No. 82-1229

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Appellant/Cross-Appellee,

v.

U. S. DEPARTMENT OF JUSTICE,

Appellee/Cross-Appellant.

AND CONSOLIDATED Nos. 82-1274,
83-1722 and 83-1764

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE/CROSS-APPELLANT

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INTRODUCTION

At oral argument in this case, the Court asked numerous questions concerning the issue of whether the Freedom of Information Act, 5 U.S.C. 552, requires search for records of third parties who have not waived their rights under the Privacy Act, 5 U.S.C. 552a, absent a showing of public interest in the information sought by the requester. In light of the questions asked by the Court, and in response to plaintiff's assertion at argument that he has demonstrated a public interest in the

material he seeks,[1] defendant Department of Justice files the instant supplemental brief to further address this issue.

ARGUMENT

In Antonelli v. Department of Justice, 721 F.2d 615 (7th Cir. 1983), pet. for cert. pending, S. Ct. No. 83-6312, the Seventh Circuit recognized that "[m]erely confirming a particular file exists and stating the applicable exemption could reveal too much information where the requester seeks access to another person's files," and that "revealing that a third party has been the subject of FBI investigations is likely to constitute an invasion of that person's privacy." 721 F.2d at 618. Accordingly, the court refused to require the FBI to confirm or deny the existence of the records sought by the requester, where acknowledgment of the very existence of the

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[1] Plaintiff made no reference to his purported "public interest" showing in his appellate briefs. His "public interest" argument was presented, for the first time, in the rebuttal portion of his oral argument in this Court, where he relied, for the first time, on affidavits which he had not even designated for inclusion in the joint appendix or this appeal. These affidavits were filed in April, 1981, more than a year after the district court determined that the FBI had conducted an adequate search of its King assassination files. J.A. 477. Thus the district court has never had an adequate opportunity to focus on plaintiff's "public interest" claim in this case.

Moreover, this issue was briefed in this Court before the Seventh Circuit released its decision in Antonelli v, Department of Justice, 721 F.2d 615 (7th Cir. 1983), pet for cert. pending, S.Ct. No. 83-6312, the first court of appeals opinion on this question. Thus, neither the district court nor the parties in their briefs had the benefit of the Antonelli court's analysis.

records could invade a third party's privacy and the requester had not demonstrated an adequate public interest justifying disclosure. See also Ely v. United States Secret Service, No. 83-2080 (D.D.C., Dec. 14, 1983) (attached); Ray v. Department of Justice, 558 F. Supp. 226, 228 n.3 (D.D.C. 1982), aff'd. without opinion, 720 F.2d 216 (D.C. Cir. 1983) (holding public interest in exculpation of James Earl Ray insufficient to justify invasion of privacy of Percy Foreman, Ray's former attorney and a subject of plaintiff's request in the case at bar); Rushford v. Civiletti, 485 F. Supp. 477, 479-81 (D.D.C. 1980), aff'd without opinion, 656 F.2d 900 (D.C. Cir. 1981) (upholding FBI's refusal to confirm or deny criminal investigations of federal judges). Cf. Miller v. Casey, No. 83-1108 (D.C. Cir. March 16, 1984); Gardels v. CIA, 689 F.2d 1100 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976).

The Department maintains that plaintiff has failed to demonstrate a sufficient public interest to justify invading the privacy of the many individuals listed in his request of December 23, 1975. Cf. Ray v. Department of Justice, supra. [2] The Court need not address this issue, however,

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[2] Most of the individuals named by plaintiff were involved in the prosecution or defense of James Earl Ray, or have written books about the King assassination. It is well settled that an attorney does not become a "public figure" divested of privacy rights merely by taking a controversial case. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974). Moreover, the "public interest" in disclosure of these individuals' files (CONTINUED)

because, as we demonstrate below, it is not properly before the Court at this time.

Plaintiff's request of December 23, 1975, sought access to several categories of "records pertaining to the assassination of Dr. Martin Luther King, Jr." J.A. 37.[3] It has always

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[2] (FOOTNOTE CONTINUED)

clearly is no greater in this case than in the Ray case.

We note in passing that plaintiff has received the requested records on Messrs. Fensterwald, Lesar and James Earl Ray, who furnished privacy waivers, and on Judge Preston Battle, who is deceased. Plaintiff's briefs also reference a release concerning one Gerold Frank, but that release was not in response to plaintiff's FOIA request; rather, it was in response to another request made by plaintiff's counsel. Pl. Opening Br. at 22; Pl. Reply Br. at 69-70. The record in this case does not reveal why the Frank material was released to plaintiff's counsel, but in any event that release forms no part of this case.

[3] These categories included (J.A. 37-40):

> Item 7 - "All correspondence and records of other communications exchanged between the Department of Justice or any division thereof and [twenty seven (27) named individuals]."
>
> Item 8 - "All correspondence or records of other communications pertaining to the guilty plea of James Earl Ray exchanged between the Department of Justice or any division thereof and [seven (7) named individuals]."
>
> Item 11 - "All tape recordings and all logs, transcripts, notes, reports, memorandums or any other written record of or reflecting any surveillance of any kind whatsoever of the following persons: [twenty three (23) named individuals]."
>
> Item 14 - "All correspondence of the following persons, regardless of origin or however obtained: [twelve (12) named individuals]."

been the FBI's position, based on its knowledge of its files, that any information about individuals relevant to the King assassination and the ensuing FBI investigation is contained in the Bureau's MURKIN file (J.A. 267), the FBI's investigative file on the King assassination. See DOJ Opening Br. at 24-25. Accordingly, rather than treating the specific items of plaintiff's request on a piecemeal basis, the FBI rationally determined to process the entire MURKIN file, which reasonably could be expected to encompass all of the particulars of plaintiff's request.[4] Throughout these proceedings, therefore, the FBI has consistently -- and reasonably -- interpreted plaintiff's request as pertaining exclusively to the MURKIN file.[5] Thus, the Bureau has not searched the records of the individuals listed in the specific items of plaintiff's request, because, to the extent that information on the listed

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[4] Indeed, plaintiff actually benefited from the Bureau's reasonable interpretation of his request, which resulted in the release to him of more material on the King assassination than would have been released through a piecemeal approach.

[5] Certain field office files and files on several groups and subjects (e.g., the Invaders, the Memphis Sanitation Workers Strike) which plaintiff expressed interest in were made available to him pursuant to the August, 1977, stipulation (J.A. 268, 403-409), although the FBI always maintained that these files were not within the scope of plaintiff's requests. Nonetheless, the FBI stipulated to the release of these files to plaintiff in an effort to accommodate him and "end the matter once and for all." Weisberg v. Department of Justice, 705 F.2d 1344, 1354 n. 12 (D.C. Cir.); see also DOJ Reply Br. at 4-5. No such stipulation was entered into with respect to the files of individuals listed in plaintiff's FOIA requests; indeed, because of the privacy interests involved, such a stipulation would not have been acceptable to the FBI.

individuals pertinent to the King assassination exists, it is located in the MURKIN file, which plaintiff has received.

The FBI's interpretation of plaintiff's request was eminently reasonable. It was in accord both with the language of the request and with the FBI's position that all material relevant to the King assassination investigation is in the MURKIN file.[6] The fact that plaintiff takes issue with the FBI's interpretation of his request in no way undermines the reasonableness of the interpretation. Furthermore, plaintiff did not even focus on the FBI's approach to his December 23, 1975 request until November 11, 1980, more than seven months after the district court determined that the FBI had conducted an adequate search of its King assassination records. J.A. 477.

To the extent that plaintiff's request is read as requiring a search of the records of the named individuals, it raises the serious concerns discussed in Antonelli, supra, and at oral argument. In light of the manifest reasonableness of the Bureau's interpretation of plaintiff's request, however, the Court need not address the Antonelli issue in this case.

If the Court concludes that the Bureau's interpretation of plaintiff's request was unreasonable, the appropriate course would be to remand the case to the district court for consideration of the Antonelli question. This course would be appropriate because the issue was never fully aired in the

[6] Plaintiff has not presented any meaningful evidence to refute the FBI's position. See DOJ Opening Br. at 25.

district court. That court should have an opportunity to resolve this matter in the first instance, with the benefit of the Antonelli decision. Moreover, if further review were to become necessary, this Court would then have the benefit of a full record concerning the privacy and public interest factors. Such a record is now lacking, since plaintiff presented his "public interest" argument for the first time on appeal in the rebuttal portion of his argument (see n. 1, supra), and relied on a "public interest" submission which he did not even see fit to include in the joint appendix in this Court; moreover, plaintiff's "public interest" affidavits were filed in district court more than a year after that court determined that the FBI had conducted an adequate search. In short, this case plainly is not in a suitable posture for this Court to resolve the Antonelli issue.

CONCLUSION

Since the FBI's interpretation of plaintiff's FOIA request was wholly reasonable, the district court's holding that the FBI's search was adequate should be affirmed. Assuming arguendo that the FBI's interpretation of plaintiff's request was unreasonable, the issue of the relationship between the FOIA and the Privacy Act concerning third party requests should be remanded to the district court for the creation of an adequate record.

Respectfully submitted,

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MAY 1984

IN THE UNITED STATES COURT OF APPEALS
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HAROLD WEISBERG, Appellant/Cross-Appellee, v. U.S. DEPARTMENT OF JUSTICE, Appellee/Cross-Appellant.	)	Nos. 82-1229 et al.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1984, I served the foregoing Defendant-Appellee/Cross-Appellant's Supplemental Brief by causing a copy to be mailed, postage prepaid, to:

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ATTACHMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID ELY,

Plaintiff,

v.

UNITED STATES SECRET SERVICE,

Defendant.

Civil Action No. 83-2080

FILED

DEC 14 1983

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiff Ely, a pro se litigant and inmate in Oxford, Wisconsin, seeks to require defendant Secret Service to give him any files it may have relating to one Raymond J. Barry. Ely first made his request by letter dated May 19, 1983, to the Secret Service under the Freedom of Information Act (FOIA). The Service denied his request in a letter dated May 23, 1983, as an unwarranted invasion of another person's privacy, citing exemption 7, 5 U.S.C. § 552(b)(7)(C). Ely appealed the decision in a letter dated May 24, 1983. He received no response and filed this complaint. Ely claims in his complaint that Barry is "well known to Plaintiff" so that disclosure of the records would not invade Barry's privacy. But Ely does not allege that Barry has waived his privacy rights with respect to any records about him held by defendant. Nor does plaintiff assert any public interest in disclosure of any Barry records.

Ely and the Secret Service have both moved for summary judgment. Ely also seeks a Vaughn index of all records on

...ry. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. ...enied, 415 U.S. 977 (1974). Defendant opposes providing the index on the ground that disclosure of the bare existence of any Secret Service records relating to Barry, without Barry's permission or a finding that the disclosure is in the public interest, would constitute an invasion of Barry's privacy.

Exemption 7, extends to, inter alia, "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy . . . ."

In the absence of a waiver by the subject of a FOIA request by a third party or a demonstration by the requester of a public interest in the disclosure, an investigative agency may not produce investigatory files about the subject. Antonelli v. FBI, No. 82-1899 (7th Cir. Nov. 22, 1983); see also Fund for Constitutional Government v. National Archives and Records Center, 656 F.2d 856 (D.C. Cir. 1981). Indeed the courts in similar circumstances have barred disclosure of the fact that an agency keeps such records. See Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982). Accordingly, even after taking into account plaintiff's stance as a pro se litigant, the statute and the controlling interpretations of it require the denial of plaintiff's motion for summary judgment and the grant of defendant's.

Date: Dec. 12, 1983

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID ELY,

Plaintiff,

v.

UNITED STATES SECRET SERVICE,

Defendant.

Civil Action No. 83-2080

FILED

DEC 14 1983

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the accompanying Memorandum, it is this 13th day of December, 1983, hereby

ORDERED: that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED: that plaintiff's motion for a Vaughn index is DENIED; and it is further

ORDERED: that defendant's motion for summary judgment is GRANTED.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE