UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4683
Summary Calendar

BILL R. HENRY,

Plaintiff-Appellant,

VERSUS

FEDERAL BUREAU OF INVESTIGATION, U.S. ATTORNEY, WESTERN DISTRICT OF LOUISIANA, a/k/a Joseph E. Cage, Jr., and U.S. ATTORNEY GENERAL, a/k/a Richard Thornburgh,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(90-1987)

(February 24, 1993)
Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Bill Henry appeals the summary judgment awarded the FBI, the United States Attorney for the Western District of Louisiana and the Attorney General of the United States in Henry's action for release of information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. We **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In 1988, Henry testified as a government witness in a federal trial which resulted in the bribery convictions of three members of the Lake Charles, Louisiana Dock Board. Harlan Duhon, a local labor leader, was apparently implicated by Henry's testimony.[2] In response, Duhon allegedly developed a plan to murder Henry. An investigation led to Duhon's indictment for conspiracy to murder a federal witness,[3] but the indictment was dismissed and Duhon never faced trial.

Henry filed several FOIA requests, seeking release of recorded telephone conversations about the alleged conspiracy to murder him.[4] After the requests were denied, Henry sued to have the district court compel their release. The defendants moved for summary judgment on the ground that the conversations were exempt under the FOIA, 5 U.S.C. §§ 552(b)(7)(C) and (D). The motion was denied, because there was insufficient factual information upon which to reach a decision; but the court stated that submission of a ***Vaughn*** index[5] would likely fill that void. After the government

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[2] Parts of the record indicate that Henry testified against Duhon, but it does not appear that Duhon was one of the three convicted in 1988.

[3] Some parts of the record state that Duhon was indicted for attempted murder. Duhon's indictment is not a part of the record in this case.

[4] The conversations were between Duhon and a confidential FBI informant.

[5] A ***Vaughn*** index lists the documents which are responsive to the request and gives a detailed explanation for the claimed exemption. ***Vaughn v. Rosen***, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

submitted a second affidavit with a ***Vaughn*** index and renewed its motion, the court concluded that the requested materials were exempt from FOIA disclosure under 5 U.S.C. § 552(b)(7)(D), and granted summary judgment for the defendants.

II.

The FOIA provides that upon a request which complies with certain guidelines, a government agency must "make [its] records promptly available to any person". 5 U.S.C. § 552(a)(3). This "general philosophy of full agency disclosure", ***Burge v. Eastburn***, 934 F.2d 577, 578 (5th Cir. 1991) (internal quotations omitted), however, is limited by certain categories of information which are exempt from disclosure. The exemption at issue allows non-disclosure of

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... (D) could reasonably be expected to disclose the identity of a confidential source, ... and, **in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation ... information furnished by a confidential source**.

5 U.S.C. § 552(b)(7)(D) (emphasis added).[6] But, any reasonably segregable portion of the requested records must be provided once the exempted portions have been removed. 5 U.S.C. § 552(b).

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[6] The defendants based their summary judgment motion on exemption (7)(C), as well. This exemption, which permits non-disclosure of information compiled for law enforcement purposes which "could reasonably be expected to constitute an unwarranted invasion of personal privacy" was not the basis of the district court's decision. Because summary judgment was properly granted on the basis of exemption 7(D), we need not address (7)(C).

In the context of a FOIA claim, this court is required to conduct a two-part analysis. We must first decide whether the district court had before it a sufficient factual basis upon which to enter judgment. If we determine that it did, we review the factual conclusions for clear error. *See* ***Villanueva v. Department of Justice***, 782 F.2d 528, 530 (5th Cir. 1986).[7]

A.

Information before the district court at the time it entered judgment included Henry's complaint, which stated that the information he sought was obtained in the course of "an investigation ... into a conspiracy to murder Complainant"; two declarations by FBI Special Agent Jung, which state that the requested information was compiled by the FBI for law enforcement purposes, the source of that information had assisted in the investigation "under an express grant of confidentiality", and neither the tapes nor their transcripts contained segregable material; and a ***Vaughn*** index of each tape. This information provides a sufficient factual basis from which to determine whether the requested information was obtained from a confidential source for law enforcement purposes.[8]

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[7] We recognize, of course, that this standard differs somewhat from our usual *de novo* review of summary judgments. However, a long line of this court's precedent supports its use in the summary judgment context. *See* ***Villanueva***, 782 F.2d at 530; ***Linsteadt v. IRS***, 729 F.2d 998, 1003 (5th Cir. 1984); ***Stephenson v. IRS***, 629 F.2d 1140, 1144 (5th Cir. 1980). Moreover, in this case, Henry seems to concede this standard is the appropriate one.

[8] Several of Henry's challenges to the district court judgment are based on allegations that the requested information is not confidential and, in any event, that information will not reveal

Henry contends here that the district court faced a genuine issue of material fact regarding the confidential status of the informant. This position is entirely without merit. An FBI agent twice stated under penalty of perjury that the informant requested confidentiality and cooperated under an express assurance of such confidence. Henry does not point to any contrary evidence. He asserts, instead, that the source cannot be confidential because 1) the informant[9] would have testified at Duhon's trial and 2) both Duhon and Henry know the identity of the informant. These assertions are irrelevant to the court's determination. Whether the informant would eventually have testified in open court does not affect his confidential status at the time he originally assisted in the criminal investigation. Moreover, the very purpose of confidential information would be defeated if the court were to confirm or disprove Henry's theory regarding the informant's identity by disclosing it. We agree with the district court's determination that there was no genuine issue of material fact regarding the confidential status of the informant.

B.

The district court made explicit factual findings that the information sought by Henry was obtained in the course of a

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the identity of the informant. However, we think it is clear from the plain language of § 552(b)(7)(D) that information provided by a confidential source is excluded from disclosure, regardless of whether the information is confidential and whether the information might lead to the disclosure of the source's identity.

[9] Henry claims to know the identity of the informant, whom he contends is male. Of course, there is nothing in the record which would confirm the gender of the informant.

criminal investigation, the source of that information was a confidential informant, and no portion of the tapes or transcripts was segregable under § 552(b). The first of these findings is supported by Henry's own statement in his complaint; the second, by Jung's uncontradicted declarations; and the third, by the ***Vaughn*** index. Henry asserts that the ***Vaughn*** index is an insufficient basis for that finding and the district court erred by failing to conduct an *in camera* review of the tapes or transcripts. It is well established that resort to a ***Vaughn*** index or *in camera* review is purely discretionary. ***Stephenson***, 629 F.2d at 1144 (citing ***NLRB v. Robbins Tire & Rubber Co.***, 437 U.S. 214, 224 (1978). The district court was not required to employ either approach. It's decision to request a detailed ***Vaughn*** index was not an abuse of discretion. Nor were its findings of fact, based upon that affidavit and the sources referenced above, clearly erroneous.

III.

Accordingly, the judgment is

AFFIRMED.