In the

ORIGINAL

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION ET AL., :
:
Petitioners :
:
v. : No. 80-1735
:
HOWARD S. ABRAMSON :

Washington, D. C.

Monday, January 11, 1982

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v. No. 80-1735

HOWARD S. ABRAMSON

Washington, D.C.

Monday, January 11, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:57 p.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Washington, D.C.; on behalf of the Petitioners.

MS. SHARON T. NELSON, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the Federal Bureau of Investigation and others against Howard S. Abramson.

Mr. Geller, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This is a Freedom of Information Act case here on writ of certiorari to the District of Columbia circuit. At issue is Exemption 7 of the FOIA which exempts from mandatory disclosure investigatory records compiled for law enforcement purposes to the extent that production of such records would cause one of six discrete harms listed by Congress in Exemption 7.

The question presented is whether records in the FBI's law enforcement files that satisfy Exemption 7, and hence that are exempt from mandatory disclosure, lose that exempt status when they are later summarized into another FBI document that was not compiled for purposes of law enforcement.

And the documents involved in this case are so-called name check summaries concerning eleven individuals

that were prepared by the FBI in October 1969 in response to a request by John Ehrlichman, who was then the counsel to the President.

The FBI frequently prepares name check summaries at the request of the White House, generally when someone is being considered for a presidential appointment or for an invitation to a White House function.

When the FBI got the White House request in this case, it, as it did in other name check requests, checked its law enforcement records and wrote a short memorandum summarizing its file information about each of the eleven individuals. In the case of a few of the individuals the FBI files included a name check summary that had been prepared in response to an earlier White House request.

QUESTION: Mr. Geller, would you briefly define what a name check is?

MR. GELLER: Yes.

QUESTION: I think I know, but I'd like to have you tell me.

MR. GELLER: A number of agencies in the federal government, including the White House, when they need certain information for perfectly lawful purposes about a particular individual, they will ask the Federal Bureau of Investigation to check its files and run what is called a name check on that individual and notify the agency of

anything pertinent that they may have found.

And as I said, the White House frequently would send over name check requests to the FBI; for example, when the President was thinking of naming somebody to a presidential appointment or someone was being considered for an invitation to a White House function, there would have to be some security checks and other things.

QUESTION: But I ask again, what is it?

MR. GELLER: It is a memorandum summarizing information in the FBI's files in the individual's case.

Perhaps the facts of this case are a trifle confusing. It might well benefit the Court at this point --

QUESTION: You mean the FBI would respond only, with respect to the individual, only with respect to what it found in its own files?

MR. GELLER: That's right. They would not do a separate investigation. They would simply check their files for that person and write a memorandum explaining --

QUESTION: Do they not check their files generally to see whether there are any arrest records of the person? Isn't that the starting point of a name check?

MR. GELLER: Yes. That would be in their file if they had that information.

QUESTION: If they had it.

MR. GELLER: They would not go about --

QUESTION: But they do not send out a nationwide --

MR. GELLER: No, no, no.

QUESTION: -- Question --

MR. GELLER: No, they do not. That's not what we're talking about by name checks here. These are fairly routine checks. The FBI, as I understand it, does not do anything more in response to these routine inquiries than check their file information; and if they find nothing, they will tell the agency we found nothing in our file about the individual.

QUESTION: Well, if someone has an arrest record out in Tipperary or some other place, would that be in the FBI's files or not?

MR. GELLER: I think that they are computerized to the extent that that could be determined. But the point is they don't go out and do a separate investigation in response to these --

QUESTION: I know, but the FBI doesn't have in its files every arrest that's been made since time began.

MR. GELLER: No. I assume at some point these arrest records began to be integrated into the FBI's files. I'm not aware of when that date was.

QUESTION: But do you think as of today when there's a name check, if someone's been arrested for anything in the last five years it will be in the FBI

computer?

MR. GELLER: Well, I hesitate to give an answer with certainty to that question, Justice White. I'd like to check --

QUESTION: Well, that's all right. I just wondered if you knew or not.

MR. GELLER: I do not know. My understanding is that they can probably find that information very quickly through computerization. I think that there is a hookup.

QUESTION: Well, what does that mean? Is it in its own files or not?

MR. GELLER: Well, I'm not sure that the FBI these days is arranged with --

QUESTION: All right. What are you referring to then? A name check, they report only what's in their own files. That's what you said.

MR. GELLER: That's right.

QUESTION: Do you mean what's on their own computer?

MR. GELLER: I believe that's right.

QUESTION: All right. Well, then, I ask you again, do they have on their computer everybody's arrest record in the last five years?

MR. GELLER: I would have to say that I don't know the answer to that question. Of course, these name check

requests came in in 1969.

QUESTION: Well, would it have on the computer anybody's conviction for anything in the last five years?

MR. GELLER: I would doubt that, but I don't know the answer to that question, once again, as to the internal organization of the FBI. But --

QUESTION: Mr. Geller, could I ask you a question about your terminology?

MR. GELLER: Yes.

QUESTION: Do you use the term documents or records or files as words of art for purposes of the FOIA?

MR. GELLER: No. The Court of Appeals did, but none of these are defined terms under the Freedom of Information Act. We don't think they have any particular significance.

It's important to realize that the 1974 amendments to Exemption 7 were quite controversial, and there were a number of allegations by opponents of those amendments that these amendments would hinder law enforcement. And in fact, President Ford vetoed the 1974 amendments for that reason, and the amendments were repassed over his veto.

Now, there was substantial debate both prior to and after the veto as to what the thrust of these amendments would be, and proponents of these amendments, such as Senator Hart and Senator Kennedy, repeatedly assured their

colleagues that no information, no matters, no records, no documents in the FBI's law enforcement records would have to be turned over to any FOIA requester if one of these six discrete harms listed in the statute would occur as a result of production. They used these words interchangeably.

The word "record" is not defined under the FOIA, but interestingly, it is defined under the Privacy Act which was passed the very same week as the 1974 amendments to the FOIA. And the Privacy Act defines "record" as including any item of information. It doesn't talk about discrete documents. And we think that that same sort of definition should apply in construing the FOIA and particularly in construing the Exemption 7.

QUESTION: Incidentally, you mention privacy. Did the Government take the position that Exemption 6 at one time applied, the privacy exemption?

MR. GELLER: At the time that the initial request came in, I think that the FBI in responding to that FOIA request listed Exemption 6 as well as Exemption 7(C).

QUESTION: And why has it been abandoned?

MR. GELLER: Well, I think it was probably abandoned because the people who were putting together the District Court papers in this case assumed that these were clearly law enforcement records and that the pertinent exemption was Exemption 7.

Also, when you're dealing with personal privacy, as this Court noted in the Rose case, Exemption 7(C) imposes on the Government a somewhat easier test to meet than Exemption 6. Under Exemption 6 the Government would have to show a clearly unwarranted invasion of personal privacy, whereas under Exemption 7(C) all that would have to be shown is an unwarranted invasion of personal privacy.

So I assume that Exemption 6 was not put forward on the understanding that Exemption 7(C) was more relevant and imposed an easier test on the Government to meet.

QUESTION: Mr. Geller, I gather from your response to some earlier question that if the White House sent over and said give us a name check on Kenneth Geller, you can't tell us what process the FBI would go through in response to that name check.

MR. GELLER: I think what they would do is they would go to their files, and they would check to see what --

QUESTION: Well, now, their files, their files.

MR. GELLER: Well, they keep, as I understand it, two sets of files. One would be by name.

QUESTION: Well, I take it that, if I may interrupt, that there's a full field investigation on you so that they wouldn't have to resort just to the name check.

MR. GELLER: Well, the result of the full field investigation, as I understand it, would be in the file on

me or on the eleven individuals whose names were requested in this case.

But as I say, the facts are a little confusing, and I do think it would help the Court if I could direct the Court's attention at this point to pages 31 and 32.

QUESTION: Of what?

MR. GELLER: Of the Joint Appendix. And page 31 is one of the name checks that was sent over in response to the Ehrlichman request. This was a name check on Joseph Duffey, and this is it, one page long, essentially saying that there was nothing on Mr. Duffey in the files. However, there was one piece of information that was deleted, blacked out there under Exemption 7.

Page 32 of the Joint Appendix contains another one of the name checks sent over in response to the Ehrlichman request, this one for John Kenneth Galbraith. Once again, all it says is that prior name checks had been prepared for Mr. Galbraith in 1961 and 1965, presumably when President Kennedy and President Johnson were considering him for a presidential appointment. And copies of those prior name checks are attached.

Now, these prior name checks are the so-called attachments that we refer to in our brief and that the Court of Appeals refers to in its opinion.

QUESTION: Incidentally, how many of those

attachments are involved here, Mr. Geller? There are eleven individuals, but how many attachments do we have?

MR. GELLER: There were --

QUESTION: Forgive me. I understand one of the Government's arguments is if an attachment exists that that's sufficient to qualify for the exemption, isn't it?

MR. GELLER: Well, the Court of Appeals -- we don't dispute that. The Court of Appeals distinguished between the name check summaries prepared in 1969 in response to the Ehrlichman request and the attachments, which were in existence before that.

QUESTION: Now, how many of these eleven individuals are the --

MR. GELLER: I think there were attachments as to about four of these individuals. Some of these attachments are prior name check requests, as in the case of John Kenneth Galbraith. Some of the attachments were other raw FBI documents that happened to be in that person's file, and rather than summarize them or excerpt them, they were simply attached and sent over. The Court of Appeals found that as to those attached documents if those attached documents were compiled for purposes of law enforcement that they would retain --

QUESTION: I gather in light of what the Court of Appeals said, at least as to those four, the Court might

believe Exemption 7 applies.

QUESTION: Only to the attachments.

MR. GELLER: Only to the attachments. The Court of Appeals remanded to the District Court to determine whether those attachments had been prepared for purposes of law enforcement, and if they were, then Exemption 7, the Court of Appeals said, would apply to them. That's what we think is --

QUESTION: Well, what would the Court of Appeals say if the name check, the main body of the name check that was sent back purported to summarize one of the attachments?

MR. GELLER: I think that the Court of Appeals clearly said, I think that's the holding in this case, that those summaries --

QUESTION: It would still say that the attachment might be exempt, but the summary would not.

MR. GELLER: Not the summary, not the summary. And that's what we find to be the utter literalness and foolishness of the distinction that the D.C. Circuit has drawn between the summaries, which are simply summaries of underlying raw FBI documents, and the attachments, which were the FBI documents themselves. They contain the same information in the two, but because one was prepared in 1969 in response to what the Court of Appeals thought was not a law enforcement request, Exemption 7 is not applicable as to

them.

Now, the Respondent made an FOIA request in 1976 for the documents that were sent over to the White House in response to John Ehrlichman's request, and the FBI eventually gave Respondent a large amount of materials, but it deleted certain portions of these materials under Exemption 7(C) for personal privacy reasons and Exemption 7(D) because disclosure would reveal the identify of a confidential source.

Respondent didn't challenge the 7(D) deletions, but he did claim that the deletions under Exemption 7(C) were improper. The District Court agreed with the FBI and upheld those deletions, but the Court of Appeals reversed. The Court of Appeals was willing to accept the FBI's contention that the name check summaries were nothing more than summaries of underlying law enforcement documents, and they were also willing to accept arguendo that those underlying documents were entitled to Exemption 7 protection.

In addition, the Court of Appeals didn't take issue with the District Court's findings that release of this information would have led to one of the specific harms that Congress included in Exemption 7, 7(C), personal privacy. The Court of Appeals nonetheless ordered the sensitive information disclosed to Respondent because the Court found that the name check summaries themselves, as

opposed to the underlying documents they summarized, were not investigatory records compiled for law enforcement purposes but were instead, according to the Court of Appeals, prepared for political purposes. And the court therefore found that the summaries did not satisfy the threshold requirement of Exemption 7 and had to be disclosed.

QUESTION: Does the record show the dates when the information was compiled as to each of the persons in question? In other words, was it ten years before or one week before?

MR. GELLER: Well, as to the attachments, the name check summaries were all prepared in October 1969 in response to the Ehrlichman request. The attachments, as I said in the case of John Kenneth Galbraith, those attachments were prepared in 1961 and 1965, and some of the other attachments in this case may well have gone back even longer than that.

QUESTION: Well, taking Mr. Galbraith, Professor Galbraith as one example, did he hold any public office on which they would have made a name check?

MR. GELLER: I believe that Mr. Galbraith was appointed as Ambassador to India by President Kennedy.

QUESTION: And this might have -- is that date related to his appointment as Ambassador?

MR. GELLER: Yes. I don't think there's any

question that that is the reason that a summary was prepared for Mr. Galbraith in 1961, and presumably in 1965 President Johnson was thinking of appointing him to some position.

QUESTION: Mr. Geller, can I ask you a question about how far your position takes us? Supposing we agreed with you that the summaries when given to Mr. Ehrlichman were still within the exemption. Then suppose Mr. Ehrlichman wrote a report for the President which said I have found out the following information without describing its source, and he confined himself to what he got here and sent it to the President. Then say the President sent that information to the Bureau of Internal Revenue and said I want you to audit the returns of these people because I found out the following information.

Would the whole chain still be protected?

MR. GELLER: Well, the situation is very unlikely to arise this way, but if the agency that receives the FOIA request looks at the document that it has been asked for and can show that that information originally came into the Government's hands --

QUESTION: Well, say the request goes to the Internal Revenue Sevice in my hypothesis, and they trace it back and say this all came from law enforcement sources. It's been rewritten two or three times, but the basic information is precisely what's involved in this case.

MR. GELLER: Yes. As I say, I think it's unlikely to arise this way, but yes, our argument would extend that far. But I think it's important to remember that it's the agency that is going to have the burden of doing this tracing, and it's often not going to be very easy to do.

QUESTION: I understand.

MR. GELLER: And it's also important to remember that simply tracing this information back to law enforcement files does not make it exempt. All it means is that you meet the threshold test under Exemption 7. You still --

QUESTION: No. I understand.

MR. GELLER: The agency would still --

QUESTION: But the privacy part of the test is met in this case.

MR. GELLER: That's right. The agency would still have to show that release of that information, even after it's worked its way into a new document and many years have passed, would cause one of the specific harms listed in Exemption 7. There's no question in this case -- Judge Ritchie made a finding, and the Respondent did not appeal it -- that the privacy protection of Exemption 7(C) would be violated with these releases.

QUESTION: Well, Mr. Geller, you wouldn't suggest, would you, that if in this chain that Justice Stevens describes this information is included in a document that is

normally made public, you wouldn't say that that may be excised from a document that would normally be made public.

MR. GELLER: Well, if the agency voluntarily makes the document public.

QUESTION: Well, it may say we're going to make it public, but we can excise this particular piece.

MR. GELLER: I would think it could do so. I would think it could do so. The question arises when the FOIA request --

QUESTION: What do you do with, what is it, Sears, the Sears case? Is it the Sears?

MR. GELLER: Well, the Sears case dealt with Exemption 5, and I'm not sure that --

QUESTION: All right. Go ahead.

MR. GELLER: We don't believe that the factors that underlie Exemption 5 are the identical sort of considerations that underlie other considerations. Exemption 5 has to do with predecisional determinations, preserving the sanctity of the predecisional process. And once a final decision has been made and the predecisional determinations have been expressly adopted, the Court found in Sears that there is no reason at that point to protect the predecisional memorandum.

QUESTION: But if an agency includes this kind of information, normally would include this kind of information

in a document that is normally available, if it actually relies on this piece of information for coming to a conclusion, the explanation of which is normally made public --

MR. GELLER: Well, you know, in Sears the Court faced a situation somewhat like this, and while it said that --

QUESTION: I know.

MR. GELLER: -- Exemption 5 would no longer be applicable, documents that are entitled to Exemption 7 protection would not lose that protection if they were incorporated in a final document.

Now --

QUESTION: Mr. Geller, can I back up a minute? The information, is it from the raw files? Does it include raw files?

MR. GELLER: Some of these attachments are raw files, yes. Yes, they are.

Now, perhaps the best way to explain the error in the Court of Appeals' mechanical and excessively literal approach is to give a fairly typical example. Suppose the FBI compiled an investigatory record for law enforcement purposes; in other words, a record that clearly meets the threshold test of Exemption 7. And for simplicity's sake let's assume that that record is two paragraphs long.

Now, if there was a request for that record, there's no question that the FBI or any law enforcement agency could refuse it under Exemption 7, assuming one of the six harms could be shown.

Now, if instead the FBI were to xerox that record or repeat it verbatim in a second record which was not compiled for purposes of law enforcement, then the D.C. Circuit would say it could still be withheld because it is still the same record; it hasn't been changed in any way. However, if that second document rather than repeating the two paragraphs verbatim repeated only one of those two paragraphs, or repeated the two paragraphs but changed one sentence in the two paragraphs or added a new sentence, or, as in this case, instead of repeating the two paragraphs verbatim it had summarized or paraphrased those two paragraphs, then the D.C. Circuit would say at that point it's a new record, it has to be turned over, even though it would contain the identical information that was in the two paragraphs as it sat in its original source.

We don't think that any test that could lead to these sort of results could possibly be what Congress intended when it intended in 1974 to wipe put the somewhat formal interpretation of Exemption 7 that the D.C. Circuit had given it.

And perhaps I can give another example that will

bring home the foolishness of the D.C. Circuit's approach in this case.

The Respondent in this case made an FOIA request for all of the documents that were sent over to the White House in 1969 in response to the Ehrlichman request. As a result, what the FBI found were these name check summaries. But let's assume instead Respondent had made a request in 1976 for all of the information in the FBI's files about Cesar Chavez, for example, one of the eleven individuals.

What the FBI would have done is it would have gone to its Cesar Chavez file, and it would have found two things. It would have found first the underlying information that it had on Cesar Chavez, clearly exempt; and it would have found the summaries that were prepared in 1969 which did nothing more than summarize the underlying information that it had on Cesar Chavez. Document B is identical to Document A except it summarizes it. The same harms would occur from release of Document B that would occur from the release of Document A. It might well be a serious invasion of Cesar Chavez's privacy. Yet the D.C. Circuit would require the FBI to turn over those summaries, but would allow the FBI to retain the underlying records that had been summarized.

Once again, we think that this could not possibly be what Congress had in mind in 1974 when it intended to

wipe out and overrule the line of excessively literal decisions of the D.C. Circuit under Exemption 7.

QUESTION: What if I go to the FBI and ask them to release anything they have in their files about me? Are they entitled to rely on the privacy exemption in turning down my request if it's simply pertains to me?

MR. GELLER: Not if it simply pertains to you, although if you ask for your own records, that's a complication that's not involved here, the Privacy Act would apply as well as the Freedom of Information Act. But a person, no, would not be refused his own records under Exemption 7(C).

In fact, in this case when Respondent's first request came in and asked for information about eleven named individuals, the FBI's initial response was would you please give us notarized statements from these eleven individuals saying that they don't mind that we give out the information on them.

Now, the hypothetical that I gave a moment ago is not farfetched. I think it's almost exactly the situation in this case with respect to the so-called attachments that I mentioned at the beginning of this argument.

As I mentioned earlier, some of these attachments are on their face quite clearly complete memoranda prepared prior to 1969 pursuant to previous totally legitimate White

House name check requests. These memos were in the FBI's law enforcement files before the Ehrlichman request was made, and they were incorporated in and attached to the documents sent over to the White House in 1969 in response to the Ehrlichman request.

The Court of Appeals remanded this aspect of the case, the attachments aspect of the case, to the District Court to determine whether these attachments were originally compiled for law enforcement purposes. If they were and if the disclosure would work an unwarranted invasion of personal privacy, then the Court of Appeals would allow the FBI to withhold them. However, if the FBI instead of attaching these documents when they sent them over to John Ehrlichman had instead summarized them, the same information would be going over, but at that point the summaries could not be withheld because they weren't the original documents, and the court would have found that they were not prepared for purposes of law enforcement.

And we think that this distinction between duplicate law enforcement records and records that are substantially identical but not exact duplicates is just the sort of mechanical and senseless approach to Exemption 7 that Congress wanted to eliminate in the 1974 amendments.

I think this approach is responsive to none of the concerns that underlie the exemption, and it would lead to

anomalous results, some of which I mentioned earlier. The harms that can occur from the release of a law enforcement record can occur just as easily from the release of a summary of that record, and those harms don't depend at all on the purpose for which the summary was prepared.

We therefore think that the Court should reject the D.C. Circuit's formal approach and literalistic approach and reverse the judgment below.

Thank you.

QUESTION: Could the agency have relied also on Exemption 5, had it chosen to do so, as an interagency piece of information?

MR. GELLER: Well, I don't think it could. It's interagency, but I don't think Exemption 5 would apply because it is not predecisional. A lot of the material is simply factual, and the courts have held that Exemption 5 doesn't apply to simply factual material.

QUESTION: Mr. Geller, the director has some proposals pending, doesn't he?

MR. GELLER: There is a Justice Department proposal pending to amend several sections of the FOIA.

QUESTION: Would these be exempt under those proposals?

MR. GELLER: I think that under the proposal the Justice Department has made to change, Exemption 7(D)s would

now be exempt because the proposal, as I understand it, changes the language of Exemption 7 to read "investigatory records or information compiled for law enforcement purposes" to make it clear that there should not be a formalistic, literal focus on particular pieces of paper but rather on what is the information that the law enforcement agency is being asked to disclose.

Thank you.

CHIEF JUSTICE BURGER: Ms. Nelson.

ORAL ARGUMENT OF SHARON T. NELSON, ESQ.,

ON BEHALF OF RESPONDENT

MS. NELSON: Mr. Chief Justice, and may it please the Court:

As you already heard, this is a Freedom of Information Act case, and a case which certain deletions from records prepared in 1969 pursuant to a request by John Ehrlichman. This request to prepare the summaries, the so-called name check summaries, by the White House concerned eleven prominent public figures. The reason apparently that Mr. Ehrlichman asked for this summary was because these eleven individuals were publicly sponsoring a one-day anti-Vietnam War moratorium along with four United States Senators. As has been mentioned, individuals in this list include John Kenneth Galbraith and even Dr. Benjamin Spock.

QUESTION: Why do you say "even?"

MS. NELSON: Well, I have to take a personal note and say as a recent mother, Benjamin Spock is somehow put on a different level. But he was certainly a well-known activist at that time and a well-known public figure even not to mothers.

I think it's important here to clarify exactly what is part of the 64-page record that was transmitted pursuant to Ehrlichman's request.

QUESTION: I'm not sure I get if there's any significance to the fact that there were four United States Senators who agreed with these people. Does that have anything to do with our case?

MS. NELSON: No, but I think it does sort of lend towards the way that these people were not exactly doing something subversive to be investigated for, that they were using their right of freedom of speech.

QUESTION: Well, that might be relevant in a tangential way if we were asked to pass on the propriety of Mr. Ehrlichman's request, but that's not what we're dealing with, is it?

MS. NELSON: No. What we are dealing with is the fact --

QUESTION: His conduct is not in issue here.

MS. NELSON: I'm sorry.

QUESTION: His conduct, Erhlichman's conduct is

not in issue.

MS. NELSON: Oh, I think that Ehrlichman's conduct is very much at issue here in the fact that these FBI files, these summaries were prepared from the FBI files for a purpose that was clearly not law enforcement.

QUESTION: Well, I say his conduct is not in issue. If he had called the FBI and said conduct an investigation on A, B, C, D, and E, that would be another matter; but here we're dealing, as I understand the record, with material that the FBI already had in its possession about these people, is that right?

MS. NELSON: I don't know. I don't think the record is clear as to whether Ehrlichman was aware of the limitation of what the FBI was or was not going to do with respect to obtaining information on the eleven people that he --

QUESTION: But is it not a fact that the information -- there was information already in the possession and in the records of the FBI, just as there is, for example, on Mr. Geller and probably on all of us sitting on this bench?

MS. NELSON: That is true.

QUESTION: And he was requesting that information.

MS. NELSON: He was requesting that the FBI prepare summaries of information on these eleven

individuals. It is not clear that he understood the limitation of what type of information the FBI would use to prepare those summaries.

QUESTION: But are we concerned in construing this statute and the exemptions with what Mr. Ehrlichman had in mind?

MS. NELSON: I think, as both the District Court and the Court of Appeals have held here, that it's very clear that these files were compiled for a partisan political reason and not for a law enforcement purpose. And because of that, because of that exact reason --

QUESTION: The summaries were compiled, the summaries were compiled for political purposes is what they found.

MS. NELSON: That's correct. There has been no holding, neither at the District Court level nor at the Court of Appeals, as to the reason or the purpose for which the underlying information was originally compiled. The record is absolutely barren on that as to that issue, other than affidavits that have been submitted by Petitioner. But the courts have made no ruling on this issue.

QUESTION: Well, I thought as to some of these attachments didn't the Court of Appeals suggest they might qualify, because they indeed had been put together for law enforcement purposes?

MS. NELSON: I think the Court of Appeals stated that -- it remanded to the District Court to review and determine what was the purpose that those underlying documents were compiled.

QUESTION: Yes, but the Court of Appeals did say if it were found that those had been, the attachments had been prepared for law enforcement purposes, then they would qualify.

MS. NELSON: That's correct.

QUESTION: And you don't dispute that, do you?

MS. NELSON: Well, the Court of Appeals was, I believe, using a very narrow use of the term "compile."

QUESTION: Well, do you disagree with that phase of the Court of Appeals holding?

MS. NELSON: Well, we contend that when the FBI rounded up new information and piled together this new information and submitted it for a purpose other than law enforcement purposes that that entire file, the entire record, could not be exempt from disclosure under Exemption 7. Information within might be exempt under another exemption, but it could not be exempt under Exemption 7.

QUESTION: Well, I'm still not clear, Ms. Nelson. Do you or not agree with what the Court of Appeals held as to the attachments?

MS. NELSON: Well, we certainly agree that -- we

certainly would not dispute if the Court would affirm the Court of Appeals decision here. We certainly can understand that the word "compile" can be used to mean the researching of information and the creation of a new document. And we believe that the Court of Appeals was using that definition and felt that the attaching of a document was not the creation of a new document.

QUESTION: Well, if --

MS. NELSON: I'm sorry.

QUESTION: Go ahead and finish. Excuse me.

MS. NELSON: I'm sorry.

But obviously, the summaries that were created in '69 -- and these are sheets, you've seen two examples of the shorter ones; some of the others are certainly longer -- they certainly show without question that they were prepared in 1969 pursuant to this request. That was a creation of a new document, and there is a question as to how you want to use the word "compile."

QUESTION: Well, what I'm referring to, Ms. Nelson, I'm quoting now from the Court of Appeals opinion, "If it is found that the attachment documents were already in existence and a part of the FBI files prior to the White House name check request, and those original documents were sent to the White House as initially compiled and without any modification, then a determination would have to be made

as to whether these documents meet the threshold requirements of Section 7(B)."

Do you disagree with that?

MS. NELSON: Well, as I said, we would prefer a wider reading of the use of the word "compile," but we would certainly not dispute that that is the holding that --

QUESTION: Well, you can't argue. We must judge the case on that basis, mustn't we, because you didn't cross appeal.

MS. NELSON: Well, the reason that we did not cross appeal --

QUESTION: Well, it may be, but nevertheless, that's the ruling below, isn't it, that if these attachments turn out to have been compiled for law enforcement, they're exempt. Don't we judge the case on that basis?

MS. NELSON: Well, there is some question, I think, as to the exact language that the Court of Appeals used here, and it can be read to say that it really did not in fact rule on the issue of attachments and left that as an open statement and giving some direction to it.

We did not cross appeal on that issue because we felt that that was a reasonable reading of the word "compiled." As I say, we certainly feel that since it has been -- this Court has repeatedly held that the Freedom of Information Act is a disclosure statute requiring the

broadest disclosure, that the use of the word "compiled" in its most narrow term goes against the idea of using the statute in its broadest sense for disclosure.

QUESTION: You don't compile records or documents, is that it?

MS. NELSON: I'm sorry.

QUESTION: You don't compile records or documents? You compile information.

MS. NELSON: Well, we would say that you compile information, that you create a new document.

QUESTION: Do I get an impression correctly that if the statute had used the words "initially secured for law enforcement purposes" then you wouldn't have any claim to a Section 7 exemption?

MS. NELSON: If they had used "secure the information?"

QUESTION: "Initially secured" so that it was plain that when it was had it was not contemperaneous with the request.

MS. NELSON: I'm sorry. I don't know if I understand your question. If you're saying when the FBI in this case would initially obtain the information, that if at that point they had done it for law enforcement purpose? Well, one of the lower courts in the Lesar case held basically in that case where the Government -- where it was

shown that the original records that were obtained were obtained for a non-law enforcement purpose, but the Government went back into those files, those raw files, and created a summary, and found that the summary that they created was created for a law enforcement purpose; and decided, the court, and I believe correctly so, said that those summaries that were created, which were created for a law enforcement purpose, were in fact protected under Exemption --

QUESTION: But that doesn't help us much here, though, does it? That doesn't help us much here on your argument, the case you're referring to, assuming, of course, that it were binding on us, which it isn't.

MS. NELSON: I understand that.

QUESTION: And you really don't know what happened in the FBI.

MS. NELSON: In this case.

QUESTION: You said they went to the files and did this and did that. You don't know what they do in any case.

MS. NELSON: That's correct.

QUESTION: Ms. Nelson, with respect to what Justice Brennan read to you, the word "original" appeared a couple of times in what the Court of Appeals said. Would you agree that a photostat of an original should be treated like an original?

MS. NELSON: Again, I would like to stay with the Court of Appeals --

QUESTION: Not what you'd like.

MS. NELSON: -- Decision.

QUESTION: Supposing you -- let's ask it this way. Supposing we had a document in the FBI files that was clearly exempt, and they made a photostat of it and transmitted it to the White House, at the request of the White House for that document. Exempt or not exempt?

MS. NELSON: I would say not exempt. I would say not exempt because --

QUESTION: Only original records in your reading of the statute.

MS. NELSON: I would say it because the Congress when it was adopting the amendments to Exemption 6 was doing so in the wake of Watergate. They were doing so -- they had a tremendous concern of exactly the kind of abusive use of information as we have in this case: going in and using information for a purpose other than a law enforcement purpose. And in today's world when it is easier to xerox or make a photostatic copy of a document than to take the time and energy to go through a document and only take those portions which need be used, I think that if you hold in your case that a photostat would at all times be protected, then you're encouraging people --

QUESTION: If the original were protected is the hypothesis.

MS. NELSON: The original -- there is no question even here that the original documents, the raw investigatory files from which this information was obtained, are still protected under whatever exemption --

QUESTION: I understand. But your view is if they just photostatted a file and shipped that over, the exemption would be lost.

MS. NELSON: As to the document that was created.

QUESTION: As to the photostats.

MS. NELSON: Yes.

QUESTION: Yes.

QUESTION: And yet not as to the attachments, at least so the Court of Appeals seemed to think.

QUESTION: Well, she's assuming the attachments are the originals, which I think highly unlikely that they would send the originals and keep photostats in their own file. But that's your assumption on which you go along with the Court of Appeals, that they attached originals and retained photostats.

MS. NELSON: No. I think that the Court of Appeals decision was based on -- was recognizing that there certainly may be xeroxes of prior files. I think that that's -- I certainly can understand that decision. As I

said, we come from a position --

QUESTION: You understand it, but you disagree with it.

MS. NELSON: Yes.

QUESTION: We can all understand that.

QUESTION: Why is it you say the photostat -- the original was protected but the photostat of the original, an identical copy of it, is not protected. What's the reason?

MS. NELSON: Because Exemption 7 -- there are nine exemptions. Some of the other exemptions go to information --

QUESTION: Let's stick to Exemption 7.

MS. NELSON: Seven goes to documents created for a specific purpose, and whether or not that purpose --

QUESTION: And you say only the originals are created, and a photostat of an original is not a creation, is that it?

MS. NELSON: I think that's the argument of the Court of Appeals. I mean that's the decision of the Court of Appeals.

QUESTION: What's your argument?

MS. NELSON: Well, at this moment I haven't cross complained, you know, cross filed on their opinion and I'm willing to stand behind their opinion. I was just saying that I think that from the congressional intent behind it,

it would seem that any time you reuse documents or information, whether or not they are photostatic copies, you are reusing them for a purpose and --

QUESTION: But, Ms. Nelson, that isn't what Exemption 7 -- it doesn't say created. It says compiled, investigatory records compiled for law enforcement purposes.

MS. NELSON: That is correct. And I --

QUESTION: And you thought that "compiled" normally applies to information rather than documents.

MS. NELSON: No, Your Honor.

QUESTION: Well, that's what you said.

MS. NELSON: I'm sorry. The word "compiled," the issue is the word "compiled" here. What I said was that the Court of Appeals used the word "compiled" in its narrow sense of researching and creating a new document, whereas I think the word "compiled" in its more modern term is used in just pulling together information.

QUESTION: Even though -- so you would be compiling a record -- I guess you have to compile a record before it's within Exemption 7.

MS. NELSON: That's correct.

QUESTION: And so you think you're not compiling a record if you make a photostat of an original and attach it.

MS. NELSON: That's the Court of Appeals decision, and we are willing to --

QUESTION: And that's yours, too, isn't it?

MS. NELSON: -- Stand behind that.

QUESTION: All right.

MS. NELSON: But in this case we're not dealing with the photostatic copies. What we're primarily first dealing here with is the issue of the summaries that were prepared in 1969, these summaries that were prepared for a non-law enforcement purpose.

And this Court in NLRB v. Robbins Tire held that as a threshold requirement to Exemption 7 must first determine that the documents are investigatory records compiled for a law enforcement purpose. And in deciding that, this Court reviewed extensively both the legislative history and the clear meaning of the statute involved.

In this case it has been undisputed that the summaries that were created in 1969 were created for a non-law enforcement purpose. Quite the contrary, it was held that these records were compiled for a partisan political reason.

QUESTION: Perhaps this isn't relevant, but I know that the Government makes something of it. Do you have any purpose you're willing to tell us about for seeing these documents?

MS. NELSON: No. In Respondent's first affidavit that was filed with the Court -- it's not part of the Joint

Appendix -- he notes that he started this investigation because one of the eleven individuals was running for the United States Senate, and that individual felt that his defeat was in part caused by a whispering campaign that he felt was based on some information that the White House had obtained. And he gave the Respondent the cover letter which is attached in the Joint Appendix at page 29, and it was because of that that the Respondent submitted his Freedom of Information Act request --

QUESTION: In other words, Respondent was more or less acting on behalf of one of these eleven individuals?

MS. NELSON: I can't say on behalf.

QUESTION: Because as I understand what the Government tells us, these eleven individuals, each could have gotten the documents pertaining to himself without any question.

MS. NELSON: That is correct. I cannot say he was acting on behalf of one of those. He was at that time a journalist.

QUESTION: But the Respondent's interest is getting at the material that's in the nature of private information pertaining to these people.

MS. NELSON: The Respondent's interest is to find out what kind of information that was being used by the White House, and to determine in this case whether it was

part of the information that was used in this whispering campaign.

Did I answer your question?

QUESTION: Yes.

QUESTION: I gather, Ms. Nelson, if I understand your basic argument, it really is that even if they are precise copies of documents originally put together, compiled, or whatever word you want to use, for law enforcement purposes, when later somebody wants copies of those for some other purpose, they have to be disclosed.

MS. NELSON: Well, they cannot be shielded from disclosure under Exemption 7. It is always possible --

QUESTION: I am talking about Section 7.

MS. NELSON: Yes, but we cannot lose sight of the fact that they may -- some of the information may in fact be protected under Exemption 6.

QUESTION: Well, forgetting other exemptions, so far as Exemption 7 is concerned am I correct that your argument basically is even exact copies have to be disclosed if the copies are wanted for some purpose other than the original purpose which was law enforcement purposes?

MS. NELSON: As I mentioned before, that is our petition, but we are more than willing to just rely on the Court of Appeals decision which does not go quite that far as to disclosure, and would only go to when they've created

a new document

QUESTION: Yes, but I think you can argue in the District Court that a xerox is creating a new document, and that the attachment isn't protected unless it's the original, which you said earlier.

MS. NELSON: I think what I said -- if we go back now to the District Court and you affirm the Court of Appeals decision, I think at that point we will probably not raise the argument of whether or not they are or are not xeroxed. What we will however raise is the issue of whether or not those attachments were in fact created for law enforcement purposes.

It should be noted that out of the record, the 64-page record, there are only really attachments as to two of the individuals, and as to two of the other individuals, from what my brother said now, I gather also attachments, there are no raw investigatory files attached. The entire record, the 64 pages, has been entered into the record as Exhibit N, Document 3 of the record at the District Court level.

QUESTION: Ms. Nelson, you've used the word "create" a number of times. I think you had an exchange with Justice White over "create" versus "compile." Actually, the statutory language of the exemption speaks just of compile, does it not?

MS. NELSON: That's correct. I used only the word "create" in defining the word "compiled." The issue is whether or not the word "compile" requires the creation of a new document or is just the pulling together of information.

QUESTION: And you rely on the Court of Appeals decision for the definition of "compiled" as opposed to "create?"

MS. NELSON: That's right. They basically use it as to create a new document, and that's why they, I believe, felt that the attachments may not be -- may still be protected if in fact they were compiled for a law enforcement purpose.

QUESTION: Well, I would think you would be better off with the broadest possible definition or rather perhaps with the narrowest possible definition of the word "compiled" since it's an exemption.

QUESTION: And of what a record was.

QUESTION: And of what a record was.

MS. NELSON: Well, we believe that it's the terms that would encourage the greatest amount of disclosure of information, and that the words should -- we should seek those definitions that would encourage the greatest disclosure.

QUESTION: Well, I just meant from the point of view of one seeking disclosure; you know, whether or not the

argument is accepted, the argument would be phrased in terms of the narrowest possible definition of the exemption.

MS. NELSON: That's correct, Your Honor.

I was going back to what this record really includes. In addition to the fact of these name check summaries, this record includes attachments attached prior to the name check summaries as to two of the individuals -- or actually I gather four of the individuals -- and it includes a very lengthy article written by Mr. Galbraith in the Saturday Evening Post, and also it includes the actual advertisement that had been placed in the New York Times for the anti-Vietnam War moratorium signed by the individuals.

QUESTION: Well, your client doesn't need to go to the FOIA to get that information.

QUESTION: Or to bother us with it.

MS. NELSON: Well, this is what was part of the document. The Respondent did not know exactly what was in the file. He did not know that the article from the Saturday Evening Post was kept by the FBI as part of its file on Mr. Galbraith.

Under Petitioners' argument that the record should be shielded under Exemption 7 if its information was once compiled for law enforcement purposes, it would shield future records even if the information is recompiled for a partisan political reason. This position, of course,

totally dilutes the public accountability that Congress meant to strengthen in the 1974 act amendment.

With respect to those amendments it's important to note that the Senate floor manager of the 1974 amendments stated on the floor of the Senate with respect to the soon to be adopted amendment -- this was back in '74 -- and I quote, "Not even the FBI should be placed beyond the law, the Freedom of Information law. Watergate has shown us that unreviewability and unaccountability in government agencies breeds irresponsibility of government officials."

As I say, Petitioners' position is at odds both with the legislative history and with the statutory construction. Under Petitioners' position we basically should -- one would have to use two different ideas of records: one record for the threshold test, whether or not it was compiled for a law enforcement purpose; and other records, the records that someone wants to be disclosed, for the second test, the specific harm that might be done.

The problem, of course, is that Exemption 7 does not talk in terms of two different records. In talks in one record, and it is very clear that they are not accepting -- the statute is very clear that it's just one record to be reviewed and to be determined.

In addition, their position is totally unworkable. It would add a greater burden on the courts and

the agencies to determine. As I've mentioned, the lower courts have not yet decided on what the original purpose for the information was when being compiled. And even Petitioners' documents show that they have been unable to find the actual source of all the information in question, as noted in affidavits that they have submitted and included in the Joint Appendix at page 19.

QUESTION: May I ask another question about the word, the statutory word "records?" Does that word include information stored in a computer data bank just with electronic signals?

MS. NELSON: Well, as my brother mentioned earlier, the word "record" is nowhere defined in the Freedom of Information Act.

QUESTION: Well, under your interpretation we don't count photostats. I just wonder if we count electronic signals that enable one to produce copies.

QUESTION: On that basis any time you had a printout you would create a new document in your approach.

QUESTION: That's why I asked the question.

MS. NELSON: It's very difficult. I think the reason that the term "record" is defined the way it is in the Privacy Act is the Privacy Act was specifically looking at computers, considering computers when it was passed. But yes, I would say every time you push that button and print

out that sheet, you created a new record.

QUESTION: A new record. Therefore, it would appear to me that nothing -- no computerized information would ever be exempt from disclosure.

QUESTION: Whether it was compiled for -- whether it was on there for law enforcement purposes or not.

QUESTION: It wouldn't be a record within the meaning of the act, and the exemption only applies to records.

MS. NELSON: Well, I think in an earlier case that was argued here --

QUESTION: Unless you could send it over to somebody else's computer by pushing the Send button.

MS. NELSON: Do that, or computer information is also transmitted by just exchanging the discs that the information is on.

QUESTION: I don't think you or I know what is on the computer at the FBI. I don't think we do. I know I don't.

MS. NELSON: I know I don't.

(Laughter.)

MS. NELSON: I think it's important here to note that the Petitioners made a conscientious litigation decision not to raise Exemption 6. They have attempted to change Exemption 7 into a broad privacy exemption in their

argument of privacy. Exemption 6 is a privacy exemption. As mentioned, they did originally raise it when they originally refused to give the Respondent any access to any of the documents, but they did not raise it at the District Court level. And after the District Court ruled that the information was not compiled for law enforcement purposes, and instead of releasing the information at that time gave Petitioners another chance to show that the information was in fact exempt under the Freedom of Information Act, Petitioners still did not raise Exemption 6.

QUESTION: You don't suggest that an invasion of personal privacy has nothing to do with Exemption 7, do you?

MS. NELSON: Oh, there's no question that the sub-part of Exemption 7 does talk in terms of invasion of privacy. It's a question of a standard. The Exemption 7, you must first reach the threshold question. If you're just dealing with privacy, Exemption 6 does not require the threshold question of it being compiled for law enforcement purposes.

QUESTION: No. It has a higher standard. It's got to be clearly --

MS. NELSON: But it is a higher standard, and as Petitioner did finally shed light onto why they might not have raised Exemption 6 earlier, it is a higher standard; and it's a higher standard to be considered. When you're

talking about eleven public figures, some of whom are no longer living, individuals; when the Petitioners made no attempt to ascertain whether or not any of these individuals are concerned about the disclosure that are in the question; where it's shown, as I mentioned, that Respondent began this investigation -- began his search for this information because of one of the eleven individuals making him aware of the file, which Petitioners have been aware of; and the fact that there is no -- we don't know whether or not the information in these files have already been included -- been dispersed into the public domain -- as I mentioned earlier, there's a question of how some of this information was used, and if it was in fact used previously, it was dispersed already.

Respondent has no way of deciding what this information is without seeing the information. No court has viewed this information in camera. So we at this time can only understand that it must not reach that higher standard of Exemption 6 type of privacy.

Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. GELLER: Just one or two things, Mr. Chief

Justice.

First, in terms of whether the information was compiled for purposes of law enforcement, FBI agent Donohoe submitted two affidavits, and they are reprinted in the Joint Appendix, and on pages 18 and 19 he said that he traced all of the information in these name check summaries to records in the FBI's law enforcement files.

QUESTION: We certainly judged the case on the basis that they were.

MR. GELLER: Yes, yes.

QUESTION: Originally.

MR. GELLER: That's right.

QUESTION: Because it didn't make any difference to the Court of Appeals.

MR. GELLER: Well, that's right, but it's not necessarily a presumption you have to indulge in. There's actually evidence, unrebutted evidence in the file.

And second, I'd like to just point out the irony of the Respondent's interpretation of the FOIA here. If John Ehrlichman had had a law enforcement purpose for making this 1969 request, then all of the information sent over to him in 1969, including the name check summaries, presumably would have been compiled for law enforcement purpose and could be withheld. However, since the District Court found that John Ehrlichman was instead motivated by a desire to

invade people's privacies for reasons unrelated to law enforcement, the result is that the FBI now has to open up all of its files about these people's privacy to any FOIA requestor who asks to see them. It does not make a great deal of sense.

Finally, in terms of the underlying purposes of the FOIA and whether they would be served by the Respondent's interpretation here, we think it's important to point out that in response to the Respondent's FOIA request, he learned of the John Ehrlichman request, he got a copy of the letter that the FBI sent to John Ehrlichman in response to that request, he got virtually all of the documents that were sent over from the FBI to the White House in 1969. The only thing we're debating here is whether certain small snippets of this information, the disclosure of which would cause one of the specific harms listed in Exemption 7, must be disclosed.

We think that the threshold test is clearly met here, and Judge Ritchie found that Exemption 7(C) was also met. We therefore think that the FBI was entitled to withhold this information.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:56 p.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:
Federal Bureau of Investigation Et Al., Petitioners v.
Howard S. Abramson. No. 80-1735

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and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly