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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES H. LESAR,

Plaintiff

v.

Civil Action No. 77-692

DEPARTMENT OF JUSTICE,

Defendant

Washington, D. C.
June 9, 1978

The above-entitled cause came on for Arguments on
Summary Judgment Motions before the HONORABLE GERHARD A. GESELL,
United States District Judge, at 9:30 a.m.

APPEARANCES:

JAMES H. LESAR, Esq.,
Pro Se

DANIEL J. METCALFE, Esq.,
Department of Justice,
Counsel for Defendant

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THE CLERK: Civil Action No. 77-0692,

James H. Lesar v. the Department of Justice, et al.

Mr. James H. Lesar, pro se Plaintiff. Mr. Daniel J. Metcalfe
for the Defendants.

THE COURT: Gentlemen, bear with me a moment.

I don't see any purpose in arguing these motions.
It is impossible for the Court to deal with these issues on the
basis of argument.

I have read your briefs. I am familiar with your
papers. They are to the Court basically unintelligible.
You are talking about documents the Court has never seen.
By and large the discussion isn't related to the Freedom of
Information Act request. There is a great deal of irrelevant
material from both sides.

I see no purpose in giving you an opportunity to
state orally what you have stated in your briefs. We have
a practical problem here that we ought to try to resolve.

What I would like to do today is to ask both of you
a number of questions in an effort to clarify the problems
that the Court sees created by the violent dispute that is
going on between the parties. So that what I would like to do
is to spend a good deal of time with you this morning seeing
if I can understand what it is I am dealing with, how many
documents, what the nature of those documents is, and so forth.

1 Let me start with the Memphis police. That is one
2 of the discrete issues that I have been able to isolate from
3 this barrage of material you have given me.

4 As I understand it, the papers in controversy were
5 subpoenaed by the Department of Justice from the police, is
6 that correct?

7 MR. METCALFE: That is correct, Your Honor.

8 THE COURT: Where did they get the authority for the
9 subpoena?

10 MR. METCALFE: Would you like me to approach the
11 bench, Your Honor?

12 THE COURT: Surely. We are at that point.

13 Was it in a trial or where did they get the right
14 to subpoena?

15 MR. METCALFE: Your Honor, the documents were sub-
16 poenaed pursuant to the work of the Martin Luther King, Jr.
17 Task Force. That Task Force was --

18 THE COURT: Did it have subpoena power?

19 MR. METCALFE: It did not have subpoena power.

20 THE COURT: Then where did they get the right to
21 issue a subpoena?

22 MR. METCALFE: The Task Force did not issue a subpoena.
23 As I understand the facts, Your Honor, they are as follows:

24 A member of the Task Force, Mr. James Walker, whose
25 affidavit is on file before the Court, went down to Memphis,

1 visited with the state Attorney General's office in the City
2 of Memphis, the Fifteenth Judicial District, which is the
3 custodian of the records in question here, and requested
4 copies of them incident to the work of the Task Force.

5 THE COURT: Right.

6 MR. METCALFE: Hugh Stanton, Jr., who was and still
7 remains the state Attorney General, the official in charge
8 of the documents, refused access to Mr. Walker. There then
9 proceeded a period of negotiations which ultimately resulted
10 in the local United States Attorney issuing a grand jury
11 subpoena for that information.

12 That subpoena is on file with the Court as an attach-
13 ment to both Mr. Walker's affidavit, as well as an attachment
14 to Mr. Stanton's affidavit.

15 THE COURT: Well now --

16 MR. METCALFE: In all candor, Your Honor --

17 I am sorry.

18 THE COURT: Go ahead.

19 MR. METCALFE: In all candor, Your Honor, with all
20 due respect to both the Task Force and also to the
21 United States Attorney who was involved in that, I cannot state
22 that it is the Department of Justice's position that that
23 subpoena was absolutely valid and binding and that that was an
24 appropriate way to proceed.

25 THE COURT: All right.

1 MR. METCALFE: Nevertheless, those are the facts
2 that led to the Task Force and the Department of Justice,
3 indeed, the Federal Government becoming custodian of those
4 records, which I think is a somewhat unique situation, to be
5 sure.

6 THE COURT: That was my next question.

7 Are the documents which the Department of Justice
8 has copies of the subpoenaed material or are they the original
9 documents of the Memphis police force?

10 MR. METCALFE: Oh, they are indeed copies of the
11 subpoenaed material, Your Honor.

12 THE COURT: After you got it through this grand jury
13 subpoena, it was returned to the police force?

14 MR. METCALFE: No, regrettably it was not,
15 Your Honor. The police force has generated the documents,
16 the Memphis Police Department, pursuant to the prosecution
17 of James Earl Ray. It is my understanding that the documents,
18 I believe ninety originals, were transferred to the custody
19 of the state Attorney General's office. That is the only
20 office with which the Federal Government has dealt in this
21 particular situation.

22 THE COURT: So the State Attorney General has the
23 originals.

24 MR. METCALFE: I believe he does. I cannot swear
25 to that from first-hand knowledge. That is my understanding.

1 THE COURT: You have a set of copies.

2 MR. METCALFE: That is correct, a Xerox set. That
3 Xerox set was not returned to the state Attorney General's
4 office; and I dare say, Your Honor, that is why the issue is
5 before you today. Had they been returned, I don't believe
6 that the Federal Government would have exercised sufficient
7 custody over them to make them subject to FOIA.

8 THE COURT: Exactly.

9 Now when did the state's Attorney General or some
10 representative of the state's interest in this matter last
11 express opposition to public disclosure of the documents to
12 the Government?

13 MR. METCALFE: That opposition would have been ex-
14 pressed in the affidavit of Mr. Hugh Stanton.

15 THE COURT: The one that is on file with me?

16 MR. METCALFE: Yes, Your Honor, that was attached to
17 our reply memorandum filed with the Court on May 11.

18 THE COURT: Yes, I am familiar with that.

19 MR. METCALFE: There had also prior to that time
20 apparently been less formal expressions of objection to release
21 of that information. That is reflected, for example, in the
22 affidavit of Michael Shaheen, where he indicates that one
23 member of the Task Force called down to that office at the
24 time that the documents were processed and was told that there
25 was such an objection to disclosure of that information.

1 THE COURT: To your knowledge, is there any on-
2 going state prosecution involving these papers, either of
3 James Earl Ray or of anybody else?

4 MR. METCALFE: Not to my knowledge, Your Honor. We
5 are not in a situation here in which Exemption 7(a) of the
6 Freedom of Information Act is applicable.

7 THE COURT: Right. There is no ongoing state in-
8 vestigation that you know of.

9 MR. METCALFE: If there is, I am not aware of it.
10 I imagine there is always the possibility that something might
11 happen in connection with Mr. Ray. He might file an appeal.

12 THE COURT: There will be continuing 2255's and
13 things of that sort. I understand that.

14 MR. METCALFE: There is always that jurisdiction,
15 of course, Your Honor. Other than that, I am not aware of any
16 prosecution.

17 The material is being withheld under 7(d),
18 Your Honor.

19 THE COURT: What is the volume of these police docu-
20 ments?

21 MR. METCALFE: Of the entire?

22 THE COURT: I am talking about --

23 MR. METCALFE: What is at issue before Your Honor?

24 THE COURT: The subpoenaed material, I am talking
25 about.

1 MR. METCALFE: The subpoenaed material constitutes
2 approximately 400 pages. That is indicated in our papers.

3 THE COURT: Under which of the requests of
4 Mr. Lesar does that fall?

5 MR. METCALFE: That falls under No. 6, Your Honor,
6 which originally requested access to the 149-page Task Force
7 Report. The subpoenaed documents are Volumes 13 through 17
8 of Appendix C of that report. That report has three appendices

9 THE COURT: Appendix C?

10 MR. METCALFE: That is correct. Only one of the
11 appendices was originally made public; the other two were
12 withheld at the time the report was published.

13 Mr. Lesar I don't believe was aware of the
14 appendices. Thus the request requested access to the report
15 only. Through subsequent correspondence, the Department of
16 Justice interpreted his request as pertaining to the appen-
17 dices as well. Those are the documents that are at issue
18 before the Court.

19 THE COURT: Volumes 13 to 17 of Appendix C?

20 MR. METCALFE: That is correct, Your Honor.

21 THE COURT: That is Volumes 13 through 17.

22 MR. METCALFE: Yes, each of the appendices is di-
23 vided into several volumes.

24 THE COURT: I see.

25 MR. METCALFE: I should add, there is one additional

1 group of documents at issue in the lawsuit that emanated from
2 the Civil Rights Division, that have nothing to do with the
3 Task Force Report or the Appendices thereto. That pertain
4 to Paragraphs 1, 2 and 3 of Mr. Lesar's request.

5 There are two such documents before the Court with-
6 held.

7 THE COURT: That came from Memphis?

8 MR. METCALFE: No, Your Honor. Those were documents
9 originating in the Civil Rights Division.

10 THE COURT: That is part of my confusion. I want to
11 deal with these police Task Force documents.

12 MR. METCALFE: I will speak of nothing other than
13 that, Your Honor.

14 THE COURT: We will try to cover everything before
15 the morning is out.

16 Do you have any knowledge as to whether or not
17 these documents have ever been released to anyone else by the
18 United States?

19 MR. METCALFE: The knowledge that I have, Your Honor,
20 the Government's position is based upon the affidavit of
21 Mr. Stanton, which states that the confidentiality of the
22 documents has been preserved.

23 THE COURT: That doesn't tell me anything at all.

24 MR. METCALFE: That they have been released in two
25 instances, to his knowledge. One in connection with the work

1 of the Senate Assassinations Investigation Committee.

2 THE COURT: They were sent to Church, is that right?

3 MR. METCALFE: I believe that is correct.

4 MR. LESAR: I think it is the House Assassinations
5 Committee.

6 THE COURT: The House.

7 MR. METCALFE: Mr. Lesar is more familiar with that
8 aspect of the case than I am.

9 And they were released in connection with the work
10 of the Task Force, as well.

11 THE COURT: I don't understand what that means.
12 The Task Force was an internal governmental unit.

13 MR. METCALFE: I am being unduly obtuse.

14 They were released to the Task Force, these documents
15 that are at issue before the Court.

16 THE COURT: Was the Task Force a Justice Task Force?

17 MR. METCALFE: Yes, it was, Your Honor.

18 THE COURT: So that is within house..

19 MR. METCALFE: I am sorry, I may have misunderstood
20 your question.

21 THE COURT: I meant, were they released outside the
22 Department of Justice?

23 MR. METCALFE: By the Department of Justice?

24 THE COURT: Right.

25 MR. METCALFE: No, Your Honor.

1 THE COURT: Only to the House Assassinations
2 Committee.

3 MR. METCALFE: I misunderstood your question
4 originally.

5 It was released by the state Attorney General's
6 office twice: Once to the Justice Task Force and once to
7 the House, as reflected in Mr. Stanton's affidavit. Those
8 records have been maintained in confidence by the Department
9 of Justice.

10 THE COURT: I am aware from Mr. Lesar's papers that
11 he has reason to believe that various reporters and others
12 have in some way gotten at least an opportunity to examine
13 these documents or seem to be familiar with their content.

14 Do you have any knowledge about that?

15 MR. METCALFE: I have no first-hand knowledge of
16 that, Your Honor.

17 THE COURT: All right.

18 MR. METCALFE: I know only that Mr. Stanton, on
19 behalf of the state Attorney General's office, has indicated
20 that the confidentiality of the documents has been preserved.

21 THE COURT: Now, as I understand it, apart from
22 the general rumpus between you both concerning names of
23 investigators and symbols, which I don't want to discuss, I
24 don't want to hear about --

25 MR. METCALFE: O.K., Your Honor.

1 THE COURT: -- that there are various categories
2 of documents in dispute. I have had great difficulty under-
3 standing precisely what those categories of documents are.

4 MR. METCALFE: I would like an opportunity to ad-
5 dress myself to that.

6 THE COURT: I would like you to kind of elucidate
7 for me.

8 MR. METCALFE: Perhaps I can elucidate upon the
9 papers that have been filed already.

10 You are talking about the case as a whole, is that
11 correct, Your Honor?

12 THE COURT: Taking out the Memphis material and for-
13 getting the question of names of investigators and symbols.

14 MR. METCALFE: O.K.

15 THE COURT: What kinds of categories of papers.

16 MR. METCALFE: Excuse me, categories in terms of the
17 exemptions which are maintained with respect to them?

18 THE COURT: No, I want to understand what they were
19 in real life.

20 MR. METCALFE: O.K.

21 THE COURT: Let me see if I can indicate to you what
22 I have in mind.

23 Through these papers, you all make some references
24 to Judge Smith's order.

25 MR. METCALFE: That is correct, Your Honor.

1 THE COURT: Well, I take it then there is a category
2 of documents that are now on deposit at Archives.

3 MR. METCALFE: That is correct.

4 THE COURT: Pursuant to Judge Smith's order.

5 MR. METCALFE: That is my understanding, Your Honor.

6 MR. LESAR: I believe it would be tapes and trans-
7 crips of tapes of various hotel rooms of Dr. King.

8 THE COURT: That was part of the surveillance.

9 MR. LESAR: Yes. The wiretapping and the bugging,
10 yes.

11 THE COURT: And those tapes are at Archives, right?

12 MR. METCALFE: That is correct, Your Honor. Those
13 tapes and the transcripts of them and I believe as well the
14 documents at the FBI which reflect that information, but
15 I am not too familiar with that case.

16 THE COURT: That, to me, is what I mean by a category.
17 Where does that come into this request?

18 MR. METCALFE: Those documents that are at Archives,
19 Your Honor, are not at issue in this lawsuit.

20 THE COURT: There is a lot of discussion about that
21 in the papers.

22 MR. METCALFE: Yes, Your Honor. That ties into
23 this lawsuit because with respect to the documents at issue
24 before Your Honor here, there have been withholdings based
25 upon that Court order, withholdings of information which fall

1 within the scope of that Court order.

2 This is basically information revealed to the FBI
3 or obtained by the FBI pursuant to electronic surveillance
4 of Dr. Martin Luther King, Jr.

5 MR. LESAR: Perhaps, Your Honor, I can make something
6 clear that is not evident.

7 When the Task Force was set up, they began to review
8 documents of two kinds: Documents related to the assassina-
9 tion of Dr. King and documents related to the so-called
10 security investigation of Dr. King.

11 They went to various field offices and they also
12 went to the FBI headquarters and they reviewed documents.
13 As they reviewed them, they took notes and the notes were
14 typed up.

15 It is the typed-up notes that for the most part con-
16 stitute the materials that are part of Appendix C, not the
17 original documents, themselves.

18 THE COURT: And it is that that you want.

19 MR. LESAR: That, with a couple of exceptions. One
20 exception is the case of the Memphis and Atlanta Police
21 Department documents, where they took the original documents
22 rather than take notes on them.

23 THE COURT: I am over that.

24 MR. LESAR: O.K. The other exception is that with
25 respect to Appendix A, they have some original documents

1 relating to internal FBI memorandums.

2 THE COURT: So the tapes and the transcripts and some
3 documentary material are over in Archives but summaries and
4 discussions of those matters are found in Appendix C to the
5 Task Force Report?

6 MR. LESAR: Apparently they took notes on those
7 and those notes are interspersed in their notes on the
8 FBI's records.

9 MR. METCALFE: Bearing upon the same subject matter
10 of what was obtained by the FBI pursuant to electronic
11 surveillance of Dr. Martin Luther King, Jr., Your Honor.

12 THE COURT: Now on what theory is that being with-
13 held?

14 MR. METCALFE: That has been withheld, Your Honor,
15 pursuant to Judge Smith's Court order.

16 THE COURT: Oh, no, no. Judge Smith's order said,
17 Subject to any order of the Court.

18 You can't bootstrap yourself that way. Judge Smith's
19 order says that all of that matter may be disclosed if any
20 court orders it. So he hasn't made any prohibition about it.

21 MR. LESAR: There has been no exception claimed for
22 those materials, which is a requirement under the Freedom
23 of Information Act.

24 THE COURT: I couldn't find what the exemption was
25 that was being claimed.

1 MR. METCALFE: However, I don't believe the
2 Department of Justice, consistent with Judge Smith's order,
3 could have released that information.

4 THE COURT: All you want then is a pro forma order
5 from me. You don't claim any exemption?

6 MR. METCALFE: No, we don't claim any specific
7 exemption because of the content of the material. We say it
8 falls within Judge Smith's Court order and, therefore, should
9 not be disclosed.

10 THE COURT: Why shouldn't it be? He didn't say it
11 shouldn't be disclosed.

12 MR. METCALFE: Judge Smith's order stated that that
13 type of material, because of its unique sensitivity and be-
14 cause it was obtained through electronic surveillance of
15 Dr. King, should not be in the public domain.

16 That same content, that same information --

17 THE COURT: Did he make a decision under the Freedom
18 of Information Act? I am not familiar with it enough. Did
19 he make a decision under the Freedom of Information Act?

20 MR. METCALFE: I don't believe that was a Freedom of
21 Information Act decision, Your Honor.

22 THE COURT: I don't believe it was either.

23 MR. METCALFE: However, I believe the Department of
24 Justice is equally bound by that decision which says that
25 information, because of its sensitivity, should not be released.

1 THE COURT: I understand you are bound in this
2 sense: Until I hold, if I do so hold, that it is subject
3 to the Freedom of Information Act, you are bound by that
4 order.

5 MR. METCALFE: I understand, Your Honor.

6 THE COURT: I understand that but if you claim no
7 exemption and the material is now requested, I suppose it
8 needs to be turned over and my order is purely pro forma.

9 MR. METCALFE: Excuse me, Your Honor. It should be
10 turned over and your order is purely pro forma?

11 THE COURT: Right.

12 MR. METCALFE: I should hasten to add the Department
13 of Justice did not claim an exemption with respect to that
14 information, as it has with respect to other information, be-
15 cause it viewed Judge Smith's order as a blanket prohibition
16 for that information.

17 THE COURT: Well, it can't. With all respect to
18 my colleague, he can't decide the application of the Freedom
19 of Information Act on material without considering that issue;
20 and you tell me he never considered it.

21 MR. METCALFE: He never considered the FOIA's
22 susceptibility of that information but he did rule because of
23 the nature of the information and basically its privacy
24 information cognizable under 7(c) of the Freedom of Information
25 Act, that that information was so sensitive because of how it

1 was obtained, it should not see the light of day for at least
2 fifty years.

3 It is the Department's position it is so clear
4 under Judge Smith's order that this information should not be
5 disclosed.

6 THE COURT: Because of some exemption.

7 MR. METCALFE: Because of the nature of the informa-
8 tion which is cognizable, I am sure, under 7(c) and perhaps
9 the two are coextensive in this case.

10 The Department felt itself first and foremost bound
11 by Judge Smith's order. So that is why --

12 THE COURT: I don't understand that. But I have
13 never seen Judge Smith's order.

14 MR. METCALFE: Judge Smith's order is attached as
15 Exhibit A to our motion for summary judgment, Your Honor.

16 THE COURT: I saw that but I have not seen the
17 context of it. I don't know what kind of a case it was.
18 I don't know how he got involved in it. I don't have an under-
19 standing.

20 How did it come before Judge Smith?

21 MR. METCALFE: The entire opinion is attached as an
22 exhibit to the memorandum. I understand that it was --

23 THE COURT: The opinion is not too informative.

24 MR. METCALFE: I was not involved in that lawsuit,
25 Your Honor. It is my understanding from reading the opinion

1 that it was brought by a number of individuals challenging
2 the FBI's surveillance of Dr. King.

3 THE COURT: Yes.

4 MR. METCALFE: Who maintained because of that sur-
5 veillance and also because of the unique sensitivity of the
6 information, that that information should be placed in the
7 Archives.

8 THE COURT: Now I read in the papers that that in-
9 formation is leaking and that various people whose names
10 are mentioned in that information are insisting that it be
11 made public. Roy Wilkins, among others.

12 Now I don't understand what is going on.

13 MR. METCALFE: I am not intimately familiar with what
14 is going on, either, Your Honor, other than that perhaps some
15 individuals are having second thoughts. But still the
16 privacy interests of Dr. King's family remain; and I don't
17 believe there has been any change in that position. As a
18 matter of fact --

19 THE COURT: Did they oppose its release before
20 Judge Smith?

21 MR. METCALFE: I don't recall whether the King
22 family was a party to that lawsuit, Your Honor; but I know
23 that they have stated publicly on many occasions that they
24 do oppose release of that information.

25 THE COURT: Yes.

*Not
time*

?

1 MR. METCALFE: If I could venture to say, I believe
2 for good reason, Your Honor, given both the unique sensitivity
3 of it as well as the circumstances under which it was ob-
4 tained.

5 I would also like to point out, if I can, that it
6 appears, based upon the papers that have been filed before
7 Your Honor, that Mr. Lesar understands the unique sensitivity
8 of that information and in fact he has not included a dis-
9 cussion of that Court order and has not pressed his insistence.

10 THE COURT: He did. There is some reference in
11 his papers to it.

12 Do you want it, Mr. Lesar?

13 MR. LESAR: Well, I guess I am put in an uncomfor-
14 table position.

15 Basically, the problem is, I don't know, because there
16 has been no adequate characterization of the material, what
17 in fact it includes.

18 THE COURT: It includes, as I understand it, surveil-
19 lance of Dr. King's personal habits.

20 MR. METCALFE: That is correct, Your Honor.

21 MR. LESAR: If that is all, then I wouldn't be in-
22 terested in it. There is some indication, I think, that it
23 may include other matters. For example, political discussions.

24 THE COURT: Oh, surely. If Dr. King was under sur-
25 veillance, he was talking political matters. He was in the

1 cutting edge of political issues and obviously he would be
2 talking about some political issues in the sense of the
3 civil rights movement.

4 MR. METCALFE: Still matters which impact upon his
5 right of personal privacy, Your Honor.

6 THE COURT: I don't know about this whole privacy
7 problem. I think I have to find out from you, Mr. Lesar,
8 whether you want it.

9 MR. LESAR: Well, I would want those materials that
10 would bear on political questions.

11 THE COURT: What do you mean by political questions?

12 MR. LESAR: Well, what Dr. King's organization was
13 going to do at a particular time, say, at the Atlantic City
14 Convention of the Democratic Party. Discussions they may
15 have had with members of the Administration, or conversations
16 reflecting their dealings with the Administration. Those
17 kinds of things.

18 THE COURT: You mean that ties into your conspiracy
19 theory? By this surveillance they knew what was going to be
20 happening where he was assassinated?

21 MR. LESAR: No, no, absolutely not. Let me separate
22 myself immediately from those who think that the FBI had any-
23 thing to do with shooting Dr. King, in the sense that they
24 planned it or --

25 THE COURT: You are interested in Dr. King's political

1 views.

2 MR. LESAR: Well, it is a little more complicated
3 than that.

4 THE COURT: You tell me what it is.

5 MR. LESAR: Yes. I am interested in particular in
6 the campaign of the FBI against Dr. King.

7 THE COURT: That includes just exactly what they
8 were surveilling.

9 MR. LESAR: Well, with respect to certain of the
10 personal habits, with respect to, for example, any sexual
11 conduct, the privacy interest there may override the public
12 interest. I am not directly concerned with that. There is
13 enough known about that already.

14 However, with respect to information that they may
15 have gained of a political nature, for example, that would
16 enable the Government to anticipate political moves by
17 Dr. King and his organization and to take some action against
18 them --

19 THE COURT: Then you do want the material.

20 MR. LESAR: That material, yes, absolutely.

21 THE COURT: As I understand it, from smatterings of
22 material that I have seen, there is indication the Bureau
23 was following King and following where he was going and trying
24 to discredit him wherever he went. If he was going to make
25 a speech or going to see the Pope or whatever he was going to

1 do, they tried to discredit him.

2 MR. METCALFE: I think that it is clear that the
3 electronic surveillance was very close indeed, Your Honor.
4 I think that is part of what persuaded Judge Smith that that
5 information obtained by the FBI under the circumstances --

6 THE COURT: They had no business obtaining it in the
7 beginning.

8 MR. METCALFE: -- should not be made public.

9 THE COURT: What is the theory that it should not be
10 made public if we are looking at the conduct of officials?

11 MR. METCALFE: When we talk about the information,
12 Your Honor, we are talking about the content, the substance.

13 THE COURT: Well, the fact that he was going to see
14 the Pope is nothing private. I am sure it was all over the
15 face of the papers at the time. I think he did go to see the
16 Pope.

17 MR. METCALFE: I don't know if that information has
18 been withheld, Your Honor, pursuant to Judge Smith's order.

19 THE COURT: It is among the materials, papers on
20 file with me indicate.

21 MR. METCALFE: If it is among the materials,
22 Your Honor, then it has not been withheld.

23 THE COURT: There is reference to it. Not reference
24 to the surveillance but reference to the issue.

25 MR. METCALFE: That has been disclosed. What

1 Your Honor has before him are the expurgated copies.

2 THE COURT: Are you telling me you are withholding
3 only the sex material?

4 MR. METCALFE: I cannot bear first-hand witness to
5 that, Your Honor. However, it is my understanding -- and
6 I have communicated this to Mr. Lesar telephonically -- that
7 the information withheld pursuant to Judge Smith's Court
8 order is that which was clearly obtained through electronic
9 surveillance or because of its sexual content could have
10 been obtained only under those circumstances and that that
11 appears to be what this information involves, highly personal
12 data pertaining to Dr. King.

13 Again, because of the manner in which it was ob-
14 tained, the content of the information bears very directly
15 upon Dr. King's privacy interests.

16 THE COURT: Let me put it to you now. You haven't
17 seen it, I take it?

18 MR. METCALFE: No, I have not read personally every
19 item of information withheld.

20 THE COURT: Right. So somebody has put over this
21 material a blanket claim of exemption, referring to
22 Judge Smith's order.

23 What do the litigants here expect me to do? Do
24 they expect me to shut this Court down and sit down and read
25 all that stuff?

1 MR. METCALFE: Absolutely not, Your Honor.

2 THE COURT: Then how are we going to resolve it?

3 MR. METCALFE: I suggest that it can be resolved
4 on the basis of Judge Smith's Court order.

5 THE COURT: I will tell you now, it can't be.

6 MR. METCALFE: I see, Your Honor.

7 THE COURT: Because he has made no Freedom of
8 Information Act ruling.

9 MR. METCALFE: Does Your Honor understand that the
10 Department of Justice was, nevertheless, bound by that Court
11 order?

12 THE COURT: No. I understand that you are restricted
13 by it but that you weren't bound in a Freedom of Information
14 Act case by it.

15 I don't understand that. You could have come to
16 me and said: This information is clearly covered by the
17 Freedom of Information Act. There is no limitation, no
18 exemption that applies to it and we ask Your Honor, pursuant
19 to Judge Smith's order, to release those portions that are
20 covered by the Act.

21 MR. METCALFE: So if I understand Your Honor, you
22 do not feel that Judge Smith's Court order has any cognizance
23 under the Freedom of Information Act?

24 THE COURT: It is not a Freedom of Information Act
25 order.

1 MR. METCALFE: No, that is correct.

2 THE COURT: So how could it? I am an inexperienced
3 lawyer perhaps but I don't understand how it could if he hasn't
4 decided it. I would be bound by it if he had decided it.

5 MR. METCALFE: I guess I can only suggest to
6 Your Honor, based upon the nature of the information in general,
7 the circumstances of which everyone is very familiar with --

8 THE COURT: I am not. You say you haven't read it.
9 So who is there around here that is? Mr. Lesar wants to see
10 it. He hasn't seen it.

11 MR. METCALFE: If I can continue. The circumstances
12 to which I am referring are the circumstances of electronic
13 surveillance on Dr. King, which is widely known.

14 Based upon those circumstances, based upon the fact
15 that Judge Smith felt that the information which he ordered
16 should not be disclosed was perhaps improperly obtained and
17 very personal information, I would suggest to Your Honor that the
18 information obtained by the FBI in this way and withheld under
19 the Court order in this case is coextensive with Exemption
20 7(c) or Exemption 6 of the Freedom of Information Act.

21 THE COURT: How am I going to test that? That is my
22 question to you. You can't even aid me because you haven't
23 read it.

24 Do I have to sit down now and read it or what do I
25 do?

1 MR. METCALFE: Your Honor, what I could do or what
2 the Government could do is once again review that information,
3 if it would be the Court's preference, rather than the Court
4 getting directly involved in it. I imagine that would be
5 the Court's preference. And testify to the coextensivity
6 between the Court order and the privacy exemption in the
7 Freedom of Information Act.

8 THE COURT: The fact that it was improperly obtained
9 has nothing to do with it. The Government files are full of
10 materials that were improperly obtained.

11 I understand the importance of preserving Dr. King's
12 privacy, certainly in the sexual area. Mr. Lesar is not
13 interested in knowing whether it shows that he had an illness
14 at a particular time, or anything of that kind. But if there
15 is information developed by this surveillance technique which
16 bears on public issues, in which Dr. King, himself, was taking
17 public positions regularly and frequently, in any event, and
18 effectively, of course, that is the kind of material
19 Mr. Lesar is talking about.

20 I have difficulty seeing just in this preliminary
21 stage what privacy aspect there is to that. His views un-
22 doubtedly are comparable to the views he was publicly expres-
23 sing.

24 MR. METCALFE: I am not certain if or to what extent
25 such information has been withheld under the Court order.

1 But if Your Honor wishes --

2 THE COURT: You see, I don't either.

3 MR. METCALFE: -- the Department of Justice can
4 review that information once again and attest to the coex-
5 tensivity between that information and the Privacy Act.

6 THE COURT: I am not making any rulings at this
7 stage. I am trying to isolate what our problems are. I
8 think we have isolated this and we are a little more clear
9 on the police.

10 Now what is another category?

11 MR. METCALFE: Another exemption category,
12 Your Honor?

13 THE COURT: No, category of documents. I am not
14 interested in the exemption categories. I am trying to figure
15 out what it is that you are not letting Mr. Lesar see.

16 MR. METCALFE: O.K. Basically that information
17 falls into categories according to the reasons for the with-
18 holding.

19 There is national security information.

20 THE COURT: I understand that. Now where does that
21 appear.

22 MR. METCALFE: That is classified.

23 THE COURT: Where does that develop?

24 MR. METCALFE: That appears throughout the informa-
25 tion, Your Honor.

1 MR. LESAR: Let me say it appears in three cate-
2 gories of documents. First, in the Murphy Report and the
3 Pottinger memorandums. I think probably now only the
4 Murphy Report has parts of it that have been withheld under
5 the national security plan.

6 Secondly, some documents and parts of documents in
7 Appendix A to the Shaheen Report.

8 THE COURT: To the what report?

9 MR. LESAR: I call it the Shaheen Report. It is
10 the Task Force Report. Mr. Michael Shaheen directed it.

11 THE COURT: Right.

12 MR. LESAR: And, thirdly, excisions from documents
13 in Appendix C.

14 THE COURT: All right. My first question then about
15 that is, what is the volume of that?

16 MR. LESAR: With respect to Appendix A, I am not
17 absolutely certain because a number of pages of some of the
18 documents, I think, have now been provided. But there were
19 a total of 18 exhibits in Appendix A. Probably half of them
20 were made public. Three or four with some excisions. A
21 couple have been provided since.

22 So we are probably talking about five or six docu-
23 ments that have been withheld in toto and three or four that
24 there have been excisions from.

25 MR. METCALFE: Excuse me, Your Honor. I believe

1 there were only two documents, Exhibits 17 and 18, of
2 Appendix A that have been withheld in their entirety and those
3 are classified documents. There are excisions in other docu-
4 ments.

5 THE COURT: How much is there in the Murphy Report?

6 MR. LESAR: The Murphy Report is 51 pages long. I
7 would say that probably two-thirds of it is public. Just as
8 a very rough estimate.

9 THE COURT: Appendix C are isolated documents, I take
10 it?

11 MR. LESAR: Not really isolated documents but ex-
12 cisions. We are not really talking about documents, the
13 original documents. We are talking about the notes on the
14 documents and sentences in the notes have been deleted under
15 an Exemption 1 claim for the most part. There may be a few
16 exceptions to that.

17 THE COURT: All right. Now what is the nature of
18 the national security problem? Am I dealing with surveillance
19 of foreign embassies?

20 MR. METCALFE: No, you are not, Your Honor.

21 THE COURT: What kind of national security informa-
22 tion am I dealing with?

23 MR. METCALFE: That is indicated in the affidavit
24 of Lewis Small, which applies to all of the documents with-
25 held on a classified basis.

1 THE COURT: He just says he looked at them and he
2 thinks the national security is important.

3 MR. METCALFE: As indicated in that affidavit,
4 Your Honor, the national security interest involved here has
5 to do with a system of sources and methods that was in
6 existence at the time that this information was obtained about
7 Dr. Martin Luther King and remains in existence; and that
8 system of sources and methods has very direct bearing upon
9 the national security.

10 There are also foreign aspects to that, as revealed
11 in the affidavit of Special Agent Small.

12 For that reason the information has been determined
13 that it could reasonably be expected to cause some harm to
14 the national security. The level of harm, of course, determines
15 the level of classification under the Executive Order.

16 The information withheld in this case as classified
17 information ranges from Confidential to Secret to Top
18 Secret.

19 THE COURT: In my last experience with national
20 security claims, I spent days in chambers looking at documents,
21 hearing witnesses in camera ex parte, sustaining the national
22 security claim; the case was appealed; and as soon as it got
23 to the Court of Appeals, the Government dropped all national
24 security claims.

25 Now that is my last experience with the Department

1 of Justice on this matter.

2 Have you looked at these national security claims?
3 Do you know anything about them yourself or is it just some
4 agent who thinks it is important?

5 MR. METCALFE: Have I, personally, looked at the
6 information?

7 THE COURT: Yes.

8 MR. METCALFE: I have looked at some of the informa-
9 tion, Your Honor, but I do not think it is appropriate for
10 me to be in the position of vouchsafing myself the national
11 security implications of the material. I am not an expert
12 in that.

13 THE COURT: You are not any more than the Court is.

14 MR. METCALFE: Perhaps that is so, Your Honor.

15 THE COURT: I don't know anything about national
16 security.

17 MR. METCALFE: The Court has more extensive experience
18 than myself.

19 I would suggest, however, that there is no issue of
20 bad faith here; and that under the Weissman decision, with
21 which I am sure Your Honor is very familiar --

22 THE COURT: I wrote it.

23 MR. METCALFE: -- having authored the decision --

24 THE COURT: I don't know what the stage of that case
25 is. Did they get an en banc in it? Have they had the en banc

1 or is the Government going to the Supreme Court? I don't
2 know.

3 MR. METCALFE: I don't believe there has been any
4 appeal of that, Your Honor. I am not familiar with any such
5 appeal. I know the Weissman decision, as indicated in our
6 papers, has been applied in several other Circuit Courts, as
7 well as in several other District Courts.

8 THE COURT: I know it has been somewhat followed but
9 I didn't know whether the case had come to rest or whether
10 there was an en banc or cert. application pending in the case.

11 We can find that out.

12 MR. METCALFE: I imagine so, Your Honor.

13 Under the Weissman decision, this claim would be
14 sustained without any in camera review. I would suggest that
15 the affidavit is adequate for that result to apply here,
16 Your Honor.

17 THE COURT: Well now, I have got two categories,
18 you see.

19 This is being very helpful to me. It may not be
20 helpful to you.

21 MR. METCALFE: I am sure it is helpful to the in-
22 terests of justice, Your Honor.

23 THE COURT: It is bringing what I have to decide into
24 some kind of clarity.

25 What is the next category?

1 MR. METCALFE: Did Your Honor say that he did not
2 wish to speak about the symbol numbers?

3 THE COURT: That is right.

4 MR. METCALFE: Or about the special agents' names
5 withheld under 7(c)?

6 THE COURT: Right. I want to come to the names at
7 the last. What other categories do we have or do we have
8 any others?

9 MR. METCALFE: Well, the only other category may be
10 the information withheld in individual excisions pursuant to
11 Exemption 7(c) and Exemption 7(d).

12 THE COURT: Privacy and investigative techniques.

13 MR. METCALFE: No, Your Honor, investigative tech-
14 niques is Exemption 7(e). I apologize. That is yet another
15 category.

16 There is information withheld under 7(c).

17 THE COURT: As to techniques, as to privacy and as
18 to --

19 MR. METCALFE: Your Honor, the information with-
20 held under Exemption 7(e), law enforcement techniques and
21 procedures, that exemption has been applied only minimally.
22 That has nothing to do with the privacy interest.

23 THE COURT: That is a separate category, privacy.
24 What is another category?

25 MR. METCALFE: The confidential source information,

1 which is in large part coextensive with 7(c), with privacy.

2 THE COURT: Often it reveals the source.

3 MR. METCALFE: Often the same sort of information
4 that would reveal the source, yes, would have privacy ramifi-
5 cations, exactly.

6 THE COURT: I am familiar with seeing that in other
7 Freedom of Information Act cases. Mrs. So-and-So, who is
8 the divorced wife of So-and-So and is reputed to be a shop-
9 lifter and has so-and-so -- that is the kind of information
10 you are talking about.

11 How many documents are there of that kind where
12 excisions have been made based on techniques and procedures
13 and privacy?

14 MR. METCALFE: Your Honor, first of all, I should
15 point out that the 7(d) and 7(e) exemptions have not been
16 applied to the Civil Rights Division documents, to the
17 Murphy Report. But all three of those exemptions have been
18 applied where necessary to withhold individual pieces of
19 information from the notes that are in the appendices.

20 THE COURT: How many documents are there of that
21 kind.

22 MR. METCALFE: I don't know offhand what the number
23 is. However, all of the documents where such excisions have
24 been made have been filed with the Court.

25 On February 1, the Government filed with the affidavi

1 of Mr. Shaheen a copy of every page in which an excision or
2 deletion for any purpose, including classified information,
3 was made. Those pages are on file with the Court.

4 THE COURT: Yes. I take it they are down in one
5 of those sealed envelopes.

6 MR. METCALFE: No, Your Honor, I should make clear
7 that these are the expurgated copies.

8 THE COURT: That is right. I knew about that. I am
9 trying to find out how many I have to look at to see if the
10 expurgations are correct.

11 MR. LESAR: Your Honor, I think that from what they
12 filed, they have filed --

13 THE COURT: The documents they gave to you.

14 MR. LESAR: Yes. If they are correct in stating that
15 they filed copies of all pages from which excisions have been
16 made, I would think it would be around 300, 400 pages maybe.

17 THE COURT: We estimated around three or four hundred
18 pages based on looking at the affidavits. When I say, we,
19 I mean my law clerk and I, when we were trying to figure it
20 out.

21 Now, if I were to test those excisions, because they
22 are contested, how would I go about that?

23 MR. METCALFE: Your Honor, I should point out
24 quickly that I believe there are well over three or four
25 hundred pages involved.

1 THE COURT: From which you have excised something?

2 MR. METCALFE: Yes. I think there is a stack that
3 has to be about this high. For example, I know that the
4 volume of information provided to the Court on February 1,
5 where excisions have been made, far exceeds that.

6 THE COURT: But that includes excisions relating
7 to symbols and excisions relating to names of investigators.

8 You say that here is a guy you know who lives out
9 in Springfield, Virginia and he is an FBI agent. Everybody
10 knows he is an FBI agent. And he tells everybody out there
11 he has to go away on the Martin Luther King investigation.
12 You don't want anybody to know that because it will destroy
13 his investigative techniques. So you excise his name.

14 MR. METCALFE: I am just saying, I am not at all
15 sure that it is only 300 pages in which that type of excisions
16 you are talking about, 7(c) and 7(d) and 7(e), were made. I
17 think it is more than that.

18 THE COURT: How would I test those excisions?

19 MR. METCALFE: One way, Your Honor, is to look at
20 the expurgated copies and see the nature of the deletion.

21 THE COURT: You cannot tell from the expurgated copies.

22 MR. METCALFE: You cannot, of course, tell what
23 information was deleted but I would respectfully submit, with
24 respect to this type of information, particularly 7(c), which
25 is often a name only, a name of a third-party, not an FBI

1 agent, and with respect to 7(d) which is often an informant's
2 name or information about an informant, that the Court can
3 determine, based upon the expurgated copies, that that,
4 indeed, as well --

5 THE COURT: There are some places where you have
6 taken out a paragraph, haven't you?

7 MR. METCALFE: That is correct, Your Honor. I would
8 suggest that the affidavits that are on file are adequate to
9 describe that.

10 THE COURT: Well, they don't tell me anything. If
11 that is what you mean. They just tell me that some agent of
12 the Bureau has decided he doesn't want me to see it.
13 They don't tell me anything else.

14 MR. METCALFE: With all due respect, Your Honor --

15 THE COURT: I am not criticizing the way you have
16 proceeded at all.

17 I wrote four decisions, I think it was, saying that
18 this in camera ex parte process derogated the Courts and dero-
19 gates the system of justice. I still feel that way.

20 I have been overruled on that and the Court of
21 Appeals instructs and the Supreme Court instructs that in
22 camera review be made.

23 Now the way that other agencies have proceeded in
24 this regard, which I have found helpful, is that they have
25 pasted over the original with translucent tape so that I can

1 pick up the document and by reading through the translucent
2 tape see immediately what it is that is being excised. It
3 facilitates the in camera review which I suppose here would
4 take two or three months.

5 MR. METCALFE: I think it would be rather lengthy.

6 THE COURT: Yes, two or three months of work. But
7 I know of nothing else to do about it. I can't just accept
8 what you tell me.

9 MR. METCALFE: With all due respect, Your Honor, I
10 feel compelled to state for the record that the affidavits
11 on file with the Court do attest to the fact that this informa-
12 tion is privacy information, that it contains the name of
13 a confidential source, that it contains unknown investigative
14 techniques, and that courts around the country and I am sure
15 Your Honor in other cases --

16 THE COURT: I am talking about this jurisdiction. I
17 know what they are doing around the country. The problem is
18 in the District of Columbia.

19 MR. METCALFE: Even in other cases the Courts have not
20 routinely made in camera inspection of 7(d) and 7(c) material
21 and have taken such affidavits as adequate.

22 THE COURT: Mr. Lesar comes and says they weren't
23 classified until he asked for them. Then they rushed in and
24 classified it.

25 What am I supposed to think from that? Apparently

1 in some cases the classification stamp was put on not when
2 they originated, as required by the classification law, but it
3 was classified when it was apparent Mr. Lesar wanted to see
4 them.

5 MR. METCALFE: I would like to address that. It is
6 a point from which the Government does not wish to shy in
7 this case.

8 THE COURT: No, it can't.

9 MR. METCALFE: That thought did flicker across my
10 mind, Your Honor.

11 It is very clear on the basis of the affidavits that
12 classification did not take place until subsequent to
13 Mr. Lesar's request.

14 THE COURT: Right.

15 MR. METCALFE: Again, I should stress that we are
16 talking about classification of the notes of the Task Force,
17 which are second generation notes, that Mr. Lesar has ade-
18 quately explained, of the FBI documents.

19 The Government has tried to indicate in the brief
20 that the members of the Task Force, believe me, have no
21 FOIA knowledge whatsoever. If they did, I think they would
22 not have maintained the copies of the Memphis PD records,
23 causing another problem. Because of that, they did not recog-
24 nize that there was a need to classify them immediately.

25 I sincerely think it is not surprising that it

1 wasn't until the potential disclosability of all of this
2 information was brought into question by Mr. Lesar's request,
3 which I point out was only a couple of weeks after the time
4 they finished their work, that the information began to get
5 classified.

6 THE COURT: Now there is another way to deal with
7 this. We are just sort of talking here.

8 Do you have the originals here in Court?

9 MR. METCALFE: No, Your Honor, I do not.

10 THE COURT: I didn't expect that you would.

11 MR. METCALFE: No.

12 THE COURT: One way to do it is simply to use what
13 is a test technique.

14 Let's accept Mr. Lesar's estimate that there are
15 400. You think there are more.

16 MR. METCALFE: I think that is incorrect, Your Honor.

17 THE COURT: Assume there are 400, just for discussion
18 purposes. If you were to bring the 400 into Court or into
19 my chambers --

20 MR. METCALFE: Are we speaking of 7(d), 7(c) and
21 7(e)?

22 THE COURT: We are talking about this category of
23 excisions.

24 MR. METCALFE: O.K., Your Honor.

25 THE COURT: -- and I were to say, I think I will

1 look at five. I reach in and pick out five and look at them.
2 I find those five are all as you represent. In other words,
3 that is another way.

4 MR. METCALFE: A spot check.

5 THE COURT: What we call a spot check. I don't want
6 to do any of this, you understand, but I feel some obligation
7 about it. I am trying to explore with you.

8 I suppose that kind of technique would be agreeable
9 with you, Mr. Lesar.

10 MR. LESAR: I think so, as long as the sample is
11 adequate.

12 It is possible that there may be another innovation
13 that I might suggest. I really haven't thought it through.
14 At times in connection with another case that we have pending
15 for King assassination materials, we have suggested to the
16 Department that really rather than going through all the time
17 and expense of deleting under 7(c) and 7(d), that they just
18 ought to call Mr. Weisberg up and ask him what he knows about
19 someone and whether or not it is public, what he knows is
20 public.

21 THE COURT: What he knows isn't public. I am not a
22 bit impressed with that argument in your papers. The fact that
23 he can make a very educated guess as to what somebody's name
24 is has nothing to do with whether or not the document can be
25 released.

1 MR. LESAR: I think that is not the point. The
2 point is not that he can make an educated guess but he knows
3 that the material in fact has been published in a book or it
4 was in a court proceeding. That is the point.

5 THE COURT: All right.

6 What is the next category? I take it there is a
7 whole report being withheld here somewhere, isn't there?

8 MR. METCALFE: A whole report being withheld? No,
9 Your Honor. The only materials that have been withheld in
10 their entirety, I believe, are, as I mentioned earlier,
11 Exhibits 17 and 18, part of Appendix A, which are entirely
12 classified, and the Memphis PD records; and there are also
13 29 pages of Atlanta PD records.

14 That may be the only remaining category.

15 If I could quickly add, though, Your Honor, the
16 Court is clearly looking for possibilities and I would feel
17 negligent if I didn't suggest, because of the expurgated
18 copies of each of these pages that you were just speaking about
19 a moment ago as the category of 7(d), 7(c) and 7(e) being on
20 file with the Court, if Your Honor looked at the expurgated
21 copies and saw one or two that raised a suspicion in your
22 mind --

23 THE COURT: I could ask for that.

24 MR. METCALFE: -- you could identify them that way and
25 we would be glad, of course, to comply with the Court's

1 request for those.

2 THE COURT: I, frankly, am absolutely devoid of
3 suspicion. I don't have any suspicion in this case one way
4 or the other.

5 MR. METCALFE: I didn't mean to imply that you did,
6 Your Honor.

7 THE COURT: Is there any other category or have we
8 covered it?

9 MR. LESAR: I think we have covered it.

10 I have a question of information that I would like
11 to ask, which may be of assistance to the Court, because it
12 is not clear to me from the Government's papers and affidavits
13 whether or not any of the underlying originals were ever
14 classified and if so when.

15 In other words, they have taken notes on documents
16 and it seems to me clear from Mr. Preusse's affidavit that at
17 least some of them and perhaps all of them were not classified.

18 MR. METCALFE: Your Honor, Mr. Lesar is speaking
19 of the parent documents for the note documents that are at
20 issue.

21 THE COURT: Yes.

22 MR. METCALFE: It is my understanding -- I checked
23 this as recently as this morning, as a matter of fact -- that
24 they are classified at the FBI. Of course, those are not the
25 documents at issue here.

1 THE COURT: No, but it does bear a little on the
2 issue. It supports your explanation of the process that has
3 taken place.

4 MR. METCALFE: Yes, Your Honor.

5 MR. LESAR: I am not so sure that it does because
6 these documents, the underlying documents, as he refers to
7 them, the parent documents, were transmitted to the Church
8 Committee in 1975 and we don't know when they were classified,
9 whether or not they were classified after that or before
10 that.

11 THE COURT: But the transfer to the Church Committee
12 doesn't make them a part of the public domain.

13 MR. LESAR: Presumably at that point, if they
14 realized that they were still unclassified and contained class
15 fied information, they would have classified at that point.

16 MR. METCALFE: I believe that they were classified
17 subsequent to 1972, at which point the FBI changed the policy.
18 The policy prior to 1972 was that documents for internal use
19 only were not individually classified because there was a
20 general policy that all FBI documents were considered Top
21 Secret. All their files were Top Secret in that way.

22 I believe that the parent documents have been --
23 I have been told that they have been classified and I believe
24 that they were classified subsequent to 1972. But, again,
25 those are documents that are not at issue here. The only real

1 issue before the Court is the (b)(1) applicability of the
2 second generation documents.

3 THE COURT: How bulky is the material at Archives?

4 MR. METCALFE: I must confess to very little first-
5 hand knowledge of that. That case took place before I joined
6 the Government and I can only assume that it is not insub-
7 stantial or else the lawsuit would not have been filed to
8 protect that information.

9 THE COURT: Is that case on appeal, Judge Smith's
10 order?

11 MR. METCALFE: Not to my knowledge, Your Honor.

12 THE COURT: Probably both sides were satisfied with
13 what he had done.

14 MR. METCALFE: I believe that may have been the
15 case but I lack certain knowledge of that.

16 THE COURT: In telling you gentlemen that I didn't
17 want to hear argument, I am not deprecating your papers; but
18 you both have filed very detailed papers and I didn't really
19 see how a sort of forensic session here would help me.

20 I can read and I will read now with the benefit of
21 this discussion that has taken an hour of time here this
22 morning your papers and I think I will be able to get a better
23 understanding of what the case is about.

24 MR. METCALFE: I would like to reiterate, Your Honor,
25 with all due respect, the Department is confident that the

1 affidavits and the information on file with the Court should
2 readily compel the conclusion that the information is
3 exempt.

4 I understand Your Honor's concern about that cate-
5 gory of information which has been withheld pursuant to
6 Judge Smith's Court order. I would like to reiterate once
7 again, if Your Honor views it as appropriate, I believe the
8 Department of Justice could reprocess that information.

9 THE COURT: One of the difficulties is that Mr. Lesar
10 isn't very clear as to what he wants.

11 MR. METCALFE: To be quite candid, there is even a
12 footnote in the Government's reply memorandum, I believe, which
13 comments upon the fact that Mr. Lesar did not press his case
14 with respect to the materials deleted under the Court order
15 and it was suspected that Mr. Lesar did not want that informa-
16 tion.

17 So I am even more so surprised that it has come up
18 today and suggest that it might not even be necessary that
19 anything further take place to further delay this action.

20 MR. LESAR: Your Honor, I have one further suggestion
21 I am aware of the Court's understandable leeriness of ex parte
22 in camera inspection with respect to national security matters.
23 I have in another case unsuccessfully moved for in camera
24 inspection with the assistance of a classification expert.
25 I would be prepared to so move in this case and to suggest

1 the classification expert that I would feel confident with,
2 and that you might want to consider perhaps more than one,
3 to assist and advise the Court on national security implica-
4 tions.

5 MR. METCALFE: Your Honor, if I could speak to that.

6 The Department would oppose that rather strenuously.

7 THE COURT: So would the Court.

8 MR. METCALFE: Not to reiterate the arguments that
9 are on the papers before the Court, Mr. Lesar has raised a
10 number of arguments with respect to (b)(1) material.

11 The Government is confident that they have been ad-
12 dressed adequately on the papers and there is no basis for
13 in camera inspection.

14 THE COURT: Before I decide whether I want to examine
15 or not, there is this difficulty, which I have experienced
16 in other cases.

17 If you have to write a public affidavit to explain
18 the national security implications of material that you are
19 withholding, no matter how it is written, it is very uninforma-
20 tive because you can't, in the nature of things, discuss the
21 real security issue because then you blow the cover.

22 MR. METCALFE: I understand.

23 THE COURT: I was wondering whether the thing to do
24 with respect to these two particular exhibits -- what is it,
25 17 and --

1 MR. METCALFE: Nos. 17 and 18, I believe, Your
2 Honor.

3 THE COURT: -- 17 and 18, might not be for the
4 Government to file promptly with the Court an in camera affi-
5 davit with the documents attached, so that in some fashion
6 the Court could appraise the validity of the claim.

7 MR. METCALFE: Your Honor, of course, is aware of the
8 Filippi decision and the fact that Judge Gasch in that case
9 followed that procedure with not entirely successful results.

10 I just state that as a caution to that particular
11 mechanism.

12 THE COURT: The only other mechanism to go by is to
13 follow the view I expressed in Weissman and to accept the
14 claim.

15 MR. METCALFE: Your Honor, I would like to say two
16 things, if I can:

17 One, the point that was raised a moment ago by the
18 Court about the sometimes inability of the Department, the
19 FBI to speak comprehensively about the basis of national
20 security classification is very apropos in this case. As
21 a matter of fact, I described the nature of that information
22 with very carefully chosen words.

23 THE COURT: I am sure you did.

24 MR. METCALFE: I spoke of that under very specific
25 instructions from the FBI as recently as this morning, about

1 a half hour before I came to Court.

2 I called that a system of sources and methods which
3 does have foreign relations aspects. That is what basically
4 has been stated in the affidavits before the Court. That
5 is a particular problem here.

6 I would suggest that any lack of depth or any lack
7 of comprehensiveness in the affidavit does not give rise
8 to a suspicion --

9 THE COURT: Oh, no.

10 MR. METCALFE: -- that the Department has not pro-
11 ceeded properly but may be explained as a result of that.

12 THE COURT: I was saying to you I understood that.

13 MR. METCALFE: I wanted to make it clear to the
14 Court.

15 THE COURT: You can't say: This is clearly national
16 security and I want to explain to you why. By the time you
17 get through, you have disclosed exactly what it is you are
18 not supposed to disclose.

19 MR. METCALFE: I wanted to make it clear to the
20 Court that Your Honor was right on the button and his observa-
21 tion was particularly apropos in this case.

22 THE COURT: Would the documents, themselves, make
23 the national security matter immediately apparent to an
24 untutored observer like myself?

25 MR. METCALFE: That is an excellent question,

1 Your Honor. I have been told and know only second-hand and
2 know only as a national security layman that in fact the
3 documents may not at first glance to the untutored eye make
4 that clear. Which is, of course, one of the inherent prob-
5 lems in in camera review by a judge who, of course, may be
6 well experienced, as Your Honor is, I am sure, but not privy
7 to broad ramifications as they are at the FBI.

8 THE COURT: Who made the national security determina-
9 tion here? How was it done?

10 MR. METCALFE: That was done by duly authorized
11 classification officers at the FBI. Of course, pursuant to
12 the requirements of Exemption (b)(1) and, of course, the
13 Executive Order, Special Agent Lewis L. Small, when he pro-
14 vided the affidavit to the Court, was required to review
15 all of that information.

16 THE COURT: Once again?

17 MR. METCALFE: One again to make that determination,
18 as well as to attest to the Court that the information is
19 properly and currently classified pursuant to the substantive
20 and procedural requirements of the Executive Order.

21 THE COURT: Well, gentlemen, I think we have covered
22 everything we can. I want to thank both of you. I will do
23 the best I can with it.

24 If I need more help, I will be in touch with you
25 both.

1 MR. METCALFE: Thank you, Your Honor.

2 MR. LESAR: Thank you.

3 (Whereupon at 10:45 a.m., the hearing was concluded.)

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7 CERTIFICATE OF COURT REPORTER

8 I, Ida Z. Watson, certify that I reported the proceed
9 ings in the above-entitled cause on June 9, 1978 and that
10 the foregoing Pages 1 to 52, inclusive, constitute the
11 official transcript.

12 Ida Z. Watson
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