acknowledge or to deny the existence of any documents responsive to the request. [FN2] The OIP based its decision on 5 U.S.C. § 552(b)(7)(C), which provides an exemption from disclosure for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). It is undisputed that Triestman's FOIA request is a request for records or information compiled for law enforcement purposes. The OIP explained that Exemption 7(C) justifies a refusal to respond to the request, because "Lacking an individual's consent, proof of death, official acknowledgement of an investigation, or an overriding public interest, even to acknowledge the existence of such law enforcement records could reasonably be expected to constitute an unwarranted invasion of personal privacy." Letter from Richard L. Huff, Co-Director OIP, to Gary Triestman, May 25, 1994 (upholding DEA's refusal to release information on appeal from the DEA decision).

FN2. In Beck v. U.S. Dep't. of Justice, 997 F.2d 1489 (D.C.Cir.1993), the Court of Appeals for the District of Columbia Circuit upheld the government's refusal to disclose whether any documents existed that were responsive to a request for documents constituting credible evidence that two DEA agents had previously engaged in wrongdoing. The court explained that, "A government employee has at least some privacy interest in his own employment records, an interest that extends to 'not having it known whether those records contain or do not contain' information on wrongdoing, whether that information is favorable or not." Beck, 997 F.2d at 1494 (citation omitted).

[1][2][3][4][5] Government employees have a privacy interest in not having their names disclosed in connection with investigations in which they are or were under scrutiny. See, e.g., Hunt v. FBI, 972 F.2d 286, 288 (9th Cir.1992). They also have privacy interests in their employment histories and performance evaluations and a strong privacy interest in not being wrongfully associated with criminal activity. Stern v. FBI, 737 F.2d 84, 91-92 (D.C.Cir.1984). However, exemption (b)(7)(C) applies only if a disclosure could ***670** reasonably be expected to lead to an unwarranted invasion of privacy. The question of whether a reasonably expected invasion is warranted is to be resolved by determining whether the invasion of privacy is justified by weightier public interests in disclosure. See Massey v. FBI, 3 F.3d 620, 624 (2d Cir.1993) ("The exemption applies only if the invasion of privacy that would result from release of the information outweighs the public interest in disclosure") (citations omitted). No public interest outweighs the privacy interests of the DEA agents in this case. Here, the only interest significantly served by disclosure is the personal interest of the plaintiff, who seeks information for use in a collateral challenge to his conviction.

[6][7][8] In Brown v. FBI, 658 F.2d 71 (2d Cir.1981), the Court of Appeals held that under FOIA Exemption 6, which also requires an evaluation of the public interest in disclosure, [FN3] "[I]t must be remembered that it is the interest of the general public, and not that of the private litigant, that must be considered." Id. at 75 (citation omitted). The Court found that no such public interest is necessarily involved when a person requesting information seeks the information for the purpose of collaterally attacking a criminal conviction: [FN4]

FN3. Exemption 6 also requires a balancing of privacy interests against public interests in disclosure. It protects from disclosure "personnel and medical files and similar files the disclosure of

which would constitute a clearly unwarranted invasion of person privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) is more protective of privacy interests than Exemption 6. See U.S. Dep't. of Justice v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 756, 109 S.Ct. 1468, 1473, 103 L.Ed.2d 774 (1989) ("[T]he standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files").

FN4. The purpose for which a FOIA request is made does not determine whether an invasion of privacy is warranted. See U.S. Dep't. of Defense v. FLRA, --- U.S. ----, ----, 114 S.Ct. 1006, 1013, 127 L.Ed.2d 325 (1994). However, the interests to be served by that purpose may be probative of whether disclosure would serve a public interest.

Plaintiff states in his brief that he is pursuing this litigation hoping to obtain evidence sufficient to mount a collateral attack on his kidnapping conviction. That this is plaintiff's primary purpose will not necessarily prevent disclosure if there is a coincidental public purpose sufficient to overcome Ms. Shepardson's privacy interest. The court, however, cannot allow the plaintiff's personal interest to enter into the weighing or balancing process. "The FOIA is not intended to be an administrative discovery statute for the benefit of private parties." Columbia Packing Co. v. U.S. Dept. of Agriculture, 417 F.Supp. 651, 655 (D.Mass.1976).

Brown, 658 F.2d at 75.

[9] In Massey, the Court of Appeals for the Second Circuit held that the FBI had properly withheld information containing agents' names, under exemption (b)(7)(C), because no substantial public interest would have been served by disclosure. In making this determination, the court considered not only the purpose for which Massey sought the information, but also whether the information was probative of the agency's conduct. The court held that the information did not "reveal any significant information concerning the conduct and administration of FBI investigations" or the "agency's own conduct" and that the fact that Massey might be able to use the information in his efforts to overturn his criminal conviction did not give rise to a public interest. Massey, 3 F.3d at 625; see also, U.S. Dep't. of Defense v. FLRA, --- U.S. ----, 114 S.Ct. at 1012 ("[T]he only relevant 'public interest in disclosure' to be weighed in this balance [under the FOIA privacy exemptions] is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government' ") (citation omitted). Triestman has offered no evidence suggesting that either the DEA itself or the agents he has inquired about have engaged in wrongdoing in either his case or in others. This fact supports the conclusion that no substantial public interest would be served by disclosure. See Hunt, 972 F.2d at 288-90 (holding that there is not a strong public interest in "one isolated investigation, ***671** no longer of any interest to anyone other than the party who instigated it," because "[t]he single file sought by Hunt will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common.... The public interest in ensuring the integrity and the reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official") (citation omitted); Rojem v. U.S. Dep't. of Justice, 775 F.Supp. 6 (D.D.C.1991) (upholding non-disclosure of FBI information under exemption 7(C), because the information shed no light on the agency's performance of its statutory duties, there was no evidence of wrongdoing, and the fact that the plaintiff sought the information to challenge a conviction for which he received a death sentence was not, under the circumstances, sufficient to create the requisite public interest in disclosure).

In response to the OIP denial of his appeal and to the government's motion for summary judgment, Triestman argues that he now seeks only information responsive to his request that has previously been made public. Recognizing the privacy interests that would be implicated by the disclosure of non-public investigative reports, Triestman explains that his FOIA request should be construed as seeking "any information that was made public about the listed agents in question; i.e., in any proceeding, publication or press release, public statement issuances, legal or administrative case opened, that was available to any generally interested party or concerned citizen of the public." Pl.'s Mem. in

Supp. of Mot. for Summ.J. at 2. Triestman alleges that the disclosure of such information cannot reasonably be expected to constitute an unwarranted invasion of personal privacy.

[10] This was not the scope of Triestman's original request which plainly infringed on personal privacy and which now appears to have been abandoned. Nevertheless, there are additional reasons why the plaintiff's newly narrowed request for public documents under FOIA should be denied. First, to require an agency to collect and produce information that has already been made public would not further the general purpose of FOIA, which is to satisfy the citizens' right to know "what their government is up to." See U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481, 103 L.Ed.2d 774 (1989) ("This basic policy of ' "full agency disclosure unless information is exempted under clearly delineated statutory language," ' U.S. Dep't. of Air Force v. Rose, 425 U.S. [352], at 360-361, 96 S.Ct. [1592], at 1599 [48 L.Ed.2d 11] [(1976)] (quoting S.Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), indeed focuses on the citizens' right to be informed about 'what their government is up to' ").

In Freedberg v. U.S. Dep't. of the Navy, 581 F.Supp. 3 (D.D.C.1982), the court held that any information that was contained in the public record of a court-martial need not be produced under FOIA by the Department of the Navy:

> Insofar as documents sought are readily available in the public record, it is "abusive and a dissipation of agency and court resources" to make and process a claim for their disclosure. Crooker v. United States State Department, 628 F.2d 9 (D.C.Cir.1980). Once such documents are open for inspection by the general public, there is no longer any matter in controversy before the Court under FOIA. Misegades & Douglas v. Schuyler, 456 F.2d 255 (4th Cir.1972). Disclosure on that basis must be denied.

Freedberg, 581 F.Supp. at 4. FOIA's purpose is to provide the general public with information as to the workings of its government: "The statute was designed ' "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." ' " U.S. Dep't. of State v. Ray, 502 U.S. 164, 173, 112 S.Ct. 541, 547, 116 L.Ed.2d 526 (1991). FOIA does not obligate an agency to serve as a research service for persons seeking information that is readily available to the public.

[11] In some cases, there may be a question as to what form of prior disclosure is sufficient to make information readily available to the public. In Freedberg and in the cases the court relied on, Crooker and Misegades, the information sought by the plaintiffs ***672** was readily available to them. In this case, the plaintiff's own characterization of the information that he seeks demonstrates that he seeks only information that is well within any definition of "public availability." The plaintiff describes the type of information that he seeks as "any information that was made public about the listed agents in question; i.e., in any proceeding, publication or press release, public statement issuances, legal or administrative case opened, that was available to any generally interested party or concerned citizen of the public." Pl.'s Mem. in Supp. of Mot. for Summ.J. at 2. Information that is available to any generally interested party or concerned citizen is information that is sufficiently available to relieve an agency of any duty to produce it under FOIA.

[12][13][14] Even if FOIA required agencies to search for, collect, and produce publicly available information, summary judgment for the government would still be appropriate in this case, because the government has provided sufficient proof that it has in fact searched for such documents and that there are no publicly available agency documents relating to investigations of the DEA agents [FN5] for allegedly making perjurious statements, mishandling evidence, or supplying false evidence or testimony. In a case in which the plaintiff seeks disclosure under FOIA, government affidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid. In Carney v. U.S. Dep't. of Justice, 19 F.3d 807 (2d Cir.1994), the Court of Appeals for the Second Circuit held that on a motion by the government for summary judgment, if the government's affidavits are adequate on their face to merit judgment in the government's favor, summary judgment should be denied and the plaintiff permitted discovery only if the plaintiff makes a showing of bad faith sufficient to impugn the affidavits. Carney, 19 F.3d at 812. Such a showing must be based on more than mere speculation. Id. at 813. In Carney, the court of

appeals upheld the district court's grant of summary judgment for the Department of Justice, finding that:

> FN5. The government has also shown that there are no publicly available responsive documents with respect to DEA agent Donald Abrahms. In his memoranda of law in support of his motion for summary judgment, Triestman requested that agent Abrahms be added to his FOIA request. The complaint does not mention agent Abrahms and there is no evidence that Triestman has exhausted administrative procedures with respect to him. The request for records relating to Abrahms must be denied for that reason. In addition, the request must be denied because the plaintiff seeks the same public documents which are not producible under FOIA and because the government has demonstrated a good faith and futile search for such documents.

> [T]he declarations are reasonably detailed and reveal that each of the DOJ subdivisions undertook a diligent search for documents responsive to Carney's requests. With respect to the withheld documents, the declarants describe the documents or classes of documents withheld and explain why they fall within an applicable exemption....
> An affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e); there is no need for the agency to supply affidavits from each individual who participated in the actual search. See Maynard [v. Central Intelligence Agency], 986 F.2d [547] at 560 [(1st Cir.1993)]; SafeCard [Services, Inc. v. Securities and Exchange Commission], 926 F.2d [1197] at 1201 [(D.C.Cir.1991)]. The DOJ's submissions thus were proper.

Carney, 19 F.3d at 813-14; see also, Doherty v. U.S. Dep't. of Justice, 775 F.2d 49, 53 (2nd Cir.1985) (holding that, "The Government's affidavits, under the circumstances of this case, provide an adequate factual basis to support its claims of exemption and thus, the District Court did not err in granting summary judgment without undertaking an in camera review of the documents").

[15] In this case, the Government has submitted a declaration by a DEA Paralegal Specialist, under the penalties of perjury, which declares that the DEA has checked its records and found that none of the individuals about whom the plaintiff requests information has been convicted of any wrongdoing, publicly disciplined or publicly investigated for any misconduct. In the circumstances ***673** of this case, this is sufficient evidence that the public documents sought by the plaintiff do not exist.

In an effort to claim any victory, the plaintiff does not contest the adequacy of the government's representation. Rather, the plaintiff has cross moved for a declaratory judgment in his favor contending that the government has "effectively conceded to Plaintiff's complaint and provided him with the FOIA materials he has requested and that he is entitled to by law." The government conceded to no such position and represents that it has not provided him with any materials. The plaintiff is not entitled to a declaratory judgment. The government contended--correctly--that the plaintiff was not entitled to disclosure of the records he sought, either private or public, and when he limited his request to public records it argued--correctly again--that he was not entitled to such records under FOIA, but that in any event they did not exist.

For the foregoing reasons, the Court grants the defendant's motion for summary judgment. In this case, no substantial public interest in disclosure exists to be weighed under FOIA Exemption 7(C) against the privacy interests of the individual DEA agents. To the extent the plaintiff's FOIA request seeks information that is publicly available and arguably does not implicate the privacy interests of the agents, summary judgment for the defendant is appropriate, because there is no duty under FOIA to compile such information and, in addition, because the defendant has offered sufficient proof that no such information exists. The plaintiff's request for a declaratory judgment is denied.

SO ORDERED.

END OF DOCUMENT

Michael RAY, etc., et al., Plaintiffs,
v.
UNITED STATES DEPT. OF JUSTICE, et al., Defendants.

No. 86-2430-CIV.

United States District Court,
S.D. Florida.

March 3, 1989.

On Motion to Compel Release of Unredacted Documents April 13, 1989.

Plaintiffs sought information, under Freedom of Information Act, from government agencies on Haitian nationals who had been returned to Haiti. The District Court, Dyer, Senior Circuit Judge, sitting by designation, held that: (1) plaintiffs failed to rebut agency's evidence that certain documents did not exist, and (2) agency was required to supply redacted information contained in documents forwarded to plaintiffs. On motion to compel, the court held that agency waived claimed exemptions that were not raised earlier.

Ordered accordingly.

[1] RECORDS ⇐ 65
326k65
Plaintiffs requesting information under Freedom of Information Act failed to rebut government agency's evidence that it conducted proper and adequate search for **documents** and that **documents** requested did **not exist.** 5 U.S.C.A. § 552.

[2] RECORDS ⇐ 65
326k65
Where Freedom of Information Act request triggers claim of exemption under Act, burden is on government agency to demonstrate basis for nondisclosure. 5 U.S.C.A. § 552.

[3] RECORDS ⇐ 65
326k65
There is presumption, under Freedom of Information Act, that documents held by government agency are subject to disclosure.

[4] RECORDS ⇐ 62
326k62
Government agency faced with request under Freedom of Information Act cannot withhold material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, purposes of Act. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 58
326k58
Under Freedom of Information Act, plaintiffs were entitled to receive from State Department names of Haitian nationals who had been returned to Haiti and were not mistreated, despite State Department's invasion of privacy concerns; public interest in safe relocation of returned Haitians outweighed de minimis invasion of privacy that would result. 5 U.S.C.A. § 552.

[5] RECORDS ⇐ 64
326k64
Under Freedom of Information Act, plaintiffs were entitled to receive from State Department names of Haitian nationals who had been returned to Haiti and were not mistreated, despite State Department's invasion of privacy concerns; public interest in safe relocation of returned Haitians outweighed de minimis invasion of privacy that would result. 5 U.S.C.A. § 552.

[6] RECORDS ⇐ 63
326k63
Government agency waived claimed exemptions to plaintiffs' Freedom of Information Act request by raising exemptions after court order requiring disclosure of the redacted information. 5 U.S.C.A. § 552.

***503** Michael D. Ray and Neil D. Kolner, Miami, Fla., for plaintiffs.

Carole A. Jeandheur, Washington, D.C., and Dexter A. Lee, Miami, Fla., for defendants.

MEMORANDUM ORDER ON PENDING MOTIONS

DYER, Senior Circuit Judge, sitting by designation.

THIS CAUSE was heard by the Court on various pending motions filed by the parties, and the Court hereby enters this Order pursuant to its rulings in

open court on March 1, 1989.

I

This case is brought pursuant to the Freedom of Information Act, 5 U.S.C. sec. 552 (FOIA), under which plaintiffs seek from the Immigration and Naturalization Service (INS), the Executive Office for Immigration Review (EOIR) and the United States Department of State (State Dept.) disclosure of (1) an alleged list of 600 Haitians who had been returned to Haiti and not mistreated after their arrival; and (2) investigative trip reports made by INS investigators who have visited Haiti.

Several searches conducted by each agency yielded responses that no records were found which fit the FOIA request made by plaintiffs. Subsequently, the State Dept. located and turned over to the plaintiffs twenty-five (25) responsive documents. Of these, seventeen documents were redacted to exclude the names of the Haitian individuals contained therein. The State Dept. claimed that release of the excised information could result in an invasion of privacy and, accordingly, asserted an exemption under the Freedom of Information Act ("FOIA"), 5 USC sec 552(b)(6). [FN1] At all times, however, each agency has maintained that there exists no list of 600 Haitians returned to Haiti.

FN1. 5 U.S.C. sec. 552(b)(6) provides an exemption from disclosure for matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

II

There are two issues confronting the Court. The first issue concerns disclosure ***504** requirements when an agency's asserts that its search uncovers no documents which satisfy an FOIA request. The second issue focuses on disclosure requirements when an agency claims that information excised from the released documents is exempt under the invasion of privacy exemption of sec. 552(b)(6).

A. Documents Claimed Not to Exist

The underlying principle in FOIA cases is that the requestor must show that an agency improperly withheld records. Kissinger v. Reporter's Comm. for Freedom of the Press, 445 U.S. 136, 150, 100 S.Ct. 960, 968, 63 L.Ed.2d 267 (1980). With respect to records that are claimed not to exist, affidavits are permissible and "possibly the best method of verification." Stephenson v. IRS, 629 F.2d 1140, 1145 (5th Cir.1980). An affidavit satisfies the "good faith" requirements of adequacy and completeness when it specifically documents the scope and methods undertaken for search and sets out the basis for the withholding of information. See Friedman v. F.B.I., 605 F.Supp. 306, 316 (N.D.Ga.1981). Once the agency demonstrates that its search was reasonable, the burden shifts to the requestor to rebut that evidence. Miller v. U.S. Dept. of State, 779 F.2d 1378, 1383 (8th Cir.1985).

[1] In this instance, the INS has responded that it did not conduct investigatory trips to Haiti nor have, in its possession, investigative reports. It has also maintained, by its answer, that the list of six hundred Haitians does not exists. The record indicates that there was a proper and adequate search, as demonstrated by the affidavits of the FOIA personnel. The record fails to disclose that any documents have been improperly withheld of that they, indeed, exist. On the record, that principle has not been rebutted by the plaintiffs. In addition, the record indicates there have been no requests directed to EOIR, and, therefore, there is no issue before the Court in connection with that party.

B. Documents Edited & Released by the State Department

[2] Where a FOIA request triggers a claim of exemption under the Act, the burden is on the government agency to demonstrate the basis for nondisclosure. Thus, contrary to the agency's assertion, a justiciable issue remains to be decided, and that is the propriety of the State Dept.'s claim of exemption under sec. 552(b)(6), because "the District Court must do something more to assure itself of the factual basis and bona fides of the agency's claim of exemption than rely solely upon an affidavit." Stephenson v. IRS, 629 F.2d 1140 (5th Cir.1980).

[3][4] There is a presumption, under the FOIA, that documents held by a government agency are subject to disclosure. Currie v. IRS, 704 F.2d 523, 530 (11th Cir.1983). An agency cannot withhold

material based on conclusory allegations of possible harm; it must show by specific, detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. See Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242, 260 (D.C.Cir.1977). In determining whether the disclosure constitutes a clearly unwarranted invasion of personal privacy, [FN2] the Court must "employ a balancing test, weighing an individual's right to privacy against the public right to disclosure of government information." Cochran v. United States, 770 F.2d 949, 955 (11th Cir.1985).

FN2. Under sec. 552(b)(6), the requested files must be "personnel", "medical", or "similar files". Because plaintiffs did not challenge this classification, the Court assumes that the names of returned Haitians are sufficiently personal in nature to satisfy the "similar file" requirement.

The degree of the invasion of privacy considers the potential harm to the individual from disclosure of the information. The critical aspect is that an invasion be actual rather than just theoretical; it must be more than a mere possibility. Dept. of Air Force v. Rose, 425 U.S. 352, 380 n. 19, 96 S.Ct. 1592, 1608 n. 19, 48 L.Ed.2d 11 (1976). Moreover, an agency's promise of confidentiality to the submitter of information was found insufficient to defend against disclosure. Robles v. E.P.A., 484 F.2d 843, 846 (4th Cir.1973).

***505** [5] As to the public interest involved in this case, this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians.

Any invasion of privacy from the mere act of disclosure of names and addresses would be de minimis and little more than speculation. The promise of confidentiality by the State Dept. is only one factor to be considered and, in this case, is not determinative of the outcome. Thus, weighing the public interest against the private interest, the balance tilts in favor of disclosure of the names because any intrusion into the privacy of the Haitian nationals would be minimal.

III

For these reasons, it is hereby

ORDERED AND ADJUDGED that summary judgment is GRANTED in favor of INS and EOIR with respect to the FOIA information requests explained or shown to be non-existent. It is

FURTHER ORDERED AND ADJUDGED that the State Department is required, within fifteen days from this Court's ruling in open court, to supply the redacted information contained in the seventeen documents. Final judgment as to the State Department is withheld until this time period has expired and a showing has been made to the Court that the names have been furnished to the plaintiffs, and, if they have not, then the Court will take further appropriate action forthwith. [FN3]

FN3. The remaining pending motions in this case are DENIED without prejudice. Plaintiffs' request for this Court to enjoin INS deportation proceedings is also DENIED. This Court has no authority to enjoin those proceedings under the FOIA or the Administrative Procedure Act, Title 5 U.S.C. sec. 704-706.

DONE AND ORDERED.

ON MOTION TO COMPEL RELEASE OF UNREDACTED DOCUMENTS

THIS CAUSE having come before the Court, and the Court having heard argument of counsel on April 12, 1989, and considered the same, it is hereby

ORDERED AND ADJUDGED that plaintiffs' motion for pro hac vice appearance of Neil D. Kolner, Esq. is GRANTED and it is

[6] FURTHER ORDERED AND ADJUDGED that defendants' motion to alter or amend is DENIED. After weighing the public interest in disclosure against the claim of exemption pursuant to 5 U.S.C. 552(b)(6), this Court Ordered the STATE DEPARTMENT on March 2, 1989 to produce to plaintiffs, no later than March 16, 1989 as originally requested in plaintiff's June 15, 1985 Freedom of Information Act Request, unredacted copies of all documents in defendant's possession which satisfy plaintiff's request. Defendants did not comply but instead raised new arguments which the Court finds are wholly unfounded. Rather than exhibit due diligence the government has been

neglectful in this matter by failing to raise these exemptions at the outset of this litigation. Consequently, the government has waived entitlement to those claims by invoking these belated exemptions after this Court's order requiring disclosure of the redacted information. See, e.g., Senate of the Commonwealth of Puerto Rico v. Dept. of Justice, 823 F.2d 574, 580 (D.C.Cir.1987); Ryan v. Dept. of Justice, 617 F.2d 781, 782 (D.C.Cir.1980); Jordan v. Dept. of Justice, 591 F.2d 753 (D.C.Cir.1978) (en banc); Cotner v. U.S. Parole Comm., 747 F.2d 1016, 1018 (5th Cir.1984); Fendler v. Parole Comm., 774 F.2d 975, 978 (9th Cir.1985); American Broadcasting Co. v. U.S.I.A., 599 F.Supp. 765, 768 (D.D.C.1984); Donovan v. F.B.I., 633 F.Supp. 35 (S.D.N.Y.1986). The government has failed to point to any set of facts that would make this an "exceptional" case such that the waiver doctrine should not apply. See Jordan 591 F.2d at 780. Indeed, by its own admission at oral argument, the government agreed its motion contains nothing more than "new material." Thus, in its prior Order this Court did not overlook any basis in the record which would require a different conclusion. The government has only attempted ***506** to "play cat and mouse by withholding its most powerful canon until after the district court has decided the case and then springing it on surprised opponents and the judge." Senate of the Commonwealth, 823 F.2d at 580, quoting Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710, 722 (D.C.Cir.1973). For this reason, it is therefore

FURTHER ORDERED AND ADJUDGED that the STATE DEPARTMENT shall release the unredacted documents to plaintiffs no later than ten (10) days from this Court's oral ruling on April 12, 1989.

DONE AND ORDERED.

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DATE AND TIME PRINTING ENDED:	02/05/96	08:47:49 pm (Central)
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NUMBER OF LINES CHARGED:	0	

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In re DEPARTMENT OF JUSTICE, Petitioner.
Barbara Ann CRANCER, Appellee,
v.
UNITED STATES DEPARTMENT OF JUSTICE, Appellant.

Nos. 91-2080, 91-2164.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1992.

Decided Aug. 5, 1993.

Freedom of Information Act (FOIA) suit was brought. The United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., required government to provide Vaughn index covering each document sought. Appeal was taken. The Court of Appeals, 950 F.2d 530, affirmed. En banc rehearing was granted. The Court of Appeals, Wollman, Circuit Judge, held that Vaughn index could not be required.

Writ of mandamus issued, orders vacated, and case remanded.

McMillian, Circuit Judge, dissented and filed opinion joined by Arnold, Chief Judge.

[1] FEDERAL COURTS ⚿ 524
170Bk524
Court of Appeals had jurisdiction under All Writs Act to decide whether district court committed usurpation of power by directing Department of Justice to produce Vaughn index when invoking Freedom of Information Act (FOIA) exemption for law enforcement records; if district court lacked authority, writ would be proper remedy, and issue of availability of writ was intertwined with merits of the interlocutory matter. 5 U.S.C.A. § 552(b)(7)(A); 28 U.S.C.A. § 1651(b).

[2] RECORDS ⚿ 50
326k50
Consistent with policy of broad disclosure under Freedom of Information Act (FOIA), government is required to release all requested information upon demand of any number of public. 5 U.S.C.A. § 552.

[3] RECORDS ⚿ 62
326k62
Once information is requested under Freedom of Information Act (FOIA), government must provide the information, unless it determines that specific exemption applies. 5 U.S.C.A. § 552.

[4] RECORDS ⚿ 62
326k62
Vaughn index could not be required for law enforcement records allegedly exempt from disclosure under Freedom of Information Act (FOIA); thus, district court should not have required government, after identifying each document, to provide detailed justification statement covering each refusal to release agency records or portions. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⚿ 65
326k65
Government need not produce fact-specific and document-specific Vaughn index in order to satisfy burden of establishing application of Freedom of Information Act (FOIA) exemption for law enforcement records; contents of requested documents are irrelevant, and court must focus on particular categories of documents and likelihood that release of documents in those categories could reasonably be expected to threaten enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[6] RECORDS ⚿ 65
326k65
To satisfy burden with regard to Freedom of Information Act (FOIA) exemption for law enforcement records, government must define functional categories of documents, conduct document-by-document review to assign documents to proper categories, and explain to court how release of each category would interfere with enforcement proceeding. 5 U.S.C.A. § 552(b)(7)(A).

[7] RECORDS ⚿ 65
326k65
If generic index submitted by government is not sufficient to sustain Freedom of Information Act (FOIA) exemption for law enforcement records, then district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with

enforcement proceedings. 5 U.S.C.A. § 552(b)(7)(A).

[8] RECORDS ⇐ 66
326k66
District court may examine disputed documents in camera to make firsthand determination of application of Freedom of Information Act (FOIA) exemption for law enforcement records if categories submitted by government remain too general after district court requests more specific, distinct categories. 5 U.S.C.A. § 552(b)(7)(A).

[9] RECORDS ⇐ 63
326k63
While district court may not order Vaughn index as aid to review of claim for exemption under Freedom of Information Act (FOIA) exemption for law enforcement records, court must satisfy itself that requested documents have been properly withheld. 5 U.S.C.A. § 552(b)(7)(A).

***1304** Scott R. McIntosh, Washington, DC, argued (Stuart M. Gerson, Stephen B. Higgins, Leonard Schaitman and Scott R. McIntosh, on the petition for rehearing), for appellant.

Richard E. Greenberg, Clayton, MO, argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

In In re Department of Justice, 950 F.2d 530 (8th Cir.1991) (Crancer I), a panel of this court upheld the district court's order requiring the government to provide a Vaughn [FN1] index after the government had invoked Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1988). We granted the government's suggestion for rehearing en banc and vacated the panel's decision. We now issue a writ of mandamus, vacate the challenged order, and remand the case to the district court for further proceedings.

FN1. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

I.

In 1987, Barbara Ann Crancer filed a Freedom of Information Act (FOIA) request with the Department of Justice. Crancer sought the release of certain information uncovered during the investigation conducted by the Federal Bureau of Investigation into the disappearance of her father, Jimmy Hoffa, the former president of the International Brotherhood of Teamsters. The FBI's investigation has resulted in the accumulation of more than 13,800 pages of records relating to Hoffa's disappearance.

The Department denied Crancer's request on the basis of Exemption 7(A), contending that the Hoffa FBI file contains "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

After exhausting her administrative remedies, Crancer brought suit to compel the Department to provide her with the documents she had requested. During the pendency of her suit, Crancer filed a second, broader request seeking any and all materials relating to the FBI's investigation into Hoffa's disappearance. After this request was administratively denied by the Department, also on the basis of Exemption 7(A), Crancer amended her complaint to include her second request.

The Department moved for summary judgment on the basis of the claimed exemption. The district court ordered the Department to provide Crancer with a Vaughn index so that she could effectively oppose the government's pending motion. The court's order required the Department to produce an "itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request," together with a "detailed justification statement covering each refusal to release [an] agency record[ ] or portions thereof." D.Ct. Order of July 27, 1990, at 1. The Department asked the court to reconsider its order directing the production of the Vaughn index. This request was denied. The Department then requested that the district court modify its earlier order and allow the Department to provide a categorical description of the documents contained in the Hoffa FBI file. The Department submitted a list of nine categories of documents and

an affidavit describing the potential interference with enforcement proceedings that would result if it were required to compile a Vaughn index. The district court denied this request and ordered the Department to submit the Vaughn index to a magistrate judge for in camera review.

In lieu of submitting a Vaughn index, the Department asked the magistrate judge to review the actual documents in camera. The magistrate judge denied this request, but extended the time period in which the Vaughn index was to be submitted. The Department then asked the district court to ***1305** reconsider the magistrate judge's order or, in the alternative, to certify the matter for interlocutory appeal. These requests were also denied.

The Department then sought relief from this court, asserting jurisdiction under the collateral order doctrine, Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), or the All Writs Act, 28 U.S.C. § 1651(b).

In Crancer I, the panel asserted jurisdiction under the All Writs Act and upheld the district court's order requiring the preparation of a Vaughn index. The panel first determined that the Department could not be required to provide a specific factual showing and explanation describing why each document is exempt. It went on to hold, however, that the Department could be required to make a specific factual showing to demonstrate why each document belongs in a certain category, along with an explanation describing why the category itself is exempt from disclosure.

II.

[1] We first examine whether, and the basis upon which, we have jurisdiction to hear this case.

We possess discretionary writ-issuing authority under the All Writs Act, 28 U.S.C. § 1651(b). As noted by the panel in Crancer I, mandamus is "available only in those exceptional circumstances amounting to a judicial usurpation of power." In re Ford Motor Co., 751 F.2d 274, 275 (8th Cir.1984).

The panel determined that:

> [The Department's] argument is a novel one and has not been directly addressed by any court. If [the Department] is correct in its contention that the district court lacked authority to order a Vaughn index, then a writ would be the proper remedy. Because the issue of whether the writ is available is intertwined with the merits of this interlocutory matter, we must decide whether the district court had authority to require a Vaughn-type index in these circumstances.

Crancer I, 950 F.2d at 532 (citation omitted). We agree with the panel's analysis and believe that this case presents a unique situation. Thus, we conclude that we have jurisdiction to decide the question whether the district court's order directing the Department to produce a Vaughn index in the face of the Department's invocation of Exemption 7(A) constituted a judicial usurpation of power.

III.

[2] "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978). Consistent with this policy of broad disclosure, the government is required to release all requested information upon the demand of any member of the public. Id. at 221, 98 S.Ct. at 2316; see also Curran v. Department of Justice, 813 F.2d 473 (1st Cir.1987); Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987). Congress fashioned certain explicit exemptions from disclosure, however, in order to preserve vital government policies and, in some cases, to protect individuals. See 5 U.S.C. § 552(b)(1)-)9; see also Robbins Tire, 437 U.S. at 220-21, 98 S.Ct. at 2316 ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests.").

[3] Once information is requested under FOIA, therefore, the government must provide the information unless it determines that a specific exemption applies. Likewise, the government bears the burden of demonstrating that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). The district court must determine de novo whether the government has satisfied its burden. Id.

In the face of a claimed statutory exemption, district courts have sometimes required the

government to provide a Vaughn index. "This indexing procedure is perceived as necessary to permit the district court and the requesting party to evaluate the [government's] decision to withhold records and to ensure its compliance with the mandates of the FOIA." Barney v. IRS, 618 F.2d 1268, 1272 (8th Cir.1980) (per curiam).

***1306** A Vaughn index provides a specific factual description of each document sought by the FOIA requester. Specifically, such an index includes a general description of each document's contents, including information about the document's creation, such as date, time, and place. Crancer I, 950 F.2d at 533. "For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided." Id.; see also Barney, 618 F.2d at 1272.

[4] Exemption 7(A) of FOIA provides that the act "does not apply to matters that are--* * * (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). The government contends that the courts have interpreted this exemption differently from other FOIA exemptions, with the result that a district court may not order the production of a Vaughn index when Exemption 7(A) is invoked.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), the Supreme Court addressed the burden that the government must bear when asserting Exemption 7(A). In that case, the FOIA requester, an employer, sought from the National Labor Relations Board all statements made by potential witnesses prior to a Board hearing on the employer's unfair labor practices. Id. at 216, 98 S.Ct. at 2314. On appeal, the employer argued that the district court had erred by not requiring the government to make an individualized showing that each withheld document fit within the limits of Exemption 7(A). The Supreme Court rejected this argument, interpreting Exemption 7(A) of FOIA to require the government to prove that "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324.

In support of its ruling, the Supreme Court noted that:

> [t]here is a readily apparent difference between [Exemption 7(A)] and [Exemptions 7(B)-(D)]. The latter [exemptions] refer to particular cases ... and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since [Exemption 7(A)] speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24, 98 S.Ct. at 2318. The Court then examined Exemption 7's legislative history, which appeared to confirm the Court's observation regarding the distinguishing characteristic of Exemption 7(A). Id. at 224-34, 98 S.Ct. at 2318. The Court further noted that had Congress intended that "the Government in each case show a particularized risk to its individual 'enforcement proceedin[g],' " it could have done so. Id. at 234, 98 S.Ct. at 2323.

The Court also addressed Congress's 1974 amendment of Exemption 7(A). This amendment was designed "to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 236, 98 S.Ct. at 2324. The Court's discussion of President Ford's veto of the 1974 amendment and the subsequent congressional override is instructive for our present analysis. The President was concerned that the 1974 amendment to Exemption 7(A) "would require the Government to 'prove ...--separately for each paragraph of each document--that disclosure "would" cause' a specific harm" to enforcement proceedings. Id. at 235, 98 S.Ct. at 2323 (citation omitted). Congressional supporters of the amendment termed the President's interpretation of the amendment " 'ludicrous,' " stating that the " 'burden is substantially less than we would be led to believe by the President's message.' " Id. (citation omitted). [FN2]

> FN2. For further discussion of the legislative history of the 1974 amendment to Exemption 7(A), see Federal Bureau of Investigation v. Abramson, 456 U.S. 615, 626, 102 S.Ct. 2054, 2061, 72 L.Ed.2d 376 (1982); Campbell v. Department of

Health and Human Serv., 682 F.2d 256, 261-63 (D.C.Cir.1982).

The Court concluded that although the 1974 amendment to Exemption 7(A) was designed ***1307** to eliminate blanket exemptions for records found in investigatory files, Congress did not intend that generic determinations of those materials entitled to Exemption 7(A) protection could never be made. Rather, the government must demonstrate, and courts must determine, whether "disclosure of particular kinds of investigatory records ... would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. In other words, Congress intended that certain types or categories of investigatory records be withheld under Exemption 7(A) because disclosure of documents within those categories generally would interfere with enforcement proceedings.

With this understanding, post-Robbins Tire courts have made these determinations generically, category-of-document by category-of-document. In Barney v. IRS, for example, we were confronted with the question whether, in the wake of Robbins Tire, the government was required to provide a Vaughn index after the government invoked Exemption 7(A). 618 F.2d 1268 (8th Cir.1980) (per curiam). We held that "[t]o sustain its burden of showing documents were properly withheld under exemption 7(A) the government had to establish only that they were investigatory records compiled for law enforcement purposes and that production would interfere with pending enforcement proceedings." Id. at 1272-73. The Barney court bolstered its conclusion by emphasizing that "[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding." Id. at 1273 (citing Robbins Tire, 437 U.S. at 234-35, 98 S.Ct. at 2323).

Congress amended Exemption 7 in 1986 to lessen the burden on the government in establishing the application of Exemption 7(A). Freedom of Information Reform Act of 1986 (FIRA), Pub.L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 (1986). Whereas under the 1974 version of Exemption 7(A), the government bore the burden of showing that the production of the requested law enforcement records "would interfere with enforcement proceedings," under the 1986 version the government need only show that the production of law enforcement records or information "could reasonably be expected to interfere with law enforcement proceedings."

In 1989, the Supreme Court revisited the government's burden under Exemption 7, this time focusing on the use of categorical determinations under Exemption 7(C), which covers documents whose production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) ("Reporters Committee "). In Reporters Committee, a group of journalists requested that the FBI disclose an individual's computerized criminal history file, known colloquially as the person's "rap sheet." The Supreme Court held that the production of rap sheets "as a categorical matter" could reasonably be expected to constitute an unwarranted invasion of a citizen's privacy. Id. at 780, 109 S.Ct. at 1485.

The Court discussed its earlier approval of a categorical approach to Exemption 7(A) in Robbins Tire. The Court noted that it had based its ruling in Robbins Tire on the perception that Exemption 7(A)'s reference to the plural "enforcement proceedings" supported a categorical approach when 7(A) was invoked, in contrast to the singular references in the other subsections of Exemption 7, which seemed to suggest a case-by-case balancing. Finding that "[j]ust as one can ask whether a particular rap sheet is a 'law enforcement record' that meets the requirements of [Exemption 7(C)], so too can one ask whether rap sheets in general ... are 'law enforcement records' that meet the stated criteria," the Court concluded that its approval of a categorical approach for Exemption 7(A) applied with equal force to the other subsections in Exemption 7. Id. at 779, 109 S.Ct. at 1485. Because the Court found that the disclosure of computerized compilations of an individual's criminal history could always be expected to constitute an invasion of an individual's privacy, it held that rap sheets as a category are exempted from disclosure under FOIA. Id. at 780, 109 S.Ct. at 1485.

The Court also supported its holding that a

categorical approach was appropriate for Exemption 7(C) as well as 7(A) by pointing to ***1308** the 1986 amendment. The Court stated that the amended 7(C), which like 7(A) had changed from the more stringent "would" to the more flexible "could reasonably be expected to," was enacted "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." Id. at 777 n. 22, 109 S.Ct. at 1484 n. 22. The Court further noted that the amendment was designed to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness ... based on an objective test.' " Id. This reasonableness standard, the Court concluded, "amply supports a categorical approach to the balance of private and public interests in Exemption 7(C)." Id. The Court's conclusion concerning the effect of the amendment applies with equal force to Exemption 7(A), given the Court's conclusion that all of the Exemption 7 subsections should be interpreted similarly with respect to the use of categorical justifications.

Recently, the Court further explained its categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). Seeking to support a claim that the government had failed to disclose exculpatory evidence in his earlier criminal case, Landano sought all of the FBI files connected with the police officer's murder for which Landano had been convicted. After releasing a portion of its files, the FBI withheld certain documents on the grounds that they were exempt under Exemption 7(D), which applies to law enforcement records or information whose production "could reasonably be expected to disclose the identity of a confidential source." The district court largely rejected the government's categorical explanations and held that the FBI had to articulate "case-specific reasons for non-disclosure" of all information other than records pertaining to regular FBI informants. Id., --- U.S. at ----, 113 S.Ct. at 2018. The Court of Appeals for the Third Circuit affirmed, holding that the government had to provide detailed explanations relating to each alleged confidential source in order to justify nondisclosure under Exemption 7(D). Id., ---U.S. at ----, 113 S.Ct. at 2019.

The Supreme Court reversed and remanded. The Court first rejected the government's argument that it is entitled to a presumption under FOIA that all FBI sources are confidential and that any records relating to FBI sources should be presumptively exempt from disclosure. The Court noted that the government's proposed presumption was not rebuttable, as argued by the government, but amounted to an irrebuttable presumption or blanket exemption that found no support in the language or legislative history of Exemption 7(D). Id., --- U.S. at ----, 113 S.Ct. at 2023.

The Court, however, did not agree with the Third Circuit's requirement that the government must provide a detailed justification relating to each alleged confidential source. To the contrary, the Court stated that the government could point to categories of documents, the circumstances surrounding which would support the inference that the sources to whom they pertained were confidential. Id., --- U.S. at ----, 113 S.Ct. at 2023. For example, the Court suggested that "paid informants normally expect their cooperation with the FBI to be kept confidential," implying that the government need only present a category of documents relating to paid informants, whose production could reasonably be expected to disclose the informant's identity, in order to justify nondisclosure under Exemption 7(D). Id. As a second example, the Court opined that eyewitnesses to a gang-related murder could also probably be presumed to be confidential. Id. The Court concluded that such a generic, categorical approach best articulated Congress's intent "to provide ' " 'workable' rules" ' of FOIA disclosure." Id. (citing Reporters Committee, 489 U.S. at 779, 109 S.Ct. at 1485).

Thus, we conclude that the Supreme Court has consistently interpreted Exemption 7 of FOIA (specifically so far subsections 7(A), 7(C), and 7(D)) to permit the government to proceed on a categorical basis in order to justify nondisclosure under one of Exemption 7's subsections. See Landano, --- U.S. at ---- - ----, 113 S.Ct. at 2023-24; Reporters Committee, 489 U.S. at 779-80, 109 S.Ct. at 1485; Robbins Tire, 437 U.S. at 241-43, 98 S.Ct. at 2326-27. The Court's interpretation ***1309** of Exemption 7 and Congress's intent in enacting it has been strengthened by the 1986 amendment, which provided for greater flexibility and lessened the government's burden. See Reporters Committee, 489 U.S. at 777 n. 22, 109 S.Ct. at 1484 n. 22.

Our interpretation of Exemption 7(A) in Barney mirrors the Supreme Court's interpretation. Moreover, consistent with the teachings of Robbins Tire, our analysis in Barney is in accord with the principle that " 'the inherent nature of the requested documents is irrelevant to the question of exemption.' " Curran, 813 F.2d at 474 (quoting Irons v. FBI, 811 F.2d 681, 685 (1st Cir.1987)). This interpretation is consistent with decisions from other circuits. See, e.g., Lewis v. IRS, 823 F.2d 375, 378 (9th Cir.1987); Curran, 813 F.2d at 475; Church of Scientology of Calif. v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986); Campbell, 682 F.2d at 265. [FN3]

> FN3. The panel attempted to distinguish these cases on the ground that the appellate courts were reviewing district court decisions that had found Vaughn indices not to be required. Crancer I, 950 F.2d at 534. We find this reasoning unpersuasive. Whatever the procedural posture, the Supreme Court has made clear that the government does not have to provide fact-specific information with respect to each document to justify its claim that Exemption 7(A) applies. As demonstrated, the actual contents of the documents are not relevant when the propriety of Exemption 7(A) is in dispute. See Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2323. Rather, the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation. Id.

The District of Columbia Circuit, which originally developed the Vaughn index, has succinctly explained the relationship between Exemption 7(A), as interpreted by Robbins Tire, and the use of Vaughn indices:

> [w]hen ... a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a Vaughn index is futile. Thus, in NLRB v. Robbins Tire & Rubber Co., [citation omitted], the Supreme Court upheld, without any provision of a Vaughn index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A Vaughn index would have served no purpose since ... [Exemption 7(A)] did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements.

Church of Scientology, 792 F.2d at 152 (Scalia, J.).

In light of the above discussion, the district court's order for a Vaughn index in the present case appends an additional requirement to Exemption 7(A) that exceeds the bounds of the statute as interpreted by the Supreme Court and this court. The district court's order required the government, after identifying each document, to provide a "detailed justification statement covering each refusal to release said agency records or portions thereof." D.Ct. Order of July 27, 1990, at 1. This goes beyond the categorical explanations that the Supreme Court in Robbins Tire held to be sufficient to justify nondisclosure under Exemption 7(A).

[5] In sum, the government bears the burden of establishing that Exemption 7(A) applies. And under Robbins Tire, Exemption 7(A) does not require that the government produce a fact-specific, document-specific, Vaughn index in order to satisfy that burden. The contents of the requested documents are irrelevant. It is the particular categories of documents, and the likelihood that the release of documents within those categories could reasonably be expected to threaten enforcement proceedings, on which the court must focus. The district court, therefore, acted beyond the scope of its authority when it ordered the Department to produce a Vaughn index.

IV.

[6] "Although generic determinations are permitted, and the government need not justify its 7(A) refusal on a document-by-document basis, there must nevertheless be some minimally sufficient showing." Curran, 813 F.2d at 475. To satisfy its burden with regard to Exemption 7(A), the government must define functional categories of documents; ***1310** it must conduct a document-by-document review to assign documents to proper categories; and it must explain to the court how the release of each category would interfere with enforcement proceedings. [FN4] See Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986).

> FN4. We express no opinion as to whether the

> categorical index submitted by the Department in this case satisfies the Bevis paradigm. The proceeding below was, for all intents and purposes, focused only on whether the district court could order a Vaughn index. On remand, the Department should submit its categorical index and affidavits in accordance with the principles set forth in this opinion.

[7] If the generic index submitted by the government is not sufficient to sustain the 7(A) exemption, then the district court may request more specific, distinct categories so that it may more easily determine how each category might interfere with enforcement proceedings. See Campbell, 682 F.2d at 265. Indeed, this is what the court ordered in Bevis, 801 F.2d at 1390. "The chief characteristic of an acceptable taxonomy should be functionality--that is, the classification should be clear enough to permit a court to ascertain 'how each .. category of documents, if disclosed, would interfere with the investigation.' " Curran, 813 F.2d at 475 (citing Campbell, 682 F.2d at 265).

[8] If the categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination. 5 U.S.C. § 552(a)(4)(B); Lewis, 823 F.2d at 378; see also Cleary v. FBI, 811 F.2d 421, 423 (8th Cir.1987) (in camera examination in 7(C) and (D) exemption case); Parton v. United States Dep't of Justice, 727 F.2d 774 (8th Cir.1984); Cox v. United States Dep't of Justice, 576 F.2d 1302 (8th Cir.1978).

In Dickerson v. Department of Justice, 992 F.2d 1426 (6th Cir.1993), the plaintiff sought the release of information from the Hoffa FBI file and requested a Vaughn index. The district court accepted the government's categorical index, examined certain documents in camera, and granted summary judgment to the government on the basis of Exemption 7(A). The court stated that it was "satisfied beyond any doubt that the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422 (E.D.Mich. July 31, 1991).

On appeal, the Court of Appeals for the Sixth Circuit reviewed the file that had been submitted to the district court and concluded that the district court had not abused its discretion in ruling that there was no need to go beyond the documents that the FBI had submitted. Dickerson, 992 F.2d at 1431-32. The court of appeals also held that the district court was correct in finding that the FBI's investigation remains active and that it was directed toward the institution of criminal proceedings. Id. at 1432. Further, the Sixth Circuit held that the district court was correct "in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution." Id. at 1433.

[9] In the present case, the district court was apparently of the belief that the Department was not asserting Exemption 7(A) in good faith or that it had not individually reviewed the requested documents to place them in their functional categories. While the district court may not order a Vaughn index as an aid to its review, it still must satisfy itself that the requested documents have been properly withheld. The Department's failure to demonstrate that the sought-after documents relate to an ongoing investigation or could reasonably be expected to interfere with future law enforcement proceedings will carry with it the loss of the 7(A) exemption. In that regard, we note that although the Sixth Circuit's affirmative holding on that issue in Dickerson will not be binding on the district court on remand, that holding does give credence to the Department's assertion of the 7(A) exemption in the present case.

In summary, Congress enacted Exemption 7(A) to prohibit interference in an ongoing criminal investigation. The Supreme Court's decision in Robbins Tire to allow generic category-by-category classifications in Exemption 7(A) cases, rather than detailed fact- ***1311** specific explanations on a document-by-document basis, serves an important interest: "[p]rovision of the detail which a satisfactory Vaughn Index entails would itself probably breach the dike." Curran, 813 F.2d at 475. "Withal, a tightrope must be walked [in Exemption 7(A) cases]: categories must be distinct enough to allow meaningful judicial review, yet not so distinct as prematurely to let the cat out of the investigative bag." Id. In short, we will not allow the cure, Exemption 7(A), to "become the carrier of the disease." Id.

The writ of mandamus prayed for is issued. The

orders directing the production of a Vaughn index are vacated, and the case is remanded to the district court for further proceedings consistent with this opinion.

McMILLIAN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, joins, dissenting.

"Free people are, of necessity, informed; uninformed people can never be free." Sen. Judiciary Comm., Freedom of Information, 88th Cong., 1st Sess. 3 (1963) (remarks of Sen. Edward Long).

As discussed below, although I agree with much of the analysis in the majority opinion, I do not agree that the district court exceeded the scope of its authority when it ordered the Department of Justice (hereinafter the government) to prepare a Vaughn index of FBIHQ file 9-60052, the FBI's investigatory file concerning the investigation into the disappearance and presumed murder of Teamsters president Jimmy Hoffa in July 1975. Accordingly, I would deny the petition for writ of mandamus.

COLLATERAL ORDER

First, I do not agree that we have appellate jurisdiction to review the government's appeal, No. 91-2164. As discussed below, the term "Vaughn index" is derived from 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), and a Vaughn index is typically a detailed affidavit which "permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information." Id., 484 F.2d at 826. In my view, the district court order in the present case requiring the preparation of a Vaughn index was essentially a discovery order in this FOIA litigation. Discovery orders are "generally not appealable as collateral orders even when they are attacked as burdensome." Hinton v. Department of Justice, 844 F.2d 126, 131 (3d Cir.1988). The Vaughn index is not an end in itself; by definition, the Vaughn index does not itself disclose anything of substance. "[A] Vaughn index does not accord a requester any of the substantive relief [the requester] seeks.... Rather, the [Vaughn] index is a tool for determining the requester's substantive rights [under FOIA]." Id. at 130.

It is true that "[the Freedom of Information Act (FOIA)] was not intended to supplement or displace rules of discovery." John Doe Agency v. John Doe Corp., 493 U.S. 146, 153, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989). However, the present case involves only the FOIA requests themselves. It is a discrete civil action. The FOIA is not being used here as a discovery tool to supplement or displace discovery in connection with other litigation, for example, other criminal or civil proceedings. In discovery proceedings the issue is whether the information sought is relevant and necessary; however, in FOIA litigation the only issue is whether the agency has properly withheld the information sought under one of the specific statutory exemptions. See, e.g., North v. Walsh, 279 U.S.App.D.C. 373, 881 F.2d 1088, 1095 (1989) (FOIA request seeking documents from Office of Independent Counsel concerning on-going criminal investigation of plaintiff).

I also do not agree that the district court order is appealable under the final collateral order exception. Hinton v. Department of Justice, 844 F.2d at 131. Collateral orders are appealable if (1) the order conclusively decides the disputed issue, (2) the issue is entirely distinct from the merits of the case, and (3) the order would be effectively unreviewable if the appeal were postponed until the issuance of a final order. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). At this point in the present case, the district court has only ordered the preparation of a Vaughn index and has yet to ***1312** conclusively decide the merits of the government's claim of exemption under Exemption 7(A). The district court agreed to consider the Vaughn index in camera; the district court has not even decided whether or not to disclose the Vaughn index itself to the public or counsel for plaintiff. As noted above, the preparation of a Vaughn index "does not accord a requester any of the substantive relief [he or she] seeks." Id. at 130. The substantive relief the requester wants is access to the government's records, not the preparation of or access to the Vaughn index of those records. The preparation of a Vaughn index is only a preliminary or preparatory step. As was noted by the panel majority opinion,

the present case

> is unique because it is not a review of a district court's order that documents be disclosed, nor is it a review of a district court's decision that documents are exempt from disclosure. [The present] case asks us to determine what a district court may do while deciding whether documents are or are not exempt from disclosure.

950 F.2d at 533.

MANDAMUS

In the present case the government does not argue the district court abused its discretion in ordering a Vaughn index; the government argues the district court lacked the authority to order a Vaughn index. The government has thus presented the issue in terms of the power or authority of the district court. The government argues that Exemption 7(A) is different from other FOIA exemptions and that the district court can never require the preparation of a Vaughn index when the government agency invokes Exemption 7(A). As noted by the panel majority opinion, this is a novel argument that squarely challenges the authority of the district court to act. 950 F.2d at 532. Because the government has presented its argument in terms of the district court's authority to act, and not in terms of whether or not the district court abused its discretion, I agree that, under these unique circumstances, we have jurisdiction to review the district court order by petition for writ of mandamus.

THE VAUGHN INDEX

A healthy distrust of government, and a corresponding suspicion of government secrecy, is the underlying premise of FOIA. FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978) (Robbins). FOIA's "general philosophy [is] 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Department of Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976), citing S.Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). " 'Congress realized that legitimate governmental and private interests could be harmed by release of certain types of information,' and therefore provided the 'specific exemptions under which disclosure could be refused.' " John Doe Agency v. John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475, citing FBI v. Abramson, 456 U.S. 615, 621, 102 S.Ct. 2054, 2059, 72 L.Ed.2d 376 (1982). The statutory exemptions are to be narrowly construed, Department of Air Force v. Rose, 425 U.S. at 361, 96 S.Ct. at 1599, the district courts review the claim of exemptions de novo, and the burden of justifying nondisclosure, that is, the burden of establishing that the information requested is protected from disclosure by a specific exemption, is on the agency. See 5 U.S.C. § 552(a)(4)(B).

As noted by the panel majority opinion, the district court's responsibility to review de novo the government's claimed exemptions is complicated by the fact that "ordinarily a government agency, and not the court, has access to the documents in question." 950 F.2d at 533. "The party requesting the disclosure must rely upon his [or her] adversary's representations as to the material withheld, and the court is deprived of the benefit of informed advocacy to draw its attention to the weaknesses in the withholding ***1313** agency's arguments." Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992). This is the precise difficulty at the heart of the present case and it is also what precipitated the invention of the Vaughn index.

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure....
>
> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information, and this case provides a classic example of such a situation.

Vaughn v. Rosen, 484 F.2d at 823-24. Thus, in FOIA litigation, the plaintiff, the party seeking disclosure, is placed in the awkward and frustrating position of speculating about the likely contents of documents that it has never seen.

In Vaughn v. Rosen the plaintiff was a law professor doing research on the Civil Service Commission. The professor sought disclosure of the evaluations of certain government agencies' personnel management programs and certain other special reports of the Bureau of Personnel Management. The government claimed that the documents contained information of a personal nature about the government agency employees and that disclosure would constitute an invasion of the employees' personal privacy. The court of appeals noted that the plaintiff's lack of knowledge necessarily meant that he quite literally did not know, and therefore could not inform the court, whether or not the government's factual characterization of the documents as containing information of a personal nature was accurate. Id., 484 F.2d at 824. The court of appeals observed that the plaintiff's lack of knowledge not only hampered his ability to litigate in the district court (he was essentially limited to arguing that the exemption is very narrow and that the general nature of the documents sought made it unlikely that they contained personal information), but

> [t]his lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, ... and hence the typical process of dispute resolution is impossible....
>
> The problem is compounded at the appellate level. In reviewing a determination of exemption, an appellate court must consider the appropriateness of a trial court's characterization of the factual nature of the information. Frequently trial courts' holdings in FOIA cases are stated in very conclusory terms, saying simply that the information falls under one or another of the exemptions to [FOIA]. An appellate court, like the trial court, is completely without the controverting illumination that would ordinarily accompany a request to review a lower court's factual determination; it must conduct its own investigation into the document. The scope of inquiry will not have been focused by the adverse parties and, if justice is to be done, the examination must be relatively comprehensive. Obviously, an appellate court is even less suited to making this inquiry than is a trial court.

Id., 484 F.2d at 824-25. The FOIA requester in the present case is in the same position as the law professor in Vaughn v. Rosen.

The Vaughn v. Rosen court concluded that, contrary to the intent of Congress, FOIA "actually encourage[d] the Government to contend that large masses of information are exempt, when in fact part of the information should be disclosed." Id., 484 F.2d at 826. Not only did FOIA contain "no inherent incentives that would affirmatively spur government agencies to disclose information," id., but "since the burden of determining the justifiability of a government claim of exemption currently falls on the court system, ... [FOIA] encourage[d] agencies automatically to claim the broadest possible grounds for exemption for the greatest amount of information." ***1314** Id. These concerns compelled the Vaughn v. Rosen court to develop what has become known as the Vaughn index in order to "(1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information." Id.

> As noted by the panel majority opinion,
>
> [t]here is no prescribed form for a Vaughn index; any form is acceptable as long as the affidavits provided by the government assist the court's efforts to decide the issues at hand. Regardless of form, however, certain components are integral parts of any Vaughn index. Specifically, Vaughn indices usually communicate descriptions of each and every document contained in the file, including a general description of each document's contents and general facts about their creation (such as date, time, and place). For each document, the exemption claimed by the government is identified, and an explanation as to why the exemption applies to the document in question is provided.

950 F.2d at 533 (citations omitted). "Specificity is the defining requirement of the Vaughn index and affidavit; affidavits cannot support summary judgment [upholding the government's claimed

exemption] if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.' " King v. United States Department of Justice, 265 U.S.App.D.C. 62, 830 F.2d 210, 219 (1987) (footnotes omitted). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a de novo review.' " Id. Whether the government's affidavit or affidavits constitute an adequate Vaughn index is a question of law reviewed de novo. Wiener v. FBI, 943 F.2d at 978, citing Binion v. United States Department of Justice, 695 F.2d 1189, 1193 (9th Cir.1983).

Preparation of the Vaughn index does more than require the government agency to review and classify the documents in question. The resulting Vaughn index is more than a litigation tool that the FOIA requester can use to challenge the government's withholding of those documents. It is important to remember that requiring the government agency to prepare a Vaughn index

> forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he [or she] can present his [or her] case to the trial court.

Lykins v. Department of Justice, 233 U.S.App.D.C. 349, 725 F.2d 1455, 1463 (1984). "The index thus functions to restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." Wiener v. FBI, 943 F.2d at 977-78; see also Davis v. CIA, 711 F.2d 858, 861 (8th Cir.1983), cert. denied, 465 U.S. 1035, 104 S.Ct. 1307, 79 L.Ed.2d 705 (1984).

ROBBINS DECISION

As has already been discussed, Exemption 7(A) is the law enforcement exemption and provides that disclosure is not required of "matters that are ... investigatory records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In the present case the government argues the district court lacked the authority to require the preparation of a Vaughn index because a Vaughn index is not required when Exemption 7(A) is invoked, citing Robbins, 437 U.S. at 223-24, 234-36, 98 S.Ct. at 2317-18, 2323. In Robbins the FOIA plaintiff was an employer seeking disclosure of witness statements prior to an unfair labor practice hearing. Following a contested representation election, the regional director of the NLRB filed an unfair labor practice charge against the employer for pre-election actions. A hearing was scheduled. Prior to the hearing, the employer sought disclosure of all potential witnesses' statements collected by the NLRB during its investigation. The regional director denied the request on the ground that the witness statements were exempt from disclosure under several FOIA exemptions, ***1315** in particular Exemption 7(A). The employer appealed to the NLRB General Counsel. However, before the expiration of FOIA's 20-day response period, 5 U.S.C. § 552(a)(4)(B), the employer filed a FOIA action in federal district court, seeking disclosure of the witness statements and an injunction against holding the hearing until the documents had been disclosed. The NLRB argued that witness statements were exempt from disclosure under Exemption 7(A) because their production would interfere with an enforcement proceeding, the pending unfair labor practice hearing. The district court disagreed and ordered the NLRB to produce the witness statements.

The issue whether Exemption 7(A) was generic, or categorical, or case-specific emerged on appeal. The court of appeals rejected the NLRB's categorical or generic approach and concluded that the 1974 legislative history demonstrated that Exemption 7(A) was available only after a specific evidentiary showing of the possibility of actual interference in an individual case. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 728 (5th Cir.1977). The court of appeals rejected the NLRB's arguments that the premature revelation of its case through the production of the witness statements before the hearing was the kind of interference that would justify nondisclosure and that pre-hearing production of witness statements would discourage potential witnesses from making statements at all. Id. at 729-31. The court of appeals acknowledged that the possibility of "interference" in the form of witness intimidation by the employer during the period between disclosure

of the witness statements to the employer and the hearing, but held that the NLRB had failed to demonstrate that the witness statements were exempt because it had not introduced any evidence that witness intimidation was likely in this particular case. Id. at 732. But see, e.g., Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.) (holding statements of employees and union representatives obtained in NLRB investigation exempt from disclosure under Exemption 7(A) until completion of administrative and judicial proceedings), cert. denied, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

The Supreme Court reversed. The Court endorsed the generic, or categorical, interpretation of Exemption 7(A) and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing." 437 U.S. at 236, 98 S.Ct. at 2324. First, the Court noted that the language of the exemption, specifically the plural reference to "enforcement proceedings," suggested that "certain generic determinations" might be made under Exemption 7(A). Id. at 224, 98 S.Ct. at 2318. The Court concluded that the early legislative history supported this interpretation, id. at 225-26, 98 S.Ct. at 2318-19 (referring to Sen. Humphrey's concerns in 1966 about the need to protect statements of agency witnesses from disclosure prior to agency proceedings, specifically witnesses in unfair labor practice proceedings), as well as the reported decisions until 1974. Id. at 226, 98 S.Ct. at 2319 (citing cases). The Court also noted that the legislative history of the 1974 amendment of Exemption 7 showed "[t]hat the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings." Id. at 232, 98 S.Ct. at 2322; see id. at 226-32, 98 S.Ct. at 2319-22 (noting background of 1974 amendment, particularly Congressional disapproval of several D.C.Cir. decisions upholding "blanket exemptions" for all government records contained in investigatory files that had been compiled for law enforcement purposes; 1974 amendment changed scope of exemption from "files" to "records" and enumerated specific purposes and objectives of exemption).

The Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of law enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Id. at 236, 98 S.Ct. at 2324. The Court agreed that "[t]he most obvious risk of interference with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony ***1316** or not testify at all." Id. at 239, 98 S.Ct. at 2325. In addition, prehearing disclosure of witnesses' statements "would disturb the existing balance of relations in unfair labor practice proceedings," id. at 236, 98 S.Ct. at 2324, especially since, "[h]istorically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case." Id. The Court also noted that the use of FOIA as the mechanism for providing a litigant with earlier and greater access to the agency's case than the litigant would otherwise have was likely to cause substantial delays in the administrative process and thus interfere with enforcement proceedings. Id. at 237-38, 98 S.Ct. at 2324. [FN5]

FN5. As noted by the majority opinion, at 1307 supra, the Supreme Court recently affirmed the Robbins categorical approach in United States Dep't of Justice v. Landano, --- U.S. ----, ----, ---- - ----, 113 S.Ct. 2014, 2021, 2023-24, 124 L.Ed.2d 84 (1993) (rejecting blanket exemption for "all" FBI sources as confidential for purposes of Exemption 7(D); however, "more narrowly defined circumstances" may support inference of confidentiality, for example, generic category of paid informants). See also United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (holding "rap sheets" constituted generic category of law enforcement records which could reasonably be expected to constitute an unwarranted invasion of privacy within meaning of Exemption 7(C)). I do not dispute the continued validity of the Robbins categorical approach. What is in dispute in the present case is whether, as a threshold matter, we know enough about the nature of the records in question to review the accuracy of the government's

> classification of the records into generic categories. I submit that we do not.

APPLICATION OF EXEMPTION 7(A)

I do not think Robbins supports the government's argument in the present case. As noted by the panel majority opinion, after Robbins endorsed the generic, or categorical, application of Exemption 7(A), many courts of appeals

> altered their views on the need for a Vaughn index when Exemption 7(A) is involved. The rationale underlying these post-Robbins decisions has been that a Vaughn index is unnecessary because the government is permitted to demonstrate interference based on categories of documents and need not demonstrate interference with enforcement proceedings on a document-by-document basis. E.g., Church of Scientology v. IRS, 792 F.2d 146, 152 (D.C.Cir.1986) (Scalia, J.); Barney v. IRS, 618 F.2d 1268, 1273 (8th Cir.1980) (per curiam). Moreover, in each of these cases, the appellate court was reviewing a district court's decision not to require a Vaughn index when the government had already provided adequate descriptions of the documents sought, as well as adequate explanations as to how the particular types of documents at issue could interfere with law enforcement proceedings.
>
> At no time, however, has an appellate court suggested that Robbins alters the district court's statutory obligation to review the claimed exemption's applicability. Robbins does not allow for exemption merely because documents appear in a law enforcement agency's file. When an agency relies upon Robbins and offers categorical justifications for exemption under Exemption 7(A), the agency must still review each document individually.... The district court is well within its authority to verify that the agency has actually examined and properly categorized each document. It may accomplish this task by requiring an affidavit that describes, on a document-by-document basis, the documents in the file, the categories into which each document is placed, and a description of how disclosure of each category of documents might interfere with enforcement proceedings. Robbins merely prevents a district court from ordering a document-by-document explanation as to how each document will interfere with enforcement proceedings. In other words, though the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis, it can require the government to justify its chosen categorization on a document-by-document basis. 950 F.2d at 533-34 (parenthetical omitted from Barney citation; citations omitted; footnote omitted).

In Robbins it was not disputed that the documents in question were in fact witness ***1317** statements. Nor was it disputed in Robbins that, at least in general, disclosure of witness statements prior to the unfair labor practice proceeding could interfere with that proceeding. What was disputed was whether the agency could rely on that generality or whether the agency had to make a specific factual showing that disclosure of those particular witness statements would interfere with that particular proceeding. Similarly, in Barney v. IRS, there was no dispute about the categorization of the documents in question; the district court and this court were "satisfied that the government's affidavits adequately described the documents, the categories to which they belonged, and the possible harms of disclosure." 950 F.2d at 534, citing 618 F.2d at 1272-73 (witness statements, documentary evidence, IRS agent's work papers, internal agency memoranda). See Curran v. Department of Justice, 813 F.2d 473, 476 (1st Cir.1987) (apparent from agency affidavit that agency conducted individualized, document-by-document search, subdivided records into types and then into functional categories).

The same cannot be said in the present case. Here, the parties disputed not only the nature of the individual documents, but also the type of category used by the government, as well as the appropriate categorization or placement of the documents into particular categories. This basic lack of agreement about the nature and categorization of the documents distinguishes the present case from Robbins and Barney.

In the present case, the district court required preparation of a Vaughn index, and in response the government filed several public affidavits or declarations and a document which it captioned a "categorical index." The district court was clearly not satisfied with the government's response. As noted by the penal majority opinion, "[t]he district court's dissatisfaction [with the government's

response was] understandable given the government's blanket assertion that all 13,800 documents, accumulated over a 15-year span, fit neatly into nine categories described over the course of five pages." Id. at 535; cf. Wiener v. FBI, 943 F.2d at 978 (noting the FBI's use of "boilerplate" explanations drawn from a "master" FOIA response). Furthermore, the district court believed that the FOIA requester had raised serious questions about the validity of the government's search and categorization of the documents. Id. Compare Curran v. Department of Justice, 813 F.2d at 476 (district court found no reason to impugn good faith of agency). The district court also concluded that it needed additional information "about each document, not only to verify that the government has fulfilled its obligation to examine each document, but also to enable it to understand or challenge the categories created by the government." 950 F.2d at 535.

By requiring the preparation of a Vaughn index in the present case, the district court was attempting to develop an adequate record. Only the government knows what is in the Hoffa file; the FOIA requester and the district court do not know, much less this court. As noted above, the record indicates only that the file consists of at least 13,800 pages in 70 volumes; the file is almost certainly larger now. Some of these pages are public source material which the government has already made available to the FOIA requester. According to the categorical index, which consists of a total of five double-spaced pages, each and every page falls within one of nine categories, the disclosure of which could reasonably be expected to interfere with law enforcement proceedings. The district court's dissatisfaction with the categorical index was directed more at the procedural and substantive accuracy of the government's classification of individual pages than at the categories identified by the government. (The majority opinion expresses no opinion on the sufficiency of the Baker affidavit and the categorical index. See supra at 1309 n. 4 supra.) In any event, as noted by the panel majority opinion, the district court's concern about whether all the documents are described by the government's categories cannot be resolved merely by requiring more specific or more detailed categories. 950 F.2d at 535.

In my view, assuming for purposes of analysis that the government's categories are sufficiently specific, the district court acted within its authority in requiring the government to verify that it had actually examined and accurately categorized each document. ***1318** Indeed, it was its duty to do so. King v. United States Department of Justice, 830 F.2d at 219 (acceptance of inadequately supported exemption claim "would constitute abandonment of the trial court's obligation under FOIA to conduct a de novo review"). The district court did not know (and we do not know) whether the government's categorization of the documents was correct or, for that matter, whether the government had examined each document individually. The district court decided that, without a Vaughn index, it could not verify whether there was a correlation between the documents and the categories. Because all the documents necessarily fall into exempt categories, unless the district court can verify that each document has been examined and accurately categorized, the Robbins categories will become "no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendments of FOIA." Bevis v. Department of State, 255 U.S.App.D.C. 347, 801 F.2d 1386, 1389 (1986), citing Robbins, 437 U.S. at 236, 98 S.Ct. at 2324.

As noted by the panel majority opinion, preparation of a Vaughn index in the present case does not require the government to demonstrate document-by-document how disclosure of each document could reasonably be expected to interfere with pending law enforcement proceedings. 950 F.2d at 535. Like the district court and the panel majority, I accept the category-by-category approach. What I do not accept is the government's conclusory assertions that each and every document in the Hoffa file falls within one of its nine categories. In other words, what is disputed, and what the district court sought to verify by requiring the preparation of a Vaughn index, is whether the government's categorization of each document is accurate. Without such a record, the FOIA requester cannot test the government's claim of exemption, the district court cannot conduct the required de novo review of the government's decision not to disclose (without undertaking the arduous task of actually reviewing the documents itself), and this court cannot conduct a meaningful review of the district court's decision.

It should be noted that the district court could decide to modify its order requiring the government to prepare a Vaughn index for the entire Hoffa file. In the proceedings before the district court, the government argued that preparation of a Vaughn index for the entire Hoffa file would be inordinately time-consuming and would necessarily divert scarce resources from other law enforcement activities. The district court could require the government to prepare a Vaughn index for a representative sample of the documents in the Hoffa file. "Representative sampling is an appropriate procedure to test an agency's FOIA exemption claims when a large number of documents are involved." Bonner v. United States Department of State, 289 U.S.App.D.C. 56, 928 F.2d 1148, 1151 (1991); accord The Washington Post v. United States Department of Defense, 766 F.Supp. 1, 15 (D.D.C.1991).

Alternatively, the district court could decide to conduct an in camera review of a representative sample of the documents in the Hoffa file. In camera review is discretionary. Robbins, 437 U.S. at 224, 98 S.Ct. at 2318. Limited in camera review might be particularly helpful in the present case. "[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 [the judge] wants satisfied before [taking] responsibility for a de novo determination.' " Meeropol v. Meese, 252 U.S.App.D.C. 381, 790 F.2d 942, 958 (1986), citing Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187, 1195 (1978). One district judge and one appellate panel have examined in camera a selection made by the government of the documents contained in the Hoffa file and concluded that those documents established that the criminal investigation into Hoffa's disappearance is active and continuing and that production of those records could reasonably be expected to interfere with enforcement proceedings. Dickerson v. Department of Justice, No. 90-CV-60045-AA, 1991 WL 337422, slip op. at 5-6 (E.D.Mich. July 31, 1991), aff'd, 992 F.2d 1426 (6th Cir.1993).

For the reasons set forth above, I would hold the district court has the authority to require the government to prepare a Vaughn index even when Exemption 7(A) is invoked ***1319** and would deny the government's application for writ of mandamus.

END OF DOCUMENT

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96

INSTA-CITE

CITATION: 999 F.2d 1302

Direct History

1 In re Department of Justice, 950 F.2d 530, 60 USLW 2377 (8th Cir.(Mo.), Dec 02, 1991) (NO. 91-2080, 91-2164), rehearing granted and opinion vacated (Feb 12, 1992) (Additional Negative Indirect History)
On Rehearing
=> 2 **In re Department of Justice,** 999 F.2d 1302, 62 USLW 2105 (8th Cir.(Mo.), Aug 05, 1993) (NO. 91-2080, 91-2164)
Certiorari Denied by
3 Crancer v. Department of Justice, 510 U.S. 1163, 114 S.Ct. 1186, 127 L.Ed.2d 537, 62 USLW 3571, 62 USLW 3573 (U.S., Feb 28, 1994) (NO. 93-700)

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96
THE CURRENT DATABASE IS ALLFEDS
YOUR TERMS AND CONNECTORS QUERY:

DICKERSON & HOFFA

Brian DICKERSON, Plaintiff-Appellant,
v.
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 92-1458.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 19, 1993.

Decided April 30, 1993.

Newspaper editor requested, pursuant to Freedom of Information Act (FOIA), release of record on investigation conducted by Federal Bureau of Investigation (FBI) into disappearance more than 15 years earlier of former union official. After FBI denied request, editor brought suit to compel Department of Justice to produce records. The United States District Court for the Eastern District of Michigan, George LaPlata, J., denied relief, and editor appealed. The Court of Appeals, David A. Nelson, Circuit Judge, held that: (1) Vaughn index was not required, and (2) records came within FOIA exemption for records compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.

Affirmed.

Beckwith, District Judge, sitting by designation, delivered separate concurring opinion.

Batchelder, Circuit Judge, delivered separate dissenting opinion.

[1] RECORDS ⇐ 65
326k65
"Vaughn index" is document-by-document index, specially prepared for litigation purposes, in which agency describes contents of its records and reasons why each of the disputed items is claimed to be exempt from disclosure under Freedom of Information Act (FOIA). 5 U.S.C.A. § 552.

See publication Words and Phrases for other judicial constructions and definitions.

[2] RECORDS ⇐ 60
326k60
Law enforcement records cannot reasonably be expected to interfere with enforcement proceedings, for purposes of Freedom of Information Act (FOIA) exemption, unless there is at least reasonable chance that enforcement proceeding will occur. 5 U.S.C.A. § 552(b)(7)(A).

[3] RECORDS ⇐ 65
326k65
District court did not have to require Federal Bureau of Investigation (FBI) to compile Vaughn index of FBI file relating to disappearance of former union official more than 15 years earlier before concluding that records relating to disappearance were within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings, based upon affidavits of several FBI officials and its in-camera review of FBI file documents assembled for purpose of briefing one of the affiants on status of investigation. 5 U.S.C.A. § 552(b)(7)(A).

[4] RECORDS ⇐ 65
326k65
In connection with dispute over whether records come within Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes, valuable time should not normally have to be spent on preparation and analysis of Vaughn index insofar as question to be resolved is whether actual enforcement proceedings are still being contemplated; as practical matter, affidavits by people with knowledge of and responsibility for investigation usually ought to suffice. 5 U.S.C.A. § 552(b)(7)(A).

[5] RECORDS ⇐ 60
326k60
Federal Bureau of Investigation (FBI) records relating to disappearance of former union official more than 15 years earlier were exempt from disclosure under Freedom of Information Act (FOIA) as records compiled for law enforcement purposes whose production could reasonably be expected to interfere with enforcement proceedings; FBI made sufficient showing that investigation of disappearance remained active and that production of record could reasonably be expected to interfere with future prosecution. 5 U.S.C.A. §

552(b)(7)(A).

[6] RECORDS ⇦ 67
326k67
On appellate record it did not appear that prospects for finding any "reasonably segregable" nonpublic portions of Federal Bureau of Investigation (FBI) files relating to disappearance of union official more than 15 years earlier that could properly be made public were such as to justify remand. 5 U.S.C.A. § 552(b).

***1427** Herschel P. Fink (argued and briefed), Michael A. Gruskin (briefed), Steven M. Ribiat, Honigman, Miller, Schwartz & Cohn, Detroit, MI, for plaintiff-appellant.

L. Michael Wicks, Asst. U.S. Atty., Detroit, MI, Stephen G. Harvey, Leonard Schaitman, U.S. Dept. of Justice, Appellate Staff, Civil Div., Scott R. McIntosh (argued and briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, for defendant-appellee.

Before: NELSON and BATCHELDER, Circuit Judges; and BECKWITH, District Judge. [FN*]

FN* The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

DAVID A. NELSON, Circuit Judge.

Pursuant to the Freedom of Information Act--a statute which, subject to certain exceptions, makes federal government records available to anyone who asks for them--plaintiff Brian Dickerson requested the release of records on an investigation conducted by the Federal Bureau of Investigation into the disappearance of Jimmy Hoffa, former president of the Teamsters Union.

Citing 5 U.S.C. § 552(b)(7)(A), which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings," the government denied the request. Mr. Dickerson brought suit in the Eastern District of Michigan to compel the Department of Justice to produce the records. The district court (La Plata, J.) ultimately decided that production was not required.

In making its decision the district court focused on the question whether a "concrete prospective law enforcement proceeding" [FN1] could still be discerned--i.e., whether there was still a reasonable chance that someone would be prosecuted in connection with Mr. Hoffa's disappearance. Based on affidavits of several FBI officials and an in camera review of FBI file documents assembled for the purpose of briefing one of the affiants on the status of the investigation, the district court found that "the investigation into Hoffa's disappearance is active and continuing, with the clear direction of future criminal proceedings being instituted." The court further found that disclosure of the requested documents could reasonably be expected to interfere with such proceedings. The court made these findings without having required the government to provide a document-by-document analysis of the files.

FN1. The phrase originated with Senator Hart, a supporter of Freedom of Information Act amendments adopted in 1974. See 120 Cong.Rec. 17033 (1974), quoted in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232, 98 S.Ct. 2311, 2322, 57 L.Ed.2d 159 (1978).

The issues presented on appeal are (1) whether the district court abused its discretion in not insisting on a full document-by-document analysis and in limiting its in camera review to the briefing materials; (2) whether the district court dealt correctly with the factual side of the case; and (3) whether the district court ought to have found that at least some non-public portions of the investigatory files were not protected ***1428** from disclosure. Resolving each of these issues in favor of the government, we shall affirm the judgment of the district court.

I

Jimmy Hoffa disappeared in Detroit, Michigan, on July 30, 1975. It is widely believed that he was abducted and killed. Mr. Hoffa's disappearance led to an FBI investigation that has not, to date, resulted in any criminal proceedings being brought.

The investigation is documented in two large files, one maintained in the FBI's field office in Detroit

and the other at FBI headquarters in Washington. At the time with which we are concerned in this proceeding the headquarters file consisted of 67 volumes and the field office file consisted of 332 volumes.

On July 25, 1989, counsel for the Detroit Free Press, a newspaper that employs plaintiff Dickerson in an editorial capacity, sent sweeping Freedom of Information Act requests on the Hoffa investigation to Justice Department and FBI officials in Detroit and Washington. When the requests were denied, Mr. Dickerson sued the Department of Justice under 5 U.S.C. § 552(a)(4)(B), which gives federal district courts jurisdiction to order the production of agency records withheld improperly. This section of the statute, which places the burden of sustaining non-disclosure on the government, directs the court to determine the matter de novo. It also provides that the court "may examine the ... agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in [5 U.S.C. § 552(b)]...."

The Department of Justice filed an answer admitting that there were no pending criminal proceedings directly relating to Mr. Hoffa's disappearance, but asserting that no documents had been improperly withheld. Both parties subsequently moved for summary judgment.

The plaintiff's summary judgment motion was accompanied by newspaper articles referring to a statement by Kenneth P. Walton, a retired head of the FBI's Detroit field office, to the effect that although he knew who had murdered Jimmy Hoffa, there would never be a prosecution because of the government's unwillingness to disclose confidential sources. The Justice Department filing was accompanied by "declarations," or affidavits, in which two FBI headquarters officials, Angus B. Llewellyn and Jim E. Moody, attested that the Hoffa investigation was still pending.

The Llewellyn declaration went on to give a general description of the contents of the investigatory files, categorizing the records by source or function. The declaration also sought to explain why law enforcement records contained in the files were exempt from production not only under subsection (7)(A) of 5 U.S.C. § 552(b), but also under subsection (7)(C) (exempting such records if they "could reasonably be expected to constitute an unwarranted invasion of personal privacy"); subsection (7)(D) (exempting them if they "could reasonably be expected to disclose the identity of a confidential source"); and subsection (7)(E) (exempting them if they "would disclose techniques and procedures for law enforcement investigations or prosecutions ... if such disclosure could reasonably be expected to risk circumvention of the law").

The Moody declaration focused on the (7)(A) exemption. The declaration explained, among other things, that

> "The files responsive to plaintiff's [Freedom of Information Act] request contain documents detailing the FBI's theories regarding the case, investigative leads we're pursuing (and those we don't consider worthy of pursuit), information furnished by confidential sources, information indicating whom the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation."

The Moody declaration stated that the FBI was continuing its efforts to develop information for use in criminal proceedings, and the declaration sought to show why production of ***1429** the records could reasonably be expected to interfere with such proceedings.

In January of 1991 the district court denied both of the motions for summary judgment on the ground that there was a material issue of fact concerning the prospect of future enforcement proceedings. The Justice Department moved for reconsideration, supporting its motion with a declaration executed by William M. Baker, the Assistant Director of the FBI in charge of the agency's Criminal Investigation Division.

Mr. Baker declared under penalty of perjury that it was his responsibility to determine whether the investigation into the Hoffa disappearance should be pursued; that in his judgment the investigation warranted the continuing efforts of the FBI; that he had allocated continued FBI resources to the investigation; that he believed "that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted;" and that public

disclosure of the information in the Hoffa file could reasonably be expected, for reasons specified in the declaration, to interfere with enforcement proceedings against those responsible for the disappearance. Mr. Baker further declared that the statement attributed to the former field office head "did not reflect and does not reflect official FBI policy."

[1] In response to the motion for reconsideration plaintiff Dickerson filed a reply brief stating that Mr. Baker's declaration was essentially identical to one he had filed in a Freedom of Information Act suit brought in a federal district court in Missouri by Mr. Hoffa's daughter, Barbara Crancer. The brief pointed out that the declaration had not dissuaded the district court in Missouri from ordering the government to submit a Vaughn index on the smaller of the two Hoffa files, [FN2] and it noted that FBI Director William Sessions had testified before a Senate Subcommittee that it is "doubtful" that the government will ever have sufficient evidence to bring to trial those responsible for Mr. Hoffa's disappearance. [FN3]

FN2. A "Vaughn index," which takes its name from a technique developed in Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is a document-by-document index, specially prepared for litigation purposes, in which the agency describes the contents of its records and the reasons why each of the disputed items is claimed to be exempt from disclosure. See Osborn v. Internal Revenue Service, 754 F.2d 195, 196 (6th Cir.1985), and the cases there cited, for a statement of the criteria such an index must meet. The requirement for a Vaughn index in Mrs. Crancer's case was subsequently upheld by a divided three judge panel of the Court of Appeals for the Eighth Circuit, see In re Department of Justice, 950 F.2d 530 (8th Cir.1991), but the panel decision has been vacated in connection with the granting of a rehearing en banc. See Order at 950 F.2d 538. As of this writing the en banc court has not announced its decision.

FN3. The Justice Department later submitted an official transcript of the subcommittee hearing showing that Director Sessions had declined to comment on the likelihood of indictments being obtained, and that it was Oliver B. Revell, Executive Assistant Director-Investigations, and not Director Sessions, who made the "doubtful" comment.

Plaintiff Dickerson's reply brief further advised the court that the Missouri proceedings had disclosed the existence of two categories of documents that might quickly reveal the status of the Hoffa investigation: documents containing the results of high level strategy conferences, with synopses of the investigation to date, and memoranda updating the Director of the FBI on the status of the investigation. The plaintiff's brief suggested that the court conduct an in camera review of all documents in these two categories. Since the Missouri court had already ordered the Justice Department to prepare a Vaughn index on the 68-volume file from FBI headquarters in Washington, plaintiff Dickerson suggested that the Department should be ordered to produce a copy of that index as well.

In the meantime, plaintiff Dickerson had served notice of the depositions of FBI Director Sessions and declarants Llewellyn, Moody and Baker, and the Justice Department had moved for a stay of discovery. The motion was referred to a magistrate judge, who conducted two telephone conferences on the matter.

In the course of the first conference the Justice Department indicated a willingness to go through the headquarters file and segregate, ***1430** for in camera review by the court, all documents in the two categories singled out by the plaintiff. Government counsel later confirmed with declarant Moody, Chief of the FBI's Organized Crime Unit, that such documents had not yet been physically segregated. Mr. Moody disclosed to counsel, however, and counsel disclosed at the second telephone conference with the magistrate judge, that Moody already had a file of documents, culled from the field office records in Detroit, that contained an update on the Hoffa investigation. This file had recently been assembled on Mr. Moody's own initiative to prepare him to testify if he should be ordered to give his deposition. The Moody file had not been put together with the idea of turning it over to the court for in camera review, counsel explained, but the government offered to make it available to the court for that purpose, along with all documents in the two categories specified by the plaintiff.

The magistrate judge expressed an interest in keeping the scope of any in camera review manageable, and counsel for plaintiff Dickerson agreed that the district judge would be more likely to undertake such a review if the quantity of materials were not excessive. The telephone conference led to an order in which the magistrate judge directed that the Moody file be sent to Michigan for possible in camera inspection by District Judge La Plata. The plaintiff's request to depose the four FBI officials was deferred in the meantime.

Judge La Plata concluded that with the addition of Assistant Director Baker's declaration, the declarations alone might be sufficient. In view of the testimony before the Senate subcommittee, however, and in view of the length of time that had elapsed since Mr. Hoffa's disappearance, Judge La Plata elected to review the Moody file (consisting of some 335 pages) in its entirety.

Having completed a careful and thorough review of the Moody file in camera, the court expressed itself as "satisfied beyond any doubt" that the investigation was active, that it was continuing, and that it was directed toward the institution of criminal proceedings. Because the court likewise found that disclosure of the documents sought by plaintiff Dickerson and his newspaper could reasonably be expected to interfere with enforcement proceedings, the court entered summary judgment in favor of the Department of Justice. A subsequent motion for reconsideration was denied, and this appeal followed.

II

[2] Law enforcement records cannot "reasonably be expected to interfere with enforcement proceedings," it has been suggested, unless there is at least "a reasonable chance that an enforcement proceeding will occur...." Nevas v. Dept. of Justice, 789 F.Supp. 445, 448 (D.D.C.1992). [FN4] We agree, and we turn first to the procedure followed by the district court in preparing itself to determine the likelihood that enforcement proceedings might still occur in the Hoffa case. (The court's determination of the likelihood that disclosure of the requested documents might interfere with any such proceedings also has a procedural aspect, and we shall touch on this at the same time.)

FN4. Even where exemption (7)(A) has become inapplicable, however, records compiled in the course of the investigation may still be exempt if production could be expected to constitute an unwarranted invasion of personal privacy or disclose the identity of a confidential source, or if production would disclose law enforcement techniques and procedures that could be expected to risk circumvention of the law in other cases. See 5 U.S.C. § 552(b)(7)(C), (D), and (E). In the case at bar the district court made no determination as to the applicability of these sections, and we shall confine our analysis to exemption (7)(A).

[3] Although requested to follow the lead of the district court in Missouri in ordering the compilation of a Vaughn index on the FBI headquarters file, Judge La Plata did not do so. Plaintiff Dickerson maintains that the court committed reversible error in granting the government's summary judgment motion without having had the benefit of such an index.

Depending on the nature of the case, the use of a Vaughn index may have obvious advantages from the perspective of one or another of the litigants or from the perspective of the courts. See, for example, Ingle v. ***1431** Dept. of Justice, 698 F.2d 259 (6th Cir.1983), where we indicated that a Vaughn index makes the playing field more nearly level for the party seeking disclosure, facilitates effective appellate review, and may obviate any need for the courts to review documents in camera. In the context of a case that did not involve exemption (7)(A), we have said that a Vaughn index should be obtained in "most" Freedom of Information Act cases. Osborn v. Internal Revenue Service, 754 F.2d 195, 197 (6th Cir.1985).

As we subsequently explained in a Vaughn decision of our own, however, Osborn created no hard and fast rule with respect to Vaughn indices as such. Vaughn v. United States, 936 F.2d 862, 867 (6th Cir.1991). The government must provide sufficient information in sufficient detail to enable the court "to make a reasoned, independent assessment of the claim of exemption," but no particular method of doing so is mandated; "[a] court's primary focus must be on the substance, rather than the form, of the information supplied by

the government to justify withholding requested information." Id. The Supreme Court has consistently taken what it terms "a practical approach" to Freedom of Information Act matters, see John Doe Agency v. John Doe Corp., 493 U.S. 146, 157, 110 S.Ct. 471, 477, 107 L.Ed.2d 462 (1989), and this circuit tries to do the same.

Where exemption (7)(A) is concerned, as a practical matter, it is often feasible for the courts to make "generic determinations" about interference with enforcement proceedings. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 98 S.Ct. 2311, 2317-18, 57 L.Ed.2d 159 (1978). [FN5] In many (7)(A) cases, at least, affidavits of the sort presented by the government here would seem to provide an adequate basis for making such determinations.

> FN5. The plaintiff in Robbins Tire was seeking disclosure of witness statements taken by the National Labor Relations Board. The plaintiff contended that such statements could be withheld under exemption (7)(A) only upon a showing of a particularized risk of interference with a particular enforcement proceeding. The Supreme Court rejected the contention that no "generic determinations" of likely interference could ever be made, concluding instead that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.' " Robbins Tire, 437 U.S. at 236, 98 S.Ct. at 2324. When Robbins Tire was decided, exemption (7)(A) required a showing that disclosure "would" interfere with enforcement proceedings. Congress subsequently amended the statute by dropping the word "would" and replacing it with the current formula, which protects law enforcement records to the extent that disclosure "could reasonably be expected to interfere...." (Emphasis supplied.) See Pub.L. 99-570, § 1802(a) (1986). This statutory change strengthens the conclusion reached by the Supreme Court in Robbins Tire, of course.

[4] The case at bar may be somewhat unusual in that here the district court was initially uncertain whether an actual enforcement proceeding was still being contemplated and whether the "purpose and point" of the investigation that generated the records in question had "expired." See Robbins Tire, 437 U.S. at 232, 98 S.Ct. at 2322, referring to legislative history indicating that "with the passage of time, ... when the investigation is all over and the purpose and point of it has expired, [disclosure] would no longer be an interference with enforcement proceedings and there ought to be disclosure." But insofar as the question to be resolved by the courts is whether actual enforcement proceedings are still being contemplated, it does not seem to us that valuable time should normally have to be spent on the preparation and analysis of a Vaughn index. As a practical matter, affidavits by people with direct knowledge of and responsibility for the investigation usually ought to suffice.

Here the district court believed that the government's affidavits might be sufficient standing alone to support a finding on whether the point and purpose of the investigation had expired, but the court nonetheless felt the need for a reality check of some kind. The Moody file seemed like a sensible place to start, and we think it was clearly within the court's discretion to begin there. If the Moody file had turned out not to be helpful, the court could obviously have moved on to an in camera inspection of the two groups of ***1432** documents that both parties had suggested the court might wish to examine. After reviewing all of the documents in the Moody file, however, the court concluded that there was no need to go further. We too have reviewed the Moody file in its entirety, and we see no abuse of discretion in the district court's decision on this score.

Plaintiff Dickerson argues that the decision to review only documents "hand-picked" by the government deprived him of the benefits of the adversary process. But the materials in the Moody file were selected, as we have seen, for briefing Mr. Moody on the status of the investigation, and not for submission to the court for review by it in camera. The idea of a court review of the Moody file in isolation originated with the magistrate judge, not with the government. The review process was necessarily non-adversarial, to be sure, but the process would have been equally non-adversarial if the documents under review had included the additional materials the government had said it was willing to turn over to the court.

The approach developed by the magistrate judge was designed in part to avoid a situation in which the district judge might have felt constrained to review more documents in camera than he would have wanted to see. This approach makes sense to us. The adversaries could and did present arguments on the sufficiency of the affidavits that formed the government's main line of defense, [FN6] and review of any documents in camera might well have been deemed superfluous; we think it was reasonable for the magistrate judge to offer Judge La Plata the documents that had already been segregated, and we think it was reasonable for Judge La Plata to decide, after reviewing them, that he had seen all he needed to see in order to make a proper decision.

FN6. Plaintiff Dickerson complains about the failure of the district court to hear oral argument, but each side had ample opportunity to present its case through briefs. In addition, of course, there were two telephone conferences with the magistrate judge.

III

A

[5] The district court was correct, we believe, in its finding on the likelihood of a criminal prosecution being brought.

It is clear, as we read the record, that the Hoffa investigation remains active. In the judgment of Assistant Director Baker--the person whose responsibility it is to determine whether the investigation should still be pursued, and, if so, what FBI resources should be devoted to it--the investigation warrants the FBI's continued efforts to bring to trial those responsible for Mr. Hoffa's disappearance.

Mr. Baker has allocated continued FBI resources to the Hoffa investigation, according to his declaration, and the declaration says that the investigation "is ongoing and still absorbs FBI management and field agent resources on a regular basis." The documents in the Moody file are consistent with Mr. Baker's representation that the Hoffa investigation remains active.

The fact that the investigation is continuing does not mean that a prosecution will definitely be brought, of course, but the Baker declaration says that FBI criminal investigations often result in enforcement proceedings many years after the crimes were committed. "[W]ith the passage of time," Mr. Baker continues, "persons with knowledge of Mr. Hoffa's disappearance may feel more free to disclose critical information to law enforcement officers." Attesting to a "belief that the person(s) responsible for Mr. Hoffa's disappearance can be identified and prosecuted," Mr. Baker says that he "would not knowingly permit scarce FBI resources to be devoted to a futile investigation."

FBI retiree Walton and Executive Assistant Director Revell may consider it doubtful whether anyone will ever be brought to trial in the Hoffa case, and they may be right. Neither of them is responsible for deciding whether it is worthwhile to continue the investigation, however, and the official who does have that responsibility--Assistant Director Baker--obviously believes that there is still a reasonable prospect of a prosecution being brought. No court is likely to be able to match Mr. Baker's expertise on that kind ***1433** of question, and, like the district court, we are disposed to defer to his judgment.

B

The district court was also correct, we believe, in its finding that production of the records sought by plaintiff Dickerson could reasonably be expected to interfere with a future prosecution.

In some contexts, the Supreme Court has said, the most obvious risk of interference with enforcement proceedings is that witnesses will be coerced or intimidated into changing their testimony or not testifying at all. Robbins Tire, 437 U.S. at 239, 98 S.Ct. at 2325. The declarations of Messrs. Llewellyn and Moody both demonstrate that witness intimidation is a genuine concern in the Hoffa investigation--an investigation that the FBI has designated a "Racketeering Influenced and Corrupt Organization-La Cosa Nostra Labor Racketeering Investigation." If the perpetrators of the crime knew what investigative leads the FBI is pursuing, who the prime suspects are, and the nature of the evidence gathered to date, as one of the affidavits explains, they "could take steps to destroy or tamper with evidence, intimidate witnesses or construct a false alibi...."

In organized crime investigations such as this one, moreover, it has been the experience of declarant Moody, the chief of the Organized Crime Section of the FBI's Criminal Investigation Division, that informants can provide information critical to the successful conclusion of the investigation. Public disclosure of the Hoffa investigation files, Mr. Moody has declared, would discourage such individuals from coming forward.

Another important issue, particularly in homicide cases, has to do with the corroboration of evidence. Verification of statements given by future witnesses becomes harder, Mr. Moody has indicated, where the factual information developed in the investigation has entered the public domain.

In addition, the record before us shows that the Hoffa files contain information regarding other pending and prospective criminal proceedings. The prospect of interference with such enforcement proceedings is not without significance.

Although the government has the burden of showing that production of the records could reasonably be expected to interfere with enforcement proceedings, the mere fact that the burden of justifying non-disclosure rests with the government does not illuminate the question of how heavy the burden is. See Robbins Tire, 437 U.S. at 224, 98 S.Ct. at 2318. Having regard to the important public interest that exemption (7)(A) was designed to protect, having regard to the fact that the language of the exemption has been broadened by Congress to protect records that "could" be expected to interfere, as opposed to records that "would" interfere, and having regard to the obvious risks that public disclosure of these active investigation files would entail, we agree with the district court that the burden with respect to interference has been met in this case.

IV

[6] The Llewellyn declaration characterizes the documents in the Hoffa investigation files as follows:

"Documents setting forth leads to be conducted.
Documents containing information received from confidential informants.
Information and documents provided by local law enforcement.
Interviews of third parties and cooperating witnesses.
Public source information such as newspaper clippings and press releases.
Public and sealed court documents.
Laboratory reports setting forth results of examinations.
Polygraph worksheets and reports."

To the extent that public source information and public judicial materials are included in the files, the government has agreed to make the relevant documents available to plaintiff Dickerson. All that is in controversy here is the non-public portions of the files.

Plaintiff Dickerson candidly acknowledges, in a footnote toward the end of his principal brief, that it is open to the government to justify the assertion of a (7)(A) exemption on a "category-of-document" basis rather than ***1434** by proceeding document by document. He points out, however, that there is no blanket exemption for investigatory files as such, and he argues that we should at least remand the case with instructions that the government be required to segregate and produce all nonexempt material. In support of this suggestion he quotes the last sentence of 5 U.S.C. § 552(b), which says that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

It is doubtless true that by deleting large portions of the information contained in the Hoffa files, the government could render whatever was left useless to any law-breaker. (And useless to plaintiff Dickerson and his newspaper, we might add.) But the words "reasonably segregable" must be given a reasonable interpretation, particularly where information or records compiled for law enforcement purposes are concerned. On the record before us we do not believe that the prospects for finding any "reasonably segregable" non-public portions of the Hoffa files that could properly be made public are such as to justify the remand that plaintiff Dickerson seeks.

The judgment of the district court is AFFIRMED.

BECKWITH, District Judge, concurring.

I.

I concur with Judge Nelson's results and his reasoning. I write separately, because I am convinced that more compelling grounds exist for exempting the Department of Justice's Hoffa file than that which was the basis of the district court's decision.

In the Llewellyn declaration, the Department of Justice cited at least three exemptions from the Freedom of Information Act in addition to exemption 7(A) of 5 U.S.C. § 522(b). The first such exemption is 7(C), the exemption for information, the disclosure of which "could reasonably be expected to be an unwanted invasion of personal privacy." The second is exemption 7(D) for information that "could reasonably be expected to disclose the identity of a confidential source." The third such exemption is 7(E), the exemption for information that "would disclose techniques and procedures for law enforcement investigations or prosecutions ... [when] such disclosure could reasonably be expected to risk circumvention of the law."

Apparently, the trial court considered each of the cited exemptions. Nevertheless, that court rested its decision entirely on exemption 7(A), concluding that the Department of Justice was engaged in an ongoing investigation directed toward the potential institution of criminal proceedings. Judge Nelson has properly confined his analysis to a review of the trial court's decision based upon exemption 7(A). I agree that the contents of the Moody file sufficiently support the trial court's conclusion that the contents of the Hoffa file are exempt under 7(A). The question is a close one, however, as is illustrated by the dissent.

My review of the Moody file suggests that each of the four exemptions discussed above supports the nondisclosure of some or all of the documents in the Hoffa file. Had the district court based its decision on all four exemptions, the correctness of the decision would have been beyond question and our review would have been much simpler.

II.

My review of the Moody file further suggests that the various exemptions are so intertwined, overlapping, and inextricable that virtually nothing from the Hoffa file could be revealed without jeopardizing the integrity of the investigation, confidential source identity, various individuals' privacy, and law enforcement investigative techniques. For this reason, the trial court could not have ordered a Vaughn index without risking inadvertent release of exempt and sensitive information.

There being no constitutional outline for the manner in which a trial court must approach its analysis of a government claim of exemption from the Freedom of Information Act, it cannot be said that the trial court in this instance failed to independently, adequately, and objectively assess the validity of the government's claim. The trial court was ***1435** under no obligation to follow Plaintiff's proffered procedure when another effective option was available. For that reason, I cannot agree with the dissent's criticism of the trial court's failure to order the production of an index.

BATCHELDER, Circuit Judge, dissenting.

I.

Over the past seventeen years, the Department of Justice has compiled a file of nearly four hundred volumes of documents on the disappearance of Jimmy Hoffa, a man, and a mystery, surely needing no introduction. Appellant Brian Dickerson, who happens to be editor of a major Detroit newspaper, has exercised the privilege Congress has given the public to request access to the documents in this file. While granting this privilege, Congress has also recognized that good government, in some circumstances, requires secrecy. Nonetheless, it has placed the burden of showing the need for secrecy on government agencies wishing to protect certain documents from public scrutiny. Since I believe the Government has fallen woefully short in carrying its burden, I dissent.

II.

The Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, enables citizens regardless of status to gain access to government documents, thus " 'open[ing] agency action to the light of public scrutiny.' " Vaughn v. United States, 936 F.2d 862, 865 (6th Cir.1991) (quoting Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749, 772, 109 S.Ct. 1468, 1481,

103 L.Ed.2d 774 (1989)); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 151, 110 S.Ct. 471, 475, 107 L.Ed.2d 462 (1989) (" '[The Act] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.' " (quoting EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973)). The Act's purpose is " 'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978)). It requires " 'full agency disclosure unless information is exempted under clearly delineated statutory language.' " Vaughn, 936 F.2d at 865 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976)). The exemptions are to be "narrowly construed." Id. " '[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). To avoid releasing requested documents, the Government must prove that the documents sought fit a specific statutory exemption; the person making the request bears no burden of showing that such documents may not be withheld. Vaughn, 936 F.2d at 866 (citing Department of Justice v. Tax Analysts, 492 U.S. 136, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989)).

A. Existence of an ongoing law enforcement proceeding.

In reviewing a District Court's decision under the FOIA, the Court of Appeals must "determine first whether the District Court had an adequate factual basis for its decision, and second, decide whether upon that basis the court's decision was clearly erroneous." Vaughn, 936 F.2d at 866 (citing Ingle v. Department of Justice, 698 F.2d 259, 267 (6th Cir.1983)). I agree with the majority that the record shows that the FBI has continued to pursue the Hoffa disappearance investigation and that officials believe that eventual prosecution is not out of the question. William M. Baker, the Assistant Director of the FBI in charge of the Criminal Investigative Division, who apparently has the authority to decide whether to continue the investigation, made a sworn declaration to that effect, and that is good enough to establish the existence of "a concrete prospective law enforcement proceeding."

***1436** B. Interference with an ongoing law enforcement proceeding.

While the existence of such an ongoing proceeding is necessary to a finding of exemption under § 522(b)(7)(A), Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986), [FN1] showing that such a proceeding indeed exists does not serve to exempt the entire file on the proceeding. Id. The Government also must prove that the documents, if released, could interfere with enforcement proceedings. Here, the Government essentially did nothing more than assure the reviewing court that all 400 volumes on Hoffa relate to their enforcement efforts, and recite (using language remarkably similar to statutory and case language) the harms that will result from any disclosure save for press clippings. It has not met its further burden of proof.

> FN1. To restate, § 522(b)(7)(A) exempts "investigatory records compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." The earlier version of this provision exempted such records where production "would" interfere with enforcement. See North v. Walsh, 881 F.2d 1088, 1098 n. 14 (D.C.Cir.1989) ("This change 'relieves the agency of the burden of proving to a certainty' that disclosure will interfere with enforcement proceedings, 'but does not otherwise alter the test.' ") (quoting Reporters Committee for Freedom of the Press v. Department of Justice, 816 F.2d 730 (D.C.Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989)). The Congress has lessened the Government's burden, but the causal connection between specific documents and potential interference still must be established; the statute still does not permit "blanket assertions" such as the Government has made here.

FOIA cases seem to pit citizen suspicion against

government defensiveness. The fact that one side knows the entire truth and the other must guess at it (as, indeed, must the judge) requires adherence to procedures meant to inform the court as to the nature of government documents without revealing their actual contents, and to retain as much fairness in the adversary proceeding as possible given the imbalance of information. See Wiener v. FBI, 943 F.2d 972, 977 (9th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 3013, 120 L.Ed.2d 886 (1992) (quoting Vaughn v. Rosen, 484 F.2d 820, 824 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974) (" 'This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system.' ").

The majority places great emphasis on the "public interest that exemption 7(A) was designed to protect" and the "obvious risks that public disclosure of these ... files would entail." I do not quarrel with the majority's observation that the release of documents containing, for example, the names of witnesses and informants might well lead to witness intimidation and destruction of evidence by those implicated in an ongoing investigation. Indeed, in enforcement exemption cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy." Campbell v. Department of Health & Human Services, 682 F.2d 256 (D.C.Cir.1982).

However, I believe the majority understates the Government's burden of showing that specific documents in its possession contain sensitive information. The majority admits that "the mere fact that the burden of justifying nondisclosure rests with the government does not illuminate the question of how heavy the burden is," and notes that Congress "broadened" exemption 7(A) from covering only records which "would" be expected to interfere with enforcement proceedings to those records which "could" be expected to interfere. While I recognize that Congress loosened up the standard somewhat from the seemingly unprovable "would interfere" standard to the more reasonable "could interfere," I certainly do not believe that in amending the statute Congress changed the underlying premise of the Act, that " 'disclosure, not secrecy, is the dominant objective of the Act.' " John Doe Corp., 493 U.S. at 152, 110 S.Ct. at 475 (quoting Rose, 425 U.S. at 361, 96 S.Ct. at 1599). Permitting the Government to satisfy its burden by simply assuring the court that all of the requested papers in a giant, seventeen year old file relate in some way to an ongoing investigation, as I think happened here, potentially robs the Act of all effectiveness in attaining this objective.

***1437** This Circuit has recognized that the focus of a FOIA case is the contents of the documents requested, not the purpose for which the Government possesses them. The Act grants disclosure exemptions for documents containing information which would most likely harm an ongoing investigation in a specific way if made public. Thus,

> a court must have sufficiently detailed information regarding the contents of withheld documents along with reasoning for the application of specific FOIA exemptions to enable the court to make an independent assessment of both the contents of the documents in issue and the applicability of any asserted exemptions.

Vaughn, 936 F.2d at 869. The court may not grant " 'blanket exemptions' for Government records simply because they were found in investigatory files compiled for law enforcement purposes." Robbins Tire & Rubber Co., 437 U.S. at 236, 98 S.Ct. at 2324. The Government "must demonstrate specifically how each document or category of documents, if disclosed, would interfere with the investigation." Campbell, 682 F.2d at 265 (emphasis added). The trial court has considerable discretion as to what procedures it uses to decide whether certain documents are exempt from disclosure, but whatever procedure the court chooses must suffice to produce enough evidence on which to rule, and to produce a record an appeals court can consult to review the decision. Vaughn, 936 F.2d at 869.

Reading the majority opinion may leave one with the distinct impression that we really have no idea what information lurks in the massive Hoffa file. That impression would be correct. The record presented us does not allow this court to make the requisite independent assessment of whether each document or category of documents would interfere with the Government's enforcement efforts. Obviously, the Government need not produce each and every document for the judge to decide whether its contents merit exemption from release. The Government's submissions may describe the

documents by categorizing them according to their content and nature, Bevis v. Department of State, 801 F.2d 1386, 1389 (D.C.Cir.1986); the indexing and categorizing of documents, particularly where the requested documents are voluminous, is preferred to in chambers inspections, Vaughn, 936 F.2d at 866. While courts have smiled on the use of Vaughn indices in sorting out large volumes of documents, and in their discretion sometimes ordered such indices produced, so long as the Government provides sufficiently specific and detailed information to permit the court to make a reasoned determination, "no particular method ... is mandated." Id. at 867.

Just because the Act does not mandate a particular method does not mean that any method will do. The Llewellyn declaration, which the majority believes adequately provides a categorization of the documents in the file, falls short in two respects. First, categories such as "information and documents provided by local law enforcement" and "public and sealed court documents" are not "sufficiently distinct to allow a court to determine, as to each category, whether the specific claimed exemption(s) are properly applied." Vaughn, 936 F.2d at 868. The court must be able " 'to trace a rational link between the nature of the document and the alleged likely interference.' " Bevis, 801 F.2d at 1389 (quoting Crooker v. Bureau of Alcohol, Tobacco and Firearms, 789 F.2d 64, 67 (D.C.Cir.1986)).

Second, even though a few of Mr. Llewellyn's categories, such as "documents containing information from confidential informants," more appropriately describe materials that fit the exemption, I do not believe the Government's task ends there with respect to showing that the documents it seeks to keep secret fit in those clearly exempt categories. A category alone gives no clue as to the content of the documents it purportedly encompasses; therefore it does not provide "adequate detail and justification" to satisfy the claimed exemption. Id. at 869. While our decision in Vaughn is careful not to prescribe specific methods, I think our opinion in that case, which affirmed the exemptions claimed there, describes considerably more effort on the part of the affiant than we see here. The affiant in Vaughn did assign the documents to rather general categories, but she

***1438** also indicated, by page number, which of the 1,000+ documents were included in each of the categories. For each of the categories, [the affiant] then discusses the legal grounds and exemptions upon which the government relies in withholding the specific documents contained within each category. Attached to her affidavit is an exhibit which summarizes, by document page number, the exemption(s) relied on for withholding each of the 1,000+ pages.

Vaughn, 936 F.2d at 868 (emphasis added). This passage, it seems to me, illustrates the rule that the Government must demonstrate that the contents of identifiable documents actually fit the exemption claimed. The record here does not allow us to see how this fit has been made. For example, while the Government has told us that the Hoffa file contains informant interviews, which comes as no surprise, it has not explained even in broad terms which specific documents those are, how many there are, or anything else to prove that the Government is not making a blanket representation, but has reviewed those documents and has good reason to believe that releasing any of them could harm the ongoing investigation. [FN2] See Bevis, 801 F.2d at 1389 ("[T]he FBI must itself review each document to determine the category in which it properly belongs. Absent such individual scrutiny, the categories would be no more than smaller versions of the 'blanket exemptions' disapproved by Congress in its 1974 amendment of FOIA.").

> FN2. A word on the "Moody file." Our decision in Vaughn makes it clear that in camera review of documents is not favored, particularly where the Government chooses to proceed using categories of documents, rather than presenting all the documents it seeks to exempt to the reviewing court. See Vaughn, 936 F.2d at 868-69. The Government admits that the documents in this file were compiled to help Agent Moody prepare his affidavit, and does not suggest that the documents somehow represent others in the Hoffa file. Allowing us to peek at a few documents from the Hoffa file does nothing to prove that the rest of the file is exempt.

Our decision in Vaughn, following fairly straightforward Supreme Court precedent, requires that the Government make a choice in arguing for exemption from FOIA disclosure. It may present the court with a highly detailed Vaughn index, it may create more general exempt categories and then show how each document fits into them, or it may

haul the entire file into chambers for hands-on review by the judge; the last of these, as I have explained, we have strongly discouraged. By holding in this case that the Government has met its burden of showing the entire Hoffa file to be exempt under § 522(b)(7)(A), the majority leaves FOIA law in this Circuit with the worst of all worlds. The Government has defined several general categories of documents, not all of them properly exempt, and then handed the court an admittedly nonrepresentative packet of secret documents to inspect in chambers. Neither effort sufficed to show how each and every document in the Hoffa file fits the proffered statutory exemption; the two methods taken together do not add up to a proper or sufficient showing. I am at a loss to reconcile the majority's opinion either with our Vaughn decision or with the Supreme Court's teachings on FOIA law.

C. Segregability of portions of the file.

I also disagree with the majority's conclusion that the Government has adequately shown that none of the Hoffa file, save for "public" documents such as newspaper clippings, is "reasonably segregable" under § 522(b). This provision requires the Government to release "any materials that do not properly fall within a legitimately withheld category." Bevis, 801 F.2d at 1390. Since I do not think the Government adequately showed what the Hoffa file contains, I certainly do not think it adequately demonstrated that none of this immense file falls outside of the statutory exemptions, as the statute itself requires. The Act does not ask the Government to judge the "prospects" of segregating non-exempt material, it commands the Government to segregate its files if at all possible. Both the statute and the caselaw indicate that Congress was largely unconcerned with the administrative burdens it was imposing on government agencies, but placed a higher value on openness. It is not our place to reorder Congress's priorities. Neither, might I add, is it our place to judge whether the material a citizen requests from the Government is "useless."

***1439** III.

It is difficult to ignore the fact that the documents Mr. Dickerson has requested may contain the secrets to Jimmy Hoffa's disappearance. One may be predisposed in favor of government secrecy or against, or may approve or disapprove of investigative reporting by the media. However, in enacting FOIA, Congress has chosen to value government disclosure over government convenience and economy, and chosen not to favor or disfavor certain persons or their reasons for asking the Government to disclose documents. Here, a private citizen has made a specific request. Congress has placed a heavy burden on the government agency wishing to keep the requested documents secret, and that burden has not been met. While it may well be that the Hoffa file should remain a secret, I do not believe that the Government has yet proven why. I dissent.

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CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 12/06/96

INSTA-CITE

CITATION: 992 F.2d 1426

Direct History

1 Dickerson v. Department of Justice, 1991 WL 337422
(E.D.Mich., Jul 31, 1991) (NO. CIV. A.90-CV-60045AA)
Reconsideration Denied by
2 Dickerson v. Department of Justice, 1992 WL 112229
(E.D.Mich., Mar 16, 1992) (NO. C.A. 90-CV-60045-AA)
AND Judgment Affirmed by
=> 3 **Dickerson v. Department of Justice,** 992 F.2d 1426, 61 USLW 2698
(6th Cir.(Mich.), Apr 30, 1993) (NO. 92-1458), rehearing denied
(Aug 03, 1993)
Certiorari Denied by
4 Dickerson v. Department of Justice, 510 U.S. 1109, 114 S.Ct. 1049,
127 L.Ed.2d 372, 62 USLW 3541, 62 USLW 3550 (U.S., Feb 22, 1994)
(NO. 93-678)

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