Filed 5-11-78
11:55 p.m.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUBMIA

JAMES H. LESAR, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	Civil Action No. 77-0692

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, James H. Lesar, and moves the Court for summary judgment in his favor with respect to all records, or portions thereof, which have been withheld from him in the above-entitled case on the grounds that they are exempt from disclosure under the provisions of 5 U.S.C. §552(b)(1), 5 U.S.C. §552(b)(2), or 5 U.S.C. §552(b)(7).

This motion is made pursuant to Rule 56 of the Federal Rules of Civil Procedure. A Memorandum of Points and Authorities and a Statement of Material Facts As To Which There Is No Genuine Issue are attached hereto.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
910 Sixteenth Street, N.W.
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Attorney pro se

CERTIFICATE OF SERVICE

I hereby certify that by prearrangement with Dan Metcalfe, I am serving a copy of the foregoing Plaintiff's Cross Motion for Summary Judgement on him at the office of his wife, Debbie Strauss, Spencer & Kay, 1920 L Street, N.W., Room 610, before the hour of 10:30 a.m., Friday, May 12, 1978.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	Civil Action No. 77-0692

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

In support of his motion for summary judgment and in conformity with Local Rule 1-9(h), plaintiff submits herewith a statement of material facts as to which he contends there is no genuine issue.

1. A police department is not a "confidential source" as that term is employed in 5 U.S.C. §552(b)(7)(D)

2. The defendant has failed to show that any of the information withheld under 5 U.C.C. §552(b)(7)(C) or (D) was provided as the result of an express or implied promise of confidentiality.

3. The defendant has failed to balance the policy considerations behind exemption 7(C) and 7(D) against the public interest in disclosures.

4. None of the records sought to be withheld under 5 U.S.C. §552(b)(1) were classified in accordance with the procedures of Executive Order 11652 of its implementing National Security Council Directive.

5. No harm will result to the government from disclosure of informant symbol numbers and there is a public benefit in the release of such numbers because it assists the public in evaluating

the meaning and content of the records made public.

James H. Lesar

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Attorney pro se

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	Civil Action No. 77-0692

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

A. The Shaheen Report

On November 1, 1975, William C. Sullivan, who had formerly served as Assistant Director, Domestic Intelligence Division, Federal Bureau of Investigation, testified before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. During his testimony, Sullivan related that from late 1963 until the time of his assassination, Dr. Martin Luther King, Jr. was the target of an intensive campaign by the FBI to "neutralize" him as an effective civil rights leader. Sullivan testified that in the war against King, "No holds were barred." (Senate Report No. 94-755, Final Report of the Select Committee To Study Governmental Operations with Respect to Intelligence Activities, Book II, p. 11).

On November 24, 1975, as a consequence of Sullivan's testimony, the Attorney General of the United States directed the Civil Rights Division of the Department of Justice to review Department

of Justice and FBI files to determine whether the investigation of Dr. King's assassination should be reopened. A week later, on December 1, 1975, Assistant Attorney General J. Stanley Pottinger, Chief of the Civil Rights Division, directed that answers to two questions be sought:

> 1. What action, if any, was undertaken by the FBI which had or may have had an effect, direct or indirect, on the assassination of Dr. Martin Luther King?
>
> 2. What action, if any, was undertaken by the FBI which had or may have had any other adverse effect, direct or indirect, on Martin Luther King?

On March 31, 1976, the Chief of the Civil Rights Division's Criminal Section, Mr. Robert A. Murphy submitted a 51-page report on the results of this inquiry. The Murphy Report was accompanied by a memorandum from Murphy to Assistant Attorney General Pottinger, also dated March 31, 1976. In his memorandum, Murphy recommended against reopening the investigation into Dr. King's assassination because "there is no evidence that the Bureau had anything to do with the shooting of Dr. King." Murphy further stated that while he believed that serious violations of the privacy of Dr. King and many others had resulted from FBI actions, he did not recommend that action be taken against any individucal because: 1) if criminal acts occurred, the statute of limitations had long since expired; 2) no one had filed a civil suit against the Department or the FBI, in spite of publicity about the FBI's activities, so no decision had been made about what position the Department might take; and 3) no FBI employee who was a section chief or higher who was involved in the King case still worked for the FBI, so no disciplinary action was needed. Mr. Murphy's memorandum also stated:

> I recommend against a public report by the Department or the appointing of a "blue ribbon" committee. The Church Committee has largely performed that function and the risk

> of adversely affecting the reputation of many people is too great. I certainly recommend against my report being made public.

The 51-page Murphy Report is almost entirely devoted to the FBI's long campaign of harrassment against Dr. King. Of its 51 pages, less than a page and a half contain material relating to Dr. King's assassination. This includes Murphy's statement that "I saw nothing in the files I read that indicates any involvement of the FBI in the assassination of Dr. King."

The Murphy Report was transmitted to the Attorney General along with a covering memorandum dated April 9, 1976, by Assistant Attorney Generl Stanley Pottinger. Stating that the FBI's campaign of harassment against Dr. King "fairly gives rise to the question whether it culminated in some action which caused his death, and logically raises the question whether the investigation by the Bureau into his death was tainted by its institutional dislike for King," Pottinger recommended the establishment of a Justice Department Task Force "for the purpose of completing the review which we have begun." Pottinger also recommened the appointment of an Advisory Committee of five to nine distinguished citizens to review the work of the Task Force. The Advisory Committee would have total and unfettered access to all "files, witnesses, and other information available to the Department and the Task Force . . .." Its purpose would be to "have an outside, fresh perspective on the state of our present information and the conduct of the investigation as it proceeds to its conclusion." (April 9, 1976 Pottinger Memorandum, p. 6)

On April 26, 1976, Attorney General Edward H. Levi directed Mr. Michael Shaheen of the Office of Professional Responsibility to continue the review which Pottinger and Murphy had reported on, and to consider the same four matters which he had original directed the Assistant Attorney General in charge of the Civil Rights

Division to review five months previously:

> First, whether the FBI investigation of the Dr. Martin Luther King's (sic) assassination was thorough and honest; second, whether there was any evidence that the FBI was involved in the first assassination of Dr. King; third, in light of the first two questions, whether there is any new evidence which has come to the attention of the Department concerning the assassination of Dr. King which should be dealt with by the appropriate authorities; fourth, whether the nature of the relationship between the Bureau and Dr. King calls for criminal prosecution, disciplinary proceedings, or other appropriate action.

The Attorney General further directed that in view of the work already done, and the tentative conclusions reached, "special emphasis should be given to the fourth question."

Ten months later, on February 18, 1977, the "Report of the Department of Justice Task Force To Review the FBI Martin Luther King, Jr. Security and Assassination Investigations," (hereafter referred to as "the Shaheen Report") was publicly released. The Shaheen Report concluded that "the FBI had conducted a painstaking and successful investigation of the 1968 assassination in Memphis, Tennessee," that the Task Force had found "no evidence of FBI complicity (in Dr. King's murder)," and that the FBI's COINTELPRO-type harassment of Dr. King and its efforts to drive him out of the civil rights movement were clearly improper.

B. Plaintiff's Lawsuit

Plaintiff is an attorney in private practice. From August, 1970 through 1976 he respresented James Earl Ray, the alleged assassin of Dr. King, in numerous court proceedings, including a two-week evidentiary hearing on Ray's habeas corpus allegations. As a result of the several thousand hours he has spent on the Ray Ray case, plaintiff has reached several conclusions, among them

that: 1) Ray did not shoot Dr. King; 2) Ray probably did not know that Dr. King was going to be shot; 3) the assassination of Dr. King is an unsolved crime; and 4) the basic institutions that have dealt with the King-Ray case have failed.

Because of his deep interest in the assassination of Dr. King, as well as his past history as a student participant in the Civil Rights movement led by Dr. King, plaintiff is interested in obtaining government records relating to these subjects. In addition, plaintiff is the friend and associate of, and attorney for, Mr. Harold Weisberg, the leading authority on Dr. King's assassination. Plaintiff is of the opinion that Mr. Weisberg's work on the assassination of Dr. King is profoundly and uniquely in the public interest. Thus, plaintiff seeks to assist Mr. Weisberg's work in every way possible, and this lawsuit is intended to benefit the public interest by obtaining records which plaintiff and Mr. Weisberg can use to inform themselves and the public about the circumstances surrounding Dr. King's assassination and the conviction of James Earl Ray for that crime.

On February 7, 1977, plaintiff made a Freedom of Information Act request for "the 148 page report by the Office of Professional Responsibility on its review of the King assassination" and five related records or categories or records. At the time this request for the Shaheen Report was made, no copy had been publicly released. When the Shaheen Report was made available to the public, plaintiff learned that it also included appendices. The Table of Contents, however, indicated only an Appendix A, consisting of eighteen "exhibits," some of which were classified and thus not printed in the appendix, and an Appendix B, consisting of "interview memoranda," none of which were printed in the volume of the Shaheen Report which was public released. Plaintiff did not learn until June, 1977, that the Shaheen Report also contained a

third appendix, Appendix C, which was not mentioned in either the Table of Contents to the Shaheen Report or in the text of the Report itself. Appendix C itself has twenty numbered volumes. Actually, it has twenty-five volumes, since five of the volumes have two parts. Most of these twenty-five volumes consist of the typewritten notes which members of the Task Force took as they read through FBI files on Dr. King and the investigation of his assassination.

At various times over the last year, the Justice Department has made releases of the requested materials. Five volumes of Appendix C (volumes XIII-XVII) have been withheld in their entirety on grounds that they are exempt from disclosure under 5 U.S.C. §552(b)(7). Aside from the withholding of these five volumes, precisely those which are of greatest importance to plaintiff and to the public, the Department has also excised records or portions of records on grounds that they are exempt under various exceptions to the Freedom of Information Act. Plaintiff contests the withholding of volumes XIII-XVII of Appendix C and all excisions in the materials provided him insofar as the decision to withhold is based on a claim that the excised records, or portions thereof, are exempt from disclosure under exemptions 1, 2, or 7 to the Freedom of Information Act. As plaintiff will argue below, the Department has not met its heavy burden of proof with respect to materials it claims are protected by these exemptions; therefore, as a matter of law, they must be disclosed.

ARGUMENT

I. ATLANTA AND MEMPHIS POLICE DEPARTMENT RECORDS ARE NOT EXEMPT FROM DISCLOSURE UNDER 5 U.S.C. §552(b)(7)(D)

Although the Department was supposed to have provided a Vaughn v. Rosen showing with respect to all withheld records, it

chose not to do so with respect to the five volumes of Memphis Police Department records which are contained in Appendix C to the Shaheen Report but instead asserted exemption 7(D) in blanket fashion to all such records. While plaintiff is uncertain as to the exact volume of these records, the Shaheen Report's reference to their pagination suggests that at least 1700 pages are involved, and perhaps considerably more. In addition, the Department has also made a blanket exemption 7(D) claim for 29 pages of Atlanta Police Department records which are contained in Volume III of Appendix C.

This raises a threshhold question as to whether exemption 7(D) gives an institutional exemption for state and local police reports which are contained in the files of federal agencies. Exemption 7(D) exempts from mandatory public releases records which:

> (D) 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, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

Plaintiff contends that this provision does not authorize blanket immunity for all state and local law enforcement records. It is clear that this provision does protect persons who provide information in confidence. It is extremely unlikely that Congress intended to use the term in a fashion which would expand its obvious meaning to include all law enforcement records provided by state or local law enforcement agency to a federal agency.

The term "confidential source" is not defined in the Freedom of Information Act. However, the legislative history of the Act would seem to rule out the possibility that Congress intended it to create an institutional exemption such as the Department is claiming here. The Senate amendment to exemption 7 originally

employed the term "informer" rather than "confidential source." In explaining the substitution of the latter phrase, the Joint Explanatory Statement of the Committee of the Conference stated:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. (Emphasis added) [Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, Committee on Governmental Operations, U.S. House of Representatives; Committee on the Judiciary, U.S. Senate, p. 230]

This makes it clear that Congress intended to broaden the term "informer," a term which is exclusively restricted to persons, to include persons other than paid informers. It obviously did not contemplate that the term would be expanded beyond human sources to include entire agencies. Other portions of the legislative history carry this same implication. For example, Senator Kennedy, a prime sponsor of the Amendment, stated:

> [W]e also provided that there be no requirement to reveal not only the identity of a confidential source, but also any information obtained from him in a criminal investigation. (Emphasis added) [Source Book, p. 459]

The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act also construes exemption 7(D) this way. After quoting exemption 7's Clause (D), the Attorney General states:

> The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatigatory record, civil or criminal. (Conf. Rept. p. 13.) The term "confidential source" refers not only to paid informants but to any person who provies information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." Ibid. In most circumstances it would be proper to

> withhold the name, address and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test for purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown. [Attorney General's Memorandum on 1974 Amendments, p. 10]

As this passage clearly shows, the Attorney General himself construed the term "confidential source" is a manner which seems definitely to restrict it to human sources. This becomes even clearer in the Attorney General's discussion of the second part of Clause (D):

> There may be situations in which a criminal law enforcement authority, eg.g., the FBI or a State authority obtains confidential information from a confidential source in the course of a criminal investigation and then provides a copy to another Federal Agency. In the event that a Freedom of Information Act request is directed to the latter agency, nondisclosure based on the second part of clause (D) is proper, regardless of whether the requested agency is itself a "criminal law enforcement authority." What determines the issue is the character of the agency that "compiled" the record. [Attonrey General's Memorandum, p. 11]

While this is directed to construing the phrase "criminal law enforcement authority" rather than "confidential source," it indicates that it is the person providing confidential information to a state law enforcement authority who is the "confidential source," not the authority itself.

Even if the Atlanta and Memphis Police Departments qualify as "confidential sources," which they clearly don't, the burden is on the Department of Justice to demonstrate that the withheld information is confidential and that there was an agency promise or implicit agreement to hold the matter in confidence. Rural Housing

Alliance v. U.S. Dept. of Agriculture, 498 F. 2d 73 (D.C. Cir. 1974); Local 32 v. Irving, 91 LRRM 2513 (W.D. Wash. (1976). It is clear that the Department can't meet this burden with respect to the Memphis Police Department records. The affidavit of Michael Shaheen which the Department has previously filed in this case expressly states that: "[The Memphis Police Department] records were made available to the Task Force by the Shelby County Attorney General's office pursuant to subpoena." (Shaheen Affidavit, ¶16. Emphasis added) The fact that these records were obtained pursuant to subpoena deprives the Department of any claim that they were obtained as a result of an agency promise or implicit agreement to hold them in confidence, or that the government would suffer some putative future damage to its ability to secure such information should it now make them available without the permission of the of the Attorney General of Shelby County. So long as the Department is armed with a valid subpoena, it can always obtain such information.

There are still other reasons why the Department cannot invoke (7)(D) in blanket fashion with respect to the Atlanta and Memphis Police Department records. Obviously, if a state or local law enforcement agency is itself a "confidential source" as that term is used in exemption 7(D), then the Atlanta and Memphis Police Department records cannot be protected under the first part of Clause D, which protects against the disclosure of the identity of a confidential source, because the identity of the so-called confidential source has already been disclosed.

Nor can the information be protected in blanket fashion under the second part of Clause D, which protects "confidential information furnished only by the confidential source." The Shaheen Report itself discloses both the identity and the content of many of the Memphis Police Department records. (See, for example, pp.

28, 38-40 of the Shaheen Report.) At least some of the Memphis Police Department records are of such non-confidential matters as the transcript of the police radio broadcasts made immediately after Dr. King was shot. (Shaheen Report, p. 40)

Furthermore, FBI records seem to indicate that Memphis Police Department records have already been made available to an attorney in private practice in Memphis. (See Exhibit 1)

There is, in short, no basis for the government's claim that the Memphis Police Department records are exempt under 7(D). The obvious reason for withholding these records from the public is that their content will destroy the basis for the official theory of Dr. King's assassination, particularly the claim that the claim that the shot which killed Dr. King was fired from the bathroom window of the rooming house at 422 1/2 S. Main Street. The release of such records will undoubtedly reveal the coverup nature of the several Justice Department "reviews" of the investigation of Dr. King's murder, including the latest one which produced the Shaheen Report.

II. THE DEPARTMENT HAS NOT MEET ITS BURDEN OF SHOWING THAT ANY OTHER RECORDS, OR PORTIONS THEREOF, HAVE BEEN PROPERLY WITHHELD UNDER EXEMPTION 7(C) or 7(D)

In addition to the claim that the Atlanta and Memphis Police Department records are entirely exempt under 7(D), the defendant has also asserted that numerous excisions in the records provided plaintiff are justified under the provisions of exemption 7(C) and 7(D). Exemption 7(C) provides an exemption from mandatory disclosure for investigatory files compiled for law enforcement purposes if their disclosure would "(C) constitute an unwarranted invasion of personal privacy."

It has been held that this provision requires that the public interest in disclosure be balanced against privacy considera-

tions. Deering Milliken, Inc. v. Irving, 548 F. 2d 1131, 1137, n. 1 (4th Cir. 1977). The District of Columbia Circuit has held that for each document, an agency must show why an invasion would occur and how serious it would be. In addition, the use to which the requester is expected to put the information must be weighed in making this determination. Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F. 2d 73 (D.C. Cir. 1974); Retail Credit Co. v. FTC, 1976-1 CCH Trade Cas ¶60727 (D.D.C. 1976).

The defendant has not provided sufficiently detailed information about the excisions grounded on a 7(C) claim for the Court to be able to determine whether disclosure would in fact result in an unwarranted invasion of privacy. There is no information contained in the affidavits submitted by the defendant which indicates that the defendant weighed the privacy interest against the public interest. Yet the Attorney General's Memorandum on the 1974 Amendments itself asserts:

> When the facts indicate an invasion of privacy under clause (C), but there is substantial uncertainty whether such invasion is "unwarranted," a balancing process may be in order, in which the agency would consider whether the individual's rights are outweighed by the public's interest in having the material available. (Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, p. 10.

The FBI and the Department of Justice have both already taken the position that the assassination of Dr. King is a historical case of great importance, and that this requires maximum possible disclosure of records pertaining to this subject. To the extent that it is a separate subject, the FBI harassment of Dr. King and his aides is a similarly important historical subject, one which also has been the focus of widespread public comment and Congressional hearings. Even without knowing the identities of those whose names have been withheld under 7(C), the balance would seem to be very heavily in favor of public disclosure. Yet it is ap-

parent that among the names excised under this claim are those of Harry Wachtel and Stanley Levison, two well-known aides to Dr. King. As public figures, these men have less of a privacy interest than others. Indeed, the information about these men (and others) which the defendant tries to suppress is already publicly known. (See Exhibit 2, Washington Post article dated December 8, 1975)

Defendant has also used 7(C) as a justification for withholding information which would identify the names of FBI personnel below the rank of section chief. These men are, however, public employees, and their is no sound reason why their identities should be withheld. On the other hand, knowledge of the identity of these agents would undoubtedly be very helpful in enabling scholars, journalists, and others to better evaluate these records and to get a clearer picture of the way in which the unlawful campaign to harrass Dr. King and his aides worked and the extent to which pervaded the FBI bureaucracy. Thus, the public interest in disclosure clearly outweighs the negligible privacy interest asserted here.

The defendant has also asserted exemption 7(D) as a justification for the numerous excisions it has made. In fact, this claim is frequently invoked together with the 7(C) claim. As pointed out above, however, in order to meet its burden under this provision the agency must be able to show that there was an agency promise or an implicit agreement to hold the information in confidence. There is no claim here that any of the information sought to be protected on this grounds was in fact made available as the result of an express agency promise to to hold the matter in confidence. While the defendant does argue there was an implied promise, it must be pointed out that implied promises are dis-

favored and require a higher standard of proof than express promises. Local 30 v. N.R.L.B. 408 F. Supp. 520 (E.D. Pa. 1976). Defendant has not met, or really attempted to meet that burden, but simply provided the Court with a conclusory affidavit asserting this. Indeed, the defendant's affidavits do not even assert that that the information and identities which it seeks to protect are in fact still confidential, still unknown to the public.

Again, defendant has not met its burden, has not stated facts sufficient to find an unwarranted invasion of privacy, has not applied a balancing test to the disclosure of this information, and has not proved the existence of a promise or implied agreement to hold the information supplied in confidence. Accordingly, plaintiff, as a matter of law, is entitled to the disclosure of all information withheld under this claim, as well.

III. NONE OF THE INFORMATION WITHHELD UNDER 5 U.S.C. §552(b)(1) HAS BEEN VALIDLY CLASSIFIED

Defendant has made numerous excisions and occasionally withheld entire documents on the grounds that they are properly classified pursuant to Executive order and therefore exempt under 5 U.S.C. §552(b)(1). While it is utterly implausible that the release of these records could endanger the national defense or foreign policy of the United States under any sane definition of the concept, it is apparent that none of the records withheld under the (b)(1) claim was ever properly classified in accordance with the procedures specified by Executive order 11652 (or any other Executive order).

Indeed, many of the records withheld on this grounds on not classified even in the most minimal sense of bearing a classification stamp. For example, Exhibit 3 is a page of the OPR records which has a paragraph blanked out on exemption 1 grounds. Yet

this page does not even bear a classification stamp showing the level of classification. Yet this is plainly required by §4(A) of Executive Order 11652. Even worse, the stamp at the bottom of the page which is designed to give the General Declassification Schedule category of the document has been crossed out. The import of these deficiencies alone makes this an unclassified document. In order to qualify for protection under 5 U.S.C. §552(b)(1), an agency must demonstrate to the court that the document in question was properly classified pursuant to executive order. Shaffer v. Kissinger, 505 F. 2d 389 (D.C.Cir. 1974).

Even the above listed procedural irregularities, as grave as they are, do not begin to exhaust the catalogue of horrors which afflicts these records and invalidates any claim that they are properly classified. For example, it is claimed that many of these records are excised to protect intelligence sources and methods. Yet the National Security Council Directive on the implementation of Executive Order 11652 expressly provides, in Section IV(A)(4), that:

> For classified information or material relating to sensitive intelligence sources and methods, the following warning notice shall be used, in addition to and in conjunction with those prescribed in (1), (2), or (3) above, as appropriate:
>
> "WARNING NOTICE--SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED"

Yet no such warning appears on the numerous pages on which material has been excised because its disclosure would allegedly reveal intelligence sources and methods and thus endanger the national security.

The NSC Directive also states in unmistakable terms that:

> [a]t the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule. (Emphasis added)

The OPR records were not classified at the time of origination. The allegedly classified materials in Appendix C to the Shaheen Report originated prior to the issuance of that Report on February 18, 1977. Yet the affidavit of William N. Preusse contains an itemization which shows that the first classification of these records did not occur until May, 1977, many were not classified until December, 1977, and some were classified as late as January 17, 1978, just two weeks before the government's Vaughn v. Rosen showing was due in this case! Facts similar to these caused the United States Court of Appeals to conclude that the District Court had correctly ruled that the documents had not been properly classified in accordance with Executive Order 11652 and its implementing NSC Directive in the case of Halperin v. Department of State, 565 F. 2d 699, 703-704 (1977).

The fact that the classification of the OPR documents occurred after the time of plaintiff's FOIA request is of some significance. Schaffer, supra, at 391. It clearly indicates an attempt to suppress information for reasons other than national security. Otherwise, the proper procedures would have been followed at the time the records were originated, not after it became necessary to find some grounds from resisting their disclosure under the Freedom of Information Act.

Finally, it should be noted that the Preusse affidavit does not state what is required of an affiant who is attempting to support an exemption 1, claim. Even the lowest level of classification, "Confidential," requires a finding on the part of the classifier that the unauthorized disclosure of the information "could reasonably be expected to cause damage to the national security." Halperin, supra, at 703. No such claim is made for any of the records which have been withheld from plaintiff in this

case, some of which are purportedly classified at a level higher than Confidential. Therefore, the defendant has not met its burden to show that the records are properly classified accordaning to the substantive criteria of Executive Order 11652 either.

IV. DEFENDANT HAS NOT MET ITS BURDEN TO JUSTIFY WITHHOLDINGS BASED ON EXEMPTION 2

Exemption 2 exempts matters that are "related solely to the internal personnel rules and practices of an agency." This exemption has been used fairly extensively in deleting material from the records which have been provided plaintiff. The affidavit of Michael Shaheen states:

> This exemption was used as the basis for deleting informant symbol numbers. These symbol numbers, which are used in lieu of identifying informants by name in FBI documents, are used for internal purposes only. Their purpose is to ensure limited access by the FBI's own personnel to sensitive information. Deleting symbol numbers does not distract from the substantive information provided to the plaintiff.

Plaintiff takes the position that delting symbol numbers does detract from the substantive information provided him because it deprives him (and the general public) of a means of evaluating the significance of the information contained in these records. For example, if the symbol numbers are disclosed, it then becomes possible to make such determinations as whether more than one source is providing certain information and to judge whether a specific source is reliable or unreliable. If, for example, symbol No. 163524 provides some information which is known to be false, then without knowing his identity one is still alerted to be on guard against crediting information provided by that symbol number. Thus, the symbol numbers are not solely related to the internal personnel rules and practices of the FBI but have a sig-

which goes beyond that. On the other hand, since the disclosure of the symbol numbers of informants does not result in a disclosure of the identity of the informants, there is no harm to the FBI in their disclosure.

In Dept. of the Air Force v. Rose, 425 U.S. 352 (1976), the United States Supreme Court held that: ". . . at least where the situation is not one where disclosure may risk circumvention of agency regulation, exemption 2 is not applicable to matters subject to such a genuine and significant public interest." Id., at 369. There is a genuine and significant public interest in having a means of better evaluating the meaning and content of the records which plaintiff has received in this case. Because there is no risk in the discloure of mere numbers, the balance should tilt in favor of disclosure.

CONCLUSION

For the foregoing reasons, all the materials which are presently withheld from plaintiff under the authority of exemptions 1, 2, and 7 should be disclosed because the defendant has failed to met its burden of showing entitlement to said claims of exemption.

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Phone: 223-5587

Attorney pro se

Exhibit 1 Civil Action No. 77-0692

UNITED STATES GOVERNMENT

Memorandum

: SAC (44-1987) DATE: 8-2-73

M : SA THOMAS O. RONAN

JECT: MURKIN

44-1987-Sub 0-5

On 8-2-73, HARVEY GIPSON of the firm of GIPSON & TUCKER, Attorneys at Law, appeared at the Memphis Office and advised as follows:

His office is Suite 1104 of the Exchange Building, Memphis 38103.

He has been retained by CHARLES STEPHENS in seeking the reward offered at the time of the slaying of Dr. MARTIN LUTHER KING. This reward, which varies between $100,000 and $192,000 was offered by the "Press-Scimitar," Downtown Association, and about 12 other groups, for information leading to the arrest and conviction of the assasin or assasins of Dr. MARTIN LUTHER KING.

On the day RAY was convicted, GIPSON filed a civil action before Chancellor (FNU) ROND of the Chancery Court, seeking the reward in behalf of STEPHENS.

GIPSON has obtained copies of records of the Police investigation and statements furnished to the Attorney General's Office. The latter were obtained from AG PHIL CANALE.

GIPSON states he is aware that there are several signed statements in the possession of the FBI furnished by STEPHENS in connection with the investigation. He desires copies of these statements. He stated he desires the statements furnished to him voluntarily as he knows he can get them, if necessary, through court proceedings.

The existence of any statements by STEPHENS was not admitted to and he was advised this matter would be discussed with the Special Agent in Charge and he would be notified accordingly.

TOR:BN
(2)

44-1987 Sub M 80-2

Exhibit 2 Civil Action No. 77-0692

Washington Post

MONDAY, DECEMBER 8, 1975 Phone (202) 223-6000 Classified Circulat

King 'Influencer' Named

By Laurence Stern
Washington Post Staff Writer

The mysterious political influence whose name the FBI secretly invoked to persuade Robert F. Kennedy to permit the wiretapping of Martin Luther King Jr. was a New York lawyer who had been a close friend and supporter of King.

He is Stanley Levison, a civil rights activist who helped King since the days of the Birmingham bus boycott with free legal and financial advice, according to a 1971 book account whose accuracy was confirmed yesterday by a former high-ranking Justice Department official.

The issue of King's bugging and wiretapping during the Kennedy and Johnson administrations was revived last week in the Senate intelligence committee, which maintained the high classification on Levison's identity accorded it by the FBI.

A spokesman for the committee said yesterday that the identity of the King associate who triggered the wiretap and bugging was being kept secret for "national security" reasons rather than privacy grounds.

Levison's role in the King surveillance was described in detail, however, in the 1971 book "Kennedy Justice" by New York writer Victor Navasky. The account received virtually no attention in the news media and neither the FBI nor Justice Department has previously com-

See KING, A8, Col. 2

KING, From A1

mented on Navasky's account.

In the wiretap requests of Oct. 7 and 18, 1963, which bore the signed approval of Robert F. Kennedy, then Attorney General, FBI Director J. Edgar Hoover said the surveillance was necessary "in view of the possible Communist influence in the racial situation." Copies of the authorization released by the Senate committee last week deleted the identity of the person named in Hoover's request.

Hoover memoranda bearing the initialed approval of Kennedy's successor, Nicholas Katzenback, also said the installation of a bug was necessary in a New York City hotel room because of the influence on King of "individuals with subversive backgrounds."

In the testimony last week on the wiretap and bugging case the suspected associate of King was described as a "secret Communist" although there was never any evidence cited publicly that King or his movement, the Southern Christian Leadership Conference, was ever under any form of Communist influence.

Katzenbach testified last week that as a deputy to Kennedy he recalled seeing in 1962 "one or more memoranda stating, in substance, that an important secret member of the Communist Party, known to be such to the FBI, was in close contact with Dr. King and might be influencing the actions of Dr. King's movement in ways amicable to the interests of the Soviet Union and contrary to those of the United States."

Katzenbach said that Robert Kennedy had a member of the Justice Department's civil rights division call upon King and suggest that "it was not in his interest nor in the interest of his movement to have further contact with this person." Katzenbach did not name the person.

King followed the suggestion for a while, Katzenbach testified, but then resumed his contacts. Afterward Hoover prepared "a detailed memorandum about Dr. King, referring to the fact of Communist infiltration in the movement and discussing questions of moral character," said Katzenbach.

When Hoover gave the memorandum wide circulation in the government, Katzenbach related, Kennedy became furious and ordered him to withdraw all copies.

Later, however, Kennedy authorized the wiretaps.

According to Navasky's account, the Justice Department failed to provide King with the evidence he requested to substantiate the allegations against Levison and justify the request that he cut off the association.

King, under prodding from the Attorney General and President, agreed to stop his association with Levison but then reconsidered and resumed the personal and working relationship. "If anybody wants to make something of it let them try," King is reported by Navasky to have told Levison.

NICHOLAS KATZENBACH
...cites FBI memoranda

Source: 105-16238 COMINFIL SCLC

Chicago Field Office

Section: 35

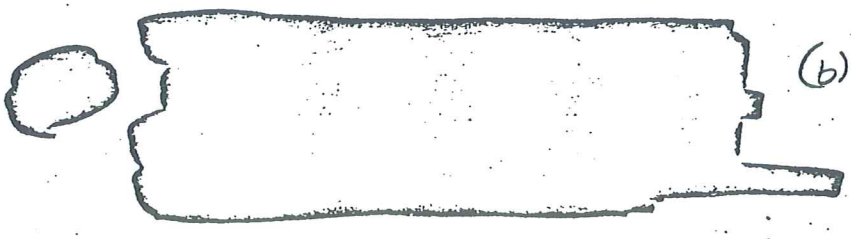
Serials: 3011-3090

The opening serials concern Operation Breadbasket.

The goings on at Illinois CP meetings are recorded - but these have nothing to do with our assignment.

Section: 36

Serials: 3091-3170



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5/6/77

Classified by 1115
Exempt from GDS, Category 2
Date of Declassification Indefinite

(10)

208

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	Civil Action No. 77-0692

O R D E R

Upon consideration of the parties' cross motions for summary judgment, their respective oppositions thereto, and the entire record herein, and the Court finding as a matter of law that the defendant has not met its burden of proving that any records, or portions thereof, are exempt from disclosure under the provisions of 5 U.S.C. §552(b)(1), 5 U.S.C. §552(b)(2), or 5 U.S.C. §552(b)(7), it is by the Court this _____ day of _____, 1978,

ORDERED, that plaintiff's motion for summary judgment be, and hereby is, GRANTED; and it is further

ORDERED, that all records or portions of records withheld from plaintiff on the grounds that they are exempt from disclosure under 5 U.S.C. §552(b)(1), 5 U.S.C. §552(b)(2), or 5 U.S.C. §552(b)(7) shall be made available to plaintiff within _____ days of the date of this Order.

_____
UNITED STATES DISTRICT COURT