U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

June 3, 2016

MR. JOHN GREENWALD JR.
[redacted]

FOIPA Request No.: 1349828-000
Subject: EXNER, JUDITH

Dear Mr. Greenwald:

Records responsive to your request were previously processed under the provisions of the Freedom of Information Act. Enclosed is one CD containing 521 pages of previously processed documents and a copy of the Explanation of Exemptions.

Submit requests by mail or fax to – Work Process Unit, 170 Marcel Drive, Winchester, VA 22602, fax number (540) 868-4997.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S. C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within sixty (60) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

Sincerely,

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Records Management Division

Enclosure(s)

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(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 to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(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 issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) 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;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(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, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of 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 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, (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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service he release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

Total Deleted Page(s) = 34
Page 24 ~ Duplicate;
Page 25 ~ Duplicate;
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FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

FD-148 (10-25-71)

FEB 1 1973

TELETYPE

Transmit attached by Facsimile — ☐ AIRTEL

Priority: ☐ URGENT

Assoc. Dir. ____
Dep.-A.D.-Adm. ____
Dep.-A.D.-Inv. ____
Asst. Dir.: ____
Admin. ____
Comp. Syst. ____
Ext. Affairs ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Laboratory ____
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Legal Coun. ____
Telephone Rm. ____
Director Sec'y ____

To: DIRECTOR, FBI
ATTN: LEGAL COUNSEL DIV.

Date: 2/11/73

From: ASSISTANT DIRECTOR MINTZ
SAC, SAN DIEGO

Time Transmitted: ____

Subject: JUDITH CAMPBELL EXNER VS. CLARENCE M. KELLEY AND EDWARD H. LEVI
CIVIL SUIT NO. 73-0089

Classified: ____

☐ Fingerprint Photo ☐ Fingerprint Record ☐ Map ☐ Newspaper clipping ☐ Photograph
☐ Artists Conception ☒ Other Complaint
☐ (6 mos) ☐ (1 mo)

Special handling instructions:

MGT-13

62-116929-

Approved: ____

FEB 21 1973

116929

10 ENCLOSURES

BRIAN D. MONAGHAN, ESQ.
1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Attorney for Plaintiff

FILED

FEB 6 - 1976

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY [signature] DEPUTY

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CIVIL ACTION NO. 76-89-S

62-116939

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States
Department of Justice Building
10th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20530,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat. 1561, to require defendants to permit access to certain records in their possession.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

3. Plaintiff, JUDITH KATHERINE EILEEN (nee DRIOOR) (CAMPBELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the Federal Bureau of Investigation and initially denied plaintiff's request.

6. Defendant Department of Justice is an agency of the United States and is responsible, under its regulations, for reviewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of the United States; the Department of Justice made the final denial

of plaintiff's request on February 5, 1976.

8. By letter dated December 24, 1975 (a copy of which is attached as Exhibit "A"), plaintiff requested access to all records in the possession of the FBI pertaining to plaintiff.

9. By failing to produce or make available said records within the statutory period, Defendant FBI denied plaintiff's request.

10. By letter dated November 11, 1976 (a copy of which is attached as Exhibit "B", plaintiff appealed the initial denial.

11. By letter dated January 26, 1976 (exhibit C) plaintiff requested preference and specified the justification for such preference.

12. By letter dated February 5, 1976 (a copy of which is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of Information Appeals Unit, Office of the Deputy Attorney General, denied said appeal.

13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is entitled to access to the requested records, and there is no legal

basis for defendants' denial of such access, nor has any such basis for denial been raised by defendants in response to plaintiff's request and appeal.

WHEREFORE, plaintiff prays that the Court (1) order defendants to permit access to the requested records; (2) provide for expeditious proceedings in this action as provided in 5 U.S.C. §552(a)(4)(D); (3) award plaintiff her costs and reasonable attorneys' fees in this action; and (4) grant such other and further relief as the Court may deem just and proper.

DATED: San Diego, California
February 6, 1975

BRIAN D. MONAGHAN
Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE-SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

December 24, 1975

Freedom of Information Unit
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith (Campbell) Exner

Gentlemen:

My client, Judith Katherine Eileen (nee Immoor) (Campbell) Exner who was born January 11, 1934, in New York, New York, hereby requests access to any and all records filed under any of her names with the Federal Bureau of Investigation. Her Social Security Number is 550-48-2363. Enclosed is a notarized statement to that effect. Please furnish this information to her at the above address.

Sincerely,

Brian D. Monaghan

BDM:maw

116928

62 ENCLOSURE

EXHIBIT "A"

I, JUDITH KATHERINE EILEEN (nee INMOOR) (CAMPBELL) EXNER, having a date of birth of January 11, 1934, in New York, New York, and having a Social Security Number of 550-48-2363, request access to any and all records filed under any of my names with the Federal Bureau of Investigation.

DATED: December 23, 1975.

JUDITH KATHERINE EILEEN (nee INMOOR) (CAMPBELL) EXNER

STATE OF CALIFORNIA)
: ss
COUNTY OF SAN DIEGO)

On December 23, 1975, before the undersigned, a Notary Public for the State of California, personally appeared JUDITH KATHERINE EILEEN (nee INMOOR) (CAMPBELL) EXNER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

OFFICIAL SEAL
GAYE N. HANSON
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co. Calif.
My Commission Exp. Jan. 11, 1978

116924

62-

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

January 11, 1976

Deputy Attorney General
Harold Tyler
Department of Justice
Washington, D. C. 20035

Re: Judith (Campbell) Exner

Gentlemen:

By letter dated December 24, 1975, I requested access to any and all files or records under the name or names of Judith Katherine Eileen (nee Immoor) (Campbell) Exner, pursuant to the Freedom of Information Act, 5 U.S.C. 552. Ten working days having elapsed, I deem my request denied and hereby appeal that denial. For your convenience I have enclosed a copy of my request letter.

If you do not act upon my appeal within twenty (20) working days, I will deem my request denied.

Sincerely,

Brian D. Monaghan

BDM:mmw
Enclosure
cc: Ms. Judith (Campbell) Exner

116929-
[redacted]

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

January 26, 1976

Department of Justice
Freedom of Information Appeals Unit
Washington, D.C. 20035
Attn: Mr. Quinn Shea

Re: Judith (Campbell) Exner

Dear Quinn:

In our recent telephone conversation, you requested specification of reasons why the Judith (Campbell) Exner file held by the FBI should be given priority with respect to its disclosure. For the following reasons, I feel strongly that the sequential order of examination of requests under the Freedom of Information Act should not apply and that she should have her file at the earliest possible moment:

1. It is obvious from the factual background that has been so prominent in the media lately that she is in physical danger until such time as all of her recollections are committed to a writing. You will recall that Sam Giancana was murdered approximately one week prior to the time that he was to testify. This fear of physical danger was the primary reason for my client coming forward after the Senate Select Committee leaked portions of her testimony in such a way as to allow speculation that she knew of the assassination plot.

2. The document which will be produced will be of historical significance. It is obvious that unless the background data is obtained, many of the facts may be clouded by an inability to recollect. It is in the interests of all parties that the facts when stated be accurate and correct but this is totally within the control of the Federal Bureau of Investigation at this point. I am referring not only to the potential for libel suits arising out of the book, but also to the American peoples' right to know the true facts in general.

3. You indicated that many requests to the FBI in the past have been of a frivolous nature. This is clearly not such a case since she physically viewed the file during her testimony

[redacted] 116925

EXHIBIT "C"

before the Senate Select Committee and had portions read to her. Consequently, this is not analogous to a situation where a radical student body president suspects that there might be something on him somewhere in a FBI file and is spurred by mere curiosity.

4. From an equitable viewpoint (if such a concept still exists), these files have been used against her and selected portions of them have been leaked to the press; it would only seem fair that she have a right to see them.

5. These items would appear to fall within none of the exceptions to the Freedom of Information Act since no investigation is presently underway as to her and the other key figures involved; that is, John F. Kennedy and Sam Giancana are both deceased.

While I recognize that this may be the sort of "hot potato" that is passed bureaucratically back and forth, it would seem that the foregoing reasons would necessitate someone making a decision to make these materials available to her. Anything that can be done to expedite this decision would be greatly appreciated.

Kindest regards.

Brian D. Monaghan

BDM:df

cc: Federal Bureau of Investigation
Attn: Freedom of Information Act

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

FEB 9 1976

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handing over the several thousand previous requests still pending in the F.B.I.

I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons.

62 - 116923

EXHIBIT "5"

I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

I thoroughly enjoyed our recent telephone conversation and wish that my response could be in accord with your desires. My basic sense of fairness, however, leads me to the conclusion that Ms. Exner should wait her turn -- a conclusion that I consider to be fully consistent with what I consider to be the basic intent of Congress in this area.

You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts. Your client has the right to sue in the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records she seeks -- if, indeed, they exist at all -- are located.

Best regards,

Sincerely,

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

SUMMONS IN A CIVIL ACTION

CIV. 1 (5-41)
(Formerly D.C. Form No. 13 Rev. (5-27))

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States
Department of Justice Building
10th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20530,

Defendants.

CIVIL ACTION FILE NO. 76-0089-S

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

ENCLOSURE

62 - 116927

BRIAN D. MONAGHAN

15

plaintiff's attorney , whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM W. LUDDY
Clerk of Court.

By E.G. ROSALES
E. G. ROSALES, Deputy Clerk.

SEAL
(Seal of Court)

Date: February 10, 1976

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

62 116929

CIVIL COVER SHEET

PLAINTIFFS

JUDITH KATHERINE KZNER

DEFENDANTS

FEDERAL BUREAU OF INVESTIGATION; CLARENCE M. KELLEY; UNITED STATES DEPARTMENT OF JUSTICE and EDWARD H. LEVI;

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

BRIAN D. MONAGHAN
1200 Third Avenue, Suite 1324
San Diego, California 92101
Telephone: (714) 232-6254

ATTORNEYS (IF KNOWN)

76-87-S

(PLACE AN X IN ONE BOX ONLY)

BASIS OF JURISDICTION

IF DIVERSITY, INDICATE RESIDENCE BELOW.

☒ U.S. PLAINTIFF ☐ U.S. DEFENDANT ☐ 3 FEDERAL QUESTION (U.S. NOT A PARTY) ☐ DIVERSITY

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

Action under Freedom of Information Act, 5 U.S.C. §552 as amended by Pub. L. No. 93-504, 88 Stat. 1561, to obtain the files of the F.B.I on the plaintiff.

C 2 - 116928

(PLACE AN X IN ONE BOX ONLY)

NATURE OF SUIT

(PLACE AN X IN ONE BOX ONLY)

ACTIONS UNDER STATUTES

CONTRACT

- ☐ 110 INSURANCE
- ☐ 120 MARINE
- ☐ 130 MILLER ACT
- ☐ 140 NEGOTIABLE INSTRUMENT
- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ 153 OTHER CONTRACT
- ☐ 195 CONTRACT PRODUCT LIABILITY

REAL PROPERTY

- ☐ 210 CONDEMNATION
- ☐ 220 FORECLOSURE
- ☐ 230 RENT LEASE & EJECTMENT
- ☐ 240 TORTS TO LAND
- ☐ 245 TORT PRODUCT LIABILITY
- ☐ 290 ALL OTHER REAL PROPERTY

TORTS

PERSONAL INJURY

- ☐ 310 AIRPLANE
- ☐ 315 AIRPLANE PRODUCT LIABILITY
- ☐ 320 ASSAULT, LIBEL & SLANDER
- ☐ 330 FEDERAL EMPLOYERS' LIABILITY
- ☐ 340 MARINE
- ☐ 345 MARINE PRODUCT LIABILITY
- ☐ 350 MOTOR VEHICLE
- ☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
- ☐ 360 OTHER PERSONAL INJURY
- ☐ 365 PERSONAL INJURY PRODUCT LIABILITY

PERSONAL PROPERTY

- ☐ 370 FRAUD OR TRUTH IN LENDING
- ☐ 380 OTHER PERSONAL PROPERTY DAMAGE
- ☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

CIVIL RIGHTS

- ☐ 441 VOTING
- ☐ 442 JOBS
- ☐ 443 ACCOMMODATIONS
- ☐ 444 WELFARE
- ☐ 440 OTHER CIVIL RIGHTS

PRISONER PETITIONS

- ☐ 510 VACATE SENTENCE (2255)
- ☐ 530 PAROLE BRD. REVIEW
- ☐ 535 HABEAS CORPUS
- ☐ 540 MANDAMUS & OTHER
- ☐ 550 CIVIL RIGHTS

FORFEITURE/PENALTY

- ☐ 610 AGRICULTURE
- ☐ 620 FOOD & DRUG
- ☐ 625 LIQUOR LAWS
- ☐ 630 R.R. & TRUCK
- ☐ 640 AIR LINE REGS.
- ☐ 650 OCCUPATIONAL SAFETY/HEALTH
- ☐ 690 OTHER

LABOR

- ☐ 710 FAIR LABOR STANDARDS
- ☐ 720 LABOR/MGMT. RELATIONS
- ☐ 730 LABOR/MGMT. REPORTING & DISCLOSURE ACT
- ☐ 740 RAILWAY LABOR ACT
- ☐ 790 OTHER LABOR LITIGATION

PROPERTY RIGHTS

- ☐ 820 COPYRIGHT
- ☐ 840 TRADEMARK
- ☐ 830 PATENT

OTHER STATUTES

- ☐ 400 STATE RE-APPORTIONMENT
- ☐ 410 ANTI-TRUST
- ☐ 422 BANKRUPTCY TRUSTEE
- ☐ 430 BANKS AND BANKING
- ☐ 450 COMMERCE ICC RATES, ETC.
- ☐ 460 DEPORTATION
- ☐ 470 RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS
- ☐ 480 CONSUMER CREDIT
- ☐ 490 CABLE/SATELLITE TV
- ☐ 891 AGRICULTURAL ACTS
- ☐ 892 ECONOMIC STABILIZATION ACT
- ☐ 893 ENVIRONMENTAL MATTERS
- ☐ 894 ENERGY ALLOCATION ACT
- ☐ 895 CONSTITUTIONALITY OF STATE STATUTES
- ☐ 896 NARA, TITLE III
- ☐ 899 OTHER STATUTORY ACTIONS

(PLACE AN X IN ONE BOX ONLY)

ORIGIN

- ☒ 1 ORIGINAL PROCEEDING
- ☐ 2 REMOVED FROM STATE COURT
- ☐ 3 REMANDED FROM APPELLATE COURT
- ☐ 4 REINSTATED OR REOPENED
- ☐ 5 TRANSFERRED FROM (SPECIFY DIST.)
- ☐ 6 MULTIDISTRICT LITIGATION

(PLACE AN X IN ONE BOX ONLY)

RESIDENCE OF PRINCIPAL PARTIES (FOR DIVERSITY)

	PTF	DEF
RESIDENT OF YOUR STATE	☐ 1	☐ 1
NON-RESIDENT CORPORATION DOING BUSINESS IN STATE	☐ 2	☐ 2
NON-RESIDENT CORPORATION NOT DOING BUSINESS IN STATE	☐ 3	☐ 3
OTHER NON-RESIDENT OF YOUR STATE	☐ 4	☐ 4

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ Attorney's Fees

CHECK YES ONLY IF DEMANDED IN COMPLAINT

JURY DEMAND ☐ YES ☒ NO

OTHER

RELATED CASE(S) IF ANY

JUDGE _____ DOCKET NUMBER _____

CIVIL CASES ARE DEEMED RELATED IF PENDING CASE INVOLVES:

- ☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT
- ☐ 2. SAME ISSUE OF FACT OR GROWS OUT OF THE SAME TRANSACTION
- ☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK

DATE

February 9, 1976

SIGNATURE OF ATTORNEY OF RECORD

BRIAN D. MONAGHAN

UNITED STATES DISTRICT COURT

JS-44c (Rev. 1/79)

76 - 116923

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

January 26, 1976

Department of Justice
Freedom of Information Appeals Unit
Washington, D.C. 20035
Attn: Mr. Quinn Shea

Re: Judith (Campbell) Exner

Dear Quinn:

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3. You indicated that many requests to the FBI in the past have been of a frivolous nature. This is clearly not such a case since she physically viewed the file during her testimony

ST-105 REC-75 62-116721-X
10-5
17 JAN 28 1976
E.O.I.A.
12/30
AUG 13 1976

before the Senate Select Committee and had portions read to her. Consequently, this is not analogous to a situation where a radical student body president suspects that there might be something on him somewhere in a FBI file and is spurred by mere curiosity.

4. From an equitable viewpoint (if such a concept still exists), these files have been used against her and selected portions of them have been leaked to the press; it would only seem fair that she have a right to see them.

5. These items would appear to fall within none of the exceptions to the Freedom of Information Act since no investigation is presently underway as to her and the other key figures involved; that is, John F. Kennedy and Sam Giancana are both deceased.

While I recognize that this may be the sort of "hot potato" that is passed bureaucratically back and forth, it would seem that the foregoing reasons would necessitate someone making a decision to make these materials available to her. Anything that can be done to expedite this decision would be greatly appreciated.

Kindest regards,

BRIAN D. MONAGHAN

Brian D. Monaghan

BDM:df

cc: Federal Bureau of Investigation
Attn: Freedom of Information Act

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handing over the several thousand previous requests still pending in the F.B.I.

I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons.

REC-75 62-116395-11

Clarence M. Kelley SI-105

1- ENCLOSURE

10/5 FEB 12 1976

54 OCT 13 1976

F.O.I.A.

I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

I thoroughly enjoyed our recent telephone conversation and wish that my response could be in accord with your desires. My basic sense of fairness, however, leads me to the conclusion that Ms. Exner should wait her turn -- a conclusion that I consider to be fully consistent with what I consider to be the basic intent of Congress in this area.

You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts. Your client has the right to sue in the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records she seeks -- if, indeed, they exist at all -- are located.

Best regards,

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

0-63 (Rev. 2-14-74)

TO: Special Investigative Division

FROM: ☐ Intelligence ☐ General Investigative ☐ Special Investigative

FOIA

REQUEST FOR SEARCH OF SPECIAL INDICES

Date of request	Requesting Agent [redacted]

b6
b7C

Please complete following and return one

_____ Section, Division - ☐ Intelligence ☐ General Investigative ☐ Special Investigative

NAMES TO BE SEARCHED	KNOWN ALIASES	Results of Criminal and Security Special Indices Search (attach separate sheet, if necessary)
Judy Campbell Judith, Judith Campbell Exner Judith Exner		Bufile 92-5383 [redacted] LA 92-396-J 92-934

b7D

5/14/62 First date of Monitor

Searched by [redacted]

Bufile _____

Date 4/21/76

b6
b7C

0-63 (Rev. 2-14-74)

TO: ~~Special Investigative Division~~ Div. 4

FROM: XX Intelligence ☐ General Investigative ☐ Special Investigative

REQUEST FOR SEARCH OF SPECIAL INDICES

Date of request	Requesting Agent
4/21/76	SA [redacted]

b6
b7C

Please complete following and return one copy to:

FOIPA Section, Division - ☐ Intelligence ☐ General Investigative ☐ Special Investigative X Records Management

NAMES TO BE SEARCHED	KNOWN ALIASES	Results of Criminal and Security Special Indices Search (attach separate sheet, if necessary)
Judy Campbell	Judith Campbell Immor Judith Exner Judith Campbell Immon	NO RECORD N/R N/R N/R

Searched by [redacted]

b6
b7C

Bufile _____

Date 4/21/76

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Philip Mogen
Chief, Litigation Unit
Freedom of Information Unit
Federal Bureau of Investigation

DATE: February 24, 1976

FROM : Rex E. Lee
Assistant Attorney General
Civil Division

REL:JAxelrad:dcb
145-12-2683

SUBJECT: By: Jeffrey Axelrad, Chief
Information and Privacy Unit

Tel: 739-3300

Judith Katherine Exner v. Federal Bureau of Investigation, U.S.D.C. S.D. Cal., Civil Action No. 76-0089-S

Enclosed is a copy of the complaint in the above-entitled matter filed pursuant to 5 U.S.C. §552.

Because the Freedom of Information Act provides that FOI cases take precedence on the docket, we would appreciate your providing us a litigation report in duplicate by March 11, 1976 if possible, which report should include the following:

1. A statement as to the manner, place, and time of plaintiff's request to your office to make the records involved available for his inspection, including four copies--one certified-- of any documents or other memoranda incorporating plaintiff's request.

2. Five copies--one certified--of any correspondence or memoranda of any communication, written or oral, between your office and the plaintiff concerning plaintiff's request for the records involved.

3. If the records have been identified and located a detailed description or summary of the records involved and a statement as to their current location. If it has not been possible to identify or locate the records, please include a statement to this effect.

REC-57 62-116929-2

4. Two copies of any correspondence or memoranda within your office showing the administrative processing of the plaintiff's request.

MCT-8 CH 41

6- ENCLOSURE

11-E. P. Mohr

5010-110

MAR 23 1976

F-59

5. A statement of the reason or reasons why in the opinion of your office the record involved should not be made available. Such reasons should be related as directly as possible to the statute, as for example, that the record is available under subsection (a)(1) or (a)(2) of the Act, that the record is exempted from disclosure by some other statute or that the record is within one or more of the other exemptions of subsection (b) of the Act, or that the plaintiff did not comply with the applicable regulations in requesting the record. Where the record falls within one or more of the exemptions of subsection (b) of the Act, such exemption should be specifically identified and discussed.

We suggest that you include in the affidavit or affidavits a statement of facts demonstrating the manner in which production of the records requested would prejudice the operation of your office.

6. Executed original and five copies of an affidavit setting forth facts establishing any defenses you think pertinent. If there are any questions on the form of this affidavit, Jeffrey Axelrad (739-3300) of our office will do his best to assist you.

7. The name and telephone number of the attorney in your office who will be familiar with this.

Enclosure

cc: United States Attorney
San Diego, California 92101

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-1)
(Formerly D. C. Form No. 45 Rev. (5-1))

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

RECEIVED
FEB 10 11 36 AM '76
U.S. MARSHAL
SOUTHERN DISTRICT OF
CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States
Department of Justice Building)
10th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20530,

Defendants.

CIVIL ACTION FILE NO. 76-0089-S

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

BRIAN D. MONAGHAN

plaintiff's attorney, whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM W. LUDDY
Clerk of Court.

By R. G. ROSALES
R. G. ROSALES, *Deputy Clerk.*

Date: February 10, 1976

[Seal of Court]

SEAL

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

BRIAN D. MONAGHAN, ESQ.
1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation 10th Street and Pennsylvania Avenue, N.W. Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States Department of Justice Building 10th Street and Pennsylvania Avenue, N.W. Washington, D. C. 20530,

Defendants.

CIVIL ACTION NO. 76-0097-S

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat. 1561, to require defendants to permit access to certain records in their possession.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

---

3. Plaintiff, JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the Federal Bureau of Investigation and initially denied plaintiff's request.

6. Defendant Department of Justice is an agency of the United States and is responsible, under its regulations, for reviewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of the United States; the Department of Justice made the final denial of plaintiff's request on February 5, 1976.

8. By letter dated December 24, 1975 (a copy of which is attached as Exhibit "A"), plaintiff requested access to all records in the possession of the FBI pertaining to plaintiff.

9. By failing to produce or make available said records within the statutory period, Defendant FBI denied plaintiff's request.

10. By letter dated November 11, 1976 (a copy of which is attached as Exhibit "B", plaintiff appealed the initial denial.

11. By letter dated January 26, 1976 (exhibit C) plaintiff requested preference and specified the justification for such preference.

12. By letter dated February 5, 1976 (a copy of which is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of Information Appeals Unit, Office of the Deputy Attorney General, denied said appeal.

13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is entitled to access to the requested records, and there is no legal

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basis for defendants' denial of such access, nor has any such basis for denial been raised by defendants in response to plaintiff's request and appeal.

WHEREFORE, plaintiff prays that the Court (1) order defendants to permit access to the requested records; (2) provide for expeditious proceedings in this action as provided in 5 U.S.C. §552(a)(4)(D); (3) award plaintiff her costs and reasonable attorneys' fees in this action; and (4) grant such other and further relief as the Court may deem just and proper.

DATED: San Diego, California
February 6, 1975

BRIAN D. MONAGHAN

Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

FD-465 (Rev. 5-31)

TREAT AS CONFIDENTIAL

COMMUNICATIONS SECTION

Transmit attached by Facsimile – PLAINTEXT

Priority Urgent

Assoc. Dir.	
Dep.-A.D.-Adm.	
Dep.-A.D.-Inv.	
Asst. Dir.:	
Admin.	
Comp. Syst.	
Ext. Affairs	
Files & Com.	
Gen. Inv.	
Ident.	
Inspection	
Intell.	
Laboratory	
Plan. & Eval.	
Spec. Inv.	
Training	
Legal Coun.	
Telephone Rm.	
Director Sec'y	

To: DIRECTOR, FBI (ATTN: Office of Legal Counsel) for TELETYPE

Date: 2/19/76

From: SAC, SD (66-1761)

Time Transmitted:

Subject: Judith Campbell Exner, aka Judith Campbell Exner

Initials:

3-E 1p.1
5-E 1,15

☐ Fingerprint Data ☐ Fingerprint Record ☐ Mail ☐ Telephone Inquiry ☐ Photograph

☐ Article Description ☐ Other Summons

☐ (6 cys) ☐ (4 cys)

Special Handling Instructions: Summons was served by U.S. Marshal on SAC, Rapid City.

Approved:

62 6D

REC-3 62-116395-3

EX-111

5 MAR 19 1976

FBI

SUMMONS IN A CIVIL ACTION

CIV. 1 (7-69)
Formerly D.C. Form No. 13 Rev. (6-01)

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

RECEIVED
FEB 10 11 35 AM '76
U.S. MARSHAL
SOUTHERN DISTRICT OF
CALIFORNIA

JUDITH-KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States
Department of Justice Building
10th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20530,

Defendants.

CIVIL ACTION FILE NO. 76-0089-G

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

BRIAN D. MONAGHAN

62-116459—

1A

plaintiff's attorney , whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM M. LOBBY
Clerk of Court

By R. G. ROSALES
R. G. ROSALES, Deputy Clerk

Date: February 10, 1976

(SEAL)

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

3

RECEIVED
FEB 9 11 57 AM '76
U.S. MARSHAL
SOUTHERN DISTRICT OF CALIFORNIA

FILED
FEB 6 - 1976
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

BRIAN D. MONAGHAN, ESQ.
1324 Security Pacific Plaza
1295 Third Avenue
San Diego, California 92101
(714) 232-6254

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

CIVIL ACTION NO. 76-89-S

62-116939-

2B

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States Department of Justice Building 10th Street and Pennsylvania Avenue, N.W. Washington, D. C. 20530,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat. 1561, to require defendants to permit access to certain records in their possession.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

3. Plaintiff, JUDITH KATHERINE EILEEN (nee DEMOOR) (CAMPBELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the Federal Bureau of Investigation and initially denied plaintiff's request.

6. Defendant Department of Justice is an agency of the United States and is responsible, under its regulations, for reviewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of the United States; the Department of Justice made the final denial of plaintiff's request on February 5, 1976.

8. By letter dated December 24, 1975 (a copy of which is attached as Exhibit "A"), plaintiff requested access to all records in the possession of the FBI pertaining to plaintiff.

9. By failing to produce or make available said records within the statutory period, Defendant FBI denied plaintiff's request.

3A

10. By letter dated November 11, 1976 (a copy of which i
attached as Exhibit "B", plaintiff appealed the initial denial.

11. By letter dated January 26, 1976 (exhibit C) plaintiff request-
ed preference and specified the justification for such preference.

12. By letter dated February 5, 1976 (a copy of which
is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of In-
formation Appeals Unit, Office of the Deputy Attorney General,
denied said appeal.

13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is en-
titled to access to the requested records, and there is no legal

bases for defendants' denial of such access, nor has any such basis for denial been raised by defendants in response to plaintiff's request and appeal.

WHEREFORE, plaintiff prays that the Court (1) order defendants to permit access to the requested records; (2) provide for expeditious proceedings in this action as provided in 5 U.S.C. §552(a)(4)(D); (3) award plaintiff her costs and reasonable attorneys' fees in this action; and (4) grant such other and further relief as the Court may deem just and proper.

DATED: San Diego, California
February 6, 1975

BRIAN D. MONAGHAN

Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

Assistant Attorney General
Civil Division
Attn: Jeffrey Axelrad

March 15, 1976

Director, FBI

1 - Mr. McDermott
Attn: Mr. Hanigan
1 - Mr. Mintz
1 - FOIA Litigation
(Mr. Moschella)

JUDITH CAMPBELL EXNER v.
FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-0089-S

Judith Katherine Exner

Reference is made to memorandum of Jeffrey Axelrad, Chief, Information and Privacy Unit, Civil Division, dated February 24, 1976, his reference REL: JAxelrad:dcb 145-12-2683, in which a litigation report in captioned matter was requested.

For your information, by letter dated December 24, 1975, plaintiff through her attorney, Brian D. Monaghan, made a request pursuant to the Freedom of Information Act (FOIA) for access to "any and all records filed under any of her names with the Federal Bureau of Investigation." By letter dated January 15, 1976, we responded to that request advising Mr. Monaghan that due to the exceedingly heavy volume of FOIA requests substantial delays in processing requests of this type are being experienced. Mr. Monaghan corresponded with Mr. Quinn Shea by letter dated January 26, 1976, requesting preferential treatment in the processing of his client's request. Both Mr. Shea and Director Kelley responded to that appeal for preferential treatment by their letters dated February 5, 1976, and February 19, 1976, respectively, and in each case denied his right to such treatment.

The following are proposed answers to specific allegations in plaintiff's amended complaint:

Paragraph One: This paragraph generally alleges the jurisdiction of the court and is not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

EPM:lsy:jd
(7)

ST-104 REC-11 62-116974-4

MAR 17 1976

8 - ENCLOSURE

MAR - 5 1976 FBI

Asoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Admin.
Comp. Syst.
Ext. Affairs
Files & Com.
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Plan. & Eval.
Spec. Inv.
Training
Legal Coun.
Telephone Rm.
Dir. Sec'y

MAIL ROOM ☑ TELETYPE UNIT ☐

56 MAY 03 1976

GPO : 1975 O - 569-920

Assistant Attorney General
Civil Division

Paragraph Two: Defendants have insufficient information upon which to form a belief as to the truth or falsity of the first sentence; therefore, it is denied. The balance of this paragraph should be denied, except to admit the authenticity of plaintiff's Exhibits One through Four to which the court is respectfully referred for a complete and accurate statement of the contents thereof.

Paragraph Three: Admit, except to deny that the FBI is an agency of the United States and that defendant Kelley denied plaintiff's request to review her records.

Paragraph Four: Deny, except to admit receipt of a letter dated December 24, 1975, to which the court is respectfully referred for a complete and accurate statement of the contents thereof.

Paragraph Five: The first sentence of this paragraph constitutes a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied. The balance of this paragraph is denied, except to admit receipt of a letter dated January 11, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Six: Deny, except to admit transmittal of a letter dated January 15, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Seven: Deny, except to admit transmittal of a letter dated February 5, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Eight: Defendants have insufficient information upon which to form a belief as to the truth or falsity of the allegations contained herein; therefore, they are denied.

Assistant Attorney General
Civil Division

Paragraph Nine: This paragraph allegedly quotes certain portions of the legislative history regarding the Privacy Act of 1974 and is not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Ten: This paragraph contains a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Eleven: This paragraph contains a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Twelve: Plaintiff is not entitled to the relief prayed for or any relief whatsoever.

Affirmative Defenses:

(1) Failure to state a claim upon which relief may be granted.

(2) Inasmuch as no documents have been improperly withheld within the meaning of Title 5, United States Code, Section 552 (a)(4)(B), the United States District Court is without jurisdiction in this matter.

(3) Defendants Edward H. Levi, Clarence M. Kelley, and the Federal Bureau of Investigation are not proper party defendants to this action as they are not agencies within the meaning of Title 5, United States Code, Section 552 (a)(4)(B).

It is requested that your office file an appropriate motion requesting the court to dismiss the action for want of jurisdiction or, in the alternative, to stay proceedings pursuant to Title 5, United States Code, Section 552 (a)(6)(C). It is noted that the United States District Court may assume jurisdiction until such time as it has determined that no documents have been improperly withheld. While various provisions of Title 5, United States Code, Section 552 (a)(6)(B) allow a requester to consider failure to comply with the time limits therein as an exhaustion of remedies (procedural matter), these provisions do not create a substantive presumption of improper withholding.

Assistant Attorney General
Civil Division

It is noted that while the court may stay the proceedings pursuant to Title 5, United States Code, Section 552 (a)(6)(C), it may also dismiss the action for want of jurisdiction. The strict time limits were inserted in the 1974 amendments to guard against certain abuses, i.e., "to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester." (See S. Rep. No. 93-854, 93d Cong., 2d Sess., p. 26.) I can assure you that the delay herein is not founded on any of the aforementioned abuses, but is clearly based on exceptional circumstances within the meaning of Title 5, United States Code, Section 552 (a)(6)(C).

Special Agent Emil P. Moschella of our Legal Counsel Division has been assigned to handle the defense in this suit and may be reached by telephone at 202-324-4522 or Departmental Code 175-4522.

1 - United States Attorney
Southern District of California

FBI

ENCLOSURE 62-116929-4

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

Please send to DOJ

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, CLARENCE M. KELLEY, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE, and EDWARD H. LEVI, Attorney General of the United States, Defendants.	CIVIL ACTION NO. 76-89-S AMENDED COMPLAINT FOR INJUNCTIVE RELIEF UNDER THE PRIVACY ACT OF 1974 AND THE FREEDOM OF INFORMATION ACT.

Plaintiff, Judith Katherine Exner [hereinafter "Exner"], brings this action against the defendants, Federal Bureau of Investigation [hereinafter sometimes "FBI"], Clarence M. Kelley, Director of the FBI [hereinafter sometimes "Kelley"], United States Department of Justice, and Edward H. Levi, Attorney General of the United States [hereinafter sometimes "Levi"], [the FBI, the Department of Justice, Kelley, and Levi are hereinafter sometimes collectively referred to as the "Government"], and complains and alleges as follows:

JURISDICTION AND VENUE

1. This action is brought, and this Court has jurisdiction over this action, pursuant to the Privacy Act of 1974,

See memo to Atty, CD, EPA, Lay 3/11/76

Rec'd from Dept by R/S 3/4/76

5 U.S.C. §552a, and the Freedom of Information Act, 5 U.S.C. §552, as hereinafter more fully appears.

2. Plaintiff Judith Katherine Exner [previously known as Judith Campbell (Nee Immoor)] is an individual who resides within the Southern District of California. Pursuant to the provisions of the Privacy Act of 1974, and the Freedom of Information Act, plaintiff has made proper demand upon the United States, through its agencies, the FBI and the Department of Justice, to review certain files and records maintained by the FBI relating to the plaintiff. The Government has refused to turn over these records to the plaintiff, and plaintiff has exhausted her administrative remedies in this regard.

3. The Department of Justice and the FBI are both agencies of the United States. The FBI has possession of records to which the plaintiff seeks access. Pursuant to the regulations issued by the Department of Justice relating to the Privacy Act of 1974 and the Freedom of Information Act, the Department of Justice is the agency responsible for reviewing appeals from denials by the FBI of requests for records under both the Freedom of Information Act and the Privacy Act. Defendant Kelley is the Director of the FBI, and is the person who initially denied plaintiff's request to review her records. Defendant Levi is the Attorney General of the United States.

FACTUAL BACKGROUND

4. On December 24, 1975, at the request of plaintiff, and with her authority, a letter was written to the Federal Bureau of Investigation requesting access to any and all records relating to the plaintiff contained in the files and records of the FBI. A copy of this letter is attached hereto as Exhibit "1" and incorporated herein by this reference.

////

////

5. In accordance with the provisions of the Freedom of Information Act and the Privacy Act, the failure of the FBI to respond to plaintiff's request within ten working days constituted a denial of plaintiff's request. Noting the failure of the FBI to respond to her request, plaintiff, by her authorized agent, sent a letter to the Department of Justice dated January 11, 1976. In that letter, plaintiff indicated that she deemed her previous request denied, and appealed that denial directly to the Department of Justice. A copy of the January 11, 1976, letter is attached hereto as Exhibit "2" and incorporated herein by this reference.

6. By letter dated January 15, 1976, over the signature of Clarence M. Kelley, the Federal Bureau of Investigation of the United States Department of Justice responded to plaintiff's earlier letters. After acknowledging receipt of plaintiff's Freedom of Information and Privacy Act requests, the FBI requested additional time to research its files in order to determine whether any records were available.

7. By letter dated February 5, 1976, over the signature of Quinlan J. Shea, Jr., Chief, Freedom of Information and Privacy Unit of the Office of the Attorney General of the United States, plaintiff's Privacy Act and Freedom of Information Act requests were denied. A copy of the February 5, 1976, letter from Mr. Shea is attached hereto as Exhibit "4" and incorporated herein by this reference.

THE REASONS FOR PLAINTIFF'S REQUEST

TO REVIEW THE FBI DOCUMENTS

7. Plaintiff is informed and believes, and based on such information and belief alleges that the Federal Bureau of Investigation has maintained records relating to plaintiff since approximately 1960. In September of 1975, plaintiff was informed

of the existence of this file during the course of her testimony in an executive session before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Reference to a "top priority investigation" of the plaintiff by the FBI was made not only during the executive Committee session of the Senate Select Committee, but was also contained in the report issued by the Senate Select Committee and published on November 20, 1975. In addition to reference to the FBI investigation of her during the Senate Select Committee's executive session, and in addition to reference to the FBI investigation of her in the Senate Select Committee's report, plaintiff was also aware that she was the subject of an FBI investigation during the early portion of the 1960's.

8. During the course of plaintiff's testimony before the Senate Select Committee, it became obvious to plaintiff that information contained in plaintiff's FBI files was inaccurate. Subsequent to her testimony before the Senate Select Committee, this inaccurate information appeared in the official report prepared by the Senate Select Committee. Moreover, information which plaintiff believes emanated from her FBI files was leaked to the press by a member or members of the Senate Select Committee staff. Some of the information leaked to the national press also was inaccurate.

9. The legislative history of the Privacy Act of 1974 provides, in pertinent part, that the purpose of Congress in enacting the Privacy Act, among other things, was to:

> "(1) Permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
>
> "(2) Permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available

for another purpose without his consent;

"(3) Permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

"(4) Collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information; . . ."

10. Although plaintiff seeks disclosure of the records both pursuant to the Privacy Act of 1974 and pursuant to the Freedom of Information Act, plaintiff believes that the Privacy Act request must take precedence. The Freedom of Information Act contains an exemption for investigative records compiled for law enforcement purposes, but only to the extent that the production of such records would:

". . .Constitute an unwarranted invasion of personal privacy. . ." [5 U.S.C. §552(b)(7)(C)]

Without first knowing the contents of the full FBI file, which should be made available to plaintiff pursuant to the Privacy Act of 1974, plaintiff believes that matters contained therein might be of such a personal nature that they should not be disclosed to the general public pursuant to the Freedom of Information Act.

11. Plaintiff is entitled, pursuant to the Privacy Act of 1974, to review the records maintained on her by the FBI, and to attempt to have the FBI correct any inaccuracies in those records. Plaintiff also believes that she is entitled to receive a copy of the records of the FBI relating to her pursuant to the

provisions of the Freedom of Information Act. The Government's denial of access to these records is without any basis. Plaintiff has no other adequate remedy at law or basis on which to pursue this litigation.

PRAYER FOR RELIEF

12. WHEREFORE, plaintiff Judith Katherine Exner prays that the Court adjudge and decree that:

(1) Pursuant to the provisions of the Privacy Act of 1974 [5 U.S.C. §552a (g)(3)(A)] enjoin the defendants from withholding the records in their possession relating to the plaintiff from her;

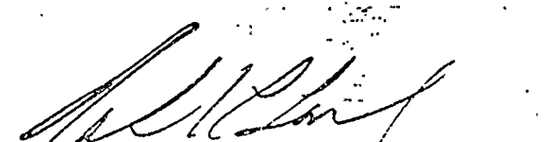
(2) Pursuant to the Freedom of Information Act [5 U.S.C. §552(a)(4)(B)] enjoin the defendants from withholding records relating to the plaintiff from her, and order the defendants to produce the records improperly withheld from her;

(3) Plaintiff be awarded her reasonable attorney's fees and costs of litigation;

(4) Pending a determination as to whether the FBI records relating to the plaintiff contain information that would invade plaintiff's privacy, enjoin the defendants from distributing that information to any other person; and

(5) For such other and further relief as the Court may deem just and proper.

DATED: February 19, 1976.



RICHARD C. LEONARD

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

December 24, 1975

Freedom of Information Unit
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith (Campbell) Exner

Gentlemen:

My client, Judith Katherine Eileen (nee Immoor) (Campbell) Exner who was born January 11, 1934, in New York, New York, hereby requests access to any and all records filed under any of her names with the Federal Bureau of Investigation. Her Social Security Number is 550-48-2363. Enclosed is a notarized statement to that effect. Please furnish this information to her at the above address.

Sincerely,

Brian D. Monaghan

BDM:maw

EXHIBIT "1"

I, JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER, having a date of birth of January 11, 1934, in New York, New York, and having a Social Security Number of 550-48-2363, request access to any and all records filed under any of my names with the Federal Bureau of Investigation.

DATED: December 23, 1975.

JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER

STATE OF CALIFORNIA)
: ss
COUNTY OF SAN DIEGO)

On December 23, 1975, before the undersigned, a Notary Public for the State of California, personally appeared JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.

OFFICIAL SEAL
GAYE H. HANSON
NOTARY PUBLIC - CALIFORNIA
Principal Office, San Diego Co. Calif.
My Commission Exp. Jan. 11, 1978

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

January 11, 1976

Deputy Attorney General
Harold Tyler
Department of Justice
Washington, D. C. 20035

Re: Judith (Campbell) Exner

Gentlemen:

By letter dated December 24, 1975, I requested access to any and all files or records under the name or names of Judith Katherine Eileen (nee Immoor) (Campbell) Exner, pursuant to the Freedom of Information Act, 5 U.S.C. 552. Ten working days having elapsed, I deem my request denied and hereby appeal that denial. For your convenience I have enclosed a copy of my request letter.

If you do not act upon my appeal within twenty (20) working days, I will deem my request denied.

Sincerely,

Brian D. Monaghan

BDM:maw
Enclosure
cc: Ms. Judith (Campbell) Exner

EXHIBIT "2"

JAN 18 1976

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

January 15, 1976

Brian D. Monaghan, Esq.
Suite 1324
Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

Dear Mr. Monaghan:

This is to acknowledge receipt of your Freedom of Information-Privacy Acts (FOIPA) request on behalf of your client, Judith Katherine Eileen Exner, by the FBI on December 30, 1975.

An exceedingly heavy volume of FOIPA requests has been received these past few months. Additionally, court deadlines involving certain historical cases of considerable scope have been imposed upon the FBI. Despite successive expansions of our staff responsible for FOIPA matters, substantial delays in processing requests continue.

The FBI has 5,964 FOIPA requests on hand. Processing has begun, and is in various stages of completion on 991 of those cases. In an effort to deal fairly with any request requiring the retrieval, processing and duplication of documents, each request is being handled in chronological order based on the date of receipt. Please be assured that your request is being handled as equitably as possible and that all documents which can be released will be made available at the earliest possible date.

Your patience and cooperation will be appreciated.

Sincerely yours,

Clarence M. Kelley
Director

EXHIBIT "3"

10.

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handing over the several thousand previous requests still pending in the F.B.I.

I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons

EXHIBIT "4"

I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

I thoroughly enjoyed our recent telephone conversation and wish that my response could be in accord with your desires. My basic sense of fairness, however, leads me to the conclusion that Ms. Exner should wait her turn -- a conclusion that I consider to be fully consistent with what I consider to be the basic intent of Congress in this area.

You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts. Your client has the right to sue in the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records she seeks -- if, indeed, they exist at all -- are located.

Best regards,

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Amended Complaint for Injunctive Relief Under the Privacy Act of 1974 and the Freedom of Information Act is hereby acknowledged this 19th day of February, 1976.

Peter W. Bonner

Hand Delivered by Mr. Leonard

BRIAN D. MONAGHAN, ESQ.
1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director, Federal Bureau of Investigation
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF JUSTICE, and

EDWARD H. LEVI, Attorney General of the United States Department of Justice Building
10th Street and Pennsylvania Avenue, N.W.
Washington, D. C. 20530,

Defendants.

CIVIL ACTION NO. 76-89-S

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat. 1561, to require defendants to permit access to certain records in their possession.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

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3. Plaintiff, JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the Federal Bureau of Investigation and initially denied plaintiff's request.

6. Defendant Department of Justice is an agency of the United States and is responsible, under its regulations, for reviewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of the United States; the Department of Justice made the final denial of plaintiff's request on February 5, 1976.

8. By letter dated December 24, 1975 (a copy of which is attached as Exhibit "A"), plaintiff requested access to all records in the possession of the FBI pertaining to plaintiff.

9. By failing to produce or make available said records within the statutory period, Defendant FBI denied plaintiff's request.

10. By letter dated November 11, 1976 (a copy of which is attached as Exhibit "B", plaintiff appealed the initial denial.

11. By letter dated January 26, 1976 (exhibit C) //plaintiff requested preference and specified the justification for such preference.

12. By letter dated February 5, 1976 (a copy of which is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of Information Appeals Unit, Office of the Deputy Attorney General, denied said appeal.

13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is entitled to access to the requested records, and there is no legal

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basis for defendants' denial of such access, nor has any such basis for denial been raised by defendants in response to plaintiff's request and appeal.

WHEREFORE, plaintiff prays that the Court (1) order defendants to permit access to the requested records; (2) provide for expeditious proceedings in this action as provided in 5 U.S.C. §552(a)(4)(D); (3) award plaintiff her costs and reasonable attorneys' fees in this action; and (4) grant such other and further relief as the Court may deem just and proper.

DATED: San Diego, California
February 6, 1975

BRIAN D. MONAGHAN

Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dirs.:
Admin. ____
Comp. Syst. ____
Ext. Affairs ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

b6
b7C

TO : [redacted]

DATE: 3/2/76

FROM : Legal Counsel

SUBJECT: SUBPOENA OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY RECORDS RELATING TO NATIONAL SECURITY MATTERS

On February 12, 1976, Mr. William Caming, Attorney for American Telephone and Telegraph Company (AT & T), appeared before the Privacy Protection Study Commission. Congressman Edward Koch (New York), serves as a member of the Privacy Protection Study Commission. The mandate of the Commission as provided for under the Privacy Act of 1974, is to examine the private sector as well as State and local governments to ascertain what provisions of the Federal Privacy Law governing the collection of material by the United States Government and its agencies should be extended to those other sectors. Congressman Koch questioned Mr. Caming regarding requests from the FBI to AT & T for toll billing records. Congressman Koch took exception to the fact that when the Director of the FBI requested records, without subpoena, related to national security, the subscriber would not be notified by AT & T. Congressman Koch asked Mr. Caming for the total number of subpoenas and other judicial process served upon him, which had a no disclosure provision for the period March 1, 1974, to date.

Mr. Caming advised the Legal Counsel Division on February 25, 1976, that he foresaw no problem in submitting that updated figure because it had been submitted previously, with Bureau concurrence, in a lawsuit against AT & T by the Reporters Committee for Freedom of the Press. He expected to receive a subpoena to furnish the figure within the next week or two and added that the figure would not be furnished without a subpoena.

62-116929-

1 - [redacted]
1 - Mr. Mintz
1 - [redacted]
1 -
1 -

JOS:clh
(7)

MAR 24 1976

MAR 18 1976

MAR 16 1976

b6
b7C

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Legal Counsel to Mr. Adams
RE: SUBPOENA OF AMERICAN TELEPHONE
AND TELEGRAPH COMPANY RECORDS RELATING
TO NATIONAL SECURITY MATTERS

Regarding the above mentioned lawsuit, it is noted that by November 26, 1975, memorandum from the Director to the Assistant Attorney General, Civil Division, captioned, "Reporters' Committee For Freedom Of The Press, et al., v. American Telephone And Telegraph Company, et al. (U.S.D.C., D.D.C.), Civil Action No. 74-1889," the Bureau responding to interrogatories, advised the Department of Justice that in approximately 133 instances, during the period March 1, 1974, through June 30, 1975, the FBI requested in writing from AT & T that the telephone records be provided without a subpoena, pursuant to a national security investigation. On December 4, 1975, that figure was furnished to the parties to the lawsuit.

Plaintiffs in the lawsuit, including columnist Jack Anderson and others, seek to require at least five days notice to telephone subscribers in the news media from defendant telephone companies before those companies comply with any subpoena or demand of lawful authority for telephone toll records of plaintiffs and members of the news media. Plaintiffs claim this would aid in protecting their confidential news sources. Because of the obvious interest, the United States has intervened in the suit and is now a defendant.

RECOMMENDATION:

For information.

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

JRN:pb

United States Department of Justice

TELEPHONE:
(714) 293-5610

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
325 WEST F STREET
SAN DIEGO 92101

F.B.I

b6
b7C

March 16, 1976

Department of Justice
Washington, D. C. 20530

Attention: [redacted] Chief
Information & Privacy Act Unit

Judith Ampbell

Re: Exner v. FBI, et al.
Civil No. 76-0089-S
DJ Ref: 145-12-2683

Gentlemen:

On March 16, 1976, at 10:30 a.m., I appeared in District Court in opposition to plaintiff's motion for a partial summary judgment. The court found that a summary judgment was not proper and that the plaintiff would have to wait sixty days for the government's response.

The court did, however, state that the Freedom of Information Act and the Privacy Act mandated that these matters be expedited. Therefore, he ordered that when the United States files its response that it should identify the file or files and their bulk, and whether the government will claim that any portion of the file or files are exempt.

I indicated to the court that the FBI was greatly backlogged due to the number of requests that have been forwarded to it by persons seeking to examine their files, if any. I also indicated that if we could not comply with the type of response ordered by the court we would bring a motion for an extension of time supported by affidavits or memorandum underscoring the government's problem. The court hinted very broadly that the government would have to make a substantial showing before he would consider changing his order.

1 ENCLOSURE

EX-112

REC-10 62-116929-5

MAR 31 1976

Hand delivered
by [redacted]
3/17/76 Ehm

54 OCT 13 1976

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I have not received a copy of the order as yet, but wish to bring this matter to you as soon as possible as our answer date is April 10, 1976, and I do not believe we should wait until that date before we make a motion to enlarge the time to plead.

If you have any further questions, please contact me.

Very truly yours,

TERRY J. KNOEPP
United States Attorney

JOHN R. NEECE
Assistant U. S. Attorney
Chief, Civil Division

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff v. FEDERAL BUREAU OF INVESTIGATION, et al. Defendants	CIVIL NO. 76-0089-S AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Phyllis H. Bauerlein, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 325 West F Street, San Diego, California; that she is over the age of eighteen years, and is not a party to the above-entitled action;

That on March 3, 1976, she deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

addressed to Richard C. Leonard, 2404 Wilshire Blvd., Suite 400 Los Agneles, CA 90057

his/~~her~~ last known address, at which place there is delivery service of mail from the United States Post Office.

Phyllis H. Bauerlein

SUBSCRIBED AND SWORN TO before me this 3rd day of March, 1976.

Mary Knisley
Notary Public in and for said County and State

OFFICIAL SEAL
MARY KNISLEY
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires MAR 13, 1979

325 West F St., Annex A, San Diego, CA 92101

FORM 08D-93
12-7-73
Formerly LAA-93

☆ GPO : 1974 O—556-284

TERRY J. KNOEPP
United States Attorney
JOHN R. NEECE
Assistant U. S. Attorney
Chief, Civil Division
United States Courthouse, Annex A
325 West F Street
San Diego, California 92101
Telephone: (714) 293-5659

Attorneys for Defendants.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil No. 76-0089-S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff filed her amended complaint on February 19, 1976, naming the Federal Bureau of Investigation, Clarence M. Kelly as director of Federal Bureau of Investigation, the United States Department of Justice, and Edward H. Levi, as Attorney General of the United States as party defendants. She bases jurisdiction under the provisions of 5 U.S.C. §552(a)(4)(B) (Freedom of Information Act), and 5 U.S.C. §552a(g)(1) (The Privacy Act of 1974).

Plaintiff's complaint, in summary, indicates that in September, 1975, she appeared before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and in the course of her testimony she became aware that there was some type of file or record compiled upon her past activity relating to her relationship with President John F. Kennedy. The Committee inferred that such records had

JRN:pb
3-3-76

been compiled or maintained by the FBI.

Plaintiff further alleges that by the nature of the questions asked by the Committee she has reason to believe that much of the information contained in the alleged files or records is inaccurate and in an effort to gain access to the files or records and correct the inaccuracies she has made requests to the FBI under both the Freedom of Information Act and the Privacy Act by letter dated December 24, 1975 (Plaintiff's Exhibit 1) and by letter dated January 11, 1976 (Plaintiff's Exhibit 2). The government, in reply, in a letter dated January 15, 1976, notified her attorney that due to the heavy volume of Freedom of Information and Privacy Act requests they could not immediately comply with her demand. Subsequently, it appears that Mr. Shea of the Freedom of Information Unit in the Department of Justice conversed by telephone with plaintiff's attorney prior to February 5, 1976, which prompted a letter of that date from Mr. Shea to plaintiff's attorney (Plaintiff's Exhibit 4) in which Mr. Shea indicated that they could not take Mrs. Exner's request out of turn and she would have to wait in line. Plaintiff, treating Mr. Shea's letter as a denial, brought the instant suit.

On February 25, 1976, the plaintiff moved for summary justment which in essence asked that the court accelerate the litigation by entering a summary judgment which would provide her with the entire relief prayed for in the complaint. The reason for such abbreviated relief as stated by plaintiff, was that (1) her integrity and the integrity of the Senate Select Committee was at state, and (2) she feared for her personal safety. The latter claim is supported by the vague references to threatening telephone calls and to an elusive analogy drawing a connection between herself and the recently murdered Mafia figure, Sam Giancana. While her effort on the behalf of the Senate Subcommittee is commendable and the fear for her personal

safety distressing, they appear to be somewhat peripheral considerations considering that the real reason for her haste is her desire to meet a publisher's deadline on her book in which her experiences with President Kennedy are apparently regaled. This latter reason was candidly admitted in court but somewhat less than candidly omitted in her pleadings.

POINTS AND AUTHORITIES

Freedom of Information Act, 5 U.S.C. §552(a)(4)(C) specifically provides that the government has thirty days to respond to a complaint filed under that Act. The Privacy Act, 5 U.S.C. §552a, does not provide for any abbreviated response. Therefore, Rule 12a giving the government sixty days must apply.

There is no question that in both the Freedom of Information Act and the Privacy Act the Congressional purpose was to reduce the time necessary to exhaust administrative remedies and encourage a speedy joinder of issues under judicial review. However, the Acts do not envision any extraordinary summary procedure surplanting the regular course of litigation. This principle was outlined in the case of Martin v. Neuschel, 396 F.2d 739 (3d Cir. 1968) where the court stated:

> ". . . the government and its officers, as well as private citizens, are entitled to due and regular process in the pleading, hearing, consideration and disposition of litigated claims. The fact that a court doubts that a public officer can justify acts complained of does not warrant a denial of the right to plead whatever defense he may and to have the merits of the controversy decided in regular course.

Similarly, in Theriault v. United States, 503 F.2d 390 (9th Cir. 1974) the court reversed a district court in a Freedom

of Information Act complaint where the court entered a pretrial discovery order which in essence provided the plaintiff with all the relief asked for under the Freedom of Information Act, stating:

> . . . The practical effect of the full force of that order is a granting of the full, complete and final relief available to a complaint under the Act.. . . (503 F.2d 391 at 390, 391)
>
> . . . Accordingly, the September order cannot stand as the ultimate grant of the relief sought under the Act and must be vacated. (503 F.2d 390, 392)

While plaintiff couches her motion under Rule 56, she is essentially asking the court to enter a preliminary injunction under Rule 65 which, if granted, would provide the plaintiff with all the injunctive relief she could obtain under the provisions of both the Privacy and Freedom of Information Act.

This result can not be read into these Acts nor is the result sought sanctioned by Rule 65. This was clearly pointed out in Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804 (9th Cir. 1963) where the court held:

> . . . It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits. The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not usually proper to grant the moving party the full relief to which he might be entitled if successful

at the conclusion of a trial. This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it. Yet this is what Judge Clarke's order does, and it is based upon findings that purport to determine that Tanner breached the contracts, that its breaches could not be cured, and that Tanner has no substantial defense to the action. These are matters to be determined at trial, not upon the motion for preliminary injunction. (316 F.2d 804, 808) See, also, Ignatius, 383 F.Supp. 58 (S.D. N.Y. 1968)

Plaintiff additionally seeks an order directing an in camera inspection of the alleged documents. While in camera inspections may be undertaken by the court pursuant to 5 U.S.C. §552(a)(4)(B) and pursuant to 5 U.S.C. §552(a)(g)(A), this does not however mean that the government should not be given an opportunity to prevail on the basis of detailed affidavits or evidence. This precise point was raised in E.P.A. v. Mink, 410 U.S. 73 (1973) where the court, in reversing the District of Columbia Circuit stated:

> . . . Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party

in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U.S.C. §552(a)(3), and if it fails to meet its burden without in camera inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. (410 U. S. 73, 93)

The 1974 amendments to the FOIA also emphasize this point. For instance, the Conference Report on the 1974 amendment states that "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." 93 Congress 2d Session, Senate Report No. 93-1200, page 9 (Conference Report).

As outlined in the letter to plaintiff (Exhibit 2 of Plaintiff's Complaint) the FBI is currently approximately 6000 requests backlogged and the government intends to seek a stay pursuant to 5 U.S.C. §552(a)(6)(C) which will state that exceptional circumstances exist and the agency is exercising due diligence in responding.

It is essential that the agency proceed to process these requests in an orderly, methodical fashion, and in addition be fair to all requestors, each person must be treated alike and wait in turn. Plaintiff's need for the material for her book should not distinguish her case different from the rights of any other person seeking information under the Act.

/ /

/ /

/ /

CONCLUSION

For the foregoing reasons plaintiff's motions must be denied.

DATED: March 3, 1976.

TERRY J. KNOEPP
United States Attorney

JOHN R. NELSON
Assistant U. S. Attorney
Chief, Civil Division

United States Attorney
San Diego, California

March 11, 1976

Rex E. Lee
Assistant Attorney General
Civil Division
By: Jeffrey Axelrad, Chief
Information and Privacy Unit

TELL:JA:jgo
145-12-2603

Tel: 739-3300

Judith Katherine Exner v. Federal Bureau of Investigation, et al., U.S.D.C. S.D. Cal., Civil No. 76-0039-S.

Attention: Mr. John L. Lacco
Assistant United States Attorney

We have consulted with the FBI and suggest that you file an answer along the lines set forth below. Please send us copies of the answer which you file and keep us informed of developments in this matter. We look forward to receipt of the brief which you recently filed, as we discussed on the telephone, and will further advise you with regard to the litigation. We intend to forward papers to you which should support a motion for stay, pursuant to 5 U.S.C. 552(a)(3)(C). Of course, the answer outlined below should not be filed until our time to respond to the complaint runs.

EXP. PROC.
34 MAR 15 1976

ANSWER

Defendants, by their undersigned attorneys, for their answer admit, deny, and aver as follows:

FIRST DEFENSE:

Defendants Federal Bureau of Investigation, Clarence M. Kelley and Edward H. Levi are not proper parties to the action.

SECOND DEFENSE

20 MAR 1976

The action should be stayed since exceptional circumstances exist and the Department of Justice is exercising due diligence in responding to plaintiff's request for records.

In answer to the numbered paragraphs of the amended complaint, defendants admit, deny, and aver as follows:

1. Deny as conclusions of law.

2. Deny except to admit that plaintiff has requested records from the Federal Bureau of Investigation.

3. Deny except to admit that the Department of Justice is an agency of the United States, the FBI is a component of the Department of Justice, defendant Kelley is the Director of the FBI, defendant Levi is the Attorney General of the United States, and aver that the FBI will process plaintiff's request for records in due course.

4. Deny except to admit the authenticity of Exhibit 1 to the amended complaint, to which the Court is respectfully referred for a true and complete statement of its contents.

5. Deny except defendants admit the authenticity of Exhibit 2 to the complaint and respectfully refers the Court to Exhibit 2 thereof for a full and complete statement of its contents.

6. Deny except to admit the authenticity of Exhibit 3 of the complaint and respectfully refer the Court to Exhibit 3 of the complaint for a full and complete statement of its contents.

7. Deny except to admit the authenticity of Exhibit 4 of the complaint and respectfully refer the Court to Exhibit 4 to the complaint for a full and complete statement of its contents.

8. Deny for lack of knowledge or information sufficient to form a belief except to refer the Court to the testimony and report of the Senate Select Committee referred to in Paragraph 7 of the complaint for the contents thereof.

9. Deny for lack of knowledge or information sufficient to form a belief.

10. Deny except to respectfully refer the Court to the Privacy Act of 1974, Public Law 93-579, 5 U.S.C. 552a, for the provisions thereof.

11. Deny as conclusions of law except to respectfully refer the Court to the Privacy Act of 1974, 5 U.S.C. 552a and to the Freedom of Information Act, 5 U.S.C. 552, for the provisions thereof.

12. Deny.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiff is entitled to the relief prayed for in the complaint or to any relief whatsoever.

WHEREFORE, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Enclosure

cc: Mr. Clarence M. Kelley
Director Federal Bureau of Investigation

Attention: Legal Counsel

62-116929-7

CHANGED TO

62-116977-2

c/vh

7/27/76

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Admin. ____
Comp. Syst. ____
Ext. Affairs ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ✓
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

b6
b7C

TO : [redacted]

DATE: 3/31/76

FROM : Legal Counsel

SUBJECT: JUDITH CAMPBELL EXNER
v. FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-0089-S

The purpose of this memorandum is to recommend that attached affidavit of Special Agent [redacted] [redacted] Records Management Division, FOI-PA Section, be approved.

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b7C

DETAILS:

By memorandum to [redacted] from Legal Counsel, dated 2/13/73, you were advised that captioned plaintiff was identified during the inquiries by the Senate Select Committee on Intelligence Activities as a close associate of John F. Kennedy while he was President of the United States and at the same time she was an associate of members of organized crime. Pursuant to the FOIA, she requested access to any and all files or records concerning her held by the FBI. She requested expeditious handling of the FOIA request which was denied by Quinlan Shea, Chief of the Freedom of Information and Privacy Unit in the Department. She now claims the failure to respond to her FOIA request in a timely fashion entitles her to sue for the materials requested.

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b7C

Attached affidavit is to be submitted to the court in order to request a stay in proceedings pending review of documents.

REC-61 62-116927-8

EX-115

Enclosure

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - FOIA Litigation Unit
[redacted]

EPM:rme
(4)

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b7C

(CONTINUED - OVER)

ENCLOSURE

F54
20 APR 9 1976

LEGAL ATTACHE

5010-108

Memorandum to [redacted] b6 b7C
Re: Judith Campbell Exner v. Federal Bureau of Investigation
(U.S.D.C., S.D. CALIFORNIA), Civil Action No. 76-0089-S

RECOMMENDATION:

That upon approval, original and five copies of attached affidavit will be hand-delivered to Departmental Attorney Jeffrey Axelrad, by 3/31/76.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v. Civil No. 76-89-SA

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.
/

AFFIDAVIT

I, Michael L. Hanigan, being duly sworn, depose as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Section of the FBI, Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures we follow in processing requests for information in our files received pursuant to Title 5, United States Code, Section 552, more commonly known as the Freedom of Information Act (FOIA), and I am personally familiar with these procedures as they apply to our response to plaintiffs' FOIA request.

(3) By letter from her attorney to the Federal Bureau of Investigation dated December 24, 1975, plaintiff requested access to any and all records filed in the names of Judith Katherine Eileen (nee Immoor)(Campbell) Exner. (A true copy of this letter is attached hereto and made a part hereof as Exhibit A).

(4) By letter dated January 11, 1976, an appeal of this request was filed with Deputy Attorney General Tyler,

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plaintiff having deemed her request denied by the lapse of ten working days. (A true copy of this letter is attached hereto and made a part hereof as Exhibit "B").

(5) Director Kelley acknowledged on January 15, 1976, that the FBI received the Freedom of Information - Privacy Act request on December 30, 1975. He explained that there were 5,964 FOIPA requests at the FBI and that 99% of the requests were in various stages of being processed. Plaintiff was informed that each request was being handled in chronological order based on the date of receipt in an effort to deal fairly with all requests, and assurance was given that the request of plaintiff was being handled as equitably as possible. The Director further stated that all documents which could be released would be made available at the earliest possible date. The backlog of requests was described to plaintiff as having resulted from an exceedingly heavy volume of requests and court imposed deadlines in historical cases of considerable scope. Substantial delays were continuing despite expansions in staff. (A true copy of this letter is attached hereto and made a part hereof as Exhibit C).

(6) By letter dated January 26, 1976, from plaintiff's attorney to Quinlan J. Shea, Chief of the Freedom of Information Appeals Unit, plaintiff sought priority consideration of the request because of fear of physical danger to herself and on the ground that historical significance would attach to the document she sought. (A true copy of this letter is attached hereto and made a part hereof as Exhibit D).

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(7) By letter dated February 5, 1976, Chief Shea notified plaintiff's attorney that the FOI Appeal's Unit was forwarding the January 26, 1976, letter to Director Kelley for his consideration. Shea further stated that plaintiff did not state sufficient grounds in his view for processing the request out of chronological order. Therefore, plaintiff could regard her administrative appeal as denied and seek relief in the courts. (A true copy of this letter is attached hereto and made a part hereof as Exhibit E).

(8) By letter dated February 19, 1976, Director Kelley reiterated that FOIPA requests are handled in chronological order. Plaintiff was advised that if she is in physical danger or has any evidence regarding threats against her life, she should bring this information to the attention of proper authorities. (A true copy of this letter is attached hereto and made a part hereof as Exhibit F).

(9) In further explanation of the FBI's response to plaintiff's FOIA request, the court's attention is respectfully directed to the following facts detailing the impact the FOIA, and in particular the 1974 amendments thereto, have had on the FBI.

(10) In 1973, the FBI received an average of approximately one FOIA request per day, an amount which could be processed without undue burden. In 1974, the FBI averaged over 37 requests per month. The amendments went into effect in February of 1975, the Privacy Act went into effect in September of 1975, and in that year we received 13,875 requests pursuant to these two acts, an increase of more

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than three thousand percent over the previous year. During December, 1975, the month in which plaintiff submitted her request, the FBI received 1,026 other requests as well. In January and February, 1976, the FBI received in excess of 2,500 new requests for access to its records. (See letter of March 15, 1976, to Honorable Bella S. Abzug, Chairwoman, Government Information and Individual Rights Subcommittee, Committee on Government Operations, United States House of Representatives from the Deputy Attorney General Harold R. Tyler, Jr., transmitting the Report of the Department of Justice to Congress on Freedom of Information Act Operations during calendar year 1975, at page 1 of the letter; Exhibit G.) 1/

(11) Although implementation of the Act has been unfunded, the FBI has recognized and taken substantial action in terms of allocation of manpower and other measures to meet the tremendous administrative burdens imposed upon it as a result of the numerous requests for information from its files received under the FOIA and Privacy Act. A special Unit, solely designated to handle FOIA requests, became operational in October of 1973, at which time it consisted of 8 employees, including 3 law-trained Special Agents. This complement was doubled during 1974 to keep pace with the increased volume of requests. During 1975 further periodic increases in the personnel complement assigned solely to the processing of FOIA and/or Privacy

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1/ This report offers graphic documentation that the experience of the FBI is not unique in the Department of Justice.

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Act requests were made, by reassigning personnel from other substantive duties. By the end of 1975, 161 employees at FBI Headquarters (FBIHQ) were engaged solely in the processing of such requests, including 23 law-trained Special Agents. This did not include numerous employees from other Divisions at FBIHQ who are required to devote a substantial portion of their time, to the detriment of their other duties, to assist in this effort. Through additional increases this year, we now have nearly 190 employees assigned full-time at FBIHQ to the processing of requests received pursuant to the FOIA and Privacy Acts. The expense incurred by the FBI in terms of both money 2/ and manpower has been enormous and I believe our overall investigative responsibilities imposed by statute may suffer as a result.

(12) Despite what we feel to be more than diligent efforts to comply with all requests, including plaintiff's, on an equitable basis, there have been unavoidable delays arising from the sheer volume of requests received and as a result of court orders requiring reassignment of substantial numbers of our personnel to process certain cases on a deadline basis.

2/ The FBI's actual cost for implementation of the FOIA in Fiscal Year (FY) 1974 was $160,000. In FY 1975, it jumped to $462,000. and for FY 1976, the FBI has estimated the cost to be $2,675,000. For FY 1977, the FBI has estimated the cost of the FOIA to be the same $2,675,000, plus $752,000. for the Privacy Act of 1974.

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(a) In Meeropol, et al. v. Levi, et al. (United States District Court for the District of Columbia, Civil Action No. 75-1121), the court issued an order on August 27, 1975, which required us to review, index and inventory, by October 21, 1974, some 363 volumes (each of which averages 150-200 pages) of files, and by the same date locate, review, index and inventory over 9,000 references, all of which represent material in the FBI's possession considered relevant to the Rosenberg espionage case. Additionally, all of the above material which is not exempt pursuant to the FOIA had to be made available to plaintiffs in that case by November 17, 1975, accompanied by a detailed justification for those portions of the above-described material which were withheld pursuant to the FOIA. This single court order forced us to assign approximately one half of all our FOIPA personnel to the processing of the subject matter of one FOIA request, while the remainder of the complement attempted to process the thousands upon thousands of other FOIA requests which had been received.

(b) In Weinstein v. Levi, et al. (United States District Court for the District of Columbia, Civil Action No. 2278-72), the court issued an order on October 20, 1975,

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* GPO : 1971 O - 427-736

which required us to furnish plaintiff an itemized inventory, by December 1, 1975, of all documents he had requested under the FOIA (essentially, all pertinent material in our possession concerning the Rosenberg case, supra, plus an additional 152 volumes of files pertaining to the Alger Hiss perjury case) not previously furnished him, setting forth a detailed justification with respect to any documents Director Kelley withheld pursuant to the FOIA. Additionally, the order required us to make available to plaintiff, by December 15, 1975, all of the above-described material which is not exempt from release pursuant to the FOIA. An additional 32 volumes of files had to be reviewed in order to locate information plaintiff had requested. Although the court issued an order on November 25, 1975, extending the above-described deadlines until January 31, 1976, as well as limiting the inventory requirement to only that material not being furnished plaintiff, this order still required the FBI to assign a substantial portion of its FOIPA personnel to the processing of the subject matter of one request.

(c) In Fellner v. U.S. Department of Justice, (United States District Court for the Western District of Wisconsin, Civil Action No. 75-C-430), the court issued an order on December 17, 1975, requiring the FBI to review an additional 4,000 pages per month of the voluminous material subject to plaintiff's request. Because of this order we are once again required to devote a substantial portion of our FOIPA personnel to the processing of one request, to the detriment of all others, including plaintiff's.

(13) The FBI is and has been making every reasonable, and sometimes extraordinary, effort to comply with the unexpected demands of the amended FOIA. In consideration of

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the present and continuing increase in the workload of the FBI in fulfillment of its Congressionally-mandated investigative duties concerning violations of statutes of the United States, and taking into account present budgetary and personnel limitations, it has become an overwhelming burden for the FBI to respond to FOIA requests within the limited time frame envisaged. Of the 13,875 requests received in 1975, we were able to respond fully to 7,699, and as of the end of that year, were processing an additional 1,004. This left a backlog of 5,172 requests which still required processing, preferably on the basis of date received to ensure fairness to all requesters. Meanwhile, in the first eleven weeks of this year, we have received 2,740 additional requests, and they continue to come in at a rate of nearly 50 per workday.

(14) The sheer enormity of our administrative burden can be seen when it is realized what is involved in processing each of the thousands upon thousands of requests we have received:

(a) Upon receipt of each request, assuming the subject matter is reasonably identifiable, such as a named individual or individuals, or a named organization or organizations, we initiate a search of our Central Indices, the result of which will indicate whether we have any files dealing with the subject matter of the request. In the case wherein we locate no record of an investigation concerning the subject matter of the inquiry, the requester is so advised at this time. If our indices search indicates that we do have files which may fall within the purview of the request, the requester is advised and the case is placed in chronological order until we are able to initiate

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the actual processing. When the case is assigned for processing, we locate these files and determine whether the information therein is in fact identical to the subject matter of the request (i.e., Is the John Doe in the file the same as the John Doe who has requested information concerning himself?) The mechanical task of processing follows.

(b) The task of processing an FOIA request involves first reproducing an entire section of the file, in order to review and mark for deletions or exemptions, if any, where appropriate. From this working copy, additional copies are made - one for the requester and one for our own administrative control. Review consists of a line-by-line reading, with constant attention to matters which involve, among other considerations, the privacy and confidentiality of third parties, classified data, and other information which is proscribed from release pursuant to the FOIA or other statutes. Classified material must be further reviewed by Special Agent personnel with expertise in the substantive area to which the particular document pertains, who must determine if the document meets the current classification criteria and which portion of the document is actually the part subject to classification. Thereafter, a determination will be made as to the release of any non-classified portion of the document.

(c) This entire reviewing process is carried out under the supervision of law-trained Special Agents, and assuming we have located and processed material which falls within the subject matter of the FOIA request, this material is subject to several succeedingly higher levels of examination and is finally furnished to the requester over

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Director Kelley's signature. These examinations are made for the purpose of assuring that no material to which the requester is entitled is erroneously withheld and that no material which should be withheld pursuant to the FOIA is inadvertently released.

(d) The above-described procedure is followed without exception in every FOIA request we receive. (Obviously, however, this is not necessary in those cases wherein we have no information concerning the subject matter of the request.)

(15) Based on the FBI's experience to date in these matters, due diligence requires that the only fair way of ensuring that each request receives the legitimate attention it deserves is to process these requests in chronological order based on the date of their receipt, and this is the policy we are presently following. The FBI has been required to make exceptions to this policy pursuant to the above-described court orders, but we respectfully point out that a point may be reached, in the not-too-distant future, when this would become a vicious circle of self-defeating proportions. It is not inconceivable that the FBI will soon reach the stage where all FOIPA personnel are engaged solely in the processing of requests pursuant to court-imposed deadlines, to the detriment of the rights of all other requesters. This could well cause other FOIA requesters who are now waiting patiently, to institute legal actions, which in turn could cause more court orders requiring immediate processing. In view of the substantial allocations of personnel and finances

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already committed to FOIA and Privacy Act processing, given the FBI's present budgetary and personnel limitations and, most importantly other statutory responsibilities, additional court-imposed deadlines could place the FBI in the position of expending so much manpower in attempting to comply with a court order in one case, that it will be held in contempt of a similar court order in a different case.

(16) The date when processing of plaintiff Exner's request will begin is unfortunately contingent on a number of unpredictable factors. The present rate of processing may be further disrupted by receipt of additional court-imposed deadlines requiring accelerated completion of the processing of one request, (such as described at pages 5-8 supra) which would require reassignment of more personnel to that request, thus delaying our responses to all others. In addition, no prediction can be made of exactly how long it will take to respond fully to those requests received prior to plaintiff's, because it is impossible to know if each of these requests will result in fairly rapid processing (because the FBI does not possess an enormous amount of information responsive to that particular request), or a massive processing effort (because the FBI has thousands of pages of material responsive to that particular request). Taking into consideration these variables and based on our present rate of processing (See paragraph 13, at page 7, supra), the best estimate of the FBI at the present time, is that the materials responsive to plaintiff's request will be reviewed beginning approximately four months from now. Since the volume of documents involved has not been ascertained yet because the request has not been processed preferentially out of order, it is not possible to project how long the review will take.

* GPO : 1971 O - 427-736

(17) Despite the difficulties described throughout this affidavit, the FBI is continuing to do its utmost to give fair and equitable treatment to all requestors. Every effort will be made to commence processing plaintiff's request within the time frame suggested. The FBI assures plaintiff that if an improvement in conditions results in an accelerated rate of processing, that benefit will accrue to plaintiff as well as others awaiting a substantive response.

Consistent with the provisions of the applicable statues, disclosure shall be forthcoming.

Michael L. Hanigan
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to
before me this 3rd day of
March, 1976.

Notary Public

My commission expires 2/1/80

February 19, 1976

Brian D. Monaghan, Esq.
Security Pacific Plaza
Suite 1324
1200 Third Avenue
San Diego, California 92101

Dear Mr. Monaghan:

Your letter to Mr. Quinlan J. Shea, Chief, Freedom of Information Appeal Unit, Department of Justice, dated January 26, 1976, was forwarded to the FBI.

To assure fair and impartial treatment to all requests made under the Freedom of Information-Privacy Acts (FOIPA) the FBI handles such requests in chronological order based on date received. The statutes in question do not permit one individual's request for his or her file to be given priority over another's. Indeed, equitable treatment of all requesters is the very basis for not attempting to establish such priorities, but instead to handle each in chronological order.

As to the merits of whether any particular exemption(s) should be applied, it would be unwise for me to speculate prior to the examination of any relevant documents.

If your client believes she is in physical danger or has any evidence regarding threats against her life, I strongly urge you to bring this information to the attention of the proper authorities.

Sincerely yours,

M. Kelley

Clarence M. Kelley
Director

62-116929-8

ENCLOSURE EXHIBIT F

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MAR 15 1976

Honorable Bella S. Abzug, Chairwoman
Government Information and Individual
Rights Subcommittee
Committee on Government Operations
Rayburn House Office Building, Room B-349-B-C
Washington, D. C. 20515

Dear Chairwoman Abzug:

This constitutes the Report of the Department of Justice to Congress covering Freedom of Information Act operations during calendar year 1975. At Tab A are the data required by the Act of every agency, in the format requested in your letter of July 1, 1975. At Tab B are the additional data required to be submitted by the Attorney General concerning cases arising under the Act and the efforts undertaken by the Department of Justice to encourage agency compliance with the Act throughout the Government.

In reviewing all of the data submitted herewith, I must state that much of it is disturbing to me and others interested and involved in F.O.I.A. matters. The receipt of over 30,000 requests for access, a number far in excess of what anyone had anticipated, has transformed this into a major area of Departmental operations. Over 120,000 man-hours are reported as having been expended, the majority by attorneys and supervisors, and these constitute only a partial accounting for the total personnel effort within the Department. These figures demonstrate the adverse impact on this Department's ability to carry out its traditional substantive missions during the past year. Moreover, the figures for the first two months of 1976 offer no indication that the tide is ebbing. Through March 5, for example, the Federal Bureau of Investigation has received in excess of 2,500 new requests for access to its records.

One of the provisions in the amendments to the Act that certainly has not worked out as anyone intended is the

62-116929-8

ENCLOSURE EXHIBIT G

imposition of very short time limits for the processing of requests. I fully understand and accept the desire of Congress to demonstrate the importance it attached to the reasonably expeditious processing of requests for access to records. In my opinion, however, any time limit that does not take into consideration the number and complexity of the records within the scope of the individual request is both unrealistic and wholly unworkable. Requesters have tended to word their requests as broadly as possible in an understandable effort to ensure that they encompass all records in which an individual has an interest. There is no effective mechanism under the Freedom of Information Act for requiring a requester to cooperate with the Department in an attempt to aid us in locating records of particular interest with a minimum expenditure of our personnel resources, although some requesters have done so willingly. Under these circumstances, once the flood of requests developed, it almost immediately became impossible to comply with the time limits in many of the components of the Department. The unfulfilled expectations of the requesters were then reflected in innumerable letters, telephone calls, complaints to Members of Congress, etc., responding to which served only to slow down even further the processing of the requests themselves. It is the large number of requests, however, encompassing thousands and tens of thousands of pages -- some, at least, among the most sensitive in the files of the Department -- that has tended, more than any other single factor, to slow down the processing of the far greater number of requests involving much smaller quantities of records. This entire area of time limits, viewed in the light of the total number of requests we have received and the significant fraction thereof involving large quantities of records, is one to which I hope your Subcommittee will give serious attention in the near future.

The results of our inability to comply with the letter of the Act as to time limits have been exacerbated by our efforts to comply fully with its spirit. At all times during my tenure as Deputy Attorney General, I have attempted to effect the maximum possible, responsible disclosure of records. It is clear that the Department of Justice is in fact releasing a considerable quantity of technically exempt material. My own view, as you know, is that an exemption is nothing more than a lawful excuse to withhold a record. I stress that access should not be denied unless some reason for doing so exists in terms of the present vital interests of the Department. My insistence on conformity with this policy, however, is an important factor contributing to the backlog within the

Appeals Unit. In addition to reviewing withheld materials to ascertain whether they are or are not exempt from mandatory release under the Act, its personnel must also review the exempt materials with a view towards a possible discretionary release, either by the component itself in the form of a supplemental release, or at my direction in the final action on the appeal. To be absolutely candid, it would be far easier for this Department to follow a practice of merely releasing that which is not exempt and withholding that which is. Certainly we could process our appeals more expeditiously. Revisions in the letter of the Act could have a great impact throughout the Executive Branch in terms of encouraging an attitude more favorably inclined towards releasing records, rather than seeking to withhold them.

There is one additional serious problem I desire to bring to your specific attention. That is the situation created by those cases in which we are sued before the administrative review process has been completed. Although the number of such cases is not particularly great, this unfortunate provision in the Act usually results in the individual who has sued receiving preferential consideration over the far greater number of other [usually prior] requesters and appellants who choose not to file suit, or who cannot do so. Congress has directed the courts, absent "exceptional circumstances" [5 U.S.C. 552(a)(6)(C)], to give these cases precedence on the docket and to expedite them "in every way." 5 U.S.C. 552 (a)(4)(D). Several cases in which courts have sought to carry out this Congressional intent have involved tremendous quantities of records; others have involved closely related, ongoing criminal investigations, so that the records have been not only voluminous, but also extremely sensitive. Over the objections of this Department, rigorous time schedules for the processing of the records in these cases have been imposed by the courts involved, to the principal detriment of the several thousand other requesters and hundreds of administrative appellants who must then wait even longer for action on their requests than would otherwise be the case. In my judgment, this result is grossly unfair in most instances. Absent some wholly arbitrary refusal to expedite a particular request or appeal when exceptional circumstances exist, each individual should be required to wait his or her turn in line. The law as presently written places the burden on the Government to prove that a case should not receive preferential, expedited treatment. This imbalance should be corrected, in fairness to other requesters and to eliminate an unnecessary contribution to the congestion of court dockets in the Federal Judicial System.

Within this Department, there have been instances in which individual cases were expedited administratively for cause. Such instances have been rare, however, which is as I believe it should be. No one anticipated the flood of requests and appeals following the effective date of the amendments to the Act. This Department's allocation of resources [currently, for example, approximately 175 in the F.B.I.'s Freedom of Information and Privacy Section -- including 25 Special Agents -- and 25 more in my own Appeals Unit] has been extremely generous. Relief could easily be granted in this area, with such issues as the allocation of resources and speed of processing being viewed as matters for Congressional, not Judicial, oversight. As it is now, we must take our personnel off cases on which they are already working, simply because some other individual or group with the inclination and resources to file suit refuses to wait in line. I strongly suggest that, in accordance with your letter of July 1, 1975, this provision of the Act should be considered by your Subcommittee for revision. As a minimum, the individual who chooses to file suit before the administrative process has been completed in his case should face a heavy burden of showing that truly exceptional circumstances exist that require expedited consideration of his request or administrative appeal and that the agency has refused to grant a specific request to do so.

There are, of course, many other problems, some of them quite serious, presented by the Act in its present form. I hope that these will also receive sympathetic consideration from your Subcommittee in the near future. Some of them would be at least partially resolved by a critical reexamination of the many substantive and procedural inconsistencies between the Freedom of Information Act and the access provisions of the Privacy Act of 1974. I would welcome the opportunity, both personally and through our respective staffs, to explore these matters with you more fully in the near future.

In conclusion, although I am not completely satisfied with the results we have achieved to date, it is my firm, overall judgment that the Department of Justice has performed well in this area during the past year under extremely arduous conditions. It remains my hope that cooperation between the Legislative and Executive Branches will result in the necessary and reasonable reformulation of the Act which would permit a substantial portion of the personnel now working in this area to return to the traditional substantive missions of the Department of Justice,

while continuing to meet the principal goals of the Freedom of Information Act.

Sincerely,

Harold R. Tyler, Jr.
Deputy Attorney General

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Admin. ____
Comp. Syst. ____
Ext. Affairs ____
Files & Com. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

TO : [redacted]

DATE: 4/14/76

FROM : Legal Counsel

SUBJECT: JUDITH KATHERINE EXNER v.
FBI, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-89-S

PURPOSE:

This memorandum is to advise that affidavit executed, approved, and hand-carried to Departmental Attorney, reportedly lost after mailing by Department. Identical affidavit reexecuted and furnished Department for use in instant litigation.

SYNOPSIS:

Plaintiff is suing for FBI records under FOIA. Legal Counsel Division furnished Department with affidavit on 3/31/76, which has been reportedly lost in the mail. Identical affidavit executed.

RECOMMENDATION:

None. For information.

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - FOIA Litigation
[redacted]
EPM:lsy
(4)

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Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

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Memorandum to [redacted] b6 b7C
Re: Judith Katherine Exner v.
FBI, et al.
(U.S.D.C., S.D. CALIFORNIA)
Civil Action No. 76-89-S

DETAILS:

Plaintiff is suing for FBI records pursuant to her FOIA request submitted in December, 1975. Inasmuch as we have not processed the request, for to do so would give this request preferential treatment, the Department wished to move the Court on our behalf to stay the proceedings to allow sufficient time in order to process the request in chronological order. In support of this motion an affidavit executed by Special Agent [redacted], FOIPA Section, Records Management Division, and approved by memorandum of Legal Counsel to [redacted] dated 3/31/76, was hand-delivered to Departmental Attorney Lynne Zusman on that date. b6 b7C

On 4/8/76 Zusman advised that she had forwarded the affidavit, together with motion papers, to the United States Attorney, Southern District of California, on 4/2/76 and further advised that he had not received these. She requested that the original affidavit be retyped and reexecuted for use in a hearing on the merits of this motion scheduled for 4/12/76. She stated that she had no explanation for the disappearance of the documents other than they were lost in the mail and that she was taking steps to trace these documents. On 4/9/76 an identical affidavit was reexecuted by Special Agent [redacted] for use of Department in support of the aforementioned motion, and hand-carried to Department on 4/9/76. b6 b7C

APPROVED:
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Admin.
Comp. Syst.
Ext. Affairs
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Legal Coun.
Plan. & Eval.
Rec. Mgmt.
Spec. Inv.
Training

FBI

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

REL;IJ;EEDavies;cva
145-12-2683

14 APR 1976

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Judith Katherine Exner v. Federal Bureau of Investigation (USDC S.D. Calif., Civil Action No. 76-0089-S)

TIME LIMITS

The district court denied a stay of judicial proceedings to permit the FBI and Deputy Attorney General's Office to complete review of the records in this FOIA/Privacy Act case on April 12, 1976. As a result of the denial, the defendants must now file a Vaughn v. Rosen (484 F. 2d 820, C.A.D.C., 1973), response by April 27, 1976, pursuant to an order earlier entered by the court in response to plaintiff's request for expeditious handling of her suit. An immediate stay must be obtained from the Ninth Circuit.

RECOMMENDATIONS

The FBI recommends appeal.

I recommend appeal.

QUESTION PRESENTED

Whether the district court's denial of a stay in this Freedom of Information Act/Privacy Act suit was contrary to the intent of Congress to permit government agencies to have additional time to review FOIA requests upon a showing of "exceptional circumstances" and "due diligence" 5 U.S.C. 552(a)(6)(C).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552(a)(6)(C) provides:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have

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> exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

The Privacy Act, 5 U.S.C. 552a(g)(3)(A) provides:

> In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

STATEMENT

On December 24, 1975, plaintiff Judith Katherine Exner made a request of the FBI for access to all records filed under her name. On January 11, 1976, before her request had been acknolwedged, her counsel appealed to the Deputy Attorney General, noting that ten working days had elapsed and he considered the request denied. On January 15, 1976, the FBI Director acknowledged receipt of the request and advised plaintiff's counsel that the Bureau had 5,964 FOIPA (Freedom of Information/Privacy Act) requests on hand and her request would have to wait its turn. On January 26, 1976, plaintiff's counsel wrote Mr. Quinn Shea, Chief, Freedom of Information Appeals Unit, and asked that plaintiff's request be expedited because she "has been so prominent in the media lately that she is in physical danger until such time as all her recollections are committed to a writing", and because the document to be produced would be of "historical interest". Also, counsel added, "these files have been used against her and selected portions of them have been leaked to the press; it would only seem fair that she has a right to see them" (Defendants Exhibit D). Mr. Shea replied that he thought that the physical danger argument was "nothing more than that--an argument; and that he could see no basis for according plaintiff preferential treatment" (Defs. Exh. E). The FBI replied that it could not give plaintiff's request priority over other individual's request and "if your client believes she is in physical danger or has any evidence of threats against her life I urge you to bring this information to the attention of the proper authorities" (Defs. Exh. F).

Plaintiff then filed suit in the district court under the Privacy Act and the FOIA, requested access to her files, an opportunity to correct inaccuracies in those files, and copies of the files for her use. Specifically, she sought to enjoin the defendants from withholding records from her pursuant to the Privacy Act (5 U.S.C. 552a(g)(3)(A)) and to produce copies of the records pursuant to the FOIA (5 U.S.C. 552(a)(4)(B)) (Amended Complaint).

Plaintiff then moved to expedite the court proceedings, and to obtain prompt "in camera" inspections of her files (see Plaintiff's Ex Parte Motion). In an affidavit in support of the motion plaintiff stated her fears for her safety resulting from personal information about her being leaked to the press, which information linked her with former President Kennedy, Sam Giancana, Frank Sinatra and the Mafia. She claimed that much of this information was inaccurate and had led to distorted news accounts linking her with assassination attempts, and to threats against her life. The affidavit

stated:

> Because of the murder of Sam Giancana, and because of threatening telephone calls I have recently received, I feel it is important that this information be recorded as quickly as possible. [Affidavit, p. 11.]

The government opposed this motion and a motion by plaintiff for "partial summary judgment" (missing from files) on the ground that the preliminary relief sought would afford plaintiff essentially the entire relief sought in the Complaint. See Theriault v. United States, 503 F. 2d 390 (C.A. 9, 1974) denying discovery in an FOIA suit on this basis. We also stated that the real reason for plaintiff's haste was not her fears for her safety but her desire to meet a publisher's deadline in her forthcoming book (Opposition to Plaintiff's Motion For Partial Summary Judgment, p. 3).

The court did not order in camera inspection but did enter an order, following a hearing on plaintiff's motion, requiring the government to file by April 12, 1976, a statement containing the information described in Vaughn v. Rosen (484 F. 2d 820, 826-828, C.A.D.C., 1973). 1/ We filed an objection to the order (Objection to Proposed Order) and moved to stay further proceedings pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(6)(C), asserting that "exceptional circumstances" existed and that the government is exercising "due diligence" in responding to the request. In support of our motion we attached affidavits of Mr. Shea and F.B.I. Special Agent [redacted] indicating that the FBI and the appeals unit are processing FOIA requests as diligently as possible on a first-come first serve basis and have allocated substantial manpower to the review of records.2/ b6 b7C

1/ We were unaware that the order had been orally issued from the bench and treated the order as "prospective" until we learned otherwise at a hearing held on April 12, 1976, on our stay motion.

2/ These affidavits indicate that the FBI estimates it will reach plaintiff's request in four months [redacted] Affidavit, para. 16). The appeals unit will process the appeal in about four months after the FBI has completed its review (Shea Affidavit, para. 11). b6 b7C

The court denied our motion and allowed us fifteen days from the hearing date to file the previously ordered Vaughn v. Rosen statement.

DISCUSSION

We recommend appeal for the same reason that we recommended appeal in Open America v. Watergate Special Prosecution Force, et al. (copy of Memorandum attached), which appeal was authorized on April 12, 1976. We think that the Department should stand firm on the proposition that agencies must be permitted to process claims equitably on a first-come first-served basis, and should not be required by the courts to expedite those cases in which suits are filed at the expense of other requesters who patiently wait administrative action. While we may find the Ninth Circuit unsympathetic to nine-to-twelve month delays, at least the course of appealing to the various Circuits will make Congress and the courts aware that the FOIA and Privacy Act cannot be implemented in the time frame Congress fixed without an input of tremendous resources.

We point out, however, that this case presents more complex problems than Open America because it involves both the Privacy Act and the Freedom of Information Act. The authority given the courts to grant stays pending completion of administrative review of records is found only in the FOIA. However, since courts have inherent equity power to stay proceedings in other cases, the absence of a similar provision in the Privacy Act should not prove fatal.

There is also the possibility that plaintiff's allegations of fears for her personal safety, if taken seriously, will cause the court of appeals to be warry of condoning bureaucratic delays. However, the relationship between plaintiff's haste to publish and fears for her safety is tenuous at best, and the prompt publication of her book is her real concern. In this connection we note that Congress rejected a proposed amendment to the FOIA that would have required priority for the press and news media whose need to know would be nullified by time delays. Indeed "need to know" is not a consideration under the Act.

Finally, we are concerned that the Ninth Circuit will decline to take jurisdiction of the interlocutory appeal (although we are prepared to argue Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541) and to grant a stay before our Vaughn v. Rosen response is due. In that case,

we would wish to consider seeking a stay from Justice Rehnquist.

CONCLUSION

For the foregoing reasons we recommend seeking an expedited appeal and a stay pending appeal.

REX E. LEE
Assistant Attorney General
Civil Division

By:

Irving Jaffe
Deputy Assistant Attorney General

JCIV
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TO: UNITED STATES ATTORNEY
SAN DIEGO, CALIFORNIA

FFL:LKZUSMAN:JLL
145-12-2683

FM: REX E. LEE
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION 739-2689
BY: JEFFREY ACKERMAN, CHIEF
INFORMATION AND PRIVACY UNIT

RE: JUDITH KATHERINE EXNER V. FBI, ET AL.,
CIVIL ACTION NO. 76-0069-S, USDC SD CALIF.

WE REQUEST THAT YOU FILE A MOTION TO STAY PENDING APPEAL OF JUDGE SCHWARTZ'S RULING RENDERED IN COURT ON APRIL 12, 1976, DENYING OUR MOTION TO STAY JUDICIAL PROCEEDINGS PENDING COMPLETION OF AGENCY REVIEW OF THE DOCUMENTS UNDER 5 U.S.C. 552(A)(6)(C) IN THE ABOVE CASE. THE TEXT OF THE MOTION AS WELL AS AN ACCOMPANYING MEMORANDUM OF LAW ARE SET FORTH BELOW. WE ARE ALSO TRANSMITTING TO YOU A PROPOSED ORDER WHICH MUST BE IMMEDIATELY REFERRED TO PLAINTIFF'S ATTORNEY, RICHARD C. LEONARD, FOR HIS APPROVAL, AND THEN TO JUDGE SCHWARTZ. WE REQUIRE A WRITTEN COURT ORDER IN ORDER TO PERFECT OUR APPEAL AND THE PROCEDURE DESCRIBED ABOVE IS PER INSTRUCTIONS ZUSMAN RECEIVED APRIL 13, 1976, VIA THE JUDGE'S LAW CLERK. PLEASE MAKE SURE THAT THE MOTION AND MEMORANDUM ARE FILED IMMEDIATELY AND THAT THE PROPOSED ORDER IS LIKEWISE DISPATCHED TO LEONARD IMMEDIATELY. WE ANTICIPATE THAT JUDGE SCHWARTZ WILL DENY THE MOTION TO STAY AND THAT IS WHY THE PROPOSED ORDER IS DRAFTED AS IT IS.

THE TEXT OF THE MOTION TO STAY PENDING APPEAL IS AS FOLLOWS:

DEFENDANTS, BY THEIR UNDERSIGNED ATTORNEYS, HEREBY MOVE THE COURT, PURSUANT TO RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE, TO STAY ALL PROCEEDINGS AND ALL ORDERS IN THE ABOVE-CAPTIONED MATTER, IN THE DISTRICT COURT, PENDING COMPLETION OF APPELLATE PROCEEDINGS IN THIS LITIGATION.

THE DEFENDANTS RESPECTFULLY REFER THE COURT TO THE MEMORANDUM OF LAW WHICH ACCOMPANIES THIS MOTION.

DEFENDANTS FURTHER REQUEST THAT THE ORDER PREVIOUSLY RENDERED BE REDUCED TO WRITTEN FORM.

MEMORANDUM IN SUPPORT OF MOTION
FOR STAY PENDING APPEAL

PLAINTIFF SUED IN THE DISTRICT COURT SEEKING INJUNCTIVE RELIEF UNDER THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT, 5 U.S.C. [illegible] AND 5 U.S.C. 552A, RESPECTIVELY, TO COMPEL DISCLOSURE OF DOCUMENTS RELATING TO HIMSELF. THE COURT FILED AN ORDER REQUIRING DEFENDANTS INVENTORY AND INDEX ALL DOCUMENTS IN POSSESSION RELATING TO PLAINTIFF, WHETHER EXEMPT OR NON-EXEMPT, AND TO DISCLOSE TO PLAINTIFF ANY DOCUMENTS THAT ARE NOT ALLEGEDLY EXEMPT UNDER ONE OF THE STATUTES RELIED ON AS WELL AS PROHIBITING DEFENDANTS FROM DISCLOSING TO ANYONE OR ANY ENTITY OTHER THAN THE PLAINTIFF OR THE COURT, THE CONTENTS OF THOSE DOCUMENTS EXCEPT FOR "ROUTINE USES" AS DEFINED IN THE PRIVACY ACT. THE COURT ALSO DENIED DEFENDANTS' MOTION TO STAY JUDICIAL PROCEEDINGS PENDING COMPLETION OF AGENCY REVIEW OF THE DOCUMENTS PURSUANT TO 5 U.S.C. 552(A)(6)(C) [illegible] PRIVATE [illegible] REVIEW INFORMATION PURSUANT TO A SHOWING OF "EXCEPTIONAL CIRCUMSTANCES" AND "DUE DILIGENCE". DEFENDANTS [illegible] THE DISTRICT COURT PENDING APPELLATE [illegible] GRANTING [illegible]

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PART II OF THE MEMO IN SUPPORT OF MOTION FOR STAY PENDING APPEAL.

DEFENDANTS CONTEND THAT THE STAY IS NECESSARY ON THE GROUNDS THAT IN ITS ABSENCE, THE BASIS FOR THE APPEAL WILL BE MOOTED, PARTICULARLY IN REGARD TO THE ORDER REQUIRING IMMEDIATE DISCLOSURE TO THE PLAINTIFF. SEE STOP H-3 ASSOCIATION V. VOLPE, 353 F. SUPP. 14 (D. HAWAII 1972). A STAY SHOULD BE GRANTED TO PERMIT THE COURT OF APPEALS TO CONSIDER DEFENDANTS' CONTENTION. SEE SCHWARTZ V. COVINGTON, 341 F.2D 537 (9TH CIR. 1965); VIRGINIA PETROLEUM JOBBERS ASS'N V. FEDERAL POWER COMM'N., 259 F.2D 921 (D.C. CIR. 1958). THE PUBLIC INTEREST WILL BE SERVED BY THE GRANT OF A STAY, TO ALLOW THE APPELLATE COURT TO INTERPRET A PROVISION OF THE FREEDOM OF INFORMATION ACT WHICH HAS NOT YET RECEIVED JUDICIAL APPELLATE SCRUTINY IN THIS CIRCUIT. PLAINTIFF HAS FAILED TO PROVE HOW SHE WILL BE HARMED IF THE STAY IS GRANTED. VIRGINIA JOBBERS, SUPRA. FURTHERMORE, THE ISSUANCE OF A VAUGHN V. ROSEN (ROSEN II), 484 F.2D 820, 826-828, PRIOR TO THE SUBSTANTIVE DETERMINATION BY THE AGENCY OF WHETHER SOME DOCUMENTS WILL BE [illegible] EXEMPT UNDER THE FOI ACT, IS REGARDED BY THE DEFENDANTS AS INAPPROPRIATE AND EXCESSIVELY PREMATURE, AND IS LIKEWISE A MATTER OF FIRST IMPRESSION IN THIS CIRCUIT, WHICH SHOULD BE RESOLVED BY THE COURT OF APPEALS.

FOR THE ABOVE REASONS, DEFENDANTS' MOTION TO STAY PENDING APPEAL SHOULD BE GRANTED.

L

PROPOSED ORDER

THIS MATTER HAVING COME BEFORE THE COURT ON DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF REVIEW AND DEFENDANTS' MOTION TO STAY PENDING APPEAL AND THE COURT BEING FULLY ADVISED IN THE PREMISES AND HAVING CONCLUDED THAT DEFENDANTS' MOTIONS ARE WELL TAKEN, IT IS THIS _____ DAY OF APRIL, 1976,

ORDERED, THAT DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF REVIEW AND DEFENDANTS' MOTION TO STAY PENDING APPEAL, APPEAL AND HEREBY ARE, BOTH DENIED.

X

UNITED STATES DISTRICT JUDGE

IF YOU HAVE ANY FURTHER QUESTIONS REGARDING THIS [illegible] LYNN. [illegible]SMAN. PLEASE SEND US COPIES OF ANY PAPERS FILED [illegible] SENT TO LEXINGTON WITH A REQUEST THAT HE FORWARD IT [illegible] [illegible]SIDE.

[illegible]
CIVIL LITIGATION UNIT, FEDERAL [illegible]
FEDERAL BUREAU OF INVESTIGATION

United States Attorney
San Diego, California

April 2, 1976

Rex E. Lee
Assistant Attorney General
Civil Division
By: Jeffrey Axelrad, Chief
Information and Privacy Unit

JAxelrad:pac
145-12-2033

Tel: 739-3300

Judith Katherine Exner v. FBI,
et al., USDC SD Calif., Civil
Action No. 76-80-S.

Attention: John R. Neece, Esquire
Chief, Civil Division

Enclosed are originals and three copies of our Motion to Stay and supporting memorandum for filing in the above-captioned litigation. Please file and serve the motion as soon as possible and advise us as to the date on which they are filed. We assume that you will also file the answer which was previously forwarded.

Should you desire, Lynne Susman of this Office is available to argue the Motion to Stay or to assist you at the argument. In all events, Mrs. Susman will provide further assistance if necessary on this matter. Please telephone her at 202-739-3250.

Please continue to keep us informed of all developments in this litigation.

Enclosures

EX-115

cc: [redacted]
Chief, Freedom of Information
Litigation Unit
Federal Bureau of Investigation
Room 3646

ENCLOSURE

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For telephone call from Lynne Susman 4/8/76 this office received by the U.S.A. + she requested a news release stating our attached. Prepared affidavit provided Exner 4/9/76-Sfn.

55 MAY 17 1976

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S PLAINTIFF'S EX PARTE MOTION FOR AN ORDER: (1) REQUIRING THE GOVERNMENT TO RESPOND TO THE AMENDED COMPLAINT BY MARCH 1, 1976; (2) REQUIRING THE GOVERNMENT TO PRODUCE THE FBI FILES RELATING TO PLAINTIFF FOR THE COURT'S IN CAMERA INSPECTION BY MARCH 1, 1976; and (3) SHORTENING TIME TO SERVE AND FILE A NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT.

Plaintiff moves this Court for an order, pursuant to Rule 78 of the Federal Rules of Civil Procedure and pursuant to Rule 3(e)(7) of this Court, as follows:

1. Requiring the defendants to file their response to the amended complaint no later than March 1, 1976.
2. Requiring the defendants to file with this Court, for its in camera inspection, all records of the Federal Bureau of Investigation relating to the plaintiff.
3. Shortening time, permitting plaintiff to serve and file her notice of motion and motion for summary judgment by Wednesday, March 3, 1976, and to have the hearing date set on that motion for Monday, March 8, 1976.

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This motion is based on all of the files and records in this action, on the memorandum of points and authorities submitted concurrently with this motion, and upon the Affidavit of Judith Katherine Exner filed concurrently herewith.

DATED: February 19, 1976.

RICHARD C. LEONARD

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF EX PARTE MOTION

1. FACTUAL BACKGROUND.

The most important document underlying this Ex Parte Motion is the Affidavit of the plaintiff, Judith Katherine Exner, which was filed concurrently with this Motion. Although the Affidavit speaks for itself, in summary, it demonstrates the following:

(1) The FBI has a file which relates to the plaintiff, Judith Katherine Exner [Affidavit of Exner, paragraph 3, p. 2, l. 20, to p. 6, l. 32].

(2) The file contains inaccuracies, which inaccuracies not only have found their way into the national press, but also are now contained in a report issued by the Senate Select Committee [Affidavit of Exner, paragraph 6, p. 8, l. 18, to p. 9, l. 11].

(3) Plaintiff's decision to speak out publicly about her relationship with the late President John F. Kennedy, and with other persons, was not prompted by any personal ambition, but was a direct result of a breach of confidence by a member or members of the Senate Select Committee, who leaked information about the plaintiff to the national press, and who apparently leaked portions of the FBI records about the plaintiff to the press [Affidavit of Exner, p. 7, ll. 1-21; paragraph 7, p. 9, l. 12, to p. 10, l. 24].

(4) Plaintiff's request for her right to review the FBI records, and to correct the misinformation contained therein is prompted by a desire to protect her own well-being and physical safety, and

to correct published inaccuracies which not only have injured her reputation, but also which might tend to influence Governmental decision-making and the electorate [paragraphs 9, 10, and 11, p. 10, l. 26, to p. 11, l. 32].

2. SUMMARY OF PLAINTIFF'S REQUESTS.

The gravamen of plaintiff's request contained in this ex parte motion is to expedite these proceedings brought pursuant to the Privacy Act of 1974 [5 U.S.C. §552a], and the Freedom of Information Act [5 U.S.C. §552]. Three methods of expedition are requested:

(1) Plaintiff requests that the defendants answer the amended complaint by March 1, 1976.

(2) Plaintiff requests that the Government produce the applicable records by March 1, 1976, for the Court's in camera inspection.

(3) Plaintiff requests that a motion for summary judgment be calendared for March 8, 1976, to resolve any questions left after the Court has reviewed the documents.

As will be noted below, both the Privacy Act and the Freedom of Information Act contain provisions for expediting actions brought pursuant to those Acts, and the requests made herein are reasonable under the circumstances.

3. IT IS IMPORTANT AND PROPER THAT THIS MATTER BE EXPEDITED.

Pursuant to Rule 12(a) of the Federal Rules of Civil Procedure, the United States Government normally has 60 days to respond to a complaint filed against it; however, Rule 12 permits a different time to be fixed by order of the Court. The Freedom of Information Act specifically provides for a 30-day period of

time in which the Government (or an agency thereof) must respond to a complaint brought pursuant to the Freedom of Information Act (5 U.S.C. §552(a)(4)(C)). That section of the Freedom of Information Act also provides that the Court may direct a different time period in which a complaint should be answered.

The Privacy Act, although containing no specific reference to a time period in which the Government must respond to a complaint filed pursuant to that Act, does give several indications that expediency was thought important by the drafters of the legislation. For example, in several portions of the Act (including 5 U.S.C. §552a (d)(2)(A)), a time period of "not later than ten days" is provided. In regard to bringing a matter on for hearing before the District Court, which has jurisdiction both over the Freedom of Information Act and over the Privacy Act matters, the Freedom of Information Act specifically provides at 5 U.S.C. §552(a)(4)(D), as follows:

> "Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

As demonstrated by the Affidavit of Judith Katherine Exner, it is important that this matter be expedited. Not only is the integrity of a Senate Select Committee report at stake, but the integrity of an individual also is on the line, as is her personal safety.

The Government cannot contend that it has not had sufficient time to review Mrs. Exner's request. As the exhibits to the amended complaint in this action demonstrate, the original request to the FBI was made to it by letter dated December 24,

1975. This was followed up on several occasions by further requests and the necessary statutory appeals. It is only through inaction on the part of the FBI that this action was necessitated, because no actual refusal to review the records was ever given to plaintiff. Instead, Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy unit of the Department of Justice, which handles appeals on Privacy Act and Freedom of Information Act requests to the FBI, stated to counsel for Mrs. Exner in a letter dated February 5, 1976, [Exhibit "4" to the amended complaint] that:

> "You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts."

The FBI has known about this request for approximately two months. Since the FBI apparently has already compiled a file on plaintiff, and has turned that over to a Senate Select Committee, it should not be a burdensome task for the FBI to make that same file available to this Court, and, subsequently, to Mrs. Exner.

4. THE PROPER METHOD TO PROCEED IN THIS ACTION IS FOR THE COURT TO IMMEDIATELY REVIEW THE FBI FILE ON MRS. EXNER IN CHAMBERS.

The Privacy Act sets forth a statutory scheme whereby a person has the right:

> "Upon request. . .to gain access to his record or to any information pertaining to him which is contained in [the records of a Governmental agency], permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, . . .and

"Permit the individual to request amendment of a record pertaining to him. . ." [5 U.S.C. §552a (d)(1) and (2)]

If the Government fails to comply with a Privacy Act request, the Act further provides for the bringing of an action to (1) seek an order that the agency be enjoined from withholding the records from the individual; and (2) requring the agency to amend the records, as the court may direct. The conduct of the court, in Privacy Act matters, is defined in 5 U.S.C. §552a (g)(3)(A):

"In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order their production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action."

The Freedom of Information Act also contains similar language relating to the trial court's role:

"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 the 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."
[5 U.S.C. §552(a)(4)(B)]

Although the decision in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973), relates solely to the Freedom of Information Act, the reasoning in that opinion is equally applicable to the Privacy Act of 1974. In Vaughn, the appellate court was concerned with the procedures which the district court should follow in considering requests under the Freedom of Information Act. The court characterized the type of situation presented in a Freedom of Information Act case, as follows:

"The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of Government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

"In light of this overwhelming emphasis upon

disclosure, it 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 many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought. 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. . ." [Footnotes omitted] (484 F.2d at 823-824)

The court in Vaughn suggested that one method by which the trial judge could proceed in Freedom of Information Act cases is to examine the requested documents in camera:

"This 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, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as trier of fact, may and often does examine the document in camera to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit

of criticism and elimination by a party with the actual interest enforcing disclosure." (484 F.2d at 824-825)

The appellate court in Vaughn continued on to suggest that if the documents are exceedingly long, a special master can be appointed, depending on the desires of the trial judge.

In the instant situation where the equities seem to indicate that disclosure is proper and warranted, any objection the Government has to disclosure can be easily resolved by the Court's reviewing the documents in camera. At a minimum, certain documents can be turned over to the plaintiff, and the remaining documents, where some objection lies, can be reviewed either by the Court or by a special master. In Vaughn, the appellate court specifically noted the fact that although some documents may be exempt from disclosure, in many cases only portions of documents may be covered by an exemption to the Act. The appellate court noted that non-exempt documents should be turned over to the plaintiff (see Vaughn, 484 F.2d at 825).

Although not raised in the context of a Privacy Act case, the holding in Chastain v. Kelly, 510 F.2d 1232, 1237 (D.C. Cir., 1975), is important. In that action, brought by an FBI agent against the director of the FBI, plaintiff was seeking to have portions of his FBI record expunged, and to have the FBI notify other agencies which had received copies of the inaccurate records of their inaccuracies. The appellate court in Chastain made the following observation:

"The part of the challenged order to which we see least objection is that requiring the Bureau [FBI] to inform other agencies to which it has hitherto disseminated information about this matter that appellee was not in fact disciplined for it. Certainly it is the Bureau's obligation to correct any erroneous information."

Since it appears from the Affidavit of Judith Katherine Exner that the FBI has circulated inaccurate information about her, that information should be corrected, and the only way to accomplish that is to allow Mrs. Exner to review the records, and to note the necessary corrections.

Although there is little if no case law regarding interpretations of the Privacy Act, which did not take effect until September of 1975, it is obvious from the Congressional history of that Act that its intent is to permit review of records by individuals affected by such records wherever possible. Based on the legislative history of the Privacy Act, Congress held that the purpose of the Act, inter alia, is to:

> "(1) Permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
>
> "(2) Permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;
>
> "(3) Permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;
>
> "(4) Collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information; . . ."

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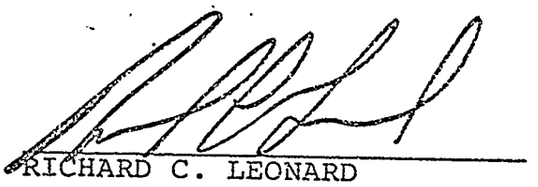
5. CONCLUSION.

Judith Katherine Exner has been brought into the public spotlight, contrary to her desire, and in violation of a promise made to her by a Select Committee of the United States Senate. Information about Mrs. Exner has been leaked to the press. Some of that information is inaccurate. Mrs. Exner's health and safety have been jeopardized by an unwarranted disclosure of her identity. She seeks to correct those abuses which have brought her to this point in time, and she seeks to correct inaccuracies, not only which threaten her psychological makeup and her safety, but also which now have been incorporated into an official report of a Senate Select Committee which deals with matters of grave national concern.

The first step necessary to correct these abuses is to provide Mrs. Exner with an opportunity to review the file maintained on her by the Federal Bureau of Investigation. By means of this motion, we are attempting to expedite the process which has been initiated.

DATED: February 19, 1976.



RICHARD C. LEONARD

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of Plaintiff's Ex Parte Motion for an Order: (1) Requiring the Government to Respond to the Amended Complaint by March 1, 1976; (2) Requiring the Government to Produce the FBI Files Relating to Plaintiff for the Court's In Camera Inspection by March 1, 1976; and (3) Shortening Time to Serve and File a Notice of Motion and Motion for Summary Judgment is hereby acknowledge this 19th day of February, 1976.

By Peter H. Bornin

RICHARD C. LEONARD
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Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S AFFIDAVIT OF JUDITH KATHERINE EXNER IN SUPPORT OF PLAINTIFF'S MOTION FOR AN EX PARTE ORDER

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Judith Katherine Exner, being first duly sworn, deposes and states that:

1. I am the plaintiff in the above-captioned action. This Affidavit is made in support of Plaintiff's Ex Parte Motion which seeks an order requiring the Government to respond to my Amended Complaint for Injunctive Relief Under the Privacy Act of 1974, and the Freedom of Information Act by March 1, 1976, and to produce any and all records compiled or maintained by the Federal Bureau of Investigation which relate to me. It is my desire that these FBI records be turned over to the Court for its in camera inspection, and that the Court determine whether I can personally review these records pursuant to the provisions of the Privacy Act of 1974.

2. In considering my request for the right to review the FBI documents which relate to me, I feel that it is important to keep in mind that my current situation has been created, not by my own doing, but by the United States Government, itself, which, through a special Senate Select Committee, leaked personal information about me to the national press after I had been assured that this information would be kept private and confidential. Although I will detail the facts relating to this incident later in this Affidavit, I feel that it is important for the Court to understand that my relationship with John F. Kennedy, Sam Giancana, and others, which formed the basis of my testimony before an executive session of the Senate Select Committee dates back to a period of time between 1960 and 1962. For 16 years I made no effort to publicize my relationship with the late President Kennedy. It was only after inaccurate information had been leaked to the national press, which information I felt put my safety in danger, that I determined that it was necessary to make certain details of my relationship with President John F. Kennedy, and others, public.

3. There is no doubt in my mind that the Federal Bureau of Investigation does have a file either which is based on me, or which contains information about me. I make this statement based on the following personal observations:

3.1) In September of 1975, I was subpoenaed to testify before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. Majority legal counsel for that Committee was Frederick A. O. Schwarz, Jr., Esq. The subject matter of my testimony concerned my relationship with former President John F. Kennedy, and with Sam Giancana (who was murdered approximately ten days prior to the day he was to testify before the same Senate Select Committee), and John Rosselli.

I testified before an executive session of the Committee for approximately three hours on Saturday, September 20, 1975. During my questioning, counsel for the Committee continuously referred to a folder of documents which was several inches thick. Contained in those documents were phone call records which related to me, as well as other materials. During the course of my testimony, majority counsel Schwarz asked Mr. Bushong, an attorney/investigator for the Committee, where certain materials in my file came from. Mr. Bushong answered that the material came "from the FBI".

3.2) In addition to the comment made by Mr. Bushong, my husband, Daniel R. Exner, in my presence, asked Mr. Smothers, Minority Counsel for the Committee, where certain information referred to by the Senate Select Committee was derived. Mr. Smothers told me and my husband that this information came "from the FBI".

3.3) During the course of my testimony before the Committee, Majority Counsel Schwarz, and other persons who participated in the executive session of the Committee meeting, referred to a file which they were using in the process of examining me as being a file obtained from the records of the FBI.

3.4) The nature of the questions asked me by the Senate Select Committee indicated that some of the material was derived from investigations of me and/or other people during the early part of the 1960's. For example, some of the questions asked by the Committee demonstrated knowledge of my whereabouts during the early part of the 1960's. The only other persons who might have been aware of certain of my travels were Sam Giancana, John F. Kennedy, and Frank Sinatra. To my knowledge, and based upon materials which have appeared in the national press, Frank Sinatra never

testified before the Committee. Both Sam Giancana and John F. Kennedy are deceased, and could not have testified before the Committee. Unless I was the subject of an FBI investigation during the early portion of the 1960's, I do not believe the Senate Select Committee would have had this type of information available to it.

3.5) In fact, I am aware that during the early portion of the 1960's I was the subject of an investigation by the Federal Bureau of Investigation. In March of 1960, I first met Sam Giancana. Shortly after that meeting, I was interviewed in Los Angeles by two persons who identified themselves as members of the Federal Bureau of Investigation, and who showed me proper credentials. Either at that initial meeting, or at some time shortly thereafter, I was also interviewed by Mr. Harold Dodge who identified himself as an agent of the FBI, and who showed me his credentials. For the next approximately four-year period, until some time in 1964, Mr. Dodge, and other ~~FBI agents,~~ kept me under surveillance. On at least 40 occasions, Mr. Dodge stopped me on the street in the Los Angeles area to ask me questions. On one occasion (which I believe happened in or around 1961), I discovered two persons, who identified themselves as FBI agents, in my apartment in Los Angeles. In 1965, while I was at my parents' home, my mother was approached by 2 FBI agents who appeared at her home to ask her questions about me. In 1971 or 1972, I was again interviewed by two men who showed me credentials of the Federal Bureau of Investigation, and who identified themselves as FBI agents. On several occasions, I copied down the California license plate numbers of certain vehicles which were following my car. Upon having the license plates of these cars checked through the Department of Motor Vehicles, I was informed that no

such plates were registered in the State of California, even though they appeared to be standard California license plates.

3.6) In addition to the questions asked me by the Senate Select Committee, and my own knowledge about the FBI investigation of me, the report issued by the Senate Select Committee also contains reference to an FBI investigation of me. Attached hereto as Exhibit "1" and incorporated herein by this reference are pages 129 to 131 of the report of the Senate Select Committee, which was issued on November 20, 1975. I am referring specifically to that portion of the report which is entitled, "Did President Kennedy Learn Anything About Assassination Plots as a Result of the FBI Investigation of Giancana and Rosselli?" In that report, I was referred to as a "friend" of the late President. The failure of the report to indicate my name, or even my sex, was based on an agreement reached by the Senate Select Committee Counsel, F. A. O. Schwarz, with my counsel. The decision not to identify me was based, in part, on the fact that the disclosure of my identity only would constitute a serious intrusion on my right of privacy, and in all likelihood, would subject me to unreasonable harassment. Moreover, the Committee counsel agreed that disclosure of my identity would in no way further the efforts of the Senate Select Committee. The report of the Committee contains the following information:

> "Evidence before the Committee indicates that a close friend of President Kennedy [myself] had frequent contact with the President from the end of 1960 through mid-1962. FBI reports and testimony indicate that the President's friend was also a close friend of John Rosselli and Sam Giancana and

saw them often during the same period.

"On February 27, 1962, Hoover [J. Edgar Hoover, head of the Federal Bureau of Investigation] sent identical copies of a memorandum to the Attorney General and Kenneth O'Donnell, Special Assistant to the President. The memorandum stated that information developed in connection with a concentrated FBI investigation of John Rosselli revealed that Rosselli had been in contact with the President's friend. The memorandum also reported that the individual was maintaining an association with Sam Giancana, described as 'a prominent Chicago underworld figure.' Hoover's memorandum also stated that a review of the telephone toll calls from the President's friend's residence revealed calls to the White House. The President's secretary ultimately received a copy of the memorandum and said she believed she would have shown it to the President.

"The association of the President's friend with the 'hoodlums' and that person's connection with the President was again brought to Hoover's attention in a memorandum preparing him for a meeting with the President planned for March 22, 1962. Courtney Evans testified that Hoover generally required a detailed summary of information in the FBI files for drafting important memoranda or preparing for significant meetings. . . .The FBI files on Giancana then contained information disclosing Giancana's connection with the CIA as well as his involvement in assassination plotting." (Pages 129 to 130 of the Select Committee report) [Emphasis added; footnotes omitted.]

4. Although my testimony before the executive session of the Senate Select Committee was to remain confidential, my testimony was leaked to the press prior to the issuance of the report of the Senate Select Committee. The report issued on November 20, 1975; however, on November 16, 1975, an article appeared in the Washington Post, which identified me, by name, as the "friend of the President" contained in the report. A copy of the Washington Post article of Sunday, November 16, 1975, is attached hereto as Exhibit "2" and incorporated herein by this reference. Further leaks from the Senate Select Committee reached the press, as demonstrated by the release put out by Dan Thomasson and Tim Wyngaard of the Scripps-Howard News Service dated November 18, 1975. A copy of the November 18, 1975, Scripps-Howard press release is attached hereto as Exhibit "3" and incorporated herein by this reference. The Scripps-Howard report specifically refers to FBI documents in the hands of the Senate Select Committee relating to my relationship with President John Fitzgerald Kennedy. Apparently, members of the Senate Select Committee leaked not only my identity, but also the contents of FBI documents--the same documents which the FBI now refuses to turn over to me for my inspection.

5. As demonstrated by the exhibits attached to the Amended Complaint for Injunctive Relief Under the Privacy Act of 1974 and the Freedom of Information Act, filed in this action, [Exhibit "4" to the Amended Complaint], my request for the right to review the FBI file relating to me has been denied. I understand that the Privacy Act of 1974 [5 U.S.C. §552(a)] permits a person to review the records maintained by a Governmental agency relating to that person. Based on the legislative history of the Privacy Act, Congress held that the purpose of the Act, inter alia, is to:

"(1) Permit an individual to determine what

records pertaining to him are collected, maintained, used, or disseminated by such agencies;

"(2) Permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

"(3) Permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

"(4) Collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information; . . ."

6. Based on questions asked me by the Senate Select Committee, and based on the final published report of the Committee, and on information leaked from the Committee to the press, I know that information contained in my FBI record is inaccurate. Not only have these inaccuracies found their way into the report of the Senate Select Committee, but they have undermined my personal integrity and reputation for truthfulness. Although I cannot detail all of the inaccuracies (since I have not seen the FBI files), I know that the following inaccuracies are contained in the FBI materials:

6.1) During the course of my testimony before the executive session of the Senate Select Committee, I was questioned as to telephone calls I placed to the late President Kennedy. Members of the Committee indicated in questioning that my FBI record noted the fact that some of

these calls were made from a private residence in Palm Springs (other than my own), and from Sam Giancana's house in the Chicago area. Both the reference to the house in Palm Springs, and the reference to telephone calls placed from Giancana's house are inaccurate.

6.2) The published report of the Senate Select Committee indicates that my communications with the late President Kennedy ceased a few hours after a March 22, 1962, meeting between J. Edgar Hoover and President Kennedy. This is not true. My communications with the late President lasted until the latter part of 1962.

7. As I previously noted, I feel that it is important to keep in mind that the present situation--the publicity of my relationship with the late President Kennedy--has been created by the Senate Select Committee's leak to the national press, and not because of any actions taken by me. My relationship with the late President began in the early part of 1960 before his nomination as Democratic candidate for President. That close personal relationship lasted until the latter part of 1962. My relationship with Sam Giancana began approximately one month after my first meeting with President Kennedy (then Senator Kennedy), and continued during the same period of time. During the 16-year period from my first meeting with John F. Kennedy up to the time I was forced to disclose facts about my relationship with the President, in December of 1975, I made no attempt to make my relationship with the late President public. In fact, I did everything in my power to keep it private. It was only after I was subpoenaed by the Senate Select Committee that knowledge of my relationship with President Kennedy became public. Even after my testimony in the executive session of the Senate Select Committee, I, along with the assistance of counsel, provided to me by the Committee, took every possible step to see

that my identity was kept confidential, and the nature of my relationship kept private. In violation of an agreement reached with me by the Senate Select Committee, allegedly with unanimous consent the Committee (or some member thereof) leaked my name and facts about my relationship with the late President to the press.

8. The first leak to the press occurred on or about November 16, 1975. Shortly thereafter, numerous other matters, many of which having no basis and fact, appeared in national publications. Several of these publications linked me both to the President and to the Mafia, and to a conspiracy to assassinate Fidel Castro. I never played any role in such an assassination attempt, and had no knowledge of any such assassination attempt. Because of the outrageous comments appearing in the press, however, I became fearful for my safety, especially knowing that Sam Gianana had been murdered after he was subpoenaed to testify before the same Senate Select Committee, but prior to the time he was to give his testimony. An example of some of the outrageous headlines appearing in newspapers throughout the country is attached hereto as Exhibit "4" and incorporated herein by this reference. The article, and the headline, which appeared in the Chicago Daily News shortly after the publication of the Senate Select Committee report stated in bold letters:

"SENATE REPORT LINKS WOMAN, JFK, MOB."

9. Following the publication of hundreds, if not thousands of news articles relating to me, which articles speculated as to my role in an assassination plot, and the nature of my relationship with "purported underworld figures", I determined that the best and safest course I could follow was to publicly appear and explain my relationship, in general terms, with President John F. Kennedy, Sam Giancana, John Rosselli, and

others. On December 17, 1975, I held a press conference. A copy of the statement I read at that press conference is attached hereto as Exhibit "5" and incorporated herein by this reference. It was my thought that by making a public disclosure of the general nature of my actual relationship with the President and others, I could stop some of the speculation and misinformation that surrounded me. I also determined at the time of my press conference that it would be best if I would commit my knowledge to writing. I felt that if the truth were known about my relationship with the late President and with other prominent figures, that my safety would be preserved.

10. I feel it is very important that I am able to review the FBI records relating to me. Not only are those records necessary to prove the accuracy of my own recollections, but also I feel it is necessary to correct misinformation contained in those records, which misinformation has found its way into a published Senate Select Committee report, and into the press. Because of the murder of Sam Giancana, and because of threatening telephone calls I have recently received, I feel it is important that this information be recorded as quickly as possible. It is for these reasons that I am requesting that the Court expedite this litigation and require the Federal Bureau of Investigation, the Department of Justice, and the United States Government to turn over records relating to me to the Court so the Court can review them and determine whether I have the right to make my own personal review of the records.

11. Although I am anxious to review the FBI records relating to me, I am also anxious to have these records remain private. I request that the Court take no steps which would interfere with the privacy aspects of the FBI records until such time as I have a right to review them, and make necessary requests to correct the records.

Judith Katherine Exner

JUDITH KATHERINE EXNER

SUBSCRIBED AND SWORN to before me

this 13 day of February, 1976.

Richard C. Leonard

Notary Public

OFFICIAL SEAL
RICHARD C. LEONARD
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires February 24, 1979

With the exception of this briefing, the FBI and Justice files indicate no other activity in the Balletti wiretap case from September 1961 through January 1962. There was no activity in the assassination effort involving underworld figures from April 1961 until mid-April 1962.

c. *1962.*—A note of January 29, 1962, from the head of the Administrative Regulations Division to the first and second assistants in the Criminal Division stated:

> Our primary interest was in Giancana * * * apparently defective (Maheu) has some connection with Giancana but he claims was because of CIA assignment in connection with Cuba—CIA has objected, may have to drop.

Assistant Attorney General Herbert Miller then asked the FBI to again speak with Edwards about the prosecution of Maheu. (Memo from Miller, 1/31/62)

An FBI memorandum dated February 24, 1962, set forth Miller's request that Edwards be reinterviewed about possible prosecutions in the Balletti case. A reply memorandum from the FBI to Miller on February 7, 1962, stated that Edwards had been contacted and that [illegible] objected to the prosecution.

Did President Kennedy Learn Anything About Assassination Efforts as a Result of the FBI Investigation of Giancana and Rosselli?

As elaborated in the previous sections of this report, all living CIA officials who were involved in the underworld assassination attempt or who were in a position to have known of the attempt have testified that they never discussed the assassination plot with the President. By May 1961, however, the Attorney General and Hoover were aware that the CIA had earlier used Giancana in an operation against Cuba and FBI files contained two memoranda which, if simultaneously reviewed, would have led one to conclude that the CIA operation had involved assassination.[1] There is no evidence that any one within the FBI concluded that the CIA had used Giancana in an assassination attempt. The Committee has uncovered a chain of events, however, which would have given Hoover an opportunity to have assembled the entire picture and to have reported the information to the President.

Evidence before the Committee indicates that a close friend of President Kennedy had frequent contact with the President from the end of 1960 through mid-1962. FBI reports and testimony indicate that the President's friend was also a close friend of John Rosselli and Sam Giancana and saw them often during this same period.[2]

On February 27, 1962, Hoover sent identical copies of a memorandum to the Attorney General and Kenneth O'Donnell, Special Assistant to the President. The memorandum stated that information developed in connection with a concentrated FBI investigation of John Rosselli revealed that Rosselli had been in contact with the President's

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[1] The two memoranda, which are discussed in considerable detail *supra*, were the October 18, 1960, memorandum linking Giancana to an assassination plot (but not mentioning CIA) and the May 22, 1961, memorandum linking Giancana to a CIA operation against Cuba involving "dirty business" (but not mentioning assassination).

[2] White House telephone logs show 70 instances of phone contact between the White House and the President's friend whose testimony confirms frequent phone contact with the President himself.

Both the President's friend and Rosselli testified that the friend did not know about either the assassination operation or the wiretap case. Giancana was killed before he was available for questioning.

friend. The memorandum also reported that the individual was maintaining an association with Sam Giancana, described as "a prominent Chicago underworld figure." Hoover's memorandum also stated that a review of the telephone toll calls from the President's friend's residence revealed calls to the White House. The President's secretary ultimately received a copy of the memorandum and said she believed she would have shown it to the President.

The association of the President's friend with the "hoodlums" and that person's connection with the President was again brought to Hoover's attention in a memorandum preparing him for a meeting with the President planned for March 22, 1962. Courtney Evans testified that Hoover generally required a detailed summary of information in the FBI files for drafting important memoranda or preparing for significant meetings. (Evans, 8/28/75, pp. 70, 72) The FBI files on Giancana then contained information disclosing Giancana's connection with the CIA as well as his involvement in assassination plotting. (Memoranda of 10/18/60 and 5/22/61)

On March 22, Hoover had a private luncheon with President Kennedy. There is no record of what transpired at that luncheon. According to the White House logs, the last telephone contact between the White House and the President's friend occurred a few hours after the luncheon.

The fact that the President and Hoover had a luncheon at which one topic was presumably that the President's friend was also a friend of Giancana and Rosselli raises several possibilities. The first is, assuming that Hoover did in fact receive a summary of FBI information relating to Giancana prior to his luncheon with the President, whether that summary reminded the Director that Giancana had been involved in a CIA operation against Cuba that included "dirty business" and further indicated that Giancana had talked about an assassination attempt against Castro. A second is whether Hoover would then have taken the luncheon as an opportunity to fulfill his duty to bring this information to the President's attention.[1] What actually transpired at that luncheon may never be known, as both participants are dead and the FBI files contain no records relating to it.

On March 22, 1962, the day immediately following his luncheon with the President, at which Rosselli and Giancana were presumably discussed, Hoover sent a memorandum to Edwards stating:

> At the request of the Criminal Division of the Department of Justice, this matter was discussed with the CIA Director of Security on February 7, 1962, and we were advised that your agency would object to any prosecution which would necessitate the use of CIA personnel or CIA information. We were also informed that introduction of evidence concerning the CIA operation would be embarrassing to the Government.
>
> The Criminal Division has now requested that CIA specifically advise whether it would or would not object to the initiation of criminal prosecution against the subjects, Balletti, Maheu, and the individual known as J. W. Harrison for conspiracy to violate the "Wire Tapping Statute."

[1] The President, thus notified, might then have inquired further of the CIA. The Presidential calendar indicates that the President had meetings at which most CIA officials witting of the assassination plot were present during the period from February 27 through April 2, 1962. All of those persons, however, have testified that the President never asked them about the assassination plot.

An early reply will be appreciated in order that we may promptly inform the Criminal Division of CIA's position in this matter.[1]

As a result of this request, the CIA did object to the prosecution of those involved in the wiretap case, thereby avoiding exposure of Giancana's and Rosselli's involvement with the Agency in an assassination plot. We now turn to events which occurred during April and May 1962 which culminated in the formal decision to forego prosecution in the wiretap case.

(2) *The Formal Decision to Forego Prosecution.*

(a) Events Leading up to a Formal Briefing of the Attorney General.

A memorandum for the record of April 4, 1962, reflects that Edwards met with Sam Papich, the FBI liaison to the CIA, on March 28 or 29 and told Papich that:

> Any prosecution in the matter would endanger sensitive sources and methods used in a duly authorized intelligence project and would not be in the national interest. (Edwards' memorandum, 4/4/62)

A memorandum for Assistant Attorney General Miller from Hoover dated April 10, 1962, stated that Edwards:

> Has now advised that he has no desire to impose any restriction which might hinder efforts to prosecute any individual, but he is firmly convinced that prosecution of Maheu undoubtedly would lead to exposure of most sensitive information relating to the abortive Cuban invasion in April 1961, and would result in most damaging embarrassment to the U.S. Government. He added that in view of this, his agency objects to the prosecution of Maheu. (Memo, Hoover to Miller, 4/10/62)

On April 16, 1962, Lawrence Houston, CIA General Counsel, met with Miller.[2] Houston reported to Edwards that Miller envisioned "no major difficulty in stopping action for prosecution." Houston offered to brief the Attorney General, but said that he "doubted if we would want to give the full story to anyone else in the Department," and Miller did not desire to know the "operational details." On April 20 Houston told Miller's first assistant that he was requesting Justice not to prosecute "on grounds of security," and asked to be informed if it was necessary to brief the Attorney General. (Memo, Houston to Edwards, 4/20/62)

In the latter half of April 1962 William Harvey, head of the CIA's anti-Castro effort, gave poison pills to Roselli for use in the post-Bay of Pigs assassination effort against Fidel Castro using underworld figures.

(b) Briefing of the Attorney General on May 7, 1962.

An entry in Attorney General Kennedy's calendar for May 7, 1962, states "1:00—Richard Helms."[3] At 4:00 the Attorney General met

[1] This memorandum is peculiar in two respects. First, the CIA had already orally objected to prosecution on two occasions. Second, Hoover was quizzing the CIA on behalf of the Department of Justice, a task that would normally be performed by the Department's Criminal Division.

[2] Houston testified that he did not remember these meetings. (Houston, 6/2/75, p. 3) Miller recalled only that Houston had spoken to him about a wiretap and possible CIA embarrassment. (Miller, 6/11/75, p. 10)

[3] Helms testified that he did not recall meeting with the Attorney General on May 7 and his desk book does not report any such meeting. When asked if he had ever met with the Attorney General to set up a knowingly inaccurate briefing, Helms testified that he had not and that if he had, he would certainly remember it because "I would have been coaching or colluding, and I have no recollection of ever having done anything like that." (Helms, 9/16/75, p. 8)

Probers Doubt Kennedy Knew of Poison Plot Against Castro

By Laurence Stern
Washington Post Staff Writer

Senate intelligence investigators pursued a bizarre White House episode which raised the possibility — now fully discounted — that President Kennedy may have learned of CIA plans to poison Fidel Castro from a woman friend of top underworld figures.

The highly sensitive investigation by the Senate intelligence committee will be detailed briefly in the report on the CIA's involvement in plans to assassinate foreign leaders. The report is scheduled for release Thursday.

The investigation centered on a 1960 Kennedy campaign volunteer, then known as Judith Campbell, who became the subject of top-priority concern to the late FBI Director J. Edgar Hoover because of her association with crime figures John Rosselli and the late Sam Giancana. Both men were involved in the CIA's plot to poison Castro.

Campbell's role in the episode was heightened by the fact that she frequently telephoned the Kennedy White House. Investigators found evidence of some 70 phone calls from her during an 11-month period in the log of former presidential secretary Evelyn Lincoln on file in the Kennedy Library.

Lincoln told the Senate intelligence committee that Campbell was a volunteer in the California campaign and had met the President there. She said she could not recall that the former campaign worker ever visited the President in the White House or elsewhere after the 1960 election.

Campbell gave the committee a deposition saying that she never knew of the poison plot from Giancana, Rosselli or anyone else. From the standpoint of the investigation into assassination schemes directed against foreign leaders this meant the entire Campbell episode was irrelevant to the committee's inquiry.

"We were not investigating President Kennedy's personal associations," said one ranking member of the investigating panel.

Campbell's calls to the White House — usually logged into Lincoln's office — began on March 29, 1961, from the caller's Los Angeles residence. Many were described in the investigative files of the staff as "Campbell-JFK calls."

The files indicate that several of Campbell's calls to the White House were made from the Oak Park, Ill., residence of Giancana. At times, however, she would call from the Mayflower Hotel in Washington.

FBI Director Hoover, who was aware of the CIA's involvement with Giancana in anti-Castro operations, sent memos in February, 1962, to Attorney General Robert F. Kennedy and White House chief of staff Kenneth O'Donnell alerting them to the potentially embarrassing range of Campbell's social acquaintances.

Hoover then submitted a memo on Campbell directly to President Kennedy and met with him for lunch on March 22, 1962. There is no record of the discussion. Close former aides to the President recall no mention of it.

Lincoln said she also received a copy of the first memo and at that point Campbell's calls were no longer accepted at the White House.

The committee decided unanimously to take a low-key approach to the Campbell episode, some members feeling that it would be more appropriate to ignore it as irrelevant to presidential awareness of the Castro assassination schemes.

"We decided to allude to it in order to avoid any suggestion that we were playing favorites with some administrations," said one well-informed committee source.

Senate intelligence committee staff logs which came into the possession of The Washington Post indicate that Hoover sent a memo to then CIA Deputy Director for Plans (covert operations) Richard Bissell on Oct. 18, 1960, recording his awareness of Giancana's involvement in the Castro poison plot.

By January, 1961, Bissell was discussing an "executive action" — believed to be the Castro assassination plan — with two other high-level CIA officials. They were Sidney Gottlieb, who became chief of the technical services division in charge of the agency's drug experimentation program, and William Harvey, a senior case officer for underworld recruits.

The same month Bissell is recorded as having briefed McGeorge Bundy, then the President's national security affairs adviser, on the executive action.

Also in January, 1961, the new President began receiving intensive briefings from then CIA Director Allen Dulles on the Bay of Pigs invasion plan.

That month of the Kennedy inauguration the new Attorney General undertook a coordinated investigation by federal and local agencies into the affairs of Giancana, who the CIA had recruited for the attempt on Castro's life.

It could not be [illegible] when Attorney [illegible] Kennedy first became a [illegible] of Giancana's due [illegible] target of [illegible] prosecution and an [illegible] agent in the pay of the [illegible]

But by April, 1961 [illegible] prior to the Bay of Pigs [illegible] — there is evidence [illegible] committee's files that [illegible] transmission of the [illegible] material; toward its [illegible] political target [illegible]

Nonetheless, the committee could not determine when President Kennedy [illegible] learned of the CIA [illegible] recruitment of underworld figures, who were [illegible] in re-establishing their [illegible] in Havana, for [illegible] assassination attempts [illegible] Castro.

EXHIBIT "2" 16.

BY DAN THOMASSON AND TIM WYNGAARD
SCRIPPS-HOWARD STAFF WRITERS

WASHINGTON, Nov. 18 -- THE LATE PRESIDENT JOHN F. KENNEDY'S CLOSE ASSOCIATION WITH A WOMAN WHO HAD STRONG TIES TO TOP UNDERWORLD FIGURES CAUSED GREAT CONCERN TO THEN-FBI DIRECTOR J. EDGAR HOOVER, BUREAU DOCUMENTS DISCLOSE.

THE ASSOCIATION HAS COME TO LIGHT THROUGH THE SENATE INTELLIGENCE COMMITTEE'S EFFORTS TO DETERMINE WHETHER KENNEDY WAS AWARE OF THE CENTRAL INTELLIGENCE AGENCY'S USE OF THESE SAME UNDERWORLD FIGURES IN TRYING TO ASSASSINATE CUBAN PREMIER FIDEL CASTRO.

THE FBI DOCUMENTS NOW IN THE HANDS OF THE SENATE COMMITTEE SHOW THE PRESIDENT'S ASSOCIATIONS WITH THE WOMAN TOOK PLACE ON NUMEROUS OCCASIONS AT VARIOUS PLACES ACROSS THE COUNTRY IN 1961 AN 1962, WHILE THE KENNEDY ADMINISTRATION WAS LAUNCHING A HIGHLY PUBLICIZED WAR ON ORGANIZED CRIME.

THE WOMAN, WHO IS REPRESENTED BY THE WASHINGTON LAW FIRM OF R. SARGENT SHRIVER, KENNEDY'S BROTHER-IN-LAW, HAS APPEARED IN CLOSED-DOOR SESSIONS BEFORE THE SENATE COMMITTEE TO ANSWER QUESTIONS ABOUT HER TIES TO KENNEDY, HIS LATE BROTHER, ROBERT, AND MOBSTERS JOHN ROSELLI AND SAM GIANCANA, RECENTLY SLAIN CHICAGO MAFIA LEADER.

THE COMMITTEE'S INTERROGATION OF JUDITH CAMPBELL, WHO NOW LIVES IN CALIFORNIA UNDER A DIFFERENT NAME, WAS AIMED AT DETERMINING WHETHER SHE KNEW AND HAD TOLD KENNEDY ABOUT THE CIA'S USE OF ROSELLI AND GIANCANA IN ATTEMPTS TO ASSASSINATE CASTRO.

THE INTELLIGENCE PANEL'S DEMOCRATIC MAJORITY HAS DISCOUNTED THE POSSIBILITY THAT KENNEDY LEARNED ABOUT THE CIA'S USE OF THE MAFIA IN ITS CASTRO PLOT THROUGH THE WOMAN. THE COMMITTEE HAS DECIDED TO GLOSS OVER THE ''CAMPBELL MATTER'' WITH A MERE ALLUSION IN ITS FORTHCOMING REPORT TO THE SENATE ON CIA ASSASSINATION PLOTS.

SOME COMMITTEE MEMBERS BELIEVE THE PANEL'S INVESTIGATORS FAILED TO PURSUE THE MATTER FAR ENOUGH, PARTICULARLY SINCE THE COMMITTEE'S RECORDS SHOW SOME OF 80 TELEPHONE CALLS THE WOMAN PLACED OVER 34 WEEKS TO KENNEDY'S PRIVATE NUMBER IN THE WHITE HOUSE ORIGINATED FROM GIANCANA'S CHICAGO-AREA HOME.

COMMITTEE INVESTIGATORS DID LEARN THE WOMAN WAS WITH THE PRESIDENT IN FLORIDA WHEN THE CIA ALLEGEDLY DELIVERED POISON PELLETS TO ROSELLI FOR USE AGAINST CASTRO.

THE FLORIDA TRIP WAS ONE OF A NUMBER THE WOMAN MADE TO MEET WITH KENNEDY IN PALM BEACH AND OTHER AREAS TO WHICH HE TRAVELLED.

EVELYN LINCOLN, KENNEDY'S PRIVATE SECRETARY, APPEARED BEFORE THE COMMITTEE IN SECRET SESSION AND TESTIFIED, ACCORDING TO SOURCES, THAT SHE ASSUMED THE WOMAN WAS A CAMPAIGN WORKER FOR KENNEDY.

JUDITH CAMPBELL REPORTEDLY WAS A VOLUNTEER WORKER IN THE PRESIDENT'S 1960 CAMPAIGN IN CALIFORNIA. SHE REPORTEDLY TESTIFIED TO COMMITTEE INVESTIGATORS THAT HER VISITS WITH KENNEDY AROUND THE COUNTRY WERE ARRANGED THROUGH MRS. LINCOLN.

EFFORTS TO REACH HER WERE UNSUCCESSFUL ALTHOUGH A MAN CLAIMING TO BE HER HUSBAND REFERRED SCRIPPS-HOWARD NEWS SERVICE TO HER ATTORNEY, HENRY A. HUBSCHMAN, A MEMBER OF SHRIVER'S FIRM. EFFORTS TO REACH HUBSCHMAN ALSO FAILED.

A CALIFORNIA ADDRESS AND TELEPHONE NUMBER FOR THE WOMAN HELD BY THE COMMITTEE PRODUCED ONLY A STATEMENT FROM AN UNIDENTIFIED WOMAN THAT JUDITH CAMPBELL AND HER HUSBAND RECEIVED ALL MAIL AND TELEPHONE CALLS THERE, BUT LIVE ELSEWHERE.

COMMITTEE SOURCES SPECULATED THAT JUDITH CAMPBELL AND HER HUSBAND HAVE ''GONE UNDERGROUND'' IN FEAR OF RETALIATION FROM THE UNDERWORLD. GIANCANA WAS FOUND SHOT TO DEATH IN HIS OAK PARK, ILL., HOME LAST

(MORE)

EXHIBIT "3"

JUNE SHORTLY AFTER BEING SUBPOENAED BY THE COMMITTEE.

HOOVER BECAME DISTURBED WHEN HE BEGAN GETTING REPORTS ON JUDITH CAMPBELL'S TIES TO THE UNDERWORLD FROM FIELD AGENTS; WHO ALSO WARNED THAT THE WOMAN WAS CLOSE TO KENNEDY.

HOOVER THEN BEGAN OBTAINING AS MUCH INFORMATION AS POSSIBLE ABOUT HER AND LATER PREPARED A MEMORANDUM FOR A MEETING WITH THE PRESIDENT WHICH TOOK PLACE REPORTEDLY ON MARCH 2; 1962.

BUREAU SOURCES SAID HOOVER PARTICULARLY WAS CONCERNED THAT SOMEONE WITH JUDITH CAMPBELL'S ASSOCIATIONS SHOULD HAVE SUCH ACCESS TO THE PRESIDENT; ESPECIALLY IN LIGHT OF KENNEDY'S PUBLIC PLEDGE TO DESTROY ORGANIZED CRIME. ATTORNEY GENERAL ROBERT F. KENNEDY ALSO KNEW OF THE ASSOCIATION; ACCORDING TO COMMITTEE SOURCES.

THE COMMITTEE REPORT TO BE RELEASED HERE THURSDAY WILL DRAW NO CONCLUSIONS ABOUT WHAT KENNEDY MIGHT HAVE KNOWN ABOUT THE ASSASSINATION PLOTS AGAINST CASTRO AND OTHERS. THE REFERENCE TO JUDITH CAMPBELL WILL STATE MERELY THAT THE PANEL HAS IDENTIFIED A ''PERSON'' WHO HAD ASSOCIATIONS WITH KENNEDY AND GIANCANA AND ROSELLI.

RHR

11-18-75
(STEIF) BY SCRIPPS-HOWARD NEWS SERVICE

RAMBOIULLET; FRANCE; NOV 18 -- THE CONCRETE RESULTS OF THE SIX-NATION ECONOMIC SUMMIT HERE WILL DEPEND ON WHAT THE LEADERS AND THEIR NATIONS DO IN THE COMING MONTHS.

PRESIDENT FORD RETURNS TO A RECALCITRANT CONGRESS AND HIS ELECTION CAMPAIGN.

FRENCH PRESIDENT VALERY GISCARD D'ESTAING RESUMES HIS ATTEMPTS TO FORESTALL DISASTROUS STRIKES.

WEST GERMAN PRESIDENT HELMUT SCHMIDT FACES A TOUGH 1976 POLITICAL CAMPAIGN.

GREAT BRITAIN'S PRIME MINISTER HAROLD WILSON RETURNS TO THE INFLATION AND MISERABLE IMBALANCE OF TRADE THAT ARE CRIPPLING HIS COUNTRY.

ITALIAN PRIME MINISTER ALDO MORO IS TRYING TO HOLD OFF THE COMMUNISTS.

EVEN JAPAN'S PRIME MINISTER TAKEO MIKI HAS A CRISIS -- HIS FINANCE MINISTER LEFT HERE A DAY EARLY TO COPE WITH A PARTY REVOLT IN THE JAPANESE DIET.

DID THEY ACCOMPLISH ANYTHING IN THEIR TALKS HERE?

THE ANSWER PROBABLY SHOULD BE A QUALIFIED ''YES''.

THEY KNOW EACH OTHER BETTER. PSYCHOLOGICALLY; THEY'RE BETTER ATTUNED. THEY MAY UNDERSTAND EACH OTHER'S PROBLEMS A LITTLE BETTER.

THE AMERICANS AND FRENCH SIGNED A SECRET PACT TO HELP STABILIZE SHARP FLUCTUATIONS IN THE VALUE OF THE DOLLAR; ALTHOUGH THE UNITED STATES DID NOT GIVE UP THE FAVORABLE FLOAT -- THE FREE MARKET RATE -- FOR THE DOLLAR. THE FRENCH; WEDDED TO THE IDEA OF FIXED EXCHANGE RATES; RECEIVED AMERICAN PROMISES OF MORE FREQUENT CONSULTATION ON CURRENCY EXCHANGES USING A STILL SECRET ''MECHANISM'' THAT IS PART OF THE AGREEMENT.

(MORE)

Senate report links woman, JFK, mob

'Close friend' identified

By Robert Sigler
Of Our Washington Bureau

WASHINGTON — A person who Senate investigators said was a "close friend" of President John F. Kennedy as well as known underworld figures has been identified as a woman who first met Kennedy during his 1960 campaign in California.

The Senate Intelligence committee, in its report released this week, referred to a "close friend" of Kennedy but did not identify the person by name or sex.

HIGHLY reliable sources, however, identified this friend as a Judith Campbell, and said she first became acquainted with Kennedy and Kennedy's close associates in California during the campaign.

The report outlined in some detail the woman's association not only with Kennedy but also with known underworld figures who were involved in CIA dirty tricks in Cuba.

THE RELEVANT portion of the report is this:

"Evidence before the committee indicates that a close friend of President Kennedy had frequent contact with the President from the end of 1960 through mid-1962. FBI reports and testimony indicate that the President's friend was also a close friend of John Rosselli and Sam Giancana and saw them often during this same period."

Both Rosselli and Giancana were widely known underworld figures who were recruited by the CIA, through an intermediary, to work on plots to assassinate Cuban Prime Minister Fidel Castro.

Giancana was shot to death last June at his home in Oak Park, a western suburb of Chicago.

Kennedy's association with Campbell became a matter of

Turn to Page 4, Column 1

EXHIBIT "4"
19

Chicago Daily News

Senate committee report links JFK, woman, mobsters

Continued from Page 1

great concern to J. Edgar Hoover, the FBI director at the time. On Feb. 22, 1962, Hoover sent a memorandum to the President's brother, Robert F. Kennedy, and an identical copy to Kenneth O'Donnell, special assistant to President Kennedy, detailing some of the FBI's information about Campbell.

According to the Senate report, "The memorandum stated that information developed in connection with a concentrated FBI investigation of John Rosselli revealed that Rosselli had been in contact with the President's friend.

"The memorandum also reported that the individual was maintaining an association with Sam Giancana, described as 'a prominent Chicago underworld figure.'

"Hoover's memorandum," the Senate report continued, "also stated that a review of the telephone toll calls from the President's friend's residence revealed calls to the White House. The President's secretary ultimately received a copy of the memorandum and said she believed she would have shown it to the President."

WHITE HOUSE TELEPHONE LOGS show there were 70 "instances of phone contact" between the White House and Campbell, the report said, still referring to her as the President's friend. The report adds that testimony by her before the committee "confirms frequent phone contact with the President himself."

On March 22, Hoover, fully briefed on Campbell's reported associations, met with President Kennedy for a private luncheon. Within a few hours, the report said, the White House logs recorded the last telephone contact between Campbell and the White House.

The report does not say who initiated the call.

The committee said there was no record of what subjects were discussed by Hoover and Kennedy. But it makes a "presumption" that Campbell was "one topic" of the conversation.

This presumption raised the possibility that Hoover may have told Kennedy of Giancana's involvement in CIA plots that included assassinating Castro, the committee said.

"What actually transpired at that luncheon may never be known, as both participants are dead and the FBI files contain no records relating to it," the report said. It added that Kennedy met afterward with "most CIA officials witting of the assassination plot" but that these officials have since testified that the President never asked them about it.

The day after the luncheon, Hoover initiated steps that eventually led to a Justice Department decision to forgo prosecution of Giancana and Rosselli because the CIA feared the roles of the two mob figures in the assassination plots would be exposed.

IN A REPORT FROM WASHINGTON earlier this week outlining some of these details, the Scripps-Howard Newspapers said Campbell is now living in California under an assumed name, perhaps in fear of retaliation from the underworld.

Efforts to reach the woman were unsuccessful. Her attorney, Henry A. Hubschman, told The Chicago Daily News, "I have no comment to offer at this time." Hubschman works in the Washington law firm of Sargent Shriver. Shriver is married to Eunice Kennedy, a sister of the late President, and is a candidate for the Democratic presidential nomination.

Comittee spokesmen would not comment either, although there were reports that some committee members believed the panel's investigators failed to pursue the Campbell matter far enough.

TWO OF President Kennedy's closest associates at the time were willing to discuss the report. In a telephone interview from his office in Boston, O'Donnell, who was Kennedy's appointments secretary, said, "I think the thing is totally out of context. I feel very strongly about it."

O'Donnell acknowledged that he had seen the memo referred to in the report and that the Senate committee had interviewed him. He also said he does not deny the fact that Campbell made telephone calls to the White House.

Evelyn Lincoln, who was Kennedy's personal secretary, remembers both Campbell and the telephone calls. "She was a volunteer in California," Mrs. Lincoln said in a telephone interview. "I knew of her during that time just like I knew of other volunteers in other states."

Mrs. Lincoln continued, "The President was right attractive and lots of girls used to call him."

Campbell eventually telephoned the White House so many times that "she got like a pest," Mrs. Lincoln said. "She would call and call and call.'

BUT BOTH MRS. LINCOLN and O'Donnell said Campbell's telephone calls were never put through to Kennedy. And they both insisted he had no "private line" on which he could have received a call.

Mrs. Lincoln and O'Donnell said they remember the memorandum that Hoover sent in which the woman's reported associations with underworld figures and Kennedy were outlined.

According to the Senate report, "The President's secretary (Mrs. Lincoln) ultimately received a copy of the memorandum and said she believed she would have shown it to the President."

But O'Donnell said "I never showed it (the memo) to the President. I thought it was so innocuous. . . . I was allegedly in charge of the White House. Every day I got memos. I probably got 500 a day. . . ."

He said he never referred memos of such a nature to Kennedy, although he would not have held back on a memo dealing with a subject such as national security.

MRS. LINCOLN REMEMBERS that "a memo from the FBI came across my desk saying she (Campbell) had a connection with the mafia. At the very moment when I saw that, I stopped receiving her calls."

Mrs. Lincoln said she saw the memorandum in March, 1962, and that, as she remembers it, Campbell's associations with underworld figures were "pretty well identified."

O'Donnell said the Hoover-Kennedy luncheon that the report discusses was held at the request of Robert F. Kennedy. When Hoover came to the White House, O'Donnell said he "presented me with a book on Communist infiltration of the United States."

After an hour or so, "the President came back . . . and told me 'Don't do it again,'" O'Donnell said.

STATEMENT

Recent articles by the Scripps-Howard syndicate, Chicago Daily News, New York Times and other papers have inferred that I was a go-between for the Mafia and/or C.I.A. with President John F. Kennedy in connection with the Castro assassination plots. Despite assurances to the contrary by Senator John Tower, portions of my closed session testimony before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities have been leaked and distorted so as to implicate me in these bizarre assassination conspiracies between the underworld and government entities. These distortions have unnecessarily intruded into my right of privacy and seriously affected both my personal relationships and health.

I will not allow the Committee to implicate me in these absurd plots nor will I allow Evelyn Lincoln or Kenny O'Donnell to sulley or distort my personal relationship with Jack Kennedy. Until now I have refused numerous offers to publish the facts concerning my relationships with Jack Kennedy, Sam Giancana and Johnny Roselli, but the leaks by the Committee and the distortions by Evelyn Lincoln and Kenny O'Donnell have forced me to reveal the truth so as to lay to rest the wild-eyed speculation which now exists.

EXHIBIT "5"

The full facts have been transcribed, documented and placed in a secure storage; they will be released at a proper time and in a proper manner. However, I can at this time emphatically state that my relationship with Jack Kennedy was of a close, personal nature and did not involve conspiratorial shenanigans of any kind. I originally met Jack Kennedy in early February 1960 in Las Vegas. We were introduced by a mutual friend. I was introduced to Sam Giancana by the same friend at a party in Miami Beach in late March 1960. I will not, at this time, reveal the identity of that friend, but will do so when the entire story is told. Johnny Roselli and I were introduced by Sam Giancana sometime after March 1960. Jack Kennedy and I last talked in late 1962. My last conversation with Sam Giancana was approximately late 1964. Despite information to the contrary, I did not place telephone calls to the White House from Sam's Chicago home at any time. My relationship with Sam Giancana and my friendship with Johnny Roselli were of a personal nature and in no way related to or affected my relationship with Jack Kennedy nor did I discuss either of them with the other.

Both Evelyn Lincoln and Kenny O'Donnell were fully aware of the nature of my relationship with Jack Kennedy and their statements to the effect that I was a "campaign worker for Kennedy" are entirely contrived. During the period in which I was involved with Jack Kennedy, the F.B.I. carried

out a top priority investigation of me which resulted in substantial harrassment. The portions of the F.B.I. file on me which were read during my session in the Committee shocked me. Their investigation was prying, insidious and sounded more like a scandal sheet than a governmental investigation. The information quoted was both incorrect and speculative. I fully intend to demand my rights as a citizen to see those F.B.I. files and also the testimony given by me before the Committee, which, by their own rules, I should have already been given the opportunity to inspect. I have not "gone underground" as alleged in the newspaper reports. I have changed my name but don't feel that is particularly unusual when one marries. Because of my lack of information of underworld activities, I do not feel I have anything to fear from the underworld. It was only when statements were made inferring that I had such knowledge that I became concerned for my safety.

DATE: December 17, 1975.

JUDITH KATHERINE (CAMPBELL) EXNER

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Affidavit of Judith Katherine Exner In Support of Plaintiff's Motion for an Ex Parte Order is hereby acknowledged this 19th day of February, 1976.

By Ruth W. Borsine

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Ex Parte Motion Re Substitution of Attorney; Affidavits of Judith Katherine Exner, Daniel R. Exner, and Richard C. Leonard is hereby acknowledged this 19th day of February, 1976.

By Peter W. Barnes

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH K. EXNER,

Plaintiff,

-vs-

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

No. 76-89-S

SUBSTITUTION OF ATTORNEY

Judith K. Exner, plaintiff, hereby substitutes Richard C. Leonard, 2404 Wilshire Boulevard, Suite 400, Los Angeles, California 90057, telephone (213) 380-3330, as attorney of record in place and stead of Brian D. Monaghan.

DATED: _____

JUDITH K. EXNER

I consent to the above substitution.

DATED: February 11, 1976.

BRIAN D. MONAGHAN

I am duly admitted to practice in this district.

Above substitution accepted

DATED: February 11, 1976.

RICHARD C. LEONARD

EXHIBIT "1"

Approved: _____
UNITED STATES DISTRICT JUDGE

Note: Please check appropriate box to indicate whether new counsel was: ☐ retained or, ☐ appointed by the Court.

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S AFFIDAVIT OF DANIEL R. EXNER RE SUBSTITUTION OF ATTORNEY

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Daniel R. Exner, being first duly sworn, deposes and states that:

1. I am the husband of Judith Katherine Exner, plaintiff in the above-captioned litigation. Along with my wife, on December 13, 1975, I retained Brian D. Monaghan, Esq., to represent me in connection with certain legal matters.

2. I became dissatisfied with Mr. Monaghan's representation, and on Sunday, February 8, 1976, I telephoned Mr. Monaghan, with my wife's consent, and advised him that he was being terminated as our attorney. I told him that he should take no further steps in connection with any legal matter, and that he should wait to hear from our new attorney, Richard C. Leonard, Esq., who would be contacting him shortly. I confirmed my February 8,

1976, telephone conversation with Mr. Monaghan in a letter to him dated February 9, 1976. A copy of that letter is attached as Exhibit "1" to the Affidavit of Judith Katherine Exner, filed concurrently herewith.

3. It is my desire to discharge Mr. Monaghan as my attorney and to be represented by Richard C. Leonard, Esq. The complaint filed by Mr. Monaghan on Monday, February 9, 1976, was filed after he was terminated, and without my authority or my wife's authority.

DANIEL R. EXNER

SUBSCRIBED AND SWORN to before me this 13th day of February, 1976.

Notary Public

OFFICIAL SEAL
RICHARD C. LEONARD
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires February 24, 1979

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S EX PARTE MOTION RE SUBSTITUTION OF ATTORNEY; AFFIDAVITS OF JUDITH KATHERINE EXNER, DANIEL R. EXNER, AND RICHARD C. LEONARD

Plaintiff Judith Katherine Exner hereby moves the Court for an order permitting the substitution of Richard C. Leonard, Esq., 2404 Wilshire Boulevard, Suite 400, Los Angeles, California 90057, (213) 380-3330, a member of the Bar of this Court, as her attorney of record, in place and instead of Brian D. Monaghan.

This motion is based on all of the files and records in this action, and on the Affidavits of Judith Katherine Exner, Daniel R. Exner, and Richard C. Leonard, which are filed concurrently with this motion.

DATED: February 19, 1976.

RICHARD C. LEONARD

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S AFFIDAVIT OF JUDITH KATHERINE EXNER RE SUBSTITUTION OF ATTORNEY

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Judith Katherine Exner, being first duly sworn, deposes and states that:

1. I am the plaintiff in the above-entitled action. On December 13, 1975, I and my husband, Daniel Exner, entered into a retainer agreement with Brian D. Monaghan, Esq., to represent me and my husband in various matters, including but not limited to the filing of a lawsuit against the Federal Bureau of Investigation.

2. In recent weeks, I had become dissatisfied with Mr. Monaghan's representation of me. On Sunday, February 8, 1976, my husband, in my presence and with my consent, telephoned Mr. Monaghan and informed him that I was discharging him as my attorney, and that I wanted him to take no further actions on my

behalf. I confirmed the telephone conversation of February 8, 1976, to Mr. Monaghan in a letter, signed both by me and by my husband, dated February 9, 1976. Attached hereto as Exhibit "1", in a sealed envelope, is a copy of that February 9, 1976, letter. I request that the Court reseal the letter after reviewing it because of the confidential nature of certain of the information contained therein, as well as in Exhibit "2" to this Affidavit.

3. On February 11, 1976, I received a letter from Mr. Monaghan dated February 9, 1976. In that letter, Mr. Monaghan indicated that he had filed the above-captioned lawsuit on my behalf. Apparently, the litigation was filed after Monaghan had been discharged and was told not to proceed with the litigation. In his February 9, 1976, letter, Mr. Monaghan indicated that he was willing to have my new attorney, Richard C. Leonard, Esq., substitute in for him at any time with an appropriate pleading. A copy of the February 9, 1976, letter from Monaghan is attached hereto as Exhibit "2" and incorporated herein by this reference.

4. It is my desire to have Richard C. Leonard, Esq., represent me in my action against the Federal Bureau of Investigation and others in place and instead of Brian D. Monaghan, Esq. It is also my desire to have Mr. Leonard file an amended complaint in this action to accurately reflect the relief I am requesting.

Judith Katherine Exner
JUDITH KATHERINE EXNER

SUBSCRIBED AND SWORN to before me this 18 day of February, 1976.

Richard C. Leonard
Notary Public

OFFICIAL SEAL
RICHARD C. LEONARD
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires February 24, 1979

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S NOTICE OF HEARING ON EX PARTE MOTION

TO DEFENDANTS AND TO JOHN R. NEECE, CHIEF, CIVIL DIVISION, UNITED STATES ATTORNEY'S OFFICE, THEIR ATTORNEY:

PLEASE TAKE NOTICE that the hearing on Plaintiff's Ex Parte Motion for an Order: (1) Requiring the Government to Respond to the Amended Complaint by March 1, 1976; (2) Requiring the Government to Produce the FBI Files Relating to Plaintiff for the Court's In Camera Inspection by March 1, 1976; and (3) Shortening Time to Serve and File a Notice of Motion and Motion for Summary Judgment will be brought on for hearing before the Honorable Edward J. Schwartz, United States District Judge, on February 13, 1976, at 9:00 a.m.

DATED: February , 1976.

RICHARD C. LEONARD

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Notice of Hearing on Ex Parte Motion is hereby acknowledged this ____ day of February, 1976.

By _____

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

(213) 380-3330

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S AFFIDAVIT OF RICHARD C. LEONARD RE SUBSTITUTION OF ATTORNEY

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Richard C. Leonard, being first duly sworn, deposes and states that:

1. I am an active member of the State Bar of California, and I am admitted to practice before this Court. I have been retained by Daniel R. and Judith Katherine Exner to represent them in various legal matters, including litigation against the Federal Bureau of Investigation and others under the Freedom of Information Act and the Privacy Act of 1974.

2. On Wednesday, February 11, 1976, I met with Brian D. Monaghan, Esq., and with Edgar Paul Boyko, Esq., (who advised me that he was acting as Mr. Monaghan's attorney). The purpose of that meeting was to have Mr. Monaghan sign a Substitution of Attorney's form in this litigation, and to have Mr. Monaghan

transfer his files and records relating to Mr. and Mrs. Exner to me. At that meeting, Mr. Monaghan confirmed what I had been told by Mr. and Mrs. Exner, to wit: that he had been telephonically advised that he was discharged as the Exners' attorney on Sunday, February 8, 1976, and that on February 11, 1976, he received a letter dated February 9, 1976, from the Exners confirming their previous telephone conversation (a copy of that February 9, 1976, letter from Mr. and Mrs. Exner to Mr. Monaghan is attached as Exhibit "1" to the Affidavit of Judith Katherine Exner filed concurrently herewith). At my February 11, 1976, meeting with Messrs. Monaghan and Boyko, I presented a Substitution of Attorney form to Mr. Monaghan for his signature. A copy of that Substitution of Attorney form is attached hereto as Exhibit "1" and incorporated herein by this reference. Mr. Monaghan refused to sign the Substitution of Attorney form unless I was willing to agree, on behalf of the Exners, to certain matters. I was not willing to so agree. I informed Monaghan and Boyko that I felt Monaghan had an obligation and a duty to sign the Substitution of Attorney form, and that Monaghan had no right conditioning his signing the Substitution of Attorney form upon any form of agreement with the Exners. Mr. Monaghan continued in his refusal to sign the Substitution of Attorney form.

RICHARD C. LEONARD

SUBSCRIBED AND SWORN to before me this 19th day of February, 1976.

Paula G. Schwartz
Notary Public

OFFICIAL SEAL
PAULA G. SCHWARTZ
NOTARY PUBLIC, CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires February 24, 1979

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

APR 1 - 1976

TELETYPE

DIRECTOR, FBI

ATTN: SA EARL J. WHITWELL

OFFICE OF LEGAL COUNSEL

SAC, SAN DIEGO (66-1764)

JUDITH CAMPBELL EXNER, aka

Privacy Act - Requester

Order of Court

"TREAT AS ORIGINAL"

Rules

Assoc. Dir.
Dep.-A.D.-Adm.
Dep.-A.D.-Inv.
Asst. Dir.:
Admin.
Comp. Syst.
Ext. Affairs
Files & Com.
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Plan. & Eval.
Spec. Inv.
Training
Legal Coun.
Telephone Rm.
Director Sec'y

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b7C

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ENCLOSURE

EX-116

REC-71 66-HQ-[redacted]-13

MAY 6 1976

LEGAL COUNSEL

CARBON COPY DO NOT FILE

56 MAY 17 1976

Filed

3-24

Send to D.J. ASAP

RICHARD C. LEONARD
Attorney at Law
2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057
(213) 380-3330
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S ORDER

ENCLOSURE 62-116464-1

On Monday, [illegible], plaintiff filed a Motion for Partial Summary Judgment, by which motion plaintiff sought, inter alia, an order requiring the defendants to: (1) turn over to the Court for its in camera inspection the Federal Bureau of Investigation [hereinafter "FBI"] files relating to th plaintiff; and (2) pending the Court's review of the FBI files, turn over those files to the plaintiff for her inspection pursuant to the Privacy Act of 1974. Richard C. Leonard appeared on behalf of plaintiff, Judith Katherine Ermer, and John K. Ness Assistant United States Attorney, and Chief, Civil Division, appeared on behalf of defendants, the Federal Bureau of Investigation; Clarence M. Kelly, Director of the FBI; the United States Department of Justice; and Edward H. Levi, Attorney General of the United States.

The Court, having considered plaintiff's moving papers

including the Affidavit of Judith Katherine Exner, and plaintil memorandum of points and authorities, and after considering the opposition to plaintiff's motion for partial summary judgment filed by the defendants, and after hearing the argument of coun for the respective parties, and after due deliberation,

IT IS ORDERED as follows:

1. Defendants, and each of them, shall file their answers to the Amended Complaint for Injunctive Relief Under th Privacy Act of 1974 and the Freedom of Information Act by April 12, 1976.

2. By April 12, 1976, the defendants, and each of th shall file with the Court an affidavit or affidavits containing the following information as described in Vaughn v. Rosen, 484 F.2d 820, 826-828 (D.C. Cir., 1973):

2.1) A statement whether the FBI has maintained

containing information about the plaintiff.

2.2) If such file or files exist, a description of the file or files maintained and/or possessed by the FBI relating to the plaintiff. Said description shall include the size of the file, which may be delineated either by the number of documents, the total pages of documents, or the dimensions of the file or files.

2.3) If such file or files exist, a description or list of the documents contained in said file or files which are not allegedly covered by any exemptions to the Privacy Act of 1974 or the Freedom of Information Act, and which therefore can be immediately turned over to the plaintiff for her review. If the Government contends that only a portion of a document is exempt from disclosure, the remaining portions of the document should be described so that it may be disclosed to the plaintiff.

2.) If such file or files exist, the defendants, by means of detailed description, must set forth any exemption or exemptions which may allege apply to any document or any portion of a document in the FBI files. The list of exemptions should be sufficiently detailed so that the Court can identify the documents or portions of documents to which the defendants are claiming a statutory exemption applies. The description should not be so detailed so as to contain information which compromises the secret nature of the documents; and, in this regard, excessive reference to the actual language of the documents should be avoided. In large documents, the defendants must specify, in detail, which portions of the documents are disclosable and which are allegedly exempt.

3. The defendants, and each of them, after filing the documents listed above, shall make arrangements to immediately make available to plaintiff those documents which are not allegedly protected by any exemption contained either in the Privacy Act of 1974 or in the Freedom of Information Act.

4. Until both the plaintiff and the Court have had an opportunity to review any documents disclosed to the plaintiff by the defendants, or any of them, the defendants shall not disclose to any other person or entity the contents of any of said documents, except for "routine use" as defined in 5 U.S.C. §552a(a)(7).

5. For the reasons stated above, plaintiff's motion for partial summary judgment is denied.

DATED: 3/8/76

UNITED STATES DISTRICT JUDGE

Presented by:

RICHARD C. LEONARD
On Behalf of Plaintiff

The above form of Order is approved:

John K. Hanes, Assistant United States Attorney, and Chief, Civil Division, On Behalf of All Defendants

Per Motion, the above order was entered. The government motion to proceed with the case was granted allowing USA additional 21 days to comply with the court order.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

b6
b7C

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Serv. ____
Ext. Affairs ____
Fin. & Pers. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Rec. Mgmt. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____

TO : [redacted]

DATE: 6/14/76

FROM : Legal Counsel

[redacted]

SUBJECT: JUDITH KATHERINE EXNER v.
FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S. D. CALIF.)
CIVIL ACTION NO. 76-89-S

[redacted]

PURPOSE: Memorandum advises of the filing of the attached documents in captioned matter.

SYNOPSIS: United States District Court by its order of 4/20/76 commanded that this Bureau conduct expeditious processing of plaintiff's FOIA request. This order was appealed to the United States Court of Appeals (U.S.C.A.) for the Ninth Circuit. On May 26, 1976, the U.S.C.A. agreed to hear the appeal but refused to stay execution of the District Court's order. The attached documents, including an affidavit of Special Agent [redacted] Records Management Division, were filed 6/10/76.

b6
b7C

RECOMMENDATION: None. For information.

APPROVED:
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Ext. Affairs
Fin. & Pers.
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Legal Coun.
Plan. & Eval.
Rec. Mgmt.
Spec. Inv.
Training

REC-80 62-116929-14

ST 104

5 JUN 17 1976

b6
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Enclosure

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - IPAL Unit [redacted]

ENC. BEHIND FILE

EPM:rme
(4)

(CONTINUED - OVER)

JUN 24 1976

5010-108

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Memorandum to [redacted] b6 b7C
Re: Judith Katherine Exner v. Federal Bureau of Investigation
(U.S.D.C., S. D. CALIF.) Civil Action No. 76-89-S

DETAILS: Plaintiff, who is suing under the FOIA for documents pertaining to herself, was formerly associated with organized crime figures John Roselli and Sam Giancana (deceased). She allegedly was introduced to former President John F. Kennedy through these individuals. On 4/20/75, the United States District Court ordered this Bureau to provide to plaintiff a detailed refusal justification statement. The Department of Justice agreed to take appeal to the U.S.C.A., 9th Circuit. The U.S.C.A. agreed to hear the appeal but refused to stay the execution of the District Court's order. The attached papers are in compliance with the District Court order and renews the motion to stay the District Court's proceedings. The affidavit, which was coordinated among Special Agent [redacted] Special Agent [redacted] Legal Counsel Division and Departmental Attorney Lynne K. Zusman, was completed in late afternoon 6/9/76. Arrangements made through Dulles Resident Agency for hand carrying by American Airlines pilot on flight which left at 10:05 a.m., 6/10/76, and picked up by Special Agent [redacted] San Diego Division. b6 b7C

[redacted] COPY b6 b7C

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

- - -

HONORABLE EDWARD J. SCHWARTZ, JUDGE PRESIDING

- - -

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	No. 76-0089 S MOTION TO STAY PENDING COMPLETION OF REVIEW

REPORTER'S TRANSCRIPT

San Diego, California

April 12, 1976

NOT RECORDED
3 JUN 2 1976

REPORTED BY: [redacted] CSR No. 2990
Official Court Reporter

b6 b7C

[redacted]

2 - ENCLOSURE

5 JUN 8 1976

A P P E A R A N C E S

For the Plaintiff

RICHARD C. LEONARD
2049 Century Park East
Suite 1800
Los Angeles, California 90067

For the Defendants

MS. LYNNE K. ZUSMAN
Department of Justice Building
Room 3535
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

62-116927

ENCLOSURE

SAN DIEGO, CALIFORNIA, MONDAY, APRIL 12, 1976, 10:30 A.M.

--oOo--

THE COURT: Item No. 76-0089 Civil, Exner versus The Federal Bureau of Investigation. Would you again state your name for the record, please?

MRS. ZUSMAN: My name is Mrs. Zusman, Z-u-s-m-a-n, for the Department of Justice.

THE COURT: All right; you may proceed.

MRS. ZUSMAN: This is my first appearance in this case, your Honor. It was previously being handled by Mr. Neece, who is the Chief of the Civil Division here in the San Diego United States Attorneys' Office. My understanding of the purpose of today's hearing is that a response is expected from the Government in regard to plaintiff's proposed order, which in essence is a Vaughn v. Rosen type order.

Secondly, we would like to make an affirmative motion ourselves to stay judicial proceedings pending the completion of Agency's review, which is provided for in the Freedom of Information Statute in Section (a)(6)(c).

First of all, in regard to Vaughn v. Rosen, proposed order of the plaintiff, I would like to make just a very short argument, which is that in our reading of the decisions in Vaughn v. Rosen -- and also in the case of Exon Corporation v. Federal Trade Commission, which is a more recent case interpreting the Vaughn v. Rosen decision -- in

62-116927-

ENCLOSURE

both of those cases it is very clear that what the Court was concerned with was trying to assist the judge in evaluating whether the Agency had made a correct determination under the statute to withhold documents. In other words, the Agency had made a decision as to which documents, as responsive to the requestors, were to be disclosed and which were to be withheld because of the voluminous amount of documents in the Vaughn v. Rosen case.

The judge was of the opinion that some kind of inventory and indexing was necessary in order for the Court to evaluate whether the Agency determination had been correct in the first place.

THE COURT: Well, of course, in this case we have had no indication whatever from the Government as to the extent of what they may have or anything on which we can operate, so we're working in the dark. The Government won't tell us anything, and so we have got to make an order to start the ball rolling.

MRS. ZUSMAN: I'm sorry that the Court's understanding of the facts in this situation is that the Government is keeping plaintiff in the dark, and I think perhaps this would be a good place for me to explain what the facts in this situation are.

First of all --

THE COURT: Are you going to talk about the facts in

this situation or the matters that are contained in the various Affidavits that you have filed as to the problems of producing documents --

MRS. ZUSMAN: Well, it would be both because the facts in the Exner request situation are in fact, as I understand it, part of the facts in this situation. We feel the facts which are the exceptional circumstances for the defendant Agency are also part of the facts in this situation.

Mrs. Exner's request was received by the Federal Bureau of Investigation on December 30, 1975. At that time, the FBI was in receipt of something like 5,900 Freedom of Information Act and Privacy Act requests, which were ahead of hers. Let me say that the Bureau's manner of handling these requests -- and in fact, the manner of handling by all the agencies of the Federal Government, which receive these requests -- that the Statute requires that there be no preferential treatment given to requesters; that there were changes in the Act because previously under the old Administrative Procedure Act, it was required that a requester had to have some kind of special interest or concern. That kind of provision was quite explicitly deleted in 1966 when the Freedom of Information Act was passed, and the language in the Statute is quite clear that any member of the public is able to file for the information that it wants.

There have been a line of decisions, including

EPA v. Mink in 410 U.S. and in LRB v. Sears in Vol. 421 of U.S. Reporter. In addition, in 448 F 2nd, Soucie v. David, which is also a leading Freedom of Information Act case -- in the two previous citations -- obviously, they are Supreme Court decisions -- the Court has taken a very clear stand that under this statute there is no such thing as a perferred party. There is no such thing as a special standing. Everyone is the same as everyone else.

So, the problem for the defendant at this point is that when Mrs. Exner's request was received, unfortunately, there were several thousand requests ahead of hers. What the FBI does, is it treats requests as of the date of receipt. In other words, they do not assign a number to a request as it comes in. They go by the date that that request was received. They are now receiving probably 50 of these requests every day.

To return to the situation as it was for the FBI at the time Mrs. Exner's request was received, there were something like 5,900 requests ahead of hers. Her letter was received on December 30. On January the 11th, I believe, she wrote a second letter -- that is, her attorney, Mr. Monaghan, did -- informing the Bureau that since there had been no response, the plaintiff was treating this as she was entitled to under the statute as a denial of her request, and therefore, she was entitled to proceed with an administrative appeal,

which -- because the FBI is a component of the Department of Justice -- is an appeal on a denial -- or was interpreted as a denial under the Act.

It goes to the Department of Justice's Freedom of Information Appeals Unit, which is an office under the Deputy Attorney General and which has the responsibility for reviewing in an appellate administrative capacity every Freedom of Information denial made by a subagency of the Department of Justice.

I would like to refer the Court quite respectfully to the Letter of the Deputy Attorney General, Harold Tyler, which was sent on March 15 of this year to both Houses of Congress, which is a letter of transmittal, which is the first of the annual reports required under the statute of the Department of Justice operations of the Freedom of Information Act to Congress. In this letter, Judge Tyler has summarized the overwhelming problems that certain parts of the Department of Justice -- and especially the FBI -- has had in trying as hard as it can diligently to conform with the Act, but unfortunately, the volume of requests received was nowhere like what Congress had in mind.

As a matter of fact, a look at the legislative history -- and I'll be more than happy to send copies to your clerk if that would be helpful -- a look at the legislative history, when the 1974 amendment was being discussed, makes it

very clear that members of both Houses of Congress were under the impression that they were merely revising already existing information procedures and that they were not creating any new administrative functions. Therefore, they did not appropriate any additional money. The kind of costs they foresaw in the discussion was something like $50,000 in additional costs for the Government the first year and $100,000 in additional costs for the next five years.

I would like at this point to bring to your attention that the FBI in the current fiscal year, 1976, has spent close to $2,675,000. In the next fiscal year it is anticipated there will be not only the same cost, $2,675,000, in responding to Freedom of Information Act requests, but an additional large sum of money to respond to the Privacy Act requests, which is anticipated will also start coming in.

The Agency, as soon as it started feeling this volume -- in our office in 1973, there were eight people at the Bureau who were working on Freedom of Information Act requests. They were receiving roughly one request per day. At the present time we are receiving something like 50 requests per day. They have increased gradually over the last year to 191 people, who are working full time just on handling these Freedom of Information Act requests, so I think that in terms of trying to evaluate what the facts of the situation are, I would have to emphasize for the Court that we do appreciate

Mrs. Exner's problem. We do appreciate the fact that under the statute she is entitled to have a certain number of days to file her appeal, and if that is not responded to, then, of course, under the Act they can file this lawsuit, which in fact she has done.

However, unfortunately, there are many, many, many, many, many thousands of requesters who are in this same situation as Mrs. Exner. Since her request was received on December 30, the FBI has received over 3,594 additional requests. At the time it received her request, it had over 5,900 requests pending, of which it was actively trying to process 991.

Now, I noticed here in the courtroom here this morning a situation that you deal with which strikes me as being somewhat analogous to what the Agency is trying to do. When you went over your civil case calendar, you tried to find out which of the matters could be disposed of rather quickly, I gather, and which of the matters on the calendar might require a longer period of time, and then you proceeded through your faster matters first and left the lengthier hearings for later in the morning. This is the problem that is facing the FBI now, and in fact, I have been told that if there is any kind of preferential treatment, it is given to the individual requester like Mrs. Exner, who is asking just for the information about her as opposed to requests which deal with very

large amounts of historical documents like the Rosenberg case and its files in order not to impede the flow of the thousands of small requests that are coming in.

The Bureau tries to utilize its personnel so that these individual requests can be taken in turn and yet, at the same time, not be crowded up by the larger requests they therefore have. They handle their requests in teams of what are called analysts, who are then supervised by law-trained special agents of the Bureau. They have, in addition to a large number of these ten-people teams, two or three who are called special project teams, which are used to address the large voluminous type of requests that they do get.

Now, returning to Mrs. Exner's case, on January the 11th, she was, as I said -- she filed her second letter with the Department, which was a letter to Director Kelley informing him that she was going to appeal as she was entitled to do at that time. On January the 15th of this year, she received a letter from Director Kelley which apologized for the situation, which explained the tremendous backlog, which gave the facts as to how many requests were ahead of hers, which explained in very, very brief format that the Bureau was delayed because of its having to respond by court order to several large historical type requests; i.e., the Miracle case which is the Rosenberg files and the Weinstein case, which involved the Rosenberg files and his files, also. That

occurred on January 15.

I believe at some time after that, Mr. Monaghan was in telephone conversation with Quinlan Shea, who is the Chief of this F.O.I. Appeals Unit in the Justice Department, and at that time Mr. Monaghan represented to Mr. Shea that there were some urgent reasons why Mrs. Exner's request should be given priority treatment, to which Mr. Shea responded that a written letter to that effect would have to be sent to his office. In the letter which Mr. Monaghan sent, he gave two reasons for giving Mrs. Exner priority treatment.

The first reason was that there had been threats made on her life and that plaintiff felt that only when she received the information that was in the FBI files about herself could she feel safe. I'm not sure what the connection there was, but secondly, that she felt that the information in the Bureau's files would have great historical significance, and for that reason, she should be given special treatment.

Mr. Shea responded by letter to Mr. Monaghan that he was referring to Mr. Monaghan's letter to Deputy Attorney General Tyler for his consideration and his determination and that Mr. Shea did not himself, as Chief of the Unit, feel that these circumstances were of sufficient urgency to give the preferential treatment which the plaintiff was seeking.

Subsequently, a letter was sent by the Deputy Attorney General Tyler -- I believe -- let me check. I know

she received another letter, and I'm just not sure whether it came from Mr. Tyler or --

MR. LEONARD: From Shea?

MRS. ZUSMAN: No, I just mentioned the one from Mr. Shea. I am talking about the letter -- she received another letter, I believe, after that. Let's see. Shea's letter was February the 5th. Yes, the next one was the February 19 letter from Director Kelley, which stated, to assure fair and impartial treatment of all requests made under the Freedom of Information and Privacy Acts, the FBI handled such requests in chronological order based on date received. The statutes in question do not permit one individual's request for his or her file to be given priority over another's. Indeed, equitable treatment of all requesters is the very basis for not attempting to establish such priorities, but instead, of handling each in chronological order.

Now, I can understand that from the plaintiff's point of view, there has been a feeling, as I gather from your remark and from the remarks of private counsel who I spoke with before the hearing, that plaintiff has been kept in the dark. I would like to say that it is my understanding that as much information could be given her as was available based on the fact that because her request was not taken out of turn, no search has been made yet as to the number of documents responsive to her request because the Department of

Justice feels very strongly as a matter of principle that if we were to find the circumstances which Mrs. Exner has put forward, entitling her to special consideration, then my goodness gracious, we have thousands of other requesters who also have very special reasons for having their requests taken out of turn.

So, to be very truthful, and with all the facts before you right now, I cannot say whether there are 50 pages of documents responsive to Mrs. Exner's request or whether there are 2,000 pages of documents responsive to Mrs. Exner's request, and I'm sorry that the correspondence between the Department of Justice and the FBI and the plaintiff has not given Mrs. Exner any additional information. This is the very best that we could do.

I would like to say this, that my defendant, the Federal Bureau of Investigation, is not unaware of the problems. It is not unaware of the fact that it's very difficult for the requesters to understand why they have to endure these long, long waits, and it's just a very unfortunate situation.

THE COURT: Have you ever heard of the Speedy Trial Act?

MRS. ZUSMAN: Yes, I have.

THE COURT: All right.

MRS. ZUSMAN: I think, though, that the answer to the situation here is in the Freedom of Information Act, and I

would address your Honor's attention to Subsection (a)(6)(C), in which Congress has provided that when there are exceptional circumstances and where the Agency has demonstrated that it is responding to plaintiff's request with due diligence, that the Court is empowered to retain jurisdiction and to issue a stay of proceedings until there has been a determination at the administrative agency level.

I would like to point out that because the Act is very complicated, because there have been changes made in it by the recent amendments, that addressing oneself to a particular request can be a very involved and very complicated job. Under the principle of execution of administrative remedy, which has been wrongly established in the court, and has been upheld in several Freedom of Information Act cases, which I have cited in my brief, including Jaffess v. Secretary of HEW, Tuchinsky v. Selective Service, the Center for National Policy Review and so forth, that Freedom of Information Act is a special problem, but it doesn't mean that established principles have to fall by the wayside.

As a matter of fact, in Deputy Attorney General Tyler's letter to Congress, he points out that one of the reasons that the Department is so slow in responding to these requests is that a very careful review is made at the Appellate administrative level. He states -- and this is stated in his Affidavit -- that in over 50 percent of the

denials, the Appellate Administrative Unit has either issued a reversal or a substantial modification of the original Agency decision; and I think this is clearly a situation where the expertise of the Agency and judicial economy does require that the Agency be permitted to complete its review.

On behalf of my client, I would like to say that the Bureau would be more than happy to keep both the Court and the plaintiff informed at regular intervals. However, of the progress that is being made, they anticipate that they will reach Mrs. Exner's request in approximately four months. That is a rough estimate based on their previous processing experience. It is very likely that that might be accelerated, depending on how small or large the requests are that are handled before hers.

On the other hand, if we are hit by another court order by a judge sitting in another part of the country, and we have to drop everything, then it might be a considerably longer length of time. That, in effect, is, I suppose, a floodgate situation which is facing the Agency now and the Department; that there have been just a very few decisions so far which have asked for accelerated processing. Those have had disastrous effects -- which are outlined in the Affidavit, and I wouldn't go into them here -- in terms of reallocating personnel resources.

Because of the fact that there are so many requesters

who are having to wait in line, all of whom theoretically could be filed in lawsuits, that eventually we would have a situation -- if the Judge gave plaintiff relief in this particular situation -- we would have a circumstance where there would be courts all over the country and where the only processing that would be going on would be going on under court order, and I appeal to the Court quite fervently that although this is a very bad situation -- and I hope that Congress -- I am sure that they are already considering what can be done to ameliorate it -- that the answer is not for the Court to become involved at this point. Thank you.

THE COURT: Mr. Leonard?

MR. LEONARD: Your Honor, there is a Yiddish term which I have heard before, and I am not sure of the spelling -- chutzpah, and there is no translation in the English language that I know of. The only example I can think of is the child who killed his parents and comes before the court and pleads for mercy because he is an orphan.

I think what the Government is doing today is an example of that. Mrs. Zusman did not have the benefit of being here for the March 15 hearing. I hoped to have a transcript for the Court of that hearing today; I have not gotten it from the reporter yet.

What the Government has done -- even though this Court issued an order on March 15 stating that the defendant

was supposed to go through its records, answer the complaint, and submit an inventory to us by April 12 -- it has done nothing; it hasn't looked for the record and hasn't done anything with the record.

It comes before you now, and the Government says we are very busy; we have all these things pending, and we just haven't had a chance to get to it. Other judges have made orders asking us to look for records, and that has been keeping us busy. We followed their orders; we haven't followed your Honor's Order; we just ignored it, and we come in on the last day -- on April 12 -- and we ask for an order to give us four more months in time.

Although Mrs. Exner has claimed physical danger, we don't believe it; we don't think there is anything to that, and even though the Court thought there might be something to that, in our own wisdom and as judge and jury, we, the Government, have ignored her request, have ignored her plea of physical danger. We are not going to expedite; we are going to do it in line with everything else.

However, we have a statute that says you don't have a right to deem the request denied, which the Government did at the first level, the appellate level, and that is, to file a lawsuit.

Mrs. Exner is not like everyone else who has filed a previous request to see their FBI file. Mr. Shea, in his letter to Mr. Monaghan on February 5, admitted that many of

his requests are frivolous. If someone needs their record, they have a way to proceed; they can proceed by filing an action in an appropriate District Court. Mrs. Exner has done that. The Government ignores that; we don't care if she's filed an action or not, if there's an order from the Court or not. We are just going to keep her in line with everyone else.

This matter has been argued on March 15. We pointed out the rights for expedition; the Court agreed with us. We submitted an order that followed the Court's ruling, citing Vaughn v. Rosen, and the procedures intimated there, and the Government comes back today and says we have done nothing; we have not searched for one record. This is even more blatant because the FBI turned these records over, we believe, to a Senate Committee. We don't know what those records look like, but there is certainly substantial evidence to that effect.

This file has already been located, we believe. It's been processed; it's been turned over. All the Government has to do is to look at it; they haven't taken the steps to do that yet. They spend more time and money sending Mrs. Zusman out here with no knowledge of what went on March 15 than it would have taken either time wise or expense wise to go through that file and comply with the Court's Order.

I am just amazed that the Government can stand before this Court, knowing that it's willfully disobeyed this

Court Order, and ask for four more months time and state that there is no reason to expedite. I think this matter has been argued. It has been decided; there is no reason for delay now. I think the Court should sign the Order we have submitted, which I think does accurately reflect the Court's Order of March 15, and this Court should proceed in that regard.

MRS. ZUSMAN: May I have a rebuttal?

THE COURT: If you can make it brief; you said ten minutes before.

MR. LEONARD: I have one brief report. The Government played a little game with us at the last hearing. They didn't answer the Freedom of Information Act in 30 days. The Privacy Act requires 60 days, and they took the 60-day period of time. I would like to point out to the Court that the Government's response does not comply with the Freedom of Information Act, and there is no similar section in the Privacy Act. Moreover, under the Freedom of Information Act section, which is 5 U.S.C. 552 (a)(6)(C), it provides that a stay can be issued by the Court if the Government complies with two requirements. One is that they can show exceptional circumstances exist, and two is that -- and I quote -- ". . . the agency is exercising due diligence in responding to the request, . . ."

Number one, the Government has not shown exceptional circumstances. The only showing by the Government today is the same showing that they make on every single Freedom of

Information Act or Privacy Act request -- they are bogged down. I am sorry they are bogged down. This is an exceptional case. They have showed no circumstances as to why they can't respond.

Number two, they show no due diligence in responding to the request. They have admitted they haven't done that. They haven't attempted to respond to the request. They haven't started searching; they haven't started inventorying; they haven't started anything. They have not complied with the section under the Freedom of Information Act. There is no similar section in the Privacy Act. They have no right to this relief. Thank you.

THE COURT: All right.

MRS. ZUSMAN: There are two points I make inquiry to as to the previous hearing. It was my understanding that there has been no substantiation of the plaintiff's claim that her life has been threatened, so at this point in time I would like to say that that basis for her request for preferential treatment as far as we are concerned remains somewhat up in the air.

Secondly, I have a question about the counsel's terminology that the Government has willfully disobeyed the Court's Order. Now, perhaps the Court can correct me on this; I have had several conversations with Mr. Neece.

THE COURT: Where is Mr. Neece? Why isn't he here today?

MRS. ZUSMAN: I believe he has another matter, your Honor, also, but it was my understanding that the Order of the Court had not been filed yet. I have asked for a copy of it, and I had understood that what had happened was that your Honor had made an order at the previous hearing but then, due to whatever circumstances happened afterward, a decision was made that the Government would be allowed to oppose the order at this hearing, and that is why I'm here. I was not under the impression that we were in disobeyance of an order that had been entered.

THE COURT: All right. Let me ask you this: Where are you from?

MRS. ZUSMAN: I am a member of the California Bar. I came from Washington, D.C.

THE COURT: You are working in Washington for the Department of Justice?

MRS. ZUSMAN: Yes.

THE COURT: When did you come out to San Diego?

MRS. ZUSMAN: Yesterday.

THE COURT: So, you used yesterday in transportation. When are you going back?

MRS. ZUSMAN: This afternoon.

THE COURT: I see. So, that is two days you've used on this matter. Well, let me say this. I think it was very clear, of course, that you were not here at the time of the

prior hearing. The Court did, I think, make it quite clear that this was to be complied with by April the 12th. An Order was presented by Mr. Leonard, which I actually signed, and then I think thereafter, the Government decided that it had some quarrel with the terms of the Order; so I held it for awhile. It had actually been signed, but not filed. But the Order was made at the hearing on March 15 as to what the Government was to do. Apparently, the Government has done nothing.

Now what the Government has done today is that they have filed about 50 pages of materials, affidavits and so on, which I assume has taken a great deal of time for somebody to prepare. You have spent or will have spent two days on this matter in transportation in appearing here. I have an idea that you spent some time preparing for this hearing and preparing these papers, and yet, the Government has done nothing to comply with the Court's Order.

I just find it rather incredible to hear that the Government hasn't even looked at the file and doesn't even know whether it's a small file, a big file, or what's in it when obviously, the FBI provided the file to the Senate Committee, which has had the file, and Mrs. Exner filed her request over three months ago.

Here the Government is back again saying well, we'll get around to it; we'll get around to it. I don't think

this is proper treatment on the part of the Government. I realize you do have problems, and that the volume of these requests is greater than had been perhaps anticipated. The courts have problems, too.

I mentioned the Speedy Trial Act earlier by which Congress has imposed on the courts the duty of processing criminal cases expeditiously, and Congress doesn't care how we do it. They just say do it, and we are doing it; and I think it's up to the Government to process these requests with some reasonable expedition.

I think that when we have a hearing in a court, and the Court makes an order -- then we get a new team in here -- a new lawyer appears; Mr. Neece isn't even here -- I just find it very difficult to accept the Government's position, and I think that the Government is not dealing either expeditiously or fairly in this situation. And so I will --

MRS. ZUSMAN: Your Honor --

THE COURT: I will grant the Government a further stay because apparently you are in a situation where you don't have the file in your hand. I'll grant an additional 15 days for the Government to comply with the Court's Order. My clerk has just handed me a note saying that the Order was filed on Friday. That's probably true, but it was made substantially in detail on March 15, and Mr. Neece was aware of it, and I'm sure that he informed the Government.

MRS. ZUSMAN: Well, he has -- I tried to explain -- he led me to believe -- and I am sure that this is his understanding. I do not think that I am misstating what his understanding was, which was that the purpose of this hearing would be in order to allow further argument on this opposition to the proposed order. Thank you very much, your Honor.

THE COURT: If the Government had used part of the effort -- just a small part of the effort -- in time that has been required for you to come out here, for you to prepare these papers -- and it is a rather thick bunch of papers that have been prepared -- to take a look at the file and to try to do what the Court requested, this thing could already have been taken care of.

Now, I think it is rather obvious to me that the FBI just doesn't want to give this file out, and I don't think that they're being forthright in coming in and saying, well, we don't have enough money to process this; we don't have enough personnel to process it; we just haven't gotten around to it. I just don't think that that is a reasonable response to the Court's Order back on March 15.

MRS. ZUSMAN: I don't want to offend the Court in any way. I would like to say this: it's my privilege to work for the Justice Department in Washington. It's my privilege to work with individuals who work for the Federal Government across the border.

at the Bureau.

THE COURT: Are you telling me that nobody has looked at this file in connection with any of these proceedings?

MRS. ZUSMAN: That is what I was told.

THE COURT: Who told you that?

MRS. ZUSMAN: I asked directly the individual attorney, who is the FBI person at the FBI assigned to this case.

THE COURT: What is his name?

MRS. ZUSMAN: Mr. Maschella.

THE COURT: And no one in the FBI ever looked at this file in the Justice Division?

MRS. ZUSMAN: The Federal Bureau of Investigation, as you know, is a separate subagency. When I asked if they had any idea what the scoop was in response to this request, I was told that as a matter of principle, the file has not been looked at. Now, obviously, you have your own idea of what the situation is, and I'm very sorry that this is what you have concluded. Thank you.

--oOo--

C E R T I F I C A T E

I, DONNA L. McQUEENEY, CSR, hereby certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court, Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings heard before the Hon. Edward J. Schwartz, on the date herein mentioned, in the case of Judith Katherine Exner v. Federal Bureau of Investigation, No. 76-0089 S, consisting of 23 pages.

DATED: This 23rd day of April, 1976.

DONNA L. McQUEENEY, CSR
Official Court Reporter

ROUTING AND TRANSMITTAL SLIP

1 TO *(Name, office symbol or location)*	INITIALS	ACTION CIRCULATE
	DATE	COORDINATION
2	INITIALS	FILE
	DATE	INFORMATION
3	INITIALS	NOTE AND RETURN
	DATE	PER CONVERSATION
4	INITIALS	SEE ME
	DATE	SIGNATURE

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REMARKS

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions

FROM *(Name, office symbol or location)* Lynne K. Zusman, Attorney Information & Privacy Section	DATE 5/26 PHONE 4096

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May 13, 1976

Please
175-12-2633

Telephone:
(202) 739-2823

Mr. Emil J. Welfi, Jr.
Clerk, United States Court of Appeals
for the Ninth Circuit
P. O. Box 547
San Francisco, California 94101

Attention: Mr. Bruce Taylor

Re: Judith Catherine Exner v. Federal
Bureau of Investigation, et al.
(CA. No. 76-1903)

Dear Mr. Welfi:

Please find enclosed four copies of page five (5) of the "Government Appellants' Response to Appellant's Motion to Dismiss Appeal".

We regret that these pages were omitted in the xeroxing process. We were unaware of the omission until it was brought to our attention by Appellee's counsel on this date.

I regret any inconvenience this may have caused the Court.

Yours very truly,

CLOYCE H. KNIGHT
Attorney, Appellate Section
Civil Division

Enclosures (4)

cc: Richard C. Leonard, Esquire
2049 Century Park East
Suite 1400
Los Angeles, California 90067

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FBI Headquarters to a Freedom of Information Section devoted solely to processing FOIPA requests, including 23 law-trained agents; that the FBI had received 13,875 FOIPA requests in 1975; and that all requests were being processed in chronological order with the exception of several cases in which courts had ordered expedited processing of requests (Hanigan Affidavit, paras. 10,11).[5/] He estimated that processing of Mrs. Exner's request would begin in approximately four months (Affidavit, para. 15).

Quinlan Shea, Chief of the Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, testified by affidavit that his Unit, which is devoted almost exclusively to the handling of administrative appeals, has eleven full-time attorneys assigned to the job. The Unit received over one thousand appeals in 1975, as compared to one hundred appeals received by the Department of Justice in 1974. Mrs. Exner's request has been assigned the number

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5/ Agent Hanigan stated that the court-expedited cases required a substantial re-allocation of personnel from the processing of other requests. For example, the Rosenburg case (Meeropol v. Levi, D. D.C. Civil Action No. 75-1121) absorbed about one half of the FOIPA Unit's personnel during the several months when the trial papers were processed pursuant to court-imposed deadlines. The Alger Hiss case (Weinstein v. Levi, D. D.C. Civil Action No. 2278-72 similarly required a disproportionate allocation of personnel to a single case. The same is true of a voluminous case presently being processed under orders of a district court in Wisconsin (Fellner v. U. S. Department of Justice, W.D. Wisc. Civil Action No. 75-C-430)) (Affidavit, para 12).

FEDERAL GOVERNMENT

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

Civil Action Number
76-89-SA

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants

AFFIDAVIT

I, Marvin Lewis, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Branch of the FBI, Washington, D. C.

(2) Pursuant to the Court's Order of August 1, 1977, I have prepared documents responsive to plaintiff's FOIPA request for the Court's in camera inspection. These

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have been previously described in Exhibit A to Second Affidavit of Michael L. Hanigan, dated June 9, 1976 (hereinafter Second Hanigan Affidavit).

(3) As explained in the Second Hanigan Affidavit, documents containing information identifiable with the plaintiff were scattered through volumes of materials concerning the investigation of others. The full document in which plaintiff's name appears is being submitted. The in camera documents have been assembled on "file backs" and in the order described in the Second Hanigan Affidavit. An index sheet has been attached to each package, and each package is lettered sequentially. This sheet also sets forth the page number in the Exhibit to the Second Hanigan Affidavit where the document has been previously described and the pages in the document which are pertinent to plaintiff's request.

(4) Plaintiff's counsel has been advised that additional administrative material previously withheld would now be released pursuant to a change in Department of Justice policy regarding instances in which the exemption allowed by Title 5, United States Code, Section 552 (b)(2) is asserted. Routing blocks and routing stamps have been released pursuant to this change. File numbers previously withheld only for convenience of processing have also been released. Exemption (b)(2), in conjunction with (b)(7)(D), will continue to be asserted to withhold informant symbol numbers. These numbers represent the internal FBI practice utilized to protect the identity of

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sources from unauthorized disclosure. They play an integral part in affording maximum security to FBI informants. Release would cause a breakdown in the security system and could assist in the actual identity of the sources.

(5) A close review of all documents in preparation for this in camera review has revealed several instances where plaintiff's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to the plaintiff. These additional references to the plaintiff have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of the plaintiff's name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another which was released in part. The former has now been released to plaintiff consistent with the release of the latter.

(6) The aforementioned changes and corrections set forth in paragraphs four and five, supra., are included in the documents available to the Court for in camera inspection and have been transmitted to the plaintiff on August 10, 1977. (A copy of this letter is attached hereto and made a part

hereof as Exhibit A.)

(7) Those portions of the documents for which no exemption is claimed have been marked through with a yellow highlighter. This is the material which has now been released pursuant to plaintiff's FOIPA request, administrative appeal and the current in camera review. Exemptions allowed by the FOIA have been noted in the margin. The notation "OSR," indicates that the paragraph is "outside the scope" of plaintiff's request and appears only on those pages listed on the index sheet.

Marvin Lewis

MARVIN LEWIS
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 10th day of August, 1977.

Sharon Fulton

Notary Public

My commission expires October 31, 1980

August 10, 1977

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Campbell Exner, and subsequent litigation.

Please be advised that an examination of the documents within our central records in preparation for the court ordered in camera review has revealed several instances where your client's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to your client. These additional references to her name have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of her name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another document previously released. The former is now being released consistent with the release of the latter.

In conversation with Ms. Lynne K. Zusman of the Department of Justice, you expressed the desire of your client to have FBI records relative to Ms. Exner reprocessed for the release of any administrative material no longer exempt under Title 5, United States Code, Section 552 (b)(2). Those records consisting of 29 pages containing excisions wherein exemption (b)(2) was cited have now been reprocessed and are enclosed.

Exhibit A

ENCLOSURE 62-116922-

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no susbtantive information concerning your client.

Sincerely yours,

Clarence M. Kelley
Director

Enclosures (61)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

STATE OF CALIFORNIA)
} ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Elayne Caddy, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On August 12, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of AFFIDAVIT (of Marvin Lewis),

addressed to Richard C. Leonard, Esq., 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210,

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of August, 1977.

ENCLOSURE Elayne Caddy

62-116929-

FEDERAL GOVERNMENT

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
Assistant United States Attorney

United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189
Telephone: 895-5610

Attorneys for Defendants.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants.

CIVIL ACTION NO. 76-89-SA

DEFENDANTS' REPLY BRIEF

Plaintiff filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552 and the Privacy Act, 5 U.S.C. 552a, seeking access to records maintained by the Federal Bureau of Investigation. After defendants' motions to stay judicial proceedings pending completion of agency review of the documents were denied, the documents were processed and released to plaintiff except for portions of documents withheld to protect the privacy of third parties and confidential information, the disclosure of which would reveal a confidential source, pursuant to 5 U.S.C. 552(b)(7)(C) and (7)(D). Defendants also withheld under 5 U.S.C. 552 (b)(7)(F) information from one document which would endanger the life or physical safety of law enforcement personnel. Material from two documents was

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withheld as agency deliberative material protected by 5 U.S.C. 552(b)(5). Deletions were made on the basis of 5 U.S.C. 552(b)(2). Due to a recent determination by the Deputy Attorney General, that this exemption should no longer be invoked to withhold administrative or routine markings, and other such material, the documents which contain deletions made on this basis are currently being re-processed to eliminate the deletions and therefore to disclose additional material.

Defendants moved to dismiss, or in the alternative, for summary judgment and respectfully referred the Court to the Second Affidavit of Michael L. Hanigan and the memorandum in support of the motion. Plaintiff opposed defendants' motion and requested in camera inspection of FBI documents. Defendants now reply to plaintiff's papers and rely on the affidavit and memorandum earlier filed as well as the affidavit of Gordon G. McNeill, Special Agent of the Federal Bureau of Investigation, dated July 13, 1977.

Defendants' motion should be granted for the reasons set forth in their prior memorandum since the contentions set forth in plaintiff's papers do not detract from or rebut the showing made by defendants that the defense motion should be granted. Defendants have shown that the material at issue has been properly withheld under the Freedom of Information Act and the Privacy Act.

DISCUSSION

The Court is wholly justified in granting defendants' motion on the basis of the record now before it. In addition to the affidavits earlier filed, defendants have recently filed the McNeill affidavit. Mr. McNeill, a Supervisor in the Organized Crime Section of the Federal Bureau of Investigation, is assigned to the unit dealing with

organized crime in the Western United States. McNeill re-iterates Special Agent Hanigan's statement that nearly all the documents containing information concerning plaintiff were obtained from an anti-racketeering investigation of John Roselli. McNeill further states that other references to plaintiff were located in files dealing with the broad subject matter of the FBI's Criminal Intelligence Program as it relates to certain FBI Field Offices in California and that plaintiff's name appears in but a small portion of these files. These documents are replete with information pertaining to other individuals gathered by high level organized crime informants. Dissimination of the information received from these informants could place their lives and physical well-being in jeopardy as well as that of their families. (McNeill Affidavit, page 2).

Furthermore, disclosure of these identities could severely hinder the FBI's ability to continue to receive high quality information in this complex area of investigation. These investigations consume years of effort to develop and premature disclosure of some of these sources could affect investigations in progress and compromise the future effectiveness of the sources in gathering quality information in the Organized Crime area. (McNeill Affidavit, pages 2 and 3).

The legislative history of the 1974 Amendments to the Freedom of Information Act makes it clear that while in camera inspection is an option available to the Court in Freedom of Information Act cases, it should be used sparingly and only because of a critical gap in the public record presently before the Court.

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." H.R. Rep. No. 93-1380, Conference Rep. 93d Cong., 2s Sess. 9 (1974); S. Rep. No. 93-854, 93d Cong., 1d Sess. 15)1974). This legislative statement was relied on once again in the recent decision of the Court of Appeals for the District of Columbia, Weissman v. CIA, No. 76-1566 (D.C. Cir., January 6, 1977; April 4, 1977) (slip opinion attached). In that opinion the Court noted:

> "We adopted this view in Vaughn v. Rosen, which specified that where the public record is sufficient to permit a legal ruling, the inquiry need go no further, 157 U.S. App. D.C. 340, 484 F.2d 820, 824 (1973) . . .
>
> The reluctance of Congress and the courts to require in camera inspection is well founded. In camera inspections are burdensome and are conducted without the benefit of an adversary proceeding. Vaughn, supra, at 824. A denial of confrontation creates suspicions of unfairness and is inconsistent with our traditions." (Weissman, supra, pp. 10-11)

The importance of endorsing this approach to in camera review was underscored by the Court's appreciation of the true intent of Congress in this regard as well as by practical realities. As the Court so wisely stated it:

> "In every FOIA case, there exists the possibility the Government affidavits claiming exemptions will be untruthful. Likewise, in every FOIA case, it is possible that some bits of non-exempt material may be found among exempt material, even after a thorough agency evaluation. . . .
>
> If, as appellant argues, these possibilities are enough automatically to trigger an in camera investigation, one will be required in every FOIA case. This is clearly not what Congress intended, nor what this Court has found to be neccessary." (Emphasis added.)
> (Weissman, supra, p. 11.) 1/

1/ See Ftn. 11 of Weissman opinion attached.

In a recent decision involving claims by the Department of HEW that inter-agency memoranda were exempted documents under 5 U.S.C. §552(b)(5) the Court rejected plaintiff's urging that in camera inspection was required on the presumption that "Courts are to be trusted to be impartial and that a third-party review by a Court is more comforting than review by representatives of the agency resisting disclosure." Morton-Norwich Products, Inc. v. Mathews, 415 F. Supp. 78, 82 (D. D.C. 1976). The Court characterized this attitude as "superficially enticing if one overlooks the experience of history that indicates how arbitrary judges as well as others in authority become if they conduct their business in secrecy." Ibid. The Court upheld the integrity of the administrative process thusly:

> "First, if the Government wished wrongfully to withhold, it need not have ever indicated that the documents existed in the first place. Second, sanctions now exist under the amended act against those who improperly conceal, 5 U.S.C. §552(a)(4)(f). The FDA processes thousands of Freedom of Information Act requests a year. It has a specialized staff which proceeds with legal advice. The U.S. Attorney in contested cases reviews that advice. There is nothing in this case to suggest that the agency has not been forthright or responsive. The Freedom of Information Act must proceed in an atmosphere of confidence in government. If the agency cannot be trusted, the Act will never work. It is a profound mistake to transfer administrative responsibility to judges on the theory that persons employed by the Executive Branch are not honest or lack judgment. The effort to do this through the in camera process is misplaced." (Morton-Norwich, supra, pp. 82-83.)

The necessity for the Court to give credence to the representations of government agency officials is well

established. In another recent opinion, the U.S. District Court for the District of Columbia refused plaintiff's plea for in camera review of Federal Trade Commission internal documents under 5 U.S.C. §552(b)(5). Bristol-Myers v. FTC, Civil Action No. 76-1364 (D.C. December 28, 1976) (Slip opinion attached). Even as to the possibility of identifying non-exempt segregable material, the Court stated:

> "In view of the evident substantial and good faith compliance with the requirements of the law insofar as the other disputed documents are concerned, the Court will take the Commission at its word and not require in camera inspection." Ibid. (See also Wellford v. Hardin, 330 F. Supp. 915 (D. Md. 1971).

Because of the sensitivity of these files as part of the Government's investigation of organized crime activities, their protection is especially important. Plaintiff's claim that defendants' withholding is unjustified because segments of some of the eighty-six documents released partially to the plaintiff have not been released, ignore the description defendants have made of the files where plaintiff's name appears. It is clear from the record that plaintiff's name merely appears peripherally in files largely unrelated to her, i.e., files dealing with other individuals and activities in which she was not involved. Wherever her name appears, the material has been processed as responsive to the request for information about herself. However, where the material reveals the names of other individuals, other than Roselli and Sam Giancana, it has been withheld to protect the third party's identity. Where the material reveals a confidential source or confidential information furnished only by a confidential source, or would cause damage to law enforcement personnel, it has been withheld. The statute amply supports the Government's withholding of

documents for these reasons. Defendants have fully established the need for confidentiality of those portions of these investigative files which have not been released.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

TERRY J. KNOEPP
United States Attorney

By: _____
CHARLES H. DICK, JR
Assistant United States Attorney

_____
JEFFREY AXELRAD

_____
LYNNE K. ZUSMAN

Attorneys, Department of Justice
Washington, D. C. 20530
Telephone: (202) 739-4544

Attorneys for Defendants.

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FORM OBD-93
12-7-73
Formerly LA4-93

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FBI, et al.,

Defendants.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On July 29, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

DEFENDANTS' REPLY BRIEF

addressed to Richard C. Leonard, Esq. 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210,

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29 day of July, 19 77.

Nancy R Amans

Nancy Amans

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TERRY J. KNOEPP
United States Attorney
CHARLES H. DICK, JR.
Assistant U.S. Attorney
United States Courthouse
940 Front Street, Rm. 5-N-19
San Diego, California 92189
Telephone: (714) 293-5662

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant

Civil Action Number
76-89-S

AFFIDAVIT

I, Gordon G. McNeill, being duly sworn, hereby depose and say as follows:

I have been a Special Agent (SA) of the Federal Bureau of Investigation (FBI) for approximately eleven years, and for the past eight years have been involved in investigations in the organized crime field. I am currently assigned to FBI Headquarters (FBIHQ), at Washington, D. C., as a Supervisor in the Organized Crime Section, specifically

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LEGAL COUNSEL

JUL 29 1977

that Unit dealing with organized crime in the Western United States. I am thoroughly familiar with the FBI's efforts in this regard including our use of informants, the necessity of maintaining their identities secret and repercussions which could ensue from disclosure of their identities, even inadvertent.

As stated in the Affidavit of Special Agent Michael L. Hanigan, dated June 9, 1976, at page six, paragraph seven, "nearly all the documents containing information concerning plaintiff were obtained from an anti-racketeering investigation of John Roselli." Other references to plaintiff were located in files dealing with the broad subject matter of the FBI's criminal intelligence program as it relates to certain FBI Field Offices in California. As previously stated in the Hanigan Affidavit, plaintiff's name appears in a small portion of these documents. These documents are replete with information pertaining to other individuals gathered by high level organized crime informants. Dissemination of the information received from these informants could, in my opinion, place their lives and physical well-being in jeopardy as well as that of their families. Furthermore, disclosure of their identities could severely hinder this Bureau's ability to continue to receive high quality information in this complex area of investigation. These investigations consume years of effort to develop and premature disclosure of some of these sources could affect investigations in progress

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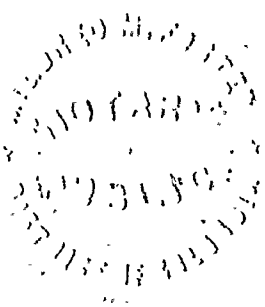
and compromise the future effectiveness of the sources in gathering quality information in the organized crime area.

GORDON G. MC NEILL
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 13th day of July, 1977.

Mildred M. Frostad
Notary Public

My commission expires My Commission Expires September 14, 1981



SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On July 19, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

AFFIDAVIT

addressed to Richard C. Leonard, Esq., 433 North Camden Drive, Suite 1200, Beverly Hills, California 90210, the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of July, 1977.

Nancy Amans

TERRY J. KNOEPP
United States Attorney
CHARLES H. DICK, JR.
Assistant U. S. Attorney
United States Courthouse
940 Front Street, Rm. 5-N-19
San Diego, California 92189
Telephone: (714) 293-6258

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil No. 76-89-S STIPULATION FOR CONTINUANCE OF PRETRIAL CONFERENCE AND ORDER THEREON

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record, that the Pretrial Conference in the above-captioned matter, presently set for February 22, 1977, at 10:30 a.m., in the courtroom of the Honorable Edward J. Schwartz, United States District Judge, be continued until such date as the court set for oral argument on the pretrial dispositive motions which the parties shall file in accordance with the following schedule and that date shall not be prior to July 1, 1977.

62-116929-
NOT RECORDED
7 MAR 8 1977

Counsel for defendants shall file a motion to dismiss, or in the alternative, for summary judgment by April 29, 1977; counsel for plaintiff shall have 45 days from the date of filing of defendants' motion to file plaintiff's response and cross motion for summary judgment or other relief. Counsel for the parties agree that the

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57 MAR 10 1977

FORM OSD-93
12-7-73

CHD:na
2/17/77

legal issues in this case (i.e., whether the defendants' action in withholding records from plaintiff under provisions of 5 U.S.C. §552(b) and 5 U.S.C. §552(a) is authorized), can be resolved effectively and most expeditiously by the filing of dispositive pretrial motions. Counsel regret that they have been unable to prepare motion papers earlier but due to the urgent nature of other matters in litigation which both attorneys are handling and the fact that both counsel have had to travel continuously during recent months, this delay has been unavoidable. Counsel also wish to bring to the court's attention the continuing efforts by both sides over the past months to narrow the issue before the court through supplementary release of documents by government defendants and frequent telephone discussions between counsel. Counsel strongly believe that this matter does not require a trial and should be disposed of on motion papers supported by affidavits as appropriate.

Based on the briefing schedule to which counsel briefly commit themselves subject to the court's approval, counsel respectfully suggest the continuance of the pretrial conference.

Dated: February 17, 1977

Richard C Leonard by VAR

RICHARD C. LEONARD
Attorney for Plaintiff

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
Assistant U. S. Attorney
Attorneys for Defendants

O R D E R

IT IS SO ORDERED this 18 day of February, 1977. FURTHER ORDERED THAT PRETRIAL HEARING HEREIN SHALL BE HELD JULY 5, 1977, AT 10:30 A.M.

EDWARD J. SCHWARTZ
United States District Judge

FORM OBD-93
12-7-73

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOCAL & STATE

JUDITH EXNER vs F. B. I., et al No. 76-0089-S

Judge	Deputy Clerk	Reporter
XX HON. EDWARD J. SCHWARTZ	___ Winora Zinn	___ Kathleen Ripley
___ HON. HOWARD B. TURRENTINE	___ Richard Bellman	___ Jeanette Ruggles
___ HON. GORDON THOMPSON, JR.	___ Victor Mohler	___ Jean Clarke
___ HON. LELAND C. NIELSEN	___ Robert Robinson	___ Dorothy Albright
___ HON. WILLIAM B. ENRIGHT	___ Milvoy Mayer	___ Joan King
___ HON.	XX Cynthia Freeman	___
___ HON.	___	___

Asst. U. S. Attorney NA

Atty NA for ___ Apptd ___ Retnd

___ for ___ Apptd ___ Retnd

___ for ___ Apptd ___ Retnd

___ for ___ Apptd ___ Retnd

___ for ___ Apptd ___ Retnd

___ for ___ Apptd ___ Retnd

PROCEEDINGS:

GOOD CAUSE APPEARING, the Pre-Trial Conference, continued for hearing to Monday, February 21, 1977 by stipulation, is hereby ordered continued to February 22, 1977 and the February 21, 1977 date vacated.

COPIES TO:

Richard C. Leonard, Esq.
433 North Camden Drive
Suite 1200
Beverly Hills, Ca. 90210

Civil Division
U. S. Attorney's Office
San Diego, Ca. 92189

62-116929-

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DEC 8 8 AM '76

DATE: DEC 21 1976

INITIALS ___ Deputy Clerk

Form 9

filed 11-15-76

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210

(213) 278-9750

Attorney for Plaintiff

FEDERAL GOVERNMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL ACTION NO. 76-89-S STIPULATION AND ORDER THEREON

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that the pretrial conference in the above-captioned action, presently set for November 22, 1976, at 10:30 a.m., in the Courtroom of the Honorable Edward J. Schwartz, United States District Judge, be continued to Monday, February 21, 1977, at the same time and place.

62-116927-

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This stipulation is the result of the belief of all counsel to this litigation that the pretrial conference in this matter should be continued. Both parties feel that there is some further work to be done on this case, including discovery and motions to be filed, so as to make the pretrial conference either unnecessary or valueless if it were to be held prior to February of 1977. The actions which counsel believe are outstanding include the following:

[redacted] -11

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Filed from the USA San Diego California 11/23/76

1. The Department of Justice is presently finalizing its appellate review of the documents requested by the plaintiff. Counsel for the Government believes that a compilation of any remaining documents to be submitted to plaintiff and the Court, along with affidavits and other materials, should be completed in the next two or three weeks.

2. Counsel for the Government wishes to file a motion for summary judgment which probably will be completed within the next four to six weeks.

3. Counsel for plaintiff wishes to serve a set of interrogatories on the Government, and to file a motion, pursuant to the Privacy Act of 1974, for the turnover of additional documents.

4. Counsel for plaintiff also wishes to file a motion for summary judgment to be heard simultaneously with the Government's motion.

Based on the further work that must be performed in this action, counsel for all parties feel that the continuance of the pretrial conference as requested is appropriate.

DATED: November 9, 1976.

RICHARD C. LEONARD
Attorney for Plaintiff

DATED: November __, 1976.

LYNNE K. ZUSMAN

TERRY J. KNOEPP,
JOHN R. NEECE,

By_____
JOHN R. NEECE
Attorneys for Defendants

O R D E R

Good cause appearing, IT IS SO ORDERED.

DATED: November 15, 1976.

EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

TERRY J. KNOEPP
United States Attorney
JOHN R. NEECE
Assistant U. S. Attorney
United States Courthouse, Annex A
325 West F Street
San Diego, California 92101
Telephone: (714) 293-5659

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil No. 76-89-S

ORDER

This matter having come before the court on July 6, 1976, on defendants' renewed motion, pursuant to 5 U.S.C. §552(a)(6)(C), to stay further proceedings pending completion of defendants' appellate administrative review of the documents which have been requested by plaintiff pursuant to 5 U.S.C. &552 and 5 U.S.C. §552(a), and on plaintiff's motion for an order adjudging defendants, and their attorneys of record, guilty of civil contempt, and,

The court having been fully advised in the premises,

IT IS ORDERED:

1. Defendants' motion is denied.

2. Plaintiff's motion is denied.

3. Plaintiff's motion for attorney fees for preparation of the above motion for contempt and opposition to defendants' motion is denied.

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IT IS FURTHER ORDERED that the April 9, 1976, and April 20, 1976, orders of this court are reaffirmed, and that in accordance therewith defendants shall not disclose to any other person or entity the contents of any of the documents responsive to plaintiff's Freedom of Information and Privacy Act request, except for "routine use" as defined in 5 U.S.C. §552a(a)(7) and 5 U.S.C. §552a(b), until further notice from this court.

DATED: 7-7-76

United States District Judge

PRESENTED BY:

LYNNE K. ZUSMAN
On Behalf of Defendants

FORM OBD-93
12-7-73
Formerly LAA-93

☆ GPO : 1974 O—556-284

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	No. 76-89-S AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I, Elayne Caddy, being first duly sworn, depose and say:

That I am a citizen of the United States and a resident of San Diego County, California; that my business address is 325 West F Street, San Diego, California; that I am over the age of eighteen years, and not a party to the above-entitled action;

That on July 7, 1976, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of ORDER

addressed to Richard C. Leonard, Esq., 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210,

the last known address, at which place there is delivery service of mail from the United States Postal Service.

Elayne Caddy

Elayne Caddy

SUBSCRIBED AND SWORN TO before me this 7th day of July, 1976.

Notary Public in and for said county and state

OFFICIAL SEAL
MARY KNISLEY
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires MAR 13, 1979

325 West F St., Annex A, San Diego, CA 92101

USA40-98-1
(8/75)

FPI LC 10-75 5M 8955

FBI

Date: 10/14/77

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL AIRMAIL - REGISTERED
(Precedence)

TO: DIRECTOR, FBI
ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (190-20)

FREEDOM OF INFORMATION (FOIA)
AND PRIVACY ACTS (PA)
LITIGATION

Re Bureau airtel 9/30/77, captioned as above.

In accordance with referenced airtel, enclosed for FBIHQ are one copy each of docket sheets pertaining to Case Number CA # 76-0089; CA # 77-0114-N; CA # 77-0269-N; and CA # 75-0420-N.

2 - Bureau (Enc. 4)(AM-RM)
1 - San Diego

JOT:ejt
(3)

ENCLOSURE

"ENCLOSURE ATTACHED"

EX-108 REC 12

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LEGAL COUNSEL

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Approved: _____ Sent _____ M Per _____
Special Agent in Charge

54NOV 25 1977

GPO : 1975 O - 590-992

ENCLOSURE

62-116929-30

OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	S	OTHER	NUMBER	DEM.	YR.	NUMBER
974-3	76	0089	02	06	76	2	440	1					7404		76	0089

PLAINTIFFS		DEFENDANTS
JUDITH KATHERINE EXNER	vs	FEDERAL BUREAU OF INVESTIGATION, CLARENCE M. KELLEY, Director, Federal Bureau of Investigation, 10th Street and Pennsylvania Avenue, N.W., Washington, D.C., UNITED STATES DEPARTMENT OF JUSTICE, and EDWARD H. LEVI, Attorney General of the United States, Department of Justice Building, 10th Street and Pennsylvania Avenue, N.W., Washington, D.C.

CAUSE

Action under Freedom of Information Act, 5 USC 552 as amended by Pub. L. No. 93-504, 88 Stat. 1561, to obtain the files of the F. B. I. on the plaintiff.

RGR

ATTORNEYS

BRIAN D. MONAGHAN
1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

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U.S. Attorney
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(213) 380-3330

RICHARD C. LEONARD
433 North Camden Drive
Suite 1200
Beverly Hills, Calif. 90210
(213) 278-9750

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	2-9-76	70108	2-11-76	JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 1/75)

DATE	NR.	PROCEEDINGS
2-6-76	1	Fld complt for injunctive relief. Action under Freedom of Information Act, 5USC 552 as amended by Pub. L. No. 93-504, 88 Stat. 1561 to obtain the files of the F.B.I. on the pltf. JS-5 CARD MADE. Issd Summons to U.S. Mars.
2-19-76	2	Fld U.S. Mars Svc on complt for injunctive relief as to F.BI. ret'd exec on 2-17-76.
2-19-76	3	MOTS - Ent ord ex part mot for Subof atty by RICHARD LEONARD - submitted Ord to be fld by Crt. (S)
2-19-76	4	Fld AMENDED COMPLT for injunctive relief under the privacy act of 1974 and the Freedom of Information Act
	5	Fld NOT OF HRNG on ex parte mot, affidt of JUDITH KATHERINE EXNER in support of pltf's mot for an ex parte ORD, & pltf's ex part mot for an ORD 1) -- Requiring the Govt to Respond to the AMENDED COMPLT by 3-1-76; 2) - requiring Govt to produce the FBI files relating to pltf for Crt's in camera inspection by 3-1-76; and 3) - shortening time to serve & file a NOT OF MOT & mot for S/J calendarddfor 2-23-76 @ 10 a.m.
2-19-76	6	Fld ex parte mot re substitution of atty; affidts of JUDITH KATHERINE EXNER, DANIEL R. EXNER, & RICHARD C. LEONARD. Fld affidt of JUDITH KATHERINE EXNER re substitution of atty. Fld affidt of DANIEL R. EXNER re substitution of atty. Fld affidt of RICHARD C. LEONARD re substituti of atty t/w acknowledgment of svc.
	7	Fld ORD that RICHARD C. LEONARD be substituted for BRIAN D. MONAGHAN as atty for the pltf. (SMITH) Cys mld.
2-23-76	8	MOTS - Ent ord hrng ex parte mot for ORD - ord off calendar. (S)
2-26-76	9	Fld pltf-s - NOT OF MOT & mot for partial S/J (1) - requiring the Govt to produce the FBI Files relating to pltf for the Crt's in camera inspection; & (2) - for an ORD making pltf's FBI Files available to her under the Privacy Act of 1975 calendared for 3-8-76 @ 10:30 a.m. t/w affidt of svc by mail thereto. LODGED pltf's - Proposed Findings of Undisputed Facts & Conclusions of Law & Proposed Partial S/J. (Sent to Judge SCHWARTZ this date).
3-3-76	10	Fld opposition to pltf's mot for Partial S/J t/w affidt of svc by mail.
3-8-76	11	MOTS - Ent ord hrng mots cont'd to 3-15-76 @ 10:30 a.m. (S)
3-15-76	12	MOTS - Ent ord hrng mot for partial S/J - DENIED; mot to produce FBI files, mot for ORD making pltf's FBI files availabla - Got to file ANSWER by 4-10-76. Pltf to prepare ORD. (S)
3-25-76	----	LODGED ORD re defts' ANSWER to Amended Compt.
3-31-76	13	Fld deft's objection to proposed ORD t/w affidt of svc by mail.
4-9-76	14	Fld Summons as to USA ret'd exec on 2-17-76.
4-9-76	15	Fld ORD defts shall file ANSWERS to AMENDED complt by 4-12-76; by 4-12-76 defts shall file w/ Crt affidt/affidts containg info as described in Vaughn v. Rosen, 484 F.2d 820, 826-828 (D.C. Cir., 1973). Pltf's mot for Partial S/J is DENIED. (S) (ENT 4-9-76)
4-12-76	16	LODGED ord staying proc pending complt of review of documents req by pltf. Fld defts Mot to stay pending completion of review; w/affid of Quinlan J. Shea, Jr.; Affid of Michael L. Hanigan.; Defts memo in supp.
4-12-76	16	Ent ord Gov't mot to stay proceedings granted given 15 days additiona to comply w/ ct ord. (S) -cont-

DATE	PROCEEDINGS
4-16-76 (17)	Fld pltf not of ruling t/w affid of serv.
4-19-76	18 - Fld Defts ex parte application for order shortening time for filing mot to stay pending appeal w/order (S); Notice of motion for 4-20-76@10:30a.m.; motion to stay pending appeal, memo of pts & auths w/affid of serv.
	LODGED - Proposed order.
4-20-76	19- Fld exhibits in opposition to Govt's mot to Stay Action Pending Appeal t/w acknowledgment of svc.
	20- Ent ord - Hrng mot for stay pending appeal 1)- Fld ORD DENYING deft's mot of 4-12-76; 2)- Fld Govt's NOTICE OF APPEAL of ORD; & 3)- Mot for Stay pending appeal - DENIED. Pltf to prepare ORD. (S)
	21- Fld ORD that deft's mot to stay further proceedings pending completi of defts' review of documents requested by pltf - mot is DENIED. FUR ORD defts' have an additional 15 days,, to & including 4-27-76, to file their ANSWERS to AMENDED COMPLT, & defts have an additional 15 days, up to & including 4-27-76, to comply w/ provisions of ORD entered on 4-9-76, relating to flg of affidts as desceibed in para 2 & subpara 2.1 to 2.4 of th 4-9-76 ORD. (S) (ENT 4-20-76)
4-20-76	22 - Fld Defts Notice of Appeal.
4-21-76	23 - Fld Defts Designation of Record on Appeal. Rule 11g
APR 21 1976	Mld rep's trans'c'ts & C/R's record to USCA an emergency Submission
4-21-76	24- Fld ANSWER to complt t/w affidt of svc by mail.
4-26-76	25 - Fld Appellee's counter-designation of record on appeal. Rule 11g mailed cys of designated documents to USCA - emergency submission
	26 - Fld Defts regular Designation of record on Appeal. (Mld cys.)
4-27-76	- Fld Reporter's Transcript of mot to stay pending completion of review of 4-12-76 (Dona L. McQueeney CSR) (Orig +1) cy given to atty.
	Fld Reporter's Transcript of hrg mot to stay pending appeal of 4-20-76 (Donna L. McQueeney CSR) (Orig +1) cy given to atty.
4-27-76	27 - Fld Order that Defts motion to stay further proceedings pending appeal is denied. (S)
5-3-76	- Recd c.c. order of USCA staying courts orders of 4-9-76 & 4-20-76 temporarily. Appellant shall file transcripts on or before 4-30-76. Appellee is req. to file response to mot for stay on or before 5-4-76.
5-6-76	- Fld Reporters transcript of motion for summary judgment on 3-15-76 (Ruanne McArthur, CSR) 1 Vol. Orig + 2 cys.)
6-3-76	28- Fld notice of ruling from USCA t/w affidt of svc.
6-9-76	29- Fld Cost Bill & Verification, t/w proof of svc.
6-10-76	30- Fld NOT OF HRNG on mot to Tax Costs calendared for 6-21-76 @ 10 a.m. t/w proof of svc by mail.
6-10-76	31- Fld Report to the Crt from Crt ORDS entered 4-9-76 & 4-20-76 & USCA's ORD entered 5-26-76.
	32- Fld NOT OF MOT to Stay Pending Completion of Review calendared for 7-6-76 @ 10:30 a.m. t/w affidt of svc by mail.

DATE	PROCEEDINGS
5-10-76	-----LODGED ORD re: renewed mot to Stay further proceedings pending completion of review in matter.
JUN 14 1976	~~rec'd~~ Cl's record to USCA
5-21-76	-----Fld Cost Bill & Verification Taxed in sum of $18.75. (CLK)
5-23-76	33- Fld pltf's MOT for an OR adjudging defts, & their attys of record, Guilty of Civil Contempt, affidt of RICHARD C. LEONARD, & MEMO of P/As ~~calendared for 7-6-76 @ 10:30 a.m. t/w proof ofsvc by mail.~~
6-28-76	34- Fld pltf's opposition to defts' mot for a stay t/w proof of svc.
7-6-76	35- Fld deft memo in supp of their opposition to pltf's mot to adjudge defts & their attys of record, Guilty of civil contempt t/w cert of serv.
	36- HRG MOTS- Ent ord hrg pltfs mot for ord adjudging defts & their attys of record, guilty of civil contempt-denied. Hrg defts mot to stay pending completion of review-denied. Pltf to prepare ord. Ct. ords addtl documents turned over to pltf not be made public. (S).
7-7-76	LODGED- Order re hrg on 7-6-76.(sent to Judge S)
7-14-76	37- Fld defts Order that (1) defts mot to stay pending completion of review- Denied.(2) pltfs mot to adjudge defts & their attys of record, guilty of civil contempt- Denied.(3)pltfs mot for atty fees for preparation of above mot- Denied.Fur ord that orders of 4-9 &20,1976 are reaffirmed, & defts not disclose to any person the contents of document responsive to pltf's Freedom of Info & Privacy Act. (S)t/w affid of serv
9-28-76	38- Fld Not of Pre-Trial hrg set for 11-22-76 @ 10:30am. mld cys.
11-15-76	39- Fld pltf stip & ord thereon that pretrial conf set 11-22-76 @ 10:30am be cont to 2-21-77 @ 10:30am.(S)
11-22-76	- Received copy of opinion from USCA remanding cause to USDC.
	- Received c.c. of order declining to award costs or fees to either side. Costs are to abide the final determination of the case in the district court.
11-26-76	40- Ent ord pre-trial conf cont for 2-21-77 cont by stip to 2-22-77 & 2-21-77 date vacated. (S)
11-30-76	Rec'd c.c. of judgment from USCA remanding decision of USDC.
12-3-76	41- Fld notice of hrg reqst to flg c.c. of judgment of USCA remanding cause to USDC on 12-20-76 @ 10:30am.mld cys.
12-20-76	42- Ent ord hrg reqst flg c.c. judgment of USCA remanding cause to USDC Ord fld. (S)
	43-Fld c.c. of judgment from USCA remanding cause to USDC. (Ent 12-21-76)
1-18-77	44- Fld defts stip for cont of pre-trial conf set 2-22-77 be held 7-5-77 @ 10:30am. (S).
	—cont—

62-116929-30

CIVIL
~~CRIMINAL~~ DOCKET vs. F.B.I., et al., (3)

DATE	PROCEEDINGS
5-5-77	45- Fld defts notice of mot to dismiss or in alternative for S/J set 6-27-77 @ 10:30am t/w mot, memo in suppt, cert of serv & affid of serv.
	LODGED- Order granting mot for S/J. (sent to Judge S)
6-23-77	46- Fld pltf Oppo to Govt mot for S/J; reqst for in camera inspection of FBI documents; memo of P/A in suppt; Affid of Judith K. Exner; affid of Richard C. Leonard & proof of serv.
6-27-77	47- HRT MOTS- Ent ord hrg defts mot to dismiss or for S/J cont to 7-18-77 @ 10:30am. P/T cont to 7-18-77 @ 10:30am. (S)
7-5-77	48- Fld defts stip cont mot for S/J set 6-27-77 cont to 7-18-77 @ 10:30am fur that P/T conf set 7-5-77 cont to 9-12-77 @ 10:30am. (S)
7-18-77	49- Ent ord hrg defts mot to dismiss or in alternative, for S/J cont to 8-1-77 @ 10:30am. (S)
7-19-77	50- Fld efts affid of Gordon G. McNeill t/w cert of serv.
7-20-77	51- Fld pltf stip ord that Govts mot for S/J& pltfs reqst for In camera inspection set 7-18-77 be cont to 8-1-77 @ 10:30am.(S)
7-29-77	52- Fld defts reply brief t/w cert of serv.
8-1-77	53- Ent ord hrg defts mot to dismiss or in the alternative for S/J under submissio Gov't to prepare ord. P/T date of 9-12-77 vacated. Pre-trial reset for 11-15-77 @ 10:30am. XXX Ord documents in question made available to court for in camera inspection by 8-12-77. (S)
8-12-77	54- Fld affid of Marvin Lewis t/w cert of serv.
8-18-77	55- Fld pltf ord that mot for in camera inspection of FBI documents relating to pltf is Granted; fur that defts make available to court all aforesaid documents on or before 8-12-77; fur P/T conf set 9-12-77 be cont to 11-14-77 @ 10:30am. (S)

D. C. 109

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Serv. ____
Crim. Inv. ____
Fin. & Pers. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgmt. ____
Spec. Inv. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

TO : Assistant Director
Records Management Division

DATE: 11/4/77

FROM : Legal Counsel

SUBJECT: JUDITH K. EXNER v.
FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-0089-S

PURPOSE: To record dismissal of instant litigation in favor of the Government.

DETAILS: Plaintiff, alleged acquaintance of certain known organized crime figures and of the late President, John F. Kennedy, sought to gain access to certain documents pursuant to the Freedom of Information Act by letter dated 12/24/75. Plaintiff requested expeditious processing of her request since, as she alleged, her life was in jeopardy. Pursuant to Court Order, the contested documents were processed and released expeditiously, as opposed to our normal chronological processing. Thereafter, the issue of delay in processing, based on exceptional circumstances was raised in the United States Court of Appeals for the Ninth Circuit. (See Legal Counsel memo to Assistant Director, Records Management Division, dated 10/29/76.) By subsequent Court Order, dated 8/18/77, contested documents were submitted to the Court by defendant for an in camera inspection. After reviewing these documents in camera, the Court, on 10/18/77, sustained Government's position regarding application of exemptions to the documents.

The Court's action was made known to us by Memorandum and Order Granting Motion For Summary Judgment and Judgment signed by United States District Court Judge

Enclosure

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - [redacted]

EPM/RJR:wsa/lmk
(4)

REC 68 162-116429-31
ST-138
2 NOV 14 1977

(OVER)

ENCLOSURE

"ENCLOSURE ATTACHED"

b6
b7C

EPM
LC

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

5 DEC 1 1977

FBI/DOJ

Legal Counsel Memo to Assistant Director
Records Management Division
Re: JUDITH K. EXNER
v. FBI, etc.

Edward J. Schwartz on 10/17/77. Copies of these Court documents are attached.

RECOMMENDATION: None. For information.

APPROVED:

Director	Adm. Serv.	Legal Coun.
Assoc. Dir.	Crim. Inv.	Plan. & Insp.
Dep. AD Adm.	Fin. & Pers.	Rec. Mgmt.
Dep. AD Inv.	Ident.	Spec. Inv.
	Intell.	Tech. Servs.
	Laboratory	Training
		Public Affs. Off.

ENCLOSURE 391

62-116929-31

U. S. DEPARTMENT OF JUSTICE
SOUTHERN DISTRICT OF CALIFORNIA
RETURN IN FIVE DAYS TO
OFFICE OF
UNITED STATES ATTORNEY
U. S. COURTHOUSE
940 FRONT STREET, ROOM 5-N-19
SAN DIEGO, CALIFORNIA 92189

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

POSTAGE AND FEES PAID
U. S. DEPARTMENT OF JUSTICE
JUS-431

Federal Bureau of Investigation
Washington, D.C. 20535

Attn: Director

Docket DH
Secy.
Atty.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM W. LUDDY
CLERK

OFFICE OF THE CLERK
303 U.S. COURT HOUSE
SAN DIEGO, CALIFORNIA 92101

RICHARD C. LEONARD
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210

TERRY J. KNOEPP
U.S. Attorney

RE: JUDITH KATHERINE EXNER
vs. Civil 76-0089-S
FEDERAL BUREAU OF
INVESTIGATION, et al.,

You are hereby notified that Memorandum and Order Granting Motion for Summary Judgment and Judgment, in each of the above-entitled cases was X Filed X Entered on October 18, 1977.

X Copy enclosed ___ Copy not enclosed.

When the time for appeal has expired (without appeal being taken), counsel must arrange for pickup of their exhibits without further notice. Unless you respond within thirty days, they will be destroyed or otherwise disposed of pursuant to Local Rule 20(a).

I hereby certify that this notice was mailed on October 19, 1977.

WILLIAM W. LUDDY, Clerk

By L. Hinnaka
Deputy Clerk

b6
b7C

3648

B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil No. 76-89-S

MEMORANDUM AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Defendants have moved to dismiss the complaint herein, or, in the alternative, for summary judgment. The court has considered all pleadings filed by the parties in connection with these motions as well as all affidavits included therewith or incorporated therein by reference.

Plaintiff's action was brought under the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act of 1974, 5 U.S.C. §552a, demanding certain records pertaining to her in the possession of the Federal Bureau of Investigation.

Pursuant to orders of this court entered April 9, 1976, and April 20, 1976, defendants were ordered to make a report and to file an affidavit or affidavits containing the type of information contemplated by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). On June 10, 1976, defendants filed a Report to the Court incorporating an affidavit by Michael L.

FPI SANDSTONE—
8-14-67—125M—1608

Hanigan, Special Agent of the Federal Bureau of Investigation assigned in a supervisory capacity to the Freedom of Information - Privacy Acts. The Hanigan affidavit set forth the search procedure used and the exemptions applied, and appended an inventory Exhibit "A" detailing the documents released to plaintiff, the excisions and exclusions from such release and the reasons and exemptions therefor claimed under the applicable statutes. As to the documents and portions of documents not released, defendants asserted exemptions under the Privacy Act and pursuant to the Freedom of Information Act, namely 5 U.S.C. §552(b)(2); (b)(5); (b)(7)(C); (b)(7)(D); and (b)(7)(F). Defendants have released to plaintiff the documents and portions of documents described as released in said inventory Exhibit "A" as well as some additional material later released to plaintiff. Of a total of ninety-two documents identified in response to plaintiff's request, defendants have released to her eighty-six documents in whole or in part.

Defendants' motion to dismiss, or, in the alternative, for summary judgment came on for hearing and was fully argued by counsel on August 1, 1977, whereupon the court ordered that all the documents in question in possession of the defendants be made available for an in camera inspection by the court. Pursuant to such order, the documents have been made available and have been examined by the court. The documents in question are a part of voluminous organized crime investigation reports containing great quantities of material which do not pertain in any way to plaintiff and which are wholly outside the scope of her request for disclosure. Thus, plaintiff appears only as a minor figure in a great mass of investigatory material comprising the documents examined by the court. In reviewing the documents, the court has considered each of the claimed exemptions as well as the appropriate balancing test where

applicable to the (b)(7)(C) claims and has weighed the individual privacy loss that would be occasioned by disclosure as opposed to the public interest purposes that would be promoted by disclosure.

After thorough consideration of the points and authorities filed and the argument made by respective counsel as well as the in camera inspection of the documents in question, the court makes the following findings, conclusions and order:

1. Because the material sought by plaintiff may be wholly exempt from disclosure under the Privacy Act due to the investigatory records exemption embodied in 5 U.S.C. §552a(j)(2), the Privacy Act should be construed in conjunction with the Freedom of Information Act's exemptions. Plaintiff's request was, therefore, properly processed under the Freedom of Information Act.

2. The documents and portions of documents not released to plaintiff have been properly withheld in accordance with the detailed exemptions claimed by defendants.

3. Defendants have made the maximum reasonable disclosures to plaintiff of the documents in question, and plaintiff has received the documents and portions of documents to which she is reasonably entitled under the Privacy Act and the Freedom of Information Act.

4. There is no genuine issue remaining as to any material fact and defendants are entitled to judgment as a matter of law.

Wherefore, IT IS HEREBY ORDERED that defendants' motion for summary judgment be and the same is hereby granted.

DATED: October 18, 1977.

EDWARD J. SCHWARTZ, Chief Judge
United States District Court

62-116929

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil No. 76-89-S

J U D G M E N T

The court having granted defendants' motion for summary judgment herein,

IT IS ORDERED, ADJUDGED AND DECREED that the above-entitled matter be and the same is hereby dismissed.

DATED: October 18, 1977.

EDWARD J. SCHWARTZ, Chief Judge
United States District Court

FFI SANDSTONE—
8-14-67—125M—1603

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (62-116929) DATE: 11/3/77

FROM : SAC, SAN DIEGO (66-1761) (RUC)

SUBJECT: JUDITH KATHERINE EXNER
vs. FBI, ET AL
(U.S. DISTRICT COURT,
SAN DIEGO, CALIFORNIA)
CIVIL ACTION 76-0089-S

62-116929-25

Re Bureau airtel to San Diego dated 8/11/77.

On 10/18/77, Chief Judge EDWARD J. SCHWARTZ, U.S. District Court, Southern District of California, at San Diego, California, ordered that the FBI's motion for a summary judgment be granted and that EXNER's suit based upon the Privacy Act be dismissed.

For the above reasons, San Diego considers this matter closed to be reopened in the event that further appeal is taken by the plaintiff.

EX-136

2 - Bureau
1 - San Diego

PBA:jaa
(3)

REC- 85

62-116929-32

9 NOV 1977

b6
b7C

3648

5 DEC 2 5 1977

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FD-36 (Rev. 2-14-74)

FBI

Date: 11/10/77

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL AIRMAIL - REGISTERED
(Precedence)

TO: DIRECTOR, FBI
ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (190-20)

FREEDOM OF INFORMATION (FOIA)
AND PRIVACY ACTS (PA)
LITIGATION

Re Bureau airtel 9/30/77, captioned as above; and San Diego airtel to Bureau 10/14/77.

A review of the records of the Clerk of the U.S. District Court, San Diego, California, concerning cases for which docket sheets were furnished to the Bureau in referenced San Diego airtel and in accordance with instructions set forth in referenced Bureau airtel, reveals that:

Concerning cases numbered 77-0114-N and 75-0420-N, no new documents have been filed with the Court pertaining to these cases during the preceding 30 day period which the Bureau is not already aware.

Concerning case number 76-0089, on 10/18/77, EDWARD J. SCHWARTZ, Chief Judge, U.S. District Court, Southern District of California, granted the defendants motion for a summary judgment and ordered, adjudged and decreed that this case, concerning JUDITH KATHERINE EXNER, plaintiff vs. Federal Bureau of Investigation, Et Al, defendants, be dismissed.

Concerning case 77-0269-N, on 10/21/77, the Attorney for the plaintiff, CARROLL SAMUEL SCHACHT, filed with the U.S. District Court, Southern District of California, a Complaint Amended for Injunctive Relief under

(2) - Bureau (AM-RM)
1 - San Diego

JOT:ejt
(3)

NOV 14 1977

Approved: _____ Sent _____ M Per _____
Special Agent in Charge

62-116102-1
62-116102-33

the Privacy Act of 1974 and the Freedom of Information Act, the defendants being the Agent Federal Bureau of Investigation, Central Intelligence Agency, Department of Commerce, the U.S. Civil Service Commission, Department of Justice, and the Veterans Administration.

OUTSIDE SOURCE

August 10, 1977

b6

1 - Mr. Mintz
Attention:

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Campbell Exner, and subsequent litigation.

V-31 DE-19 REC-42 62-116929-34

Please be advised that an examination of the documents within our central records in preparation for the court ordered in camera review has revealed several instances where your client's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to your client. These additional references to her name have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of her name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another document previously released. The former is now being released consistent with the release of the latter.

MAILED 24 AUG 10 1977 FBI

7 JAN 25 1978

In conversation with Ms. Lynne K. Zusman of the Department of Justice, you expressed the desire of your client to have FBI records relative to Ms. Exner reprocessed for the release of any administrative material no longer exempt under Title 5, United States Code, Section 552 (b)(2). Those records consisting of 29 pages containing excisions wherein exemption (b)(2) was cited have now been reprocessed and are enclosed.

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Crim. Inv.
Fin. & Pers.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgmt.
Spec. Inv.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

61-ENCLOSURE
ENC. BEHIND FILE

cer:jmd (4)

SEE NOTE PAGE THREE

5 FEB 9 1978

MAIL ROOM ☐ TELETYPE UNIT ☐

FBI/DOJ

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no susbtantive information concerning your client.

Sincerely yours,
C. M. Kelley

Clarence M. Kelley
Director

Enclosures (61)

Richard C. Leonard, Esq.

NOTE: In conncection with the litigation related to the Judith Campbell Exner FOIPA request, the court ordered an in camera inspection. A copy of records pertaining to Ms. Exner have been prepared for the court and arranged in the order of Exhibit A of the affidavit of SA [redacted] dated 6/9/76. In addition, Ms. Exner's attorney acting in her capacity, informed Departmental Attorney Lynne Zusman that his client wanted all FBI records pertaining to her wherein (b)(2) material was excised to be reprocessed under recent guidelines set forth by the Deputy Attorney General. In reviewing our records, it was discovered that certain pages in some reports containing information relating to Ms. Exner had not been considered in previous releases, as a result of reliance upon a table of contents to identify pages wherein data relevent to the request appeared. This has resulted in the release of 73 additional pages, consisting mostly of table of contents and index pages. In addition to the above 73 additional pages, 29 previously released pages with excisions of (b)(2) material have also been reprocessed under present guidelines and released for a total supplemental release of 102 pages (61 documents).

b6
b7C

FD-36 (Rev. 7-27-76)

FBI

TRANSMIT VIA:
- ☐ Teletype
- ☐ Facsimile
- ☐ Airtel

PRECEDENCE:
- ☐ Immediate
- ☐ Priority
- ☐ Routine

CLASSIFICATION:
- ☐ TOP SECRET
- ☐ SECRET
- ☐ CONFIDENTIAL
- ☐ E F T O
- ☐ CLEAR

Date 2/1/78

AIRTEL

TO: DIRECTOR, FBI (62116929)
ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (66-1761)

JUDITH KATHERINE EXNER
VS. FBI, ET AL
(U.S. DISTRICT COURT,
SAN DIEGO, CALIFORNIA)
CIVIL ACTION 76-0089-S

Enclosed herewith for the Bureau are one copy each of the following documents:

Notice of Appeal

Plaintiff JUDITH KATHERINE EXNER's
Designation of Record on Appeal
From Final Judgment

Resistance to Application
For Attorney Fees

Judgment Awarding Attorney Fees
And Costs

Memorandum Opinion

REC- 13 62-116929-35

22 FEB 3 1978

For the information of the Bureau, the U. S. Attorney's Office, San Diego, advised that they were communicating with the Department regarding the appeal fr[illegible] the awarding of attorney fees.

FEB 3 2 11 PM

The Bureau will be kept advised.

ENCLOSURE

LEGAL COUNSEL

b6
b7C

2 - Bureau (Enc. 5)
1 - San Diego

JRR/jt
(3)

3648

Approved: _____ Transmitted _____ Per _____
(Number) (Time)

58 MAR 14 1978

GPO : 1977 O - 225-539

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210
(213) 278-9750
Attorney for Plaintiff

~~CALENDAR~~ Dec
Docket SP
Secy.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL NO. 76-89-S NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff Judith Katherine Exner hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on October 18, 1977.

DATED: December 13, 1977.

RICHARD C. LEONARD

62-116929-35

ENCLOSURE

(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

_____

in the above entitled action or proceeding; I have read the foregoing _____

_____

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

_____

_____

Executed on _____ *(date)* *at* _____ *(place)*, *California*

I declare, under penalty of perjury, that the foregoing is true and correct.

_____
Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is I am employed in the office of a member of the Bar of this Court, at whose direction the service was made; my business address is 433 N. Camden Dr., Suite 1200, Beverly Hills, CA 90210

On December 13, *19* 77, *I served the within* NOTICE OF APPEAL

_____

on the defendants
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California
addressed as follows:

Terry J. Knoepp, Esq.
Charles H. Dick, Jr., Esq.
U. S. Courthouse, Annex A
325 West F Street
San Diego, CA 92101

Lynne K. Zusman, Esq.
Department of Justice
Washington, D.C. 20530

Executed on December 13, 1977 *at* Beverly Hills *(date)* *(place)*, *California*

I declare, under penalty of perjury, that the foregoing is true and correct.

Paula G. Schwartz
Signature
PAULA G. SCHWARTZ

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210
(213) 278-9750
Attorney for Plaintiff

Docket's
Seq'

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL NO. 76-89-S PLAINTIFF JUDITH KATHERINE EXNER'S DESIGNATION OF RECORD ON APPEAL FROM FINAL JUDGMENT

Defendant, Judith Katherine Exner, hereby designates the following papers and records to be incorporated in the record on appeal and transported to the Clerk of the United States Court of Appeals for the Ninth Circuit:

1. Amended Complaint for Injunctive Relief Under the Privacy Act of 1974 and the Freedom of Information Act, filed February 19, 1976.

2. Plaintiff's Ex Parte Motion for an Order: (1) Requiring the Government to Respond to the Amended Complaint by March 1, 1976; (2) Requiring the Government to Produce the FBI Files Relating to Plaintiff for the Court's In Camera Inspection

62-116929-35

ENCLOSURE

by March 1, 1976; and (3) Shortening Time to Serve and File a Notice of Motion for Summary Judgment, filed February 19, 1976.

3. Affidavit of Judith Katherine Exner in Support of Plaintiff's Motion for an Ex Parte Order, filed February 19, 1976.

4. Notice of Motion and Motion for Partial Summary Judgment (1) Requiring the Government to Produce the FBI Files Relating to Plaintiff for the Court's In Camera Inspection; and (2) for an Order Making Plaintiff's FBI Files Available to Her Under the Privacy Act of 1974, filed on or about February 26, 1976.

5. Opposition to Plaintiff's Motion for Partial Summary Judgment, filed March 3, 1976.

6. Objection to Proposed Order, filed on or about March 31, 1976.

7. Order, filed April 9, 1976.

8. Motion to Stay Pending Completion of Review, filed April 12, 1976.

9. Ex Parte Application for an Order to Shorten Time for Filing Motion to Stay Pending Appeal, filed on or about April 14, 1976.

10. Notice of Ruling, filed April 16, 1976.

11. Exhibits in Opposition to Government's Motion to Stay Action Pending Appeal, filed April 20, 1976.

12. Order, filed April 20, 1976.

13. Notice of Appeal, filed April 20, 1976.

14. Answer to Complaint, filed on or about April 21, 1976.

15. Notice of Ruling, filed June 3, 1976.

16. Renewed Motion to Stay Pending Completion of Review,

filed on or about June 10, 1976.

17. Report to the Court, filed on or about June 10, 1976.

18. Plaintiff's Opposition to Defendants' Motion for a Stay, filed June 28, 1976.

19. Order, filed on or about July 7, 1976.

20. Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed May 5, 1977.

21. Plaintiff's Opposition to Government's Motion for Summary Judgment; Request for In Camera Inspection of FBI Documents; Memorandum of Points and Authorities in Support Thereof; Supplemental Affidavit of Judith Katherine Exner; Affidavit of Richard C. Leonard, filed June 23, 1977.

22. Affidavit of Gordon G. McNeill, filed July 19, 1977.

23. Defendants' Reply Brief, filed July 29, 1977.

24. Memorandum and Order Granting Motion for Summary Judgment, filed October 18, 1977.

25. Judgment, filed October 18, 1977.

26. Plaintiff's Motion for Award of Attorney's Fees; Affidavit of Richard C. Leonard, filed November 30, 1977.

27. Notice of Appeal, filed concurrently with this Designation.

28. This Designation of Record on Appeal.

In addition to the record of the Clerk in this matter, plaintiff further requests that the following Reporter's Transcripts of Proceedings also be filed with the Court:

1. Reporter's Transcript of Proceedings, March 15, 1976.

2. Reporter's Transcript of Proceedings, April 12, 1976.

3. Reporter's Transcript of Proceedings, April 20, 1976.

DATED: December 13, 1977.

RICHARD C. LEONARD
Attorney for Plaintiff,
Judith Katherine Exner

(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

_____

in the above entitled action or proceeding; I have read the foregoing _____

_____

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

_____

_____

Executed on _____ *(date)* *at* _____ *(place)*, *California*

I declare, under penalty of perjury, that the foregoing is true and correct.

_____
Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: I am employed in the office of a member of the Bar of this Court, at whose direction the service was made; my business ~~address is 433 North Camden Drive, Suite 1200, Beverly Hills, CA~~

On December 13, 19 77, *I served the within* PLAINTIFF JUDITH KATHERINE EXNER'S DESIGNATION OF RECORD ON APPEAL FROM FINAL JUDGMENT

on the defendants *in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at* Beverly Hills, California *addressed as follows:*

Terry J. Knoepp, Esq.
Charles H. Dick, Jr., Esq.
U. S. Courthouse, Annex A
325 West F Street
San Diego, CA 92101

Lynne K. Zusman, Esq.
Department of Justice
Washington, D.C. 20530

Executed on December 13, 1977 *at* Beverly Hills *(place)*, *California*

I declare; under penalty of perjury, that the foregoing is true and correct.

Paula G. Schwartz
Signature
PAULA G. SCHWARTZ

FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, 94th CONG., 1st SESS., at 171, 202, 243-43 (Joint Comm. Print, March 1975).

4. There is nothing in the record of this case to suggest that the plaintiff's suit brought about production of any information that she otherwise would not have received. While filing suit may have affected the timing of production, there is no basis to conclude that the plaintiff has acted as a private attorney general and compelled production of information which wrongfully was being withheld. Indeed, once the administrative machinery processed her requests, information was produced; and this court affirmed the government's position with respect to the only information that ever was withheld.

5. To argue that the plaintiff has substantially prevailed in compelling production of information wrongfully withheld, is to contend post hoc, ergo propter hoc. This court should reject such a suggestion and disallow recovery of attorney fees. See, Cameron v. Central Intelligence Agency, Civil No. C76-1741A (N.D. Ga., filed November 17, 1977) [attached as Exhibit "A"].

DATED: December 12, 1977

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
Assistant U. S. Attorney

FILED IN CLERK'S

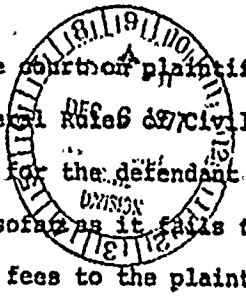
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOV 17 1977

BEN H. CARTER, Cl
By: [illegible] Deputy C

RONDO EMMETT CAMERON :
:
vs. : CIVIL NO. C76-1741A
:
CENTRAL INTELLIGENCE AGENCY :
and GEORGE BUSH, Director :

ORDER



This civil action is before the court on plaintiff's motion pursuant to rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment for the defendant entered herein on September 30, 1977, insofar as it fails to include an award of costs and attorney's fees to the plaintiff.

Plaintiff's motion is predicated upon 5 U.S.C. § 552(a)(4)(E) of the Freedom of Information Act [hereinafter "FOIA"], which authorizes a court to award reasonable attorney fees and other litigation costs in any case where the complainant has "substantially prevailed." Plaintiff contends that an executive agency should not be able to deprive an FOIA plaintiff of an attorney's fee award by unilaterally releasing documents wrongfully withheld prior to litigation. In short, plaintiff argues that in the case sub judice, he gained access to the information wrongfully withheld by the CIA only after the pressure of litigation and, therefore, that he has "substantially prevailed" within the meaning of the statute. At least three circuits of the United States Court of Appeals have held that a judgment in favor of the FOIA requester is not an absolute prerequisite to an award of attorney's fees under section 552(a)(4)(E). These decisions were based on the rationale that Congress did not intend to allow the government to evade the FOIA attorney's fee provision through eleventh hour tenders of the requested

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information after litigation of the request is already pending:

> In enacting section 552(a)(4)(E) Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complainant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action but prior to a judgment or a court order.

Cuneo v. Rumsfeld, 553 F.2d 1360 at 1365 (D.C. Cir. 1977). See also Vermont Low Income Advocacy Council Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976); Campbell v. United States Civil Service Commission, 539 F.2d 58 (10th Cir. 1976). However, notwithstanding that the complainant herein may have "substantially prevailed," there are other factors which the court must consider in determining the appropriateness of an award of costs and attorney's fees. At a minimum, the FOIA plaintiff must show that "the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." Usery, supra, at 513. In addition, the legislative history of what was to become section 552(a)(4)(E) specified four criteria to be weighed by the court in exercising its discretion to award attorney's fees: "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefits to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records sought had a reasonable basis in law."[1]

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1 Vermont Low Income Advocacy Council Inc. v. Usery, 546 F.2d 509 at 512 (2d Cir. 1976). These four factors originate from the Senate version of what was to become section 552(a)(4)(E). Although the conference substitute eliminated these four factors, the conference report explicitly states that in so doing the conferees did not intend to make the award of attorney's fees automatic or to preclude the courts, in exercising their discretion in awarding such fees, from taking these factors into

In reviewing the record in the case sub judice, the court concludes that the complainant should not prevail in his motion for an award of attorney's fees. First, the affidavit of Mr. Gene F. Wilson, Privacy Coordinator of the Central Intelligence Agency, offered in support of defendants' motion for summary judgment, establishes that the documents requested by the complainant were released as a result of a final determination of the merits of the complainant's FOIA appeal by the internal administrative processes of the defendant agency. Although the defendant failed to act promptly on plaintiff's administrative appeal of the partial denial of his initial FOIA request, no final action on the appeal had been taken by the defendant at the time this action was brought. Thus, there is substantial doubt on this record as to whether the release of the documents actually resulted from the pressure of litigation rather than from the routine disposition of an administrative appeal. Second, the complainant herein has failed to establish either the absence of potential private commercial benefit to the plaintiff from a disclosure of the documents in question or the presence of any public benefit from such disclosure. Finally, fatal to the complainant's prayer for an award of attorney's fees is his failure to act promptly following the defendant's release of additional documents or portions of documents on February 7 and February 14, 1977. The complainant's delay in communicating his position after the February releases necessitated considerable effort by defendants in the course of preparing their motion for summary judgment filed on July 14, 1977. Furthermore, the complainant herein again delayed these proceedings by failing to reply to the defendants' motion for summary judgment until September 27, 1977. Because the complainant has

needlessly prolonged this suit with disregard for the defendants and for the resulting added burden to the already heavy docket of the Northern District of Georgia, this court can see no reason for rewarding this complainant with monies from the public treasury. Accordingly, plaintiff's motion to alter or amend the judgment of September 30, 1977, is hereby denied.

IT IS SO ORDERED this 17th day of November, 1977.

William C. O'Kelley

WILLIAM C. O'KELLEY
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

No. 76-89-S

CERTIFICATE OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On December 12, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of _____

_____

_____

_____,

addressed to Richard C. Leonard, Esq., 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210,

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 12th day of December, 19 77.

Nancy Amans

Nancy Amans

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ENCLOSURE

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JAN 27 1978

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil No. 76-89-S

MEMORANDUM OPINION

Plaintiff, JUDITH KATHERINE EXNER, has moved for an award of attorney fees and litigation costs pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (a)(4)(E). Plaintiff's action was brought under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a, demanding certain records pertaining to her in the possession of the Federal Bureau of Investigation (FBI). For the reasons discussed in this opinion, the court concludes that plaintiff has "substantially prevailed" in this litigation, and that she is entitled to an award of attorney fees and litigation costs.

1 ENCLOSURE

FACTUAL BACKGROUND

On December 24, 1975, at the request of plaintiff, a letter was written to the FBI requesting access to any and all records relating to her contained in the files of the

[redacted]

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FBI. Plaintiff received no response to her request within ten working days. Deeming this failure to respond a denial of her request[1], plaintiff, by her attorney, wrote a letter to the Department of Justice dated January 11, 1976. Plaintiff indicated in this letter that she deemed her previous request denied and appealed that denial directly to the Department of Justice.

By letter dated January 15, 1976, the Director of the FBI responded to plaintiff's request for information. After acknowledging receipt of plaintiff's Freedom of Information-Privacy Acts request, the FBI letter indicated that, because of the heavy backlog of requests for information, more time would be necessary to process plaintiff's request.

During the next two weeks, plaintiff's attorney attempted, by letter and telephone call, to convince the FBI that plaintiff's request should be given priority handling. Because of the unique circumstances of her case, plaintiff believed her request was entitled to expedited treatment and processing by the government. In a letter dated February 5, 1976, the Chief of the Freedom of Information and Privacy Unit in the Office of the Attorney General denied plaintiff's request for preferential treatment. Plaintiff was advised that she could treat the February 5 letter as a denial of her administrative appeal by the Deputy Attorney General, entitling her to seek relief in the courts.

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[1] 5 U.S.C. § 552(a)(6)(A) requires an agency, upon any request for records made under the Freedom of Information Act, to determine within ten working days after the receipt of such a request whether to comply with it. The agency must immediately notify the person making the request whether the agency will comply. Under 5 U.S.C. § 552(a)(6)(C), the person is deemed to have exhausted his administrative remedies with respect to the request if the agency fails to comply with the ten day limit. It was under the authority of this statutory scheme that plaintiff deemed the FBI's failure to respond within ten working days a denial of her request.

On February 6, 1976, plaintiff filed an action in this court to compel immediate disclosure of records pertaining to her in the possession of the FBI. Pursuant to orders of this court entered April 9, 1976, and April 20, 1976, defendants were ordered to make a report and to file an affidavit or affidavits containing the detailed information contemplated by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The court also denied the government's motion to stay further proceedings pending completion of defendants' review of the documents requested.

Immediately thereafter, the defendants appealed this court's orders relating to the stay and to the requirement that a Vaughn v. Rosen affidavit be filed. On May 26, 1976, the Court of Appeals for the Ninth Circuit denied the government's motion for a stay of this court's orders pending appeal. The effect of the Ninth Circuit's denial was to force the government to produce a Vaughn v. Rosen affidavit, and any documents which were not in dispute, while the appeal was pending. The Ninth Circuit issued its decision on the substantive merits of the government's appeal on September 30, 1976. Concluding that this court did not abuse its discretion in declining to grant the defendants further time, the Court of Appeals held that "the filing of suit by a person demanding information can (but does not necessarily) move such petition 'up the line,' i.e., create a preference, particularly if a Federal Court orders it." Exner v. Federal Bureau of Investigation, 542 F.2d 1121, 1123 (9th Cir. 1976).

In the wake of this court's April, 1976, orders, and the Ninth Circuit's denial of a stay pending appeal, the defendants on June 24, 1976, released to plaintiff approximately 200 pages from 85 documents. On four additional occasions through and including August 10, 1977, more documents were released. Of a total of ninety-two documents identified

by defendants in response to plaintiff's request, defendants released to her eighty-six documents in whole or in part by August 10, 1977. As to the documents and portions of documents not released, the government asserted exemptions pursuant to the Privacy Act and the Freedom of Information Act. After examining these documents in camera, the court concluded that they were properly withheld from disclosure. The government's motion for summary judgment was granted and the action was dismissed.

PLAINTIFF'S MOTION FOR ATTORNEY FEES

Against this factual background, plaintiff has moved for an award of attorney fees and litigation costs. As a general rule of law, it is well established that attorney fees are not ordinarily recoverable by the prevailing party in federal litigation in the absence of statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Similarly, Congress has provided in 28 U.S.C. § 2412 that attorney fees may not be assessed against the United States unless they are specifically authorized by statute. In this case, the authority for an award of fees and costs derives from 5 U.S.C. § 552(a)(4)(E), which provides as follows:

> "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." [emphasis added]

The issue the court must resolve is whether the plaintiff has "substantially prevailed" as that term is used in the above statutory provision.

Policy and legislative history of § 552(a)(4)(E)

To resolve this issue, some attention must be given to the underlying policy and legislative history of § 552(a)(4)(E). The Freedom of Information Act was enacted to insure that an unnecessary web of secrecy would not be drawn around

information which the public is entitled to know. As the Court of Appeals for the District of Columbia Circuit recently noted, FOIA's basic policy is "to encourage the maximum public access to government information." Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977). The attorney fees provision of the statute has as its fundamental purpose the facilitation of citizen access to the courts to vindicate the public's statutory rights. This court finds itself persuaded by the view of the D. C. Circuit that "a grudging application" of the attorney fees provision "would be clearly contrary to congressional intent." Id.

This court also is cognizant of the fact that without some provision for attorney fees, many citizens and organizations would be unable to prosecute actions under the Freedom of Information Act. As a practical matter, costs and fees present a virtually insurmountable barrier which bars the average person from forcing governmental compliance with the law. See S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974); Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-64 (D.C. Cir. 1977). Congress realized that an allowance of fees and costs was necessary in FOIA actions to encourage full public disclosure of government information. S. Rep. No. 93-854, supra, at 18. In § 552(a)(4)(E), Congress has made a clear determination that an award of attorney fees is appropriate and desirable whenever a complainant prevails in FOIA litigation. Id.; Cuneo v. Rumsfeld, supra, 553 F.2d at 1364.

Legislative history provides additional insight into the purpose and function of the Freedom of Information Act's proviso for attorney fees. As originally proposed by the House of Representatives, the provision which was to become § 552(a)(4)(E) permitted recovery of attorney fees and litigation costs in any FOIA case in which the United States "has not prevailed"

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H.R. 12471, 93d Cong., 2d Sess. (1974). The Senate's somewhat different version proposed an award of attorney fees in any case where the complainant "substantially prevailed." S. 2543, 93d Cong., 2d Sess. (1974). The Senate bill outlined four criteria to be considered by the court in exercising its discretion to award attorney fees: (1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records sought had a reasonable basis in law. The Senate report accompanying the bill included the following explanation

> "Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fees to make the government comply with the law."

S. Rep. No. 93-854, supra, at 19.

The compromise bill which emerged from conference retained the "substantially prevailed" language of the Senate bill but eliminated the four criteria set forth above. Although the conferees did not wish to preclude the courts from taking such criteria into consideration, they believed the courts should not be limited to these criteria in exercising their discretion. H. Rep. No. 93-1380, 93d Cong., 2d Sess. 9 (1974). Consequently, the court may take into account whatever factors it deems relevant in determining whether an award of attorney fees is appropriate.

Analysis of legal issues

This particular case presents the court with a factual situation which, to the court's knowledge, has not been faced by any other federal court. Unlike so many of the

reported decisions construing § 552(a)(4)(E), this is not a case where the government voluntarily turned over everything the plaintiff sought after the lawsuit was initiated but before a final judgment. See, e.g., Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976); Cuneo v. Rumsfeld, supra; Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976). Neither side in this case was 100% successful or unsuccessful. Although the limited number of previous decisions construing § 552(a)(4)(E) provide some general guidance, the court deals here with a matter governed primarily by judicial discretion. Because of the unusual nature of this case, the court has reviewed plaintiff's request for attorney fees with a great deal of care and consideration.

In determining whether a plaintiff has substantially prevailed in FOIA litigation, the court requires two threshold conditions to be satisfied. First, the plaintiff must show that prosecution of the action could reasonably have been regarded as necessary. Second, the action must be shown to have had substantial causative effect on the delivery of the information. Vermont Low Income Advocacy Council, Inc. v. Usery, supra, 546 F.2d at 513. Both conditions have been fulfilled here.

With regard to the first condition, plaintiff had a compelling need to bring this lawsuit. She was not simply an ordinary citizen who was curious as to what information the government might have compiled on her. During her 1975 testimony before a U. S. Senate select committee on intelligence activities, she became aware that the FBI had conducted investigations and maintained files relating to her since 1960. She believed that information pertaining to her published by the Senate committee in its official report was inaccurate. Although she herself was enjoined to secrecy by the Senate committee, and had maintained strict personal silence as to the subject matter for

many years, it soon appeared that information emanating from her FBI files, some of it inaccurate, had been leaked to the press by the Senate select committee staff. Perhaps most important, she felt the leaked information regarding her alleged relationships with organized crime figures, two of whom had been murdered, exposed her to grave personal danger. Because of all these concerns, it was incumbent that plaintiff have an opportunity not only to review and correct the information in the FBI's files, but to do so as soon as possible. Given the government's unwillingness to give her request any sort of preferential treatment, the only way plaintiff could accomplish her goal was to bring this action.

As far as causative effect is concerned, the court has no doubt that this action was directly responsible for delivery of the documents plaintiff received. The government contends that plaintiff's suit did not facilitate the production of any information that she otherwise would not have received in due time. This may or may not be true; there is no proof as to what, if any, information eventually would have been produced in the absence of this action. Even assuming the government's contention is correct, the purpose of the lawsuit was to compel immediate production of documents in the government's possession. The government seems to suggest in its argument that an action affecting only the timing of production does not meet the test for an award of attorney fees. Section 552(a)(4)(E) contains no such limitation, nor does the legislative history suggest Congress desired one. The key is whether there is a substantial causative relationship between the lawsuit and the delivery of information. When the information is delivered may be as important as what information is delivered.

The court's conclusion that this action substantially caused the delivery of information is further

supported by the fact that this litigation was tedious and hard fought at every stage. Throughout the proceedings, the government presented a very formidable opposition. Virtually everything plaintiff attempted to do was vigorously opposed. Were it not for the dogged determination of plaintiff and her attorney, it is unlikely the case would ever have produced the favorable results it achieved.

There are other factors which lead the court to conclude that plaintiff substantially prevailed in this case. Plaintiff convinced this court and the Ninth Circuit Court of Appeals that she was entitled to have her request for information moved "up the line". In so doing, she established the principle that there are some exceptional cases where the government must specially process requests for information on a priority basis. In effect, plaintiff acted as a private attorney general in vindicating an important public policy. This is precisely the type of situation Congress indicated would be proper for an award of attorney fees. S. Rep. No. 93-854, supra, at 19.

In addition, the court has evaluated the nature of plaintiff's interest in the records she sought. Plaintiff had a legitimate personal interest in the documents involved in this case. There was evidence that (1) the FBI had compiled a substantial amount of information pertaining to plaintiff; (2) at least some of the information may have been inaccurate; (3) the information was being made a matter of public record without plaintiff's being given an opportunity to review it beforehand; and (4) plaintiff's personal safety might be endangered. Throughout the case, the government has urged that plaintiff wanted the information primarily for use in connection with a book she was preparing. While this may have been one reason for pursuing the action, the court believes plaintiff's primary motivation was personal rather than commercial. The

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matter is somewhat academic because plaintiff's book was published prior to the release of any documents in this litigation.

Finally, the court is impressed by the sum total of what plaintiff accomplished in this litigation. It is true that plaintiff was not completely successful. The statute, however, does not require complete success. It requires only that the complainant substantially prevail. Plaintiff here was significantly more successful than the government. Although she did not receive all the documents she sought, she did get a very substantial portion of what she requested. More important, she completely succeeded in her effort to force the government to give her information request priority treatment. On balance, the court considers plaintiff to have substantially prevailed in this litigation. Therefore, she is entitled to an award of attorney fees and litigation costs.

Amount of award

It remains for the court to determine the amount of attorney fees to be awarded. The following criteria should be considered in determining the award: time spent by attorney; novelty and complexity of the issues presented; level of skill required; customary fee charged by attorney or firm; experience, reputation, and ability of attorney; and awards in similar cases. Goldstein v. Levi, supra, 415 F. Supp. at 305-06.

Plaintiff's counsel has submitted an affidavit detailing the services rendered in this case, time spent, and his general background and experience. Counsel states in his affidavit that he has spent approximately one hundred fifty hours in connection with this litigation, including six appearances before this court, argument before the Ninth Circuit Court of Appeals, and preparation of appellate court briefs and numerous motions and pleadings. Counsel indicates that he has a substantial amount of experience in commercial litigation matters, more

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8-14-67—125M—1608

than fifty percent of which has been in federal court. The customary hourly rate charged by counsel is stated to range from $75 to $85 per hour. In this matter, counsel has billed plaintiff at the rate of $75 per hour, which this court finds to be a reasonable hourly compensation for plaintiff's attorney herein.

As the court indicated previously, this litigation was tedious and hard fought at every stage. Many of the issues were complex, particularly those concerning the plaintiff's right to have her document request accorded priority consideration. The action, which was actively litigated before this court for a period of nineteen months, was fairly lengthy. Finally, the quality of counsel's work throughout the case was consistently excellent.

Counsel for plaintiff indicated on the record that of the total of one hundred fifty hours expended by him in this matter, approximately twenty-five hours were devoted to resisting defendants' motion for summary judgment which was granted by the court. It is the finding of the court that by the time the motion for summary judgment was filed, plaintiff had received all the questioned materials to which she was entitled and that plaintiff's unsuccessful resistence of the motion produced no substantial benefit for plaintiff. Accordingly, in its allowance of fees the court will take into account only one hundred twenty-five hours of attorney time, and will order an award of $9,375.00 as and for plaintiff's attorney fees herein.

Counsel for plaintiff also has submitted an itemized list of costs and expenses. 5 U.S.C. § 552(a)(4)(E) permits an award of litigation costs in addition to attorney fees. The costs incurred by plaintiff are reasonable, and the court will order an award of $700.21 for expenses and costs.

DATED: January ~~26~~, 1978

EDWARD J. SCHWARTZ, Chief Judge
United States District Court

Copies to all parties

TERRY J. KNOEPP
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CHARLES H. DICK, JR.
Assistant U. S. Attorney
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940 Front Street, Rm. 5-N-19
San Diego, California 92189
Telephone: (714) 293-5662

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	Civil No. 76-89-S RESISTANCE TO APPLICATION FOR ATTORNEY FEES

1. The Freedom of Information Act [FOIA] authorizes recovery of attorney fees by a party who has "substantially prevailed" in the litigation. 5 U.S.C. §552(a)(4)(E).

2. Although entry of judgment in one's favor is not a condition precedent to finding that one has "substantially prevailed," recovery of attorney fees is contingent upon some causal link between filing an FOIA suit and production of the documents. See, Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976).

3. Legislative history makes it clear that the Congress contemplated that the government would need to have withheld information before one could be said to have substantially prevailed, and hence be entitled to attorney fees. See generally, Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-66 (D.C. Cir. 1977);

FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, 94th CONG., 1st SESS., at 171, 202, 243-43 (Joint Comm. Print, March 1975).

4. There is nothing in the record of this case to suggest that the plaintiff's suit brought about production of any information that she otherwise would not have received. While filing suit may have affected the timing of production, there is no basis to conclude that the plaintiff has acted as a private attorney general and compelled production of information which wrongfully was being withheld. Indeed, once the administrative machinery processed her requests, information was produced; and this court affirmed the government's position with respect to the only information that ever was withheld.

5. To argue that the plaintiff has substantially prevailed in compelling production of information wrongfully withheld, is to contend post hoc, ergo propter hoc. This court should reject such a suggestion and disallow recovery of attorney fees. See, Cameron v. Central Intelligence Agency, Civil No. C76-1741A (N.D. Ga., filed November 17, 1977) [attached as Exhibit "A"].

DATED: December 12, 1977

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
Assistant U. S. Attorney

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

February 14, 1979

Address Reply to the Division Indicated and Refer to Initials and Number

LMCole:wm
145-12-2683

FEDERAL GOVERNMENT

TELEPHONE:
(202) 633-3525

John Hall, Esquire
Legal Division
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith Katherine Exner v. Federal Bureau of Investigation (C.A. 9, No. 78-1152 and 78-1880)

Dear Mr. Hall:

This letter will confirm our telephone conversation of February 13, 1979. At that time, I informed you of the statements which the presiding judge made at oral argument in the above-captioned cases. The judge's statements are also summarized in the enclosed memorandum to the files which I wrote on the day after the argument.

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As you know, 95% of the documents at stake in the Exner case were drawn from the Bureau's files on John Roselli. In view of the judge's statement that he was once Roselli's lawyer and in view of his statement that he too may appear in the Roselli files, we asked you to send us a recommendation concerning a possible motion to disqualify. Given the extreme sensitivity of asking a federal judge to step down, we would request that any recommendation in favor of filing such a motion be signed by Director Webster.

Very truly yours,

Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosure

ENCLOSURE

REC-139

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OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : MEMORANDUM TO THE FILE

DATE: February 13, 1979
LMCole:wm

FROM : Linda M. Cole
Attorney, Appellate Staff
Civil Division

SUBJECT: Judith Katherine Exner v. Federal Bureau of Investigation, et al. (C.A. 9, No. 78-1152 and No. 78-1880)

On Monday, February 12, 1979, I presented oral argument in the above-captioned cases. The appeal in No. 78-1152 concerns the scope of the F.B.I.'s exemption from the Privacy Act. The underlying facts concern Judith Exner's attempt to obtain information from the F.B.I.'s organized crime files. As noted at p. 5 of our main brief, over 95% of the documents in dispute were drawn from files compiled during the anti-racketeering investigation of John Roselli.

At oral argument, the presiding judge (Walter Ely) stated that, prior to his elevation to the bench, he had been John Roselli's lawyer. Judge Ely further noted that his name probably appears in the Roselli files too. The judge made these comments during a discussion of the extent to which the F.B.I. could exclude persons who are named in the organized crime files from access to those files under the Privacy Act.

The judge also directed government counsel to send the Court a letter stating the whereabouts of the in camera exhibit so that the Court would have the option of studying the materials in question. The exhibit consists primarily of material from the Roselli files which was submitted to the District Court in connection with Mrs. Exner's FOIA claims. Neither party designated the exhibit for inclusion in the record on appeal.

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ENCLOSURE

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

BAB:IJ:LMCole:eac
145-12-2683

31 MAY 1978

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Exner v. F.B.I. (U.S.D.C., S.D. Cal., No. 76-89-S)

JUDITH

Cv. Judith Katherine Eileen Exner

TIME LIMITS

A protective notice of appeal from the District Court's order awarding Exner attorneys fees was filed on March 24, 1978. Exner subsequently moved to consolidate the government's appeal with her own appeal from the District Court's order holding certain records exempt from disclosure under the Freedom of Information Act. The Ninth Circuit granted the motion with the result that our opening brief on the attorneys fees issue is now due on June 26, 1978.

RECOMMENDATIONS

The F.B.I. orally recommends appeal.

I recommend appeal.

DE-62 REC-114 V-6 162-116929-36

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QUESTION PRESENTED

Whether a plaintiff who obtained expedited handling of her FOIA request has "substantially prevailed" on the merits within the meaning of 5 U.S.C. § 552(a)(4)(E) so as to be entitled to an award of attorneys' fees and costs against the United States.

STATUTES INVOLVED

5 U.S.C. § 552(a)(4)(E) provides:

> (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

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5 U.S.C. (a)(6)(A) provides:

> Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --
>
> (1) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 U.S.C. 552(a)(6)(C) pertinently provides:

> Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. * * *.

STATEMENT

On Christmas Eve, 1975, Judith Exner submitted an FOIA request to the FBI seeking access to any Bureau records concerning her. On January 11, 1976, barely ten working days later, Exner informed the Deputy Attorney General (1) that the FBI had not responded to her request within the time limits imposed by the Act, (2) that she therefore deemed her request to have been denied, (3) that he should construe her letter as a formal appeal and (4) that he must act upon her appeal within twenty working days. Exner relied upon 5 U.S.C. § 552(a)(6)(A) and (C).

On January 15, 1976, the FBI acknowledged Exner's request and explained that it could not fairly act upon her application until it had processed earlier requests from other people. Exner promptly sought priority treatment, alleging that she was afraid for her personal safety and that her records would be of historical interest. On February 5, 1976, the Deputy Attorney General refused to prefer her over the thousands of prior applicants and, on February 6, 1976, Exner sued to compel immediate disclosure.

In district court, the government argued that the FBI was entitled to additional time under 5 U.S.C. § 552(a)(6)(C) because the unexpected volume of FOIA requests which had flooded the agency constituted "exceptional circumstances" and because the agency was "exercising due diligence" in processing the requests in chronological order. The government further argued that the FOIA does not provide any basis for preferring some claims over others and that it would be unfair to process later applications before earlier ones. Although these arguments subsequently persuaded the U.S. Court of Appeals for the D.C. Circuit, See Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (1976), they did not convince the District Court. It ordered immediate production of all non-exempt material.

The government promptly sought but failed to obtain, a stay pending appeal. It therefore had to expedite its handling of Exner's request before it could present its arguments against expedition to the Ninth Circuit. By the time the case was ultimately heard, the bulk of Exner's request had already been granted.

On appeal, the Ninth Circuit agreed that the FBI receives so many FOIA requests that it literally cannot comply with the strict time limits of 5 U.S.C. §552(a)(6)(A) and that, under the circumstances, the practice of processing all requests seriatim is generally fair and reasonable. However, the Court held that 5 U.S.C. § 552(a)(6)(C) gives the district judge broad discretion in deciding whether to allow an agency additional time to process a given request and that the government had failed to show that the judge had abused his discretion in refusing to grant additional time in this case. Exner v. F.B.I., 542 F. 2d 1121 (9th Cir. 1976). Both Exner and the government thereupon requested the Court of Appeals to award costs and attorneys fees, but the Court refused, holding that "no party has as yet prevailed." Order dated November 15, 1976.

On remand, the district court examined each disputed document in camera. Finding that the FBI had made "the maximum reasonable disclosures to plaintiff," the court upheld all of the government's claimed exemptions. Order dated October 18, 1977. Nevertheless, the court awarded Exner $10,075.21 in costs and attorney's fees. Order dated January 27, 1978. The court based its decision primarily upon Exner's success in forcing the government to give her preferential treatment and secondarily upon the government's failure to prove that Exner's lawsuit did not compel any disclosures which would not have been made had she simply waited her turn. Opinion dated January 27, 1978, pp. 8-9.

Exner has appealed from the Order sustaining the government's claims of exemption and the Ninth Circuit has consolidated her appeal on the exemption issue with the government's appeal on the attorney's fees issue.

DISCUSSION

I. The District Court's reasoning is erroneous in light of the legislative history of 5 U.S.C. § 552(a)(4)(E).

In construing the attorney's fees provision of the FOIA, the Courts of Appeals have uniformly begun by analyzing its legislative history. See, e.g., Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704 (D.C. Cir. 1977); Vermont Low Income Advisory Council v. Usery, 546 F. 2d 509 (2d Cir. 1976). This

legislative history makes it clear that an award of attorney's fees should not be automatic and that, in deciding whether to make an award, the District Court should give special consideration to the four factors enumerated in the original Senate bill. Freedom of Information Act and Amendments of 1974 (94th Cong., 1st Sess., March 1975), pp. 226-27. Those factors are (1) the benefit to the public deriving from the case (2) the commercial benefit to the complainant (3) the nature of the complainant's interest in the records sought and (4) whether the government's withholding of the records sought had a reasonable basis in law. Id. A fair application of these four criteria to the instant case establishes that the award of attorney's fees was inappropriate.

1. The public benefit.

In obtaining preferential treatment for herself, Exner did not contribute to the total flow of information into the public domain. She simply forced the FBI to expend resources for her personal benefit which would otherwise have been used to process earlier FOIA requests. Open American v. Watergate Special Prosecution Force, 547 F. 2d 605, 614 (D.C. Cir. 1976). Thus, in assessing the public benefit from Exner's suit, it is important to note its displacement effect. Exner did succeed in hastening the production of the information she desired. However, she did so by delaying the production of other, perhaps more valuable, information to other requesters.

2. Commercial benefit and the nature of the complainant's interest.

The legislative history of 5 U.S.C. § 552(a)(4)(E) makes it clear that the Senate instructed the federal courts to inquire into the commercial ramifications of an FOIA request and into the nature of the complainant's interest in the records sought because it did not want to subsidize FOIA litigants who would have filed suit anyway. S. Rep. No. 93-854, 93d Cong., 2d Sess., p. 19 (1974). See also Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704, 712-13 (D.C. Cir. 1977). FOIA plaintiffs who feel a compelling need to obtain their

records on a preferential basis do not require the incentive of 5 U.S.C. § 552(a)(4)(E) to bring suit. By definition, they have a "private self-interest motive . . . sufficient to insure the vindication of the rights given in the FOIA." S. Rep. No. 93-854, at 19.

3. The legal basis for the government's conduct.

Although the government's reasons for treating all FOIA requests in chronological order were rejected by the District Court, they were subsequently accepted by the U.S. Court of Appeals for the District of Columbia Circuit. Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (D.C. Cir. 1976). The fact that the government's arguments were of sufficient weight to convince a federal appellate court should be more than enough to establish that it had a reasonable basis in law for refusing to expedite Exner's request.

In addition, the government's conduct in the instant case must be viewed against a backdrop of precedents holding that all FOIA requests are to be treated equally regardless of the intensity of the requester's interest in the documents in question. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). The government made no effort to withhold disclosable information from Exner. It simply insisted upon treating her request just like any other. Prior cases such as Sears indicated that this was the appropriate course of action.

II. The District Court's reasoning in light of the prior decisions construing 5 U.S.C. § 552(a)(4)(E).

In the first Court of Appeals decision construing 5 U.S.C. § 552(a)(4)(E), the Second Circuit concluded that "a plaintiff must show at a minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had a substantial causative effect on the delivery of the information." Vermont Low Income Advisory Council v. Usery, 546 F. 2d 509, 513 (1976) (Friendly, J.). In the instant case, the government argued that Exner had not shown the requisite causal link because she would have received the same information

simply by waiting her turn.

The District Court dismissed the contention on the grounds that "there is no proof as to what, if any, information eventually would have been produced in the absence of this action." Opinion dated January 27, 1978, p. 8. In so doing, it inverted the burden of proof set by the Second Circuit. Instead of requiring the plaintiff to show necessity or causation, the District Court required the government to show a lack thereof. This line of reasoning is clearly erroneous.

The District Court also opined that Exner had established causation because she had achieved immediate production. In the eyes of the District Court, "When the information is delivered may be as important as what information is delivered." Opinion dated January 27, 1978, p. 8. (Emphasis in original.) This line of reasoning also conflicts with applicable precedents in the Courts of Appeals. The Second Circuit has denied attorney's fees to a plaintiff who attempted to use the time limits of 5 U.S.C. § 552(a)(6)(A) to "make a federal case out of a matter that . . . . had promise of amicable resolution" Vermont Low Income Advisory Council, 546 F. 2d at 514-15. Similarly, the D.C. Circuit has observed that the FOIA's time limits "are intended to prevent the government from utilizing administrative delay to shield FOIA disputes from judicial review. They should not be read as a congressional imprimatur, conclusively establishing the necessity of court action when an agency does not comply -- particularly where the administrative delay arises from an agency's attempt to comply fully with the spirit of the FOIA . . ." Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704, 715 (1977) (emphasis added). In the instant case, the FBI was attempting to comply with the spirit of the Act. It was attempting to treat all FOIA requesters equally, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1977), under circumstances which precluded satisfying the § 552(a)(6)(A) time limits. Exner v. FBI, 542 F. 2d 1121, 1122 (9th Cir. 1976); Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (D.C. Cir. 1976).

III. The District Court's reasoning is questionable in light of the record.

The District Court's primary reason for awarding attorney's fees was that Exner had successfully forced the government to give her preferential treatment and had

established the legal principle that there are exceptional cases in which the government must give priority to some FOIA requests at the expense of others. Opinion dated January 27, 1978, pp. 7-8. However, Exner had accomplished the former on May 26, 1976 when the Ninth Circuit denied the government's motion for a stay pending appeal and the FBI began processing her request out of sequence. She accomplished the latter on September 30, 1976 when the Ninth Circuit refused to hold that the District Court had abused its discretion in requiring that her request be given priority. Both of these accomplishments were thus before the Ninth Circuit when, on November 15, 1976, it declined to award attorney's fees on the express grounds that "no party has as yet prevailed." Nothing in the record on remand would justify the District Court in reaching the opposite conclusion.

CONCLUSION

For the foregoing reasons, I recommend appeal.

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

By:

Irving Jaffe
Deputy Assistant Attorney General

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

Total Deleted Page(s) = 8
Page 68 ~ Duplicate;
Page 69 ~ Duplicate;
Page 70 ~ Duplicate;
Page 71 ~ Duplicate;
Page 72 ~ Duplicate;
Page 73 ~ Duplicate;
Page 74 ~ Duplicate;
Page 75 ~ Duplicate;

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RICHARD C. LEONARD
ATTORNEY AT LAW

433 NORTH CAMDEN DRIVE, SUITE 1200
BEVERLY HILLS, CALIFORNIA 90210
(213) 278-9750

JUN 19 8 50 AM '76

June 17, 1976

Lynne K. Zusman, Esq.
Department of Justice
Washington, D. C. 20530

Re: Judith Katherine Exner v. Federal Bureau of Investigation, et al., USDC NO. 76-89-S

Dear Ms. Zusman:

As I explained to you in our telephone conversation of Tuesday, June 15, 1976, I am extremely concerned and agitated by certain actions taken by you and the Government in connection with the above-referenced action. Although it is impossible for you to rectify certain actions you already have taken, the purpose of this letter is to clarify my position, confirm our understanding of June 15, 1976, and attempt to set ground rules for further proceedings.

The April 9, 1976, Order of the District Court required the Government to turn over certain materials to plaintiff and to describe other materials which were not being turned over. Paragraph 2.4 of the Order expressly provides, in pertinent part, that:

EX-103 REC-37 62-116929-15

22 OCT 5 1976

> "The description should not be so detailed so as to contain information which compromises the secret nature of the documents, and, in this regard, excessive reference to the actual language of the documents should be avoided."

In addition to the provisions of paragraph 2.4, paragraph 4 of the Order further provides:

FED. BU. OF INV.
F.O.I.P.A.

> "Until both the plaintiff and the Court have had an opportunity to review any documents disclosed to the plaintiff by the defendants, or any of them, the defendants shall not disclose to any other person or entity the contents of any of said documents, except for 'routine use' as defined in 5 U.S.C. §552a(a)(7) and 5 U.S.C. §552a(b)."

C/Z 10/4/76

FED. BU. OF INV.

56 OCT 13 1976

The Report to the Court filed by you on or about June 10, 1976, violates the above cited provisions of the April 9, 1976, Order in that you attached to the Report as Exhibit "B" "samples" of the documents being disclosed to the plaintiff. Not only was such disclosure in violation of the Court's Order and in direct contravention of the provisions of the Privacy Act (upon which this litigation is, in part, grounded), but also, the disclosure of the documents constitutes unnecessary, intentional, and malicious invasion of my client's privacy. Not only did you disclose a "sample" of the documents which were to remain private, but also, it appears that you selected documents for the sole purpose of embarrassing Mrs. Exner and holding her up to public scorn and ridicule. By excising certain names and references, the documents you attached to the Report to the Court are subject to interpretation which would cast aspersions on Mrs. Exner's character.

Since the damage already has been done in connection with the documents attached to the Report, you have left me with no other remedy but to initiate civil contempt proceedings against the defendants and against the attorneys whose names appear on the offending documents. Although five names appear on the document (Rex E. Lee, Terry J. Knoepp, John R. Neece, Jeffrey Axelred, and Lynne K. Zusman), if you will inform me which attorney is the responsible person, I will drop my charges against the other attorneys named. So that they will be advised of my intention to proceed with contempt proceedings, and so that they will understand my motivation therefor and my indignation, I am sending copies of this letter to the other attorneys listed on the pleading filed by the Government, as well as to Richard Lavine, Chief of the Civil Division.

In order to avoid any further problems, in our telephone conversation of June 15, 1976, you agreed not to make any further documents pertaining to Mrs. Exner public pending a ruling by Judge Schwartz. Additionally, I am awaiting a response from you as to your intentions with respect to the remaining documents which the Government is required to turn over to Mrs. Exner. I have not yet received those documents, and the time for production has passed. My oral demand of June 15, 1976, is reiterated. Failure to produce those documents for Mrs. Exner's inspection will be deemed a further contempt and will require me to proceed accordingly. Of course, the

disclosure of the required documents must be made in private so as not to occasion a further contempt and violation of the Court's Order of April 9, 1976.

Very truly yours,

RICHARD C. LEONARD

RCL:pgs

cc: Rex E. Lee, Esq.
Terry J. Knoepp, Esq.
John R. Neece, Esq.
Jeffrey Axelred, Esq.
Richard Lavine, Esq.

June 24, 1976

REGISTERED

1 - Legal Counsel
Attn: [redacted] b6 b7C

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Katherine Exner, dated December 24, 1975, and the current litigation, Exner v. FBI, et al., before the United States District Court, Southern District of California, Civil Action No. 76-89-SA.

Enclosed are two hundred pages from eighty-five documents which your client is entitled to receive pursuant to her request. For specific and detailed description of the exempted materials and applicable provisions of the statute, see the affidavit of Special Agent [redacted] b6 b7C filed in CA No. 76-89-SA, June 10, 1976, with the "Report To The Court", by Assistant United States Attorney, John R. Neece. Please note that the affidavit states that portions of eighty-three documents out of a total of ninety-two were deemed releasable. In fact portions of eighty-five are being released. The discrepancy is due to a miscount at the time the affidavit was prepared.

ENCLOSURE

REC-15 62-116929-16

Your client's request for records concerning herself is categorized as a Privacy Act request for purposes of determining fees. The applicable regulations specify a charge of ten cents per page and no charge for search efforts. Please remit a check or money order payable to the Federal Bureau of Investigation in the amount of $20 to cover the duplication costs of the enclosed release.

22 OCT 5 1976

5135

1 - Assistant Attorney General for Administration
Attention: FOIPA Administrative Unit (Room 1134)

MLH:jal (6)

716855 See Note Page Two

MAILED 10
JUN 24 1976
FBI

MAIL ROOM ☑ TELETYPE UNIT ☐

OCT 3 1976

FBI/DO

Richard C. Leonard, Esq.

You have thirty days from receipt of this letter to appeal to the Attorney General from any denial contained herein. Appeals should be directed in writing to the Attorney General (Attention: Freedom of Information Appeals Unit), Washington, D. C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

Sincerely yours,

Clarence M. Kelley
Director

Enclosures (85)

Note: Due to the litigation which ensued prior to disclosure pursuant to normal FOIPA processing, the FBI was compelled by court order to make known its disclosure decision by affidavit. Therefore no exemptions are cited in this letter and no changes should be directed pertaining to the enclosed documents unless the official doing so is prepared to authorize the filing of an additional affidavit before the court, amending the Government's prior position, e.g., as stated in 6/10/76, affidavit. Requester is receiving 200 pages from 85 documents out of a total of 396 pages (not counting "same information" in other documents) from 92 documents. Exemptions cited were Title 5, United States Code, Section 552 (b)(2), (b)(5), 7 (C), (D) and (F). In view of the court order regarding this matter, the FBI is billing, rather than collecting in advance for the duplication costs.

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.: ✓
Adm. Serv. ____
Ext. Affairs ____
Fin. & Pers. ✓
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Rec. Mgnt. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

TO : Assistant Director
Records Management Division

DATE: 10/29/76

FROM : Legal Counsel

SUBJECT: JUDITH KATHERINE EXNER v.
FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S. D. OF CALIFORNIA)
CIVIL ACTION NO. 76-89-SA

PURPOSE: Memorandum advises of the filing of an opinion by the United States Court of Appeals for the Ninth Circuit on 9/30/76 in captioned matter.

SYNOPSIS: On 9/30/76, United States Court of Appeals for the Ninth Circuit issued an opinion on whether the provisions of Title 5, United States Code, Section 552 (a)(6)(C), which allow for a stay of proceedings in FOIA suits, can be based on the FBI backlog and current processing effort. The Court held that it can but adopted the reasoning of Judge Leventhal in the Open America case.

RECOMMENDATION: None. For information.

APPROVED:		
Assoc. Dir.	Ext. Affairs	Laboratory
Dep. AD Adm.	Fin. & Pers.	Legal Coun.
Dep. AD Inv.	Gen. Inv.	Plan. & Insp.
Asst. Dir.:	Ident.	Rec. Mgmt.
Adm. Serv.	Intell.	Spec. Inv.
		Training

DETAILS: On 9/30/76, United States Court of Appeals for the Ninth Circuit filed an opinion which is attached hereto in captioned matter on the issue of whether the FBI backlog in processing

Enclosure

62-116929-17

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - [redacted]

EX 104
REC-52

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b6
b7C

EPM:rml
(4)

ENCLOSURE

CONTINUED - OVER

[redacted]

309

5 NOV 3 1976

FBI/DOJ

5010-108

Memorandum to Assistant Director
Records Management Division
Re: Judith Katherine Exner v. Federal Bureau of Investigation, et al., (U.S.D.C., S. D. OF CALIFORNIA), CIVIL ACTION NO. 76-89-SA

FOIA requests constitutes exceptional circumstances within the meaning of Title 5, United States Code, Section 552 (a)(6)(C) which allows the Court to retain jurisdiction upon the showing of exceptional circumstances and due diligence. This Court adopted the reasoning of the District of Columbia Circuit in Open America, et al. v. The Watergate Special Prosecution Force, et al., "to the extent it is concurred in by Judge Leventhal." It will be recalled that Judge Leventhal criticized the majority opinion in that he felt that the decision was overly broad and placed the burden on the plaintiff to show a "genuine need and reason for urgency." He also objected to the majority's assumption that "the Department's troubles in meeting FOIA's time limits will continue," and seeking "to justify those failures in advance." In short, Judge Leventhal would leave to the discretion of District Court whether the assertion of Title 5, United States Code, Section 552 (a)(6)(C), judged on a case-by-case basis, is valid.

[redacted] b6 b7C

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

September 30, 1976

RE: 76-1903, JUDITH KATHERINE EXNER VS. FBI, et al.

Dear

An opinion was filed and a judgment entered in the above case today, Sept. 30, 1976, remanding the case to ~~the judgment of~~ the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

Emil E. Melfi, Jr.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure

CO 76.2

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellants.

No. 76-1903

OPINION

On Appeal from the United States District Court for the Southern District of California.

Before: BARNES and GOODWIN, Circuit Judges, and TAKASUGI, District Judge.*

BARNES, Senior Circuit Judge:

This action in the district court was brought to compel disclosure to plaintiff within certain specified time limits of information sought from the files of the Federal Bureau of Investigation (herein FBI) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

It has no relation to any flat refusal by the FBI to act, but to the FBI's refusal (a) to act until it has treated all previous requests, seriatim; and (b) to act until it has satisfied both itself and, in certain matters, the Department of Justice (of which the FBI is a part), that the requested material can properly be made available. It thus deals with what time compliance the courts should order;

* The Honorable Robert M. Takasugi, District Judge, Central District of California, sitting by designation.

not on a flat or blanket refusal of the FBI to comply with plaintiff's demands.

The primary problem is that precise time limits were placed by the Congress on the furnishing of such information by the FBI, which bear no relation in actual practice to the multiple demands placed upon it, or to the capacity of the FBI work force to do the careful and thorough examination required on each such demand.

To put it in another way, the procedures adopted by the FBI in servicing citizens' demands (such as the seriatim consideration of each demand, based almost (but not entirely) on the earliest date of filing the demand) are said to violate the intent of Congress as expressed in 5 U.S.C. § 552(a)(6)(C) which provides:

> "If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." (Emphasis added.)

It is obvious that the foregoing paragraph gives the district court discretion to allow the government additional time to comply. Here the district court declined to grant further time. There is no showing that in doing so it abused its discretion. Instead, the district judge ordered partial immediate compliance.[1/] Instead of complying, the government filed in the district court an ex parte motion, based on 5 U.S.C. § 552(a)(6)(C), seeking a stay of plaintiff Exner's civil action pending "government review" of any Exner files.

The government argued that the huge number and volume of demands under the Act had created a backlog and that it was impossible to fulfill Exner's demand without giving her preference over other parties who had filed their

demands at an earlier date. Thus, the government asserted that in order to maintain its "first come - first served" policy, Exner should await her turn. On April 20, 1976, the district judge denied the government's motion for a stay. It is from this order which the government appeals.

The issue thus raised is apparently one of first impression in this Circuit. Fortunately, one other Circuit (the District of Columbia Circuit) has considered the problem in Open America, et al. v. The Watergate Special Prosecution Force, et al., No. 76-1371, ___ F.2d ___ (decided July 7, 1976).

In that case, and this, the government's defense was that "exceptional circumstance" and "due diligence" was being exercised by the government. While all three judges on the District of Columbia Circuit concurred in the result, the majority (Judges MacKinnon and Wilkey) painted with a broad brush, and according to the concurring judge (Judge Leventhal), went

> "beyond the holding which . . . requires this case to be remanded to the district court for further proceedings, delivers dictum accepting the broad premise for relief asserted by the Department of Justice, dictum in which I do not join."

It is not necessary to repeat or discuss the reasoning behind Judge Leventhal's opinion, for it is well stated therein. We accept and approve the majority opinion to the extent it is concurred in by Judge Leventhal. We hold the "first in - first out" consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable, and we hold that the filing of suit by a person demanding information can (but does not necessarily) move such petitioner "up the line," i.e. create a preference, particularly if a Federal Court orders it.

We note that some 400 documents have already been delivered to plaintiff's attorney by the FBI, and that others are being evaluated by persons employed without the FBI, but by the Justice Department. This recent factual development has answered some (but not all) of the questions the district court ordered answered.

We therefore vacate the order of the district court appealed from herein, and remand the case for a determination whether this appellant-defendant is entitled to any relief under 5 U.S.C. § 522(a)(6)(C), in light of the FBI's burden of proof to establish (1) the existence of "exceptional circumstances," (2) that the agency has and is exercising due dilegence, and (3) in accordance with this opinion. In other words, the district court still has the right to exercise its discretion in passing on the newly developed facts.

REMANDED.

FOOTNOTE

1/

The district court ordered the government within 15 days:

(1) To file the following information:

(a) Whether the FBI has any files relating to plaintiff;

(b) If such a file exists, a description of the file by size; and

(c) If such a file exists, a detailed list of any exemptions claimed by the government.

(2) To make immediately available to plaintiff all documents as to which there is no claim of exemption.

(3) To refrain from disclosing the contents of the files to any other person until plaintiff could review it.

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

NOV 22 1976

FEDERAL BUREAU OF INVESTIGATION

Richard D. Leonard, Esquire
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210

Dear Mr. Leonard:

This is in further response to the pending administrative appeal of your client, Ms. Judith Campbell Exner, concerning the handling by the Federal Bureau of Investigation of her request for access to records pertaining to herself. A partial release of the records within the scope of your client's request has been made by the Bureau and my consideration has extended only to those records which were withheld, in whole or in part.

After careful consideration of this appeal, I have decided to modify the action of Director Kelley. By copy of this letter I am requesting the Bureau to release certain additional material to you, including one serial of two pages not previously released. Other records will now be released with fewer excisions than before. In addition, there is a limited number of other records in Bureau files which pertain to your client, but which contain only the same substantive information which you either have been, or soon will be, provided. If you desire copies of these particular records, simply notify my Freedom of Information and Privacy Appeals Unit and they will be provided. The records which will continue to be withheld are considered by me to be exempt from mandatory release under the Act pursuant to one or more of the following statutory provisions: 5 U.S.C. 552(b)(2), (7)(C), (7)(D) and (7)(F). These relate, respectively, to certain purely internal agency practices and to investigatory records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of personal privacy, disclose the identities of confidential sources and endanger the lives or personal safety of law enforcement personnel. There are no reasonably segregable, nonexempt portions

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55 JAN 13 1977

of any of the withheld materials that can be released to your client. I do not consider that release of any of the withheld materials as a matter of my discretion would be appropriate.

Although I am fully aware of the fact that this matter is already in litigation, I am required by law and Departmental Regulations to advise you fully of your client's right to judicial review of my decision on this administrative appeal. Such review is available to her in the United States District Court for the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records to which she seeks access are located.

Very truly yours,

Harold R. Tyler, Jr.
Deputy Attorney General

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Serv. ____
Ext. Affairs ____
Fin. & Pers. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Rec. Mgmt. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

TO : [redacted]

DATE: 12/21/76

FROM : [redacted]

SUBJECT: FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)
FREEDOM OF INFORMATION APPEAL OF MS. JUDITH CAMPBELL EXNER

PURPOSE

To inform you of the outcome of an administrative appeal filed by Ms. Judith Campbell Exner through her attorney, Mr. Richard D. Leonard, with the Department of Justice's Appeals Unit. In accordance with the Deputy Attorney General's instructions, President Kennedy's identity, previously excised, is now being released.

DETAILS

Because of the importance of this material, on 12/6/76 the impact and full ramifications of this release were personally discussed with Mr. Quinlan J. Shea, Jr., Chief of the Freedom of Information Appeals Unit, and thereafter with Mr. Harold P. Tyler, Jr., Deputy Attorney General. The Bureau was represented at these discussions by Inspector Powers, SA's [redacted] The Bureau's position at this meeting was that the name of President John F. Kennedy should be deleted from any releases made to Ms. Exner as it would be an invasion of the privacy of the Kennedy family. Mr. Shea disagreed with this position and ordered the release of the President's name.

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Attached to this memorandum you will find additional documents released to Ms. Exner. The information outlined in red is the information Mr. Shea decided to

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b7C

1 - [redacted]
1 -
1 -

JFL:mjg (6)

Enc. (6)

REC-7 62-116928-19

5 JAN 4 1977

5 5 3 1 1977

FBI/DOJ

Memorandum to [redacted]

b6
b7C

RE: FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)
FREEDOM OF INFORMATION APPEAL OF MS. JUDITH CAMPBELL EXNER

withhold. Mr. Tyler subsequently upheld the amended release which disclosed the identity of former President Kennedy. His reasoning, therefore, is set forth in attached "Action Memorandum."

RECOMMENDATION

For information only.

Enclosures (7)

APPROVED:	Adm. Serv.	Legal Coun.
	Ext. Affairs	Plan. & Insp.
Director	Fin. & Pers.	Rec. Mgt.
Assoc. Dir.	Gen. Inv.	S. & T. Serv.
Dep. AD Adm.	Ident.	Spec. Inv.
Dep. AD Inv.	Intell.	Training

OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
Callahan
Conrad
DeLoach
Evans
Malone
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : MR. BELMONT

DATE: March 15, 1962

FROM : C. A. EVANS

SUBJECT: JUDITH E. CAMPBELL
aka Judy Campbell
INFORMATION CONCERNING

[redacted]

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b7C

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell made telephone calls from her residence in Los Angeles to Mrs. Evelyn Lincoln, secretary to the President, at the White House. The information indicating Campbell called the White House was forwarded to Mr. Kenneth O'Donnell of the White House and to the Attorney General in letters dated February 27, 1962.

SAC Simon of the Los Angeles Office telephonically furnished the following information today regarding Judy Campbell. SA [redacted] of the Los Angeles Office, while in the U. S. Court House, was approached by [redacted] who is a private investigator on the West Coast whose reputation is questionable. [redacted] remarked to the Agent that he had been in Jerry Lewis's place last week (Jerry Lewis is the well-known comedian). While there, [redacted] stated he observed Judy Campbell with John Roselli. [redacted] further remarked that he wondered what Roselli was doing with Campbell. He then made the statement that Campbell is the girl who was "shacking up with John Kennedy in the East." According to Simon at the same time this statement was made by [redacted] other persons appeared and no further statement was made by [redacted] in this connection. The Agent, of course, made no comment.

With reference to [redacted] he is an enterprising private investigator whose ethics are open to serious question. We know that he has been approached in the past by [redacted] associated with Jimmy Hoffa, to work for Hoffa collecting information on the identity of prostitutes who might have had association with members of the Kennedy family. [redacted] reportedly told [redacted] at the time of this contact that Hoffa was out to "bury the Kennedys." It is not known whether [redacted] ever actually assisted [redacted] in any such venture. (This information previously furnished to the Attorney General.)

ACTION:

REC- 37 92-3267-154

SAC Simon stated this was being furnished to the Bureau as a matter of information. We currently have John Roselli under intensive investigation under our Criminal Intelligence program. In connection with this investigation, the Los Angeles Office has previously been instructed to develop information

1 - Mr. Rosen
CHS:dlb
-3[illegible] APR 3 1962

ENCLOSURE

62-116929-[illegible]

Memorandum to Mr. Belmont
RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samual Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

Bv

V Eas

GSA FPMR (41 CFR) 101-11.6
OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

TO :

DATE: March 15, 1962

FROM :

SUBJECT: JUDITH E. CAMPBELL
aka Judy Campbell
INFORMATION CONCERNING

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell in Los Angeles to at the White House. The information indicating Campbell called the White House was forwarded to of the White House and to the Attorney General in letters dated February 27, 1962.

SAC of the Los Angeles Office telephonically furnished the following information today regarding Judy Campbell. SA of the Los Angeles Office, while in the U. S. Court House, was approached by whose reputation is questionable. remarked to the Agent that he had been in s place last week While there, stated he observed Judy Campbell with John Roselli. further remarked that he wondered what Roselli was doing with Campbell. He then made the statement that Campbell is the girl who was "shacking up with in the East." According to at the same time this statement was made by other persons appeared and no further statement was made by in this connection. The Agent, of course, made no comment.

62-109060-1578

SAC stated this was being furnished to the Bureau as a matter of information. We currently have John Roselli under intensive investigation under our Criminal Intelligence program. In connection with this investigation, the Los Angeles Office has previously been instructed to develop information

RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samual Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

Bw

V Eas

158

TO : Mr. Belmont

DATE: 8/17/62

Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

FROM : C. A. Evans

SUBJECT: JOHN ROSELLI
ANTI-RACKETEERING

[redacted] b6 b7C

John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sam Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with Evelyn Lincoln, the President's secretary at the White House. The nature of the relationship between Campbell and Mrs. Lincoln is not known. However, one [redacted] a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy. The information concerning Campbell's contacts with the President's secretary has been furnished previously to the White House and the Attorney General. b6 b7C

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to [redacted] b6 b7C

REC-1 62-3267-30

Our Dallas Office has advised that former [redacted] b6 b7C

8 AUG 28 1962 EX-109

1 - Administrative Division

56 SEP 6 1962

JEK:maw
(7)

XEROX AUG 29 1962

XEROX AUG 31 1962

22 AUG 28 1962

SENT DIRECTOR 8-13-62

PERS. REC. UNIT

ENCLOSURE 62-116929-17

Memorandum to Mr. Belmont
RE: JOHN ROSELLI

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b7C

An associate of [redacted] has indicated to the Dallas Office that one of [redacted] sons had obtained a Chevrolet sports car and was possibly in California. According to our Los Angeles agents, the man observed leaving the vicinity of Campbell's apartment did so in a Chevrolet Corvette which is a sports car.

The description [redacted] is generally similar to that of the man who entered Campbell's apartment.

As a matter of interest, [redacted] to the daughter of [redacted] candidate for Governor of Texas, [redacted] daughter committed suicide with a shotgun over a year ago. [redacted] was exonerated of any complicity in his wife's death by a grand jury.

ACTION:

In view of the highly sensitive nature of our inquiries concerning Campbell and the fact we are uncertain that the individual we observed entering the apartment is identical with the person seen driving away in a [redacted] the above information is not being disseminated to the Los Angeles Police Department at this time.

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

UNITED STATES GOVERNMENT

Memorandum

TO :

DATE: 8/17/62

FROM :

SUBJECT: JOHN ROSELLI
ANTI-RACKETEERING

John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sam Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with the White House. The nature of the relationship between Campbell and is not known. However, one of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with The information concerning Campbell's contacts with has been furnished previously to the White House and the Attorney General.

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to

-3-

An associate has indicated to the Dallas Office that one of had obtained a Chevrolet sports car and was possibly in California. According to our Los Angeles agents, the man observed leaving the vicinity of Campbell's apartment did so in a Chevrolet Corvette which is a sports car.

The description of is generally similar to that of the man who entered Campbell's apartment.

ACTION:

In view of the highly sensitive nature of our inquiries concerning Campbell and the fact we are uncertain that the individual we observed entering the apartment is identical with the person seen driving away in a Chevrolet sports car the above information is not being disseminated to the Los Angeles Police Department at this time.

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

March 26, 1962

TO MR. BELMONT

FROM C. A. EVANS

Judith E. Campbell, referred to in the attached airtel, has associated with prominent underworld figures Sam Giancana and John Roselli.

A review of telephone toll calls from Campbell's Los Angeles residence reveals that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's secretary at the White House.

Telephone toll calls were charged to Campbell to Mrs. Lincoln at the White House on November 10 and 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, at Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at that time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

[redacted] a Los Angeles private investigator of questionable reputation, referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

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b7C

ENCLOSURE

62-116929-19

March 26, 1962

Judith E. Campbell, referred to in the attached airtel, has associated with promine: underworld figures Sam Giancana and John Roselli.

The nature of the relationship between Campbell and [redacted] is not known.

[redacted], of questionable reputation, referred to Campbell as the girl who was "shacking up with [redacted] in the East."

V 9 Ex

157

February 27, 1962

BY COURIER SERVICE

92-3267

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

FEB 27 3 49 PM '62
FBI
REC'D-READING ROOM

My dear Mr. O'Donnell:

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

A review of telephone toll calls from Campbell's residence disclosed that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

BY COURIER SVC.
28 FEB 28
COMM-FBI

Tolson
Belmont
Mohr
Callahan
Conrad
DeLoach
Evans
Malone
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Ingram
Gandy

NOTE: See cover memo Evans to Belmont, 2/26/62, same caption,
JEK:rmk, asg
JEK:asg:mac
(7)

FBI
REC'D MAIL ROOM EX-116

FBI
RECEIVED-DIRECTOR

92-3267-125

19 MAR 1 1962

51 MAR 5 1962

MAIL ROOM ☐ TELETYPE UNIT ☐

97-3267-125

February 27, 1962

BY COURIER SERVICE

Honorable
Special Assistant to the President
The White House
Washington, D. C.

My dear

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

[redacted] disclosed that on November 7 and 15, 1961, calls were made to [redacted] Secretary, at the White House.

The relationship between Campbell and [redacted] or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

BY COURIER SVC.
97-3267-128
COMM-FBI

FEB 27 1962

19 MAR 1 1962

The Attorney General

February 27, 1962

Director, FBI

REC-12 92-3267 126

EX-113

JOHN ROSELLI
ANTI-RACKETEERING

FEB 27 3 49 PM '62 FBI REC'D-READING ROOM

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

A review of the telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from [redacted].

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b7C

MAILED 30
FEB 28 1961
COMM-FBI

This information is being made available to Honorable P. Kenneth O'Donnell, Special Assistant to the President.

You will be advised of all significant developments in this matter.

1 - The Deputy Attorney General

1 - Mr. Herbert J. Miller, Jr.
Assistant Attorney General

NOTE: See cover memo Evans to Belmont 2/26/62 captioned as above.
JEK:rmk,asg.

Tolson
Belmont
Mohr
Callahan
Conrad
DeLoach
Evans
Malone
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Ingram
Gandy

JEK:asg (10)

FBI
REC'D-WFO

FBI
RECEIVED-DIRECTOR

Xeroxed to Senate Select Committee 9/16/75

63 MAR 7 1962

ENCLOSURE

MAIL ROOM ☐ TELETYPE UNIT ☐

92-3267-126

The Attorney General

February 27, 1962

Director, FBI

REC 12 92-3267-126

EX-113

JOHN ROSELLI
ANTI-RACKETEERING

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

[redacted] discloses that on November 7 and 15, 1961, calls were made to [redacted] Secretary, at the White House.

The relationship between Campbell and [redacted] or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from [redacted]

b6
b7C

This information is being made available to Honorable [redacted] Special Assistant to the President.

You will be advised of all significant developments in this matter.

1 - The Deputy Attorney General

1 - Mr. Herbert J. Miller, Jr.
Assistant Attorney General

FEB 28 1961
COMM-FBI

RECD-READING ROOM
FBI

FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

Tolson
Belmont
Mohr
Callahan
Conrad
DeLoach
Evans
Malone
Rosen
Sullivan
Tavel
Trotter
Tele. Room
Holmes
Gandy

TO : Mr. Belmont

DATE: March 20, 1962

FROM : C. A. Evans

SUBJECT: JUDITH E. CAMPBELL
ASSOCIATE OF HOODLUMS
CRIMINAL INTELLIGENCE MATTER

Kennedy, John F.

There is attached a restatement of information relating to telephone calls made to the President's Secretary from Judith Campbell's Los Angeles residence.

This is being submitted as the Director may desire to bear this information in mind in connection with his forthcoming appointment with the President.

Enclosure

AAS:mp
(6)

NOT PREVIOUSLY RELEASED

ENCLOSURE

62-116929-19 B

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

WASHINGTON 25, D. C.

March 20, 1962

JUDITH E. CAMPBELL
LOS ANGELES, CALIFORNIA

Information has been developed that Judith E. Campbell, a free-lance artist, has associated with prominent underworld figures Sam Giancana of Chicago and John Roselli of Los Angeles.

A review of telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary at the White House.

Telephone toll calls were charged to residence Campbell rented in Palm Springs, California, to Evelyn Lincoln at the White House on November 10, 1961, and November 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, from Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at the time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

[redacted] a Los Angeles private investigator of questionable reputation, advised that he has seen Campbell with John Roselli. [redacted] referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

b6
b7C

NOT PREVIOUSLY RELEASED

December 21, 1976

1 - Mr. Mintz
Legal Counsel

Richard D. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

OUTSIDE SOURCE

Dear Mr. Leonard:

This is in further response to your administrative appeal under the Freedom of Information Act from the partial denial by the Federal Bureau of Investigation of your request for access to records pertaining to your client, Ms. Judith Campbell Exner.

As a result of your administrative appeal to the Department of Justice, documents from our central files were reviewed with a staff member of the Department's Freedom of Information Act Appeals Unit. Pursuant to this review, additional portions of five documents previously released to you are being disclosed.

Also, one additional document previously withheld is being released. Excisions have been made from this document in order to protect material which is exempted from disclosure pursuant to Subsections (b)(2) (material related solely to the internal rules and practices of the FBI) and (b)(7)(C) (unwarranted invasion of the personal privacy of a third party) of Title 5, United States Code, Section 552.

MAILED 10
DEC 21 1976
FBI

REC-7 62-116729-20

Sincerely yours,

C. M. Kelley

Clarence M. Kelley
Director

6 JAN 4 1977

Enclosures (6)

ENCLOSURE

JFL:mjg (8)

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Ext. Affairs
Fin. & Pers.
Gen. Inv.
Ident.
Inspection
Intell.
Laboratory
Legal Coun.
Plan. & Eval.
Rec. Mgnt.
Spec. Inv.
Training
Telephone Rm.
Director's Sec'y

MAIL ROOM ☐ TELETYPE UNIT ☐

GPO : 1976 O - 207-526

Richard D. Leonard, Esq.

1 - Assistant Attorney General for Administration
Attention: FOIPA Administrative Unit (Room 1134)
1 - The Deputy Attorney General
Attention: Quinlan J. Shea, Jr.

1 - ADIC, Los Angeles (FOIPA Information)

NOTE for ADIC, Los Angeles (FOIPA Information) - Because of the importance of this material, the impact and full ramifications of this release were personally discussed with Mr. Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy Appeals Unit, and thereafter with Mr. Harold R. Tyler, Jr., Deputy Attorney General, on 12/6/76. Release of this addditional information is being made upon the instructions of DAG Tyler, and the documents released will reveal the identity of former President Kennedy.

APPROVED:	Adm. Serv.	Legal Coun.
	Ext. Affairs	Plan. & Insp.
Director	Fin. & Pers.	Rec. Mgt.
Assoc. Dir.	Gen. Inv.	S. & T. Serv.
Dep. AD Adm.	Ident.	Spec. Inv.
Dep. AD Inv.	Intell.	Training

OPTIONAL FORM NO. 10

UNITED STATES GOVERNMENT

Memorandum

TO : MR. BELMONT

DATE: March 15, 1962

FROM : C. A. EVANS

SUBJECT: JUDITH E. CAMPBELL
aka Judy Campbell
INFORMATION CONCERNING

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell made telephone calls from her residence in Los Angeles to Mrs. Evelyn Lincoln, secretary to the President, at the White House. The information indicating Campbell called the White House was forwarded to Mr. Kenneth O'Donnell of the White House and to the Attorney General in letters dated February 27, 1962.

SAC of the Los Angeles Office telephonically furnished the following information today regarding Judy Campbell. SA of the Los Angeles Office, while in the U. S. Court House, was approached by who is a private investigator on the West Coast whose reputation is questionable. remarked to the Agent that he had been in place last week While there, stated he observed Judy Campbell with John Roselli. further remarked that he wondered what Roselli was doing with Campbell. He then made the statement that Campbell is the girl who was "shacking up with John Kennedy in the East." According to at the same time this statement was made by other persons appeared and no further statement was made by in this connection. The Agent, of course, made no comment.

92-3267-158
released on appeal

ACTION:

92-3267-157

MAR 20 1962

SAC stated this was being furnished to the Bureau as a matter of information. We currently have John Roselli under intensive investigation under our Criminal Intelligence program. In connection with this investigation, the Los Angeles Office has previously been instructed to develop information

ENCLOSURE

62-116929-20

Memorandum to Mr. Belmont
RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samual Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

Bu V Eas

TO : Mr. Belmont DATE: 8/17/62

FROM : C. A. Evans

SUBJECT: JOHN ROSELLI
ANTI-RACKETEERING

John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sam Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with Evelyn Lincoln, the President's secretary at the White House. The nature of the relationship between Campbell and Mrs. Lincoln is not known. However, one _____ a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy. The information concerning Campbell's contacts with the President's secretary has been furnished previously to the White House and the Attorney General.

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to

92-3267-30

92-3267-303
released on appeal

ENCLOSURE 62-116929-20

Memorandum to M[redacted] Belmont
RE: JOHN ROSELLI

An associate of [redacted] has indicated to the Dallas Office that one of [redacted] had obtained a Chevrolet sports car and was possibly in California. According to our Los Angeles agents, the man observed leaving the vicinity of Campbell's apartment did so in a Chevrolet Corvette which is a sports car.

The description [redacted] is generally similar to that of the man who entered Campbell's apartment.

ACTION:

In view of the highly sensitive nature of our inquiries concerning Campbell and the fact we are uncertain that the individual we observed entering the apartment is identical with the person seen driving away in a Chevrolet sports car registered to [redacted] the above information is not being disseminated to the Los Angeles Police Department at this time.

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

March 26, 1962

TO MR. BELMONT

FROM C. A. EVANS

Judith E. Campbell, referred to in the attached airtel, has associated with prominent underworld figures Sam Giancana and John Roselli.

A review of telephone toll calls from Campbell's Los Angeles residence reveals that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's secretary at the White House.

Telephone toll calls were charged to Campbell to Mrs. Lincoln at the White House on November 10 and 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, at Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at that time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

_____ a Los Angeles private investigator of questionable reputation, referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

92-3267-157
released on appeal

62-116929-20

ENCLOSURE

February 27, 1962

BY COURIER SERVICE

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

My dear Mr. O'Donnell:

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

A review of telephone toll calls from Campbell's residence disclosed that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

NOTE: See cover memo Evans to Belmont, 2/26/62, same caption,
JEK:rmk, asg

JEK:asg:mac
(7)

92-3267-125
released on appeal

62-116892-1-20

19 MAR 1 1962

The Attorney General

February 27, 1962

Director, FBI

REC-12 92-3267-126

EX-113

JOHN ROSELLI
ANTI-RACKETEERING

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

A review of the telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from William Campbell, a television producer.

This information is being made available to Honorable P. Kenneth O'Donnell, Special Assistant to the President.

You will be advised of all significant developments in this matter.

1 - The Deputy Attorney General

1 - Mr. Herbert J. Miller, Jr.
Assistant Attorney General

NOTE: See cover memo Evans to Belmont 2/26/62 captioned as above.
JEK:rmk,asg.

JEK:asg
(10)

92-3267-126
released on appeal

62-116929-20

FEB 27 3 49 PM '62 FBI REC'D-READING ROOM

FEB 28 1961 COMM-FBI

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. Belmont

DATE: March 20, 1962

FROM : C. A. Evans

SUBJECT: JUDITH E. CAMPBELL
ASSOCIATE OF HOODLUMS
CRIMINAL INTELLIGENCE MATTER

Kennedy, John F.

There is attached a restatement of information relating to telephone calls made to the President's Secretary from Judith Campbell's Los Angeles residence.

This is being submitted as the Director may desire to bear this information in mind in connection with his forthcoming appointment with the President.

Enclosure

AAS:aap
(6)

Memo from official and confidential files of former Director Hoover
Released on appeal

62-116929-20

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to File No.

WASHINGTON 25, D. C.

March 20, 1962

JUDITH E. CAMPBELL
LOS ANGELES, CALIFORNIA

Information has been developed that Judith E. Campbell, a free-lance artist, has associated with prominent underworld figures Sam Giancana of Chicago and John Roselli of Los Angeles.

A review of telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary at the White House.

Telephone toll calls were charged to residence Campbell rented in Palm Springs, California, to Evelyn Lincoln at the White House on November 10, 1961, and November 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, from Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at the time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

_____ a Los Angeles private investigator of questionable reputation, advised that he has seen Campbell with John Roselli. _____ referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

62-116929-20

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re: Freedom of Information Appeal
of Judith Campbell Exner
Attorney: Richard D. Leonard

ACTION MEMORANDUM

Background

Ms. Judith Campbell Exner, through a previous attorney, filed a request with the Federal Bureau of Investigation for copies of all records pertaining to herself. Upon the failure of the Bureau to issue a timely response, she filed this appeal. 1/

Departmental Positions

The Bureau and I are in disagreement as to the disposition of a portion of the records involved in this appeal.

Facts and Discussion

The Bureau maintains no main file on Ms. Exner. Information concerning her appears in ninety-two reference serials ["see references"] from the Bureau's central files

REC-7

62-116929-21

1/ Upon the failure of the Department to adjudicate this appeal on a timely basis, Ms. Exner filed suit in United States District Court for the Southern District of California. The court denied the Department's motion for a stay of the proceedings and ordered the processing of both the initial request and this administrative appeal. The Bureau subsequently made available a significant amount of material. The Ninth Circuit has since issued a ruling stating that the District Court should not have "ignored" our position on the stay motion and remanding for possible further consideration. Under the circumstances, however, I propose that we simply adjudicate the appeal, as suggested by the Civil Division.

JAN 4 1977

5 JAN 31 1977

ENCLOSURE

and one serial from former Director Hoover's "Official and Confidential" ["O.C."] files. Seventy-six of these serials were properly processed by the Bureau, according to our precedents, in the course of its initial review. Content excised from released documents and seven serials which were withheld in their entirety are exempt from mandatory release, in my judgment, pursuant to the routine application of exemption 2 [internal agency practices] and three clauses of the investigatory records exemption, 7(C) [unwarranted invasion of personal privacy], 7(D) [identities of confidential sources] and 7(F) [danger to law enforcement personnel]. Of the material withheld, the Bureau has now agreed to release to Ms. Exner certain portions of eleven serials [other portions of eight of these same serials have already been made available]. The Bureau has, however, objected to the release of portions of five other serials [other portions of four of which have already been made available], on the basis that the releasable substantive information contained therein has been made available to the requester by means of documents already provided. I concur in the factual conclusion that, in every instance, the substantive information contained in these five serials has already been made available to Ms. Exner. In fact, some of these withheld records are merely cover pages of Bureau investigative reports which simply synopsize the detailed material contained in the reports, which has already been released to her from the bodies of the reports. The Bureau contends that to release the material "again" constitutes an unnecessary administrative burden neither compelled nor contemplated by the Act. I disagree, in accordance with our precedents, and my proposed letter gives Ms. Exner the option in the matter.

My second area of disagreement with the Bureau concerns certain excisions from three documents [two letterhead memoranda dated March 15 and August 17, 1962, plus a note dated March 26, 1962, all three of which were from Mr. Evans to Mr. Belmont] which were among those serials originally released. Copies of these serials, with and without the excisions made by the Bureau, are at Tab A. The considerably fewer excisions I propose are indicated in red on the complete-text copies [administrative markings could also be deleted, to the extent they were previously]. Two of the statements, in quoting an allegation made by a certain private investigator, describe "Campbell" as "the girl who was 'shacking up with John Kennedy in the East.'" The third statement, reflecting the same rumor, notes that ". . . a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy." The Bureau excised the name of the former President from these comments and contends that it should continue to be deleted on

the basis of exemption 7(C), on the theory that its release would constitute an unwarranted invasion of the privacies of the Kennedy heirs. In my judgment, the application of this general principle to these particular records is not appropriate. 2/ The Bureau has already released the critical allegation in each document with only the name of the former President deleted. I agree with the release of the allegation, but not with the excision of President Kennedy's name. It is my judgment that release of the name of the former President will not serve to further invade the privacy of the Kennedy family. Given what is in the public domain, taking out his name is nothing but a mechanical application of a general rule in an inappropriate specific context.

The third area of disagreement concerns the Bureau's handling of certain portions of the same three records, as well as two other records [a letter to Kenneth O'Donnell and a memorandum to the Attorney General, both from Director Hoover and both dated February 27, 1962]. These latter items are at Tab B, in both unexcised form and as released by the Bureau; my recommendation is that both of these items be released with no excisions [again, with the possible exception of purely administrative markings]. Certain portions of these five records directly link the requester to the White House, not as a matter of rumor, or mere allegation, but as a matter of fact. It is shown that Ms. Exner was in telephone contact with Ms. Evelyn Lincoln, President Kennedy's personal secretary. Unlike the "shacking up" allegation, the release of which can do no one any real harm, the Bureau has actually released what must be viewed as a significant corroborating fact in support of Ms. Exner's own allegations as to the fact of her relationship with President Kennedy. It also appears from these materials as released that Director Hoover brought all of this information [i.e., Campbell's association with Roselli and Giancana, the allegation about Campbell and President Kennedy and the fact of Campbell's calls to Ms. Lincoln] to the personal

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2/ You have previously held that the release of "quite intimate or personal" information about a deceased person could, given the appropriate circumstances, constitute an unwarranted invasion of the privacy of an heir. No. 1507a, National Enquirer and John M. Cathcart. As in the appeal of [redacted] for Sumner Welles material, however, we are dealing here with reports concerning statements of an allegation. We do not know the extent to which the "rumor" circulated in 1962; we do know that its circulation in 1976 [Parade, Nov. 7, 1976, page 2] is widespread. The "gross" invasion of the privacy of the Kennedy heirs on this point has already occurred. b6 b7C

attention of the Attorney General and the Special Assistant to the President at the White House. When the actual information is coupled with the fact of such action by Director Hoover, it constitutes strong circumstantial corroboration of Ms. Exner's statements that she had an intimate relationship of some duration with President Kennedy. If the privacy of the Kennedy heirs was to be viewed as outweighing the presumed public interest in disclosure in this area, the portions of these five documents showing a definite connection between Ms. Exner and the White House should have been withheld in their entireties. Taking out the names of Ms. Lincoln and Mr. O'Donnell was hardly sufficient to do the job.

Given the situation with which we are confronted, in light of what has already been released, your options are narrow and not particularly attractive. My own view is that the names of Mr. O'Donnell and Ms. Lincoln should be reinstated -- if for no other reason than to avoid looking silly. Given the known (and released) facts that Ms. Exner "called the White House" and "has been in telephonic contact" with someone at the White House and that the "nature of the relationship between Campbell and [excised] is not known," etc., it is obvious we knew that Ms. Campbell/Exner called someone [a Secretary with a capital "S"], but that we did not know why or what was said. By a process of elimination, the fact that our "source" was telephone toll records can be demonstrated -- I believe with logical certainty. The fact that we had access to such information is very persuasive -- although not conclusive -- that the actual telephone companies were our source. For a number of reasons, I propose that this information be reinserted by you as well.

Admitting that we had access to telephone toll records [in this particular case] does minimal violence to our general, overriding principle of protecting source identities. There are two definite beneifts to be gained by the course of action I propose, however, both of which redound to the benefit of the F.B.I. First, we show that the Bureau was not keeping tabs on President Kennedy himself [one current rumor] and, second, we show that Director Hoover commendably brought this information to the attention of the proper individuals. Both Director Hoover and the Bureau have been accused of seeking out and storing up "dirt" on prominent persons to use for improper purposes. A logical target of such activities could well have been the President. In this entire episode, however, the Director and the Bureau handled themselves well, with the ultimate result that a connection between organized crime and the President of the United States was snapped, after being uncovered by the Bureau in the course of a perfectly proper investigation. Nothing we can do now will thwart Ms. Exner. The

privacy of the Kennedy family is beyond saving [by no means solely or even largely as the result of the Bureau's release in this case]. I believe that we may as well salvage what we can.

The last area of disagreement concerns the single serial from Director Hoover's "O.C." files. This serial, which is at Tab C, consists of two pages and was not released by the Bureau. One page is a letterhead memorandum from Los Angeles titled with the name of the requester which, like the five serials discussed above, reiterates information contained in documents which have been released to the requester. It reflects her organized crime connections, the "relationship" with Evelyn Lincoln and the "rumor" that Campbell has been intimate with President Kennedy. The other page of the serial is an internal cover memorandum, dated March 20, 1962, which states that the information contained in the letterhead memorandum is being provided by Mr. Evans to Mr. Belmont for the benefit of Director Hoover in light of an impending meeting scheduled between himself and President Kennedy. 3/ The Bureau contends that the letterhead memorandum should not be released for the same reason [that it is duplicative] addressed and rejected above. In this case, moreover, I really don't agree that the "information" it contains has already been made available to Ms. Exner. The "linkage" of the content of the letterhead memorandum with the internal cover memorandum puts the same old facts into a somewhat unique factual perspective. In any event, the statutes deal with "records," not "information." The cover memorandum, according to the Bureau, is outside the scope of this request, or, in the alternative, exempt from mandatory release in its entirety pursuant to exemptions 2 and 7(C). The Bureau's position on "scope," in my judgment, should be rejected out of hand. The cover memorandum relates to the letterhead memorandum and both clearly concern this requester. The exemption 2 argument is

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3/ There is no indication in the file whether this meeting actually took place, although other "information" leads one to conclude that it probably did and that they did talk about Ms. Exner.

similarly indefensible. In my mind, a document which furnishes information on a particular individual in the context of that individual being a possible topic of conversation at a proposed meeting between the Director of the F.B.I. and the President of the United States obviously cannot be withheld as relating solely to internal agency practices.

The basic 7(C) argument is slightly more tenable logically, but equally unpersuasive. The Bureau contends, as with the release of the former President's name in the serials discussed above, that the release of the cover memorandum, at least in conjunction with the letterhead memorandum, would constitute an unwarranted invasion of the privacy of the Kennedy family. For the reasons already indicated, I disagree. I recommend that both the cover and letterhead memoranda be released with limited excisions pursuant to exemptions 2 [administrative markings only] and 7(C) [the identity of the private investigator responsible for the rumor]. As with the documents at Tab A, I propose leaving in the names of Messrs. Evans and Belmont. To do so is, in this context, absolutely not an unwarranted invasion of their privacy.

Recommendation

I recommend that you modify the action of Director Kelley as indicated herein. A proposed letter to effect this result is attached.

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz

July 13, 1977

1 - [redacted]

Assistant Attorney General
Civil Division
Attention: Lynne K. Zusman

Assistant Director - Legal Counsel
Federal Bureau of Investigation

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-89-S

FEDERAL GOVERNMENT

Reference is made to the conversation between Special Agent [redacted] and Departmental Attorney Lynne K. Zusman on July 12, 1977, in which she requested an affidavit in support of defendant's opposition to in camera inspection.

Enclosed for your assistance and information are the original and five copies of the affidavit of Special Agent [redacted]

Enclosures (6)

NOTE:

Per request of DOJ Attorney, Lynne K. Zusman, original and five copies of Affidavit of SA [redacted] Organized Crime Section, Division 6, being forwarded in support of opposition to in camera inspection.

EPM:dmf (6)

ST-117 REC 44 62-116927-2

APPROVED:

Director	Adm. Serv.	Legal Coun.	
Assoc. Dir.	Crim. Inv.	Plan. & Insp.	
Dep. AD Adm.	Fin. & Pers.	Rec. Mgnt.	
Dep. AD Inv.	Ident.	Spec. Inv.	
	Intell.	Tech. Servs.	
	Laboratory	Training	
		Public Affs. Off.	

2 JUL 22 1977

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Crim. Inv.
Fin. & Pers.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Spec. Inv.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

ENCLOSURE

1 - [redacted]

55 AUG 1 1977

MAIL ROOM ☑ TELETYPE UNIT ☐

3648

FBI/DOJ

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

Civil Action Number
76-89-S

FEDERAL BUREAU OF INVESTIGATION,

Defendant

AFFIDAVIT

I, Gordon G. McNeill, being duly sworn, hereby depose and say as follows:

I have been a Special Agent (SA) of the Federal Bureau of Investigation (FBI) for approximately eleven years, and for the past eight years have been involved in investigations in the organized crime field. I am currently assigned to FBI Headquarters (FBIHQ), at Washington, D. C., as a Supervisor in the Organized Crime Section, specifically

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62-116929-22

Enc to AAG Memo + Civ Div 7/13/77 EPM:dlw

ENCLOSURE

that Unit dealing with organized crime in the Western United States. I am thoroughly familiar with the FBI's efforts in this regard including our use of informants, the necessity of maintaining their identities secret and repercussions which could ensue from disclosure of their identities, even inadvertent.

As stated in the Affidavit of Special Agent Michael L. Hanigan, dated June 9, 1976, at page six, paragraph seven, "nearly all the documents containing information concerning plaintiff were obtained from an anti-racketeering investigation of John Roselli." Other references to plaintiff were located in files dealing with the broad subject matter of the FBI's criminal intelligence program as it relates to certain FBI Field Offices in California. As previously stated in the Hanigan Affidavit, plaintiff's name appears in a small portion of these documents. These documents are replete with information pertaining to other individuals gathered by high level organized crime informants. Dissemination of the information received from these informants could, in my opinion, place their lives and physical well-being in jeopardy as well as that of their families. Furthermore, disclosure of their identities could severely hinder this Bureau's ability to continue to receive high quality information in this complex area of investigation. These investigations consume years of effort to develop and premature disclosure of some of these sources could affect investigations in progress

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and compromise the future effectiveness of the sources in gathering quality information in the organized crime area.

GORDON G. MC NEILL
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 3rd day of July, 1977.

Notary Public

My commission expires _____.

FEDERAL GOVERNMENT

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210

(213) 278-9750

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER, Plaintiff, -vs- FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	CIVIL NO. 76-89-S STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective attorneys of record, that the Government's Motion for Summary Judgment and plaintiff's Request for In Camera Inspection set for Monday, July 18, 1977, at 10:30 a.m., before the Honorable Edward J. Schwartz, be continued to Monday, August 1, 1977, at the same time and place.

This Stipulation is entered into at the request of counsel for the Government who had important business in Washington which has to be attended to on Monday, July 18, 1977.

DATED: July 15, 1977.

RICHARD C. LEONARD

DATED: July 19, 1977.

TERRY J. KNOEPP
United States Attorney

By /s/
CHARLES H. DICK, JR.
Assistant U. S. Attorney
Attorneys for Defendants

O R D E R

Good cause appearing, IT IS SO ORDERED.

DATED: July 20, 1977.

EDWARD J SCHWARTZ
UNITED STATES DISTRICT JUDGE

1 - [redacted]
Attn: [redacted] b6 b7C
1 - Mr. Mintz
1 - [redacted]

August 10, 1977

FEDERAL GOVERNMENT

Honorable Edward J. Schwartz
United States District Court
Southern District of California
San Diego, California 92189

Dear Judge Schwartz:

Reference is made to suit captioned Judith Katherine Exner v. Federal Bureau of Investigation, et al., Civil Action Number 76-89-S.

Enclosed please find a copy of the Affidavit of Special Agent (SA) [redacted] b6 b7C Federal Bureau of Investigation (FBI) Headquarters, Washington, D. C., to be filed August 12, 1977, in compliance with your order of August 1, 1977, for in camera inspection.

Department of Justice Attorney Lynne K. Zusman, has advised that with your permission the FBI may maintain the in camera documents at our San Diego Office. These documents will be made available at your convenience by Special Agent in Charge Ronald L. Maley, or his assistant, John C. McGinley, at 231-1122.

Assoc. Dir. ___
Dep. AD Adm. ___
Dep. AD Inv. ___
Asst. Dir.:
Adm. Serv. ___
Crim. Inv. ___
Fin. & Pers. ___
Ident. ___
Intell. ___
Laboratory ___
Legal Coun. 1
Plan. & Insp. ___
Rec. Mgnt. ___
Spec. Inv. ___
Tech. Servs. ___
Training ___
Public Affs. Off. ___
Telephone Rm. ___
Director's Sec'y ___

REC-36 62-116929-24
ST 104
2 AUG 17 1977

ENCLOSURE

EPM:dlr (9) (SEE NOTE, PAGE 2)

MAIL ROOM ☑ TELETYPE UNIT ☐

FBI/DOJ

Honorable Edward J. Schwartz

SA [redacted] Legal Counsel Division, FBI Headquarters, may be contacted at FTS number 324-4522, if you desire any further assistance. b6 b7C

Sincerely yours,

John A. Mintz
Assistant Director - Legal Counsel

Enclosure

1 - Richard C. Leonard, Esq.
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210

1 - Assistant Attorney General (Encs. 2)
Civil Division
Attention: Lynne K. Zusman

1 - United States Attorney (Enc.)
Southern District of California
Attention: Charles B. Dick, Jr.
Assistant United States Attorney

NOTE:

Per instructions from DOJ Attorney Lynne K. Zusman, copy of Affidavit of SA [redacted] transmitted herewith. b6 b7C

APPROVED:
Director
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Adm. Serv.
Crim. Inv.
Fin. & Pers.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Eval.
Spec. Inv.
Tech. Servs.
Training
Public Affs. Off.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

Civil Action Number
76-89-SA

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants

Enc. to AUSA Picone 4 PM 8/10/77

AFFIDAVIT

I, Marvin Lewis, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Branch of the FBI, Washington, D. C.

(2) Pursuant to the Court's Order of August 1, 1977, I have prepared documents responsive to plaintiff's FOIPA request for the Court's in camera inspection. These

ENCLOSURE 62-116929-14

have been previously described in Exhibit A to Second Affidavit of Michael L. Hanigan, dated June 9, 1976 (hereinafter Second Hanigan Affidavit).

(3) As explained in the Second Hanigan Affidavit, documents containing information identifiable with the plaintiff were scattered through volumes of materials concerning the investigation of others. The full document in which plaintiff's name appears is being submitted. The in camera documents have been assembled on "file backs" and in the order described in the Second Hanigan Affidavit. An index sheet has been attached to each package, and each package is lettered sequentially. This sheet also sets forth the page number in the Exhibit to the Second Hanigan Affidavit where the document has been previously described and the pages in the document which are pertinent to plaintiff's request.

(4) Plaintiff's counsel has been advised that additional administrative material previously withheld would now be released pursuant to a change in Department of Justice policy regarding instances in which the exemption allowed by Title 5, United States Code, Section 552 (b)(2) is asserted. Routing blocks and routing stamps have been released pursuant to this change. File numbers previously withheld only for convenience of processing have also been released. Exemption (b)(2), in conjunction with (b)(7)(D), will continue to be asserted to withhold informant symbol numbers. These numbers represent the internal FBI practice utilized to protect the identity of

sources from unauthorized disclosure. They play an integral part in affording maximum security to FBI informants. Release would cause a breakdown in the security system and could assist in the actual identity of the sources.

(5) A close review of all documents in preparation for this in camera review has revealed several instances where plaintiff's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to the plaintiff. These additional references to the plaintiff have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of the plaintiff's name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another which was released in part. The former has now been released to plaintiff consistent with the release of the latter.

(6) The aforementioned changes and corrections set forth in paragraphs four and five, supra., are included in the documents available to the Court for in camera inspection

hereof as Exhibit A.)

(7) Those portions of the documents for which no exemption is claimed have been marked through with a yellow highlighter. This is the material which has now been released pursuant to plaintiff's FOIPA request, administrative appeal and the current in camera review. Exemptions allowed by the FOIA have been noted in the margin. The notation "OSR," indicates that the paragraph is "outside the scope" of plaintiff's request and appears only on those pages listed on the index sheet.

Marvin Lewis
MARVIN LEWIS
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 10th day of August, 1977.

Sharon Fulton
Notary Public

My commission expires October 31, 1980

August 10, 1977

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Campbell Exner, and subsequent litigation.

Please be advised that an examination of the documents within our central records in preparation for the court ordered in camera review has revealed several instances where your client's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to your client. These additional references to her name have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of her name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another document previously released. The former is now being released consistent with the release of the latter.

In conversation with Ms. Lynne K. Zusman of the Department of Justice, you expressed the desire of your client to have FBI records relative to Ms. Exner reprocessed for the release of any administrative material no longer exempt under Title 5, United States Code, Section 552 (b)(2). Those records consisting of 29 pages containing excisions wherein exemption (b)(2) was cited have now been reprocessed and are enclosed.

62-116929-21

Exhibit A ENCLOSURE

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no susbtantive information concerning your client.

Sincerely yours,

Clarence M. Kelley
Director

Enclosures (61)

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - [redacted]

b6
b7C

8/11/77

Airtel

FEDERAL GOVERNMENT
Via Federal Express

To: SAC, San Diego (66-1761)

From: Director, FBI

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-89-S

Enclosed are the original and three copies of a letter from Assistant Director John A. Mintz, Legal Counsel Division, to United States District Court Judge Edward J. Schwartz, dated 8/10/77; the original and four copies of the Affidavit of SA [redacted] and one set of documents relating to plaintiff's FOI-PA request.

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b7C

Plaintiff instituted captioned litigation to obtain documents pertaining to herself under the FOI-PA. On 8/1/77, Judge Schwartz ordered the defendants to produce documents pertaining to this litigation for his in camera inspection by 8/12/77.

On 8/5/77, Departmental Attorney Lynne K. Zusman advised that she contacted the law clerk to Judge Schwartz regarding the maintenance of these documents in the San Diego Field Office. As a result of these conversations, Ms. Zusman advised that the Court had no objection to the San Diego Office maintaining the documents provided that they would be made available to him at his convenience.

62-116939-25
ST 104 [illegible]-36

San Diego insure that original and three copies of enclosed affidavit are hand delivered to AUSA Charles H. Dick, Jr., for his filing and service on plaintiff no later than 8/12/77. Further, insure hand delivery of original and one copy of letter to Judge Schwartz from Assistant Director Mintz. (Copies of this letter being mailed from Headquarters.)

AUG 17 1977

Enclosures (10)
EPM:dlr (6)
NOTE:

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2 - ENCLOSURE

Original and four copies of Affidavit of SA [redacted] and in camera documents being forwarded to San Diego Office. On 8/1/77, Court ordered in camera inspection of documents. After conversations with law clerk to Judge Schwartz, DOJ Attorney Lynne K. Zusman advised that would be permissible for FBI to maintain documents at San Diego Office. SA [redacted] San Diego, advised of arrangements made with Court.

20 SEP [illegible]
MAIL ROOM [ ] TELETYPE UNIT [ ]

By Federal Express 8-11-77

FBI/DOJ

APPROVED: Director, Assoc. Dir., Dep. AD Adm., Dep. AD Inv., Asst. Dir.: Adm. Serv., Crim. Inv., Fin. & Pers., Ident., Intell., Laboratory, Legal Coun., Plan. & Insp., Rec. Mgnt., Spec. Inv., Tech. Servs., Training, Public Affs. Off., Telephone Rm., Director's Sec'y

RICHARD C. LEONARD
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Attorney for Plaintiff

Filed
8-18-77

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

-vs-

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

CIVIL NO. 76-89-S

ORDER

On August 1, 1977, at 10:30 a.m., Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment and Plaintiff's Request for In Camera Review came on for hearing before the Honorable Edward J. Schwartz. Following oral argument, and the Court's consideration of all Points and Authorities filed in support and in opposition to the Motion, and review of the file, it is hereby ORDERED as follows:

62-116929-210
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Plaintiff's Motion for In Camera Inspection of all of the Federal Bureau of Investigation documents relating to Plaintiff, Judith Katherine Exner, is granted; and it is further

ORDERED that the Defendants shall make available to the Court all of the aforesaid documents on or before Friday, August 12,

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1977, for purposes of the Court's in camera inspection.

IT IS FURTHER ORDERED, that the Pretrial Conference previously set to be held on September 12, 1977, be continued until Monday, November 14, 1977, at 10:30 a.m. before the Honorable Edward J. Schwartz.

Dated: 8-18-77

/s/ Edward J. Schwartz
United States District Judge

SUBMITTED BY THE PARTIES:

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433 North Camden Drive
Suite 1200
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Attorney for Plaintiff

LYNNE K. ZUSMAN
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By:
CHARLES H. DICK, JR.
Assistant U.S. Attorney

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
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United States Courthouse
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Attorneys for Defendants.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants.

CIVIL ACTION NO. 76-89-SA

DEFENDANTS' REPLY BRIEF

Plaintiff filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552 and the Privacy Act, 5 U.S.C. 552a, seeking access to records maintained by the Federal Bureau of Investigation. After defendants' motions to stay judicial proceedings pending completion of agency review of the documents were denied, the documents were processed and released to plaintiff except for portions of documents withheld to protect the privacy of third parties and confidential information, the disclosure of which would reveal a confidential source, pursuant to 5 U.S.C. 552(b)(7)(C) and (7)(D). Defendants also withheld, under 5 U.S.C. 552 (b)(7)(F) information from one document which would endanger the life or physical safety of law enforcement personnel. Material from two documents was

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FORM OBD-93
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withheld as agency deliberative material protected by 5 U.S.C. 552(b)(5). Deletions were made on the basis of 5 U.S.C. 552(b)(2). Due to a recent determination by the Deputy Attorney General, that this exemption should no longer be invoked to withhold administrative or routine markings, and other such material, the documents which contain deletions made on this basis are currently being re-processed to eliminate the deletions and therefore to disclose additional material.

Defendants moved to dismiss, or in the alternative, for summary judgment and respectfully referred the Court to the Second Affidavit of Michael L. Hanigan and the memorandum in support of the motion. Plaintiff opposed defendants' motion and requested in camera inspection of FBI documents. Defendants now reply to plaintiff's papers and rely on the affidavit and memorandum earlier filed as well as the affidavit of Gordon G. McNeill, Special Agent of the Federal Bureau of Investigation, dated July 13, 1977.

Defendants' motion should be granted for the reasons set forth in their prior memorandum since the contentions set forth in plaintiff's papers do not detract from or rebut the showing made by defendants that the defense motion should be granted. Defendants have shown that the material at issue has been properly withheld under the Freedom of Information Act and the Privacy Act.

DISCUSSION

The Court is wholly justified in granting defendants' motion on the basis of the record now before it. In addition to the affidavits earlier filed, defendants have recently filed the McNeill affidavit. Mr. McNeill, a Supervisor in the Organized Crime Section of the Federal Bureau of Investigation, is assigned to the unit dealing with

organized crime in the Western United States. McNeill re-iterates Special Agent Hanigan's statement that nearly all the documents containing information concerning plaintiff were obtained from an anti-racketeering investigation of John Roselli. McNeill further states that other references to plaintiff were located in files dealing with the broad subject matter of the FBI's Criminal Intelligence Program as it relates to certain FBI Field Offices in California and that plaintiff's name appears in but a small portion of these files. These documents are replete with information pertaining to other individuals gathered by high level organized crime informants. Dissimination of the information received from these informants could place their lives and physical well-being in jeopardy as well as that of their families. (McNeill Affidavit, page 2).

Furthermore, disclosure of these identities could severely hinder the FBI's ability to continue to receive high quality information in this complex area of investigation. These investigations consume years of effort to develop and premature disclosure of some of these sources could affect investigations in progress and compromise the future effectiveness of the sources in gathering quality information in the Organized Crime area. (McNeill Affidavit, pages 2 and 3).

The legislative history of the 1974 Amendments to the Freedom of Information Act makes it clear that while in camera inspection is an option available to the Court in Freedom of Information Act cases, it should be used sparingly and only because of a critical gap in the public record presently before the Court.

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." H.R. Rep. No. 93-1380, Conference Rep. 93d Cong., 2s Sess. 9 (1974); S. Rep. No. 93-854, 93d Cong., 1d Sess. 15)1974). This legislative statement was relied on once again in the recent decision of the Court of Appeals for the District of Columbia, Weissman v. CIA, No. 76-1566 (D.C. Cir., January 6, 1977; April 4, 1977) (slip opinion attached). In that opinion the Court noted:

> "We adopted this view in Vaughn v. Rosen, which specified that where the public record is sufficient to permit a legal ruling, the inquiry need go no further, 157 U.S. App. D.C. 340, 484 F.2d 820, 824 (1973) . . .
>
> The reluctance of Congress and the courts to require in camera inspection is well founded. In camera inspections are burdensome and are conducted without the benefit of an adversary proceeding. Vaughn, supra, at 824. A denial of confrontation creates suspicions of unfairness and is inconsistent with our traditions." (Weissman, supra, pp. 10-11)

The importance of endorsing this approach to in camera review was underscored by the Court's appreciation of the true intent of Congress in this regard as well as by practical realities. As the Court so wisely stated it:

> "In every FOIA case, there exists the possibility the Government affidavits claiming exemptions will be untruthful. Likewise, in every FOIA case, it is possible that some bits of non-exempt material may be found among exempt material, even after a thorough agency evaluation. . . .
>
> If, as appellant argues, these possibilities are enough automatically to trigger an in camera investigation, one will be required in every FOIA case. This is clearly not what Congress intended, nor what this Court has found to be neccessary." (Emphasis added.)
> (Weissman, supra, p. 11.) 1/

1/ See Ftn. 11 of Weissman opinion attached.

In a recent decision involving claims by the Department of HEW that inter-agency memoranda were exempted documents under 5 U.S.C. §552(b)(5) the Court rejected plaintiff's urging that in camera inspection was required on the presumption that "Courts are to be trusted to be impartial and that a third-party review by a Court is more comforting than review by representatives of the agency resisting disclosure." Morton-Norwich Products, Inc. v. Mathews, 415 F. Supp. 78, 82 (D. D.C. 1976). The Court characterized this attitude as "superficially enticing if one overlooks the experience of history that indicates how arbitrary judges as well as others in authority become if they conduct their business in secrecy." Ibid. The Court upheld the integrity of the administrative process thusly:

> "First, if the Government wished wrongfully to withhold, it need not have ever indicated that the documents existed in the first place. Second, sanctions now exist under the amended act against those who improperly conceal, 5 U.S.C. §552(a)(4)(f). The FDA processes thousands of Freedom of Information Act requests a year. It has a specialized staff which proceeds with legal advice. The U.S. Attorney in contested cases reviews that advice. There is nothing in this case to suggest that the agency has not been forthright or responsive. The Freedom of Information Act must proceed in an atmosphere of confidence in government. If the agency cannot be trusted, the Act will never work. It is a profound mistake to transfer administrative responsibility to judges on the theory that persons employed by the Executive Branch are not honest or lack judgment. The effort to do this through the in camera process is misplaced." (Morton-Norwich, supra, pp. 82-83.)

The necessity for the Court to give credence to the representations of government agency officials is well

established. In another recent opinion, the U.S. District Court for the District of Columbia refused plaintiff's plea for in camera review of Federal Trade Commission internal documents under 5 U.S.C. §552(b)(5). Bristol-Myers v. FTC, Civil Action No. 76-1364 (D.C. December 28, 1976) (Slip opinion attached). Even as to the possibility of identifying non-exempt segregable material, the Court stated:

> "In view of the evident substantial and good faith compliance with the requirements of the law insofar as the other disputed documents are concerned, the Court will take the Commission at its word and not require in camera inspection." Ibid. (See also Wellford v. Hardin, 330 F. Supp. 915 (D. Md. 1971).

Because of the sensitivity of these files as part of the Government's investigation of organized crime activities, their protection is especially important. Plaintiff's claim that defendants' withholding is unjustified because segments of some of the eighty-six documents released partially to the plaintiff have not been released, ignore the description defendants have made of the files where plaintiff's name appears. It is clear from the record that plaintiff's name merely appears peripherally in files largely unrelated to her, i.e., files dealing with other individuals and activities in which she was not involved. Wherever her name appears, the material has been processed as responsive to the request for information about herself. However, where the material reveals the names of other individuals, other than Roselli and Sam Giancana, it has been withheld to protect the third party's identity. Where the material reveals a confidential source or confidential information furnished only by a confidential source, or would cause damage to law enforcement personnel, it has been withheld. The statute amply supports the Government's withholding of

documents for these reasons. Defendants have fully established the need for confidentiality of those portions of these investigative files which have not been released.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General

TERRY J. KNOEPP
United States Attorney

By: _____
CHARLES H. DICK, JR
Assistant United States Attorney

_____
JEFFREY AXELRAD

_____
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Attorneys for Defendants.

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FORM OBD-93
12-7-73
Formerly LSA-23

FILED

DEC 29 1976

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRISTOL-MYERS COMPANY, Plaintiff	)	Civil Action
v	)	No. 76-1364
Federal Trade Commission, Defendant	)	

O P I N I O N

Plaintiff in this case is Bristol-Myers Company, the maker of three non-prescription internal analgesics -- Bufferin, Excedrin and Excedrin P.M. Bristol-Myers is presently defending a Federal Trade Commission complaint (FTC Docket No. 8917) alleging false advertising of these products. The Commission is also carrying on adjudicative proceedings in two companion cases, American Home Products, et al., and Sterling Drug, Inc. et al.

As part of its discovery in Docket No. 8917, Bristol-Myers applied for the issuance of one subpoena duces tecum and three subpoenas duces tecum et ad testificandum, all of which were directed to the FTC or its employees. However, on May 30, 1976, the administrative law judge handling the case denied access to a substantial portion of the documents sought. On May 6, 1976, Bruce Hafner, counsel for Bristol-Myers, served a Freedom of Information Act request on the Commission for most of the documents pertinent to the complaint proceeding. On May 10th, the request was modified, excluding any document already in the possession of Bristol-Myers.

In response to this request, the Commission has

31,742 pages.[1] It withheld, however, 1,300 documents (3,000 pages). Some of these documents are the subject of this litigation, which is before the Court on the Commission's Motion to Dismiss, and Cross-Motions for Summary Judgment.

In its Motion to Dismiss, or in the alternative, for Summary Judgment, the government submitted an index of the withheld documents. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.s. 977 (1974). They were divided into nine discrete categories:

CATEGORY A. Intra-agency memoranda

CATEGORY B. 100 "Blue Minutes", i.e. reflections of the Commission's deliberations

CATEGORY C. Documents from Commissioners

CATEGORY D. Interview reports (of expert witnesses)

CATEGORY E. Correspondence between staff and consultatnts

CATEGORY F. One letter discussing a witness' dissatisfaction with his compensation

CATEGORY G. Drafts and comments (of proposed rules, notice orders and complaints)

CATEGORY H. Staff written reports of interviews by counsel

CATEGORY I. Memoranda from files of U. S. Pharmocopeial Convention

After examining the index, Bristol-Myers withdrew its request as to many of the documents. Others have

1. By affidavit, the senior FTC attorney assigned to this case states that he has spent more than 374 hours in search of the requested documents.

been supplied to them through normal discovery channels. The remaining papers[2] are being withheld by the Commission under Exemptions 5[3] and 7A[4] to the Act's production rules. The Court finds the exemptions applicable. Accordingly, the Commission's Motion for Summary Judgment will be granted.

Category A. According to the index, the majority of the letters listed in this category are to the Commission from heads of one of the agency's divisions or bureaus. Others are inter-departmental. These letters and memos consist of recommendations and opinions pertaining to various aspects of the enforcement proceeding. Manifestly, the documents are not investigatory.[5] Consequently, exemption 7A is inapplicable. However, they are free from disclosure under the fifth exemption[6] Retail Credit Co. v.

2/ The documents still disputed are: Category A--(a)(3), (a)(5), (a)(7)-(8), (b)(9), (b)(13)-(14), (b)(16)-(17)' (b)(19)-(25), (b)(27); Category B; Category C--(a)(1), (a)(4), (b); Category D--(a) and (b) [factual portions only], (c); Category E--(a)(7), (a)(11)-(12); Category G--(a), (b), and (e); Category H. This amounts to 327 documents (765 pages).

3/ Exemption 5 protects "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).

4/ Exemption 7A protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A).

5/ The Commission index repeatedly invokes Exemption 7A in situations in which the exemption is not even arguably available.

6/ Citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), Bristol-Myers has argued that certain documents in Categories A, B, C, and G are "final opinions...made in the adjudication of cases" and therefore must be disclosed. See 5 U.S.C. §552(a)(2)(A). However, as counsel for Bristol-Myers acknowledged at oral argument on these motions, the operations of the NLRB are sui generis. Justice White's opinion in Sears carefully confined the holding there to the unique structure of the Labor Board. Therefore, Sears will not be invoked here.

FTC, 1976-1 Trade Cases ¶60,727 (D.D.C. 1976).

Category B. These are the "blue minutes." They too fall under Exemption 5. Ash Grove Cement Co. v. FTC, 511 F.2d 815, 8[illegible] (D.C. Cir. 1975).

Category C. The four memoranda to the Commission in subsection (a) of this category are from various Commissioners. Discussed are such matters as the weaknesses of the case, proposed revisions in the complaint, and the relative merits of proceeding by complaint, as opposed to rulemaking. None of these documents need be produced. See Retail Credit Co. v. FTC, supra, at pp.68, 129-68, 130.

The items in subsection (b) to Category C are described as "over 50 Circulations and Routing Slips from from Commissioners containing theories, strategies, reflections or plans to take action." Exemption 5 applies here as well. Id. at p.68, 127.

Category D. Those papers in subsections (a) and (b) of this category are described as interviews, conversations and discussionswith expert consultants. Plaintiff seeks only the factual portions of these documents. Essentially, the Commission takes the position that the factual material in these papers is not "in a form that is severable without compromising the private remainder of the documents." EPA v. Mink, 410 U.S. 73, 89 (1972); see Montrose Chemical Corporation v. Train, 491 F.2d 63 (D.C. Cir. 1972); Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238 (D.C.Cir. 1974). In view of the evident s bstantial and good faith compliance with the requirements of the law insofar as the other disputed documents are concerned, the Court will take the

Commission at its word and not require in camera inspection.

Subsection (c) of the category is described as "reports of visits and conversations with expert consultants who are included on the witness list." Basically, these documents reflect discussions of trial strategy. The Court finds these exempt under both Exemptions 5 and 7A. See Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976). Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976). See also Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971); Wu v. National Endowment for the Humanities, 460 F.2d 1030,1032 (5th Cir. 1972).

Category E. Plaintiff seeks only three letters in this category. All are letters from complaint counsel to various experts. These are free from disclosure under Exemption 5. See EPA v. Mink, supra; Hickman v. Taylor, 329 U.S. 495 (1947).

Category G. This category consists of drafts of the complaint issued against Bristol-Myers and a draft of a "Notice of Formulation of Proposed Trade Regulation Rule Relating to Advertising of Analgesics and an attached memorandum." These documents fully reflect the deliberative processes and attorney work-product of the Commission and, therefore, are covered by Exemption 5. See Retail Credit Co. v. FTC, supra at pp.68, 126-68, 127.

Category H. This final category is composed of the notes, taken by Commission attorneys, of interviews taken in connection with the companion case, American Home Products, et al., of two experts. The interviews were conducted by counsel for American Home Products. The Commission contends that both sets of notes are exempt under section (b)(5) and (b)(7)(A).

While the Commission has failed to sustain its burden of showing both that these documents are investigatory records and that their production would interfere with its enforcement proceedings, the Court is satisfied that they are the work-product of the Commission's attorneys, and therefore free from disclosure under the fifth exemption.

United States District Judge

Dated: December 23rd, 1976

FILED

DEC 23 1976

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRISTOL-MYERS COMPANY	)	
	)	
Plaintiff	)	
	)	Civil Action
v.	)	No. 76-1364
	)	
FEDERAL TRADE COMMISSION	)	
	)	
Defendant	)	

ORDER

Upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, Plaintiff's Motion for Summary Judgment, Points and Authorities in support thereof, and Oppositions thereto, and after oral argument by counsel, it i by the Court this 23d day of December, 1976

ORDERED that Plaintiff's Motion for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, denied; and it is further

ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, granted.

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566

GARY A. WEISSMAN, PLAINTIFF-APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 75-1583)

Argued November 24, 1976

Decided January 6, 1977

Mark H. Lynch, with whom *Larry P. Ellsworth* and *Allan B. Morrison*, were on the brief for appellant.

Frank A. Rosenfeld, Attorney, Department of Justice, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief for appellees.

Michael H. Stein, Attorney, Department of Justice, also entered an appearance for appellees.

Before: McGOWAN and TAMM, *Circuit Judges* and GESELL,* *United States District Judge* for the United States District Court for the District of Columbia

Opinion for the Court filed by *District Judge* GESELL.

GESELL, *District Judge*: This is an appeal arising under the Freedom of Information Act, 5 U.S.C. §§ 552 [illegible]. Appellant Weissman challenges an order of the District Court granting summary judgment in favor of the Central Intelligence Agency which refused to turn over certain documentary material to Weissman claiming that disclosure was not required because of three exemptions found in § 552(b) of the Act. The appeal focuses on the scope of these statutory exemptions as well as upon the procedures by which the availability of such FOIA exemptions is to be determined at the trial court level.

In February, 1975, Weissman wrote the CIA expressing his alarm at news stories suggesting that investigative activities of the Agency had been directed against left-of-center political activists. Stating that he had been active in political reform during the 1960's, he requested "to see all files completed on me by the CIA." The CIA

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

† Appellees sought by tardy motion to have this appeal dismissed. The trial judge originally made a brief oral ruling and later, at defendants-appellees' request, particularized his findings of fact and conclusions of law, document-by-document, issued in conformity with Schwartz v. IRS, 167 U.S. App. D.C. 301, 511 F.2d 1303 (1975). Under all the circumstances the trial judge did not abuse his discretion in granting plaintiff-appellant's unopposed motion for extension. See Fed. R. Civ. P. 52(b); Fed. R. App. P. 4(a)(2). Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962). The motion to dismiss is without merit.

advised that "Unbeknown to Mr. Weissman he was considered for employment by this agency in the 1950's . . . ." A substantial amount of documentary material was thereafter released to Weissman. These papers disclosed that from 1958 to 1963 Weissman, without his knowledge or permission, was under a periodic but continuing investigation by the Agency for potential use as a witting agent to provide information about foreign activities in which he might participate, such as the VII Youth Festival held in Vienna in 1959. Detailed background checks were made, and provisional followed by final covert security approvals were granted. Although deemed qualified for undercover assignment, Weissman was never approached and he did not at any time seek employment with the Agency.

All or part of over 50 documents developed by the CIA during its investigation were withheld. Since much of this material gathered by the Agency was classified as confidential, contained information concerning agents' names, sources and procedures, or was considered part of an investigation compiled for law-enforcement purposes, the Agency in particularizing each document withheld claimed exemption under 5 U.S.C. § 552(b)(1), (3) or (7). After Weissman brought suit to compel disclosure, the Agency moved for summary judgment. Upon hearing the motion and considering the supporting affidavits, the District Court accepted the Agency's position. This appeal followed.

When Congress enacted the FOIA it recognized the obvious difficulties that would inevitably arise when disclosure was sought of documents touching on sensitive matters affecting law enforcement and national security. The Act, however, gave only general guidance in seeking to protect material of this type, and it has been left to the courts to develop standards and procedures in the light of experience with this delicate area.

The exemptions claimed in this instance, as set forth at 5 U.S.C. § 552(b), remove from the disclosure obligations of the FOIA matters that are

> (b)(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (b)(3) Specifically exempted from disclosure by statute;
>
> (b)(7) investigatory records compiled for law enforcement purposes . . . [subject to some conditions].

I. Exemption Under 5 U.S.C. § 552(b)(3)

In this instance, the Agency placed principal reliance on exemption (b)(3).[2] The Central Intelligence Act of 1949 provided at 50 U.S.C. § 403g that "the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency" shall be protected from disclosure. In addition, Section 403(d)(3) of this Title provides, "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The directive that the CIA protect its sources is especially broad protecting not only the name of the source but, to the extent the Agency considers reasonable to protect the source, the nature and type of information supplied. While appellant vigorously asserts that § 403(d)(3) is not a statute within the exemption, the legislative history clearly demonstrates[3] that both § 403(d)(3) and § 403

[2] This exemption has been modified effective March, 1977, but the Court is concerned here only with the present statutory language.

[3] The Conference Report on the 1974 Amendments to the FOIA notes, ". . . intelligence sources and methods (50 U.S.C. § 403(d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act." H.R. Rep. 93-1389, 93d Cong., 2d Sess., 12 (1974); *see also* S. Rep. No. 93-854, 93d Cong., 2d Sess., 16 (1974).

(g) are precisely the type of statutes comprehended by exemption (b)(3). Appellant's contention, moreover, has now been rejected. *Phillippi* v. *Central Intelligence Agency*, No. 76-1004 (D.C. Cir., Nov. 16, 1976), n. 14.

II. Exemption Under 5 U.S.C. § 552(b)(7)

The Agency also withheld material pursuant to exemption (b)(7) which shields from disclosure certain records compiled for law-enforcement purposes. This claim to exemption is misplaced as appellant strenuously contends.

To be sure, it appears from the sparse record available that the CIA investigation of Weissman, an American citizen, may well have been a genuine attempt to determine whether he was a safe candidate for recruitment by the Agency. Accepting this as a fact, however, it is clear that the CIA nonetheless conducted an intermittent but extensive investigation over a five-year period of an American citizen living at home, without his knowledge. It cannot be contended that this activity was for law-enforcement purposes.

The National Security Act of 1947, which created the CIA[4] and empowered it to correlate and evaluate intelligence relating to the national security, specifically provided that the "Agency shall have no police, subpena, law-enforcement powers, or internal-security functions." 50 U.S.C. § 403(d)(3). This directive was intended, at the very least, to prohibit the CIA from conducting se-

[4] Under a Presidential Directive, 11 Fed. Reg. 1339 (Feb. 1946), the Agency had temporarily operated as the Central Intelligence Group (CIG).

ernal investigations of United States citizens, in this country, who have no connection with the Agency.

The Agency has been given far-reaching authority to gather information and to conduct intelligence activities abroad. These vital functions are liberally financed and concern national security. It is generally accepted that the Agency, in both its reporting and operational functions, serves an essential role in the development and implementation of foreign policy. The Agency, of course, proceeds in secret. Many of its operations are covert, and since the stakes are high few are in a position to know or to question the manner by which it carries out its work. It has the power that flows from money and stealth. Congress was well aware such activities create a potential for abuse, and chose to limit the Agency's activities to intelligence gathering abroad. It was unwilling to make it a policeman at home, or to create a conflict between the CIA and the FBI.

The legislative history of the CIA enabling act is sketchy, but these concerns are abundantly clear. Congress wisely sought from the outset to make sure that when it released the CIA genie from the lamp, the Agency would be prevented from using its enormous resources and broad delegation of power to place United States citizens living at home under surveillance and scrutiny. It denied the Agency police or internal-security functions to obviate the possibility that overzealous representatives of the CIA might pry into the lives and thoughts of citizens whose conduct or words might seem unconventional or subversive. Thus, during floor debates in the House, for example, a member of the Committee which considered the legislation stated:

> This Central Intelligence Agency is supposed to collect military intelligence abroad, but we want to be sure it cannot strike down into the lives of our own people here. So, we put in a provision that

> "the Agency shall have no police, subpena, law-enforcement powers, or internal-security functions."

93 Cong. Rec. 9444 (1947) (remarks of Congressman Judd).

Congress had a realistic fear of secret police that would move inward rather than outward, and assume prerogatives never intended. While the 80th Congress obviously, and for good reason, wished to protect America's security, it had no intention of making the mistake of creating an American "Gestapo."[5] As the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee") recently reported, "By codifying the prohibition against police and internal security functions, Congress apparently felt that it had protected the American people from the possibility that the CIA might act in any way that would have an impact upon their rights."[6]

In spite of this congressional awareness and insistence, the CIA hopes to find support for this type of investigation into a citizen's background by reference to 50 U.S.C. § 403(d)(3), which, while denying the CIA any internal security functions, also states ". . . the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclo-

---

[5] The fear of creating a secret police and the intention to avoid such an error pervaded congressional consideration of the new intelligence agency. *See, e.g.*, 93 Cong. Rec. 9413 (1947) (remarks of Congressman Harness); Senate Armed Services Committee, Hearings on S. 758, 80th Cong., 1st Sess. 497 (1947) (remarks of General Vandenberg); House Expenditure in the Executive Department Committee, Hearings on H.R. 2319, 80th Cong., 1st Sess. 127, 433, 479-481 (1947).

[6] S. Rep. No. 94-755, 94th Cong., 2d Sess. Book I, 138 (1974).

sure." This provision contains no grant of power to conduct security investigations of unwitting American citizens. As the Rockefeller Commission noted,[7] and as the Church Committee stated, the provision

> . . . was not viewed as conveying new authority to investigate; rather it charged the Director of Central Intelligence Agency with responsibility to use the authority which he already had to protect sensitive intelligence information.
>
> S. Rep. No. 94-755, *supra*, Book I at 139.

Whatever may be the power to check on its own personnel,[8] we are obliged to agree with the Church Committee when it commented on § 403(d)(3):

> Given the prohibition against internal security functions, it is unlikely that the provision was meant to include investigations of private American nationals who had no contact with the CIA, on the grounds that eventually their activities might threaten the Agency.
>
> S. Rep. No. 94-755, *supra*, Book I, 139. *See also*, Report to the President, *supra*, at 165-166.

Thus, the Agency's interpretation of the sources and methods proviso is misplaced. A full background check

[7] Report to the President, Commission on CIA Activities Within the United States, 58 (1975).

[8] In its recommendations to the President, the Rockefeller Commission suggested that the CIA be given power to investigate persons "being considered for affiliation" with the CIA, "or others who require clearance by the CIA to receive classified information." Report to the President, *supra*, at 66. In its Recommendations, the Church Committee suggested that the CIA not be allowed to investigate through surveillance any American national not affiliated with the CIA; but should be allowed to collect information through confidential interviews about "individuals or organizations being considered by the CIA as potential sources of information. . . ." S. Rep. No. 94-755, *supra*, at Book II, 302-303.

within the United States of a citizen who never had any relationship with the CIA is not authorized, and the law-enforcement exemption is accordingly unavailable. The Agency simply has no authority in the guise of law enforcement to make such a background check of Weissman with a view to his possible recruitment.

III. In Camera Inspection

Finally, appellant contends that by refusing to conduct an *in camera* examination of documents before sustaining Agency claims of exemption under sections (b)(1), (3) and (7), the District Court failed to follow proper procedures. He asserts that an *in camera* inspection of documents withheld under (b)(1) was especially necessary because the affidavits were not sufficiently detailed to permit scrutiny of the Agency claims. He also urges that the *in camera* procedure was required to check the truthfulness of Agency claims under each exemption, and to conduct a line-by-line analysis of documents withheld under each exemption to cull out any non-exempt material.

While the FOIA itself now provides for *in camera* inspections, 5 U.S.C. § 552(a)(4)(B),[9] it is clear from the legislative history that this section merely "permit[s] such *in camera* inspection at the discretion of the Court." H.R. Rep. No. 93-1380, Conference Rep. 93d Cong., 2d Sess., 9 (1974). As Congress indicated, before the Court orders *in camera* inspection, the

> Government should be given the opportunity to establish by means of testimony or detailed affidavits

[9] ". . . the court . . . *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) . . . ." § 552(a)(4)(B) (emphasis added).

that the documents are clearly exempt from disclosure.

Ibid. See also, S. Rep. No. 93-854, 93rd Cong., 2d Sess. 15 (1974).

We adopted this view in *Vaughn* v. *Rosen*, which specified that where the public record is sufficient to permit a legal ruling, the inquiry need go no further, 157 U.S. App. D.C. 340, 484 F.2d 820, 824 (1973); *see also*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973), and indicated in *Phillippi* v. *Central Intelligence Agency*, *supra*, that *in camera* proceedings are particularly a last resort in "national security" situations.

The reluctance of Congress and the Courts to require *in camera* inspection is well founded. *In camera* inspections are burdensome and are conducted without the benefit of an adversary proceeding. *Vaughn*, *supra*, at 824. A denial of confrontation creates suspicions of unfairness and is inconsistent with our traditions.

Additional considerations apply to *in camera* proceedings under exemption (b)(1) where classification of documents is involved. Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem, and when it amended the FOIA to permit *in camera* inspection in exemption (b)(1) cases, it indicated [illegible] was not to substitute its judgment for [illegible] agency.[10] If exemption is claimed on the basis of national security the District Court must, of course,

[10] "This standard of review does not allow the court to substitute its judgment for that of the agency—as under a *de novo* review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released." S. Rep. No. 93-854, *supra*, at 16.

be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

In every FOIA case, there exists the possibility that Government affidavits claiming exemptions will be untruthful. Likewise, in every FOIA case it is possible that some bits of non-exempt material may be found among exempt material, even after a thorough agency evaluation. If, as appellant argues, these possibilities are enough automatically to trigger an *in camera* investigation, one will be required in every FOIA case.[11] This is clearly not what Congress intended, nor what this Court has found to be necessary.

When Congress amended the FOIA in 1974 to provide that any reasonably segregable non-exempt portion of an agency record should be released, 5 U.S.C. § 552 (b) (Pub. L. 93-502 § 2(c)), this addition was meant to endorse judicial decisions holding that Congress did not intend to exempt an entire document "merely because it contained some confidential information."[12] But, neither the legislative history, nor court decisions, have

[11] It should be noted that this is no small matter. The number of FOIA complaints filed in the District of Columbia tripled this past year and totalled 183 cases. It should also be noted that 30 percent of the closed cases are appealed to this Court. (The national average rate of appeals for all cases is nine percent.) *In camera* inspection in each FOIA case would create a staggering burden both for this Court and the District Court.

[12] Grumman Aircraft Engineering Corp. v. Renegotiation Bd., 475 F.2d 578, 580 (D.C. Cir. 1970), quoted in S. Rep. No. 93-854, 93d Cong., 2d Sess. 31 (1974).

indicated that it was appropriate for the District Courts to undertake a line-by-line analysis of agency records in each case. This Court has noted the difficulty of such a task, and held that such an investment of judicial energy was not justified, or even permissible. *Vaughn* v. *Rosen*, *supra*, at 825. "The burden has been placed specifically by statute on the Government." *Ibid.* It is only where the record is vague and the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an *in camera* examination to look for segregable non-exempt matter.

The CIA dealt with the instant request in a conscientious manner. It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. Agency documents have been released to plaintiff-appellant on four separate occasions.[13] The Agency submitted affidavits summarizing each document, or portion of a document withheld, and indicated the rationale for each claimed exemption. It filed an indexed description of all material withheld, and supported the withholding by explicit affidavits. No discovery was attempted; plaintiff simply contested the adequacy of the affidavits. There is no reason, on this record, to presume bad faith on the part of the CIA. In this instance, the CIA released some documents in their entirety and portions of 22 others. From the deletions in the partially released documents, and the Agency explanations for these deletions, the District Court could well

[13] On May 16, 1975, portions of two documents were released. On July 8, 1975, additional portions of those two documents were released, and portions of seven more documents that had been discovered after the initial Agency reply. On January 8, 1976, portions of nine additional documents and one entire document were released. On January 29, 1976, 15 more documents, or portions thereof, including some portions previously deleted, were released.

determine that the Agency was not improperly withholding information. Such an examination of a full record can take the place of a partial, or sampling, *in camera* inspection. *See Ash Grove Cement Co.* v. *FTC*, 511 F.2d 815 (D.C. Cir. 1975). The District Court was correct in refusing to conduct an *in camera* inspection to check the veracity of Agency claims or to search for non-exempt material and no abuse of discretion has been shown. Where it is clear from the record that an agency has not exempted whole documents merely because they contain some exempt material,[14] it is unnecessary and often unwise for a court to undertake such an examination.

IV. Conclusion

As the above discussion indicates, the trial judge was well within his discretion in refusing to order an *in camera* examination. The Agency claims for exemptions under section (b)(1) and (b)(3) were properly sustained. However exemptions under section (b)(7) are not available to the CIA except under special collateral circumstances.[15] There are 29 documents where claims for exemption under various subsections of (b)(7) were made. While in most instances these claims were coupled with claims under (b)(3), it is still necessary to remand the case to the District Court to determine whether all or part of any of the 29 documents should be re-

[14] In some limited instances a stronger standard may apply. *See, e.g.*, Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973), where the issue was whether "secret law" was being withheld. However, we do not deal with that issue here.

[15] For example, in the case of three documents, Nos. 12, 44 and 46, an exemption under (b)(7) was claimed to protect the names of FBI law enforcement officers. The exemption was properly claimed in this instance in conjunction with the claims for exemption of the same three documents under exemptions (b)(1) and (3).

leased. The Agency may well be able to show that the claim of exemption (b)(3) alone, or coupled with other exemptions, is sufficient to protect the document against disclosure even in the absence of (b)(7), but this cannot be ascertained on the basis of the papers brought here on the appeal.

The judgment below is affirmed in all respects except as it relates to documents claimed to be exempt under section (b)(7), other than Nos. 12, 44 and 46, and the case in this respect alone is remanded to the District Court for further proceedings consistent with this opinion.

Affirmed

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1565

September Term, 1976

Civil Action No. 75-1583

Jary A. Weissman,
Plaintiff-Appellant

v.

Central Intelligence Agency, et al.,
Defendants-Appellees

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 4 1977

GEORGE A. FISHER
Clerk

BEFORE: McGowan and Tamm, Circuit Judges; Gesell, U.S. District Judge for the District of Columbia

ORDER

It is ORDERED by the Court, sua sponte, that the Opinion for the Court heretofore filed in this case on January 6, 1977 be, and it hereby is, amended by striking in its entirety the paragraph beginning on Page 10 which contains onto Page 11, including Footnote 10 to which it refers, and substituting in lieu thereof a new paragraph, including a new footnote, which shall be and read as follows:

> Additional considerations apply to in camera proceedings under exemption (b)(1) where classification of documents is involved. Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem when it amended the FOIA to permit in camera inspection in exemption (b)(1) cases.10/ If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an in camera inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

10/ Claims under (b)(1), like other claims of exemption, are subject to de novo review in the District Court. See 5 U.S.C. § 552(a)(4)(B). However, the legislative history of the 1974 amendments makes clear that, in evaluating (b)(1) claims under this standard, "substantial weight" is to be accorded to detailed agency affidavits setting forth the basis for exemption:

> [T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that the federal

courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information Act, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. S. Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974).

See also Senator Muskie's remarks during the floor debate preceding the Senate's vote to override President Ford's veto of the amendments. 120 Cong. Rec. 36870 (1974) ("The judge would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.")

It is FURTHER ORDERED by the Court, sua sponte, that the word "and" in the eighth line on Page 12 of the Opinion for the Court is stricken and the word "or" is inserted in lieu thereof, so that as amended, the sentence of which that line is a part, shall be and read as follows:

It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an in camera examination to look for segregable non-exempt matter.

Per Curiam

For the Court:

George A. Fisher

GEORGE A. FISHER
Clerk

Sitting by designation pursuant to 28 U.S.C. § 292(a).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566 * September Term, 1975

Gary A. Weisman, Civil Action No. 75-1583

Plaintiff-Appellant

v.

Central Intelligence Agency, et al.,

Defendants-Appellees

BEFORE: McGowan and Tamm, Circuit Judges; Gesell*, U.S. District Judge for the District of Columbia

ORDER

Upon consideration of the petitions for rehearing filed by the appellant and by the appellees, and of the brief filed by Senator Edmund S. Muskie, as amicus curiae on behalf of appellant's petition for rehearing, and the Court having this date filed and entered an order amending the Opinion for the Court dated January 6, 1977, it is

ORDERED by the Court that both petitions are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FBI, et al.,

Defendants.

No. 76-89-S

CERTIFICATE OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On July 29, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

DEFENDANTS' REPLY BRIEF

addressed to Richard C. Leonard, Esq. 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210,

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29 day of July, 1977.

Nancy R Amans

Nancy Amans

[redacted]

USM 030-93
12-7-73

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

Total Deleted Page(s) = 9
Page 26 ~ Duplicate;
Page 27 ~ Duplicate;
Page 34 ~ Duplicate;
Page 35 ~ Duplicate;
Page 36 ~ Duplicate;
Page 48 ~ Duplicate;
Page 49 ~ Duplicate;
Page 50 ~ Duplicate;
Page 91 ~ Duplicate;

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UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Servs. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgmt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

TO : The Director

DATE: 3/2/79

FROM : Legal Counsel

SUBJECT: JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al
(U.S.D.C., S.D. CAL.)
CIVIL ACTION NUMBER 76-89S
NINTH CIRCUIT NUMBERS 78-1152 and 78-1880

PURPOSE: To report recent developments in captioned case now on appeal before the Ninth Circuit and to advise of a request from the Appellate Section, Civil Division, Department of Justice, for the Bureau's recommendation with respect to a proposed motion to recuse presiding Judge Walter Ely.

62-116929-36 X1

SYNOPSIS AND DETAILS: On 2/13/79, Ms. Linda Cole, Appellate Section, Civil Division, Department of Justice, telephonically contacted SA [redacted] b6 b7C [redacted] of this Division to advise that certain recent developments have given rise to a question of conflict of interest on the part of Judge Walter Ely, presiding judge of the Ninth Circuit panel hearing the appeal of captioned case, and to solicit the Bureau's recommendation as to a motion by the Appellate Section for recusal. On 2/14/79, Ms. Cole confirmed this conversation by memorandum, a copy of which is attached hereto as Exhibit A. Pertinent details are as follows:

EX-114 REC-2 187-100-2

Oral arguments regarding captioned case were heard by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit on 2/12/79, Judge Ely presiding. The major issue before the Court is whether the FBI has properly exempted certain systems of records from the disclosure provisions of the Privacy Act. This question arose in the context of plaintiff's Freedom of Information Act (FOIA) request for records pertaining to herself. Although no file was located of which plaintiff was the subject, several references to her were located in files pertaining to other

5 MAR 20 1979

ENCLOSURE ATTACHED

3 ENCLOSURES

Encl. - Sent 3/5/79

1 - [redacted]
1 - [redacted]
1 - [redacted]
1 - [redacted]
1 - [redacted]
1 - IPALU

b6

(CONTINUED - SEE OVER)

JCH:cmw:kmr (8)

9-7-79 JCC

57 MAR 27 1979

FBI/DOJ

subjects, particularly the files pertaining to the FBI's anti-racketerring investigation of the late organized crime figure John Rosselli.

Those documents containing references to plaintiff were processed under the FOIA inasmuch as the system of records in which they were located is exempt from the disclosure provisions of the Privacy Act. (Title 5, United States Code, Sections 552a(j)(2) and (k)(2). Title 28, Code of Federal Regulations, Section 16.96(a)(1)).

The District Court, following in camera review of the disputed documents, upheld all of the exemptions claimed by the Government but awarded attorney's fees and costs to plaintiff. Plaintiff appealed the Court's ruling on the exemptions, and the Government appealed the ruling on attorney's fees.

On appeal, plaintiff does not challenge the application of the FOIA exemptions to the disputed documents. Rather, she asserts that the documents should have been processed under the Privacy Act instead of the FOIA and that the FBI should not be allowed to apply a blanket exemption to systems of records.

Ms. Cole advised that during oral arguments, Judge Ely stated that he had been Rosselli's lawyer at one time and further expressed concern that his own name may appear in the file. According to Ms. Cole, these comments were made by Judge Ely during a discussion of the extent to which the FBI could deny access under the Privacy Act to persons whose names appear in the organized crime files.

Judge Ely also directed Government counsel to advise of the whereabouts of the in camera exhibit in the event the Court should decide to review the material. The exhibit consists primarily of documents from the Rosselli files which were submitted to the District Court in connection with plaintiff's FOIA claim. It is noted that the exhibit was not designated for inclusion in the record on appeal by either party and does not appear to be germane. Regardless, Ms. Cole has indicated that in her opinion any move by the Government to preclude review of the in camera documents by Judge Ely will be without foundation unless preceeded by a motion for recusal.

To Director
From Legal Counsel

On 2/23/79, Ms. Cole provided to this office a copy of an affidavit of George C. Stoll which sets forth certain pertinent excerpts of the oral arguments. A copy of this affidavit is attached hereto as Exhibit B.

In addition, at the request of Ms. Cole this Bureau conducted a review of the disputed documents and the remaining portions of the Rosselli file, which disclosed two references to contacts made by either Rosselli or one of his colleagues to the law firm of Ely, Kadison and Quinn. The details of this review are set forth in the attached affidavit of SA [redacted], of the Records Management Division, marked Exhibit C. b6 b7C

Ms. Cole has advised that it is her opinion, and that of her colleagues in the Appellate Section, that the above facts raise a serious question as to the ability of Judge Ely to review the matters on appeal objectively, and therefore justify a motion for recusal. Nevertheless, due to the serious nature of a move to recuse a Federal judge, the Appellate Section is requesting any recommendation which the Bureau may desire to make with respect to such action. Ms. Cole indicated that the proposed motion has been drafted and that it is the intention of the Appellate Section at this time to seek Attorney General approval prior to filing. A draft of the proposed motion is attached hereto as Exhibit D.

Based upon discussions with the Departmental attorney, and review of the foregoing facts, Legal Counsel Division concurs in the judgment of the Appellate Section that a motion to recuse is justified under Title 28, United States Code, Section 455(a) which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." In view of the potential impact that such an action could have on this appeal, as well as others before the Ninth Circuit of which only the Department can be fully aware, it is the opinion of Legal Counsel Division that the final decision must rest with the Department and that the Bureau should defer to their judgment.

To Director
From Legal Counsel

RECOMMENDATION: 1. That the Director advise the Department of Justice that the Bureau defers to the judgment of the Department with respect to the proposed action by the Appellate Section to move for recusal of Judge Walter Ely from further review of captioned case.

Avid indicate -no objection; I think it must be done

APPROVED: Director / Assoc. Dir. / Dep. AD Adm. / Dep. AD Inv. / Adm. Serv. / Crim. Inv. / Ident. / Intell. / Laboratory / Legal Coun. / Plan. & Insp. / Rec. Mgmt. / Tech. Servs. / Training / Public Affs. Off.

2. That the attached letter setting forth the Bureau's position be forwarded to the Civil Division, Department of Justice.

APPROVED: Director / Assoc. Dir. / Dep. AD Adm. / Dep. AD Inv. / Adm. Serv. / Crim. Inv. / Ident. / Intell. / Laboratory / Legal Coun. / Plan. & Insp. / Rec. Mgmt. / Tech. Servs. / Training / Public Affs. Off.

Enclosures (4)

62-116929-36X1

~~197-900-2~~

ENCLOSURE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER, Plaintiff-Appellant and Appellee, v. FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE and GRIFFIN B. BELL, Attorney General of the United States, Defendant-Appellees and Appellants.	No. 78-1152 and No. 78-1880

MOTION TO RECUSE

TO THE HONORABLE JUDGE WALTER ELY:

Defendants, the Federal Bureau of Investigation, William H. Webster, the Department of Justice and Griffin B. Bell, respectfully submit this motion that Your Honor recuse himself from further participation in the above captioned appeals in light of facts which came to defendants' attention as a result of comments made at the February 12, 1979 oral argument in the above-captioned case.[1/] Defendants respectfully request Your Honor to consider these newly discovered facts in light of the recent amendment to the recusal statute and

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1/ Immediately after returning to Washington, D.C., the appellate attorney who argued this case for the government brought these comments to the attention of her review officer at the Department of Justice. The FBI was then immediately requested to check its relevant files, steps were immediately taken to obtain a transcript of the oral argument, and necessary research into the recusal statute was immediately commenced. After a careful study of the entire matter, the decision was reached, as quickly as possible, to file the instant motion.

EXHIBIT D

to grant the instant motion because, in light of those facts, your "impartiality might reasonably be questioned." 28 U.S.C. 455(a). We believe that it is our duty to file the instant motion in order to vindicate the important public policies which underlie the recusal statute and to provide Your Honor with the protections which the statute was designed to afford federal judges.

The Newly Discovered Facts

This case involves the efforts of plaintiff Judith Katherine Exner to obtain documents from the Central Records System of the Federal Bureau of Investigation which contain references to her. Because the Privacy Act contains broad exemptions for law enforcement agencies and for law enforcement files, the FBI processed Mrs. Exner's request solely under the Freedom of Information Act. Pursuant to the latter statute, the FBI released over two hundred pages to Mrs. Exner. The FBI withheld additional material on the grounds that its release would invade the privacy of persons other than Mrs. Exner who were also named in the documents. The district court examined all of the disputed material in camera and upheld both the FBI's reading of the exemptions to the Privacy Act and its invocation of the exemption to the Freedom of Information Act which pertains to clearly unwarranted invasions of personal privacy. Plaintiff appealed these rulings of the district court and the government cross-appealed from the court's award of attorneys' fees to plaintiff.

The case was fully briefed and orally argued on February 12, 1979, before a panel of this Court consisting of Your Honor, Circuit Judge Wallace and District Court Judge Pregerson. The instant motion to recuse stems from comments made by Your Honor at the oral argument. As noted on page five of the government's main brief on the appeal, over 95% of the disputed material in this case came from files which were compiled during the anti-racketeering investigation of John Roselli. Twice during oral argument, Your Honor commented that he had been John Roselli's lawyer.[2/] In addition, both Judge Wallace and Your Honor requested government counsel to advise the Court of the location of the in camera exhibit which was submitted to the district court but which was not designated as part of the record on appeal.[3/] See the attached affidavit of George C. Stoll which contains a transcription of the relevant portions of the oral argument.[4/]

2/ By filing this motion, the government, of course, does not suggest any impropriety whatsoever in Your Honor's hearing oral argument in the first place. This motion is based solely upon (1) comments which were obviously evoked as a spontaneous response to the colloquy at oral argument concerning events which Your Honor had long since forgotten and (2) the FBI's post-argument examination of the files in question.

3/ Earlier during the argument, Judge Wallace raised the question of the location of the documents.

4/ Mr. Stoll's affidavit at one point refers to "Rosetta" rather than "Roselli." However, it is clear from the context that John Roselli was the individual under discussion. We have also been advised that the word "intelligible" was inadvertently typed in the affidavit instead of the correct "unintelligible."

Because Your Honor's comments raised the possibility that your name might appear in the very files which are the subject of this appeal,[5/] the Department of Justice immediately asked the FBI to ascertain whether or not this situation did exist. The attached affidavit of John F. Loome indicates that the name of Your Honor's former law firm (Ely, Kadison and Quinn) does appear both in the portions of the Roselli files from which the documents pertaining to Mrs. Exner were drawn and in the actual in camera exhibit itself.

The Amendment To The Recusal Statute

In 1974, Congress amended the recusal statute to provide that "[a]ny justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). The legislative history demonstrates that Congress amended the statute in order to protect federal judges from "uncertain language [which] has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril" and to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify and let another judge preside over the case." H. Rep. No. 93-1453, 93d Cong., 2d Sess. 2, 5 (1974),

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5/ At the oral argument, Your Honor stated: "I hope it doesn't have any reference to me because I represented one of the plaintiffs in an isolated matter. . . ."

reprinted in 1974 U.S. Code Cong. and Admin. News at 6352 and 6355.

Thus, the post-1974 test for recusal is not whether the judge could, as a subjective matter, decide the case with impartiality. The test is whether, under the circumstances, a reasonable man might question the judge's ability to do so. Davis v. Board of School Commissioners, 517 F. 2d 1044, 1052 (5th Cir. 1975), rehearing denied, 521 F. 2d 814 (1975), certiorari denied, 425 U.S. 944 (1976). Indeed, under the amended statute, the "appearance of impartiality is virtually as important as the fact of impartiality." Webbe v. McGhie Land Title Co., 549 F. 2d 1358, 3161 (10th Cir. 1977).

The Recusal Statute as Applied to the Instant Case

The fact that the name of Your Honor's law firm (Ely, Kadison and Quinn) appears in the very files which are at issue in this case places Your Honor's personal interests at the very center of this litigation. On the one hand, Your Honor's position can be directly analogized to that of the plaintiff in this case. The district court found that Mrs. Exner's name appears throughout the Roselli files on a sporadic and incidental basis. The Loome affidavit shows that Your Honor's law firm also appears in those files on two occasions. At the oral argument, Your Honor noted that he had been John Roselli's lawyer. It appears, therefore, that Your Honor, like the plaintiff, may have a substantial interest in access to those files. On the other hand, Your

Honor's position is directly analogous to the position of the third parties whose interests the government has tried to protect by withholding documents from Mrs. Exner under Exemption b(7)(C) to the Freedom of Information Act. It thus appears that no matter how Your Honor decides this case, it could reasonably be contended that he has allowed his personal interests to influence his actions. If Your Honor rules for plaintiff, it can be asserted that he has vindicated his own right of access. If Your Honor rules for the government, it can be asserted that he has protected his own privacy.

In our view, therefore, this case fits squarely within the language and spirit of the recusal statute since this is a case in which Your Honor's "impartiality might reasonably be questioned." 28 U.S.C. 455(a). The remedy of recusal provided by the statute must therefore be applied in order to protect the reputation of the federal judiciary and to afford Your Honor the protection which the recusal statute was designed to provide federal judges.

There is an additional consideration which lends further, independent, support to the motion to recuse. As noted above, at the oral argument, Judge Wallace and Your Honor expressed an interest in the in camera exhibit. If Your Honor, as a private citizen, had submitted a request for references to himself or his law firm contained in the in camera exhibit, that request would most probably have been denied by the FBI on the same grounds as it denied access to Mrs. Exner. If the

panel of which Your Honor is a member should, in deciding the instant appeals, seek in camera inspection of the documents, Your Honor would be provided materials in his judicial capacity which would have been withheld from him in his personal capacity. Any appearance that a judge has used his office to gain a personal advantage must be avoided.

For the foregoing reasons, defendants respectfully request Your Honor to recuse himself from further participation in the above-captioned appeals.[6/]

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General,

LEONARD SCHAITMAN (202) 633-3321

LINDA M. COLE (202) 633-3525
Attorneys,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

6/ While the appearance of lack of impartiality is directly raised only in plaintiff's appeal from the district court's adverse rulings on access, the government's cross-appeal on attorneys' fees arises out of the same case and its appeal was consolidated, by order of this Court, with plaintiff's appeal. It would be inappropriate for Your Honor to continue to sit on the government's appeal, while recusing himself from plaintiff's appeal, since the cases are so intimately connected.

~~197-900~~ →
62-116929-36X1

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

February 14, 1979

Address Reply to the
Division Indicated
and Refer to Initials and Number
LMCole:wm
145-12-2683

TELEPHONE:
(202) 633-3525

John Hall, Esquire
Legal Division
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith Katherine Exner v. Federal Bureau of Investigation (C.A. 9, No. 78-1152 and 78-1880)

Dear Mr. Hall:

This letter will confirm our telephone conversation of February 13, 1979. At that time, I informed you of the statements which the presiding judge made at oral argument in the above-captioned cases. The judge's statements are also summarized in the enclosed memorandum to the files which I wrote on the day after the argument.

As you know, 95% of the documents at stake in the Exner case were drawn from the Bureau's files on John Roselli. In view of the judge's statement that he was once Roselli's lawyer and in view of his statement that he too may appear in the Roselli files, we asked you to send us a recommendation concerning a possible motion to disqualify. Given the extreme sensitivity of asking a federal judge to step down, we would request that any recommendation in favor of filing such a motion be signed by Director Webster.

Very truly yours,

Linda M. Cole

Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosure

EXHIBIT A

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : MEMORANDUM TO THE FILE

DATE: February 13, 1979
LMCole:wm

FROM : Linda M. Cole
LMC Attorney, Appellate Staff
Civil Division

SUBJECT: Judith Katherine Exner v. Federal Bureau of Investigation, et al. (C.A. 9, No. 78-1152 and No. 78-1880)

On Monday, February 12, 1979, I presented oral argument in the above-captioned cases. The appeal in No. 78-1152 concerns the scope of the F.B.I.'s exemption from the Privacy Act. The underlying facts concern Judith Exner's attempt to obtain information from the F.B.I.'s organized crime files. As noted at p. 5 of our main brief, over 95% of the documents in dispute were drawn from files compiled during the anti-racketeering investigation of John Roselli.

At oral argument, the presiding judge (Walter Ely) stated that, prior to his elevation to the bench, he had been John Roselli's lawyer. Judge Ely further noted that his name probably appears in the Roselli files too. The judge made these comments during a discussion of the extent to which the F.B.I. could exclude persons who are named in the organized crime files from access to those files under the Privacy Act.

The judge also directed government counsel to send the Court a letter stating the whereabouts of the in camera exhibit so that the Court would have the option of studying the materials in question. The exhibit consists primarily of material from the Roselli files which was submitted to the District Court in connection with Mrs. Exner's FOIA claims. Neither party designated the exhibit for inclusion in the record on appeal.

5010-110

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXNER Plaintiff-Appellant. v. FEDERAL BUREAU OF INVESTIGATION, Defendant-Appellee.	NOS. 78-1152/78-1880 AFFIDAVIT OF GEORGE C. STOLL

On February 16, 1979 I obtained a cassette tape of an oral argument in Case Number 78-1152/78-1880, Exner v. Federal Bureau of Investigation from the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The panel of the Court which heard that argument consisted of Circuit Judges Ely, Wallace and District Judge Pregerson. I am personally familiar with the voices of Circuit Judges Ely and Wallace.

I have faithfully transcribed the following statements from that tape:

1. At approximately eighteen minutes and thirty seconds appellant's counsel was arguing: You are not protecting their privacy if she already knows who they are. What you are doing is giving her a chance to correct an incorrect record. I don't see how you can protect Giancana's and Roselli's privacy at this point, they are dead, they have no real interest. Even if they (third parties) have an interest ...(unintelligible interruption by court)... Even if they did have an interest to the extent the records relate to their relationship with Mrs. Exner, she knows about it already. What privacy are you protecting? Thats why the

EXHIBIT B

Privacy Act has to be different from the Freedom of Information Act.

Judge Wallace: Maybe the deceased widow of one of the ... or the widow of one of the deceased... or other privacy interests in ...

Appellant's Counsel: We're not asking to make them public ... interrupted

Judge Ely: John Rosetta didn't have a witness. John Rosetta wasn't ... unintelligble ... interrupted.

Appellant's Counsel: You see theres a difference under the ... interrupted ....

Judge Wallace: I don't know, I didn't follow it that closely.

Judge Ely: He was my client. (Laughter in the Court) Well maybe he got a widow. (Laughter in the Court) Maybe he had one when he ... he disappeared in some shoes of cement ... interrupte

Appellant's Counsel: In a metal drum of some sort. Under the Freedom of Information Act... argument continued.

2. About 43 minutes into the argument:

Appellee's Attorney: Then I would refer, your honor, to the District Judge's finding of fact that the information which the FBI has withheld consists of voluminous organized crime investigation reports which do not pertain in any way to the plaintiff and which are wholly outside the scope of her disclosure ... I'm reading from the quotation on page four of our brief...she's a ... interrupted.

Judge Ely: I hope it doesn't have any reference to me because I represented one of these people in an isolated matter ... intelligible...but well, well I don't care whether

it does or not.

Appellee's Counsel: I just refer your honor...argument continues...

3. After Conclusion of Rebuttal at approximately fifty eight minutes:

Judge Ely: Miss Cole (Appellee's attorney) do you know where the documents are?

Appellee's Attorney: Ah... your Honor I don't know, we did not designate them as part of the record on appeal and neither did opposing counsel. If the Court wants to see them of course...interrupted.

Judge Ely: Would you mind writing us a letter within the next ten days with a copy to counsel, just telling us where the records are.

Appellee's Attorney: Yes your Honor.

I declare under penalty of perjury that the foregoing transcribed material is true and correct.

Dated: 2-17-1979

Respectfully submitted,

GEORGE CHRISTOPHER STOLL
Assistant United States Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER

Plaintiff-Appellant,

v. Nos. 78-1152
78-1880

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendant-Appellee.

AFFIDAVIT OF JOHN F. LOOME, JR.

I, John F. Loome, Jr., being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Branch, Records Management Division, at FBI Headquarters (FBIHQ), Washington, D. C.

(2) Due to the nature of my official duties, I am personally familiar with plaintiff's Freedom of Information Act (FOIA) request for information located within the files of the FBI and subsequent lawsuit.

(3) It has come to my attention that during oral argument before a three judge panel of the United States Court of Appeals for the 9th Circuit, the presiding Judge, Walter Ely, commented to the Government Counsel that he at one time had served as attorney for one John Rosselli. Inasmuch as the bulk of the disputed documents in this litigation currently being reviewed by the Court are from an investigatory file maintained by the FBI wherein the subject of investigation was the late John Rosselli, Ms. Linda Cole, an attorney for the United States Department of Justice, requested that a review of the disputed records be made to

FBI/DOJ

EXHIBIT C

determine whether or not such an attorney-client relationship is reflected within the aforesaid documents.

(4) Pursuant to this request, a review was made of those documents reviewed by the United States District Court for the Southern District of California, in camera in connection with this litigation and the investigative file relating to the late John Rosselli which consists of 38 volumes.

(5) In connection with the FBI's investigation into the activities of the late John Rosselli, information relating to contacts made by Mr. Rosselli and his associates were recorded in investigative reports which were filed in his investigatory file. One such report which was included in the documents submitted to the Court for in camera review, contained the name of the lawfirm of Ely, Kadison and Quinn, 550 South Flower, Room 1111. This record contained no further information relating to this firm nor information as to the circumstances for the contact.

(6) In our review of all 38 volumes of the investigatory file regarding the late John Rosselli, one additional reference to the firm, Ely, Kadison and Quinn, Attorneys, Room 1111, 550 South Flower, Los Angeles, California, was located. This material set forth information indicating that the late John Rosselli or someone connected with him had been in contact with the aforesaid firm. This record contained no further information relating to this firm or circumstances for the contact.

(7) In addition, a search of our central indices was conducted to determine if the names of Walter Ely or Ely, Kadison and Quinn had been indexed in the investigatory file relating to the late John Rosselli. This search was negative.

(8) It should be noted that all names of individuals or organizations appearing in documents maintained in the FBI's central records are not indexed and readily retrievable. The decision to index is made by the investigative Agent within a field office, or an FBI Headquarters supervisor, except for the names of subject(s), suspects(s) or victim(s) carried in the case caption, which are automatically indexed. Therefore, unless an index card has been prepared and filed, names appearing within our files are not readily accessible. A good case in point is as indicated within this affidavit wherein it is pointed out that the name of the firm Ely, Kadison and Quinn is not recorded in our central indices, however, the name was located in two instances by a page by page review of the Rosselli file.

John F. Loome, Jr.

John F. Loome, Jr.
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to before me this 27th day of February, 1979.

Mary B. Kircher
Notary Public

My Commission expires Sept. 14, 1982.

March 2, 1979

1 - [redacted]
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1 -
1 - IPALU

b6
b7C

Ms. Barbara A. Babcock
Assistant Attorney General
Civil Division
Department of Justice

FEDERAL GOVERNMENT

Re: [illegible]
v. [illegible], et al
(N.D.C., E.D. [illegible].)
CIVIL ACTION [illegible] 78-398
[illegible] 78-1152 and 78-1580

3

Dear Ms. Babcock:

Reference is made to the telephone conversation between Ms. Linda Cole, an attorney in the Appellate Section, Civil Division, and Special Agent [redacted] of this Bureau's Legal Counsel Division on February 15, 1979, and to Ms. Cole's confirming memorandum dated February 14, 1979.

b6

62-116929-36X2

By the referenced communications, Ms. Cole advised this Bureau of certain developments which arose during oral argument on captioned case on February 12, 1979, before a three-judge panel of the Ninth Circuit Court of Appeals, and which give rise to a question of conflict of interest on the part of presiding Judge Walter Ely. In view of the serious nature of a motion to recuse a Federal judge, Ms. Cole requested the Bureau's recommendation with respect to such action.

REC-114 62-116929-363

22 MAR 13 1979

The pertinent facts are as follows:

(1) The major issue in dispute in this case is the authority of the FBI to exempt certain systems of records from disclosure pursuant to the Privacy Act. (Title 5, United States Code, Section 552a(j)(2) and (k)(2)). The disputed records, to which plaintiff seeks access, are almost entirely from the files pertaining to the FBI's anti-racketeering investigation of the late John Rosselli.

(SEE NOTE PAGE 2)

MAR 5 1979 FBI

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Servs.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

62 MAR 26 1979

JCH:kmr (10)

MAIL ROOM

H/11-9
36 UL

Ms. Barbara A. Babcock
Assistant Attorney General

(2) During oral argument on February 12, 1979, Judge Lily stated that he had at one time served as Rosselli's attorney and expressed concern that his own name might appear in the file.

(3) The transcript of the oral arguments confirms that such statements were made.

(4) A review of the disputed documents and the remaining portions of the Rosselli file discloses two references which appear to confirm Judge Lily's statement that he represented Rosselli at one time.

Although I am fully aware of the very serious implications inherent in moving for the recusal of a Federal judge in a particular case, I concur with the judgment of the Appellate Section that the foregoing facts appear to justify such action in this instance.

However, due to the gravity of the proposed action, and the potential impact on this appeal, as well as other matters which the Department may have before the Ninth Circuit, I believe the ultimate decision should rest with the Department of Justice, therefore the FBI defers to your judgment in this matter.

Very truly yours,

William H. Webster
Director
Federal Bureau of Investigation

"And I am entirely satisfied with
the draft motion."

NOTE:

See Legal Counsel memorandum to Director, captioned and dated as above.

- 2 -

APPROVED:
Director
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Adm. Serv.
Crim. Inv.
Ident.
Insp.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgt.
Tech. Servs.
Training
Public Affs. Off.

UNITED STATES GOVERNMENT

Memorandum

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Servs. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

TO : The Director

DATE: 4/27/79

FROM : Legal Counsel

SUBJECT: JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CAL.)
CIVIL ACTION NUMBER 76-89S
NINTH CIRCUIT NUMBERS 78-1152 and 78-1880
(FOIPA LITIGATION)

PURPOSE: To advise that Judge Walter Ely has recused himself from participation in any further proceedings in connection with appeals numbered 78-1152 and 78-1880 regarding captioned matter.

SYNOPSIS AND DETAILS: By memorandum dated 3/2/79, captioned as above, Legal Counsel Division reported recent developments in captioned matter to the Director, including a request from the Appellate Section, Civil Division, Department of Justice (DOJ), for the Bureau's recommendation with respect to a proposed motion to recuse presiding Judge Walter Ely.

By letter dated 3/2/79, from the Director to Ms. Barbara A. Babcock, Assistant Attorney General, Civil Division, DOJ, we concurred that the DOJ should move to recuse Judge Ely.

62-116929-36X4

By letter dated 4/10/79, from Ms. Linda Cole, Attorney, Appellate Staff, Civil Division, DOJ, to SA John C. Hall, Legal Counsel Division, this Bureau was advised of Judge Ely's decision to recuse himself from further participation in appeals numbered 78-1152 and 78-1880 regarding captioned matter. Ms. Cole also enclosed therewith a copy of a letter

REC-2 197-905-5

1- ENCLOSURE

1 - [redacted] (Enc.)
1 - [redacted] (Enc.)
1 - [redacted] (Enc.)
1 - [redacted] Enc.)
1 - [redacted] (Enc.)
1 - [redacted] Enc.)
1 - [redacted] (Enc.)
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11 MAY 11 1979

EX-124 (CONTINUED - SEE OVER)

JAB:cmw (9) 364

62 JUN 1 1979

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Memo Legal Counsel
To The Director

from Judge Ely to Ms. Babcock, dated 3/30/79 (copy attached), expressing his appreciation for the manner in which the recusal was handled.

RECOMMENDATION: None, for information.

APPROVED:
Director
Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Adm. Serv.
Crim. Inv.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgmt.
Tech. Servs.
Training
Public Affs. Off.

Enclosure

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

[redacted]
[redacted] COURT HOUSE
[redacted] CALIFORNIA 90012

March 30, 1979

The Honorable Barbara Allen Babcock
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

RE: EXNER v. FEDERAL BUREAU OF INVESTIGATION, ET AL.
Nos. 78-1152, 78-1880

Dear Ms. Babcock:

On the day before yesterday, March 28th, I flew to San Francisco to attend to some official duties there. Before leaving Los Angeles, I had advised two of our judges, by telephone, of my intention to direct that all communications pertaining to the issue of my recusal in appeal No. 78-1152 be filed. Later in the day, in a telephone call, I was advised that my copy of the "MOTION TO RECUSE" had been received in my Los Angeles office. That copy of the Motion did not contain the attachments. The attachments were, however, included with the Original of the Motion, which was filed in San Francisco; thus, the original Motion and the attachments were readily available for my reading there.

I am glad that you filed the Motion, and I am grateful for the respectful tone of your covering letter to me, dated March 27, 1979.

As I have said before, I appreciate the courtesy of Mr. Egan, as I appreciate the courtesy of the letter written to me by Mr. Leonard under date of March 21, 1979.

The letter that you wrote to me on March 27th indicates a justifiable misapprehension on your part. It was never intended that our full Court, or any judge other than myself, should decide the issue of my recusal. While Mr. Egan's writing to me directly on March 9, 1979 constituted a violation of our Court's Local Rule 1, all acknowledge that, in writing that letter, Mr. Egan was motivated by the

62-116929-36X4

~~197-900-5~~

ENCLOSURE

consideration of courtesy. Thus, I cannot conscientiously fault him. I am more inclined to fault myself for my own impulsive mistake in telephoning Mr. Egan without advising Mr. Leonard in advance and without inviting Mr. Leonard to being privy, in a conference telephone call, to the telephone exchange between Mr. Egan and me. Now, however, there has been a full disclosure to Mr. Leonard of the thrust of that telephone conversation.

Next, I call your attention to the one obvious mistake in the affidavit of Mr. Stoll, attached to your "MOTION TO RECUSE". On the 8th line of page 2 of Mr. Stoll's affidavit, the word "witness" should be "widow". Mr. Stoll's mistake is quite understandable, since our recording equipment is by no means perfect and its imperfection in recording my comments is doubtless aggravated by my "Texas accent". In any event, I suggest that Mr. Stoll should again listen to the recording in the light of the context of the colloquy and file a brief amending affidavit substituting "widow" for "witness" at the specified place.

Today, I am forwarding an Order to San Francisco for filing. The Order grants your Motion that I recuse myself from participation in any further proceedings in connection with appeal No. 78-1152, the appeal to which your Motion was directed. By my Order, I also recuse myself from further participation in the consolidated appeal, No. 78-1880.

My Order eliminates the need for Mr. Leonard to file an opposition to your "MOTION TO RECUSE", and I hereby direct Mr. Leonard that he not file a response to the Motion.

Finally, and so that the record will be absolutely complete, I am directing our Court's Clerk to file a copy of this letter. No further communications between the parties and the Court should now be necessary.

I reiterate my satisfaction over your decision to file the "MOTION TO RECUSE". I could not have taken action upon the basis of Mr. Egan's informal letter of March 9th without bringing its contents to the attention of my colleagues and causing it, together with all other correspondence pertaining to the issue of my recusal, to be filed.

This is because of my belief, a belief that your Department apparently shares, as indicated by the filing of your motion, that no Court, or a judge thereof, should issue a significant Order affecting the Court's operation or the interest of litigants without a court recordation of the foundation of the Order.

Yours very truly,

WALTER ELY

WE:uk

cc: Associates
Honorable Harry Pregerson
Clerk Emil Melfi
Richard C. Leonard, Esq.
Honorable Michael J. Egan
Leonard Schaitman, Esq.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

April 10, 1979

Address Reply to the
Division Indicated
and Refer to Initials and Number

LMC:wm
145-12-2683

TELEPHONE:
(202) 633-3525

[redacted] Esquire
F.B.I. Academy
Legal Division
Quantico, Virginia 22135

b6
b7C

Re: Judith Katherine Exner v. Federal Bureau of Investigation (C.A. 9, No. 78-1152 and 78-1880)

Dear [redacted]

b6
b7C

I am enclosing copies of our most recent submissions to the Ninth Circuit so that you can bring your file on the Exner case up to date. As you can see from the enclosures, the Associate Attorney General originally decided to handle the recusal issue in a manner which differed from our recommendations. However, a formal motion was eventually filed and Judge Ely had indicated that he will disqualify himself from further participation in both appeals.

After the Exner case was argued and submitted, both the First and Fourth Circuits issued favorable decisions on the scope of the F.B.I.'s exemptions from the access provisions of the Privacy Act. We have transmitted copies of both decisions to the Clerk of the Court with a request that they be distributed to the panel. Copies of the decisions and our transmittal letters are enclosed.

62-116329-3645

I would like to take this opportunity to thank you for your cooperation throughout the appellate proceedings in this case. I will keep you apprised of any future developments.

Very truly yours,

SEP 26 1990

Linda

Linda M. Cole
Attoreny, Appellate Staff

2-ENCLOSURE

Enclosures

[redacted]

b6

Cole

March 30, 1979

LMC:wm
145-12-2683

TELEPHONE:
(202) 633-3525

Mr. Emil E. Melfi, Jr.
Clerk, United States Court of Appeals
for the Ninth Circuit
Post Office Box 547
San Francisco, California 94101

Re: Judith Katherine Exner v. Federal Bureau of Investigation (C.A. 9, No. 78-1152 and 78-1880)

Dear Mr. Melfi:

The above-captioned appeals were argued and submitted on February 12, 1979. On March 27, 1979, the United States Court of Appeals for the First Circuit issued a decision which squarely addresses the issue which is now pending before this Court in Appeal No. 1152. Irons v. Bell, No. 78-1350 (March 27, 1979).

In accordance with Local Rule 1, we are enclosing sufficient copies of the First Circuit's opinion for distribution to the panel. We would ask the panel to consider pages 4 and 5 of the First Circuit's decision in connection with the arguments presented at pages 14-21 of our principal brief.

Thank you for your assistance.

Very truly yours,

Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosures

cc: Richard C. Leonard, Esquire
Suite 1200
433 North Camden Drive
Beverly Hill, California 90210

62-110929-3645

ENCLOSURE

Cole

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER, Plaintiff-Appellant, v. FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE and GRIFFIN B. BELL, Attorney General of the United States, Defendants-Appellees.	)	No. 78-1152

MOTION TO RECUSE

TO THE HONORABLE JUDGE WALTER ELY:

Defendants, the Federal Bureau of Investigation, William H. Webster, the Department of Justice and Griffin B. Bell, respectfully submit this motion that Your Honor recuse himself from further participation in Appeal No. 78-1152.[1/] Defendants base this motion upon facts which came to their attention as a result of comments made at the February 12,

---

1/ The Appeal in No. 78-1152 concerns the extent to which the FBI can exempt files compiled for law enforcement purposes from the access provisions of the Privacy Act. It was consolidated, by order of this Court, with the Appeal in No. 78-1880 which deals with the standards for awarding attorneys' fees under the Freedom of Information Act. Although the two appeals stem from the same lawsuit and involve the same parties, the legal issues are wholly different. The appearance of lack of impartiality is directly raised only in Appeal No. 78-1152. Accordingly, defendants do not request Your Honor to recuse himself from participation in the disposition of Appeal No. 78-1880.

1979 oral argument in the above-captioned case.[2] Defendants respectfully request Your Honor to consider these newly discovered facts in light of the recent amendment to the recusal statute and to grant the instant motion because, in light of those facts, your "impartiality might reasonably be questioned." 28 U.S.C. 455(a). We believe that it is our duty to file the instant motion in order to vindicate the important public policies which underlie the recusal statute and to provide Your Honor with the protections which the statute was designed to afford federal judges.[3]

2/ Immediately after returning to Washington, D.C., the appellate attorney who argued this case for the government brought these comments to the attention of her review officer. The Department of Justice then took steps to obtain a transcript of the relevant portions of the oral argument. The Department also requested the FBI to review the files which are the subject of this lawsuit in light of the comments made at the oral argument. The transcript, the results of the FBI search, and a draft motion were then submitted to the Director of the FBI, the Assistant Attorney General for the Civil Division and the Associate Attorney General for a determination as to whether the Department should ask Your Honor to recuse himself.

3/ Because the motion is based in part upon facts which came to the government's attention after the oral argument, the Associate Attorney General decided that, as a courtesy, he would make those facts available to Your Honor in advance of filing the motion for whatever response Your Honor might wish to make. Accordingly, by letter of March 9, 1979, the Associate Attorney General sent Your Honor a letter stating that the name of Your Honor's former law firm does in fact appear in the files which are the subject of this lawsuit. A copy of that letter was sent to opposing counsel. Subsequently, Your Honor telephoned the Associate Attorney General to request additional factual information. The Associate Attorney General then sent a follow-up letter providing the information requested. A copy of that letter was also sent to opposing counsel. Both Your Honor and the Department of Justice sent opposing counsel a letter describing the substance of the telephone contact which did occur. At that point, opposing counsel submitted a letter expressing a desire to file a written opposition to Your Honor's recusal. After receiving that letter, the Department filed the instant motion. Copies of all correspondence pertaining to the issue of recusal are attached hereto.

The Newly Discovered Facts

This case involves the efforts of plaintiff Judith Katherine Exner to obtain documents from the Central Records System of the Federal Bureau of Investigation which contain references to her. Because the Privacy Act contains broad exemptions for law enforcement agencies and for law enforcement files, the FBI processed Mrs. Exner's request solely under the Freedom of Information Act. Pursuant to the latter statute, the FBI released over two hundred pages to Mrs. Exner. The FBI withheld additional material on the grounds that its release would invade the privacy of persons other than Mrs. Exner who were also named in the documents. The district court examined all of the disputed material in camera and upheld both the FBI's reading of the exemptions to the Privacy Act and its invocation of the exemption to the Freedom of Information Act which pertains to clearly unwarranted invasions of personal privacy. Plaintiff appealed the district court's ruling on the Privacy Act and the government cross-appealed from the court's award of attorneys' fees to plaintiff.

The case was fully briefed and orally argued on February 12, 1979, before a panel of this Court consisting of Your Honor, Circuit Judge Wallace and District Judge Pregerson. The instant motion to recuse stems from comments made by Your Honor at the oral argument. As noted on page five of the government's main brief on the appeal, over 95% of the disputed material in this case came from files which were compiled during the anti-racketeering investigation of John

Roselli. Twice during oral argument, Your Honor commented that he had been John Roselli's lawyer.[4/] In addition, both Judge Wallace and Your Honor requested government counsel to advise the Court of the location of the in camera exhibit which was submitted to the district court but which was not designated as part of the record on appeal.[5/] See the attached affidavit of George C. Stoll which contains a transcription of the relevant portions of the oral argument.[6/]

Because Your Honor's comments raised the possibility that your name might appear in the very files which are the subject of this appeal,[7/] the Department of Justice immediately asked the FBI to ascertain whether or not this situation did exist. The attached affidavit of John F. Loome indicates that the name of Your Honor's former law firm (Ely, Kadison and Quinn) does appear both in the portions of

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4/ By filing this motion, the government, of course, does not suggest any impropriety whatsoever in Your Honor's hearing oral argument in the first place. This motion is based solely upon (1) comments which were obviously evoked as a spontaneous response to the colloquy at oral argument and (2) the FBI's post-argument examination of the files in question.

5/ Earlier during the argument, Judge Wallace raised the question of the location of the documents.

6/ Mr. Stoll's affidavit at one point refers to "Rosetta" rather than "Roselli." However, it is clear from the context that John Roselli was the individual under discussion. We have also been advised that the word "intelligible" was inadvertently typed in the affidavit instead of the correct "unintelligible."

7/ At the oral argument, Your Honor stated: "I hope it doesn't have any reference to me because I represented one of the plaintiffs in an isolated matter. . . ."

the Roselli files from which the documents pertaining to Mrs. Exner were drawn and in the actual in camera exhibit itself.

The Amendment To The Recusal Statute

In 1974, Congress amended the recusal statute to provide that "[a]ny justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). The legislative history demonstrates that Congress amended the statute in order to protect federal judges from "uncertain language [which] has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril" and to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify and let another judge preside over the case." H. Rep. No. 93-1453, 93d Cong., 2d Sess. 2, 5 (1974), reprinted in 1974 U.S. Code Cong. and Admin. News at 6352 and 6355.

Thus, the post-1974 test for recusal is not whether the judge could, as a subjective matter, decide the case with impartiality. The test is whether, under the circumstances, a reasonable man might question the judge's ability to do so. Davis v. Board of School Commissioners, 517 F. 2d 1044, 1052 (5th Cir. 1975), rehearing denied, 521 F. 2d 814 (1975), certiorari denied, 425 U.S. 944 (1976). Indeed, under the amended statute, the "appearance of

impartiality is virtually as important as the fact of impartiality." Webbe v. McGhie Land Title Co., 549 F. 2d 1358, 3161 (10th Cir. 1977).

The Recusal Statute as Applied to the Instant Case

The fact that the name of Your Honor's law firm (Ely, Kadison and Quinn) appears in the very files which are at issue in this case places Your Honor's personal interests at the very center of the appeal in No. 78-1152. On the one hand, Your Honor's position can be directly analogized to that of the plaintiff. The district court found that Mrs. Exner's name appears throughout the Roselli files on a sporadic and incidental basis. The Loome affidavit shows that Your Honor's law firm also appears in those files on two occasions. At the oral argument, Your Honor noted that he had been John Roselli's lawyer. It appears, therefore, that Your Honor, like the plaintiff, may have a substantial interest in access to those files. On the other hand, Your Honor's position is directly analogous to the position of the third parties whose interests the government has tried to protect by withholding documents from Mrs. Exner under Exemption b(7)(C) to the Freedom of Information Act. The Loome affidavit establishes that the name of Your Honor's former law firm appears in one of the actual documents which was withheld from the plaintiff and which was submitted to the district court for in camera review. Thus, were the plaintiff to prevail on this appeal, she will in fact obtain a direct reference to Your Honor's firm. It thus appears that no matter how Your Honor decides this case, it could

reasonably be contended that he has allowed his personal interests to influence his actions. If Your Honor rules for plaintiff, it can be asserted that he has vindicated his own right of access. If Your Honor rules for the government, it can be asserted that he has protected his own privacy.

In our view, therefore, this case fits squarely within the language and spirit of the recusal statute since this is a case in which Your Honor's "impartiality might reasonably be questioned." 28 U.S.C. 455(a). The remedy of recusal provided by the statute must therefore be applied in order to protect the reputation of the federal judiciary and to afford Your Honor the protection which the recusal statute was designed to provide federal judges.

There is an additional consideration which lends further, independent, support to the motion to recuse. As noted above, at the oral argument, Judge Wallace and Your Honor expressed an interest in the in camera exhibit. If Your Honor, as a private citizen, had submitted a request for references to himself or his law firm contained in the in camera exhibit, that request would most probably have been denied by the FBI on the same grounds as it denied access to Mrs. Exner.[8/] If the panel of which Your Honor is a member should, in deciding the instant appeals, seek in camera inspection of

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8/ The FBI would certainly have denied access under the Privacy Act in accordance with Exemptions (j)(2) and (k)(2) and the implementing regulations. The FBI would also have limited access under the Freedom of Information Act in accordance with Exemption b(7)(C) to the extent necessary to protect third parties from any "clearly unwarranted invasions of personal privacy."

the documents, Your Honor would be provided materials in his judicial capacity which might have been withheld from him in his personal capacity. Any appearance that a judge has used his office to gain a personal advantage must be avoided.

For the foregoing reasons, defendants respectfully request Your Honor to recuse himself from further participation in appeal No. 78-1152.

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General,

LEONARD SCHAITMAN (202) 633-3321

LINDA M. COLE (202) 633-3525
Attorneys,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER, Plaintiff-Appellant, v. FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE, and GRIFFIN B. BELL, Attorney General of the United States, Defendants-Appellees.	)	No. 78-1152

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 1979, I caused the foregoing Motion To Recuse to be served upon counsel for Plaintiff-Appellant, by mailing a copy, postage prepaid, to:

Richard C. Leonard, Esquire
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

LINDA M. COLE
Attorney.

A T T A C H M E N T S

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b7C

Assistant Attorney General
Appellate Staff, Civil Division
Attention: Ms. Linda M. Cole
Room 3610 FEDERAL GOVERNMENT
Assistant Director - Legal Counsel
Federal Bureau of Investigation

February 22, 1980

2 - [redacted] (Enc.)
Attn: [redacted]
Attn: [redacted]
1 - [redacted] Enc.)
1 - [redacted] (Enc.)
1 - IPALU

JUDITH KATHERINE LERNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CAL.)
CIVIL ACTION NUMBER 76-39S
NINTH CIRCUIT COURT OF APPEALS NUMBERS 78-1152 and 78-1880

Reference is made to your memorandum dated February 11, 1980 (your reference: LS:LMCole:wm, 145-12-2683), and the telephone conversation of February 20, 1980, between Ms. Linda M. Cole of your office and Special Agent (SA) [redacted] of this Bureau's Legal Counsel Division.

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Pursuant to the above, and in view of the Ninth Circuit Court of Appeals affirmation of the District Court's award of attorneys' fees to plaintiff in captioned matter, we strongly recommend that your office file a petition for rehearing, and preferably, for rehearing en banc. If such a petition is denied or if the Court of Appeals will not reverse itself, we also recommend that a petition for a writ of certiorari be filed with the Supreme Court.

It is this Bureau's opinion that the District Court's ruling, and the Court of Appeals' affirmation thereof, that plaintiff "substantially prevailed" in captioned matter and is entitled to attorneys' fees simply because she received expedited treatment of her Freedom of Information Act (FOIA) request by court order, is a blatant misapplication of the FOIA's attorneys' fees provision and clearly unsupported by case law and the Act's legislative history. See, e.g. S.Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1977); Cox v. United States Department of Justice, 601 F.2d 1 (D.C. Cir. 1979); Olaguibeet A. Lopez Pacheco v. Federal Bureau of Investigation, Civil Action Number 76-83 (D.P.R. January 10, 1980)(copy attached), and citations therein.

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SEE NOTE PAGE 2

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.:
Adm. Servs. ____
Crim. Inv. ____
Ident. ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Insp. ____
Rec. Mgnt. ____
Tech. Servs. ____
Training ____
Public Affs. Off. ____
Telephone Rm. ____
Director's Sec'y ____

MAIL ROOM ☑

FBI/DOJ

Assistant Attorney General
Appellate Staff, Civil Division

Additionally, we believe that such an interpretation would have an extremely chilling effect on all Government agencies in FOIA cases wherein a plaintiff receives expedited treatment, whether it be court ordered or otherwise.

It is this Bureau's interpretation of the FOIA's attorneys' fees provision, based upon case law and the Act's legislative history, that such fees may be awarded to a plaintiff in an FOIA action only where a defendant agency has "improperly withheld" documents from the plaintiff. Such a factual situation does not exist as to plaintiff, as her FOIA lawsuit did not bring about the disclosure of information to her which would not have been made available to her in the absence of the suit. Simply stated, had plaintiff not initiated her lawsuit, she would have received the same information, only not on an expedited basis. No documents were improperly withheld from plaintiff as is clearly supported by the record in captioned matter. Thus, there was no substantial causal relationship between the result of plaintiff's lawsuit and what she originally sought pursuant to her FOIA request; and, therefore, she did not "substantially prevail" in captioned matter and should not be entitled to an award of attorneys' fees.

Should you require additional information and/or assistance concerning captioned matter, please contact SA [redacted] to whom it is currently assigned, at (202) 324-5662.

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Enclosure

NOTE: Copy of referenced memorandum and of Court of Appeals opinion attached hereto for Bureau personnel only. Views sought by DOJ in paragraph three of referenced memorandum orally furnished to Ms. Cole on 2/20/80, by Legal Counsel Division. Prior history of captioned matter set forth at 542 F.2d 1121 (9th Cir. 1976) and 443 F.Supp. 1349 (S.D. Cal. 1978).

APPROVED:

Director _____
Exec. AD-Inv. _____
Exec. AD-Adm. _____
Exec. AD-LES _____

Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. _____
Plan. & Insp. _____
Rec. Mgmt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

Thus, after an overall assessment of the particularities of this action what can be gleaned is: first, that it is questionable that this civil suit was needed for substantial compliance on the part of the agency; second, that no bad faith can be attributed to the agency in either the delay between the request and the disclosure or the invocation of the defenses to disclosure; and third, the fact the Defendants did prevail on these defenses demonstrates that "the Goverment's withholding of the records sought /had/ a reasonable basis in law." Nationwide Building Maintenance, supra, p. 711

For all the above cited reasons we find that no award of attorney's fees is warranted in the present action and this request is accordingly, DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10th day of January, 1980.

JUAN E. TORRUELLA
U. S. DISTRICT COURT JUDGE

that an award of attorney's fees is warranted in this case. Although we recognize that Plaintiff has vigorously litigated his claims throughout the proceedings, he has nevertheless failed to show that he has "substantially prevailed" in his claims before this Court.

While it is true that the courts have not required a court order or judgment compelling disclosure in order to find that a party has prevailed,[4/] it is equally true that a substantial causal relationship must be shown between the result of the suit and what was originally sought. It must appear that Plaintiff could not have obtained substantial compliance with his request if it were not but for his suit. This must necessarily follow if there is to be a finding that a Plaintiff did indeed "substantially prevail." As we have noted before, Defendants substantial compliance with their obligation under the Act came only some six to seven months after the initial request for disclosure was made.[5/] Moreover, a significant amount of disclosure was had administratively,[6/] when this civil action was still very much in its incipient stage. As to those documents that remained in controversy the claimed exceptions were upheld by this Court; see 470 F. Supp. 1091, and our subsequent Opinion and Order of July 31, 1978.[7/]

4/ See esp.: Nationwide Building Maintenance, Inc., supra and Cureo v. Rumsfeld, 553 F. 2d 1360 (C.A.D.C. 1977).

5/ In this respect, we are not unmindful that the F.B.I. is one of the agencies with the greatest volume of requests under the F.O.I.A. See Open America v. Watergate Special Prosecution Force, 547 F. 1d 605 (C.A.D.C., 1976).

6/ To this end this action was stayed pending administrative exhaustion. See note 2 supra. In this respect the fact that these documents were provided administratively is some indication that no bad faith was involved on the part of the agency in processing the request.

7/ We should also mention that what was adjudicated in summary judgment was for the most part a dispute on excisions from the documents and not an outright denial of complete documents held by the F.B.I.

This Section was added to the F.O.I.A. and the F.O.I.P.A. by the 1974 Amendment with intention of providing compensation to private persons for their assistance to the general public in bringing the government to comply with the national policy favoring disclosure of government documents and in this way encourage prompt and good faith compliance by the administrative agencies with their duties under the Act. S.Rep. No. 93-854, 93d Cong., 2d Sess. 17(1977); Cox v. United States Department of Justice, 601 F. 2d 1 (D.C.Cir. 1979).

An award of attorney's fees is never automatic. First and foremost the Court must determine that the plaintiff has "substantially prevailed." s552(a)(4)(E). Moreover, this determination involves an exercise of sound discretion of the Court which takes into account the particular facts of each individual case. In reaching this decision, the Court is guided by several factors, among these: (1) whether the prosecution of Plaintiff's claim could reasonably be regarded as necessary; (2) whether his suit had a substantial causative effect on the delivery of the information; (3) the benefit to the public, if any, derived from the suit, (4) the nature of the complainant's interest in the released information, and (5) whether the agency's withholding of the record had a reasonable basis in law.[3/]

After a careful examination of 5 U.S.C.s552(a)(4)(E), and the above enumerated factors against the particular circumstances of this case, we find that they fail as a whole, to demonstrate

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3/ Several factors are taken from the original Senate version of what is now Section 552(a)(4)(G). The others are taken from different cases which have previouly discussed this same matter. See e.g. Nationwide Building Maintenance Inc, v. Sampson, 599 F. 2d 704 (C.A.D.C. 1977) and Vermont Low Income Advocacy Council v. Dunlop, 71 F.R.D. 344 (D. Vt.) aff'd sub nom., Vermont Low Income Advocacy Council v. Usery, 546 F. 2d 509 (C.A. 2 1976). As Nationwide Building, supra, teaches, neither one factor is exclusive or is individually dispositive of the issue, nor is this list of factors exhaustive.

complaint before this Court seeking Defendants' compliance under the F.O.I.A.

On March 11, 1976 Defendants released 111 pages of documents. Shortly thereafter this case was stayed pending exhaustion of administrative remedies.[2/] As a result of these further administrative proceedings, on November 1, 1977, 84 additional pages were released. Plaintiff filed an amended complaint on February 8, 1978 to obtain release of all requested documents still withheld. A second amended complaint was filed on June 1, 1978.

By way of summary judgment, we disposed of all the controversies raised by the amended complaint: Plaintiffs' Motion for in camera inspection was denied; all of the exemptions claimed by Defendants under 5 U.S.C.ss 552(b)(7)(c); 552(b)(7)(D); and 552(b)(1) were sustained; Plaintiffs' request for amendment of record was dismissed; and Plaintiffs' request of all documents originating with the F.B.I's Counter Intelligence Program relating to groups and individuals seeking independence for Puerto Rico was denied. Plaintiff did succeed in obtaining release of his photograph in Defendants' records, which Defendants originally denied they had, and successfully obtained release of 11 additional pages of documents originating with other federal agencies which Defendants initially refused to release.

The Freedom of Information Act, ("F.O.I.A."), 5 U.S.C. s552(a)(4)(E) and the Freedom of Information and Privacy Act ("F.O.I.P.A."), 5 U.S.C. s552a(g)(3)(B), both provide that:

> "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

2/ See our Order of March 30, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

OLAGUIBEET A. LOPEZ PACHECO et al

Plaintiffs

v.) CIVIL NUMBER: 76-83

FEDERAL BUREAU OF INVESTIGATION, et al

Defendants

DECISION AND ORDER

In our previous Opinions and Orders[1] we disposed of all controversy on the merits pending in this case. Plaintiff has now reinstated his Motion for Attorney's fees and Defendants adhere to their opposition previously filed before the Court.

The facts underlying this Motion are as follows: On July 6, 1975, Plaintiff filed a request under the Freedom of Information Act, ("FOIA"), 5 U.S.C. s552(a)(4)(E), with Defendants to obtain copy of the entire record of himself and his deceased son prepared by Defendants in relation with the investigation of the events and circumstances surrounding his son's death. On July 10, 1975 Defendants replied that they would comply with this request within the next 45 working days. On September 30, 1975 Defendants requested Plaintiff's notarized signature in order to release the documents. This signature was immediately provided by Plaintiff. Further inquiry was made on December 12, 1975 as to the status of the request for the documents. Because the requested documents had not been received by January 23, 1976 Plaintiff filed a

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1/ See: 470 F. Supp. 1091 (1978) and the Opinion and Order of July 31, 1979.

62-116929-37

ENCLOSURE

February 11, 1980
Leonard Schaitman
Appellate Staff, Civil Division
Department of Justice
Exner v. Federal Bureau of Investigation
(C. A. 9, No. 78-1880)

LS:LMCole:wr
145 - 12 - 2683

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[redacted]
Legal Counsel Division
Federal Brueau of Investigation

I am enclosing for your review a recent decision of the United States Court of Appeals for the Ninth Circuit which sets unfavorable precedent under the attorney's fees provision of the Freedom of Information Act. We are presently considering whether to file a petition for rehearing and a suggestion for rehearing en banc; we may ultimately have to consider whether to file a petiton for a writ of certiorari. Your comments will help us to ascertain the extent to which the Ninth Circuit's decision adversely affects the government.

Briefly, the district court awarded attorney's fees to the plaintiff even though it had upheld every single one of the government's claimed exemptions. The court theorized that the plaintiff had "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) because she had obtained a judicial order directing the F.B.I. to process her request ahead of the prior requests of other individuals. The government appealed, contending, inter alia, that an FOIA litigant cannot substantially prevail within the meaning of the fee provision unless (s)he obtains some sort of disclosure which the government would not otherwise have made. A copy of the government's brief is attached. The Ninth Circuit affirmed the decision of the district court as a factual finding which withstood review under the clearly erroneous standard.

We would appreciate your comments on all aspects of the decision. However, we are particularly interested in your views on (1) the extent to which government agencies find it impossible to comply with the time limits of the FOIA and resort to processing requests on a first-in-first-out basis, (2) the extent to which the courts have been ordering government agencies to process certain FOIA requests ahead of others, and (3) the extent to which such court orders disrupt an agency's ability to process all FOIA requests in the most efficient possible manner.

Please send your comments to Linda M. Cole, Room 3610, Appellate Staff, Civil Division, Department of Justice, Washington, D. C. 20530. You may also telephone Mrs. Cole at 633-3525. Thank you for your cooperation.

FILED

FEB 4 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER, Appellant, v. FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES UNITED STATES DEPARTMENT OF JUSTICE and GRIFFIN B. BELL, Attorney General of the United States, Appellees.	No. 78-1152
JUDITH KATHERINE EXNER, Appellee, v. FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES UNITED STATES DEPARTMENT OF JUSTICE and GRIFFIN B. BELL, Attorney General of the United States, Appellants.	No. 78-1880 OPINION

Appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, Chief Judge, Presiding
Argued February 12, 1979
Panel reconstituted, submitted on briefs and record,
April 19, 1979

Before: GOODWIN, WALLACE and PREGERSON*, Circuit Judges.
GOODWIN, Circuit Judge:

Judith Katherine Exner sued the Federal Bureau of Investigation under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, to

*The Honorable Harry Pregerson, now a member of this court, was United States District Judge for the Central District of California, sitting by designation when this case was submitted.

FPI-LOM-4-8-77

62-116929-37

ENCLOSURE

obtain access to the information about her in the Bureau's files. While the case was pending in the district court, and during the time consumed by an earlier appeal to this court,[1] the FBI released to Mrs. Exner some 86 documents, in whole or part, of a total of 92 documents identified by the FBI as responsive to her request. The district court denied Mrs. Exner's request for an order to produce the remaining six documents, but allowed her attorney's fees and costs upon a finding that she had "substantially prevailed" under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). Both parties appeal.

The factual background of the case has been published in the decisions cited in the margin. The legal questions are (1) whether Mrs. Exner, whose appeal is not based on the FOIA, is entitled under the Privacy Act to disclosure of certain remaining documents in the possession of the FBI; and (2) whether the district court properly awarded Mrs. Exner attorney's fees and costs under the FOIA.

Both the FOIA and the Privacy Act provide for access to records maintained by agencies of the United States. The FOIA contemplates public access to any and all records not exempt from disclosure. The Privacy Act provides for access by an individual to government records concerning that individual and not exempt from access under specified circumstances.

The trial court, before granting summary judgment, examined the unreleased documents in chambers as a court may do under the FOIA (5 U.S.C. § 552(a)(4)(B)). A more limited procedure appears in the Privacy Act. (5 U.S.C. § 552a(g)(3)(A)).

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After the examination pursuant to the FOIA, the trial court made findings which, under both the FOIA and Privacy Acts, made the contested documents exempt from release to anyone not authorized by the FBI to see them.

The court accordingly ruled that Mrs. Exner was entitled to no further releases of documents under either statute. Her appeal challenges only the court's interpretation of the Privacy Act. Technically, therefore, we have no need to consider the FOIA further, except as that statute provided the basis for the court's award of attorney fees. The FOIA is, however, tied into the Privacy Act in certain of Mrs. Exner's arguments on appeal, and therefore will be considered in that connection.

I. THE PRIVACY ACT

Subsection 552a(d) of the Privacy Act permits an individual[2] to gain access to those records[3] which pertain to him and are found in a system of records[4] maintained by an agency.

Having given general access to the individual in 552a(d), Congress in subsection 552a(j)(2) denied access to any system of records which is "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws * * * and which consists of * * * (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual * * * ."

To exempt a system of records from access under the Privacy Act, an agency must, first, promulgate rules, pursuant to the rulemaking requirements of 5 U.S.C.

§§ 553(b)(1), (2), and (3)(c) and (e), and, second, state the reasons in the rule itself why the system of records is to be exempt from a provision of the Act. 5 U.S.C. § 552a(j). The Justice Department takes the position that it has fully complied with both requirements. See 28 C.F.R. § 16.91. The trial court agreed, and we affirm.

In her amended complaint, Mrs. Exner indicated that she sought access under the Privacy Act because, once she obtained access to her records, the Privacy Act would give her the opportunity to correct what she believed to be inaccurate information in the FBI's files. She contends on appeal that if she cannot inspect the remaining FBI records not previously released to her she cannot correct them. This is true, but it is not necessarily controlling. First, she must establish the right to see the withheld records.

The scope of our review of the district court's decision exempting 6 of the 92 documents from disclosure is two-sided. First, we agree that the trial court's perception of the facts withstands review under Fed. R. Civ. P. 52. The trial court found, as a fact, that the withheld documents were part of a criminal investigation report in an exempt system of records. This finding is virtually conceded. Next, we must decide whether the trial court applied the correct legal standard.

The only Privacy Act exemption cited by the district court is the one contained in section 552a(j)(2)[5].

The Department of Justice regulations found in 28 C.F.R. § 16.96 activate the exemptions with respect to four different systems of records: the Central Records System, the Electronic Surveillance Indices, the Identification Division Records System, and the National Crime

FPI-LOM-4-8-77

Information Center. While the trial court's findings do not so specify, the information concerning Mrs. Exner was apparently all found in the Central Records System.

Regulation § 16.96(a) provides that the Central Records System is exempt from subsection 552a(d) "to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. § 552a(j) or (k)."[6] The regulation gives as reasons for these exemptions :

> "[I]ndividual access to records * * * might compromise ongoing investigations, reveal investigatory techniques and confidential informants, and invade the privacy of private citizens who provide information in connection with a particular investigation. In addition, exemption * * * is necessary to protect the security of information classified in the interest of national defense and foreign policy." 28 C.F.R. § 16.96(b)(2).

The district court correctly ruled that the (j)(2)(B) exemption, as implemented by 28 C.F.R. § 16.96(a) and (b)(2), precludes Mrs. Exner from obtaining any further disclosure of the information pertaining to her that has been withheld as exempt.

On the face of the (j)(2)(B) exemption and the accompanying regulation, Mrs. Exner was not entitled to disclosure of any of the information concerning her that appears in the FBI files. All the information on Mrs. Exner was contained in criminal investigatory files located in the Central Records System, and regulation section 16.96(a) has activated the (j)(2)(B) exemption with respect to the Central Records System.[7]

Mrs. Exner contends, however, that the district court relied solely on the FOIA, and ignored the Privacy Act, when it ruled that the government could properly withhold those documents and portions of documents it has not voluntarily turned over to Mrs. Exner. She is wrong. The

"Memorandum and Order Granting Motion for Summary Judgment" demonstrates that the district court did in fact consider the Privacy Act and did find that Mrs. Exner was not entitled to any further disclosure under the Privacy Act or under the FOIA.

Mrs. Exner argues here that the Privacy Act's investigatory records exemption, set forth at subsection 552a(j)(2)(B), should be construed in her case as coextensive with the FOIA's investigatory records exemption, set forth in subsection 552(b)(7).[8] We need not decide in this case whether the Privacy (j) (2) (B) exemption exempts more information from disclosure than does FOIA (b)(7). Upon any reading of either statute, Mrs. Exner has already received at least as much information as she has a statutory right to demand. Accordingly, we can reserve until a time when a case turns upon the question whether her theory is sound.[9]

On oral argument a question was raised whether the Privacy Act entitles Mrs. Exner to further disclosure on another ground: given that the information at issue is contained in a system of records (the Central Records System) that may be totally exempted from access under subsection 552a(j)(2)(B) to the extent that it contains criminal investigatory files, and given that the FBI has promulgated a regulation, 28 C.F.R. § 16.96(a), that nominally activates the exemption, may the FBI nevertheless not withhold the information at issue unless the reason for withholding is consistent with one of the reasons listed in subsection 16.96(b)(2) for exempting the Central Records System from the application of the access provisions? The question, then, is whether the reasons given in the regulation limit the exemption.

As noted earlier, Privacy Act subsection 552a(j) requires an agency to specify "the reasons why the system of records is to be exempted" when it promulgates a regulation exempting the system from the access provisions. The Privacy Act does not indicate the purpose or effect of this requirement. Nor does the statute state that once the agency has promulgated the regulation activating the (j)(2)(B) exemption, the agency may withhold information only if the reason for withholding is consistent with one of the reasons listed in the implementing regulation. We find it unnecessary at this time to explore the meaning of legislative silence on this point because the district court found that the material here had been withheld for reasons consistent with those set out in the implementing regulation. The disputed documents were, thus, exempt under any reading of the statute.

Under the Privacy Act, 5 U.S.C. § 552a(g)(3)(A), the court may conduct in camera proceedings only to determine whether the exemptions set forth in subsection (k) are applicable; the Privacy Act does not expressly give the court the right to look at the records to determine whether the exemptions set forth in subsection (j) are applicable. Given this diverse treatment of the different exemptions, we decline to speculate whether Congress, by failing to provide expressly for review of (j)(2)(B) material, intended to preclude such review or merely overlooked the point. Whether or not, in this case, the district court had statutory authority to review any of Mrs. Exner's records, with respect to which the government was claiming the (j)(2)(B) exemption, to determine whether the government's reasons for withholding those records are consistent

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with the reasons listed in 28 C.F.R. § 16.96(b)(2) for exempting the Central Records System from the access provisions, the court did examine the documents and concluded that they were exempt.

This conclusion leaves only the question of attorney's fees under 5 U.S.C. § 552(a)(4)(E).

II. ATTORNEY'S FEES

The plaintiff's right to attorney's fees and costs cannot be considered apart from the procedural history of the case. The decision whether to award attorney's fees under 5 U.S.C. § 552(a)(4)(E) is within the discretion of the district court. Cox v. United States Department of Justice, ____ F.2d _____ (D.C. Cir., June 11, 1979). The trial court, in which this litigation flourished for several years, made specific findings that withstand review under Fed. R. Civ. P. 52, to the effect that Mrs. Exner "substantially prevailed" under her FOIA claim. The record supports both the findings and the court's conclusions.

Affirmed.

FOOTNOTES:

[1]See Exner v. Federal Bureau of Investigation, 443 F. Supp. 1349 (S.D. Cal. 1978), and Exner v. Federal Bureau of Investigation, 542 F.2d 1121 (9th Cir. 1976).

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[2]Subsection 552a(d) provides in part:

> "(1) [U]pon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made * * * ."

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[3]The term "record" is defined in subsection 552a(a)(4) as follows:

> " * * * [A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph * * * ."

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[4]The term "system of records" is defined in subsection 552a(a)(5) as follows:

> " * * * [A] group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual * * * ."

"Records * * *

"(2) [M]aintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

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[6]On appeal, the government also relies on the exemption contained in § 552a(k)(2). It provides that an agency head may exempt from the access and amendment requirements a system of records that contains:

"(2) [I]nvestigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence * * * ."

It is not necessary in this case to consider this exemption, and we decline to do so.

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[7]We do not express an opinion on the documents disclosed earlier under the FOIA during the course of the litigation. The government has not raised the issue on appeal, and it is moot in any event.

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[8] "(b) This section does not apply to matters that are -

* * *

"(7) investigatory records complied 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 complied 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; * * * ."

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[9]The version of the Privacy Act that originally passed the Senate contained a single exemption concerning access to investigative records. That exemption, by design, was identical to the FOIA's (b)(7) exemption as amended, except that it also provided that investigative information could not be exempted where the information had been maintained for a period longer than necessary to begin criminal prosecution. 120 Cong. Rec. 36917, 36920,

36891 (1974) (§ 203(b) of the Senate version). The House version, passed the same day (November 21, 1974), contained the (j)(2)(B) and (k)(2) exemptions that appear in the Privacy Act, except the House version did not require an agency to set forth in the implementing regulations the reasons why a system of records was to be exempted. Id. at 36654, 36962, 36976. The House bill was also significantly different from the Senate bill in other ways. Pressed for time, the members and staffs of the relevant House and Senate committees informally negotiated a compromise between the two versions. The compromise retained the basic thrust of the House measure but also included important segments of the Senate bill. Id. at 40400, 40880. The House then passed the Senate bill, amending it by substituting the language of the House measure. Id. at 39204. The Senate bill, as amended by the House, was presented to the Senate together with amendments incorporating the compromises. Id. at 40397-405. The compromise measure adopted the investigatory records exemptions contained in the House bill, i.e., it adopted the (j)(2)(B) and (k)(2) exemptions. The Senate version, which tracked the FOIA's (b)(7) exemption, was dropped. Added to the House version, however, was the requirement that regulations implementing the exemptions set forth the reasons why the exemptions were to be invoked. Id. at 40402-03. The Senate accepted the compromise, id. at 40413; the House accepted the compromise with technical amendments, id. at 40880, 40886; the Senate concurred in the amendments, id. at 40730; and the Privacy Act was presented to the President and was signed.

PREGERSON, Circuit Judge(concurring):

As I read the district court's Memorandum and Order Granting Motion for Summary Judgment, Judge Schwartz correctly treated the investigatory records exemptions found in the Freedom of Information Act(FOIA) and the Privacy Act as coextensive. In my view, a coextensive reading of these exemptions is required to effectuate the purposes of both acts. Both the FOIA and the Privacy Act contain provisions under which a party may gain access to records maintained by agencies of the United States. Under the FOIA, an individual may gain access to nonexempt records, whether or not the records pertain to him or her. Under the Privacy Act, an individual may gain access to nonexempt records only if they concern him or her. Thus, an individual may obtain documents pertaining to him or her under both acts. It makes good sense, then, that parties should have the same access to records pertaining to them under the Privacy Act as they would have under the FOIA. In this way, the disclosure purpose underlying both acts may be effectuated.

Under the FOIA, 5 U.S.C. §552, agencies must release records to a requesting party unless those records fall within one of nine exemptions to disclosure

set forth in §552(b). The exemption at issue here is the investigatory records exemption contained in subsection (b)(7). That provision exempts 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 . . . .

§552(b)(7).

Under the FOIA, when an agency refuses to disclose requested documents by asserting the investigatory records exemption, the requesting party may challenge the claimed exemption in district court. The court may then examine the documents in camera to determine if the (b)(7) exemption does indeed apply. §552(a)(4)(B). The agency bears the burden of demonstrating both that the documents are investigatory records compiled for law enforcement purposes and that at least one of the justifications for nondisclosure spelled out in (b)(7) applies.

The scope of the investigatory records exemptions in the FOIA, 5 U.S.C. §552, and the Privacy Act,

5 U.S.C. §552a, is basically the same. Subsection (j)(2)(B) of the Privacy Act generally exempts from disclosure any system of records maintained

> By an agency . . . which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . and which consists of . . . information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual . . . .

§552a(j)(2)(B). To activate this exemption, however, an agency must promulgate rules in accordance with sections 553(b)(1), (2), and (3), (c), and (e) of the Administrative Procedure Act. Those rules must include a statement of reasons explaining why a system of records is exempt from the Privacy Act's disclosure provisions. §552a(j).

Pursuant to §552a(j), the FBI activated the Privacy Act's (j)(2)(B) investigatory records exemption by promulgating regulations in 28 C.F.R. §16.96. These regulations set forth the following statement of reasons justifying the exemption:

> [T]hese [disclosure] provisions concern individual access to records and such access might compromise ongoing investigations, reveal investigatory techniques and confidential informants, and invade the privacy of private citizens who provide information in connection with a particular investigation. In addition, exemption . . . is necessary to protect the security of information classified in the interest of national defense and foreign policy.

28 C.F.R. §16.96(b)(2).

When an agency refuses to disclose the requested documents by asserting the Privacy Act's investigatory records exemption, the requesting party may challenge the claimed exemption in district court. The court is empowered to determine the matter de novo. §552a(g)(3)(A). Unlike the FOIA, the Privacy Act does not expressly authorize in camera inspection of documents when an agency asserts the investigatory records exemption of subsection (j)(2)(B).

When one compares the (b)(7) exemption of the FOIA with the (j)(2)(B) exemption of the Privacy Act in conjunction with its activating regulations, the two schemes appear remarkably alike. Both schemes contemplate nondisclosure of documents for virtually identical reasons. For example, FOIA subsection (b)(7)(A) which authorizes nondisclosure if granting access to a document would "interfere with enforcement proceedings," is very similar to 28 C.F.R. §16.96 (b)(2), promulgated under the Privacy Act, which justifies denial of access to a document where disclosure would "compromise ongoing investigations." Furthermore, the considerations concerning the protection of national security, investigative techniques, personal privacy, and identity of confidential sources in subsections (b)(7)(C), (D), and (E) of the FOIA are mirrored in the Privacy Act's regulations at §16.96(b)(2). Since the considerations regarding investigatory records are the same in both statutory schemes, when a request for access to documents is made under both

acts, the most reasonable way to correlate the statutes would be to read the exemptions coextensively.

Additional support for a coextensive reading of the two exemptions is found in the Office of Management and Budget Guidelines to the Privacy Act, 40 FED. REG. 28,949(July 9, 1975) and Supplementary Guidelines, 40 FED. REG. 56741(December 4, 1975). The Privacy Act charges the OMB with the task of devising guidelines for the implementation of the Act. §552a note. These guidelines state:

> When a request specifies, and may be processed under both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the difference, if any, between the agency's procedures under the two Acts(e.g., fees, time limits, access and appeals).
>
> The net effect of this approach should be to assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.

Supplementary Guidelines, 40 FED. REG. at 56743. The thrust of the OMB Guidelines is clear: they give the requesting individual the benefits of both acts. Thus, in keeping with the spirit of the OMB Guidelines, a coextensive reading of the two investigatory records exemptions would assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had under the earlier enacted FOIA.

In reading the exemptions coextensively,

the question arises whether the court should allow an agency to claim the Privacy Act's investigatory records exemption only if release of material in the particular record would have one of the adverse effects set forth in the statement of reasons at 28 C.F.R. §16.96.[1] The Fourth Circuit recently upheld a denial of access under the Privacy Act where the reason for withholding the document was consistent with at least one of the adverse effects listed in the statement of reasons. Ryan v. Department of Justice, 595 F.2d. 954, 957(4th Cir. 1979). The Privacy Act does not expressly authorize in camera inspection by the district court of records purportedly exempt under subsection (j). This silence should not be construed to mean that Congress intended to preclude inquiry into whether release of material in the records would result in one of the adverse effects set forth in the statement of reasons. For a court to uphold an asserted investigatory record exemption without inquiring into whether the information in the document justifies the exemption would make judicial review meaningless.

Moreover, although Congress did not expressly authorize in camera review of investigatory records falling within the Privacy Act's (j) exemption, Congress did, nonetheless, authorize the district court both to enjoin an agency from improperly withholding records and to order the production of such records after a de novo determination. §552a(g)(3)(A).[2] Implicit in that authorization of de novo review is the power to examine the questioned document because

"'de novo' means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered." Farmingdale Supermarket, Inc. v. United States, 336 F.Supp. 534, 536(D.C.N.J. 1971). Without the power of inspection, de novo review would be an ineffective remedy. In other words, in camera inspection is mandated because (1) de novo review is meaningless without it and (2) it is the only way a court can determine that the claimed exemption complies with the statement of reasons requirement set forth in §552a(j).

For the foregoing reasons, I conclude that the investigatory records exemptions under the two acts should be read coextensively. Judge Schwartz did just that. I vote to affirm.

FOOTNOTES

1. This question does not arise under the FOIA because subsection (b)(7) expressly requires that a reason supporting the exemption exist. See also Epstein v. Resor, 421 F.2d. 930, 933(9th Cir.), cert. denied 398 U.S. 965(1970).

2. §552a(g)(3)(A) provides, in pertinent part:

> In any suit brought under the [access] provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court may determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(Emphasis added.) The Privacy Act debates are silent as to why subsection (j) was omitted from this provision. See 120 CONG. REC. 36655(1974)(remarks of Rep. Moorhead), reprinted in LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974(SOURCEBOOK ON PRIVACY), at 908(1976).

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April

Mr. Boynton:

SSF
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Re: New York Daily News Article
by Columnist Liz Smith Regarding
Judith Campbell Exner

Attached is a newspaper clipping regarding Judith Campbell Exner relating to her FOIA litigation with the FBI. By routing slip, the Director asked for the facts concerning the article.

Judith Exner submitted an FOIA request to the FBI in December, 1975. Records responsive to her request were located for the most part in organized crime files wherein her name had been indexed.

In 1975, during the course of testifying before a Senate committee, Mrs. Exner became aware that the FBI had conducted investigations and had maintained files relating to her since 1960. She believed that information published about her by the Senate committee in its official report was inaccurate. It also appeared to her that some inaccurate information from FBI files had been leaked to the press by Senate staff. She felt this leaked information regarding her alleged relationships with organized crime figures exposed her to personal danger.

She successfully sued the Bureau for expedited processing of her request by convincing the Court she had immediate need to see files and correct any inaccurate information therein. She was unsuccessful, however, in obtaining information for which the FBI had claimed various exemptions.

Nevertheless, in a subsequent action for attorney fees in the case, Mrs. Exner was found to have "substantially prevailed" by virtue of her success in securing priority processing, and fees were awarded. This was unusual in that most

ENCLOSURE
2-ENCLOSURE Attachment

62-116929-38X

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1 - Mr. Boynton
1 - [redacted]
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(Attn: [redacted])
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CONTINUED - OVER

attorney fee cases under the FOIA involve an award for success in obtaining information the agency was attempting to withhold.

This appeal was brought by both parties. Mrs. Exner appealed on the basis of the Privacy Act (PA), a claim which she said was ignored in the lower courts, in an effort to obtain the remaining documents withheld by the Bureau. The Government appealed because of its contention that the award of attorney fees and costs was improper.

Exner's PA claim was premised on the theory that the information about her in FBI files was inaccurate, and the PA would give her the opportunity to have the files corrected. Obviously, she argued, she could correct the inaccuracies only if she had access to the files.

On February 11, 1980, the Ninth Circuit rejected her argument and upheld the District Court's ruling, saying that the District had given the PA claim the consideration it deserved. While granting that it was impossible for Exner to correct files she could not see, the Court noted that PA exemption (j)(2) was applicable in this situation. The Exner files were compiled in the course of criminal investigations and were contained in a system of records exempt from disclosure pursuant to appropriate regulations promulgated by the Justice Department. Therefore, Exner was entitled to no more information than she had already received.

The Court then rejected the Government's argument that the award of fees was improper. The Ninth Circuit found the award of fees to be a proper exercise of the District Court's discretion. Consideration is being given by the Department to seek certiorari regarding the adverse ruling.

The statement in the article that the Bureau was cited for contempt is inaccurate.

[redacted]

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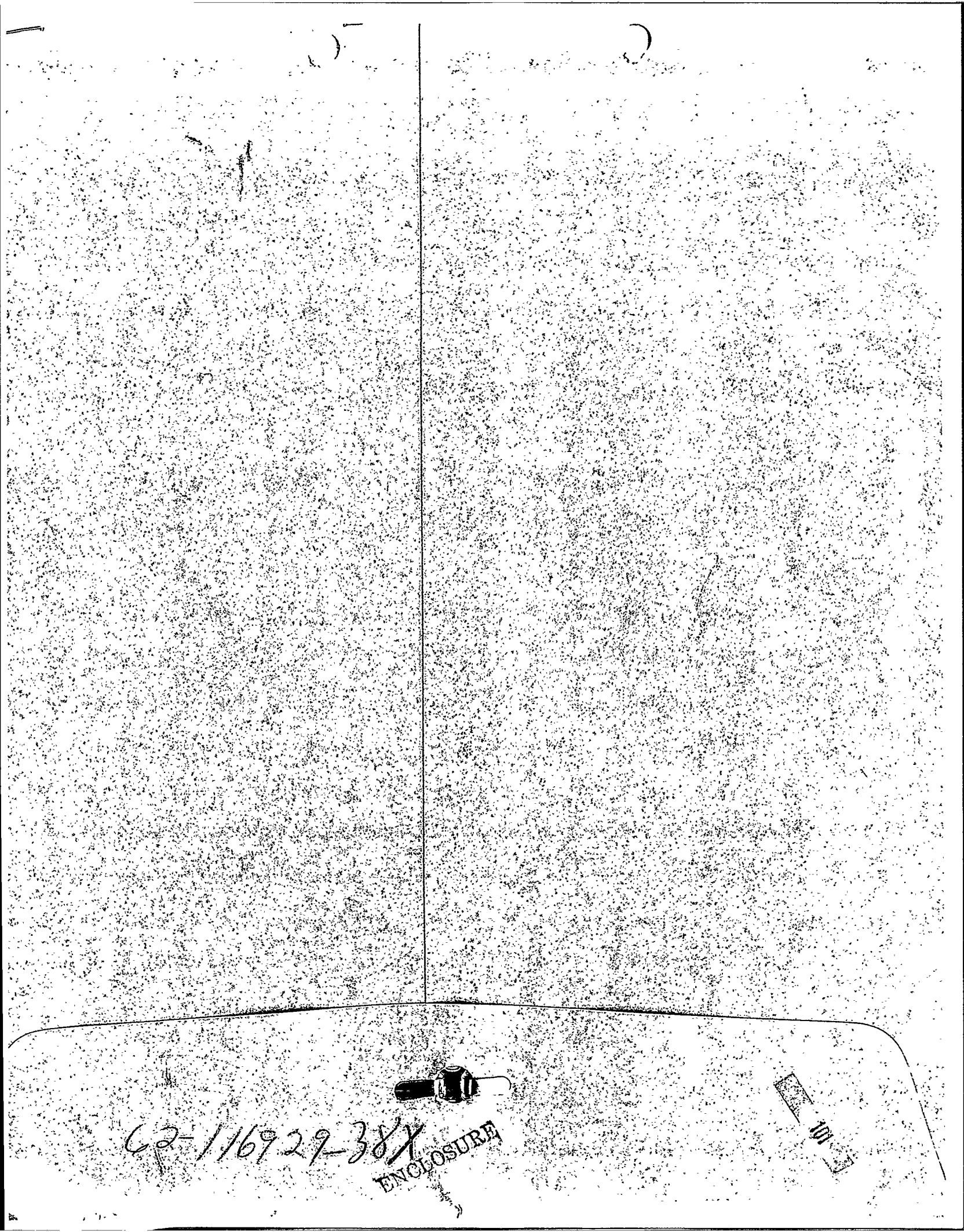
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ENCLOSURE
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DAILY PRESS SUMMARY FOR THE DIRECTOR

PREPARED BY

PUBLIC AFFAIRS OFFICE

April 2, 1980

0-19 (Rev. 8-20-79)

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Director's Sec'y ___

HOUSE COMMITTEE ACTION

Appropriations	Defense subcmte hearing on implementation of military personnel programs. Afternoon meeting at 1:30.	9:30	H140 Capitol
	Military Construction subcmte hears public witnesses. Afternoon meeting at 1:30.	9:30	B300 Rayburn
	District of Columbia subcmte hearing on D.C. economic development and regulation programs.	10:00	H302 Capitol
	Energy subcmte hears public witnesses on energy programs.	10:00	2362 Rayburn
	HUD subcmte hearing on the National Institute for Building Sciences.	10:00	H143 Capitol
	Interior subcmte hearing on the Office of Territories. Afternoon meeting at 1:30.	10:00	B308 Rayburn
	Labor subcmte hearing on impact aid.	10:00	2358 Rayburn
	State Justice subcmte closed hearing on the FBI.	10:00	H310 Capitol
	Transportation subcmte hears the Secretary of Transportation.	10:00	2358 Rayburn
	State-Justice subcmte hearing on the Chrysler loan program and other programs.	2:00	H310 Capitol
	Labor subcmte hears public testimony on program funding.	2:00	2358 Rayburn
Armed Services	Investigations subcmte hearing on funding for naval oil reserve R&D.	10:30	2337 Rayburn
Commerce	Transportation subcmte continues hearings on the deregulation of railroads.	9:30	2322 Rayburn
	Oversight subcmte holds a hearing on hazardous wastes issues in North Memphis, Tenn.	10:00	2237 Rayburn
	Energy subcmte holds a hearing on legislation to reduce the use of oil and gas in the electric utility sector.	TBA	2322 Rayburn
Education & Labor	Post-secondary subcmte continues hearings on funding for the National Endowments for the Arts and Humanities.	9:30	304 Cannon
	Human Resources subcmte drafts funding for juvenile justice.	10:00	2257 Rayburn
Foreign Affairs	Europe subcmte will continue hearings on Carter's Persian Gulf policy.	10:00	2200 Rayburn
Intelligence	Program subcmte continues consideration of the FY81 intelligence community budget (closed).	2:30	H405 Capitol
Judiciary	Drafting session on press protection legislation addressing the Stanford Daily decision and funding for the Legal Services Corporation.	9:30	2141 Rayburn
Merchant Marine	Drafting session on omnibus maritime bill and other legislation.	9:30	1334 Longworth
Public Works	Drafting session on prospectuses for federal buildings and other pending bills.	10:00	2167 Rayburn
	Water resources subcmte holds drafting session on oil spill liability legislation.	2:00	2167 Rayburn
Science	Space subcmte drafts FY81 budget for NASA.	9:00	220 Rayburn
	Science Research subcmte hearings on new information technology.	9:00	2318 Rayburn
	Transportation subcmte hearing on mass transit R&D.	10:00	2200 Rayburn
Small Business	Equity capital subcmte holds hearings on the effect of monetary policy on small business.	1:00	2359A Rayburn
Veterans	Medical facilities subcmte drafts funding for FY81 construction.	9:00	340 Cannon
Ways & Means	Hearing on tax rates and marital status.	10:00	1100 Longworth

The Washington Post ___
Washington Star-News A2
Daily News (New York) ___
The New York Times ___
The Wall Street Journal ___
The Atlanta Constitution ___
The Los Angeles Times ___

Date 4-2-80

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FBI/DOJ

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Refusal to Indict Aides in Vesco Inquiry Confirmed

By EDWARD T. POUND
Special to The New York Times

WASHINGTON, April 1 — A Government lawyer confirmed today that a Federal grand jury had decided not to return any indictments in its investigation of allegations that Robert L. Vesco attempted to fix his legal problems at the White House.

But Ralph E. Ulmer, the foreman of the grand jury, immediately criticized what he said was the incompleteness of the Government announcement. Mr. Ulmer said, "The statement is incomplete and thus misleading, which is about par for the course for the Justice Department."

Mr. Ulmer said he was not questioning the accuracy of the announcement that the grand jury had decided not to return any indictments. He said he could not elaborate because he was bound by the secrecy provisions of grand jury proceedings.

Calls Statement Accurate

The announcement was made by Carl S. Rauh, the principal Assistant United States Attorney for the District of Columbia. It was that office that most recently presented evidence to the grand jury in the case involving alleged influence peddling by Mr. Vesco, the fugitive financier.

Mr. Rauh said in the statement that the grand jury "has determined not to return any indictments from its investigation into allegations that Robert Vesco, through intermediaries, attempted to bribe members of the Carter Administration."

He said that the office of the United States Attorney here "concurs in this result" and had closed its investigation.

Georgian Made Charge

One White House official, Richard M. Harden, was under investigation by the grand jury for possible perjury. Mr. Harden's lawyer, Robert A. Altman of Washington, said today: "We're gratified that the investigation has confirmed that Mr. Harden is completely innocent of any wrongdoing. We feel that it is exceedingly unfortunate that earlier stages of the investigation were marred by leaks and the circulation of baseless allegations."

The inquiry began after a South Georgia businessman, R. L. Herring, asserted that Mr. Vesco wanted to bribe Administration officials to resolve his longstanding legal problems. Mr. Vesco fled from the United States nearly a decade ago after he was charged with bilking stockholders out of millions of dollars in an international swindle.

Mr. Herring, who was convicted of fraud and racketeering charges unrelated to the Vesco inquiry in 1978 and is now in a Federal prison, said he had retained an Albany, Ga., lawyer, W. Spender Lee 4th, to approach the White House in Mr. Vesco's behalf. Mr. Lee later met with Mr. Harden, a close friend. Both men said Mr. Harden talked Mr. Lee out of continuing to represent Mr. Vesco.

When told of the grand jury's decision, Mr. Vesco said by telephone from the Bahamas, "That's interesting. I have no reaction."

The Washington Post ___
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Daily News (New York) ___
The New York Times A 14
The Wall Street Journal ___
The Atlanta Constitution ___
The Los Angeles Times ___

Date 4/2/80

2

FBI/DOJ

18-Month Vesco Probe Ends With No Indictments

By Laura A. Kiernan
and Charles R. Babcock
Washington Post Staff Writers

A federal grand jury here has decided against bringing any indictments in connection with allegations that fugitive financier Robert Vesco attempted to bribe members of the Carter administration to take care of his legal problems.

Principal Assistant U.S. Attorney Carl S. Rauh said in a statement yesterday that the federal prosecutor's office agrees with the grand jury's decision, and that the lengthy investigation is closed.

The prosecutor's unusual announcement of the grand jury's decision against indictments apparently was intended to put an official end to a case that had provoked intense publicity from the beginning.

The 18-month investigation opened in September 1978, after newspaper columnist Jack Anderson wrote that White House advisers Hamilton Jordan and Charles Kirbo were "linked" to a $10 million political fix to help Vesco.

There followed an extensive series of exchanges between Anderson and the White House in which each side tried to undermine the other's credibility. The Justice Department investigation itself was marred by a variety of problems, including several changes in the prosecutors assigned to the case and public charges by the grand jury foreman of an administration cover-up.

By last summer, information leaked from the grand jury that prosecutors had doubts about the testimony of White House aide Richard M. Harden, who admitted he had been approached in February 1977 about the Vesco case by a childhood friend of his and Jordan's.

The friend, W. Spencer Lee IV, an Albany, Ga., lawyer, acknowledged that he had been paid $10,000 by Georgia businessman and convicted swindler R. L. Herring to approach the White House about Vesco's legal problems. Vesco, who reportedly is living in the Bahamas, fled the country after he was indicted in New York on charges that he looted a publicly held corporation of millions of dollars and then tried to solve his legal problems with a $200,000 contribution to the 1972 Nixon campaign.

President Carter met with Harden Feb. 15, 1977, shortly after Harden's meeting with Lee. At that time, Harden said, he told Carter that Lee had been offered "a large sum of money" to arrange a meeting between Jordan and Vesco associates. Harden said he told Carter that he had persuaded Lee to drop the plan.

At that same meeting, however, Carter wrote a cryptic note to then-Attorney General Griffin B. Bell which said, "Please see Spencer Lee from Albany when he requests an appointment." The note, which later was discovered in Justice Department files, never reached Bell.

Sources have said that the grand jury saw video-taped testimony from Carter about the meeting, but that Carter could recall few of the details of the discussion.

Suspicions about Harden's testimony were raised by prosecutors last fall after Lee—who told essentially the same story as Harden—failed two lie detector tests.

Harden's attorney, Robert Altman, said yesterday that he and Harden "are gratified that the investigation has confirmed that Mr. Harden is completely innocent of any wrongdoing."

Grand jury foreman Ralph E. Ulmer said yesterday that the grand jury voted against indictments in the case last week.

In August 1979, Ulmer tried to resign from the grand jury, charging that federal prosecutors had mishandled the investigation. Ulmer's accusations were vigorously denied by Assistant Attorney General Philip B. Heymann, chief of the Justice Department's Criminal Division. President Carter also strongly denied any charges that the Justice Department was trying to coverup any White House wrongdoing.

Eventually, Chief Judge William B. Bryant refused to allow Ulmer to resign from the grand jury.

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Prostitute Says Burkhardt Aided Brothel Start

By Jane Mayer
Washington Star Staff Writer

An admitted prostitute yesterday testified that prominent Alexandria attorney James I. Burkhardt and former Commonwealth's Attorney William L. Cowhig helped her set up a house of prostitution in 1976.

Elizabeth Hartley Pesaresi told a U.S. District Court jury in Alexandria that Burkhardt gave her name and phone number to a man who lent her the money to establish the prostitution business.

The deal, she said, followed three lunches in late 1975 and early 1976 with Burkhardt and Cowhig at which she was promised protection against police interference.

Burkhardt, 49, is on trial on one count of conspiring to promote prostitution and two counts of causing women to cross state lines for the purpose of prostitution. He has pleaded innocent to the charges.

According to a three-count indictment, Burkhardt funneled regular cash payoffs from massage parlor clients to unnamed law-enforcement officials for protection.

Among Burkhardt's clients was Louis Michael Parrish, former operator of a $1-million-a-year massage parlor business. Parrish was convicted in March 1979 of prostitution and racketeering charges.

Pesaresi said she had come to know Burkhardt through her work as a prostitute for Parrish.

Speaking in a soft voice, and at one point breaking into tears, Pesaresi testified that at one of the three lunches with Burkhardt and Cowhig, Cowhig promised her the operation would be safe.

"Mr. Cowhig told me that in Alexandria I didn't have to worry about prostitution," Pesaresi recalled. "He said he was the one to worry about that."

Pesaresi did not say whether Burkhardt overheard Cowhig's assurances.

Cowhig, originally the target of the grand jury investigation which led to Burkhardt's indictment, has not been charged in connection with alleged massage parlor bribes.

He was twice charged and acquitted of unrelated gambling and bribery charges. He resigned from office in February 1978 rather than face a third trial on a gambling charge.

Pesaresi said Burkhardt put her in touch with an acquaintance named David Hanneman, who loaned her $1,500 to set up a small prostitution business in Alexandria's Oakwood apartment complex. The business lasted only three months, she added.

At that apartment, in the spring of 1976, Pesaresi said she and Burkhardt "got drunk and slept together once." She said that was the last time she had seen Burkhardt.

On cross-examination, Burkhardt's defense attorney, Kenneth M. Robinson, asked her, "Shortly after Mr. Burkhardt was indicted, did you call his office to wish him luck?"

"I did," she said and started to cry.

The government maintains that Pesaresi became an informer voluntarily last month. She was given immunity from prosecution yesterday.

Two other witnesses yesterday, including the former majority leader of the Virginia House of Delegates, testified they had knowledge of a massage parlor protection racket in Alexandria.

Former House Majority Leader James M. Thomson said he had learned from Burkhardt at a meeting in his own office on Dec. 22, 1978, that "there were $200-a-week payments being made per massage parlor to law-enforcement officials."

Thomson, who later reported the allegations to the FBI, said "Burkhardt volunteered the information."

The statement came out, according to Thomson, during a meeting between Burkhardt, Thomson and Cowhig's attorney, Leonard B. Sussholz. The meeting, Thomson said, had been called to arrange a deal in which Cowhig would resign from office rather than face a third trial.

Thomson said Burkhardt did not identify who was making the payments or name the recipients.

"The name of Cowhig never came up," he said, "but I made some assumptions."

He said Burkhardt phoned him when Thomson testified before the grand jury to ask if he had identified anyone. "When I told him I hadn't," Thomson said, "he sounded relieved."

Larry Wadino, Michael Parrish's chief assistant, testified that Burkhardt was present at the inception of the protection scheme.

Wadino, who has been cooperating with the U.S. attorney's office since his conviction on racketeering charges a year ago, said yesterday that Burkhardt was present when Parrish gave Cowhig $5,000 in cash at a Crystal City meeting in January 1974.

"When he (Parrish) came out of the meeting," Wadino testified, "he said, 'It's time to rock and roll.' . . . He meant that the city of Alexandria was locked up. Business following that meeting skyrocketed."

Protection, according to earlier testimony, included advance notice of police raids and descriptions of undercover police officers.

Wadino also testified that "Burkhardt told me to lie" under oath in a 1975 rape trial involving a Parrish prostitute.

He said he thought the prostitute had probably not been raped, but Burkhardt had told him, "This is a big case for the commonwealth, and they don't want to lose it."

Wadino said this meant on the witness stand he was to lie by saying the woman was of good character when he thought she was not. Wadino said he did lie in his testimony and, after the trial was over, "Burkhardt told me I did just fine."

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Sex Ring Figure: Perjury Was a Favor to Cowhig

By Joe Pichirallo
Washington Post Staff Writer

A former lieutenant in a major Washington-area prostitution ring testified yesterday he lied under oath to help convict the defendant in a 1975 rape trial as a favor to then-Alexandria prosecutor William L. Cowhig.

Larry J. Wadino, 32, convicted last year of helping run the prostitution ring, said he committed perjury in the rape case at the urging of Alexandria attorney James I. Burkhardt, who told him, "The Commonwealth (Cowhig) does not want to lose this case."

The defendant, Danny Stubblefield, was subsequently convicted of the rape charge and served a four-year prison term before being paroled last year.

The rape complaint was brought by a masseuse employed by the prostitution ring operated by Louis Michael Parrish with Wadino's assistance.

A source said yesterday that Wadino, called by the defense in the 1975 case to testify to the character of the masseuse, surprised lawyers on both sides by describing her under oath as truthful and worthy of being believed.

Wadino's testimony was interrupted and he was abruptly dropped as a defense witness, the source said.

Yesterday's testimony by Wadino came on the second day of Burkhardt's trial on racketeering and conspiracy charges growing out of his role as attorney for a string of Parrish-owned massage parlors and outcall dating services—a once-flourishing Alexandria-based operation that grossed a million dollars a year, according to prosecutors.

Burkhardt, 49, the tall, curly-haired former president of the Alexandria Bar Association, has pleaded innocent. His attorneys have charged that Parrish and Wadino "concocted" the allegations against their former lawyer after the two were convicted last year on charges related to the prostitution ring.

The 4th U.S. Circuit Court of Appeals in Richmond yesterday upheld the convictions of Parrish, Wadino and a third convicted member of the ring, Kathy Lynn Caldwell.

The defense argued yesterday that the three can now seek reduced sentences in return for their cooperation in the prosecution of Burkhardt.

Parrish testified on Monday he transmitted $500 in monthly cash payoffs to Cowhig through Burkhardt for more than three years to avoid prosecution of his sex-ring operation.

Wadino testified yesterday that he drove Parrish to a 1974 meeting with Cowhig and Burkhardt in which Cowhig allegedly promised not to enforce local massage parlor ordinances and state prostitution laws.

Wadino said that when Parrish emerged from the lunch at a Crystal City restaurant, Parrish announced: "It's time to rock and roll. The town is ours . . ." He said "we had the city of Alexandria locked up," Wadino testified.

When Wadino and a woman masseuse were arrested a short time later on charges related to operating a house of prostitution at a Parrish massage parlor named Bunny's, Wadino said, Burkhardt assured him the charge against him would be dropped in court. "Jim (Burkhardt) just said don't worry about it," Wadino recalled under oath.

Wadino said then-prosecutor Cowhig's office dismissed the charge against him before it came to trial and the woman masseuse received "a token $100 fine."

When he left the courthouse after his case was dismissed, Wadino said, he saw Burkhardt arguing with the police officer who raided the massage parlor. According to Wadino, Burkhardt later told him "that SOB will be back in uniform on the streets" as punishment for arresting Wadino and the masseuse. A short time later, Wadino said, he saw the same officer patrolling the streets in uniform.

Before the 1975 rape trial, Wadino said, he had told defendant Stubblefield's lawyer that he knew the mas-

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seuse pressing the charges had a bad character. But later, Wadino said, Burkhardt told him it was a "big case" for Cowhig's office, and Burkhardt allegedly instructed him to "paint a picture of her as being a pillar of the community."

When he got to the courthouse, Wadino said, he saw Burkhardt talking to Cowhig. Burkhardt then repeated to him, Wadino said, that "the Commonwealth does not want to lose this case, you know what I mean?" Wadino said Burkhardt did not specifically tell him to lie, but said Burkhardt's meaning was clear. "I knew what Jim Burkhardt meant. He meant for me to lie," Wadino swore.

Wadino also expanded yesterday on earlier testimony by Parrish concerning alleged payoffs to Alexandria city officials

He testified that he personally made payoffs to former Alexandria health inspector Richard L. Mathews, whose duties included inspecting massage parlors for health code violations.

Mathews, 86, who now works as a health inspector for the Fauquier County health department, has strongly denied receiving any payoffs.

Wadino, a short, stocky man, also testified that Parrish took $5,000 to the 1974 meeting with Burkhardt and Cowhig at the Crystal City restaurant and intended to give it to Cowhig as a bribe.

Wadino was not present when the three met. Parrish has testified there was no talk of payoffs on that occasion.

Cowhig resigned as chief prosecutor a year ago after being acquitted at two trials of state charges related to illegal bingo operations in Alexandria.

The defense has argued that Cowhig is a target of a two-year federal investigation of possible official corruption in Alexandria and that Burkhardt was indicted to force him to give testimony against Cowhig. Burkhardt's lawyers said their client never transmitted any payoffs to Cowhig.

Another former Parrish employe, Elizabeth Dane Pesaresi, testified yesterday that when she made plans to run her own prostitution business out of an Alexandria apartment, Cowhig assured her that she was not in danger of being prosecuted.

"Mr. Cowhig told me that in Alexandria I did not have to worry about being prosecuted," she recalled under oath. She said she met Cowhig twice through Burkhardt and described Cowhig as having "a colorful sense of humor." Pesaresi testified after receiving immunity from the government.

Burkhardt announced yesterday that he will testify in his defense. The prosecution completed its case yesterday.

Staff writer Stephanie Mansfield contributed to this story.

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LIZ SMITH

Judith earned justice the hard way

"WE MUST ALL HANG together or assuredly we shall all hang separately," said Ben Franklin. (And Odyssey, those native New Yorkers, have titled their new record album "Hang Together" at the suggestion of their producer-writer Sandy Linzer.)

Don't say there ain't no justice. Judith and Dan Exner have had their share of troubles since she was exposed by the FBI as a former lover of John F. Kennedy's during his term in office, and also as a friend of Frank Sinatra's and of mob boss Sam Giancana's. After the FBI leaked Exner's private Senate testimony, she sat down and wrote a book telling her own story and defending herself. For this, she was pilloried in the press and by Kennedy defenders as if she had made it all up.

Since those traumatic days, Judith has had an operation for breast cancer and her loyal husband Dan was stricken by a brain tumor. Both of the Exners have struggled back from the brink. When Dan was told he couldn't survive his illness, it made him angry. "I don't like to be told I can't do something," he said.

Now Judith has won several unprecedented struggles, striking blows for herself and for others. First, she set a precedent in suing the FBI for her papers under the Freedom of Information Act and then winning all fees and costs. Both the AP and UPI wrongly reported that the FBI voluntarily surrendered Judith's papers. In truth, the FBI had to be ordered repeatedly by the courts to give up the Exner papers, and then Judith had to have the bureau cited for contempt before they gave in. But she proved that a citizen can take on the FBI and win.

Then, the tabloid Midnight settled with Judith out of court in a libel case, where they had called her "a spy hired by the mafia to report on the President of the United States." Exner didn't get a lot of money but did vindicate herself and received more than enough to cover legal fees. The Exners now live in Newport Beach, Calif.

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FROM

OFFICE OF DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

TO

OFFICIAL INDICATED BELOW

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Note and return ( )
Prepare reply and return for my signature ( )
Please Handle ( )
Respond over your signature ( )
Prepare memo for the Department ( )
For your recommendation ( )
What are the facts? ( )
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Remarks:

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Behind The Schemes

Irv Davidson, D.C.'s Master Operator

By Gordon Chaplin

Moving lightly on his feet, very lightly, almost as if he were on eggs, I. Irving Davidson flits around his desk to touch the upper arm of a visitor. The touch is light as the walk, inviting confidentiality, promising discretion. The look is sharp, but not too sharp: dark suit, rounded gold jewelry, crisp white shirt. The face . . . you've seen it in the various corridors of power, elfin even at 59, always slightly in the shadow but always smiling, as if Irv Davidson knows something that the rest of us can only guess at: the ultimate Inside Story.

"Listen. If I get knocked out of the box it's going to hurt this country." A wink. A squeeze. The hint of anonymous contact, vague yet crucial understandings. "I'm involved in some very sensitive stuff overseas. I'm talking to people who our own people can't talk to."

For the second time in his long career as the Handy Andy of behind-the-scenes Washington, promoter-lobbyist Irv Davidson may be in trouble with the law. Trouble means publicity. Publicity is anathema to the back-channel function: "You can't operate with it. I'm looking for deals. I put people together. I work on a very personal level."

Indeed. Two people the FBI recently said that Davidson has "put together" are reputed New Orleans Mafia boss Carlos Marcello and Mario T. Noto, the former No. 2 man in the Immigration Service. Result: The FBI is investigating allegations that Noto acted improperly to help Marcello fight deportation. Davidson also introduced his "old friend" Marcello to another of his old friends who later turned out to be an undercover informer posing as an insurance salesman in the FBI sting scam Operation Brilab, which surfaced in February. Result: The FBI is investigating allegations that public officials ranging from Louisiana Lt. Gov. Jimmy Fitzmorris to Texas House Speaker William Clayton accepted illegal money. Fitzmorris and Clayton have testified before grand juries in connection with Brilab.

So Irv Davidson is walking like a cat on eggs. FBI agents grilled him for four hours Feb. 8 and told him they had bugged his phone for a year before that. He is under investigation. Suppose he is subpoenaed himself? Suppose there is a leak? Suppose . . . "I deal in confidentialities. If it gets out that I talked a lot, if my friends start thinking I have a big mouth . . ."

Mr. Witty

Ah yes. The friends of Irv Davidson. Columnist Jack Anderson is as well acquainted with them as anybody.

"Your first impression of Irv is that he's a cheap operator," Anderson has said. "But when you get to know him you find he's got better contacts than Clark Clifford or any other St. Louis smoothie. In fact he's got *unbelievable* contacts. I'd call him unique. I've investigated a lot of five percenters and promoters but I've never run across anybody like him."

Davidson's array of business cards say everything from "public relations" to "door opener and arranger." Of course there's no official name for what he really does . . . which is wheeling and dealing without a net, pedaling his lonely little bicycle across the tightrope hundreds of feet above the center ring. Usually in darkness, too: No illumination for Irv. He's the grease in the machinery, the Grand Central switchboard operator. His stock in trade is being "witty," as they say in the CIA to describe someone who is aware of the various covert maneuverings. He claims that knowing the right Inside Story for everybody is now worth $250,000 a year.

Now certainly people like Clark Clifford must know a good piece of the Inside Story themselves, but they are too big, solid and respectable to make it into all the corners. Clifford would look out of place in the red-brocaded, twilit Gaslight Club with it's neo-bunny waitresses that the behind-the-scenes set love so much. Whereas Davidson is not only on a first-name basis with practically everyone there, but also with the hard core at Sans Souci, the Sheraton-Carlton Hotel Bar and the Georgetown Inn.

Jack Anderson, and before him Drew Pearson, not only calls Davidson but rented office space from him in the past. He was the first person Anderson called when Teamster boss Jimmy Hoffa disappeared and when Marcello was reported to be back in the country after deportation to Guatemala. When Anderson wanted to talk to Bobby Baker, Davidson actually brought Baker into Anderson's office. In the end Davidson's maneuvering to capitalize on his Anderson connection forced the columnist to issue careful instructions: "Nobody is to say *anything* that Irv can use for promoting himself."

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'Fidel Knows . . .'

Even now, with the heavy faatsteps of the FBI echoing in the corridor, Davidson will talk about deals with an almost frighteningly irrepressible banty pleasure:

"Who needs to get mixed up in this horse - - - - with Immigration?" He waves his hand around his office, which is full of totems from various deals—model tanks and planes, plaques of quotations, trick paperweights, carved wooden statues. It looks like the bar at the 21 Club in New York. "Look what I have going. I'm bringing the Coke soft drink team into Sudan to show them how to grow citrus in the desert. I sold Clint Murchison's oil pier to the Malaysians when nobody else could even *talk* to them. I just borrowed $1 million for six months on nothing but pure bull."

The little tank is his favorite story: "An Israeli Staghound tank, see. I sold 70 of these to Nicaragua from Israel and then we decided to sell 20 of them to Batista in Cuba. We got them in shape, we put them on a Swedish boat to Havana and guess what? *Castro* got hold of them. Next thing I know he's riding into the city of Havana on one of our tanks. Now, there's an ending to this story going to knock you off your chair . . . I got a call from the Cuban ambassador in Mexico City. He wanted me to get a sugar group together to go to Cuba and talk to Castro. I said Castro's not going to want me in there after that tank business." And the ambassador said: 'Fidel knows all about you and the tanks. He likes you because you provided his transportation.'"

Favors and Debts

The son of a Pittsburgh meat market owner, Davidson began to piece together his unique web of contacts as an "expediter" for the ammunition program in the War Production Board during World War II, he has said, and "I've been expediting ever since." He has represented the American interests of dictators in Nicaragua ("Somoza called me to get him a 707 out of the country during the Sandinista thing"), Indonesia ("I got Malik in to see LBJ during the Commie coup thing when no one else could"); Haiti, and Cuba. He says he's putting together fast food deals in France, import deals in Italy, agri-technology and construction in the Mideast, and expediting ventures for Texas oilman Clint Murchison in Singapore, Malaysia and Indonesia. This year he registered as a foreign agent for Sudan, and is trying to form a lobby-expertise group for the Association of Southeast Asian Nations.

Debts and favors is what it all goes back to . . . the personal level. Irv can get you anything: a hotel room in a crowded city, tickets to a sold-out ballgame, office space, a quick loan. He never forgets who owes him what. When Murchison needed $4 million for a housing project and was too proud to ask his father, Davidson put him in touch with Hoffa on the condition Drew Pearson be allowed to write a column about it. He has been involved in Murchison deals ever since and now Murchison is willing to say about him: "I have found him to be reliable . . and straightforward and know his other clients have too."

Davidson ran afoul of the law in 1969. At that time he and a friend named Leonard Bursten got an $11 million Teamster Pension fund loan to develop property near Beverly Hills. If his friend Hoffa had still been firmly in control, things might have been different. But with Hoffa out, Davidson and Bursten found themselves pleading guilty to charges of concealing $500,000 in a bankruptcy proceeding when the Teamsters tried to foreclose.

What happened after Davidson's guilty plea is not precisely clear. The record indicates his lawyers moved to have the plea expunged and vacated. The motion, is an unusual turn of events, was granted. Last year Davidson filed a $60 million suit against the Teamsters to recover real estate and damages.

'Re Irving Davidson'

Now part of the Inside Story here, Davidson confides, involves an item in the Justice Department known as the "in-depth file re Irving Davidson." He will make mysterious bits of paper available (who wrote them, where they came from he will not say) describing it as detailing "activities of Irv in the interests of the United States . . . The details are of a sensitive nature . . . ."

"I told those FBI people not to play superagent with me," he says now. "I travel on two passports, but I've never taken a nickel from Uncle for my services. Look at my diary here: Jan. 4, National Security Council. Do you think I planted that? I tell you that I'm dealing day and night with those boys."

He is asked for official corroboration.

"Are you kidding. If those details came out, I'd be useless. Nobody'd trust me."

After some hemming and hawing, a short, smiling State Department man does show up in the office, on the strict condition his name not be used. "Sometimes the interests of the United States requires certain things which because of their shaky nature can not be identified with the United States," he says.

And, with the caution of a true, tried diplomat, that is about as far as he will go.

It is certainly not as far as Davidson himself went in defending his friend Jimmy Hoffa when Hoffa was in trouble. He peddled tapes purporting to tell "explicitly" how a certain Marie Monday had compromised the trial judge (the judge denied it and Monday recanted). He filed an affidavit with the Supreme Court on the tapping of Hoffa's phone. And he lobbied mightily with the Justice Department, where he was seen as "this little guy who used to keep trying to tell Bobby Kennedy what a great guy Jimmy Hoffa was. I mean you had to admire him, you know, in those days it wasn't the greatest thing in the world to be in favor of Hoffa. But he never wavered. Hoffa was a standup guy, he'd say. It's the people around him who are leading him astray."

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One Guilty Plea In 'Mafia' Trial

FREEHOLD, N.J. (AP) — One defendant in a trial aimed at proving the existence of "the Mafia" pleaded guilty to conspiracy and bookmaking charges before attorneys for four other alleged underworld figures gave opening statements. The defendant, 51-year-old Thomas DePhillips of Belleville, is to be sentenced to a total of five years in a plea bargain.

The defense lawyers contended in their opening statements that the prosecutors lacked concrete evidence to support the charges in the indictment, which ranged from lotteries to loansharking to murder. Many of the witnesses who could testify about specific incidents are dead, they said.

"The indictment reads like a fairy tale — all of this garbage about a spider-like network of organized crime from Alaska to Florida," said Joseph Ferrante, the attorney for one of the four remaining defendants.

"The valiant men of our state police sat at tape recorders like children and listened to grown men cursing and bragging and trying to impress each other," he said.

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3 Indicted in Gun-Running Case

A federal grand jury indicted three men for conspiring to export weapons illegally to Northern Ireland and the Republic of Ireland.

Attorney General Benjamin R. Civiletti said the indictment, returned in U.S. District Court in Raleigh, N.C., named as defendants Howard B. Brutton Jr. of Wilson, N.C., and Robert Ferraro and George DeMeo both of New York City.

Brandon Alvey, criminal division attorney who supervised the case, said in a telephone interview from Raleigh that this was the 13th or 14th gun-running case involving either Northern Ireland or the Republic of Ireland brought by the department since 1972. But he declined to say whether this one, like some of the previous ones, involved alleged shipments to the outlawed Irish Republican Army.

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Racketeering Charged to S.C. Aide

COLUMBIA, S.C.—A federal grand jury indicted state Sen. John D. Long III on racketeering charges. The indictment charges Long and Billy D. Roark, a former security officer of the Senate, with taking bribes in return for state jobs.

U.S. Attorney Thomas E. Lydon would not comment on the investigation except to say it has been continuing for several months.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Plaintiff-Appellee,

-vs-

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellants.

NO. 76-1903

PLAINTIFF-APPELLEE'S OPPOSITION TO GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

2 ENCLOSURE

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Attorney for Plaintiff-Appellee

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GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

1. STATEMENT OF ISSUE PRESENTED.

The issue presented by this appeal is whether the tr court abused its discretion by refusing to grant the Govern- ment's [1] motion for a stay of plaintiff-appellee's [2] action brought pursuant to the Freedom of Information Act [3] and the Privacy Act of 1974. [4]

The Government's request for a stay was based upon a specific provision in the Freedom of Information Act [5 U.S.C. §552(a)(6)(C)] which allows the District Court, in its discret to grant the Government a stay if the Government can demonstra that exceptional circumstances exist, and that the agency involved is exercising due diligence in responding to the Freed of Information Act request and needs additional time to comple its review of the requested records. The District Court in thi action ruled that neither exceptional circumstances existed no that the Government had shown due diligence in undertaking a

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1/ Defendants and appellants in this action consist of the Federal Bureau of Investigation [FBI]; Clarence M. Kelley, the Director of the FBI; the Department of Justice; and Edward H. Levi, Attorney General of the United States. For the sake of convenience, all of the defendants/ appellants will be collectively referred to as the "Government."

2/ Plaintiff and Appellee is Judith Katherine Exner who, for the sake of convenience, will be referred to herein as "Exner."

3/ 5 U.S.C. §552.

4/ 5 U.S.C. §552a.

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ENCLOSURE

review of the requested records, 5/ and thus denied the Government's request for a stay. The Government is appealing from the District Court's Order denying the stay pending the Government's review of the records, which was entered on April 20, 1976. 6/

Although the Government is only appealing from the April 20, 1976, Order which denied the Government a stay of Mrs. Exner's action, the purpose of the requested stay relates to an April 9, 1976, Order entered by the District Court. That earlier order required the Government to answer Mrs. Exner's complaint, and to identify the documents contained in the FBI files relating to Mrs. Exner which the Government contends are exempt from disclosure either under the Freedom of Information Act or the Privacy Act. 7/

2. SUMMARY OF THE LITIGATION.

On February 19, 1976, Judith Katherine Exner filed h Amended Complaint for Injunctive Relief Under the Privacy Act of 1974 and the Freedom of Information Act. The complaint, wh

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5/ In fact, one month after the District Court originally ordered the Government to complete its review of the requested records, the District Court specifically found that the Government had neither determined the scope of th requested records nor had it begun to review those records

6/ The District Court entered two Orders on April 20, 1976. The first Order, and the one being appealed from herein, denied the Government's request for a stay pursuant to 5 U.S.C. §552(a)(6)(C). The second Order was a denial of the Government's request for a stay pending appeal, brough pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

7/ The April 9, 1976, Order is contained in the Clerk's Transcript at pages 1 to 4.

alleged that plaintiff had exhausted her administrative remedies, sought an order enjoining the Government from withholding from her records of the Federal Bureau of Investigation that relate to her, and requiring the Government to make those records available to Mrs. Exner. Additionally, pursuant to the Privacy Act of 1974, Mrs. Exner sought an order requiring that the records be declared private and that the Government be enjoined from distributing information in her files to any other person. Mrs. Exner also sought the right to correct any records in the FBI file which are inaccurate.

Following hearings on certain pretrial motions, on March 15, 1976, the Honorable Edward J. Schwartz, United States District Judge, ordered that the Government file its answer to the Amended Complaint by April 12, 1976. Judge Schwartz further ordered that by April 12, 1976, the defendants must file with the Court an affidavit or affidavits containing certain information about the FBI records relating to Mrs. Exner. Basing his ruling, in part, upon Vaughn v. Rosen, 484 F.2d 820, 826-828 (D.C. Cir., 1973), Judge Schwartz ordered that the defendants indicate in their affidavits the following:

"2.1) A statement whether the FBI has maintained and/or possesses any file or files relating to the plaintiff or containing any information about the plaintiff.

"2.2) If such file or files exist, a description of the file or files maintained and/or possessed by the FBI relating to the plaintiff. Said description shall include the size of the file, which may be

delineated either by the number of documents, the total pages of documents, or the dimensions of the file or files.

"2.3) If such file or files exist, a description or list of the documents contained in said file or files which are not allegedly covered by any exemptions to the Privacy Act of 1974 or the Freedom of Information Act, and which therefore can be immediately turned over to the plaintiff for her review. If the Government contends that only a portion of the document is exempt from disclosure, the remaining portions of the document should be described so that it may be disclosed to the plaintiff

"2.4) If such file or files exist, the defendants, by means of a detailed description, must set forth any exemption or exemptions which they allege apply to any document or any portion of a document in the FBI files. The list of exemptions should be sufficiently detailed so that the Court can identify the documents or portion of documents to which the defendants are claiming a statutory exemption applies. The description should not be so detailed so as to contain information which compromises the secret nature of the documents, and, in this regard, excessive reference to the actual language of the documents should be avoided. In large documents, the defendants must specify, in detail, which portions of the documents are disclosable and which are allegedly exempt."

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3. ARGUMENT.

3.1) The District Court did not Abuse Its Discretion in Denying the Government's Motion for a Stay Because the Government Failed to Demonstrate that Either Exceptional Circumstances Exist or that It has Exercised Due Diligence in Reviewing the FBI Files Relating to Mrs. Exner.

The Government's request for a stay of proceedings pending its review of the FBI records relating to Mrs. Exner w based upon a specific provision of the Freedom of Information Act [5 U.S.C. §552(a)(6)(C)], which provides, in pertinent par that:

> ". . .If the government can show exceptional circumstances exist in that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. . . ."

This provision sets forth a two-part test with which the Gover ment must comply in order to obtain a stay of proceedings:

(1) The Government must show that "exceptional circumstances" exist; and

(2) The Government must show that it has exercised "due diligence" in responding to the request a that it needs additional time to complete its review of the records.

The Government failed to show either that exceptional circumstances exist, or that it had exercised such due diligence

In addition to the above ruling, the District Court further ordered that the documents to which the Government did not clai an exemption either under the Freedom of Information Act or und the Privacy Act should be immediately made available to Mrs. Ex for her examination. Pending Mrs. Exner's and the Court's opportunity to review any documents disclosed to Mrs. Exner by the Government, the Government was further ordered not to disclose the contents of the documents to any other person or entity, except for such disclosure which constitutes "routine use" as defined in the Privacy Act. 8/

The March 15, 1976, ruling by Judge Schwartz was memorialized in written form and filed and entered by the Cour on April 9, 1976.

On April 12, 1976, the date on which the Government's answer to the amended complaint was due, and the date on which the affidavit or affidavits required to be filed by the Govern ment were due, the Government filed an ex parte motion seeking a stay of Mrs. Exner's action pending the Government's review of her FBI files. The Government's motion was based on a specific provision of the Freedom of Information Act [5 U.S.C. §552(a)(6)(C)], which allows the District Court, in its discre tion, the right to grant the Government a stay of litigation brought pursuant to the Freedom of Information Act if the Gove ment can affirmatively demonstrate that "exceptional circumstances" exist and that the Government is exercising "due dili gence" in completing its review of the requested documents. T

8/ 5 U.S.C. §§552a(a)(7) and 552a(b).

gist of the Government's motion for a stay was based on the cla that the FBI was backlogged in its review of Freedom of Informa tion Act and Privacy Act requests, and that it did not feel it necessary to expedite its review of Mrs. Exner's files, even though the District Court had already ordered that such a revie be completed by April 12, 1976.

At the hearing on April 12, 1976, the District Court denied the Government's request for a stay, but did give the Government an additional 15 days in which to comply with the April 9, 1976, Order. 9/

On April 20, 1976, the Government filed its Notice of Appeal from the Court's April 20, 1976, Order denying the stay. On that same date, April 20, 1976, the District Court denied th Government's motion for a stay pending an appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

Because of the pendency of the District Court's April 1976, and April 20, 1976, Orders requiring the Government to complete its review of Mrs. Exner's file and file the required affidavits by April 27, 1976, this Court entered an order temporarily staying the District Court's orders of April 9 and April 20, 1976, pending this appeal. The Order of this Court was filed on April 23, 1976.

9/ The ruling made by the District Court denying the Government's motion for a stay was memorialized by a written Order filed and entered on April 20, 1976, and contained in the Clerk's Trasncript on pages 5 and 6.

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necessary to give the District Court a basis for granting a discretionary stay.

The Government admitted in its papers filed in suppo of its motion for a stay and in the comments of its counsel during oral argument on the motion for a stay that it not only had failed to begin a review of Mrs. Exner's records, but also that it had refused to attempt to determine the scope of the requested records, so that it was impossible to even estimate how long it would take to complete its review of the records o that review began. 10/

10/ The affidavit of Michael L. Hanigan, Special Agent of the FBI assigned in a supervisory capacity to the Freedom of Information-Privacy Act section of the FBI, filed in support of the Government's motion for a stay, noted:

> "Since the volume of documents involved [in Mrs. Exner's request] has not been ascertained yet because the request has not been processed preferentially out of order, it is not possible to project how long the review will take." (Hanigan affidavit at page 11, paragraph 12.)

In oral argument at the April 12, 1976, hearing before Judge Schwartz on the Government's motion for a stay, the Judge had the following exchange with Mrs. Zusman of the Department of Justice:

> "THE COURT: Are you telling me that nobody has looked at this file in connection with any of these proceedings?
> "MRS. ZUSMAN: That is what I was told.
> "THE COURT: Who told you that?
> "MRS. ZUSMAN: I asked directly the individual attorney who is the FBI person at the FBI assigned to this case.
> "THE COURT: What is his name?
> "MRS. ZUSMAN: Mr. Maschella.
> "THE COURT: And no one in the FBI ever looked at this file in the Justice Division?
> "MRS. ZUSMAN: The Federal Bureau of Investigation, as you know is a separate subagency. When I

(Footnote 10 continued next pag

Since 5 U.S.C. §552(a)(6)(C) requires the Government to affirmatively demonstrate that it has exercised due diligen in its efforts to complete the review of requested records, it is encumbent upon the Government to demonstrate that it has ta the necessary steps to start processing Mrs. Exner's records i order to comply with the essential prerequisites of the provision upon which it bases its request for a stay.

Based on the factual record before the District Cour since the Government admitted it had intentionally avoided beginning any review of Mrs. Exner's records, no basis for the Government's request for a stay existed. Moreover, the Govern ment could not argue, in good faith, that it had exercised "du diligence", since it affirmatively appeared that the Governmen had the time to begin its review of Mrs. Exner's records (if not to complete that review), and chose to spend that time see ing a stay instead. District Judge Schwartz observed this fac at the April 12, 1976, hearing on the Government's motion for stay:

> "Now what the Government has done today is that they have filed about 50 pages of materials, affidavits and so on, which I assume has taken a great deal of time for somebody to prepare. You have spent or will have spent two days on this matter in

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(Footnote 10 continued)

> asked if they had any idea what the scope was in response to this request, I was told that as a matter of principle, the file has not yet been looked at. . . ." (Reporter's Transcript of Proceedings, April 12, 1976, at page 23.)

transportation in appearing here. I have an idea that you spent some time preparing for this hearing and preparing these papers, and yet, the Government has done nothing to comply with the Court's Order [of April 9, 1976].

"I just find it rather incredible to hear that the Government hasn't even looked at the file and doesn't even know whether it's a small file, a big file, or what's in it when obviously, the FBI provided the file to the Senate Committee, which has had the file and Mrs. Exner filed her request over three months ago." 11/ (Reporter's Transcript of Proceedings, April 12, 1976, at page 20.)

Judge Schwartz further noted:

"If the Government had used part of the effort--just a small part of the effort--in time that has been required for you to come out here, for you to prepare these papers--and it is a rather thick bunch of papers that have been prepared--to take a look at the file and to try to do what the Court requested, this thing could already have been taken care of.

"Now, I think it is rather obvious to me that the

11/ Evidence before the District Court indicated that the FBI had compiled its records relating to Mrs. Exner and had turned them over to a Special Select Senate Subcommittee prior to September of 1975. See the Affidavit of Judith Katherine Exner in Support of Plaintiff's Motion for an Ex Parte Order, filed February 19, 1976, at page 2, line 20, to page 7, line 21.

FBI just doesn't want to give this file out, and I don't think that they're being forthright in coming in and saying, well, we don't have enough money to process this; we don't have enough personnel to process it; we just haven't gotten around to it. I just don't think that that is a reasonable response to the Court's Order back on March 15." (Reporter's Transcript of Proceedings, April 12, 1976, at p. 22.)

Not only has the Government failed to show that it ha exercised due diligence, but also it has failed to demonstrate any exceptional circumstances which relate to the present case. The Government's argument in support of its stay centers on the claim that the FBI is without sufficient personnel to revie all of the Freedom of Information Act and Privacy Act requests which have been filed, and that such requests should be reviewe only in order of their receipt by the FBI. The Government suggests that it might begin processing Mrs. Exner's request in approximately four months, but notes that it could possibly be longer than four months. 12/

A fair reading of Section (a)(6)(C) of the Freedom of Information Act indicates that the term "exceptional circumstances" relates to the circumstances surrounding an individual request, and not to circumstances which relate to the Government's overall handling of Freedom of Information Act requests.

12/ Affidavit of Michael Hanigan (see fn. 10, infra, at page 8), at page 11, lines 8 to 32.

The opening sentence of Section (a)(6)(C) makes reference to specific, individual requests, and the right of the requestor to deem that his request has been denied and commence litigation in the applicable District Court pursuant to Section 552(a)(4) of the Act. The second sentence of Section (a)(6)(C) proceeds to set forth the showing which the Government must make to warrant the District Court's granting of a stay pending the Government's completion of its review of the requested records. Thus, it appears that the requirement of "exceptional circumstances" relates to circumstances which would effect the individual request.

The Government has not demonstrated that any "exceptional circumstances" exist with relation to Mrs. Exner's requ It has only indicated that it is without sufficient personnel to handle the numerous requests that have been filed with the FBI. The Government's moving papers make no attempt to indica how many Freedom of Information Act requests are the subject o pending litigation, as is Mrs. Exner's. The total failure of the Government to demonstrate the existence of any exceptional circumstances relating to her request constituted sufficient ground for the District Court to deny the Government's motion for a stay. 13/

13/ The type of situation which may justify a claim that "exceptional circumstances" exist might involve a case where the agency determined that the number of documents sought by a Freedom of Information Act request numbered in the thousands, and that it would take a substantial amount of time to review all of the documents. In such a situation, upon a showing of due diligence (i.e. so man documents were being reviewed on a daily basis), the Cour

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3.2 The Underlying Basis for the Government's Request for a Stay is Without Merit, and the District Court Properly Exercised Its Discretion to Deny the Stay.

Since the Government's motion for a stay pending its completion of the review of the FBI files relating to Mrs. Exn was subject to the Court's discretion, the Court could properl consider the underlying basis for the Government's request. N only did the Government fail to demonstrate the existence eith of "exceptional circumstances" or of the exercise of "due dili gence", but also the Government was unable to establish any independent, meritorious reason why the stay should be granted The Government's principal contention in support of the stay w that Mrs. Exner's request did not deserve any preferential treatment. The Government argued that Mrs. Exner should be ma to wait in line with all other requestors, even though she had exercised her right, under both the Freedom of Information Act and the Privacy Act, to expedite her request by commencing litigation in the District Court. 14/

(Footnote 13 continued)

could grant a temporary stay. In the instant situation, the Government not only has failed to begin its review, but also it has not even determined the scope of the records relating to Mrs. Exner. Thus, there has been no due diligence exercised, and no exceptional circumstances pled.

14/ 5 U.S.C. §552(a)(4)(B) and (a)(6)(C); 5 U.S.C. §552a(g)(1)(D).

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The Government further contends that it should be allowed to consider all requests for information on a "first-come, first-served basis." 15/ Respondents submit that not on is the Government's position untenable and in direct contradiction to the provisions of the Freedom of Information and Privacy Acts, but also that it is factually inaccurate, as demonstrated by the Government's own admissions.

It is obvious that the Government does not treat all Freedom of Information and Privacy Act requests on a first-com first-served basis. In the affidavit of Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, United States Department of Justice, Shea notes that: 16/

> "Save in those relatively rare instances where an appellant can demonstrate a real and substantial need for preferential handling, I adhere to this practice [processing requests in their approximate order of receipt] as an almost absolute rule." [Emphasis added]

Shea's affidavit demonstrates that the Government does not alw treat all requests on a "first-come, first served basis", but

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15/ At page 8 of the Government's Memorandum in Support of Government's Motion for a Stay Pending Appeal, filed with this Court, the Government asks that this Court determine that the handling of Mrs. Exner's request on a "first-come, first-served basis" is inherently fair and consistent with the Congressional intent behind the Freedom of Information and Privacy Acts.

16/ See page 7, lines 2 to 8, of Shea's affidavit, filed in the District Court on April 12, 1976, in connection with the Government's Motion to Stay Pending Completion of Review.

does grant preferential treatment to certain types of requests. Shea's affidavit, however, speaks only in terms of requests sent to the Government, and does not deal with litigated Freedom of Information and Privacy Act requests. However, it does appear from the Affidavit of Michael L. Hanigan, Special Agent of the Federal Bureau of Investigation (who was assigned in a supervisory capacity to the Freedom of Information-Privacy Acts section of the FBI), that litigated Freedom of Information Act and Privacy Act requests often receive preferential treatment. In Hanigan's affidavit he notes that there have been several situations where District Courts have ordered records to be reviewed on a priority basis. 17/ Apparently, the Government takes the position that it can, in its own discretion, determin which requests deserve preferential treatment and which do not deserve such treatment, and which court orders it will comply with, and which court orders it will ignore.

The fact that the FBI will consider handling a Freedo of Information Act or Privacy Act request in an expedited manne can be demonstrated by reference to Exhibit "4" to the Amended Complaint in this action. Exhibit "4" is a copy of a letter from Quinlan Shea to Mrs. Exner's attorney. In that letter, Shea indicates that he has determined that there is no basis for handling Mrs. Exner's request in an expedited manner. How ever, Shea does indicate that he will pass the request on to

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17/ Hanigan affidavit at page 5, line 16, to page 7, line 29; See footnote 10, infra.

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Clarence M. Kelley, Director of the FBI, for his consideration

Although the Government did not feel it was necessary to give priority handling to Mrs. Exner's request, District Judge Schwartz found, on the record before him, that such priority handling was warranted for several reasons. At the April 20, 1976, hearing at which the Court denied the Government's motion for a stay pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, Judge Schwartz reviewed the history of this litigation. After summarizing the proceedings, Judge Schwartz noted some of the reasons contained in the record why Mrs. Exner's claim should be given such priority handling:

> "The third question that has to be answered is will the stay substantially harm other parties? Now, it appears to me that by the time any appeal in this matter is decided, a number of months would pass, and Mrs. Exner's interest, as she has stated, in correcting any false press stories or false facts that have been leaked or made public might be past remedy.
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> "Now, I think I should say that I have no particular concern with Mrs. Exner as a person or what

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18/ Shea's letter notes, in pertinent part:

> "This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handling over the several thousand previous requests still pending in the F.B.I.
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> "I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive."

her motives may be. Evidently, it is alleged that she is going to write a book or is in the course of writing a book. 19/ She may have other motives. She has alleged that there is some fear of danger to her life because of the statements that have been leaked in the press coverage of possible underworld connections.

(1)

"She's also stated that she would like to know what's in the file so that she can set the record straight, so to speak, if the file contains erroneous information. Again, I think that the Court should take into consideration the fact that, for whatever reason or whatever motives, Mrs. Exner kept the information that is now the hub of this controversy to herself for a period of perhaps 15 or 16 years, that she didn't write any books, she didn't publish any of this information, and then she was subpoenaed before a Senate Committee and required to testify.

(2)

"I'm sure she was informed that the proceedings were secret, and then she found that the proceedings, at least insofar as they pertained to her, had been leaked obviously--and I can't imagine any other way than through some Government source.

19/ Prior to the April 20, 1976, Court appearance, counsel for Mrs. Exner advised the Court that Mrs. Exner was not seeking the FBI materials for use in her book. Although information in the FBI records may corroborate information in the book, it appears a certainty that the book will be completed prior to the time Mrs. Exner would have the FBI records available to her.

"Then, when the stories began to hit the press and Mrs. Exner was made the subject of a great deal of notoriety and publicity, she then brought this action to see if she could have a look at the information and materials that are filed.

"Now, I don't think that her application is a frivolous one, whatever her motives. The articles from the New York Times that have been submitted by her counsel today, indicate that this matter is not a dead issue, but that she is still the subject of very extensive notoriety and statements of specific facts, the immediate source of which is not apparent.

"* * *

"I think that the stay that's being requested here is one that would prevent Mrs. Exner from having the information that is specifically contemplated under the Freedom of Information Act.

"Now, the observation is made, or has been made, and was made very strongly at the last hearing on April 12 that there are thousands of requests for information, that Mrs. Exner should just wait in line. I would hazard to guess that many, many of those thousands of requests may be trivial, may be curiousity [sic] seekers, may be persons who want information for various reasons. I think with regard to Mrs. Exner, she is a person who is herself directly concerned, and I don't think that under the circumstances she should just have to wait in line.

"The Government observes that with regard to any possible death threats against her or threats of harm, that there is no evidence of that. Well, threats of that kind frequently, or at least sometimes, do not manifest themselves until some harm occurs. Whether her fears are genuine or just imaginary, I think she should be at least given the opportunity to see the non-exempt materials in her file so that she can perhaps be on her guard against harm, or perhaps these materials would set at rest her possible fears." 20/

The fact that many of the Freedom of Information Act and Privacy Act requests (which the Government wishes to revie before dealing with Mrs. Exner's request) are frivolous was acknowledged by the Government. In Quinlan J. Shea's letter to Mrs. Exner's counsel [Exhibit "4" to the Amended Complaint], S admits "that many requests to the F.B.I. have been of a frivolous nature. . . ." It is for this reason, among others, that Congress has provided a person requesting a review of his file under the Freedom of Information Act or Privacy Act an opportunity to expedite that review by commencing litigation in the District Court. The Congressional intent to expedite actions brought pursuant to the Freedom of Information Act can be clea seen from the language of the Act itself. 5 U.S.C. §552(a)(4) provides:

20/ Reporter's Transcript of Proceedings, April 20, 1976, at page 16, line 19, to page 20, line 11.

"Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

Section 552(a)(4)(C) also demonstrates the Congressional intent to expedite Freedom of Information Act litigation by requiring the Government to answer a complaint under the Act "within 30 days after service" instead of the normal 60 days required by the Federal Rules. The Congressional intent behind the Freedom of Information Act and the Privacy Act could be circumvented if the Government were allowed to make its own determination when process Freedom of Information Act and Privacy Act requests. Under the statutory scheme established by Congress, individuals are given the option to "wait their turn in line" and allow the Government to process their request as soon as it is able to do so, or the individual can expedite the procedure by filing an action in the District Court after the statutory time for the review of his file has passed, and thus expedite the review. Obviously, unless there is some reason for expediting, an individual normally will not file such an action in the District Court. In the instant situation, Mrs. Exner has determined that there is reason to seek her records in an expedited fashion and the District Court, having full knowledge of the facts of this matter, has agreed. The basis for the Government's request stay order is without merit and the District Court did not abuse

its discretion in denying the stay.

3.3) The Order from Which the Government is Appealing is not an Appealable Order. The Appeal should be Dismissed and the Action Allowed to Proceed in the District Court.

Upon the filing of its notice of appeal, the Governme sought, and received, a temporary stay of the District Court's orders of April 9 and April 20, 1976. The basis of the Government's request for the temporary stay was contained in the affidavit of Eloise E. Davies, an attorney in the Appellate Section of the Civil Division of the Department of Justice. Ms. Davies' affidavit was attached to the Government's Motion for Expedited Consideration of Government Appellants' Motion fo Immediate Temporary Stay, filed with this Court. In her affidavit, Ms. Davies states:

> "If this Court does not immediately stay the district court's order pending appellate review the issue raised on this appeal will be rendered moot because if the FBI delivers the documents in question, the plaintiff will have obtained substantially all of the relief sought in her FOIA suit." [Emphasis added]

Ms. Davies' contention is totally unfounded. The April 9, 1976 Order issued by District Judge Schwartz, which Order the Government is seeking to stay, is only an interim discovery order and does not resolve any of the issues framed by Mrs. Exner's Amende Complaint.

Although the Government is appealing from the April 2 1976, Order in which the District Court denied the Government's request for a stay pursuant to 5 U.S.C. §552(a)(6)(C), it is important that this Court understand the provisions of the April 9, 1976, Order which the Government was seeking to stay. The April 9, 1976, Order, in addition to requiring the Government to file an answer to the amended complaint, also required the Government to submit an affidavit or affidavits identifying the nature of the records maintained by the FBI relating to Mrs. Exner to which the FBI is claiming an exemption either under the Freedom of Information Act or under the Privacy Act. The Government, pursuant to the April 9, 1976, Order was not required to turn over any documents to Mrs. Exner to which an exemption was claimed. The only documents which Mrs. Exner was to receive pursuant to the April 9, 1976, Order were documents to which no exemption was claimed. 21/

The fact that the Government might have to turn over to Mrs. Exner some non-exempt documents pursuant to the April 9 1976, Order does not mean that Mrs. Exner is obtaining any of the relief sought in her Amended Complaint. The Government is obligated, both under the Freedom of Information Act and the Privacy Act to turn over all non-exempt documents to a person requesting those documents. 22/ The legislative history both of

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21/ The entirety of the April 9, 1976, Order is set out in the Clerk's Transcript at pages 1 to 4. A portion of the Order is quoted at pages 3 to 4, infra.

22/ 5 U.S.C. §552(a)(6)(C) provides, in pertinent part, that:

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the Freedom of Information Act and the Privacy Act make it clea that the purpose of these acts was to facilitate disclosure of person's record to that person (in the case of the Privacy Act) or to any other interested party (in the case of the Freedom of Information Act) where the records are not subject to an exemption set forth in one of the Acts. In the Congressional findi and statement of purpose relating to the Privacy Act, it was noted:

> "The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring federal agencies, except as otherwise provided by law, to--
>
> "1. Permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;
>
> "* * *

(Footnote 22 continued)

> "Upon any determination by an agency to comply with the request for records, the records shall be made promptly available to such person making such request."

5 U.S.C. §552(a)(3) also provides that:

> ". . .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."

The Privacy Act contains a similar provision requiring th documents be turned over to a person if such documents ar not exempted by any provision of the Privacy Act. 5 U.S. §552a(D)(1).

"3. Permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records."

The primary purpose for litigating a Freedom of Information Act or Privacy Act request is (in addition to expediting such requests) to contest the validity of any exemptions claimed by the Government. 23/

Under the April 9, 1976, Order, the Government has not been required to turn over any documents to which a claim of exemption is being made. The Order merely provides for an itemization of documents to which the Government is claiming an exemption, an identification of the exemption, and sufficient detail about the documents so a court can determine whether an in camera review is necessary. Such an order is merely a preliminary order in order to facilitate the handling of Freedom of Information Act and Privacy Act litigation.

The April 9, 1976, Order makes specific reference to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973), cert. den. 41 U.S. 977 (1974). In the Vaughn case, the District of Columbia Circuit was asked to review a District Court order denying the disclosure of records to an individual. In reversing the District Court's order and remanding it for further proceedings the District of Columbia Circuit noted the inherent difficulti

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23/ Additionally, under the Privacy Act, litigation may be commenced in order to have the Government correct an error in a record, or to keep certain records private. Mrs. Exner is seeking both types of additional relief in her Amended Complaint.

in the handling of Freedom of Information Act matters:.

"The Freedom of Information Act was conceived in an effort to permit access by the citizenry to most forms of Government records. In essence, the Act provides that all documents are available to the public unless specifically exempted by the Act itself. This Court has repeatedly stated that these exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act. By like token and specific provision of the Act, when the Government declines to disclose a document the burden is upon the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA. Thus the statute and the judicial interpretations recognize and place great emphasis upon the importance of disclosure.

"In light of this overwhelming emphasis upon disclosure, it 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 many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

"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, . . ." (484 F.2d at 823)

In order to allow the party seeking disclosure to present his case for disclosure, the court in Vaughn suggested the following manner in which the trial court could proceed with the litigation upon remand:

"The problem of assuring that allegations of exempt status are adequately justified is the most obvious and the most easily remedied flaw in current procedures. It may be corrected by assuring Government agencies that courts will simply no longer accept conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments. An analysis sufficiently detailed would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the actual language of the document.

"* * *

"A need for adequate specificity is closely related to assuring a proper justification by the Governmental agency. In a large document it is vital that the agency specify in detail which portions of the document are disclosable and which are allegedly exempt. This could be

achieved by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document.

"Such an indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." (484 F.2d at 826-287)

By requiring such detailed affidavits, the Appellate Court in Vaughn was attempting to formulate a procedure which would (1) assure that a party's right to information was not submerge beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of the disputed information (484 F.2d at 826).

District Judge Schwartz determined that the procedure suggested by the Appellate Court in Vaughn presented the most efficient method of proceeding. The order signed by Judge Schwartz mirrors the language in Vaughn. Contrary to the Gove ment's statement that the April 9, 1976, Order grants to Mrs. Exner "substantially all of the relief sought in her FOIA suit the Order merely sets up a preliminary method to proceed with the litigation.

The Government is, in essence, contending that Judge Schwartz' Order is similar to the Order that was discussed in Theriault v. United States, 503 F.2d 390 (9th Cir., 1974). However, in Theriault, the District Court granted an order in Freedom of Information Act case pursuant to Rule 34 of the

Federal Rules of Civil Procedure. That order required the Government to produce all of the disputed documents and turn them over to the plaintiff. Correctly noting that the effect of the District Court's order was to terminate the Freedom of Information Act litigation, this Court vacated the District Court's order and remanded the case to the District Court for further proceedings in order to adjudicate the Government's claims of exemption.

The District Court's Order in the instant action is conformity with this Court's ruling in Theriault, since it provides a method by which the Government's claimed exemptions can be expeditiously litigated. Such expeditious handling of Freedom of Information and Privacy Act cases is required by the Freedom of Information Act, 5 U.S.C. §552(a)(4)(D).

Based on a review of the April 9, 1976, Order, it is clear that the Order is merely an interim order and not a final order. The Order does not (as the Government would lead this Court to believe) fully adjudicate Mrs. Exner's Freedom of Information Act and Privacy Act complaint. Interim orders, such as the April 9, 1976, Order, are non-appealable.

Normally, an order compelling testimony or production of documents in an ordinary civil suit or criminal action is neither a final order nor an interlocutory order granting an injunction and is not appealable. Alexander v. U. S., 201 U.S. 117, 121, 26 S.Ct. 356 (1905); Lampman v. United States District Court, Central District of California, 418 F.2d 215 (9th Cir., 1969), cert. den. 397 U.S. 923 (1970); Theriault v. United States, supra; Borden v. Sylk, 410 F.2d 843, (3d Cir., 1969).

In certain proceedings, however, where the entire purpose is the discovery of information, such proceedings are regarded as independent actions, with the result that orders that finally compel or refuse to compel testimony or production of documents are appealable as final orders. Theriault v. United States, supra; 9 Moore, Federal Practice, ¶110.13[2] at page 157 (2d Ed., 1975). However, an appeal can only be had from such orders when they are final and not interim orders. Goldfine v. Pastore, 261 F.2d 519 (1st Cir., 1958). Goldfine involved a proceeding by the Internal Revenue Service to enforce a summons. The taxpayer appealed from an "interim order" of the District Court. The order was termed an "interim" order because it only required the taxpayer to turn over documents that were non-questioned; all documents which related to any tax year in which a contention was made by the taxpayer that the statute of limitations would apply or other questioned documents were excluded from the enforcement order of the District Court. The District Court expressly reserved jurisdiction of the proceeding so that the questionable documents could be more fully adjudicated. Based on the facts of the situation, the First Circuit Court of Appeals denied a motion for a stay holding that the District Court's interim order was a type of interlocutory order not appealable to the Appellate Court.

The Ninth Circuit ruled on a similar question in Chapman v. Goodman, 219 F.2d 802 (9th Cir., 1955). In Chapman a special agent of the Bureau of Internal Revenue brought a proceeding to compel an attorney to give testimony concerning tax liability of a client and to bring records relating to

financial transactions between the attorney and client. The attorney appeared pursuant to the subpoena, but brought no papers and refused to be sworn. The IRS agent filed an action in the United States District Court seeking an order compelling the attorney to attend and give testimony and to produce books and records. The District Court issued an order directing the attorney to appear and "to bring" all records relating to the financial transactions in question. The Appellate Court ruled that the District Court's order simply required the attorney "to bring" the documents into the presence of the IRS agent, and if any issues of privilege as to testimony or documents arose, then those issues could be brought back before the trial judge who could rule on them. Based on this interpretation of the order, the Court of Appeals ruled:

> "Taking this view of the order, it would seem that the District Court really has not made a final order, . . ." (219 F.2d at 806)

The Ninth Circuit continued:

> "In the instant case, while attorney Chapman has been ordered to appear before Goodman (and if that were all, the order might be considered final) it does not look as though the court below by its order has come to final grips with the ultimate issue, and that time will arrive when it defines by appropriate order what questions Chapman must answer and what if any documents must be produced." (219 F.2d at 806)

//// ////

Based on this interpretation of the Order, the Ninth Circuit Court of Appeals dismissed the appeal.

It is conceivable that pursuant to the District Court Order of April 9, 1976, the Government will turn over no documents to Mrs. Exner, and that it will claim that all documents in the FBI files relating to her are covered by some form of exemption. Although Mrs. Exner would probably contest this position, the Government would not have to turn over any documents pending an adjudication of its claimed exemptions. Thus, the April 9, 1976, Order of the District Court is an interim order which only allows this litigation to proceed expeditiously as provided for in the Freedom of Information Act. The Order is not appealable, and a stay is not warranted. 24/

4. CONCLUSION.

For the reasons stated herein, the Government's motion for the issuance of the stay should be denied, and the temporary stay issued by this Court should be vacated. The Government's

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24/ It is interesting to note that the Government is seeking a stay pursuant to a provision in the Freedom of Information Act. There is no similar provision in the Privacy Act, and since Mrs. Exner's Amended Complaint seeks relief both under the Privacy Act and under the Freedom of Information Act, there is no basis upon which the District Court can stay the Privacy Act litigation.

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appeal should be dismissed, and the action allowed to proceed in the District Court.

DATED: April 30, 1976.

RICHARD C. LEONARD
Attorney for Plaintiff-
Appellee, Judith Katherine E

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Appellants.

FEDERAL GOVERNMENT

No. 76-1903

ORDER

Before: BARNES and GOODWIN, Circuit Judges, and TAKASUGI, District Judge.*

Each side requests this Court to award costs and/or attorneys' fees to them as the prevailing party. After careful consideration, we hold no party has as yet prevailed.

We decline to award costs or fees to either side. Costs are to abide the final determination of the case in the district court.

file

* The Honorable Robert M. Takasugi, District Judge, Central District of California, sitting by designation.

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LEGAL COUNSEL

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LEGAL COUNSEL

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LEGAL COUNSEL

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INFORMATION AND
PRIVACY ACTS
LITIGATION UNIT

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

AD:TSM:LMCole:wm
145-12-2683

25 APR 1980

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Judith Katherine Exner v. Federal Bureau of Investigation
(C. A. 9, No. 78-1880)

TIME LIMITS

Our petition for a writ of certiorari is due on May 5, 1980. We have attached a draft motion for an extension of time.

RECOMMENDATIONS

The FBI recommends certiorari. 1/

The Office of Information Law and Policy recommends against certiorari.

I recommend against certiorari.

QUESTIONS PRESENTED

1. Whether a plaintiff who obtains expedited handling of her FOIA request by order of the District Court has "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) so as to be entitled to an award of attorneys' fees and costs against the United States.

2. Whether the Court of Appeals erred in holding that the District Court did not abuse its discretion in awarding attorneys' fees against the United States.

1/ The FBI initially recommended filing a petition for rehearing and a suggestion for rehearing en banc. During a telephone conversation with Ms. Linda Cole of the Civil Division, Special Agent [redacted] agreed that the Ninth Circuit was unlikely to grant rehearing en banc and that the filing of a petition for rehearing would simply give the panel an opportunity to amplify its views. The FBI therefore withdrew its recommendation in favor of rehearing but adhered to its recommendation in favor of certiorari.

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STATUTE INVOLVED

5 U.S.C. §552(a)(4)(E) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

STATEMENT

On December 24, 1975, Judith Exner submitted a Freedom of Information Act request to the Federal Bureau of Investigation seeking "access to any and all records filed under any of my names." (R. 473). On January 11, 1976, exactly ten working days later, she informed the Deputy Attorney General that the FBI had not responded to her request, that she deemed it to have been denied, and that her letter constituted an appeal requiring disposition within twenty working days. (R. 474). Exner relied upon 5 U.S.C. §552(a)(6)(A) and (C).

On January 15, 1976, the FBI acknowledged Exner's request and explained that it could not fairly act upon her application until it had processed earlier requests from other people. Exner promptly sought priority treatment, averrring that she feared for her safety and that her records were of historical interest. (R. 475). On February 5, 1976, the Deputy Attorney General refused to prefer her over the thousands of prior applicants and, on February 6, 1976, Exner sued to compel immediate disclosure. Exner based her lawsuit on the Privacy Act as well as on the Freedom of Information Act.

In District Court, the government argued that FOIA requests had flooded the FBI, rendering it impossible for the agency to process them all within the time limits specified in 5 U.S.C. §552(a)(6)(A) and (C). Under the circumstances, the government contented that the fair and reasonable thing to do was to process each request in chronological order. Nevertheless, the District Court ordered prompt production of all non-exempt material. When both the District Court and the Court of Appeals denied the government's motion for a stay pending appeal, the FBI began processing Exner's request out of sequence.

On appeal, the Ninth Circuit ruled as follows:

> We hold the 'first in-first out' consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable, and we hold that the filing of suit by a person demanding information can (but does not necessarily) move such petitioner 'up the line,' i.e. create a preference, particularly if a Federal Court orders it.
>
> * * * * *
>
> We therefore vacate the order of the district court appealed from herein, and remand the case for a determination whether this appellant-defendant is entitled to any relief under 5 U.S.C. §552(a)(6)(C) . . . .

The Court of Appeals also declined to award costs or fees to either side, expressly holding that "no party has as yet prevalied." Order dated November 15, 1976.

On remand, the government moved for summary judgment, arguing that the only documents which had not been disclosed were exempt. After reviewing all of the disputed documents in camera, the District Court found that

> Defendants have made the maximum reasonable disclosures to plaintiff of the documents in question, and plaintiff has received the documents and portions of documents to which she is reasonably entitled under the Privacy Act and the Freedom of Information Act. Id.

Subsequently, Exner moved the District Court for an award of attorneys' fees and costs which, under 5 U.S.C. §552(a)(4)(E), "may" be taxed against the United States "in any case under this section in which the complainant has substantially prevailed." The Court concluded that Exner had so prevailed because she had succeeded in forcing the government to expedite her request. The Court likened Exner to a "private attorney general," establishing the important legal principle of "priority" in unusual situations. Opinion dated January 27, 1978. The amount assessed against the United States was $10,075.21.

Exner appealed on the disclosure issue and you authorized us to file a cross-appeal on the attorneys' fee issue. We argued that an FOIA litigant cannot "substantially prevail" within the meaning of 5 U.S.C. §552a(4)(E) unless s(he) obtains some sort of disclosure which the government would not otherwise have made. Expedition alone would not suffice. We also

argued that Exner did not prevail on the merits of her expedition claim: she had obtained preferential treatment only because of the government's failure to obtain a stay pending our successful appeal on that issue. Finally, we argued that the district court had abused its discretion in awarding fees because Exner's lawsuit had produced no public benefit, because she had a commercial motive for filing suit and because the FBI had a solid legal basis for its actions. A copy of our brief is attached.

The Ninth Circuit did not discuss any of these issues. Indeed, it disposed of our appeal with the unelaborated and somewhat inapposite statement that the district court's findings withstood analysis under Rule 52, Fed. R. Civ. P.

DISCUSSION

We share the FBI's irritation over the Ninth Circuit's disposition of this appeal. It is galling to pay attorneys' fees in a case which vindicates the government's behavior on all counts. In connection with the first Exner appeal the Ninth Circuit upheld the FBI's practice of processing requests on a first-in-first-out basis. During the proceedings on remand and on the second appeal both the District Court and the Court of Appeals found that the agency had made the maximum reasonable disclosure. It is difficult to see what else the Bureau could have done to comply with the statute.

Nonetheless, we do not regard this case as an appropriate vehicle for certiorari. The Ninth Circuit's decision has very little adverse precedential significance. Most agencies do not have enormous backlogs of FOIA requests. Moreover, the standards which a litigant must meet in order to obtain expedition are quite stringent. See Exner v. Federal Bureau of Investigation, 542 F.2d 1121 (9th Cir. 1976); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). As a result, very few FOIA cases involve preferential handling. The FBI has had only three such cases. No other agency has had any.

Moreover, we can probably distinguish the Exner decision from subsequent cases involving expedited handling. The Ninth Circuit affirmed the district court's decision without comment and that decision rests in part upon the fact that Exner's suit proved to be one of the test cases on the question of preferential treatment. The court apparently believed that Exner had served the public interest by acting as the trail-blazer on this issue. Subsequent litigants will not be able to advance this claim.

CONCLUSION

For the foregoing reasons, I recommend against certiorari.

ALICE DANIEL
Assistant Attorney General
Civil Division

By:

Thomas S. Martin
Deputy Assistant Attorney General

UNITED STATES GOVERNMENT

memorandum

DATE: February 11, 1980

REPLY TO ATTN OF: Leonard Schaitman
Appellate Staff, Civil Division
Department of Justice

LS:LMCole:wm
145 - 12 - 2683

SUBJECT: Exner v. Federal Bureau of Investigation
(C. A. 9, No. 78-1880)
EDWARD KATHERINE

FEDERAL GOVERNMENT

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TO: [redacted]
Legal Counsel Division
Federal Brueau of Investigation

I am enclosing for your review a recent decision of the United States Court of Appeals for the Ninth Circuit which sets unfavorable precedent under the attorney's fees provision of the Freedom of Information Act. We are presently considering whether to file a petition for rehearing and a suggestion for rehearing en banc; we may ultimately have to consider whether to file a petiton for a writ of certiorari. Your comments will help us to ascertain the extent to which the Ninth Circuit's decision adversely affects the government.

62-116929-38

Briefly, the district court awarded attorney's fees to the plaintiff even though it had upheld every single one of the government's claimed exemptions. The court theorized that the plaintiff had "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) because she had obtained a judicial order directing the F.B.I. to process her request ahead of the prior requests of other individuals. The government appealed, contending, inter alia, that an FOIA litigant cannot substantially prevail within the meaning of the fee provision unless (s)he obtains some sort of disclosure which the government would not otherwise have made. A copy of the government's brief is attached. The Ninth Circuit affirmed the decision of the district court as a factual finding which withstood review under the clearly erroneous standard.

197-916

We would appreciate your comments on all aspects of the decision. However, we are particularly interested in your views on (1) the extent to which government agencies find it impossible to comply with the time limits of the FOIA and resort to processing requests on a first-in-first-out basis, (2) the extent to which the courts have been ordering government agencies to process certain FOIA requests ahead of others, and (3) the extent to which such court orders disrupt an agency's ability to process all FOIA requests in the most efficient possible manner.

FEB 14 1980

Please send your comments to Linda M. Cole, Room 3610, Appellate Staff, Civil Division, Department of Justice, Washington, D. C. 20530. You may also telephone Mrs. Cole at 633-3525. Thank you for your cooperation.

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enclosures retained by Legal Counsel.

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FBI

TRANSMIT VIA:
- ☐ Teletype
- ☐ Facsimile
- ☒ AIRTEL

PRECEDENCE:
- ☐ Immediate
- ☐ Priority
- ☐ Routine

CLASSIFICATION:
- ☐ TOP SECRET
- ☐ SECRET
- ☐ CONFIDENTIAL
- ☐ UNCLAS E F T O
- ☐ UNCLAS

Date 4/25/85

TO: DIRECTOR, FBI
(ATTN : LEGAL COUNSEL DIVISION, SA [redacted] b6 b7C

FROM: SAC, SAN FRANCISCO (197-0)

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION
ET AL
9th CIRCUIT COURT OF APPEALS
CIVIL ACTION NOS. 78-1880;
78-1152

Re LA telcall from PLA [redacted] to San Francisco dated 4/17/85. b6 b7C

Enclosed for the Legal Counsel Division and Los Angeles are two copies each of Docket Sheets of captioned matter.

Pursuant to referenced telephone conversation, San Francisco obtained the enclosures from the 9th Circuit Court of Appeals. They are being forwarded for information.

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4-ENCLOSURE

2 - Bureau (Enc. 2)
2 - Los Angeles (Enc. 2)(Attn: PLA [redacted]
1 - San Francisco
JDLW/dc
(5)

LEGAL COUNSEL b6 b7C

Approved: _____ Transmitted _____ Per _____
(Number) (Time)

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U.S. GOVERNMENT PRINTING

ENCLOSURE

60-1169-29-39

D. C. No. CV 76-89-S
D. C. Judge Hon. E.J. Schwartz
Notice of appeal filed March 24, 1978
.... FED. REP. 2ND. P ....

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

78-1880

FILED IN DC: February 6, 1976

CONSOLIDATED WITH: 78-1152

FPI LC 11-75 10M 9000

CIVIL DC: SOUTHERN CALIFORNIA

PREV.: 76-1903 (rem., 9/30/76, BA, G & Takasugi)

JUDITH KATHERINE EXNER,

Plaintiff/Appellee,

vs.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants/Appellants.

For ~~Appellee~~ Appellee:

Richard C. Leonard, Esq.

For ~~Appellants~~ Appellants:

UNITED STATES ATTORNEY
John R. Neece, AUSA
Chief, Civil Division

DATE 1978	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
	USA			

(1)

78-1880

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S FEES APPELLANT	APPELLI
APR 20	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. - nw	USA	
Apr 21	Filed in 78-1152, as of 4/20, aplt's (Exner) motion for consolidation of appeals 78-1152 and 78-1880 and combined briefing schedule; motion for ext of time to file opening brief; affidavit in support. 4/17 (Schickele) ec		
ay 1	Filed, as of Apr. 27, in 78-1152, order (BR) Upon due consideration of aplt's motion, these appeals #'s 78-1152 & 78-1880 are consolidated, aplt in Appeal No. 78-1152 shall be deemed aplt for purposes of briefing pursuant to Rule 28(h), F.R.A.P., and she is granted an ext of time through May 26, 1978 in which to file her brief. -fn-		
	FOR FURTHER PROCEEDINGS SEE 78-1152		
EB 15	As of 2/12/79 ARGUED & SUBMITTED Before: ELY, WALLACE, CJJ, PREGERSON, D.J.	CALENDARED FEB 12 1979 K.G.	-v
ar 6	Recvd as of 3/5, in 78-1152, ltr dtd. Feb 28, 1979, from US Dept of Justice, re documents submitted to DC in camera. (panel) ec		
ar 28	Filed in 78-1152, Aplees' motion to recuse. 3/27 (panel) ec		
r 3	Filed in 78-1152, as of Apr 2, order (E) granting aplee's motion to recuse. -dmf-		
r 3	Recvd in 78-1152, from aple (USA) ltr dtd. Mar 30,1979, re 1st Cir. decision in Irons v. Bell. (Wl, Pregerson) ec cc. Judge Goodwin (replacing Judge Ely)		
r 12	Recvd in 78-1152, from US Dept of Justice ltr dtd. Apr 9,1979, with copies of the Fourth Cir. opinion in Ryan v. Dept of Justice. (G, Wl, Pregerson) ec		
r 26	As of Apr 23, in 78-1152, FILED ORDER (G, WL, PREGERSON) the matter is withdrawn from submission to the former panel of Judges Ely, Wallace and Pregerson, and will be resubmitted to the panel of Judges Goodwin, Wallace and Pregerson 28 days from the date of this order upon the briefs and records now on file and upon the tape-recorded oral argument. -dmf-		
14	Recvd in 78-1152, letter dtd. May 10,1979, from the US Dept of Justice, w/copies of the 1st Cir decision in Irons v. Bell and 4th Cir decision in Ryan v. Dept of Justice, requesting that they be made available to Judge Goodwin. (see entries of 4/3/79 & 4/12/79) to "G" ec		
20	Rec'd in 78-1152 Aples Add'l citations. (panel) -vt-		

(See Second Sheet)

JUDITH KATHERINE EXNER, APLE
VS.
FBI, APLTS.

78-1880
(SECOND SHEET)

DC: SOUTHERN, CA.

DATE 1980	FILINGS-PROCEEDINGS	CLERK'S APPELLANT
Feb 4	ORDERED OPINION (GOODWIN) PREGERSON (CONCURRING) FILED & JUDG TO BE FILED & ENTD:	
Feb 4	Filed opinion - Affirmed JS/34	
Feb 4	Filed & Entered Judgment. -rmc-	
FEB 13	Filed aplts' (FBI,et al) motion for 21 day ext. of time to file petition for rehearing & suggestion for rehearing en banc. (panel) 2/12 -db-	
Feb 20	Filed order (G) GRANTING defts/aplt's motion for an ext of twenty-one (21) days to file a petition for rehearing and suggestion of the appropriateness of rehearing en banc. -rmc-	
11 MAR 1980	MANDATE ISSUED	
	RECORD RET'D Date: JUN 26 1980	
	Pldgs: Vol(s)	
	R/T's: Vol(s) 3 D216	
	Exh's: ___Bx, ___Eny, ( ) Sealed	
	Ctfd Mail No.	

D. C. No. CV 76-89-S
D. C. Judge Hon. E.J. Schwartz
Notice of appeal filed March 24, 1978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

78-1880

.... FED. REP. 2ND. P ....

FILED IN DC: February 6, 1976

CONSOLIDATED WITH: 78-1152

FPI LC 11-75 10M 9000

CIVIL DC: SOUTHERN CALIFORNIA

PREV.: 76-1903 (rem., 9/30/76, BA, G & Takasugi)

JUDITH KATHERINE EXNER,

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FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants/Appellants.

For ~~Appellee~~ Appellee:

Richard C. Leonard, Esq.

For ~~Appellants~~ Appellants:

UNITED STATES ATTORNEY
John R. Neece, AUSA
Chief, Civil Division

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JUDITH KATHERINE EXNER, APLE
VS.
FBI, APLTS.

78-1880
(SECOND SHEET)

DC: SOUTHERN, CA.

DATE 1980	FILINGS-PROCEEDINGS	CLERK'S APPELLANT
Feb 4	ORDERED OPINION (GOODWIN) PREGERSON (CONCURRING) FILED & JUDG TO BE FILED & ENTD:	
Feb 4	Filed opinion - Affirmed JS/34	
Feb 4	Filed & Entered Judgment. -rmc-	
FEB 13	Filed aplts' (FBI,et al) motion for 21 day ext. of time to file petition for rehearing & suggestion for rehearing en banc. (panel) 2/12 -db-	
Feb 20	Filed order (G) GRANTING defts/aplt's motion for an ext of twenty-one (21) days to file a petition for rehearing and suggestion of the appropriateness of rehearing en banc. -rmc-	
11 MAR 1980	MANDATE ISSUED	
	RECORD RET'D Date: JUN 26 1980	
	Pldgs: Vol(s)	
	R/T's: Vol(s) 3 DOCS	
	Exh's: Bx, Env, ( ) Sealed	
	Ctfd Mail No.	

D. C. No. CV 76-89-S
D. C. Judge Hon. E.J. Schwartz
Notice of appeal filed December 14, 1977
.... FED. REP. 2ND. P ....

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

78-1152

FPI LC 11-75 10M 9000

FILED IN DC: February 6, 1976

CONSOLIDATED WITH 78-1880

CIVIL DC: SOUTHERN CALIFORNIA

PREV.: 76-1903 (rem., 9/30/76, BA, G & Takasugi)

JUDITH KATHERINE EXNER,

Plaintiff/Appellant,

vs.

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants/Appellees.

For Appellant:

Richard C. Leonard, Esq.

For Appellee:

UNITED STATES ATTORNEY
John R. Neece, AUSA
Chief, Civil Division

DATE 1978	APPELLANT'S ACCOUNT	BALANCE	RECEIVED	DISBURSED
JAN 31	[illegible] 12 Leonard (66359)	0		50 —

78-1152

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S FEES APPELLANT	APPELL
AN 23	DOCKET FEE PAID. - nw	$50. 00	
AN 25	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. nw		
Feb 9	FILED, AS OF JAN 30, 1978 CERT TRANS RECORD ON APPEAL IN FIVE VOLUMES: VOLS. I-II, PLDGS, THREE CERT COPIES; VOLS. III-V, R/T'S, ORIG & ONE COPY. -dmf-		
eb 9	Aplt's brief due March 20, 1978. -dmf-		
ar 14	Filed, as of Mar. 13, motion & order (CLK) Granting aplt an ext if time to and including April 24, 1978 in which to file her opening brief. Subject to reconsideration if any objection filed within 7 days. -fn-		
pr 21	Filed as of 4/19, aplt's (Exner) motion for consolidation of appeals 78-1152 and 78-1880 and combined briefing schedule; motion for ext of time to file opening brief; affidavit in support. 4/17 (Schickele) ec		
pr 25	FILED AS OF 4/21/78, CERT SUPPLEMENTAL RECORD ON APPEAL IN ONE VOL. OF PLDGS, VOL. II-A, THREE CERT COPIES. RECORD IN SIX VOLS. -mp-		
ay 1	Filed, as of Apr. 27, order (BR) Upon due consideration of aplt's motion, these appeals #'s 78-1152 & 78-1880 are consolidated, aplt in Appeal No. 78-1152 shall be deemed aplt for purposes of briefing pursuant to Rule 28(h), F.R.A.P., and she is granted ext of time through May 26, 1978 in which to file her brief. -fn-		
Jun 5	Filed 26 Aplt's Opening Briefs 5/26 -jrv-		
ne 22	Filed motion & order (CLK) Granting aples (FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, & GRIFFIN B. BELL) an ext of time to and including July 26, 1978 in which to file their brief. -fn-		
UG 3	Filed, as of 7/31/78, motion & order (Clk) granting defts leave to file their brief one day out of time. nw		
ug 3	Filed, as of July 31, 25 Aplees' Briefs (FBI, et al) 7/27/78	-dmf-	
UG 15	Filed, as of 8/14/78, motion & order (Chief Deputy Clk) granting pltf-aplt and aple (EXNER) an extension of time to and including September 15, 1978 in which to file her reply brief. nw		
ept 15	Filed, as of Sept. 14, motion & order (CLK) Granting pltf-aplt and aple (JUDITH EXNER) an ext of time to and including Sept. 29, 1978 in which to file her reply brief. -fn-		
ct 4	Filed, as of Oct 3, 25 Aplt's Reply Briefs (Exner) 9/29/78	-dmf-	
	(SEE SECOND SHEET)		

#78-1152
(SECOND SHEET)

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Oct 17	Filed, as of Oct. 16, motion & order (CLK) Granting aplts F.B.I., et al., an ext of time to and including Oct. 30, 1978 in which to file its brief. -fn-	
Nov 2	Filed, as of Nov 1, 25 Aplee/Cross-Aplts' Reply Briefs (FBI, et al) 10/30/78 -dmf-	
	As of 2/12/79	CALENDARED
FEB 15	ARGUED & SUBMITTED Before: ELY, WALLACE, CJJ, PREGERSON, DJ	FEB 12 1979
Mar 6	Recvd as of 3/5, ltr dtd. Feb 28, 1979, from US Dept of Justice, re documents submitted to DC in camera. (panel) ec	P.C.
Mar 28	Filed Aplees' motion to recuse. 3/27 (panel) ec	
Apr 3	Filed, as of Apr 2, order (E) granting aplees' motion to recuse. -dmf-	
Apr 3	Recvd from aple (USA) ltr dtd. Mar 30,1979, re Ist Cir. decision in Irons v. Bell. (Wl & Pregerson) ec cc. Judge Goodwin (replacing Judge Ely)	
Apr 12	Recvd from US Dept of Justice ltr dtd. Apr 9,1979, with copies of Fourth Cir. opinion in Ryan v. Dept. of Justice. (G, Wl, Pregerson)	
Apr 26	As of Apr 23, FILED ORDER (G, WL, PREGERSON) the matter is withdrawn from submission to the former panel of Judges Ely, Wallace, and Pregerson, and will be resubmitted to the panel of Judges Goodwin, Wallace and Pregerson 28 days from the date of this order upon the briefs and records now on file and upon the tape-recorded oral argument. -dmf-	
May 14	Recvd from US Dept of Justice letter dated May 10,1979, w/copies of the Ist Cir decision in Irons v. Bell and 4th Cir decision in Ryan v. Dept of Justice, requesting that they be made available to Judge Goodwin. (see entries of 4/3/79 & 4/12/79) ec (to "G")	
JUL 20	Rec'd Aples' Add'l citations . (panel) -vt-	
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11 MAR 1980	MANDATE ISSUED	
		JUN 26 1980

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~~Ctfd Mail No.~~ 654125[illegible]

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

78-1152

FPI LC 11-75 10M 9000

FILED IN DC: February 6, 1976

CONSOLIDATED W/ 78-1880

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PREV.: 76-1903 (rem., 9/30/76, BA, G & Takasugi)

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