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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

For the reasons set forth below, plaintiff opposes defendant's motion for summary judgment. Plaintiff's opposition is supported by the attached affidavits of Harold Weisberg and James H. Lesar. In addition, as required by Local Rule 1-9(h), plaintiff attaches hereto a Statement of Genuine issues which may require litigation.

ARGUMENT

I. DEFENDANT HAS NOT DEMONSTRATED THAT INFORMATION WITHHELD PURSUANT TO EXEMPTION 1 IS PROPERLY CLASSIFIED

A. Withheld Information Is Not Properly Classified According to Procedures of Executive Order 11652

Defendant contends that "[t]he classified documents, or document portions, involved in this lawsuit meet every requirement for non-disclosure pursuant to Exemption 1." (Defendant's Memorandum, p. 7) Exemption 1 authorizes nondisclosure of matters that are:

> (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (emphasis added)

This clearly provides that in order to qualify for nondisclosure under Exemption 1, the material withheld must be classified in accordance with both the substantive and procedural requirements of the relevant Executive order. The Conference Report also makes this explicit by stating that material may be withheld under Exemption 1 only if it is properly classified "pursuant to both procedural and substantive criteria contained in such Executive Order" (House Report, 93-1380, at p. 12)

As plaintiff noted in his cross motion for summary judgment, the OPR records withheld from him on the basis of an Exemption 1 claim have not been classified in accordance with the procedural criteria of Executive Order 11652 or the National Security Council Directive implementing it. 28 C.F.R. §17.1(b) provides:

> (b) No information or material originated within the Department shall be classified in the interest of national security except in accordance with these regulations, the order, directives issued pursuant to the order through the National Security Council (the "Directives"), or the Atomic Energy Act of 1954, as amended . . ..

28 C.F.R. §17.14 provides:

> Each document or other material containing national security information requiring protection under the order shall be marked with its assigned classification at the time of origination.

Because the OPR records withheld under Exemption 1 were not even purportedly classified until long after their origination, the Department has violated its own classification procedures, as well as those set forth in Executive Order 11652 and the National Security Council Directive of May 19, 1972 (37 Fed.Reg. 10053 (1972)).

In amending Exemption 1 to override the Supreme Court's decision in the Mink case, Congress made an express determination that information must be properly classified in accordance with ap-

plicable procedures in order for it to be exempt from disclosure under 5 U.S.C. §552(b)(1). When Congress made this determination it undoubtedly had in mind the testimony it had heard of numerous ludicrous examples of misclassifications, including the testimony of one classification expert that less that 1/2 of one percent of all material classified merited even the lowest defense classification, "Confidential". (See H.R. Rep. No. 221, 93d Cong., 1st Sess., at 34) In any event, Congress did enact a law which plainly provides that information must be properly classified procedurally before it can be withheld under the authority of Exemption 1. That is the law, and this Court must uphold it.

In this regard, plaintiff points out that there are at least two important policy considerations which are protected by strict enforcement of the law that information not properly classified in accordance with the applicable procedures cannot be withheld under Exemption 1. One, of course, is the policy of trying to curtail the amount of information which is unjustifiably classified. The second is enforcement of the laws which protect against disclosure of validly classified information. Thus, failure to classify information which should be classified at the time it originates endangers security by leaving the information unprotected against either accidental or deliberate disclosure. In order to prevent national security information from laying around unprotected by a classification label which puts all on notice of the seriousness of disclosing it, the regulations soundly provide that it is to be classified at the time of origin. Congress has determined that the consequence of failure to adhere to this sound provision is to subject the information to disclosure under the Freedom of Information Act.

Plaintiff has previously noted the decision of the United States Court of Appeals for the District of Columbia in Halperin

v. Department of State, 565 F. 2d 699 (1977), as well as its earlier decision in Shaffer v. Kissinger, 505 F. 2d 389 (1974), on the need for an agency to demonstrate that the proper classification procedures were followed in order to show entitlement to Exemption 1. In a similar vein is the decision of this Court in Weisberg v. General Services Administration, Civil Action No. 2052-73. A copy of this Court's May 3, 1974 Memorandum and Order in that case is attached hereto as Exhibit 1.

B. Defendant Has Not Met Its Burden of Showing That the Withheld Materials Are Properly Classified According to Substantive Criteria

In Halperin, supra the classifying official labelled materials "confidential" because their attribution to the Secretary of State "could damage the national security" and "would be prejudicial to the national interest." The Halperin court noted that the classification standard employed by the classifier was not the one dictated by Executive Order 11652. Executive Order 11652 permits material to be designated "Confidential" "only if its unauthorized disclosure 'could reasonably be expected to cause damage to the national security.'" Halperin, supra, at 704. However, the standard which Mr. Small's affidavit states is quite different. When stating the standard as applied to the specific excisions, Mr. Small repeatedly states that "disclosure could reveal an intelligence source . . .." This is a far cry from the correct standard, requires a determination that disclosure "could reasonably be expected . . ." to cause the specified damage.

Defendant cites Weissman v. Central Intelligence Agency, 565 F. 2d 692, 697 (1977), but fails to quote in full the relevant passage:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document

> logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

As noted above, the proper procedures were not followed in this case. Moreover, the conclusory affidavits submitted by the defendant provide insufficient details upon which to make a rational determination as to whether the information excised logically falls into the catergory of the exemption indicated. Moreover, a number of factors raise questions about the veracity or good faith of these classification claims. One such factor, of course, is the failure to classify the underlying originals at the time they were created. (It is not even clear that the underlying originals were ever classified!) Another is the failure to classify the Task Force notes on the originals at the time they were created, or to apply appropriate stamps indicating the classification level or warning that sensitive intelligence sources and methods are involved. Still another indication that the classification of these records is pretextual and not made in good faith can be gained from comparing what was originally withheld as classified with what is now available because it has been "declassified." Thus, the entire Murphy Report was originally classified but parts of it have been declassified while other parts remain classified (or even re-classified upwards!). In reading the declassified portions of the Murphy Report, it soon becomes apparent that there never was any basis substantive basis for classifying them in the first place. This bears on the credibility of defendant's remaining classification claims, particularly those which have been re-classified upwards allegedly on the basis of a Departmental regulation which only authorizes downgrading and declassification (28 C.F.R. §17.26).

Another example of the lack of any basis for defendant's classifications can be seen in Exhibit 12 to Appendix A to the

Shaheen Report, which was originally withheld entirely. (See Exhibit 2) What has now been declassified shows the ridiculousness of the previous classification of it.

No doubt the discovery which plaintiffs wishes to pursue (see atttached affidavit of James H. Lesar) will cast further doubt on the substantive basis for defendant's classifications.

II. THERE IS A LEGITIMATE PUBLIC INTEREST IN THE DISCLOSURE OF OF INFORMANT SYMBOL NUMBERS IN THESE HISTORICALLY IMPORTANT DOCUMENTS

Defendant claims that the informant symbol numbers which have been deleted under Exemption 2 have "no substantive significance" and "can hardly be characterized as the subject of a legitimate or genuine public interest . . .." (Defendant's Memorandum, p. 10) The attached affidavit of Harold Weisberg effectively reveals the obtuseness of these assertions:

> 38. Although disclosure of informant symbol numbers does not reveal the identity of the informants and does not jeopardize them, it can provide important substantive information. Disclosure of informant symbol numbers would give an idea of how many informants were used. This provides a means of assessing the extent of the FBI's coverage. Even repitition of a symbol number can be important. It may, for example, show that an agent provocateur is heating up a situation. Disclosure of the informant symbol numbers makes it possible to evaluate the accuracy and prejudice of a given informant without disclosing his identity. This in turn makes it possible to evaluate the accuracy and prejudice of the review conducted by the Department of Justice Task Force headed by Mr. Shaheen. Contrary to the assertion in defendant's memorandum that the informant symbol numbers do not bear "any substantive relation to the content of the document upon which they appear," these symbol numbers can be content, as where they show that the informant was not merely an informant but an agent provocateur who precipitated violence or dissention through deception, fraud, provocative communications or the other acts typical of a COINTELPRO agent. In cases such as this, the symbol numbers provide a means of evaluating the content and significance

> of events and information. Obviously, if the informant represented by a particular symbol number provides information known to be false on any occasion, this means that all information provided by that informant must be viewed as suspect unless more reliably confirmed. In such cases as this, content cannot be evaluated apart from the informant. There is, therefore, a legitimate public interest in disclosing these informant symbol numbers.

Weighing the public interest in disclosing these informant symbol numbers against the harm which would result from their disclosure, which is nonexistent because the identity of the informant remains concealed, it is clear that in a historically important matter such as is reflected in these records, the balance is in favor of disclosure, not withholding.

III. THE PUBLIC INTEREST IN DISCLOSURE CLEARLY OUTWEIGHS ANY PERSONAL PRIVACY INTEREST ESTABLISHED BY THE DEFENDANT UNDER EXEMPTION 7(C)

Defendant has made numerous deletions on the grounds of Exemption 7(C), both with respect to King assassination materials and with respect to materials on the alleged security investigation of Dr. King. Defendant has not sufficiently detailed the nature and different kinds of invasions of privacy which might be involved in releasing these materials. While defendant asserts that with respect to the Civil Rights Division documents, some of the 7(C) excisions were made "with respect to information not known to be within the public domain, in order to protect the privacy of Dr. King's family," it is difficult to believe that the use of 7(C) so extensively is justified. The record of the Civil Rights Division is quite bad on the use of Exemption 7(C) and 7(D), as witness Attachment 1 to the Lesar Affidavit. Part of the problem is that the persons processing the records have not the slighest idea what is already in the public domain. With respect to both

the assassination and the alleged security investigation of him, there is very little information which is not now public knowledge. There have been congressional investigations of both matters, T.V. movies, news reports, newspaper articles, managazine articles, books, and so forth. What damage there is to personal reputations has probably already been accomplished.

While plaintiff would concede that there may be some justifiable use of Exemption 7(C), it seems obvious that its employment by the defendant has been overly broad. In general, unless the damage to personal reputation is new and substantial, it would seem that the public interest in disclosing as much as possible about the investigation of Dr. King's assassination and the FBI's dirty tricks campaign against him should outweigh the privacy interest. In addition, plaintiff notes that it is impossible to determine, without discovery, how many of these deletions pertain to Dr. King and how many pertain to others.

Plaintiff notes that the Department of Justice itself recognizes that the considerations which apply to cases of great historical interest are substantially different than those which apply to ordinary matters. (See Attachment 3, August 5, 1975 Memorandum of Quinlan Shea, Jr., Chief, Information and Privacy Appeals Unit) It is the historical importance of the materials which plaintiff seeks which sets his case apart from all the cases cited by defendant in which courts held that the privacy interest outweighed what was a minimal or nonexistent public interest in disclosure.

IV. DEFENDANT HAS NOT MET ITS BURDEN OF ESTABLISHING ENTITLEMENT TO EXEMPTION 7(D)

Defendant has also made extensive use of Exemption 7(D). One such use has been to apply it in blanket fashion to all records

obtained from the Memphis Police Department. It may be that this claim is being applied to notes made by the Task Force on Memphis Police Department records as well as to the Police Department records themselves. (See Lesar Affidavit, ¶8) Discovery may be necessary to establish whether this is in fact the case.

Defendant argues that a third party having custody of duplicate copies of the Memphis Police Department records, the District Attorney General of Shelby County, is a confidential source within the meaning of Exemption 7(D) and that these local law enforcement records were provided under circumstances from which an assurance of confidentiality could be reasonably inferred." (Defendant's Memorandum, pp. 17-18)

Defendant's argument is, however, destroyed by the Affidavit of James F. Walker which it attaches to its motion for summary judgment. That affidavit states that the Shelby County DA furnished the Police Department records only after they were subpoenaed. This has two effects. One is to undercut the argument that disclosure of these records under the Freedom of Information Act would "seriously impair the free flow of necessary law enforcement information between federal and local authorities and . . . thus jeopardize the law enforcement interests of the Department of Justice." (Defendant's Memorandum, pp. 19-20) Since the records were obtained the Department as a matter of legal right, there is no such threat to the ability of the Justice Department to obtain such information in the future from local law enforcement agencies. The availability of legal process to compel production of informa- has been recognized as a factor in demonstrating that disclosure will not harm the government's interests in an Exemption 4 case, Save the Dolphins v. U.S. Dept. of Commerce, 404 F. Supp. 407 (N.D. Cal. 1975), and the same reasoning applies here.

The second effect of the fact that these records were subpoenaed rather than supplied voluntarily is that it cuts against the argument that they were furnished to the Justice Department under circumstances from which an assurance of confidentiality could be reasonably inferred. Given the legal power to obtain the records, the Justice Department clearly has the authority to them as it sees fit, including the right to make the records or their contents public. Indeed, the Justice Department has made the content of some of the records public in the Shaheen Report itself. How can it be contended that the Justice Department was provided these documents under circumstances from which an assurance of confidentiality can be implied when it made the content of some of them public in its Task Force Report?

Finally, the attached affidavit of Harold Weisberg shows beyond any question that there has been no assurance of confidentiality of local law enforcement records sufficiently binding as to enjoy the respect of the Justice Department. Mr. Weisberg has in fact already obtained local law enforcement records and information from such records in the course of Freedom of Information Act lawsuits. (See Weisberg Affidavit, ¶¶16-38) In fact, through his Freedom of Information Act lawsuits he has obtained records of Shelby County District Attorney General's Office. (See Attachment 7 to Weisberg Affidavit) Thus, the facts do not indicate any claim to confidentiality such as is now being urged upon the court.

Apart from the institutional 7(D) claim which is advanced on behalf of the Atlanta and Memphis Police Department records, the defendant has frequently applied this provision to excisions in the other OPR and Civil Rights Division records. In moving for summary judgment, the burden is on the defendant to demonstrate that no genuine issue of material fact impedes its right to judg-

ment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure; Bloomgarden v. Coyer, 156 U.S.App.D.C. o09, 479 F. 2d 201, 208 (D.C.Cir. 1973). Matters of fact are to be viewed in the light most favorable to the party opposing the motion. Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 466 F. 2d 440, 442 (D.C.Cir. 1972); Seamaan v. Mumford, 118 U.S.App.D.C. 282, 335 F. 2d 704, 705, n. 2 (D.C.Cir. 1964).

With respect to all the exemptions claimed by defendant, there are genuine issues of material fact in dispute which make summary judgment in favor of the defendant inappropriate on the record presently before the court. (See plaintiff's attached Statement of Genuine Issues) Until these issues are resolved by discovery or trial, summary judgment cannot be granted. This is particularly true with respect to the Exemption 7(D) claims, where plaintiff disputes all the basic factual findings required to support the claim. Thus plaintiff disputes that the information withheld on this grounds is in fact confidential; instead he asserts that much of it is in fact already publicly known.

V. DEFENDANT HAS NOT MET ITS BURDEN OF DEMONSTRATING ENTITLEMENT TO EXEMPTION 7(E)

Defendant has deleted some materials on grounds that they are exempt under (b)(7)(E), which relates to disclosure of investigative techniques and procedures. As is indicated in the attached affidavit of Mr. Lesar, plaintiff needs to undertake discovery on this point to determine whether this claim is in fact being used to suppress information which is already publicly known or otherwise nonexempt. In view of the fact that a great deal of information about the FBI's COINTELPRO operations has already been disclosed, it seems likely that plaintiff may be able to establish

through discovery that defendant has applied this exemption to information which is already public. Therefore, summary judgment cannot be awarded the defendant until plaintiff has been afforded an opportunity to engage in discovery on this issue.

VI. EVEN IF THE MATERIALS SOUGHT BY PLAINTIFF ARE EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT, IT IS AN ABUSE OF DISCRETION FOR THE DEFENDANT TO WITHHOLD THEM

In Charles River Park "A", Inc. v. Department of H. & U.D., 519 F. 2d 935 (1975), an Exemption 4 case, the United States Court of Appeals held that the district court had to consider, first, whether or not the requested information was exempt from disclosure, but that that did not end its inquiry. If the district court found that the Freedom of Information Act was inapplicable, it must then consider whether the agency's release of the information would be an abuse of discretion. The court stated that: "If public interest consideration supports disclosure of this information, the fact that it was submitted in confidence would not be enough to establish that the release of the information is an abuse of discretion." Charles River Park, supra, at 942.

Plaintiff contends that even if this Court were to determine that the requested information which is still withheld falls within one or more of the exemptions to the Freedom of Information Act, it then has to consider whether or not the Department of Justice has abused its discretion in withholding this information. Because of the overriding public interest in the maximum possible disclosure of materials related to the assassination and alleged national security investigation of Dr. King, plaintiff contends that the Department has abused its discretion in refusing to make the withheld materials available. Plaintiff's position that the Department has abused its discretion is supported by the fact that

Department has not followed the guidelines which the Attorney General has himself set for all Freedom of Information Act cases. (See Exhibit 4, May 5, 1977 letter from Attorney General Griffin Bell to heads of all federal departments and agencies) The failure to adhere to these guidelines where the materials sought are of great historical interest, as is the case here, makes the abuse of discretion all the more obvious.

Respectfully submitted,

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Attorney pro se

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of May, 1978, mailed a copy of the foregoing Plaintiff's Opposition to Defendant's Motion for Summary Judgment to Mr. Dan Metcalfe, P.O. Box 7219, Washington, D.C. 20044.

JAMES H. LESAR