UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,
Plaintiff
v
CENTRAL INTELLIGENCE AGENCY, et al.,
Defendants

Civil Action No. 77-1997

FILED
JAN 4 1979
JAMES F. DAVEY, Clerk

O P I N I O N

This is an action arising under the Freedom of Information Act, 5 U.S.C. §552, wherein the plaintiff, Harold Weisberg, seeks disclosure of several categories of records contained in the files of the Central Intelligence Agency (hereinafter CIA) pertaining to Dr. Martin Luther King and James Earl Ray. While processing plaintiff's FOIA request, the CIA located documents of the National Security Agency which were forwarded to that agency for direct response. Plaintiff amended his complaint to join the National Security Agency (hereinafter NSA). The matter is before the Court on defendants' motion for summary judgment.

The CIA located 373 documents in processing plaintiff's FOIA request. 238 documents have been released in their entirety, major portions of 104 documents were released and 31 are withheld in their entirety. The 22 NSA documents are withheld in their entirety. Plaintiff contends that 1) defendants have not accounted for every document maintained by the CIA that could be responsive to plaintiff's request; 2) the referred documents have not been received; and 3) withheld information is not properly classified pursuant to Exemptions 3 and 6.

The CIA has met its burden in showing that all identifiable records pertaining to Dr. King and Mr. Ray have been located in this case. An affidavit supporting the motion for summary judgment states that all identifiable records have been retrieved from the CIA files, and the only way to improve upon the search would be to undertake a page-by-page review of all records in the CIA. The Court of Appeals for this Circuit recently reaffirmed that such a search was not intended by the FOIA, stating:

> . . .the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search. It is well established that an agency is not "required to reorganize [its] files in response to [a plaintiff's] request in the form in which it was made . . ." Goland, et al v CIA et al., Civil No. 76-1800 (D.C.Cir. May 23, 1978 at 26-27).

Here there is no reason to believe that the additional documents could be located without an unreasonable search. To the contrary, the CIA has located 373 documents, a large majority of which have been released in their entirety or with minor deletions.

Plaintiff's next contention is that documents referred to other agencies have not been accounted for by the defendants. In cases involving documents originating with another agency the Courts have abstained from making any determination regarding such documents when the originating party is not a named party. Church of Scientology of California v. Department of the Army, Civil No. CV 753056-F (C.D. California June 2, 1977); Founding Church of Scientology of Washington, D.C., Inc. v. Levi, Civil No. 75-1577 (D.D.C. January 24, 1978).

Plaintiff in his supplemental opposition cites a recent case in this court for the proposition that the defendant could not refer documents to the originating agency and that

summary judgment would be inappropriate until the defendant agency processed the documents itself. Church of Scientology v. United States Department of the Air Force, C.A. No. 76-1008, April 12, 1978 (D.D.C.). In subsequent decisions this Court and the United States Court of Appeals for the District of Columbia have not followed the decision in Scientology. Goland v. CIA, supra; Serbian Eastern Orthodox Dioceses v. Central Intelligence Agency, Civil No. 77-1412 (D.D.C. July 13, 1978). Both decisions reaffirmed that the originating body should decide whether to make a document public and declined to follow a contrary course of action.

Plaintiff then asserts that Exemption 3[1/] does not apply to the materials in question. He does not dispute that the statutes relied upon, 60 U.S.C. §§ 403(d)(3) and (g), Public Law 86-36 and 18 U.S.C. § 798 are Exemption 3 statutes. However, he contends that assertion of this exemption, at least with regard to the statutes relied upon,

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1/ The pertinent portions of the statute are as follows:

> §552. Public information; agency rules, opinions, orders, records, and proceedings
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> (a) Each agency shall make available to the public information as follows:
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> (b) This section does not apply to matters that are-
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

should somehow be contingent upon defendants' successful invocation of Exemption 1, citing Phillippi v. CIA, 546 F.2d 1009 at 1015 n.14 (D.C.Cir. 1976) for that proposition. In fact, the statement referred to in Phillippi indicated a possible overlapping between the two national security exemptions, suggesting that Exemption 1 may apply in addition to Exemption 3. Plaintiff's theory that Exemption 3 was intended by Congress to be subordinate to Exemption 1 was expressly rejected in Marks v. CIA, 426 F.Supp. 708 (D.D.C. 1976) in which the Court concluded that the two exemptions were independent rather than interdependent. Id at 710 n.5.

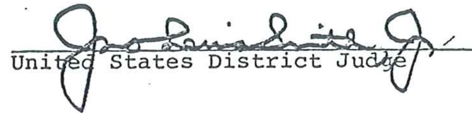
Finally, plaintiff contends that Exemption 6 does not apply to prevent disclosure of the names of several persons who were considered suspects because they allegedly resembled the supposed assassin of Dr. King, and he further asserts that there are reasons to doubt whether this information is private. According to supporting affidavits, the CIA has released the identity of individuals where it is apparent from the document that the information is published or otherwise a matter of public record. In the other cases, where the information was derogatory or potentially embarrassing and there was no indication that such information was public, the CIA has withheld this information. This is consistent with protecting the privacy of others as stated in Cervany v. CIA, 445 F.Supp 772 (D.Colo. 1978). In plaintiff's affidavit he suggests that defendants should engage in exhaustive research to corroborate whether each piece of information is in some form or another in the public domain. Recently, Judge Sirica of this Court stated in a

case seeking documents pertaining to the assassination of President Kennedy:

> Even if it is assumed for the sake of discussion that some of the withheld information has already been disclosed through unauthorized publication, that does not detract from the fact that the agency has not officially confirmed the accuracy of these disclosures. Fensterwald v. CIA, Civil No. 75-897 (D.D.C. July 12, 1978)

The same reasoning applies in this case, and the questioned documents are exempt from disclosure pursuant to Exemption 6.

Accordingly, there being no genuine issues of material fact in dispute, defendants' motion for summary judgment is granted.



United States District Judge

Dated: Jan 4, 1979