U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

LLS:SJW:mlb

19 JAN 1981

cc: Simms
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Retrieval
Wilkinson
Brown

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Disclosure of Information

This responds to your request for our opinion whether you have authority to disclose certain information compiled by the Federal Bureau of Investigation regarding an individual employed by a federal judge. The FBI has proposed to disclose this information both to the federal judge and to the security officer of the Foreign Intelligence Surveillance Court, on which the federal judge sits. The information, which sheds light on the likelihood of the individual's breaching any rule of confidentiality that the judge might have regarding sensitive government information 1/ held in his chambers, was gathered by the Federal Bureau of Investigation in a full counterintelligence investigation. We conclude that, unless disclosure of the information is restricted by the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations of May 1, 1980 (FCI Guidelines)--an issue which, under the guidelines, should be resolved by the Office of Intelligence Policy and Review--dissemination to the judge is permissible. We do not believe authority presently exists to permit disclosure to the security officer.

I

In the conduct of their official business, agencies and officers of the United States may disclose information about individuals unless dissemination is prohibited by the Constitution, statute, or regulation. Cf. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The Constitution has not been interpreted to prohibit the dissemination of information legally obtained by

1/ Examples would be classified information and unclassified but sensitive information sought to be withheld under the Freedom of Information Act and submitted in camera.

the Government, although the Supreme Court has not ruled out the possibility that dissemination of certain kinds of information might eventually be held to enjoy some constitutional protection with regard to dissemination. Whalen v. Roe, 429 U.S. 589, 598-601 (1977). 2/ The Court has definitively, however, held that the Constitution does not prohibit the Government from disseminating information about the honesty and trustworthiness of an individual when the information is comprised of facts which are not of an intimate, personal nature, e.g., Paul v. Davis, 424 U.S. 693, 713 (1976) and cases cited therein at 702-10; 3/ But see Doe v. United States Civil Service Commission, 483 F. Supp. 539 (S.D.N.Y. 1980). A review of the information specifically related to the individual's trustworthiness 4/ proposed to be revealed to the judge convinces us that its disclosure would not violate the Constitution.

We know of no statute which expressly prohibits the disclosure of the type of information under consideration. The Privacy Act, 5 U.S.C. 552a, generally prohibits an agency's disclosing any item of information about an individual, without permission, that is contained in a "system of records," i.e., a group of records from which information is retrieved by the name of the individual. However, there are a number of exceptions to this general prohibition. One is that disclosures may be made for a published routine use. 5 U.S.C. 552a(a)(3).

2/ We do not believe that Whalen v. Roe should read to establish a constitutional prohibition against the Government's disclosing legitimately obtained information. Compare 429 U.S., at 606-07 (Brennan, J., concurring), with 429 U.S., at 607-08 (Stewart J., concurring).

3/ As the Court recognized in Paul v. Davis, a disclosure by a government official, although not a constitutional violation, might constitute defamation or some other common law tort. However, federal officials acting within the scope of their duties and not in violation of the Constitution or a statute are immune from liability for such torts. Butz v. Economou, 438 U.S. 478, 487-95 (1978).

4/ Some of the information which the FBI has collected about the individual concerns political associations and preferences. To the extent that this information is not directly associated with trustworthiness, we see no reason for its disclosure.

The information about the individual under discussion is contained in a system of records maintained by the FBI. The FBI has published a routine use for that system which provides:

> In addition, personal information may be disclosed from this system to members of the Judicial Branch of the Federal Government in response to a specific request, or at the initiation of the FBI, where disclosure appears relevant to the authorized function of the recipient judicial office or court system. An example would be where an individual is being considered for employment by a Federal judge.

45 Fed. Reg. 2206 (daily ed. Jan. 10, 1980). Such use is, we believe, compatible with the purpose for which the information proposed to be disclosed was collected, 5/ 5 U.S.C. 522a(a)(7), and accurately describes the reason for which disclosure to the judge would be made. Hence the Privacy Act does not stand as a bar to disclosure to the judge.

Disclosure to the security officer would not, in our view, be permissible under this routine use. The routine use is applicable only "where disclosure appears to be relevant to the authorized function of the recipient judicial office or court system." With regard to the judge, the relevance to authorized functions is clear. Information about the trustworthiness of an applicant or employee can help a judge to make decisions related to the protection of the integrity, including the confidentiality, of the judicial process and, as well, to the protection of specific sensitive documents held in his chambers, both authorized functions. This reasoning would appear to be inapplicable to disclosure to the security officer of the Foreign Intelligence Surveillance Court.

Under the Security Procedures of the Foreign Intelligence Surveillance Court, the security officer is responsible for both document and personnel security of the Court. We do not believe, however, that his responsibility encompasses the trustworthiness of the individual in question. The judge is a member of the appellate panel of the Court. That panel has yet to hear a case. Even

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5/ The information would be disclosed with the aim of assuring the protection of government information. It was collected in a counterintelligence investigation. Such investigations have as a major objective the protection of government information from disclosure to foreign powers.

if it were to hear a case during the tenure of this employee, the rules and practice of the Court would not permit the judge to share classified information disclosed to him in his capacity as a judge of the Court with his office employees. Moreover, it is not clear from the Security Procedures what authority, if any, the security officer has respecting the office employees of the judge. In light of the attenuated connection between the individual and any authorized function of the security officer, we do not believe that the published routine use could be relied upon for disclosure of the information to him.

II

As stated, the information about the individual proposed to be disclosed was collected in a full counterintelligence investigation. The dissemination of non-public information about individuals gathered in such investigations is generally controlled by Art. VII. B. of the FCI Guidelines. The question whether the information under consideration for disclosure may be disclosed to the judge under the guidelines is, we believe, a "question as to the coverage and interpretation of [the] guidelines" which should, under Art. I. B. of the guidelines, be resolved by the Office of Intelligence Policy and Review. 6/

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6/ Section 2-208 of Executive Order No. 12036 prohibits agencies in the intelligence community from disseminating non-publicly available information about United States persons except with consent or in accordance with procedures established pursuant to § 2-201 of the order. Assuming without deciding that this prohibition applies to disclosures by the Attorney General of information gathered by the intelligence element of the FBI, we believe that, if the FCI guidelines--which are § 2-201 procedures--permit disclosure, the requirement of the order would be satisfied. The type of information proposed to be disclosed is within the permissible categories set forth in the order. See § 2-208(b).