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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.
July 20, 1978

The above-entitled cause came on for Status
Conference 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

SA

P R O C E E D I N G S

1
2 THE COURT: Good morning, gentlemen. I have gotten
3 you in to raise a problem with you and to get your help on the
4 pending matters before the Court.

5 The Court has resolved in its own mind and has a
6 decision ready with respect to all of the issues presented
7 except the problem relating to the Atlanta and Memphis Police
8 Departments.

9 In looking at the papers, the Court is confronted
10 with the fact that the only description of these documents
11 available is the rather generalized description found in the
12 attachment to the duces tecum subpoena which was served on the
13 Memphis people.

14 Attached to that subpoena is a one-page description
15 of the records. It isn't very informative.

16 What I have been considering doing is to take an
17 in camera view of the Memphis records, if that is feasible in the
18 next few days, or even if it is feasible perhaps today, later
19 today.

20 How voluminous are those records in terms of
21 quantity?

22 MR. METCALFE: Your Honor, those records number ap-
23 proximately 400 pages, separated through five, maybe six
24 volumes.

25 THE COURT: What do you mean, separated? You mean

1 they are in volumes?

2 MR. METCALFE: They are contained in five or six
3 separate volumes, yes.

4 May I speak to that point, Your Honor?

5 THE COURT: Yes.

6 MR. METCALFE: I would like, if I could, at least
7 for the record, to articulate the Department of Justice's
8 position with respect to those documents.

9 They have been maintained by the Department under
10 confidentiality and it is the Department's position in this
11 lawsuit that they are entitled to "blanket exemption."

12 THE COURT: I understand that. Your papers make
13 that clear.

14 MR. METCALFE: Under Exemption 7(D). For that
15 reason we would think that an in camera inspection would not
16 be necessary.

17 The only issue before the Court would be whether
18 the documents were provided in confidence by the Memphis and
19 Atlanta Police Departments to the Department in confidence
20 and should be maintained in confidence and, therefore, should
21 be --

22 *THE COURT: It isn't that simple a problem. The
23 Nixon Court made it that simple a problem but I don't see it
24 as that simple a problem.

25 In the first place, there is an explicit showing

1 in the papers that the confidentiality has not been fully
2 maintained. Plaintiff has received one document from those
3 files.

4 MR. METCALFE: Excuse me, Your Honor. Are you
5 speaking about the document that was attached to Mr. Lesar's
6 pleading filed just within the last week?

7 THE COURT: Yes, that is a Memphis Police record.

8 MR. METCALFE: I would like to speak to that very
9 specifically, if I can, one moment, please.

10 THE COURT: Yes.

11 MR. METCALFE: Mr. Lesar's pleading, which was
12 mailed on Sunday, didn't reach me until late yesterday after-
13 noon when it disgorged itself from the bowels of the Department
14 of Justice mailroom.

15 I then proceeded to follow through on that matter.
16 I apologize because of the time frame, --

17 THE COURT: I am not worried about that.

18 MR. METCALFE: -- I was unable to prepare a formal
19 responsive pleading.

20 THE COURT: The reason I brought you in a little
21 earlier is I am going on vacation and I want to decide this
22 case before I go. That is why I am taking these shortcuts to
23 get at it.

24 MR. METCALFE: I only wish to indicate that had I
25 had more time before this morning's hearing, I would have

1 prepared a more formal response to that pleading.

2 Upon my inspection of that document and my examina-
3 tion of that document within Appendix B of the Report, I
4 learned that that document was in fact not one of the docu-
5 ments that was forwarded by the State Attorney General's
6 office in Memphis to the Task Force pursuant to that subpoena.
7 It is not one of the Memphis Police Department records at
8 issue in this case.

9 If I may, I would like to hand up to the Court the
10 copy of the document which precedes that report in Appendix B,
11 a copy of which I handed to Mr. Lesar this morning.

12 The document which I have handed up to the Court
13 is the cover transmittal letter.

14 THE COURT: They didn't claim confidentiality
15 clearly then as to that document.

16 MR. METCALFE: No, Your Honor, it is even more than
17 that.

18 Mr. Holloman, who submitted the document attached
19 to the cover letter that I have handed to you, was not a member
20 of the Memphis Police Department at that time.

21 THE COURT: Who is he?

22 • MR. METCALFE: He was at that time the former
23 Director of Fire and Police for Memphis, Tennessee.

24 THE COURT: Right.

25 MR. METCALFE: And apparently the document which

1 the nature of the excisions made. Whereas here we have what
2 now appears to be a blanket claim to exemption for 400 pages
3 of miscellaneous materials.

4 MR. METCALFE: May I speak to that, Your Honor?

5 THE COURT: Surely.

6 MR. METCALFE: First and foremost, the basis for the
7 Department's position that, as Your Honor states, the documents
8 should receive a blanket exemption, is within Exemption 7(D).

9 As has been recognized by a number of cases which
10 have held a blanket exemption for documents held the documents
11 should be exempt in their entirety when they have been provided
12 to the Federal Government by a state.

13 THE COURT: You are arguing something that I may
14 not go along with. I don't want to argue the law. I know
15 the Nix case. I have read the other cases. I am not sure I
16 agree with them.

17 MR. METCALFE: I see, Your Honor.

18 THE COURT: It doesn't seem to me they are thoughtful
19 cases particularly and I am struggling with what seems to me
20 a more practical problem in this Circuit, not in some other
21 Circuit.

22 MR. METCALFE: I see.

23 THE COURT: Where I am confronted also with a re-
24 quest for discovery. I have great doubts that discovery would
25 be profitable. But I also have opinions that suggest that

1 where this kind of question arises, the Court should consider
2 the appropriateness of allowing discovery.

3 MR. METCALFE: May I attempt to persuade
4 Your Honor for a moment?

5 THE COURT: I would rather you wouldn't. I would
6 rather you would work with me in trying to help me with my
7 dilemma. I have a decision and you don't. I am familiar with
8 these cases.

9 Deal with the question I have asked you.

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

11 I think what you are concerned about is the prac-
12 ticality involved here.

13 THE COURT: Sure. That is what the FOIA is about,
14 practicality.

15 MR. METCALFE: I would like to speak to that for a
16 moment and beg your indulgence, if you would.

17 The circumstances involved in this case, Your Honor,
18 I submit, are unique. The Task Force was charged with a
19 specific responsibility and it was a very critical responsibili-
20 ty.

21 In order to completely fulfill its responsibility,
22 it felt it was necessary to review some of the records of
23 the Memphis Police Department.

24 Now, as a practical matter, once it received those
25 records and maintained them, there is no question but that if

1 it indicated that it had five volumes of local Police
2 Department records, everyone would know they would be Memphis
3 Police Department records.

4 So they did obtain the records and they did it
5 under a circumstance in which it was presumed that they would
6 maintain their confidentiality.

7 The practical ramification of this case, Your Honor,
8 is as follows: If Your Honor does not afford a blanket
9 Exemption 7(D) protection to these records, then I submit it
10 would require the following: It would require with that
11 blanket 7(D) protection lifted, individual processing --

12 THE COURT: That is right.

13 MR. METCALFE: -- of all of the documents which
14 would, of course, comport with Your Honor's proposed in camera
15 examination.

16 THE COURT: Or in camera inspection.

17 MR. METCALFE: I would submit under those circum-
18 stances what would be at issue would be individual 7(D) and
19 7(C) deletions that would be appropriate within the contents
20 of those records.

21 The FBI, because of these circumstances, or the
22 Department of Justice is not in a proper position to tell the
23 Court or to administratively discern what those proper dele-
24 tions would be.

25 Only the Memphis Police Department or possibly

1 the State Attorney General's office in Tennessee would be
2 in that position.

3 THE COURT: They won't know any more than you know
4 about that.

5 MR. METCALFE: We would take the position --

6 THE COURT: Because when you delete for reasons of
7 privacy, you don't make an independent investigation as to
8 whether or not there is in reality a privacy interest.

9 MR. METCALFE: That may be, Your Honor, in some in-
10 stances, but I would submit when you delete under 7(D) in
11 the case of individual sources, that deleting process requires
12 a first-hand knowledge of whether someone was the confidential
13 source or not. Knowledge that would repose only in the
14 Memphis Police Department.

15 THE COURT: Let me raise another aspect that your
16 comments don't address.

17 The Court is instructed -- there isn't any question
18 that they are so instructed, even by the cases you cite -- to
19 weigh the countervailing public interest before allowing the
20 exemption.

21 Now you present to me in the papers the public
22 interest as representing the need for the FBI to be able to
23 continue to cooperate in this way with local police departments.

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

25 THE COURT: And the general informer type of

1 protection.

2 MR. METCALFE: And the fact that that relationship
3 might well be chilled.

4 THE COURT: Right. Now Plaintiff says that in these
5 records he has reason to believe is evidence of a massive
6 cover-up, a failure to disclose facts which would cast a
7 wholly different light on the assassination of Martin Luther King

8 Now, that is an assertion, I realize, but in some
9 sense it is no more different than some of the assertions you
10 make about how this is going to affect cooperation or how it
11 is going to do anything else.

12 How do I balance the public interest without looking
13 at the documents?

14 MR. METCALFE: I would suggest, Your Honor, two
15 things:

16 First of all, the assertion that the Department of
17 Justice makes in this case that its relationship with local
18 law-enforcement agencies would be impaired is one that has
19 been recognized by a number of courts.

20 THE COURT: I am afraid you have got a judge who
21 is going to look at this case and not read cases from other
22 Circuits.

23 MR. METCALFE: I appreciate that, Your Honor.

24 THE COURT: And just say, All right. I want to do
25 it the way I think it ought to be done.

1 MR. METCALFE: Very well, Your Honor.

2 Secondly, though --

3 THE COURT: Because I don't find any argument in
4 any of those cases at all. They just state the flat position.

5 Now let me ask you something on that. Are these
6 records the Memphis police records or are these your copies
7 of the Memphis records?

8 MR. METCALFE: Is Your Honor inquiring whether they
9 are originals or duplicates?

10 THE COURT: Yes.

11 MR. METCALFE: They are duplicate copies.

12 THE COURT: They are not even the Memphis police
13 records. They are somebody else's records; they are your
14 records.

15 MR. METCALFE: If they were not Federal Government
16 records, you would not be presented with this problem.

17 THE COURT: You copied them and determined to keep
18 them as part of the Federal process.

19 MR. METCALFE: A determination that has led to this
20 problem, unfortunately. I would venture to say that that de-
21 termination may not be made in the future.

22 THE COURT: I don't see any reason why it should
23 have been made but it was made.

24 MR. METCALFE: It may not be made in the future,
25 Your Honor. For instance, say hypothetically in the future

1 another task force is charged with a similar critical responsi-
2 bility and feels it is necessary to obtain records, if
3 Your Honor does not afford a blanket 7(D) to these records,
4 that task force either, a, will not feel it can obtain the
5 records for its work and thus its work will be impaired; or,
6 b, may not be able to obtain them because the local agency
7 may say --

8 THE COURT: I understand all that.

9 MR. METCALFE: One other point, Your Honor, is that
10 in all due respect to Mr. Lesar, Plaintiff in this case, who
11 is also an attorney for Mr. Harold Weisberg, the claim that
12 you mentioned, the assertion that you mentioned that has been
13 made by Mr. Lesar, that these records, because they are with-
14 held, must be evidence of a cover-up, in all due respect,
15 this claim has been made several times by Mr. Lesar.

16 THE COURT: Surely.

17 MR. METCALFE: It has been made repeatedly and
18 undoubtedly will be made again with respect to anything that
19 has been withheld.

20 I would suggest that it is not particularly perti-
21 nent in this case.

22 THE COURT: The Government has always claimed that
23 all these documents are super-confidential; they can't be dis-
24 closed. You always make that claim in every case.

25 MR. METCALFE: Excuse me?

1 THE COURT: You make your claim of confidentiality
2 in every case. There is no difference.

3 MR. METCALFE: Yes, Your Honor, but we support
4 that with an affidavit based upon a review of the documents.

5 THE COURT: Mr. Lesar has supported his contention
6 with two affidavits.

7 MR. METCALFE: But not based upon a review of the
8 documents.

9 THE COURT: Based upon a review of the event and
10 knowledge of the event.

11 MR. METCALFE: I would only suggest, in all respect,
12 that any documents that we withheld in its entirety or in
13 their entirety would be the subject of a similar claim by
14 Mr. Lesar, I suspect.

15 THE COURT: Well, it seems to me that I ought to
16 pursue this in some fashion. Either by a Vaughn v. Rosen
17 index or by what seems to me to be an easier and more sensible,
18 practical approach, and that is to take an in camera view of
19 the documents.

20 I can tell you this: I recognize that this issue
21 is an important issue in the administration of the Freedom
22 of Information Act.

23 MR. METCALFE: Indeed it is, Your Honor.

24 THE COURT: It is entirely possible that if I were
25 -- and I am nowhere near that point yet -- to conclude that

1 these records ought to be turned over, there is no reason
2 the Government's interest can't be protected by a stay with
3 respect to the turning over until my mistakes, as you would
4 view them, were reviewed on appeal.

5 You see what I mean. The determination with respect
6 to whether or not there is to be disclosure does not necessarily
7 mean in this context the documents will be immediately disclosed.

8 MR. METCALFE: Could I clarify one point?

9 In the in camera examination which the Court is
10 proposing, would that be for purposes of determining the
11 applicability of the blanket 7(D) exemption claim or would the
12 Court be determining individually whether certain portions
13 of the documents should be disclosed?

14 If it is the latter, I would like to stress this
15 point, that only with the cooperation and participation in
16 this lawsuit of the Memphis Police Department would the
17 Government be in the position of advocating to the Court
18 or describing to the Court through a Vaughn v. Rosen or any
19 other mechanism what individual segments of the documents have
20 to be withheld under 7(C) and 7(D).

21 THE COURT: I don't accept that.

22 MR. METCALFE: I can advise --

23 THE COURT: The affidavits from the Memphis Police
24 Department place particular stress on the need of protecting
25 their sources. They say that if this is disclosed, citizens

1 will not come forward and cooperate with their police depart-
2 ment.

3 It is a perfectly natural position in their investi-
4 gation of offenses within the City of Memphis.

5 MR. METCALFE: That is at the level of the individual
6 7(D) deletions.

7 THE COURT: That is right. But as a practical
8 matter, the description of the documents indicates that a
9 substantial amount of this material is not in that category.

10 MR. METCALFE: Yes.

11 THE COURT: A substantial amount of this, running
12 into several hundred pages, is not a series of individual
13 letters and communications received from members of the public
14 but it is part of reports that the Police Department has made.

15 Now I am not clear what the nature of those reports
16 is. There is nothing in your papers that suggests what the
17 nature of the reports is.

18 MR. METCALFE: No, Your Honor, we have not.

19 THE COURT: In addition, I am not satisfied on what
20 I have in front of me that all of these communications from
21 citizens are communications of a type that would place them
22 in the sort of informal cooperating member of the public type
23 of status. That could readily be ascertained by flipping through
24 the pages.

25 MR. METCALFE: May I speak to that, because I

1 consider this to be a particularly critical point; and I
2 want to make certain that I understand Your Honor and that
3 vice versa the same situation applies.

4 There are two levels of 7(D) hearing in this case:
5 One level pertaining to the individual 7(D) deletions.
6 Those portions of the material which would have to be protected
7 to protect individual street-level confidential sources.

8 But the second level of 7(D), I feel compelled to
9 emphasize, is that the entire group of documents, because as
10 a group they were provided by the Memphis Police Department --

11 THE COURT: I understand.

12 MR. METCALFE: -- need confidential source protec-
13 tion.

14 THE COURT: Supposing the Memphis Police Department
15 had provided you a summary of the local newspaper discussion
16 of it.

17 MR. METCALFE: Yes.

18 THE COURT: Would you go so far as to claim that the
19 Memphis Police Department summary of, let's say, public
20 broadcasts relating to the Martin Luther King assassination
21 is exempt?

22 MR. METCALFE: Yes, Your Honor, for the following
23 reason.

24 THE COURT: If that is what is involved, it seems
25 to me the Court at least has to know that. I have had cases

1 where your colleagues have come in and claimed Top Secret
2 protection for clippings from the New York Times; and I haven't
3 felt very inclined to sustain it.

4 MR. METCALFE: Your Honor, I can assure you that
5 there is nothing like that in this case.

6 THE COURT: I haven't seen this material and I
7 want to know what it is.

8 MR. METCALFE: I just wish to emphasize that the basis
9 for our exemption claim has not to do in the first instance
10 with the contents of the material.

11 THE COURT: It is that it came from the police.

12 MR. METCALFE: That is correct. If we start dis-
13 closing what they provided us, regardless of the content,
14 Your Honor, truly regardless of the content, it would cause
15 the harm.

16 THE COURT: I understand that is your position
17 but how do I balance the public interest?

18 MR. METCALFE: Well, I would suggest --

19 THE COURT: Suppose they have in that material a
20 confession by someone that he, rather than James Earl Ray,
21 shot Martin Luther King. What is the public interest?

22 MR. METCALFE: O.K., Your Honor, Hypothetically,
23 if that were the case, that would mean on file in the Office
24 of Professional Responsibility in the United States Department
25 of Justice there is a record exonerating James Earl Ray and

1 that the Task Force members there totally ignored that in their
2 report.

3 THE COURT: Right.

4 MR. METCALFE: I would submit to Your Honor that that
5 is not the case; and that although Mr. Lesar may suggest that
6 that is the case, that suggestion should only be given so much
7 credence.

8 THE COURT: I wasn't even suggesting that Mr. Lesar
9 said that.

10 MR. METCALFE: He has used the word, cover-up,
11 Your Honor.

12 THE COURT: Yes, sure. How do I cover the question
13 of the public interest?

14 MR. METCALFE: I would submit, Your Honor, that there
15 is no competing public interest question.

16 THE COURT: You mean truth isn't a competing public
17 interest? The truth is not a competing public interest in
18 a matter of national concern?

19 MR. METCALFE: Your Honor --

20 THE COURT: That is an interesting observation.

21 MR. METCALFE: Truth in this case has been attested
22 to the Court by the affidavits of the Department of Justice.

23 The only thing contradicting that is Mr. Lesar's
24 bare assertion, since we are withholding documents, there must
25 be a cover-up.

1 I would submit that that assertion should not be
2 entitled to much weight, especially given the fact that the
3 Department has, I believe, amply explained a critical law-
4 enforcement reason why we feel compelled to withhold the
5 documents in blanket form regardless, regardless of their
6 content.

7 THE COURT: Well, you see, you are trying to per-
8 suade me of the position in your papers. I am trying to dis-
9 cuss with you my problem. I don't feel that I am in a posi-
10 tion to accept it. I may accept it.

11 MR. METCALFE: I see, Your Honor.

12 THE COURT: I feel that I am uninformed.

13 MR. METCALFE: Well, while there is still hope, I
14 feel compelled as part of my responsibility to continue to
15 try to persuade Your Honor.

16 THE COURT: I brought you in here today to help
17 me with my problems. Your papers are very able. You have done
18 a fine job and so has Mr. Lesar. I am in the decisional
19 status now and I find that I don't know enough to reach a
20 conclusion.

21 MR. METCALFE: Your Honor, I wish I was in the posi-
22 tion of being able to personally vouchsafe that I have read
23 every page of those records and they did not contain any
24 evidence of a cover-up.

25 THE COURT: It isn't just that. I have no idea what

1 these records are.

2 MR. METCALFE: Would Your Honor be amenable to a
3 description in general terms of those records, comparable to
4 a Vaughn v. Rosen index?

5 THE COURT: Well, if that is the way you would prefer
6 to proceed. As you know, I have resisted unsuccessfully,
7 always unsuccessfully, in camera-type of proceedings; and the
8 Government has been of no help to me in that.

9 MR. METCALFE: I am not certain that I propose that
10 because that would be somewhat inconsistent with our position
11 that the documents are entitled to a blanket exemption and,
12 therefore, should not be viewed in camera or should not be the
13 subject of a Vaughn index.

14 I want to clarify that point. I am trying to
15 struggle with the Court and be responsive to the Court's concern.
16 I do submit that --

17 THE COURT: If you want to take the position that
18 you will not agree to in camera inspection by the Court, say
19 so. That will suit me fine. I can take that into account
20 in connection with my decision.

21 MR. METCALFE: No, Your Honor. The Department of
22 Justice would, of course, comply with an in camera order.

23 THE COURT: If you think I want to sit down and
24 read this material, you are certainly mistaken.

25 MR. METCALFE: I suffer from no such delusion,

1 Your Honor, I assure you.

2 THE COURT: I do it under the pressure of my
3 responsibilities only.

4 MR. METCALFE: I do take the position and feel com-
5 pelled to articulate to the record in camera examination
6 would not be appropriate and would be inconsistent with our
7 legal position of a blanket Exemption 7(D) claim.

8 THE COURT: You would take the position, I under-
9 stand, if this material included transcripts of public broad-
10 casts, which I gather it does, that that is entitled to
11 protection, as I understand your position.

12 MR. METCALFE: Your Honor is now perhaps properly
13 delving into the finer points of the blanket Exemption 7(D).

14 THE COURT: That is exactly what I am doing.

15 MR. METCALFE: O.K. Although this issue has probably
16 not been discussed within the Department, off the top of my
17 head I think the Department's position -- and again I stress
18 this is what I think off the top of my head -- would be that
19 any segregable portion, any unit of documents within documents
20 transmitted by law enforcement agency that exist in a given
21 form, independent of their existence within the law-enforce-
22 ment agency's records, i.e., a transcript of a public broad-
23 cast, that could be obtained through a radio station --

24 THE COURT: Or of a preliminary hearing, let's say.

25 MR. METCALFE: -- or in a court record, that that

1 would not intrinsically be a local law-enforcement record
2 and nothing else and that could be disclosed.

3 THE COURT: Can you tell me that that material
4 isn't in the four hundred pages?

5 MR. METCALFE: No, but I would be very eager to go
6 and check and to tell you this afternoon.

7 THE COURT: You see what my problem is.

8 MR. METCALFE: I think I see the Court's problem.

9 THE COURT: That is why I need something more than
10 a blanket claim.

11 The question I am really posing to you is, what is
12 the best way, most practical and, I think, sensible way to do
13 it?

14 One is to give me the records and let me look;
15 and the other is for you to prepare some kind of an affidavit
16 that gives more detail as to what is in the records.

17 MR. METCALFE: Your Honor, the Department would
18 have no difficulty, I believe, in preparing an affidavit ad-
19 dressing the points that we just discussed, addressing whether
20 there are any records, sub-records, if you will, within that
21 group of Memphis and Atlanta P.D. records which exist inde-
22 pendently of their records as Atlanta or Memphis P.D. records
23 and their disclosure would not in any way impair the relation-
24 ship between the Government and local law-enforcement agencies.

25 THE COURT: You say everything impairs it.

1 MR. METCALFE: I say, those records which Your Honor
2 has identified as independent public documents, that the dis-
3 closure of that, I do not believe, would impair the relation-
4 ship between the Federal and local officers.

5 I would be more than willing to submit an affidavit
6 in that respect.

7 THE COURT: Supposing you have this kind of a
8 document in there: You have a letter from Minnie Zilch who
9 says: Enclosed is a copy of a letter I have written to my
10 Congressman and to the mayor and to the governor disclosing
11 what I saw on the day of the assassination and I am prepared
12 to appear anywhere and testify to these facts.

13 Is that the kind of document that will bring down
14 the processes of law enforcement if it is released?

15 MR. METCALFE: Not in and of itself, Your Honor,
16 but to the extent that that document, as distinguished from
17 what we were discussing a moment ago, is not a public document
18 in the same sense.

19 THE COURT: She sent it to everybody she ever heard
20 of.

21 MR. METCALFE: Well, within the hypothetical, it
22 would have received wide exposure for dissemination, I under-
23 stand. It could well be that that is a closer case and that
24 the local police department would regard the disclosure of
25 that document as a violation of the confidentiality.

1 THE COURT: They will consider any disclosure a
2 violation of confidentiality.

3 MR. METCALFE: Your Honor, I would submit that they
4 probably would not.

5 THE COURT: They claim it in this case. They filed
6 affidavits.

7 MR. METCALFE: But Your Honor just said that they
8 would regard any disclosure. I wanted to harken back to the
9 point we discussed a moment ago. I do not think the local
10 law-enforcement agency would consider the disclosure of an
11 independently existing public document as a violation of
12 confidentiality or as something that would impair the rela-
13 tionship between the Federal Government and the local govern-
14 ments.

15 THE COURT: But you can't assure me that there are
16 not documents like that in these pages.

17 MR. METCALFE: I would be pleased to do that by
18 affidavit as soon as it can be prepared. I cannot, personally,
19 assure the Court of that right now.

20 That is what I suggested a moment ago. I would be
21 more than willing to prepare such an affidavit, have someone
22 else prepare such an affidavit.

23 THE COURT: I am quite willing to take a two-step
24 process if that is what you wish to do to avoid my inspection
25 of the documents.

1 MR. METCALFE: I am not --

2 THE COURT: If you wish to categorize them and
3 describe the general nature of them, that is all right with
4 me. Then I can decide, after I get your description, whether
5 or not I want an in camera inspection.

6 I am perfectly willing to let you take it in a
7 two-step way, if that is what you wish to do.

8 MR. METCALFE: It is not just so much what the
9 Government wishes to do. The Court seems inclined toward that.

10 The Government's position, again, is that any exami-
11 nation is not necessary in this case, either in camera or a
12 Vaughn.

13 THE COURT: All right. Do you want to mandamus me?
14 If not, I am going to go ahead and decide this case.

15 MR. METCALFE: I understand that, Your Honor.

16 THE COURT: I will let you go either way you want.
17 It doesn't make any difference to me.

18 MR. METCALFE: Would Your Honor be satisfied if I
19 returned to the Department of Justice and discussed this
20 matter with others there and advise the Court informally as to
21 what the Defendant's preference would be?

22 THE COURT: Surely, and advise Mr. Lesar.

23 MR. METCALFE: Of course, Your Honor. And we are
24 taking it as a given that the Court will order either in camera
25 inspection of the documents, themselves, or a Vaughn index or

1 some affidavit.

2 THE COURT: Not a Vaughn index but some more detailed
3 clarifying description as to the nature of the documents.

4 MR. METCALFE: That is right, I did misspeak, some
5 clarifying affidavit.

6 THE COURT: I need one or the other and maybe both.

7 MR. METCALFE: I understand, Your Honor.

8 THE COURT: You can let me know by letter; or you
9 can confirm it by letter. You can telephone me and let me
10 know what you are going to do.

11 I had hoped that I would be able to resolve this
12 entire matter before I went away. I am leaving August 1.

13 MR. METCALFE: It may well be that you can resolve
14 it before that time, Your Honor.

15 THE COURT: I am not going to put you under
16 strictures but I want you to know what the time schedule is.

17 MR. METCALFE: I can assure the Court we will be
18 proceeding on this without any undue delay because the
19 Department wants to resolve this matter as expeditiously as
20 possible.

21 THE COURT: Do you have anything you want to say,
22 Mr. Lesar?

23 MR. LESAR: Just a couple of comments.

24 One is, I think with respect to the confidentiality
25 claim part and maybe the entire matter might very well be
resolved by the fact that the Task Force Report, itself,

1 the content of it, relies upon these documents. That is made
2 quite clear if you read the report, where they refer specifically

3 THE COURT: You say that and I understand that and
4 it has seemed to me that that is a factor that runs against you
5 rather than for you. But I am aware of it.

6 MR. METCALFE: I should emphasize I believe there are
7 but just a handful of references in the official report to the
8 Memphis Police Department records.

9 MR. LESAR: My argument on that is, they say that they
10 cannot reveal these things, that they need to protect the rela-
11 tionship and they were provided under confidentiality not to
12 reveal them, but they have in fact revealed certainly some of
13 the information in the report, itself, because it refers to
14 them and summarizes their content.

15 Secondly, there are a number of other problems. I
16 have, I think, indicated before that I have information that
17 indicates that records that were held by the State Attorney
18 General's office were being made available to authors.

19 I know in addition that the former District Attorney
20 General, Mr. Phil Canale, who was District Attorney General at the
21 time that the James Earl Ray case arose, has been going around
22 making public speeches, giving slide lectures to various groups,
23 and that there are references in those speeches to documents
24 and materials which I think will be included in the Memphis
25 Police Department reports that are being withheld.

The public importance of this is, I think, best

1 illustrated by a brief example that arises out of the guilty
2 plea proceeding, itself.

3 At the guilty plea proceeding of James Earl Ray
4 on March 10, 1969, a representative of the State Attorney
5 General's office told the court what the state's evidence
6 would be, had there been a trial.

7 One of the specific representations was that they
8 would be able to link the alleged murder weapon with a dent
9 on the bathroom window sill, from which the state alleged the
10 shot was fired.

11 There was very little comment on that except by
12 Mr. Harold Weisberg, who ridiculed it in a book that he wrote
13 in 1970, until the last couple of years, when we began under
14 the Freedom of Information Act to get the FBI's own evidence
15 with respect to that.

16 It indicates quite clearly that there was no basis
17 for making that assertion to the court. In fact, the report
18 indicated that there was some evidence that could be taken
19 as meaning that the shot had not been fired there. For
20 example, there were no powder residues and they were not able
21 to link the rifle, that rifle or any rifle, to that dent.

22 So the public interest is that in order to evaluate
23 this, we need all the information.

24 Now the Government is in the position of saying --

25 THE COURT: You say in order to evaluate it. If

1 you have any problem in court, you can get the record. You
2 don't have any problem getting the record in court.

3 MR. LESAR: That is not true.

4 THE COURT: You certainly don't. You can go to a
5 judge, make a showing to the judge, get a subpoena and sub-
6 poena these records in rapid order.

7 I am not a bit interested in Mr. James Earl Ray's
8 legal problems. I have to look at this in terms of Freedom
9 of Information Act.

10 MR. LESAR: I understand that. You spoke, and I think
11 quite to the point, about truth is a competing interest,
12 and truth as a factor that this Court has to weigh.

13 Now that is an example of how the public interest
14 in truth can be served by the revelation of documents which
15 are being withheld.

16 THE COURT: Well, I understand your point.

17 MR. LESAR: O.K.

18 Now, you referred briefly to my request for dis-
19 covery. I think that some discovery would be helpful. I have
20 for example, an FBI report that I brought with me which indi-
21 cates that the FBI interviewed an author, George McMillan,
22 about some allegations that he had seen or had access to
23 files on the Ray case, and the report is not definitive.

24 Mr. McMillan refused to say whether or not the
25 State's Attorney General had made FBI files available to him.

1 There is a document attached to it which reads:

2 "If not already done, the Memphis office
3 should contact appropriate current and former
4 Tennessee state authorities to ascertain if
5 they have any information that FBI files previously
6 in possession of state authorities were made avail-
7 able to Frank and Huie or anyone else by state
8 or county personnel."

9 MR. METCALFE: Excuse me, are these FBI files as
10 opposed to Memphis police records?

11 MR. LESAR: Yes, they are FBI files as opposed
12 to Police Department records.

13 What I am showing is there is some reason to believe
14 that records in the possession of the State Attorney General's
15 office were made available to other people and that that
16 might be explored through discovery.

17 THE COURT: Well, you see, the interest that is being
18 presented here is not what the Memphis police choose to do
19 with their own records. The interest being presented here
20 is the view that the Memphis police and the FBI feel future
21 mature cooperation is dependent on each of them maintaining
22 the other's security.

23 MR. LESAR: First of all, just from practical ex-
24 perience, they don't do it. And secondly, they have no
25 practical alternative but to cooperate with one another in any

1 event.

2 THE COURT: Those are considerations I am weighing.

3 MR. METCALFE: Your Honor, I would suggest that
4 the latter point is not necessarily so, that there are
5 practical alternatives. Excuse me. That the local law enforce-
6 ment agency very often does have the right to refuse.

7 THE COURT: Well, I am not getting into all that.

8 I take it, since I haven't heard from you,
9 Mr. Lesar, that you are now satisfied with respect to the
10 archival material.

11 MR. LESAR: No, Your Honor, I am not.

12 There are two things. I have prepared a motion for
13 partial summary judgment, which I had not filed yet, just for
14 part of that material, for which they have claimed no
15 exemption whatsoever.

16 THE COURT: When I say, satisfied, that material
17 would be ordered by the Court.

18 MR. LESAR: I assumed that it would.

19 THE COURT: As I understand it, all they are saying
20 is that they can't release that material to you without a
21 court order.

22 MR. LESAR: Yes.

23 THE COURT: Because of Judge Smith's order, but it
24 isn't covered by the Federal Freedom of Information Act.

25 When I asked you whether you were satisfied,

1 assuming you get that material, you are satisfied with re-
2 spect to Archives.

3 MR. LESAR: No, because they have claimed Exemption
4 7(C).

5 THE COURT: You had better get those papers in to
6 me very promptly if you want me to rule on them.

7 MR. LESAR: I will do that. They had not moved
8 for summary judgment with respect to it so I was waiting for
9 them to make a move.

10 MR. METCALFE: Excuse me, Your Honor, we have moved
11 for summary judgment as to all aspects of the case.

12 THE COURT: That is my understanding, too.

13 MR. METCALFE: Mr. Lesar has also cross-moved for
14 summary judgment back in May on 7(C) as well.

15 THE COURT: The only question I have is whether you
16 have any further comment on the presentation made by affidavit
17 after the additional review of the Archive material, which
18 was made following the time both of you were last in Court?

19 MR. LESAR: Oh, yes, I will oppose it because again -

20 THE COURT: Will you get that in very promptly?

21 MR. LESAR: I will do my best, yes, sir.

22 THE COURT: That isn't what I asked you. Can you
23 get it in in five days?

24 MR. LESAR: I will do it.

25 MR. METCALFE: Your Honor, the Government, not

1 knowing what that submission will be, might like to respond
2 to that as well.

3 THE COURT: I assumed that you would want to respond
4 to it.

5 MR. METCALFE: In that connection, I would like to
6 make one brief point.

7 As regards that material, material appearing on
8 fifteen different pages of Appendix C, which the Department
9 has said is not exempt within 7(C), but feels bound not to
10 disclose because of Judge Smith's Court Order, as indicated
11 in our submission papers, that material is, of course, avail-
12 able for the Court's in camera examination, if the Court deems
13 that appropriate.

14 The Department would submit to Your Honor that a
15 review of that information might persuade the Court to agree
16 with Judge Smith that that material should not be disclosed,
17 although it is not claimed as exempt under the FOIA, because
18 again of the unique circumstances under which it was obtained.

19 We would submit that the same reasoning that per-
20 suaded Judge Smith in January of '77 might persuade
21 Your Honor.

22 We are a mere stakeholder, as it were, with respect
23 to those materials but I feel compelled, in the public interest
24 and in the interests of Judge Smith's order and of those
25 individuals who are party to that lawsuit to emphasize that

1 point at this time.

2 THE COURT: Well I, with all respect, don't see
3 how Judge Smith can amend the Freedom of Information Act.

4 It is really rather humorous for the Department of
5 Justice, having engaged in illegal surveillance of a national
6 figure, to claim that because we engaged in such illegality,
7 we ought to be able to conceal the fruits of our illegality.

8 MR. METCALFE: We make no such claim, Your Honor.

9 THE COURT: That is what it comes down to in plain
10 simple language.

11 MR. METCALFE: I would respectfully disagree,
12 Your Honor.

13 The import of my statement was only to caution the
14 Court that perhaps it would be most appropriate before the
15 information was released for an in camera examination of it
16 to be made.

17 THE COURT: Why would it be appropriate? If it
18 isn't exempt under the Act, under what theory would it be
19 appropriate?

20 MR. METCALFE: Under the same theory that compelled
21 Judge Smith, because of the circumstances under which it was
22 obtained and out of respect to the individuals who are the
23 subject of the surveillance, perhaps it should not be disclosed,
24 although it is not of such a nature as would indicate the
25 invocation of Exemption 7(C).

1 MR. LESAR: May I address that briefly?

2 I took the time after the last status call to re-
3 view the file in that case. It, of course, did not arise in
4 a Freedom of Information Act context.

5 THE COURT: Right.

6 MR. LESAR: It did not even arise or there are no
7 findings with respect to privacy made in the case.

8 THE COURT: There are no findings.

9 MR. LESAR: Yes. It is just totally irrelevant.

10 THE COURT: I am going to apply the Freedom of
11 Information Act. The Freedom of Information Act hurts all
12 kinds of people.

13 MR. METCALFE: Indeed it does, Your Honor.

14 I just wanted to stress that the material was avail-
15 able for in camera examination.

16 THE COURT: I am not going to do it.

17 I will hear from you with respect to your desire
18 for further information there.

19 MR. LESAR: Right.

20 THE COURT: I guess in view of all of these develop-
21 ments, there is no way I can get this case out for many weeks
22 yet to come.

23 MR. METCALFE: I would hope that is not the case.

24 THE COURT: I had hoped it would be possible to
25 resolve it by August 1.

1 I will try if you get your papers in.

2 MR. LESAR: I will get it in as soon as I can.

3 MR. METCALFE: Your Honor, the Department would be
4 interested in resolving it before August 1, as well.

5 THE COURT: You gentlemen push each other and get
6 the papers in to me.

7 MR. METCALFE: We do that regularly, Your Honor.

8 THE COURT: All right, fine. Thank you.

9 (Whereupon at 10:20 a.m., the hearing was concluded.)

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CERTIFICATE OF COURT REPORTER

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I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on July 20, 1978, and that the foregoing Pages 1 to 37, inclusive, constitute the official transcript.

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Ida Z. Watson