UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 78-0249

CLARENCE M. KELLEY, ET AL.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS
OR IN THE ALTERNATIVE MOTION
FOR SUMMARY JUDGMENT

Defendants, by and through counsel, hereby move the Court to dismiss this action or for summary judgment pursuant to Rules 12(b)(1) and (2) and 56 of the Federal Rules of Civil Procedure on the grounds that Clarence M. Kelley and Griffin Bell are not proper parties to this action and no documents have been improperly withheld within the meaning of 5 U.S.C. (a)(4)(B), and no genuine issue exists as to any material fact and defendants are entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to the affidavit of David M. Lattin (dated April 28, 1978 and attached hereto as Exhibit 1), Special Agent (SA) of the Federal Bureau of Investigation (FBI), a supervisor in the Document Classification Review Unit in the Records Management Division at FBI Headquarters (FBIHQ), Washington, D.C., the affidavit of Horace P. Beckwith, (dated April 28, 1978 and attached hereto as Exhibit 2), Special Agent (SA) of the Federal Bureau of Investigation (FBI), assigned as a supervisor in the Freedom of Information-Privacy Acts Branch, Records Management Division at FBI Headquarters (FBIHQ), Washington, D.C., and

to defendants' Memorandum in Support of their Motion to Dismiss or, in the Alternative, Motion for Summary Judgment.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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HAROLD WEISBERG,

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DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff brought this action pursuant to the Freedom of Information Act (5 U.S.C. § 552 - sometimes hereinafter referrred to as FOIA), seeking the disclosure of the following documents regarding the Kennedy assassination:

> A copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they may be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the content of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released I ask for a copy of it also or if an inventory was made, a copy of the inventory. 1/

Plaintiff requested this data by letter dated December 6, 1977, addressed to Allen H. McCreight, Chief, Freedom of Information/Privacy Acts Branch, Records Management Division. (A true and correct copy of this letter is attached to the affidavit of Horace P. Beckwith as Exhibit A.)

1/ It was determined that plaintiff was requesting the inventory worksheets since he had previously mentioned them and the information on the worksheets appeared to conform with the information requested by plaintiff.

Plaintiff was notified by letter dated February 21, 1978 (a true and correct copy of which is attached to defendants' opposition to plaintiff's motion for summary judgment as Exhibit 2) that release of the worksheets was being discussed. Additionally, by letter dated March 6, 1978, (a true and correct copy of which is attached to defendants' opposition to plaintiff's motion for summary judgment as Exhibit 3), plaintiff's request was acknowledged.

On April 12, 1978, 2,581 pages of worksheets were released to plaintiff pursuant to his request of December 6, 1977. Defendants contend that portions of the worksheets are exempt from mandatory disclosure under the FOIA. The exemptions utilized by defendants in deleting data are as follows: Title 5, United States Code, Section 552(b)(1), (b)(2), (b)(7)(C), (b)(7)(D), and (b)(7)(E).

Statutory Provisions

The relevant portions of the Freedom of Information Act, 5 U.S.C. § 552 are as follows:

> (b) This section does not apply to matters that are - - -
>
> (1)(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;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures. . . .

Defendants rely on Executive Order 11652 for the assertion of the (b)(1) exemption.

ARGUMENT

I. Defendants Have Properly Invoked Exemption One Of The Freedom Of Information Act To Withhold Classified Documents.

Exemption 1 of the Freedom of Information Act provides that the Act does not apply to matters that are:

> (1)(A) specifically authorized under criteria estbalished 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.

Once it is established that particular information is specifically authorized to be kept secret in the interest of national defense or foreign policy and that that information is indeed classified pursuant to the provisions of an appropriate Executive order, the information is therefore exempt from mandatory disclosure under the FOIA.

Classification authority is derived from a series of Executive Orders, the most recent of which is Executive Order 11652. It sets forth the qualifications of officials empowered to and charged with the duty to classify documents.

The initial consideration is whether unauthorized disclosure could reasonably be expected to damage national security or foreign relations. Types of classified information protected against disclosure include intelligence operations, sources and methods, foreign relations matters affecting national security and classified information provided by foreign governments.

Special Agent David M. Lattin examined the inventory worksheets for classified data pursuant to Executive Order

11652 (Lattin Affidavit, para. 3). Special Agent Lattin found that the information warranted the "confidential" designation. (See Lattin Affidavit, para. 9.)

Exemption 1 of the FOIA quoted above, was intended by Congress to protect against harm to the national defense and foreign policy as determined by the Executive, in accordance with Executive Orders. At the same time as Congress amended the FOIA in 1974, it acknowledged that the revised Exemption 1 accords the Executive broad powers to protect material:

> However, the conferees recognized that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. [93d Cong., 2d Sess., Senate Report No. 93-1200, Page 12 (The Conference Report)].

The Senate Report on the amendments also states that the standard of review encompassed by amended Exemption 1 "does not allow the court to substitute its judgment for that of the agency. . . . Only if the Court finds the withholding to be without a reasonable basis under the applicable Executive Order or statute may it order the documents released." (Senate Report No. 93-854, 93d Cong. 2d Sess., page 16). The Court should, of course, satisfy itself that this is so. In doing so, defendants suggest that the Court heed the counsel of the Fourth Circuit Court of Appeals:

> It is not to slight judges, lawyers or anyone else to suggest that any such disclosure [of classified information] carries with it serious risk that highly sensitive information may be compromised. . . . The national interest requires that the government withhold or delete unrelated items of sensitive information, as it did, in the absence of compelling necessity. It is enough, as we have said, that the particular item of information is classifiable and is shown to have been embodied in a classified

> document. This approach is consistent with the Freedom of Information Act which, we have noticed, provides the judge only with discretionary authority even to require production of the document for his in camera inspection; he may find the information both classified and classifiable on the basis of testimony or affidavits. [Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362, 1369 (4th Cir. 1975), cert. denied, 421 U.S. 992.]

See also, Weissman v. Central Intelligence Agency, et al., 565 F.2d 692 (D.C. Cir. 1977).

In short, if it is established that the subject matter of the litigation is classified in accordance with Executive Order 11652, the litigation is at an end.

Information Supplied By Foreign Police Agencies Must Remain Confidential.

Information supplied by foreign police agencies must remain classified. Most foreign police agencies do not officially acknowledge the existence or scope of their intelligence activities or their liaisons with intelligence-gathering agencies in the United States. If the United States unilaterally released official documents provided to us by foreign police agencies, relations between our government and foreign police agencies would be seriously strained. Moreover, such a release would sharply curtail or eliminate cooperation among foreign and American police agencies, thus seriously impairing the United States' police intelligence-gathering capabilities.

Similarly, it is crucial to protect against the disclosure of intelligence methods, particularly where the capability for gathering intelligence or the use of certain techniques is unknown to those who might employ counter-measures.

Finally, it is absolutely crucial that an intelligence or investigative agency stand firm on its promise of confidentiality to its sources. Any suggestion that the FBI would divulge the identities of individuals with whom they

maintain confidential relationships would have a severe impact on the intelligence-gathering investigatory capability of the United States. Furthermore, confidential sources would, in many cases, cease to cooperate with the FBI if their identities were revealed, and new sources would be difficult -- if not impossible -- to recruit. It is only through a pledge of extreme secrecy that the assistance of confidential sources can be enlisted in the first place, and it is only through the maintenance of strictest secrecy that their cooperation will continue.

The FBI affidavit shows that the documents in question are specifically authorized under Executive Order 11652 to be kept secret in the interest of national defense or foreign policy, and that the documents have been properly classified. The contested documents have been described sufficiently to show that they logically fall into the (b)(1) exemption, and that there is a reasonable basis under Executive Order 11652 for withholding them. Furthermore, there has been no showing of lack of good faith on the part of the FBI. The defendants have met their burden of showing that the withheld material is exempt from disclosure on the basis of current and proper classification.

II. Exemption 2 Has Been Properly Invoked To Protect Information Related Solely To The Internal Practies Of An Agency. 2/

The FBI has utilized the second exemption of the FOIA to withhold information related to FBI administrative practices regarding the handling of informants. The information withheld consists of the file and symbol numbers

2/ This exemption has been utilized in conjunction with exemption (b)(7)(D).

related to the informant program and the administration thereof. (See Beckwith Affidavit, para. (6)(b)). Release of the numbers could result in the disclosure of the identity of the informant (see Beckwith Affidavit, para. (6)(b)). In Department Of The Air Force v. Rose, 425 U.S. 352 (1976), the Supreme Court held that "Exemption 2 is not applicable to matters subject to . . . a genuine and significant public interest. . . ." and it quoted Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975) to the effect that:

> . . . the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest. . . . Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not harm significantly specific governmental interests.' [Department Of The Air Force v. Rose, supra at 365.]

See also, Cox v. Levi, 427 F. Supp. 833 (W.D. Mo. 1977), and Ott v. Levi, 419 F. Supp. 750 (E.D. Mo. 1976).

Employing the standards enunciated in Rose and Vaughn, it is clear that the public's interest in knowing the names of FBI informants is neither significant nor genuine when compared to the FBI's need to keep this information confidential. A confidential source whose identity becomes known is obviously of no further use to an investigatory agency. Furthermore, the source might be subjected to extreme forms of harassment, and the agency would no doubt experience great difficulty in recruiting other sources if its promises of confidentiality (whether implied or explicit) are not kept. For the above reasons, the numbers utilized by the FBI have been properly withheld pursuant to Exemption 2.

III. Defendants Have Properly Withheld Data Pursuant to 5 U.S.C. § 552 (b)(7)(C).

The Freedom of Information Act authorizes public access to a wide range of governmental records. However, Congress

has also determined that there are specific "types of information that the Executive Branch must have the option to keep confidential." (S. Rep. No. 813, 89th Congress, 1st Sess. 9 (1967)). The type of information that may be withheld is set forth in 5 U.S.C. § 552(b).

Subsection (b)(7)(C) of the Freedom of Information Act was enacted to protect from compelled disclosure "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." This exemption extends to investigatory records the (b)(6) exemption which applies to personal, medical and similar files.

The significant difference between the two exemptions is the deletion of the term "clearly" in (b)(7)(C). Thus, the deletion of the word "clearly" certainly reduces the Government's burden of proof under (b)(7)(C) as compared to (b)(6).

The material withheld pursuant to exemption (b)(7)(C), deletions of names, background data, other identifying information involving third parties have been made pursuant to (b)(7)(C) (see Beckwith Affidavit, para.(6)(c).) Additionally, the names of FBI agents have been deleted pursuant to (b)(7)(C) (see Beckwith Affidavit, para.(6)(c).)

It is evident that the inclusion of a person's name in an investigatory file, either as a source of information, as a third party who has been in some way connected with the person who was the object of the investigation, or as a third party who appears in the file for various other reasons, carries strong privacy implications. Indeed, dissemination of this file in an undeleted state is the type of dissemination Congress sought to control through exemption (b)(7)(C).

The purpose of the provision is to protect not only the "privacy" of the subject of the investigation but also the privacy of the individuals mentioned in the file (120 Cong. Rec. S. 9330, (May 20, 1974), remarks of Senator Hart).

One of the current cases which dealt with (b)(7)(C) is Congressional News Syndicate v. U. S. Department of Justice, et al., 438 F. Supp. 538 (D. D.C. 1977). The Court initially discussed the difference in emphasis between (b)(6) and (b)(7)(C), but went on to say that the two exemptions should be applied using a de novo balancing test, weighing the public's interest in disclosure against the individual privacy interest and the extent of invasion of that interest.

In Congressional News, supra, the Court found that the disclosure of the names and addresses of contributors to various 1970 Congressional campaigns, as part of the illegal Watergate fund-raising campaign, did not constitute an unwarranted invasion of privacy, but that disclosure of the records relating to the role of one individual in that campaign did constitute an unwarranted invasion. The Court distinguished the situations by indicating that any protection from disclosure political contributors may have had in the past has been eliminated by the 1972 Federal Corrupt Practices Act, which circumscribed the privacy interest of contributors to political election campaigns. The Court noted that the privacy interest of that single individual remained intact because his part in the fund-raising, if any, was not governed by the Corrupt Practices Act. Even if the individual engaged in allegedly criminal activity, the relevation of his name, absent indictment, would expose him to public embarrassment and ridicule and place him in the position of having to defend his conduct without benefit of a formal judicial proceeding.

The present situation before the Court is similar to that of the individual in Congressional News, supra. There is no pre-emptive act of Congress, rather there is information pertaining to individuals who came to the attention of the FBI and who were not the subject of the investigation. To expose the names or data concerning these individuals would constitute an unwarranted invasion of their privacy such as (b)(7)(C) was designed to avoid. Indeed, no legitimate public interest would be served in releasing this data, but, on the other hand, irreparable harm could be done to these individuals.

The names of the FBI agents who produced the worksheets have been withheld. To identify these agents could lead to harassment of these agents and their families which would inevitably affect their ability to perform their responsibilities. The public interest in disclosing these names does not outweigh the privacy interests of the agents. Ott v. Levi, 419 F. Supp. 750 (E.D. Md. 1976).

IV. The FBI Has Properly Asserted Exemption (b)(7)(D) To Protect The Identity Of Confidential Sources Or Information Furnished Only By A Confidential Source. 3/

Exemption (b)(7) of the FOIA provides that the disclosure provisions of the Act do not apply to:

> . . . investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . . (emphasis supplied)

3/ Exemption (b)(7)(D) is utilized in conjunction with exemption (b)(2) as regards the file and symbol numbers.

The two clauses of exemption 7(D) have two distinct effects: (1) investigatory records compiled for law enforcement purposes may be withheld to the extent that disclosure of such records would disclose the identity of a confidential source and additionally; (2) the actual confidential information furnished only by the confidential source, may be withheld even if it would not disclose the identity of the source if the record was compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation.

Assurances of confidentiality need not be express as long as it is the mutual understanding of the sources and the FBI that the confidentiality of their relationship would be respected. The case law supports this view.

> Relying on the legislative history, the courts have decided a source is confidential if the information was provided under an expressed or implied pledge of confidentiality. Luzaich v. United States, 435 F. Supp. 31, 35 (D. Minn. 1977).

The Opinion in Church of Scientology v. Department of Justice, 410 F. Supp. 1297, 1302 (C.D. Calif., 1976), cited the legislative history approvingly,

> The substitution of the term "confidential source" . . . in section 552(b)(7)(D) is to make clear that an identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance can be reasonably inferred. (original emphasis)

Exemption 7(D) is a measure designed to safeguard an important source of information for federal law enforcement officials. Informants, private citizens, and local law enforcement officials would be reluctant to provide information to the FBI and other federal investigative agencies if

they believe that their identities or information which they supplied in confidence would be available under the FOIA. See, e.g., Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918.

> The Act clearly states that confidential information furnished by a confidential source compiled in the course of a criminal investigation is not to be revealed. Congress feared that revelation of even apparently innocuous information might inadvertently reveal the identity of confidential sources. Moreover, the Congress believed that potential sources would fear that disclosure of information would reveal their cooperation and that such sources would be discouraged from cooperating. Church of Scientology v. Department of Justice, supra, at 1302.

See also, Shaver v. Levi, 433 F. Supp. 438 (N.D. Ga. 1977). It is, therefore, imperative that a federal law enforcement agency be able to give assurances in all cases that the identity and information supplied by a confidential source will not be made public.

The Congressional debates relating to exemption 7(D) reveal that Congress intended the courts to defer to the FBI's designation of a source of investigative information as a confidential source. The meaning of exemption 7(D) was debated at length after the President vetoed the 1974 Amendments. Senator Hart, who introduced the amendment modifying exemption 7, spoke on this issue while attempting to persuade the Senate to override the veto. The Senator stated:

> One of the reasons given by the President for his veto is that the investigatory files amendment which I offered would hamper criminal law enforcement agencies in their efforts to protect confidential files. We made major changes in the conference to accommodate this concern. * * * The major change in conference was the provision which permits law enforcement agencies to withhold 'confidential information furnished only by a confidential source.' In other words, the agency not only can withhold information which would disclose the identity of a confidential source,

> but also can provide blanket protection for any information supplied by a confidential source. The President is therefore mistaken in his statement that the F.B.I. must prove the disclosure would reveal an informer's identity; all the F.B.I. has to do is to state that the information was furnished by a confidential source and it is exempt. 120 Cong. Rec. S. 19,812 (November 21, 1974) (emphasis added).

The FBI's very limited assertion of exemption 7(D) to protect from disclosure only the identities of confidential sources is fully justified under the Freedom of Information Act. Protection of confidential sources must be upheld in the interest of law enforcement as well as in the interests of the privacy and safety of the cooperating individuals.

The identity of confidential informants and the information supplied only by them has been withheld by the FBI pursuant to (b)(7)(D). (See Beckwith Affidavit, para. (6)(d).)

It is crucial that an investigative organization such as the FBI be able to obtain information from confidential sources. The ability to do this is predicated on the source's belief in and reliance on the agency's promise of absolute confidentiality. If this confidentiality is breached, the sources would "dry up", and information vital to the FBI's functions would be lost. The substance of the information supplied by a confidential source, as well as the source's identity, must be withheld since it might be possible to trace the identity of the source from the nature of the information supplied.

The legislative history of (b)(7)(D) indicates that it was meant to protect the identity of the source as well as information provided by the source which might reasonably lead to disclosure of the source's identity, 120 Cong. Rec. S-19,812 (November 21, 1974) (Remarks of Sen. Phillip Hart). The courts have also recognized the real danger that citizen cooperation with law enforcement or other agencies will end

if confidential sources are not protected. See, for example, Church of Scientology of California v. U.S. Department of Justice, 410 F. Supp. 1297, 1303 (C.D. Cal. 1976); Evans v. Department of Transportation, 446 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); and Wellman Industries, Inc. v. NLRB, 490 F.2d 427 (4th Cir. 1973).

Among the material exempt under (b)(7)(D) is information supplied by confidential commercial or institutional sources. The policy considerations for protecting the confidentiality of human sources under (7)(D) apply equally to commercial institutional sources. In both cases, the prime consideration is to ensure the uninterrupted flow of essential information from the source to the investigative agency. Therefore, the character of the source is immaterial so long as the information is given to the agency in exchange for either an expressed or implied promise of confidentiality.

In Church of Scientology of California v. U.S. Department of Justice, supra, the court grappled with the question of whether a law enforcement agency itself could be a confidential source within the meaning of 5 U.S.C. § 552(b)(7)(D). In holding that (b)(7)(D) is applicable to law enforcement agency sources (at 1303), the Court stated:

> A recognition of the overall purpose of the [1974] amendment [to the FOIA] and the political realities surrounding its passage make it unmistakably clear that the term source means source, not human source. [Id., at 1302.]

The Court went on to note that the purpose of (7)(D) is "to protect against disclosure of confidential information . . . provided by any confidential source." [Id. at 1303; emphasis added]. This would include a human source, a law enforcement agency source, or, presumably, a commercial or institutional source.

V. Exemption (b)(7)(E) Has Been Properly Asserted.

The FBI has used (b)(7)(E) to protect investigative techniques and procedures, not generally known, from disclosure. (See Beckwith Affidavit, para. (6)(e).)

In Ott v. Levi, 419 F. Supp. 750 (E.D. Mo. 1976), the Court held that FBI laboratory reports disclosing techniques used in arson investigations, not commonly known, "could place potential arsonists on notice of the law enforcement capabilities in this area and assist them in avoiding detection," and therefore, the reports were exempt under (7)(E).

If the techniques in question were made known to the public, their effectiveness would be destroyed because subjects of future FBI investigations would be able to circumvent them. Therefore, the deleted material is exempt under (b)(7)(E).

VI. This Action Must Be Dismissed As To Defendants Clarence M. Kelley And Griffin Bell As They Are Not Proper Parties To This Action.

Neither Clarence M. Kelley nor Griffin Bell in either their official on individual capacities is a proper defendant in this action. The FOIA grants jurisdiction to the Federal District Courts "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 551(a)(4)(B). Clarence M. Kelley and Griffin Bell are not agencies (see 5 U.S.C. § 551(e) and 5 U.S.C. § 551) within the meaning of the FOIA, and therefore are not proper parties to this action. See Lombardo v. Handler, 397 F. Supp. 792 (D. D.C. 1975), and Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976).

CONCLUSION

For the foregoing reasons, Defendants' Motion To Dismiss or in the Alternative Motion for Summary Judgment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE
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HAROLD WEISBERG,

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CLARENCE M. KELLEY, ET AL.,

Defendants.
_____/

ORDER

This Motion having come before the Court on Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and the Court being fully advised in the premises and having concluded that the Motion is well taken, it is by the Court on this _____ day of _____, 1978,

Ordered that Defendants' Motion to Dismiss be and hereby is granted.

_____

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. Civil Action No. 78-0249

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_____/

ORDER

This Motion having come before the Court on Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and the Court being fully advised in the premises and having concluded that the Motion is well taken, it is by the Court on this _____ day of _____, 1978,

Ordered that Defendants' Motion for Summary Judgment be and hereby is granted.

_____

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v. Civil Action No. 78-0249

CLARENCE M. KELLEY, et al.,

Defendants

AFFIDAVIT

I, David M. Lattin, being duly sworn, depose and say as follows:

(1) I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI assigned in a supervisory capacity to the Document Classification Review Unit in the Records Management Division at the FBI Headquarters (FBIHQ), Washington, D. C.

(2) I have been authorized to classify FBI documents pursuant to Executive Order (EO) 11652, Section 2(A)(3) and 2(C), and 28 C.F.R. 17.23, et seq. My current assignment in classification matters involves a variety of duties including review of classified documents requested under the Freedom of Information Act (FOIA) and Privacy Act (PA) as to their suitability for continued classification, and when indicated, declassification of FBI documents.

(3) The documents referred to herein are inventory worksheets utilized in the processing of files pertaining to the investigation of the assassination of President John F. Kennedy. These worksheets are referred to in the affidavit of Special Agent Horace P. Beckwith which is being filed in this matter.

I have made a personal independent examination of these inventory worksheets and have personal knowledge of the

Exhibit #1

information set forth for which the exemption (b)(1) pursuant to Title 5, United States Code, Section 552 is claimed.

(4) My examination was conducted in strict adherence to the standards and criteria found in EO 11652. The classification level of "Confidential" as set forth in EO 11652 was relied upon exclusively by the affiant as set forth in the pertinent part in Section 1 as follows:

"(C) 'Confidential.' 'Confidential' refers to that national security information or material which requires protection. The test for assigning 'Confidential' classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security."

(5) The classifications of portions of these worksheets are exempt from automatic declassification as authorized by EO 11652. These exemption categories are described in Section 5(B) of EO 11652 as follows:

> "(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence."
>
> "(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods."
>
> "(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security."
>
> "(4) Classified information or material the disclosure of which would place a person in immediate jeopardy."

(6) Thirteen of the 19 items classified in the inventory worksheets are classified "Confidential" inasmuch as the items would reveal cooperation with foreign police agencies. These foreign police agencies specify that all cooperation they afford us should be held in strict confidence. Failure to honor confidential agreements established between the FBI and these foreign agencies can be expected to cause them to cease to provide cooperation. Loss of such cooperative arrangements would be a serious blow to the intelligence gathering abilities of the United States. Violating this confidentiality could damage our relations with the countries in which these foreign police agencies are located.

(7) Four of the items classified in the inventory worksheets are classified "Confidential" as they could identify an intelligence method. The intelligence method that could be revealed by disclosure of this classified material is a method that was directed at establishments of foreign governments within the United States.

The acknowledgement of the details of the intelligence method and operation referred to in these worksheets could lead to the disruption of foreign relations by stimulating diplomatic confrontations with certain foreign states, and thus could damage national security. While all sovereign nations are, of course, aware that they may be the targets or objects of clandestine intelligence methods and may even unofficially acknowledge this fact, no Government can ignore an official acknowledgement by another Government that specific intelligence operations have been conducted against it. Official acknowledgement of specific clandestine operatons not only creates an opportunity for foreign governments to claim that such operations constitute breaches of international obligations but may even mandate an appropriate reaction.

Acknowledgement could be perceived as a direct challenge to the sovereignty of that foreign state and make it incumbent for such state to answer the challenge by means of diplomatic protest or stronger measures. On the other hand, even where states are aware, both specifically and generally, that activity of this nature takes place, they retain the alternative of not responding, if not confronted with acknowledgement.

More generally, this intelligence method which remains in active use by the FBI today, must be protected in order to maximize the effectiveness of our national security investigations. Information concerning the patterns and practice of intelligence agencies and the methods by which they operate must be guarded since disclosure of such information can be of great assistance to those who seek to penetrate or damage United States intelligence operations, or to take countermeasures against them. Intelligence methods which are disclosed are demonstrably less effective in subsequent investigations, thereby reducing the intelligence capabilities of the FBI, while benefiting the hostile foreign governments and the internal elements who are the legitimate targets of national security investigations. At a minimum, a decline in the FBI's ability to collect information in national security investigations designed to detect internal threats to the Government, as well as the hostile activities of foreign countries within our borders, may reasonably be expected to cause damage to the national defense.

(8) Two of the items classified in the inventory worksheets were classified "Confidential" as the items would identify intelligence sources. Both of these sources are foreign nationals having contacts with foreign establishments or individuals in foreign countries. The need for the protection of such sources is evident.

At the very least, exposure of sources will end their particular usefulness for gathering further intelligence.

Confidential sources of intelligence information can be expected to furnish information only so long as they feel secure in the knowledge that they are protected from retribution or embarrassment by the pledge of confidentiality that surrounds the information transaction. It is only with pledges of extreme secrecy that the aid of such individuals can be enlisted in the first place, and it is only through confidence in the ability to maintain extreme secrecy that such individuals can be pursuaded to remain in place and act as informants over an extended period of time. Moreover, if sources cannot be given assurances that their involvement will be kept confidential, or if such assurances are not lived up to, intelligence sources will be difficult to find. Potential agents and informants will be discouraged and inhibited from becoming active providers of intelligence if the United States Government's records indicates a failure to protect sources. Any action on the Government's part which indicates that it may fail in any way to protect its intelligence sources lessens the confidence of such sources in this country's intelligence organizations. This loss of confidence reduces the capability to attract and hold new sources and this loss of capability, in turn, diminishes the United States Government's ability to collect needed intelligence.

These individuals, who have been willing to act as agents or informants for United States intelligence, are subject to retribution if and when they are exposed. This remains true to informants who are no longer active. For exposed sources residing abroad, the risk of the more serious forms of retaliation is particularly acute. Of course, disclosure of intelligence operations by the United States directed against any foreign establishment risks the damage to our foreign relations.

(9) The affiant has reviewed the worksheets and has determined that the proper classification has been assigned and that they have been appropriately marked in accordance with EO 11652 and Section 4(A), and 28 C.F.R. 17.40, et seq.

David M. Lattin

DAVID M. LATTIN
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to before me this 28th day of April, 1978.

Mildred M. Foster

Notary Public

My commission expires My Commission Expires September 14, 1981.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v. Civil Action Number 78-0249

CLARENCE M. KELLEY, et al.,

Defendants

AFFIDAVIT

I, Horace P. Beckwith, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned in a supervisory capacity to the Freedom of Information-Privacy Acts Branch, Records Management Division at FBI Headquarters. Pursuant to my official duties, I am familiar with the plaintiff's Freedom of Information Act (FOIA) request dated December 6, 1977, requesting records pertaining to the processing and release of records concerning the assassination of President John F. Kennedy (A true copy of this request is attached hereto as Exhibit A).

(2) In response to plaintiff's FOIA request of December 6, 1977, the FBI provided plaintiff, by letter dated April 12, 1978 (a true copy of which is attached hereto as Exhibit B), 2,581 pages of inventory worksheets utilized in the processing of files pertaining to the investigation of the assassination of President John F. Kennedy. Certain exemptions pursuant to the FOIA were utilized to withhold information from release and are as follows: Title 5, United States Code, Section 552 (b)(1), (b)(2), (b)(7)(C),

Exhibit #2

(b)(7)(D) and (b)(7)(E).

(3) Inventory worksheets are used by FBI employees to provide certain descriptive data relating to each document processed and to provide the statutory exemption used to excise material from each document or, if necessary, to indicate the Federal agency to whom the document was referred. The worksheets are used to assist in a statistical analysis of the documents processed and to assist in locating a document in question after it is processed. However, the worksheets are primarily used by the FBI employee reviewing the documents prior to release. This reviewer checks all the documents processed and has the benefit of the worksheets to insure the proper exemptions were used for any excisions of material.

(4) The files pertaining to the assassination of President John F. Kenendy were processed by Special Agents of the FBI who were at FBI Headquarters during the summer and fall of 1977 on temporary assignment to assist in reducing the backlog of requests in FOIA matters. This temporary assignment of Special Agents from their investigative assignments to FOIA matters was called "Project Onslaught." Approximately thirty Special Agents assisted in various phases of the processing of the files pertaining to the assassination of President Kennedy. All of the Special Agents knew their efforts at processing documents would be reviewed and the inventory worksheets would be used to check the exemptions claimed. A few of the Special Agents not only listed the exemptions, but made an occassional explanatory note about the exemption. These few Special Agents were attempting to be of further assistance to the reviewer, however, they actually listed the information on the worksheets which was excised in the original document. Therefore, excisions had to be made from the worksheets before release to the plaintiff because the same material had been properly withheld from the original documents. Additionally, the names of the Special Agents responsible for the processing were deleted from the worksheets. See paragraph (6)(C) below.

(5) Of the 2581 pages of inventory worksheets released to plaintiff, there were deletions made on 125 pages or 4.8 percent of the pages. The remaining 95.2 percent of the pages were released in their entirety with no deletions and no exemptions claimed.

(6) The following are explanations which detail the use of the Freedom of Information Act exemptions:

(a) Classified Matters

Title 5, United States Code, Section 552 (b)(1) exempts from disclosure information which is currently and properly classified pursuant to Executive Order 11652. This information contained in the inventory worksheets in the form of notations and short phrases is identical to information which is duly classified in the original documents. This information, if released, would identify foreign sources or sensitive procedures, thereby jeopardizing foreign policy and the national defense. See affidavit of SA David M. Lattin,

(b) Internal Agency Rules and Practices

Title 5, United States Code, Section 552, (b)(2) allows for deletion of material relating solely to the internal rules and practices of an agency. This exemption has been asserted solely to remove informant file numbers and informant symbol numbers. These file numbers and symbol numbers are withheld to protect the FBI informant program and the FBI's administration of its informants. This material is protected not only with the (b)(2) exemption, but also under Title 5, United States Code, Section 552, (b)(7)(D) as material which will identify confidential sources. (See paragraph (d) below.

(c) Unwarranted Invasion of Personal Privacy

Title 5, United States Code, Section 552, (b)(7)(C) which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy has been asserted to protect names, background data, and other identifying information of third parties that appear on the inventory worksheets and were withheld in the original documents. This subsection was also utilized to excise names of Special Agents responsible for producing the inventory

worksheets during the processing of the original documents. To release these names could cause public exposure or harassment of Special Agents and their families, which is unwarranted and would inevitably affect their ability to perform their responsibilities. There appears to be no public need for the revelation of the names of those who processed the original documents.

The following are examples of information that was deleted pursuant to Section 552 (b)(7)(C) in the original processing of the files pertaining to the assassination of President Kennedy, therefore, notes on the worksheets with similar information were deleted. (1) References to a person's criminal background. (2) References to a person's medical background. (3) Psychological diagnosis of an individual. (4) Derogatory information about a third person. (5) The name of a correspondent was protected in underlying document due to his mental state. (6) Police Department identification numbers of individuals. (7) References to person's personal sex life.

(d) Confidential Source Material

Title 5, United States Code, Section 552, (b)(7)(D) allows for the deletion of material that would disclose the identity of a confidential source or reveal confidential information furnished only by the confidential source and not apparently known to the public. The exemption was cited in the inventory worksheets corresponding to the same information as excised in the original documents. In addition, this exemption has been utilized to remove symbol numbers of informants and the file numbers of informants. These symbol numbers and file numbers are used to cover the actual identity of the informant in the document, but still enable the FBI to determine his identity. These deletions are made to insure protection of the identity of sources.

(e) Sensitive Techniques and Procedures

Title 5, United States Code, Section 552 (b)(7)(E) exempts from disclosure information which would reveal investigative techniques and procedures, thereby impairing their future effectiveness. These techniques and procedures were

deleted in the worksheets in those instances where they were deleted in the original document.

The (b)(7)(E) exemption was claimed a total of seven times on the worksheets. It was used to protect two investigative techniques. Six times it was used to delete one such technique and once for another technique. The Special Agent who processed the original documents wrote the identity of the technique to assist the reviewer.

(7) The release of these inventory worksheets is pursuant to plaintiff's request for records relevant to the processing and release of the original records. These worksheets represent the only documents available within the FBI which are responsive to plaintiff's request.

(8) The records provided plaintiff by the FBI's April 12, 1978 letter were provided without charge.

(9) A true copy of the worksheets released to the plaintiff is attached hereto as Exhibit C.

Horace P. Beckwith
HORACE P. BECKWITH
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to before me this 28th day of April, 1978.

Mildred M. Foster
Notary Public

My Commission expires My Commission Expires September 14, 1981.

Mr. Allen H. McCreight, Chief FOIA/PA Branch
Records Management Division, FBI
Wash., D.C. 20535

Rt. 12, Frederick, Md., 21701
12/6/77

Dear Mr. McCreight,

Your letter of December2,1977 relating to the FBI's release of JFK assassination files came today. I regret that it requires further correspondence.

The first question I must raise, one I've raised more times than I can estimate, is why with all these reviews of JFK assassination records my many requests for precisely this public information remain without response. I have filed two dozen or more such FOIA requests. It is more than a year since your SA Howard testified in my C.A.75-1996 that the FBI had by then had three reviews of this material. It is more than a year since I testified to these requests that are entirely without any compliance since. The FBI's counsel, AUSA and staff, were present at my testimony and at SA Howard's. Various FBI FOIA personnel were present. You obtained the transcript of this testimony. I have since the time of the testimony repeated prior appeals. But to date there is the same - total - silence from the FBI and from you who sign yourself as in charge of the FBI's FOIA work.

The Act requires the production of records, not their generation. However, my PA and FOIA requests that should have yielded these records years ago also are without your compliance. My appeals of this ~~has~~ also without response. I therefore do not have all the records relevant to my FOIA and PA requests. I herewith repeat my requests under the Acts, intending by the repetition that you provide within the time limitations of the Acts all those records that relate to my requests. This means back to as I recall it 1968. I assume that this is your all-time record of non-compliance. Whether or not it is I want any and all such records of whatever source or nature, however generated and wherever filed or stored or described or classified by the FBI. I also solicit any explanation you would care to provide for this persisting non-compliance and the permeating disregard for the obligations imposed upon the Bureau and upon you personally by the Acts.

Aside from other and I believe obvious considerations it is a fact that some if not much or indeed all of what you are now making available should have been provided to me quite long ago. Not having complied with my requests and the Acts has, I believe, been hurtful to me and has constituted an interference with my right and ability to perform the work upon which I have for so long been engaged.

As you are aware long ago non-compliance with my requests was ordered and approved to the highest FBI levels, including the first Director. As you are also aware compliance is the present issue in my C.A.75-1996 and because of the FBI's non-compliance I am at this very moment forced to forego other work and do the work of the FBI with regard to compliance in that case. With this non-compliance being total with regard to JFK assassination records and a major factor in the 1996 case and for other reasons I believe the request in my second paragraph above constitutes justification under the Acts for expedited compliance and I do ask that of you. I want to be able to incorporate what you should provide in the memoranda I am being compelled to prepare for you and at your request in C.A.75-1996.

By the time of the date of your letter of December 2,1977, a letter I take it was sent to many and is a sort of form letter, your representations in it were untruthful. You had in fact made an exclusive release or more than 500 pages of these "forthcoming" records to Radio Station WTOP and the AP at least. You thereafter and prior to the date of your letter made duplicates available to others in the press. Whatever the circumstances of these releases it is a fact and to my personal knowledge is a fact that within this release there are records I began to ask the FBI for going back to about 1968. But your first paragraph refers to your "forthcoming release" and your second begins,"The first segment of these materials will be made available beginning at 9:30 a.m. December 7,1977, ..."

EXHIBIT A

Of course I am also troubled by your failure to notify me of your making these records available until the day prior to their availability. While I do not deceive you - I cannot use these records in your reading room - your unnecessary delay in this guaranteed that were it within my capabilities it would still be impossible for me because I have a medical appointment that precludes it.

Your fifth paragraph is also troubling. You say of these about 80,000 pages, "Materials to be released are copies from the raw investigative files of the FBI..." This is the same FBI that forced me to go all the way to the Supreme Court in a case in which I did not request "raw investigative files" by falsely-representing that I had asked for such raw files and that the release of any of them at any time and under any circumstances would utterly destroy the FBI or render it forever impotent.

When you follow this with "as they were compiled chronologically in our central records system during the investigation," I am further troubled, in general and as it relates to my own requests that remain without response. Most FBI records do not even reach your "central records system" at FBIHQ and there is no such limitation in any of my requests for JFK assassination records. This can mean, for example, that if I had all the 80,000 pages you are to release you might still not have complied with my requests.

Your concluding paragraph states that "No index of our FBI materials is available to cross-reference these materials to the public record." This is a semantical representation. The public record is only part of the records that are involved. The raw materials are often incorporated in other records, like Letterhead Memoranda and other reports. From my personal experience in FBIA cases I have learned that the FBI has a practise of noting on its field office raw materials what reports include that information. This should mean that through other than what you might describe as an index it is possible to correlate the raw materials with the other records into which parts are incorporated.

These records were processed under FOIA, I take it. This means that other records relevant to the processing were generated. These should include worksheets on which the records are listed and where exemptions are claimed the exemptions are noted. There are other records relevant to processing and review. I herewith ask for a copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they may be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the content of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released I ask for a copy of it also or if an inventory was made, a copy of the inventory.

Sincerely,

Harold Weisberg

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

April 12, 1978

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

Dear Mr. Weisberg:

Enclosed are 2,581 pages of inventory worksheets utilized in the processing of files pertaining to the investigation into the Assassination of President John F. Kennedy. These pages are releasable under the provisions of the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. The deletions made in this material are based on one or more of the following subsections of Section 552:

(b)(1) information which is currently and properly classified pursuant to Executive Order 11652 in the interest of the national defense or foreign policy;

(b)(2) materials related solely to the internal rules and practices of the FBI;

(b)(7) investigatory records compiled for law enforcement purposes, the disclosure of which would:

(C) constitute an unwarranted invasion of the personal privacy of another person;

(D) reveal the identity of an individual who has furnished information to the FBI under confidential circumstances or reveal information furnished only by such a person and not apparently known to the public or otherwise accessible to the FBI by overt means;

EXHIBIT B

(E) disclose investigative techniques and procedures, thereby impairing their future effectiveness.

Pursuant to the decision of the Deputy Attorney General, Office of Privacy and Information Appeals by letter dated March 31, 1978, to your attorney, James H. Lesar, no fee is being charged for the duplication of these documents.

You have 30 days from receipt of this letter to appeal to the Deputy Attorney General from any denial contained herein. Appeals should be directed in writing to the Deputy Attorney General (Attention: Office of Privacy and Information Appeals), Washington, D. C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

Sincerely yours,

Allen H. McCreight, Chief
Freedom of Information-
Privacy Acts Branch
Records Management Division

Enclosures (7)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, Memorandum in Support of Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and exhibits upon plaintiff by depositing a copy thereof in the United States mail, first class, postage prepaid to:

James H. Lesar
910 Sixteenth Street, N.W.
Washington, D.C. 20006

this 3rd day of July, 1978.

Emory J. Bailey
EMORY J. BAILEY