10/5/78

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. CENTRAL INTELLIGENCE AGENCY, et al., Defendants	Civil Action No. 77-1997

SUPPLEMENTAL OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants have moved for summary judgment in this case, claiming that there are no genuine issues of material fact in dispute and that they are entitled to judgment in their favor as a matter of law. Plaintiff thereafter filed an Opposition to defendants' motion and supported it with affidavits and their exhibits. Plaintiff now files this Supplemental Opposition in order that the Court be fully advised on recent court cases and new facts not set forth in the original Opposition.

I. CIA REFERRALS ARE AGENCY RECORDS SUBJECT TO THE JURISDICTION OF THIS COURT

During the processing of plaintiff's request the CIA located certain documents which it then referred to other agencies. In their Reply Memorandum defendants assert that: "Those documents classified by agencies other than the CIA or NSA are not "agency records" within the control of the defendants to this action and therefore not within the jurisdiction of this Court." (Reply Memorandum, p. 9, fn. 13)

A

The Freedom of Information Act, 5 U.S.C. §552(a)(3) states that:

> each agency, upon any request for records which reasonably describes such records . . ., shall make the records promptly available to any person."

In addition, §552(c) makes it clear that agencies may not impose any limitations on the availability of information other than those expressly provided by the Act:

> This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.

This issue was recently dealt with by Judge Richey in Church of Scientology v. United States Department of the Air Force, et al., Civil Action No. 76-1008 (D.D.C. April 12, 1978), a case which has only now come to the attention of plaintiff's counsel. Citing these provisions and noting that "defendants are unable to point to any provision of the FOIA which even arguably athorizes a different procedural treatment for documents that originated with an agency other than the agency possessing the sought documents," Judge Richey held that:

> The referral procedure limits the availability of records by precluding a requestor from obtaining requested documents from a single agency that has possession of all the documents he seeks and that does not have a large backlog of FOIA requests. (Slip Op., p. 8)

For this reason, and also because it violated the time limits imposed by the Act, Judge Richey held that the referral procedure established by DoD Directive 5400.1 is inconsistent with the Act's express language and "cannot be employed by the defendants to avoid processing plaintiff's request for the documents it seeks." (Slip. Op., pp. 8-9. A copy of Judge Richey's decision is attached hereto as Attachment 1)

It is transparently obvious that in this case the CIA is using the referrals procedure as a device for circumventing the

express intent of the Freedom of Information Act. As plaintiff's counsel pointed out at the oral argument on defendants' summary judgment motion, the government has not taken this position in other cases brought by Mr. Weisberg. Here, however, some 62 documents are said to have been referred to the FBI, the agency with the largest backlog. Thus the referrals procedure is being coupled with a claim that there is no jurisdiction over these records in order to further stall plaintiff's access to them. This is but one of the many signs of bad faith which pervade the CIA's handling of this Freedom of Information Act case, as well as others.

II. CIA HAS NOT RETRIEVED ALL DOCUMENTS REASONABLY DESCRIBED BY PLAINTIFF'S REQUEST

Item 6 of plaintiff's June 11, 1976 FOIA request asked that the CIA provide him with copies of the following:

> 6. All analyses, commentaries, reports or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr., or the authors of said materials.

Because plaintiff's affidavits and exhibits provided positive proof that it had not provided records relevant to this item of his request, the CIA has tried to get around it by asserting that: "Plaintiff's request can be said to reasonably describe only such materials that are retrievable by reference to Dr. King or Mr. Ray, not documents on additional individuals such as the authors that plaintiff enumerates now for the first time." (Reply Memorandum, p. 6)

The Freedom of Information Act orginally required each agency to make documents available "on request for identifiable records made in accordance with published rules." The 1974 Amendments revised this to require that the request be one which "reasonably

describes such records," rather than one which is for "identifiable records."

The legislative history of the 1974 Amendments gives an explanation which makes the meaning of this change quite clear:

> A "description of a requested document would be sufficient if it enable a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort. (H. Rept. 93-876, pp. 5-6)

Without any doubt, Item No. 6 of Mr. Weisberg's request meets this test.

Moreover, the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act states, at page 23, that when an agency receives a request which does not "reasonably describe" the records sought, "it should notify the requestor of the defect." In fact, the CIA's own regulations provide that where the Freedom of Information Coordinator has determined that an intended request fails to reasonably describe the records sought, "he shall so inform the originator of the communication promptly, in writing, and he may offer to assist the orginator in revising and perfecting the description of the records of interest." (See 32 C.F.R. §1900.31(c)(2)).

Well over two years have passed since the CIA received plaintiff's June 11, 1976 request. Yet the CIA has yet to do what the required by both the Attorney General's Memorandum and its own regualtions require.

This is again indicative of the CIA's bad faith in handling plaintiff's FOIA request. However, because plaintiff cannot afford to play the endless games which the CIA engages in, he has provided the CIA with names of the principal authors of books and articles on the assassination of Dr. King. Under the law he is not required to do this and in reality there is no need for him to do this, but

now that he has done so the CIA has no pretext whatsoever for continuing to stonewall plaintiff's request for these records.

Plaintiff's letter to the CIA's Freedom of Information Act Coordinator listing the principal authors of King assassination books and articles is attached hereto as Attachment 2. A CIA memorandum attached to that letter reveals the CIA's deep and abiding interest in what authors have written on that assassination. At least three authors of books on President Kennedy's assassination have also written books on Dr. King's murder.

III. RECENT DECISIONS OF THE COURT OF APPEALS MAKE IT CLEAR THAT SUMMARY JUDGMENT IS PREMATURE

Recent decisions of the United States Court of Appeals for the District of Columbia make it clear that defendants' motion for summary judgment is premature at this stage of the proceedings. In National Association of Government Employees v. Campbell, et al., (Nos. 76-2010, 76-2013, 76-2022, and 76-2023, decided May 9, 1978), the Court of Appeals emphasized repeatedly and at great length that the normal standards for granting summary judgment applied in that Freedom of Information Act case. In various passages the Court declared:

> A motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." Indeed, "the record must show the movant's right to [summary judgment] 'with such clarity as to leave no room for controvers,' and must demonstrate that his opponent 'would not be able to [prevail] under any discernible circumstances.'" (Slip Op., p. 9. Citations omitted)
>
> * * *
>
> Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible

> of dispute. Facts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence; rather, the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. That responsibility may not be relieved through adjudication since ""[t]he court's function is limited to ascertaining whether any factual issues pertinent to the controversy exists [and] does not extend to resolution of any such issue." (Slip Op., pp. 9-10. Citations omitted)
>
> * * *
>
> But the opinion-evaluation thus necessitated is a task for which a summary-judgment motion is ill-suited. The judicial function at that stage, we repeat, is not factfinding, but rather an ascertainment of whether factfinding is essential to diposition of the litigation, and in no event is summary judgment appropriate unless the movant is entitled to victory as a matter of law. As the Supreme Court has warned, expert opinions "have no such conclusive force that there is error in refusing to follow them."; to boot, expert witnesses normally should be subject to cross examination, the best method yet devised for testing trustworthiness of testimony." It follows that "their credibility and the weight to be given to their opinions is to be determined after trial in the regular manner." Particularly when, as is the situation here, experts are not wholly disinterested in the outcome of the litigation, courts must exercise cautious restraint in awarding summary judgments. (Slip Op., pp. 15-16. Citations omitted)

In this case the are many material facts which remain in dispute. One, of course, is whether the CIA has made a good-faith search for all documents relevant to plaintiff's request. There is no question but that the CIA has not search for records which would be responsive to Item 6 of the request. In addition, however, a study of the documents thus far provided indicates that the search has been incomplete with respect to other items of the request as well. The following paragraphs of plaintiff's attached affidavit make this point again and again with respect to the records provided by the CIA's Office of Security (which gave its documents an "S" number):

> 105. Dr. King is included in S-12, a memo from the Director of Security to the Deputy Director for Support. (No records from the

> Deputy Director for Support of from its files have been provided in this instant cause.) This December 11, 1967 memo is titled "Threats to CIA by Some 'Black Power' Elements." Most of the record is not provided. Page A23, which deals with King and his Southern Christian Leadership Conference (SCLC), regers to information not provided, information used as the basis for this part of the memo. Certainly those who processed the records provided in this instant cause read this and other records which refer to records not provided. They thus knew of the existence of withheld information and have not provided it while claiming compliance with the information request.
>
> 107. S-13 is an updating of S-12. It refers to content of S-12 that is withheld in the expurgated copy provided me. It also refers, on each of its four pages, to information not provided, information that sometimes is quoted directly. It refers to "the results of inquiries with the FBI," of which neither copies of the inquiry nor copies of the FBI's response is identifiable amont the few records provided in this instant cause.
>
> 110. In S-14 there is also reference to new material from the FBI, "two-excellent studies," not provided in all or in relevant part, despite Dr. King's leadership role in what is described as "extremist elements and the potential for civil disturbance" in Washington. Although this concludes, "I will keep you informed," no other such memos are provided. The attachments mentioned are not provided either. Textual reference to the attachments is obliterated.
>
> 111. S-16. March 6, 1970 statement that CP "exercised considerable control over King." What is obliterated includes the name of the person(s) through whom this alleged control was allegedly "exercised." Unless what is obliterated is fictional, it is and for years has been within the public domain and is not properly subject to a privacy claim.

Thus, plaintiff's latest affidavit raises, as did his earlier affidavits, issues as to the scope of the search, whether all relevant records have been provided, and whether or not deleted materials have been justifiably exercised or are in fact in the public domain.

Before these issues can be resolved, discovery must be had, and perhaps a trial. In the recent case of Ellen L. Ray and

William H. Schaap v. Turner, et al., (Case No. 77-1401, decided August 24, 1978) noted the special importance of discovery in a case involving national security claims:

> . . . appellants emphasize that summary judgment was granted before any discovery took place. Interrogatories and depositions are especially important in a case where one party has an effective monopoly on the relevant information. Discovery may be particularly useful to appellants in testing whether the procedural requirements of Exemption 1 have been met in this case. (Concurring Opinion of Chief Judge Wright, p. 43)

Discovery is needed in this case to determine not only what kind of search has been made, but also to test the defendants' claims of exemption. One example of why this is necessary is supplied by the history of this case. The CIA referred a document to the Department of State which State withheld in part under a claim that of exemption under 7(E), which applies to records which would "disclose investigative techniques and procedures." (See Attachment 3) Subsequently the entire document was released. None of it had ever been justifiably withheld. The portion previously withheld under a 7(E) claim said "pursuant exhaustive check of Canadian passport files by EXTAFF and RCMP. Full Details available FBI headquarters Washington." (See Attachment 4) Without exercising discovery plaintiff cannot determine the extent of other such unjustiable excisions.

IV. CORRECTION OF ERROR IN DEFENDATNS' REPLY BRIEF

In their Reply Memorandum, defendants quote from part of the Transcript in Lesar v. Department of Justice, Civil Action No. 77-0692 and attaches the "pertinent part of the transcript as Exhibit

L." (Reply Memorandum, p. 22, fn. 24) Unfortunately, defendants' counsel neglected to attach the following page of this transcript, which refutes the erroneous conclusion which Judge Gesell drew during the dialogue on the preceding page of the transcript. The result of this omission is to give the court a misleading impression, diametrically opposite the truth, of what occured at that hearing. To correct the record on this point plaintiff attaches both relevant pages of the transcript in that case. (See Attachment 5)

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
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Phone: 223-5587

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of October, 1978 hand-delivered a copy of the foregoing Supplemental Opposition to Defendants' Motion for Summary Judgement to the office of Ms. Jo Ann Dolan, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

Attachment 1 C.A. No. 77-1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHURCH OF SCIENTOLOGY OF CALIFORNIA, :

Plaintiff, :

v. : C.A. No. 76-1008

UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., :

Defendants. :

APR 13 1978

FILED

APR 12 1978

JAMES F. DAVEY, Clerk

APPEARANCES: For the Plaintiff:

Earl C. Dudley, Jr.
Washington, D.C.

For the Defendants:

Earl J. Silbert, United States Attorney
Robert N. Ford, AUSA
Karen I. Ward, AUSA
Washington, D.C.

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is brought pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to compel the production of certain documents withheld from disclosure by the Department of the Air Force. Pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), defendants prepared ten detailed affidavits that indexed and described the withheld documents and articulated the rationale for the withholding.[1/] In addition, plaintiff has undertaken substantial discovery with respect to the nature and scope of defendants' document search and with respect to some issues raised by defendants' Vaughn affidavits. As a result of these preliminary procedures, and through the diligent and good-faith efforts of counsel for both sides, the parties were able to reach accord with respect to all but 17 of the withheld documents. See Amended Stipulation, filed Feb. 1, 1978. This case is now before the Court on defendants' motion for summary judgment with respect to portions of these 17 disputed documents and on plaintiff's cross-

1/ Defendants' affidavits were prepared by Major William C. Goforth, Chief of Plans and Programs Division, Directorate of Plans, Programs, and Resources, Headquarters, Air Force Office of Special Investigations (AFOSI).

motion for summary judgment with respect to portions of three of the disputed documents. Three "categories" of documents are presently in dispute.

I. The Document-Portions For Which Exemption 1 Was Invoked Are Properly Withheld From Disclosure.

The first category of disputed documents consists of a single document. This document is described in paragraph (e) of Affidavit II of AFOSI, Report of Investigation (ROI) 21 June 1966, AFOSI District 62, file 40-489. Two portions of this document, labeled "C" and "I", remain in dispute.[2/] Defendants assert that these document portions contain information provided by an official agency of a foreign government that was provided under a specific pledge of confidentiality. Accordingly, defendants contend that the foreign agency is a "confidential source" and that the identity thereof and the information provided thereby is exempt from disclosure pursuant to exemption 7(D). Defendants further assert that the information provided by the foreign agency is classified as Confidential by that agency and is thus exempt from disclosure pursuant to exemption 1. For the following reasons, the Court concludes that these disputed document portions are properly withheld pursuant to exemption 1. Thus, the Court need not reach defendants' claims with respect to exemption 7(D).

Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), exempts from mandatory disclosure matters

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

Plaintiff does not dispute that Executive Order 11652, § 4(c) specifically authorizes the defendants to classify as confidential documents provided by a foreign government where such documents

2/ Document portion "D", which had been in dispute, was released to plaintiff in Answer 2(a) to Plaintiff's Second Set of Interrogatories. Some 1-1/4 lines of document portion "C" have been withheld pursuant to exemption 7(C), and plaintiff has dropped its demand for disclosure of these lines.

are so classified by the foreign government. And plaintiff does not challenge the fact that the foreign government herein has classified the withheld information as Confidential. Rather, plaintiff's opposition to defendants' invocation of exemption 1 is based on the fact that defendants' affidavit does not indicate whether, as required by part (B) of exemption 1, they "in fact properly classified" the withheld document.

Plaintiff attempted to explore defendants' actual classification treatment of document portions "C" and "I" by means of various interrogatories. Because defendants' responses left some doubt as to whether these document portions in fact remained classified, plaintiff opposed defendants' motion for summary judgment. At the hearing on the instant motions, counsel for the respective parties agreed to depose Major William C. Goforth, custodian of the AFOSI files pertaining to the Church of Scientology, in an effort to resolve the extant ambiguities. The answers given by Major Goforth in that deposition eliminate all such ambiguities and demonstrate clearly that the information contained in the two disputed document portions withheld pursuant to exemption 1 was properly classified as Confidential when it was first received and was never declassified, despite the fact that other previously classified documents were subsequently declassified. Thus, the information contained in document portions "C" and "I" was still classified at the time of plaintiff's FOIA request and remains properly so classified to this day. Accordingly, the Court will grant defendants summary judgment with respect to these two document portions withheld pursuant to exemption 1.

II. The Document Portions For Which Both Exemptions 7(C) and 7(D) Were Invoked Are Properly Withheld From Disclosure Pursuant To Exemption 7(C).

The second category of disputed documents includes two documents for which defendants have invoked exemption 7(C) and (D), are described as: ROI, AFOSI District 4, dated September 18, 1957, file 39-62930 (described in paragraph (c) of Affidavit I) (hereinafter, document I(c)); and AFOSI Detachment 1108,

Memorandum, 19 May 1961 (described in paragraph (j) of Affidavit VIII) (hereinafter, document VIII(j)[3]). Plaintiff continues to seek two withheld portions of document I(c) labeled "C" and "D", and one withheld portion of document VIII(j), labeled "F".

Portion "C" of document I(c) is the name of a Postal Service employee in Silver Spring, Maryland, who provided defendants with information that the address being used by the Hubbard Professional College was maintained by a certain individual. Portion "D" of that same document is the name and other identifying information of a second Postal Service employee that provided defendants with information regarding investigations of the Hubbard Professional College for mail fraud. With respect to both of these document portions, defendants have relied primarily on exemption 7(D) as the basis for their withholding. Defendants have, however, asserted exemption 7(C) as an alternative basis for the withholding of these document portions. Portion "F" of document VIII(j) contains information provided defendants by the FBI on how to locate and contact particular sources of information. Defendants rely primarily on exemption 7(C) as the basis for withholding this document portion, but alternatively they assert exemption 7(D).

In their cross-motions for summary judgment with respect to these disputed document portions, and in their oral arguments to the Court, both parties have focused largely on

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3/ Portions of a third document, AFOSI, ROI 21 June 1966, AFOSI District 62, file 40-489 (described in ¶ (e) of Affidavit II), were withheld pursuant to exemption 7(D) and pursuant to exemption 1. For the reasons set forth in section I of this opinion, the Court holds that exemption 1 was properly invoked as a basis for withholding these document portions ("C" and "I"). Thus, as indicated in section I, supra, the Court need not resolve plaintiff's challenge to defendants' invocation of exemption 7(D) for these document portions.

on the exemption 7(D) claims. Nevertheless, the Court has considered the applicability of both exemption 7(C) and 7(D) to these document portions, and the Court, for the reasons set forth herein, concludes that these document portions are appropriately withheld pursuant to exemption 7(C). Thus, the Court need not resolve the parties' dispute over the applicability of exemption 7(D) to these document portions.

Exemption 7(C) permits the withholding of

> investigatory records compiled for law enforcement purposes . . . to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy . . . .

As a threshold matter, it is clear that documents I(c) and VIII(j) are "investigatory records compiled for law enforcement purposes." While plaintiff suggested in its oral argument that exemption 7 may be totally inapplicable since the Department of the Air Force has no "law enforcement" responsibilities, this argument is premised on an unduly restrictive interpretation of the term "law enforcement." The Court reads the term "law enforcement" as did the Attorney General in his "Memorandum on the 1974 Amendments to the Freedom of Information Act" (at 6):

> "Law enforcement" includes not merely the detection and punishment of law violation, but also its prevention. Thus, lawful national security intelligence investigations are covered by the exemption, as are background security investigations of applicants for Government jobs under Executive Order 10450.

Accordingly, the Court rejects plaintiff's contention that documents I(c) and VIII(j) were not compiled for law enforcement purposes.

It is thus necessary to determine whether the disclosure of the disputed portions of these two documents would result in "an unwarranted invasion of personal privacy." This Court recently considered this same issue in Tarnopol v. Federal Bureau of Investigation, 442 F. Supp. 5 (D.D.C. 1977), and concluded:

> In [making this determination] a court must consider and balance both the public and private interests in disclosure as compared with nondisclosure. See Deering Milliken,

> Inc. v. Irving, 548 F.2d 1131, 1136 (4th Cir. 1977); Tax Reform Research Group v. IRS, 419 F. Supp. 415 (D.D.C. 1976); Luzaich v. United States, 435 F. Supp. 31 (D. Minn. 1977); Cf. Department of the Air Force v. Rose, 425 U.S. 352, 372-73, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). This requires the Court to assess the severity of the invasion of privacy that release of the withheld portions would cause and the public interest in disclosure of the withheld information.

Id. at 7. In Tarnopol, this Court found that "identification of the agents who participated in the preparation of . . . investigative reports and of the individual who furnished the FBI with telephone information may cause such individuals to be harassed." Id. at 8. The Court further found that plaintiffs had "identified no particular interests other than their own personal curiosity that would be served by the release of such information," and the Court itself was unable to identify any substantial interests, either public or private, that would be served by the disclosure of the document portions there in issue. Id. Accordingly, the Court upheld defendants' invocation of exemption 7(C).

The Court now finds that its reasoning in Tarnopol is dispositive of plaintiff's challenge to defendants' instant invocation of exemption 7(C). Disclosure of portions "C" and "D" of document I(c) might well expose the individual Postal Service employees to harassment, and the disclosure of portion "F" of document VIII(j) might well expose the particular information sources to similar harassment. Since plaintiff has not identified any particular interests other than personal curiosity that would be served by the release of these disputed document portions, and since the Court has been unable to identify any substantial public or private interests that would be served by such disclosure, the Court concludes that exemption 7(C) was properly invoked by defendants. Thus, the Court will grant defendants' motion for summary judgment with respect to (1) portions "C" and "D" of document I(c), and (2) portion "F" of document VIII(j).

III. Defendants' Referral To The FBI And CSC Of Certain Documents Was Contrary To The FOIA.

The final category of disputed documents are those documents in defendants' possession that originated from a different agency (here, the FBI or the CSC). There are fifteen documents in this group (described in paragraphs b, e, f, g, h, and i of Affidavit IV; in paragraphs b and j of Affidavit VIII; and in paragraphs a, c, d, k, and l of Affidavit IX). These documents were not withheld from plaintiff pursuant to any of the FOIA's nine exemptions. Rather, plaintiff's request for these documents was directly referred by defendants to the originating agency for processing. Defendants rely on Department of Defense (DoD) Directive 5400.1 as the authority for this referral procedure. Defendants have moved for summary judgment with respect to these documents, but plaintiff has not filed a cross-motion for summary judgment on these documents. It is plaintiff's position that DoD Directive 5400.1 is contrary to the FOIA and thus defendants have no authority to refuse to process plaintiff's request for these documents. Thus, plaintiff asserts that summary judgment is premature until defendants properly process plaintiff's request for those fifteen documents.

Section V(D) of DoD Directive 5400.1 is the provision upon which defendants rely for referring plaintiff's request to the agencies that originated the requested documents here in dispute. It provides:

> When the record requested was originated by another agency or component, the request normally shall be referred promptly and directly to that agency or component for disposition, and the requester shall be notified of that referral.
>
> 1. Coordination prior to transfer of a request for a record is recommended to insure that there is no valid basis for an exception to this normal procedure.
>
> 2. The component which receives the request for a record originated by another component or agency may respond directly to that request pursuant to an agreement with the originator.

> 3. Requests referred from other components or agencies for the records of a component shall be answered in accordance with the time limits applicable to direct requests from the public, and begin to run upon receipt of the referral.

While this referral procedure does not appear to be an unreasonable means of handling such document requests, the Court concludes that it contravenes the strict mandate of the FOIA.

Section 552(a)(3) of Title 5 states in relevant part that "each agency, upon any request for records which reasonably describes such records . . . , shall make the records promptly available to any person." (Emphasis added.) Thus, this section makes no exception for "non-original" records. Indeed, defendants are unable to point to any provision of the FOIA which even arguably authorizes a different procedural treatment for documents that originated with an agency other than the agency possessing the sought documents. And section 552(c) indicates in no uncertain terms that agencies may not impose any limitations on the availability of information other than those expressly provided by the Act:

> This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section.

The referral procedure limits the availability of records by precluding a requestor from obtaining requested documents from a single agency that has possession of all the documents he seeks and that does not have a large backlog of FOIA requests. The referral procedure established by DoD Directive 5400.1 is therefore inconsistent with the express language of the Act. DoD Directive 5400.1 is inconsistent with the Act's express language in a second way: Section 552(a)(6)(A) states that any agency receiving a document request shall process the request within specified time periods. Section V(E)(3) of the Directive contravenes this strict time requirement by stating that the statutory time limits will not begin to run until the "originating" agency actually receives the referral. For these reasons, the Court holds that the referral procedure established by DoD Directive 5400.1 cannot be employed by defendants to avoid processing plaintiff's request for the

the documents it seeks. The Court will therefore deny defendants' motion for summary judgment with respect to the third category of documents here in dispute, and the Court will order defendants to process plaintiff's request for the fifteen disputed documents within ten days of the date hereof.

The Court recognizes that the FBI and CSC, which originated the documents that are the subject of plaintiff's FOIA request, may well be in the best position to determine which if any exemptions should be invoked as the basis for withholding such documents from disclosure. However, the Act expressly provides for circumstances such as these by permitting agencies to extend by ten days the statutory time limits for processing FOIA requests if it is "reasonably necessary to the proper processing of the particular request" for the agency to consult "with another agency having a substantial interest in the determination of the request . . . ." 5 U.S.C. § 552 (a)(6)(B)(iii). Accordingly, if defendants deem it necessary for proper processing to consult with the FBI and the CSC, they must do so in the manner and within the time limits established by the Act.

An Order in accordance with the foregoing will be issued of even date herewith.

Date: 4/12/78

Charles R. Richey
United States District Judge

Attachment 2 Civil Action No. 77-1997

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ATTORNEY AT LAW
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WASHINGTON, D. C. 20006
TELEPHONE (202) 223-5587

October 3, 1978

Mr. George Owens
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: Weisberg v. Central Intelligence Agency, et al., C.A. No. 77-1997

Dear Mr. Owens:

By letter dated June 11, 1976, I made a Freedom of Information Act request of your agency on behalf of Mr. Harold Weisberg, a client. One item of the request asked your agency for copies of the following:

> 6. All analyses, commentaries, reports, or investigations on or in any way pertaining to any published materials on the assassination of Dr. Martin Luther King, Jr., or the authors of said materials.

It has been more than two years since your agency received this request. At no time has the CIA stated that it does not know or cannot easily ascertain the identities of the authors of books and articles on the assassination of Dr. King. Nor have you ever requested that I or Mr. Weisberg provide you with a list of such authors in order to facilitate any search needed to locate such materials.

The CIA does possess materials responsive to Item 6 of Mr. Weisberg's request which it has not provided. Notwithstanding this, the CIA has claimed in court that it has complied with this request. Although it has neither produced these Item 6 materials nor asserted that they do not exist, the CIA seeks to avoid its obligation to do so. Thus, it has recently sought justify its failure to search for and produce such records by claiming that Mr. Weisberg has not provided it with a list of such authors.

It is abundantly clear that the CIA's claim in this regard is pretextual and made in bad faith. Among other things, the CIA is well aware that Mr. Weisberg is the author of a book on the assassination of Dr. King and that it has records on him which have not been produced in response to this request. Moreover, the CIA's releases of its records on the assassination of President

Kennedy reveal the CIA's deep and abiding interest in what the authors of books and articles on that subject have written. (See Attachment A) Mr. Weisberg therefore had no reason to assume, nor did he assume, that the CIA would need his assistance in identifying the authors of books and articles on the assassination of Dr. King.

As you are surely aware, the Freedom of Information Act originally required each agency to make documents available "on request for identifiable records made in accordance with published rules." The 1974 Amendments revised this to require that the request be one which "reasonably describes such records," rather than one which is for "identifiable records."

The legislative history of the 1974 Amendments states that: "A 'description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." H. Rept. No. 93-876, pp. 5-6. Without doubt, Item No. 6 of Mr. Weisberg's request meets this test.

Moreover, the Attorney General's Memorandum on the 1974 Amendments states, at page 23, that when an agency recieves a request which does not "reasonably describe" the records sought, "it should notify the requester of the defect." This the CIA has not done. Nor has the CIA offered assistance in reformulation of the request to comply with the Act, a practice recommended by the Attorney General's Memorandum. There is, of course, no reason why this should be done, since Mr. Weisberg's request reasonably describes the records he is seeking.

As the CIA well knows, my client is poor, old, and suffers from circulatory problems which seriously limit his work. He is anxious to continue his work and cannot afford to let you keep on playing games with his information requests. For this reason I am providing you with a list of some authors who have written books and articles on Dr. King's assassination even though the Act does not require this and you have not requested it.

Although this list is not complete, it does include the principal writers who have published books or articles on Dr. King's assassination. They are:

1. Harold Weisberg, Frame-Up: The Martin Luther King/ James Earl Ray Case

2. Gerold Frank, An American Death

3. William Bradford Huie, He Slew The Dreamer (subsequently republished as Did the FBI Kill Martin Luther King?)

4. Mark Lane, Code Name Zorro!
5. Dick Gregory, Code Name Zorro!
6. George McMillan, The Making of an Assassin
7. Jim Bishop, The Days of Martin Luther King, Jr.
8. John Seigenthaler, A Search for Justice
9. Clay Blair, The Strange Case of James Earl Ray
10. Fred J. Cook
11. Bernard Fensterwald, Jr.
12. John Kaplan

I trust that now that you have been provided with these names and titles you will cease stalling compliance with Mr. Weisberg's request and provide the requested materials forthwith.

If I can be of any further assistance, please do not hesitate to call or write me.

Sincerely yours,

James H. Lesar

James H. Lesar

DISPATCH

CLASSIFICATION

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MARKED FOR INDEXING

X NO INDEXING REQUIRED

ONLY QUALIFIED DESK CAN JUDGE INDEXING

MICROFILM

TO: Chiefs, Certain Stations and Bases

FROM:

Document Number 1035-960

For FOIA Review on SEP 1976

SUBJECT: Countering Criticism of the Warren Report

ACTION REQUIRED · REFERENCES

FOR OSWALD FILE! re CRIMES

THIS WAS PULLED TOGETHER BY INCLUDE CONJUNCTION WITH OF THE SOURCE MATERIAL, PARAGRAPH NUMBER THE THEMES, AND PARIS 9 GENERAL "EXPERTISE" ON THE CASE, THIS SPECIFIC ARTICLE WAS WRITTEN

WE FURNISHED MOST

PSYCH

23 JAN 1967

1. Our Concern. From the day of President Kennedy's assassination on, there has been speculation about the responsibility for his murder. Although this was stemmed for a time by the Warren Commission report (which appeared at the end of September 1964), various writers have now had time to scan the Commission's published report and documents for new pretexts for questioning, and there has been a new wave of books and articles criticizing the Commission's findings. In most cases the critics have speculated as to the existence of some kind of conspiracy, and often they have implied that the Commission itself was involved. Presumably as a result of the increasing challenge to the Warren Commission's Report, a public opinion poll recently indicated that 46% of the American public did not think that Oswald acted alone, while more than half of those polled thought that the Commission had left some questions unresolved. Doubtless polls abroad would show similar, or possibly more adverse, results.

2. This trend of opinion is a matter of concern to the U.S. government, including our organization. The members of the Warren Commission were naturally chosen for their integrity, experience, and prominence. They represented both major parties, and they and their staff were deliberately drawn from all sections of the country. Just because of the standing of the Commissioners, efforts to impugn their rectitude and wisdom tend to cast doubt on the whole leadership of American society. Moreover, there seems to be an increasing tendency to hint that President Johnson himself, as the one person who might be said to have benefited, was in some way responsible for the assassination. Innuendo of such seriousness affects not only the individual concerned, but also the whole reputation of the American government. Our organization itself is directly involved: among other facts, we contributed information to the investigation. Conspiracy theories have frequently thrown suspicion on our organization, for example by falsely alleging that Lee Harvey Oswald worked for us. The aim of this dispatch is to provide material for countering and discrediting the claims of the conspiracy theorists, so as to inhibit the circulation of such claims in other countries. Background information is supplied in a classified section and in a number of unclassified attachments.

3. Action. We do not recommend that discussion of the assassination question be initiated where it is not already taking place. Where discussion is active however addressees are requested:

BT COPY

9 attachments h/w

1 - Scott

8 - Unclassified

DISPATCH SYMBOL AND NUMBER

DATE 4/1/67

CLASSIFICATION

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a. To discuss the publicity problem with liaison and friendly elite contacts (especially politicians and editors), pointing out that the Warren Commission made as thorough an investigation as humanly possible, that the charges of the critics are without serious foundation, and that further speculative discussion only plays into the hands of the opposition. Point out also that parts of the conspiracy talk appear to be deliberately generated by Communist propagandists. Urge them to use their influence to discourage unfounded and irresponsible speculation.

b. To employ propaganda assets to answer and refute the attacks of the critics. Book reviews and feature articles are particularly appropriate for this purpose. The unclassified attachments to this guidance should provide useful background material for passage to assets. Our play should point out, as applicable, that the critics are (i) wedded to theories adopted before the evidence was in, (ii) politically interested, (iii) financially interested, (iv) hasty and inaccurate in their research, or (v) infatuated with their own theories. In the course of discussions of the whole phenomenon of criticism, a useful strategy may be to single out Epstein's theory for attack, using the attached Fletcher Knebel article and Spectator piece for background. (Although Mark Lane's book is much less convincing than Epstein's and comes off badly where contested by knowledgeable critics, it is also much more difficult to answer as a whole, as one becomes lost in a morass of unrelated details.)

4. In private or media discussion not directed at any particular writer, or in attacking publications which may be yet forthcoming, the following arguments should be useful:

a. No significant new evidence has emerged which the Commission did not consider. The assassination is sometimes compared (e.g., by Joachim Joesten and Bertrand Russell) with the Dreyfus case; however, unlike that case, the attacks on the Warren Commission have produced no new evidence, no new culprits have been convincingly identified, and there is no agreement among the critics. (A better parallel, though an imperfect one, might be with the Reichstag fire of 1933, which some competent historians (Fritz Tobias, A.J.P. Taylor, D.C. Watt) now believe was set by Van der Lubbe on his own initiative, without acting for either Nazis or Communists; the Nazis tried to pin the blame on the Communists, but the latter have been much more successful in convincing the world that the Nazis were to blame.)

b. Critics usually overvalue particular items and ignore others. They tend to place more emphasis on the recollections of individual eyewitnesses (which are less reliable and more divergent -- and hence offer more hand-holds for criticism) and less on ballistic, autopsy, and photographic evidence. A close examination of the Commission's records will usually show that the conflicting eyewitness accounts are quoted out of context, or were discarded by the Commission for good and sufficient reason.

c. Conspiracy on the large scale often suggested would be impossible to conceal in the United States, esp. since informants could expect to receive large royalties, etc. Note that Robert Kennedy, Attorney General at the time and John F. Kennedy's brother, would be the last man to overlook or conceal any conspiracy. And as one reviewer pointed out, Congressman Gerald R. Ford would hardly have held his tongue for the sake of the Democratic administration, and Senator Russell would have had every political interest in exposing any misdeeds on the part of Chief Justice Warren. A conspirator moreover would hardly choose a location for a shooting where so much depended on conditions beyond his control: the route, the speed of the cars, the moving target, the risk that the assassin would be discovered. A group of wealthy conspirators could have arranged much more secure conditions.

d. Critics have often been enticed by a form of intellectual pride: they light on some theory and fall in love with it; they also scoff at the Commission because it did not always answer every question with a flat decision one way or the other. Actually, the make-up of the Commission and its staff was an excellent safeguard against over-commitment to any one theory, or against the illicit transformation of probabilities into certainties.

e. Oswald would not have been any sensible person's choice for a co-conspirator. He was a "loner," mixed-up, of questionable reliability and an unknown quantity to any professional intelligence service.

f. As to charges that the Commission's report was a rush job, it emerged three months after the deadline originally set. But to the degree that the Commission tried to speed up its reporting, this was largely due to the pressure of irresponsible speculation already appearing, in some cases coming from the same critics who, refusing to admit their errors, are now putting out new criticisms.

g. Such vague accusations as that "more than ten people have died mysteriously" can always be explained in some more natural way: e.g., the individuals concerned have for the most part died of natural causes; the Commission staff questioned 418 witnesses (the FBI interviewed far more people, conducting 25,000 interviews and reinterviews), and in such a large group, a certain number of deaths are to be expected. (When Penn Jones, one of the originators of the "ten mysterious deaths" line, appeared on television, it emerged that two of the deaths on his list were from heart attacks, one from cancer, one was from a head-on collision on a bridge, and one occurred when a driver drifted into a bridge abutment.)

5. Where possible, counter speculation by encouraging reference to the Commission's Report itself. Open-minded foreign readers should still be impressed by the care, thoroughness, objectivity and speed with which the Commission worked. Reviewers of other books might be encouraged to add to their account the idea that, checking back with the Report itself, they found it far superior to the work of its critics.

Attachment 3 Civil Action No. 77-1997

DEPARTMENT OF STATE
Washington, D.C. 20520

Case No. 720-119

June 22, 1977

Mr. James H. Lesar,
Attorney at Law
1231 Fourth Street, S.W.
Washington, D. C.

Dear Mr. Lesar:

I refer to your letter of June 11, 1976, addressed to Mr. Gene F. Wilson, Freedom of Information Coordinator, Central Intelligence Agency, in which you request on behalf of your client, Mr. Harold Weisberg, access to all records pertaining to Dr. Martin Luther King, Jr.; records pertaining to Dr. King's assassination; records pertaining to James Earl Ray, under whatever name or alias; all records and data relevant to the above, as itemized in your letter.

My colleagues and I have reviewed one document which was referred to this Bureau, and we have determined that a portion of this document constitutes an investigatory record compiled for law enforcement purposes, to the extent that the production of such records would (E) disclose investigative techniques and procedures. That portion is, therefore, exempt from disclosure under Section (b)(7) of the Freedom of Information Act (5 USC 552). The sense of the deleted portion however is to confirm that James Earl Ray was in fact the bearer of a Canadian passport in the name of Ramon George Sneyd, information which is already in the public domain. The Freedom of Information Office, Bureau of Public Affairs, will be in touch with you regarding the released portion of this document.

You should be aware that, under the Freedom of Information Act, you have the right to appeal this determination to the Council on Classification Policy under the Department of State's regulation on appeals, a copy of which is enclosed.

Sincerely,

Richard D. Vine

Richard D. Vine
Deputy Assistant Secretary
Bureau of European Affairs

Enclosure:

Appeals regulation.

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Department of State

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REPORTS OF APPREHENSION IN LONDON OF JAMES EARL RAY, SUSPECTED MURDERER OF DR. MARTIN LUTHER KING, HAVE BEEN FEATURED ON LOCAL RADIO AND TV NEWSCASTS IN OTTAWA TODAY, NOTABLY BECAUSE RAY WAS REPORTEDLY BEARER OF CANADIAN PASSPORT.

BUTTERWORTH

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Attachment 4 Civil Action No. 77-1997

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FM AMEMBASSY OTTAWA
TO SECSTATE WASHDC 3271 PRIORITY

LIMITED OFFICIAL USE OTTAWA 1813

REPORTS OF APPREHENSION IN LONDON OF JAMES EARL RAY, SUSPECTED MURDERER OF DR. MARTIN LUTHER KING, HAVE BEEN FEATURED ON LOCAL RADIO AND TV NEWSCASTS IN OTTAWA TODAY, NOTABLY BECAUSE RAY WAS REPORTELY BEARER OF CANADIAN PASSPORT. EMBASSY LEGAL ATTACHES STATES THAT RAY HAS IN FACT BEEN IDENTIFIED AS BEARER OF CANADIAN PASSPORT IN NAME OF RAMON GEORGE SNEYD PURSUANT EXHAUSTIVE CHECK OF CANADIAN PASSPORT FILES BY EXTAFF AND RCMP. FULL DETAILS AVAILABLE FBI HEADQUARTERS WASHINGTON.

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

THE COURT: All right.

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

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

That may be the only remaining category.

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

THE COURT: I could ask for that.

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

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

MR. METCALFE: A spot check.

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

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

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

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

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