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Reversed by Alliance to End Repression v. City of Chicago, 7th Cir.(Ill.), July 2, 1997

1992 WL 296388

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United States District Court, N.D. Illinois, Eastern  
Division.

ALLIANCE TO END REPRESSION, et al.,  
Plaintiffs,  
Chicago Cispes, et al., Petitioners,  
v.  
CITY OF CHICAGO, et al., Defendants,  
Federal Bureau of Investigation, Respondent.

No. 74 C 3268. | Oct. 14, 1992.

## Opinion

### MEMORANDUM OPINION AND ORDER

ANN CLAIRE WILLIAMS, District Judge.

\*1 This case arises out of an investigation of the Chicago Subcommittee in Solidarity with the People of El Salvador (“CISPES”) which the Federal Bureau of Investigation (“FBI”) conducted between 1983 and 1985. CISPES and several other petitioners brought this action against the FBI claiming that the CISPES investigation violated their Joint Motion and Stipulation (“Consent Decree”) which was signed in 1980 and approved by this court on August 11, 1981. This court referred the matter to Magistrate Judge Lefkow for a report and recommendation. In her thorough and well-reasoned report, issued on February 4, 1991, the Magistrate Judge found that the FBI had engaged in serious intentional non-compliance with the Consent Decree and that petitioners were entitled to summary judgment pursuant to Federal Rule of Civil Procedure 56. This court adopted the Magistrate Judge’s report and recommendation on October 2, 1991.

The one issue left unresolved with respect to that motion was whether expungement of government records regarding the CISPES investigation was an appropriate remedy for the FBI’s violation of the Consent Decree. In its October 2 opinion, this court ordered the parties to submit additional briefing on the expungement issue and referred the matter back to Magistrate Judge Lefkow for a report and recommendation. On September 21, 1992, the Magistrate Judge issued her report, recommending that petitioners’ request for expungement be granted. For the reasons stated below, this court adopts the Magistrate

Judge’s report and recommendation. Petitioners’ motion for the expungement of all names and other data identifying Chicago CISPES members and associates from government records is granted.<sup>1</sup>

### *Background*

The facts of this case have been fully explained in this court’s October 2, 1991 opinion and the Magistrate Judge’s February 4, 1991 report and recommendation. For the purposes of this opinion, therefore, this court briefly reviews the facts. Petitioners brought this action against respondent under Paragraphs 5.1 and 5.2 (“Paragraph 5.2”), the enforcement provisions, of the Consent Decree. Of particular importance to this opinion, Paragraph 5.2 provides:

If the Court finds that a pattern of substantial noncompliance or a serious intentional noncompliance with the terms of the Stipulation has occurred or is occurring, it shall make such order as it deems just and necessary to insure future compliance with the Stipulation.

Petitioners claim that this provision was violated when the FBI investigated them from March 1983 through June 1985. Among other things undertaken during the course of the investigation, the FBI gathered, maintained, and disseminated information regarding the lawful exercise of First Amendment rights by CISPES, its members, and its associates. This information was gathered through a variety of techniques including the use of infiltrators, photographic surveillance of CISPES members, and the unauthorized procurement of banking and telephone records.

\*2 On June 3, 1985, the Department of Justice (“DOJ”) determined that CISPES was involved in political activities involving First Amendment rights, and was not involved in international terrorism as the FBI originally suspected. Although the DOJ ordered the CISPES investigation closed, the Chicago Field Office of the FBI continued to collect and record information regarding CISPES’ lawful exercise of its First Amendment rights.

Then FBI Director William Sessions (“Sessions”) subsequently ordered an in-depth inquiry into the CISPES investigation in response to Congressional interest in it. At a Congressional hearing, Sessions admitted that the FBI had investigated essentially political activities and that FBI field offices ignored instructions from headquarters regarding these investigations. Thereafter,

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Sessions instituted a number of changes with respect to such investigations to prevent reoccurrence of the CISPES investigation problems. In addition, the FBI disciplined the appropriate personnel associated with the investigation and had all the records accumulated throughout the course of the investigation moved to the National Archives and Records Administration (“National Archives”).

The files which were sent to the National Archives are designated “IT,” which stands for “International Terrorism,” and their file classification number is “199C,” which stands for “Foreign Counterintelligence—Terrorism.” Access to the undeleted originals is currently available to National Archives employees. The FBI also has access to the files to the extent necessary to resolve issues that may arise regarding informant confidentiality or the propriety of a document’s security classification. However, since the National Archives has removed all index references from the files, the FBI no longer can access the files for investigatory purposes. Public access to the files is restricted to that which is permitted by the Freedom of Information and Privacy Acts. However, under current policy, restrictions on access to the records by the public may end in approximately 75 years.

### ***The Objections to the Magistrate Judge’s Report and Recommendation***

Where expungement is sought due to the violation of constitutional rights, a “determination of the propriety of an order directing expungement involves a balancing of interests; the harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance.” *Doe v. U.S. Air Force*, 812 F.2d 738, 741 (D.C.Cir.1987) (quoting *Hobson v. Wilson*, 737 F.2d 1, 65 (D.C.Cir.1984); *Paton v. La Prade*, 524 F.2d 862,, 868 (3d Cir.1975). In balancing these interests, the court should consider: (1) the accuracy and adverse nature of the information, (2) the availability and scope of dissemination of the records, (3) the legality of the methods by which the information was compiled, (4) the existence of statutes authorizing the compilation and prohibiting the destruction of the records, and (5) the value of the records to the government. *Paton*, 524 F.2d at 869.

\*3 Upon thorough consideration of all the evidence, Magistrate Judge Lefkow properly determined that the balance of interests in this case favors expungement of all names and other data identifying Chicago CISPES members and associates from the disputed records. For example, the Magistrate Judge noted that the labeling of

the files as “international terrorism” and “foreign counterintelligence-terrorism” could harm petitioners by the stigma that would be improperly attached to them upon release of the files. The Magistrate Judge appropriately found that this harm is compounded by the fact that the files are currently accessible to National Archives employees and could be accessible without restriction to the public in approximately 75 years. As the Magistrate Judge determined, this harm is particularly egregious since petitioners’ activities involved the exercise of their First Amendment rights, and not international terrorism as the files suggest. Despite instructions to close the CISPES investigation, the Chicago Field Office continued to collect information regarding CISPES’ constitutional activities. Therefore, not only are the CISPES files inaccurate, but the information contained in them is obtained as a result of unlawful conduct.

The Magistrate Judge accurately determined that the government’s interest in the retention or destruction of the records does not compare to the significant harm which petitioners would experience if the records are not expunged. The FBI has stressed that the purpose behind the National Archives and Records Administration Act of 1984 is to “preserve and make available a full and rich documentary historical record ...” so that the record is not “impoverished, even distorted.” However, as the Magistrate Judge properly noted, provisions directing the maintenance or destruction of government records “must yield to statutory or constitutional rights elsewhere granted.” *Smith v. Nixon*, 807 F.2d 197, 204 (D.C.Cir.1984) (quoting *Hobson*, 737 F.2d at 64). As the Magistrate Judge concluded, the government’s interest in preserving a historical record is easily overcome by evidence that the information was unlawfully obtained and highly prejudicial to the named individuals. Therefore, Magistrate Judge Lefkow correctly recommended that plaintiff’s request for expungement be granted.

Respondent objects to this determination, claiming that, pursuant to Paragraph 5.2 of the Consent Decree, this court cannot order the expungement of the government records. As previously noted, Paragraph 5.2 only permits this court to enter orders which are “just and necessary to insure future compliance with” the Consent Decree. Respondent argues that the Magistrate Judge fails to adequately address how expungement of CISPES members and associates’ names from government records would affect the FBI’s behavior in the future. Respondent further argues that expungement could not have any significant effect on the FBI’s actions since transfer of the disputed records to the National Archives already assures that the CISPES files cannot be accessed for FBI investigations. Therefore, according to respondent, expungement is not a remedy which this court can appropriately order under the Consent Decree.

\*4 This court disagrees. As both this court and the Magistrate Judge have adequately explained, expungement is an appropriate remedy under Paragraph 5.2. As this court noted in its October 2, 1991 opinion, the FBI's enactment of new regulations for investigations similar to that of CISPES does not sufficiently demonstrate that the Consent Decree will not be violated. *See Campbell v. McGruder*, 580 F.2d 521, 541 (D.D.C.1978). Moreover, future compliance with the new regulations is also not guaranteed because FBI guidelines can be repealed or modified. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Anderson v. City of Albany*, 321 F.2d 649 (5th Cir.1963).

Destruction of the fruits of the FBI's unlawful conduct would better deter future violations by placing the Government on notice that it will not be permitted to derive any benefit from previous violations. This court recognizes that the FBI is already prevented from accessing the files to obtain information for future investigations. However, deleting the names of CISPES members and associates from the files better assures that the FBI cannot benefit from the unlawfully obtained information. This is particularly important since the files are currently accessible to National Archives employees and may eventually be accessible, without restriction, to the public. Therefore, contrary to respondent's contention, this court finds that preventing it from benefitting from its unlawful activity should increase the likelihood of future compliance with the Consent Decree as Paragraph 5.2 requires.

Respondent also objects to the Magistrate Judge's determination that petitioners' request for expungement be granted because petitioners have failed to adequately demonstrate that they have suffered irreparable harm. According to respondent, the mere existence of the CISPES investigation records or the court's finding that respondent violated the Consent Decree does not suffice to establish the requisite irreparable harm. Rather, respondent argues that only a constitutional violation rises to the level of irreparable harm.

Expungement is an equitable remedy designed to prevent future harm as a result of an original violation. As respondent suggests, a court must first find there is a real and immediate threat of irreparable harm before it can allow expungement. *See Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 263 n. 4 (5th Cir.1984). Thus, federal courts are empowered to order the expungement of government records where it is necessary to vindicate constitutional rights. *Doe*, 812 F.2d at 741 (quoting *Chastain v. Kelley*, 510 F.2d 1232, 1235 (D.C.Cir.1975)).

As previously noted, respondents began investigating CISPES because it suspected that CISPES associates and members were involved in international terrorism. Even

after it was determined that these individuals were only involved in political activities involving First Amendment rights, the Chicago Field Office of the FBI continued to collect and record information regarding petitioners' lawful exercise of their Constitutional rights. Contrary to respondent's assertion, not only did respondent violate the Consent Decree, but it also improperly threatened petitioners' First Amendment rights.

\*5 Moreover, courts have recognized that "there may remain a right not to be adversely affected by the information in the future. Such a right may exist if the information ... was acquired by fatally flawed procedures ..." *Chastain*, 510 F.2d at 1236; *Doe*, 812 F.2d at 741. There is no doubt that the information contained in the CISPES files was obtained as a result of "fatally flawed procedures." Therefore, this court will not overrule the Magistrate Judge's determination on this basis.

Respondent further objects to the Magistrate Judge's determination because it claims that she improperly sought to balance the harm to petitioners from the continued existence of the records against the government's interest in their preservation. However, as previously discussed, this is exactly what the court is required to do with expungement requests such as that in this law suit. *See Doe*, 812 F.2d at 741; *Hobson*, 737 F.2d at 65; *Paton*, 524 F.2d at 868. Furthermore, contrary to respondent's contention, the evidence sufficiently demonstrates that petitioners could be harmed by the retention of the files in the National Archives. In *Paton*, plaintiff sought to expunge a file designated "SM-SWP" for "subversive material Socialist Worker's Party" that the FBI had prepared on her. 524 F.2d at 862. The court recognized that the labeling of her file as "SM-SWP" could prove to be extremely damaging to plaintiff's reputation in the future. Therefore, while the court noted that plaintiff could not determine the exact consequences of her file, it ultimately determined that plaintiff had alleged sufficient injury to seek expungement of her file. *Id.* at 868.

Like the designation of plaintiff's file in *Paton*, the wrongful designation of the CISPES files as "IT" for "international terrorism" could have an equally damaging effect upon petitioners' reputations. The harm is particularly egregious in this case since the information contained in the files actually pertains to petitioners' protected First Amendment activity. And, unlike the plaintiff in *Paton*, this court has already determined that the disputed files are currently accessible to National Archives employees and to the public with certain restrictions, and could become freely accessible to the public in approximately 75 years. Thus, contrary to respondent's argument, the government's interest in preserving a historical record is easily overcome by evidence that the information was unlawfully obtained and highly prejudicial to the named individuals.

Finally, respondent attacks the Magistrate Judge's decision to expunge all names and other data identifying Chicago CISPES members and associates from the disputed records because she did not consider a less extreme remedy. When balancing petitioners and respondent's interests, this court recognizes that expungement is intended to be a versatile tool. As the court stated in *Chastain*: "... expungement of only some records, from some Government files, may be enough, as may the placing of restrictions on how the information contained in the records may be used. It is a tool which must be applied with close attention to the peculiar facts of each case." 510 F.2d at 1236; *Hobson*, 737 F.2d at 66 n. 86. While this court may have considerable discretion in applying this equitable remedy, its ultimate decision "must be rationally and selectively responsive to [the competing] interests [in the case]." *Chastain*, 510 F.2d at 1236.

\*6 This court is not persuaded that a less extreme measure would better serve the competing interests in this case. As repeatedly noted in this opinion, the designation of the files as relating to international terrorism is highly prejudicial to petitioners' reputations, particularly in light of the fact that the files actually describe protected constitutional activity. Moreover, the information in the files was obtained through unlawful measures which also violated the Consent Decree in this case. This court finds that expungement of information identifying particular CISPES members and associates is an appropriate remedy, and will best discourage future violations of the law and the Consent Decree.

Respondent counters that in a similar case retention of the disputed records in the National Archives was the very relief sought by other CISPES members. See *Committee In Solidarity With The People of El Salvador v. Sessions*, 929 F.2d 742 (D.C.Cir.1991). Respondent suggests that

the conclusion of the United States Appellate Court for the District of Columbia that this was the appropriate remedy provides an additional reason for this court to decline to adopt the Magistrate Judge's recommendation. However, *Sessions* and the instant case are distinguishable on the very basis that respondent highlights. Petitioners in *Sessions* did not request expungement of their names and other information identifying them as petitioners have done in the instant case. Therefore, unlike this court, the appellate court in *Sessions* had no reason to consider whether expungement was an appropriate remedy.

In sum, this court finds that the expungement requested strikes an appropriate compromise in this case. While the records which the government wishes to maintain in order to preserve the historical record will still be available at the National Archives, CISPES members and associates named in the reports will be protected. Moreover, this court agrees with the Magistrate Judge that expungement is both just and necessary to ensure future compliance with the Consent Decree. Therefore, this court adopts Magistrate Judge Lefkow's report and recommendation. Petitioners' motion for expungement of all names and other data identifying Chicago CISPES members and associates from government records is granted.

### *Conclusion*

For the reasons stated above, this court adopts the Magistrate Judge's report and recommendation. Petitioners' motion for the expungement of all names and other data identifying Chicago CISPES members and associates from government records is granted.

### Footnotes

<sup>1</sup> This court notes that petitioners originally sought to have the CISPES files expunged in their entirety. In December 1991, petitioners notified the court that they wished to limit their petition to the removal of all names and other data identifying CISPES members and associates.

<sup>2</sup> Sen.Rep. No. 98-373, 98th Cong., 2d Sess., 10, reprinted in 1984 U.S.Code Cong. & Admin.News 3865, 3874.