

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG)

Plaintiff)

v.)

DEPARTMENT OF JUSTICE)

Defendant)

Civil Action No. 75-1996

FILED

DEC 1 1981

JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This is a six-year-old Freedom of Information lawsuit, representing a thirteen-year-old quest for records on the assassination of Dr. Martin Luther King, Jr. On August 3, 1981, the Court vacated its orders which had dismissed the case without prejudice. The Court now reopens this action to decide the numerous pending motions of plaintiff and defendant's third motion for summary judgment. With the resolution of plaintiff's motions, the Court finds that there are no genuine issues of material fact remaining, and grants summary judgment to defendant.

I.

Dr. Martin Luther King was assassinated on April 4, 1968 in Memphis, Tennessee. James Earl Ray pled guilty to the assassination. Plaintiff Harold Weisberg was one of the investigators in the Ray case. Mr. Weisberg did not believe the official version of the King assassination. Beginning in April 1969, Mr. Weisberg wrote numerous letters to high officials at the Department of Justice, including the Federal Bureau of Investigation (FBI). In these letters, Mr. Weisberg requested information about Dr. King's assassination for a forthcoming book. The FBI deliberately ignored Mr. Weisberg's letters. On November 28, 1975, Mr. Weisberg filed this action, an appeal of a one-page freedom of information request to the deputy attorney general dated April 15, 1975. Mr. Weisberg amended his complaint on December 24, adding a five-page freedom of information request to the deputy attorney general dated December 23, 1975.

The Department of Justice has released to plaintiff over 50,000 pages in this lawsuit. Plaintiff remains unsatisfied with the scope of search and deletions in released material. Because of the practical impossibility of the Court reviewing a Vaughn index of all material released to plaintiff, the Court ordered a Vaughn index justifying substantive deletions on every 200th document. The Court rejected defendant's initial index and ordered a new one prepared which would exclude documents released in their entirety. The new index was filed on October 1, 1980.

II.

Plaintiff's Motions

Plaintiff has filed a number of motions improperly styled "motions for summary judgment" which are more properly motions for declaratory relief or mandatory injunctions. The Court will review each of these motions in turn.

On May 29, 1979, plaintiff filed a motion for an order requiring defendant to pay consultancy fee. On July 6, 1979, the Court deferred ruling on this motion pending disposition of the case. The Court now grants plaintiff's motion. The Department of Justice offered a consultancy arrangement, which plaintiff accepted. Because of the delay involved, the Court finds that a reasonable rate of reimbursement is \$75 per hour. Plaintiff shall submit an affidavit listing time spent on the consultancy.

On June 11, 1979, plaintiff filed a motion for partial summary judgment on the issue whether he has substantially prevailed. Here, too, the Court deferred ruling on this motion pending disposition of the case. Defendant has released over

50,000 pages to plaintiff in this lawsuit; there is no question that plaintiff has substantially prevailed. Accordingly, this motion is granted.

Plaintiff filed a motion on December 20, 1979 for partial summary judgment with respect to abstracts of King assassination records. There are over 6,500 3 x 5 inch abstract cards on the King assassination compiled by the FBI as an index to their files. Defendant submitted one hundred of these cards to the Court for in camera review on January 21, 1980. The Court assumes that some of the abstracts have been released to plaintiff, since several appear in the Vaughn index of October 1, 1980. The Court denies plaintiff's motion because the abstracts are essentially duplicative of information already released to plaintiff. The abstracts reveal less information than the documents which plaintiff received.

Plaintiff filed a motion on January 2, 1980 for an order directing that defendants release field office records offered plaintiff in a letter from former FBI director Clarence Kelley. This motion, defendant's opposition with attachments, and plaintiff's affidavit in reply, were explored in detail during a hearing on February 26, 1980. The Court then granted partial summary judgment to defendant on the scope of search for all items responsive to plaintiff's request in FBI headquarters' Murkin file and in all files of the FBI field offices, with the exception of the Frederick residency. Transcript of February 26, 1980 hearing, at 48. An appropriate order to that effect was issued the same day. This ruling mooted plaintiff's motion. The Court today finds no reason to change its holding that the FBI conducted a proper and good faith search. Accordingly, plaintiff's motion is denied.

On June 5, 1980, plaintiff filed a motion for partial summary judgment with respect to six Murkin documents: Murkin

headquarters serials 3374, 3400, 3509, 3763, 3764, and the first unrecorded serial after serial 6110. These documents were withheld in their entirety. Defendant replied that justification for this withholding was not needed because the sample Vaughn index sufficed. The Court denied without prejudice plaintiff's motion on September 11, 1980. The Court now orders in camera review of these documents because of the public interest in this action, the lack of agency affidavits justifying the withholding of these documents in their entirety, and the small amount (18 pages) of material involved. The Court defers ruling on plaintiff's motion pending in camera review of these six documents.

On July 9, 1980, plaintiff moved for partial summary judgment with respect to FBI field office records withheld as previously processed. Plaintiff asserts over 2,000 pages were withheld as previously processed in another case of his that sought documents on the investigation of President John F. Kennedy's assassination. Plaintiff's motion was denied without prejudice on September 11, 1980. Plaintiff refiled it on November 14, 1980. The parties agreed in 1977 that "duplicates of documents already processed at headquarters will not be processed as listed on the worksheets, but attachments that are missing from headquarters' documents will be processed and included if found in field offices as well as copies of documents with notations." Stipulation of August 15, 1977, page 1. Special Agent John N. Phillips stated that this procedure was followed. Second affidavit of John N. Phillips, paragraph 4, filed December 10, 1980 as appendix D to defendant's motion for summary judgment. There is nothing to indicate Mr. Phillips' statement of compliance was made in bad faith. The Court will not require the mammoth reprocessing plaintiff seeks based on what happened in another case. Plaintiff's motion is denied.

Plaintiff filed a motion on December 26, 1980 to compel release of neutron activation and spectrographic materials. He has received nine pages of raw data calculations used in a neutron activation test from an FBI laboratory report dated April 29, 1968. This motion was discussed during the April 6, 1981 hearing in this case, transcript at 39-44, and the Court ordered defendant to submit an affidavit on the subject. Defendant has not done this. Plaintiff's motion is granted. The Court orders a renewed search for neutron activation and spectrographic analyses performed in the investigation of Dr. King's assassination. Defendant shall file an affidavit within twenty days describing the search and its results. If such materials do not exist or cannot otherwise be found, defendant should provide a detailed explanation.

On December 29, 1980, plaintiff moved to compel defendant to release laboratory "ticklers" of three documents. Defendant stated these three documents were not responsive to plaintiff's freedom of information requests, and offered to submit them for in camera inspection. The Court accepts defendant's suggestion, and defers ruling on plaintiff's motion pending in camera review of these three documents.

Plaintiff filed a motion for specified records from the civil rights division of the Department of Justice on May 23, 1980. The Court denied the motion without prejudice on September 11, 1980. It was renewed on January 12, 1981. After careful examination of the affidavits submitted by both parties, the Court denies plaintiff's motion subject to three exceptions. The Court orders a search for documents and appropriate release of materials found in these three instances: (1) DJ file 41-157-147 (although defendant denied the existence of this file,

plaintiff produced records attached to his reply which indicate the existence of such a file); (2) DJ file 144-19-0 (defendant explained this file did not pertain to the investigation of the assassination of Dr. King, but the Court orders the material in the file be reviewed to determine whether any document or portion thereof is relevant); and (3) "Memorandum to Attorney General re James Earl Ray Possible Evidence of Conspiracy" (plaintiff notes that this memorandum was found in DJ file 144-72-662 according to footnote 222 to the House Select Committee on Assassinations' investigation into Dr. King's murder, volume XIII). The affidavits of Ms. Janet Blizard, Mr. Stephen Horn, and Ms. Salliann Dougherty, attached to defendant's reply, satisfy the Court that the remaining materials plaintiff sought in this motion have either been released to him or do not exist.

On January 27, 1981, plaintiff filed a motion to place the director of the ~~FBI-Office of Privacy and Information Appeals~~ in charge of this case. Alternatively, plaintiff sought an order compelling that the director act upon plaintiff's administrative appeals and review all the excisions complained about by plaintiff. The Court's jurisdiction under the Freedom of Information Act, 5 U.S.C. § 552 et seq., does not extend to transferring its de novo review authority to an agency official; section 552(a)(4)(B) states "the Court shall determine the matter de novo" (emphasis added). Neither is it within the Court's jurisdiction to require administrative action on appeals which are separate from plaintiff's instant action. Assuming jurisdiction exists to order the relief sought, the Court finds such relief unwarranted in view of the disposition of the case today. Accordingly, plaintiff's motion is denied.

On February 5, 1981, plaintiff moved to compel release of an index compiled by the civil rights division of the Department

of Justice. Ms. Salliann Dougherty prepared this index in 1977-78 to determine whether Mr. Weisberg had received records responsive to his request. Plaintiff requested in his freedom of information request any index to the evidence on the assassination of Dr. King. Read in liberal fashion, the request includes this index, even though the index was not in existence at the time of the request. After oral argument on April 6, 1981, the Court ordered that the index be given to plaintiff. Transcript of April 6, 1981 hearing at 47-49. Since there is no indication of compliance, the Court grants plaintiff's motion. Defendant shall release to plaintiff within twenty days the civil rights division index, with deletions where appropriate under the Freedom of Information Act.

Plaintiff moved on February 17, 1981 for summary judgment with respect to Murkin headquarters documents and pages withheld in their entirety. Attached to that motion was a list of documents and pages withheld in their entirety. Defendant argues that the Vaughn index of every 200th document mooted this motion. The Court disagrees. The agency has the burden of proof to sustain its action, 5 U.S.C. § 552(a)(4)(B). The Vaughn index of every 200th document reviewed only one document withheld in its entirety. The Court considers that in camera inspection of a reasonable number of the documents withheld in their entirety is warranted in view of the need to resolve this case expeditiously, the public interest in the matter, and the lack of agency affidavits concerning documents withheld in their entirety. Additionally, the Court finds in camera review warranted for a reasonable number of documents which were withheld almost entirely, and documents for which no exemption was claimed. Accordingly, the Court defers ruling on plaintiff's motion pending in camera review of the following documents, identified

by serial number: 58, 1196, 1470, 1500, 1549, 2126, 2161, 3400, 3763, 4438, 4692, 4694, 4986, 5708 and 6010. The Court finds that these fifteen documents constitute a reasonable number of the 114 documents plaintiff lists in his motion as withheld entirely or almost entirely. The Court also orders in camera review of the documents plaintiff lists for which no exemption was claimed: 413, 1427, 3503, 4761, 4919, 5212, 5338, 5487, 5663, 5719 and 5819.

On March 24, 1981, plaintiff filed a motion to compel release of certain records described in field office inventories. This motion repeated the contents of a memorandum to the Court filed on August 20, 1980. The Court has compared plaintiff's motion with the second affidavit of FBI Special Agent John N. Phillips, appendix D to defendant's motion for summary judgment, filed on December 10, 1980. The Court credits Mr. Phillips' statements that with three exceptions the documents sought by this motion were released to plaintiff. The first exception, which the Court upholds, was for evidentiary items, e.g., an ashtray and a can of Clairol hair spray. These were properly excluded because they are not retrievable for processing under the Freedom of Information Act. The inventory sheets listing these items were released to plaintiff. Second Phillips affidavit, paragraph 12. The Court disagrees with the other two exceptions: Memphis field office files 100-4105 ("Martin Luther King, Jr., Security Matters, Sub C 2 vols., 66 serials, includes activities in Memphis area March and April") and 149-121 ("Threat to American Airlines and Dr. Martin Luther King., Jr., Memphis, Tenn., April 1, 1968 DAMV, 3 serials on threat to bomb plane in which King would return to Memphis"); and Savannah internal field office memoranda dated August 6, 1968, August 28, 1968, and June 5, 1969. The Memphis files were withheld because they

were unresponsive to FBI instructions. The Court finds that the Memphis files are relevant to plaintiff's freedom of information requests in this action and orders their release to plaintiff, within twenty days, with deletions if appropriate under the Freedom of Information Act. The three Savannah internal memoranda were withheld because the "substantive information" they contained was known through other sources. Second Phillips affidavit, paragraphs 15(B), (C). The Court finds this justification unpersuasive, and orders the release of these documents within twenty days, with deletions if appropriate under the Act. Plaintiff's motion is denied in all respects other than the release of the Memphis and Savannah documents described above.

On July 13, 1981, plaintiff moved to dismiss this action without prejudice under Fed.R.Civ.Pro 41(a)(2). Rule 41(a)(2) permits dismissal at the plaintiff's instance only "upon order of the court and upon such terms and conditions as the court deems proper." Dismissal of this case without prejudice would waste six years of litigative effort and expense by the Department of Justice. Plaintiff's motion is denied.

The Court upholds its previous rulings on other motions by plaintiff.^{1/} Plaintiff moved for a detailed Vaughn

^{1/} The Court granted plaintiff's motions for partial summary judgment with respect to Memphis field office indices (filed June 11, 1979, granted August 15, 1979, compliance shown by affidavit of Mr. Martin Wood, October 10, 1979), and with respect to records of the office of Attorney General and the office of the Deputy Attorney General (filed June 4, 1980, granted September 11, 1980, compliance shown by affidavit of Mr. Quinlan Shea, Jr., December 10, 1980, except that the Court orders a further search for records responsive to plaintiff's freedom of information requests in this action in former Attorney General Ramsey Clark's files at the Department of Justice).
(footnote continued next page)

index by the Department of Justice on February 8, 1980. The Court denied this motion in effect when it ordered an index of every 200th document. The Court now turns to the Vaughn index submitted by defendant to determine whether the deletions in this case were proper under the Freedom of Information Act.

III.

Defendant's Motion for Summary Judgment

The instant Vaughn index with its accompanying affidavits enables the Court to determine de novo whether the agency has properly withheld material under the Freedom of Information Act. As a practical matter it is impossible for the Court to review a Vaughn index of 50,000 pages. This Vaughn index contains 93 documents and some 400 pages. It is immaterial that no documents involving use of exemptions 3, 5, 6 and 7(F) were included, because the agency used such exemptions in less than 2% of the documents (91 of 6000 headquarters Murkin documents, according to the May 28, 1980 affidavit of plaintiff's counsel James H. Lesar, paragraph 3).

Under the Freedom of Information Act, agencies may withhold investigatory records compiled for law enforcement purposes to the extent that they would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). There is no question that the investigation of Dr. King's assassination was conducted for law enforcement purposes. FBI Special Agent Martin Wood explained defendant's withholding the identities

1/ (Cont'd.)

The Court denied plaintiff's motions to require reprocessing of Murkin headquarters records (filed June 6, 1980, denied September 11, 1980), and for partial summary judgment with respect to withheld CIA referrals (filed April 9, 1980, denied September 11, 1980, refiled January 12, 1981, denied January 28, 1981).

Defendant is ordered sua sponte to search for and release the April 4, 1968 taxicab manifest of Memphis cab driver James McCraw. This item was specified in plaintiff's December 23, 1975 freedom of information request. If the manifest cannot be found, defendants should explain its absence in detail by affidavit. See Transcript of hearing on April 6, 1981, at 37-38.

of persons investigated or interviewed, information about third persons appearing in the documents and the names of FBI Special Agents. Seventh affidavit of Martin Wood, filed April 25, 1980. The Court has reviewed the instant Vaughn index and finds that defendant's use of exemption 7(C) was proper. See Lesar v. United States Department of Justice, 636 F.2d 472, 488 (D. C. Cir. 1980); Baez v. United States Department of Justice, 647 F.2d 1328, 1338-39 (D. C. Cir. 1980).

Agencies may withhold investigatory records compiled for law enforcement purposes to the extent that they would "disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential source." 5 U.S.C. § 552(b)(7)(D). Special Agent Wood explained in his affidavit defendant's withholding of material which would reveal the identity of persons who supplied information under either express or implied assurances of confidentiality. Confidential information supplied by local and foreign police agencies was also withheld under this exemption.^{2/} The Court has reviewed the use of exemption 7(D) in the Vaughn index and finds it proper. See Lesar v. United States Department of Justice, supra at 492; Baez v. United States Department of Justice, supra at 1339-40.^{3/}

Section 552(b)(1) of the Freedom of Information Act exempts from disclosure matters that are "specifically authorized under criteria established by an Executive order to be kept secret

^{2/} Plaintiff alleges defendant disclosed identities and information embarrassing to blacks, civil rights groups and plaintiff himself which should have been withheld. If true, such actions would not justify release of other names or information withheld properly.

^{3/} Plaintiff alleges that the identities of many persons investigated are known to him, to the public, or both. The Court recognizes the merit of plaintiff's claim. Substantial cause exists to defeat the application of exemptions 7(C) and (D) in these circumstances. However, the burden on defendant to reprocess over 50,000 pages, the defendant's good faith efforts in searching and releasing materials in general, the lack of harm to plaintiff regarding nondisclosure of names he knows, and the need to protect names which plaintiff merely suspects, persuade the Court that the equities are on defendant's side. Under these extraordinary circumstances, the Court upholds defendant's use of exemptions 7(C) and (D).

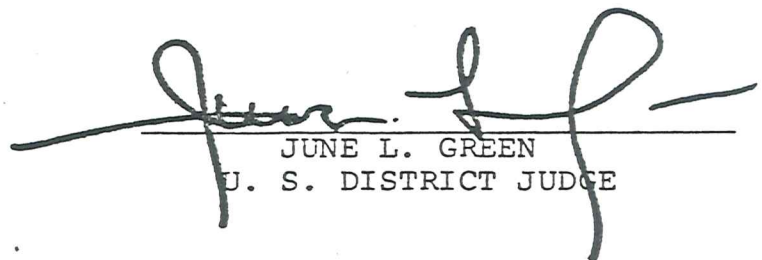
in the interest of national defense or foreign policy and are in fact classified pursuant to such Executive order." Where a (b)(1) exemption is claimed, the agency has the burden of establishing applicability; the court must make a de novo determination; and the court must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. Ray v. Turner, 587 F.2d 1187, 1194 (D. C. Cir. 1978). Further, the Court must "be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated." Id. at 1195, quoting Weissman v. CIA, 565 F.2d 692, 697 (D. C. Cir. 1977).

The three documents in the Vaughn index which contain information withheld under exemption (b)(1) are documents 30A, 34A and 39A.^{4/} FBI Special Agent Donald MacDonald is assigned in a supervisory capacity to review classification status of FBI information under current Executive Order 12065. Mr. MacDonald stated by affidavit that all three documents were classified "confidential" under the classification requirements of Executive Order 12065. A foreign government originated the withheld information in documents 30A and 39A. The information was withheld pursuant to §§ 1-301(b)^{5/}, 1-302^{6/} and 1-303^{7/} of

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- 4/ The number of (b)(1) documents in the index is in proportion to the frequency it was claimed: 29 documents out of 6,000 Murkin headquarters serials continued (b)(1) withholding, compared to 4,138 documents with a 7(C) exemption.
- 5/ "§ 1-301. Information may not be considered for classification unless it concerns. . . (b) foreign government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States."
- 6/ "§ 1-302. Even though information is determined to concern one or more of the (above) criteria. . . , it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security."
- 7/ "§ 1-303. Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security."

Executive Order 12065. MacDonald affidavit, October 1, 1980, at 13, 15. The withheld portion of document 34A concerned intelligence sources and activities, named a foreign country, revealed a specific target, and identified a specific foreign relations matter. This information was withheld pursuant to §§ 1-301(c), (d); and 1-302, MacDonald affidavit, October 1, 1980. The propriety of the original withholding was explained by Special Agent MacDonald in a second affidavit, filed December 10, 1980 as appendix E to defendant's motion for summary judgment. The Court accords substantial weight to the MacDonald affidavits, and finds that the deletions for which exemption 1 was claimed in the Vaughn index were properly classified in procedural and substantive conformity with Executive Order 12065. Accordingly, the use of exemption 1 in the Vaughn index was proper.

The resolution of plaintiff's motions and defendant's motion for summary judgment leave no genuine issues as to any material fact. Defendant's motion for summary judgment is granted. This action is held pending determination of in camera submissions and defendant's compliance with the Court's other orders in this opinion. An appropriate order is attached.


JUNE L. GREEN
U. S. DISTRICT JUDGE

December 1, 1981