

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE,

Defendant.

Civil Action No. 81-0023

DECLARATION OF FREDERICK D. HESS

Re: Request of HAROLD WEISBERG

I, FREDERICK D. HESS, declare the following to be true and correct:

1. I am an attorney in and the Acting Director of the Office of Legal Support Services of the Criminal Division of the United States Department of Justice. The statements made herein, I declare on the basis of my personal knowledge, as well as upon knowledge acquired through the performance of my official duties as Acting Director.

2. The Criminal Division's Freedom of Information/Privacy Act Unit (FOI/PA Unit) is a component of the Office of Legal Support Services.

3. This Declaration is being prepared at the request of Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, for the purpose of explaining the legal basis for the withholding of the substantive portions of three documents originating in the Criminal Division and denominated as CRIM #5, CRIM #6, and CRIM #7.

4. The withholdings were premised on the following exemption contained in the Freedom of Information Act:

5 U.S.C. Section 552(b)(5), which provides for the nondisclosure of matters that are "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."

5. On the basis of the foregoing exemption, the substantive portion of each document was withheld in toto:

a. Document No. CRIM #5 is a three-page memorandum dated April 21, 1976, from Robert L. Keuch, then Deputy Assistant Attorney General, Criminal Division, to Richard L. Thornburgh, then Assistant Attorney General, Criminal Division, captioned "The Attorney General's Memorandum of April 15 re Dr. King Investigation."

The memorandum has seven paragraphs: Paragraph one relates Mr. Keuch's recommendation with respect to views expressed to the Attorney General; Paragraphs two through six (numbered 1. through 5.) set forth Mr. Keuch's reasons for the recommendation expressed in paragraph one; and Paragraph seven sets forth Mr. Keuch's recommendation with respect to other views expressed to the Attorney General.

b. Document No. CRIM #6 is a five-page memorandum dated April 21, 1976, from Jay C. Waldman, then Deputy Assistant Attorney General, Criminal Division, to Richard L. Thornburgh, then Assistant Attorney General, Criminal Division, captioned "Martin Luther King Report."

The memorandum has eighteen paragraphs: Paragraph one relates the purpose of the instant memorandum; Paragraphs two through five set forth the writer's recommendation with respect to "Creation of a Task Force"; Paragraphs six through nine set forth the writer's recommendation with respect to "Creation of an Advisory Committee"; Paragraphs ten and eleven set forth the writer's recommendation with respect to "Remedial Action, Disposition of the Material"; Paragraphs twelve through fourteen set forth the writer's recommendation with respect to "Remedial Action, Prosecutive or Disciplinary Action"; and

Paragraphs fifteen through eighteen set forth the writer's recommendation with respect to "Remedial Action, Redress."

c. Document No. CRIM #7 is an uncaptioned two-page memorandum dated April 20, 1976, from John C. Keeney, Deputy Assistant Attorney General, Criminal Division to Richard L. Thornburgh, then Assistant Attorney General, Criminal Division.

The memorandum has one unnumbered with numbered subparts and five numbered paragraphs, one of which has two lettered subparts: The unnumbered paragraph relates the purpose of the instant memorandum and the numbered paragraphs which follow relate the writer's recommendations with respect thereto.

6. All substantive portions of the three memoranda are deemed to be exempt under 5 U.S.C. 552(b)(5). This Section provides for the withholding of inter-agency and intra-agency communications not available by law to a party other than an agency in litigation with the agency. None of the substantive paragraphs would be so available. The paragraphs reflect the subjective opinions of the writers with respect to the views given to the Attorney General. All relate to an inquiry with respect to the exercise of prosecutorial (investigative) discretion. All three memoranda contain material of a deliberative and advisory nature, representing the free exchange of opinions of Government officials, the disclosure of which would severely inhibit the Government's future ability to have open and frank discussions of important issues, which is so necessary for effective Government and it would have an inhibitive effect upon the development of policy and upon administrative/supervisory direction. Indeed, they are not simply deliberative material--they are the deliberative process of the Government which courts do necessarily protect to shield governmental decision making from the type of intrusive inspection which would prevent the deliberative process from operating effectively. Each memorandum is a pre-decisional advisory communication, the disclosure of which would be injurious to the consultative

function of the Government. Unless protected from disclosure evaluations, and especially characterizations contained in the evaluative process, will not be committed to writing. This would have a damaging effect on law enforcement and Government operations generally.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 1981

Frederick D. Hess
FREDERICK D. HESS