

Case Nos. 82-1229, et al.

Oral Argument--May 8, 1984

LESAR

Bork: Amended complaint, then filed request.

Lesar: No. Made request, amended complaint next day.

Starr: Is it true that no materials were released to him until after writ was filed?

Lesar: That is correct.

--Lesar states Weisberg is withdrawing appeal on particularized search issues, e.g., records on Hardin, Esquivel. Also limiting search of DOJ units to two components, CRS and OLC.

--No search on 12/23 request until summer of 1977. Then only when privacy waiver or death certificate provided.

--Many items of 12/23 request have nothing to do with individuals at all. Item 18, Item 6.

--Government did not properly raise privacy issue in lower court.

Lesar: Now with respect to some items of the request there is a question that the Government has raised, although I think it has not properly raised the issue in the court below as to the Privacy Act or as to b6 or b7C exemption under the Freedom of Information Act. The Government did state at oral argument that the Privacy Act prohibited them from searching those files.

Mikva: From the search itself!

Lesar: From the search itself. Now our position, first of all, we don't know what argument they're making under the Privacy Act. It's never been briefed. The cases they cite, some go off on b6 or b7C tangent and there is one that does go does mention the Privacy Act, a particular provision of the Privacy Act, but we basically don't understand the argument. But the fundamental point is that there is no attestation as to why they can't do the search.

--Nature of FBI files requires search.

Mikva: What documents are involved?

Lesar refers to JA 39.

Mikva: Did the Government claim privacy as the sole basis for refusing to make a search?

Lesar--just haven't looked at material. Don't even know if it would qualify for threshold exemption.

--Previously processed.

--on consultancy: Mikva--Is it undisputed that agreement was not reduced to writing?

KOPPEL

--conducted thorough search and withheld only exempt material.

Mikva: I'm troubled about how you claim privacy on some of those law enforcement materials without looking at the files.

Koppel: The FBI takes the position which has recently been upheld by the Seventh Circuit in the Antonelli case that in case when third party requests the records of other individuals and does not provide privacy waiver from those individuals, the FBI will not even search for those records unless there is a compelling public interest in the case.

Now with respect to virtually of these items the individuals, to the extent that the individuals are relevant at all to the assassination, their names appear in the MURKIN file which was provided to plaintiff.

Moreover, most of these individuals, many of these individuals, well, plaintiff has not demonstrated the kind of compelling public interest with respect to any of these individuals and it's not even clear what, well, exactly what the plaintiff wants with respect to them. If we turn to page 39 we see what is essentially a laundry list of names and plaintiff asks for all ... regarding these individuals. *** Now, it's clear, first of all, there's no way the FBI can conduct the kind of search that plaintiff is seeking....

Mikva: You're mixing up apples and oranges. Impossibility is one thing, but if you're talking about 7C, which I was asking about, I don't understand how you can say 7C applies to a document you haven't looked at. I don't read Antonelli to say that either. I think Antonelli continues to recognize that some balancing has to be done.

Koppel: That's correct, Your Honor.

Mikva: How can you balance something you haven't looked at?

Koppel: Antonelli says plaintiff has to demonstrate that there is a public interest before FBI will be forced to search its files. *** Antonelli accurately reflects the position of the Department on this issue.

Mikva: Because I think it's a major legal question, let me make sure I do understand.... *** ... will not search unless and until plaintiff does what?

Koppel: [describes third party requests, says this is only kind he is talking about] *** Under those circumstances, it is the FBI's position that it does not have to search for the records of those individuals, it does not have to confirm or deny [the existence of (?)] records pertaining to those individuals absent either a privacy waiver from the individual or a demonstration by plaintiff that there is some sort of compelling balancing test, compelling public interest justifying release.

Mikva: How can you expect plaintiff to show some great public interest about documents that you don't know about and they don't know about?

Mikva: --[issue is] search, not disclosure. How do you know public interest until you look at [materials]?

--... if you are right, you have "discovered a way of short-circuiting a lot of FOIA litigation.

Koppel: The Department takes the position that to show public interest there has to be , well, there would have to be some significant connection, in this case there would have to be some significant connection, demonstrably significant connection between the individuals listed by plaintiff and the King assassination case. We do not believe that plaintiff has satisfied that burden, and there is no ...

Mikva: How is that done, is that done in the FOIA request?

Koppel: That can be done through a showing in the district court at a later stage, but what, initially, initially, yes, it would be appropriate for the FOIA request to indicate some sort of justification.

Starr: --"relevance" "demonstrably significant"

Koppel: In order to show the kind of public interest that justifies the imposition on the privacy of third parties which is at issue here, we submit that the plaintiff has to make some sort of showing that there is a meaningful public benefit to be derived from disclosure.

Koppel: Plaintiff has to do more than make a mere allegation....

Mikva: You want them to make an evidentiary, you want them to lay out an evidentiary predicate that would satisfy the standard of demonstrably significant nexus. You want them to prove the case, to prove the nexus involving the assassination, and then you, under your standard, would say that justifies a search?

Koppel: ... show nexus that would lead reasonable person to conclude [that there was a nexus with the assassination].

Mikva: *** You're at point where the Government takes the position we're not even going to look unless you prove the case first, and that worries me. First of all, I don't even know how you can review that.

Normally, when we review these questions of whether or not they've made out a prima facie case, or they've shown some relevancy, there's an in camera inspection of some of the documents but you don't know at this point whether or not those documents may in fact have some relationship to what their, to the public interest.

Koppel: Your Honor, in this case we do because to the extent that these individuals are relevant to the King assassination investigation, their names appear in the MURKIN file. What the plaintiff is seeking is considerably more than just the relevance, the materials on these individuals as it relates to the assassination investigation. The plaintiff is asking for their files . . . and for materials covering their relationship with the FBI, possible FBI surveillance of them. It is inconceivable that this could have any significant bearing on the King assassination investigation.

Bork--any limitations--can submit list of names taken from D.C. phone book?

Mikva: You're saying all they have to do is show some causal nexus to the individual.

Koppel--says requester might review MURKIN file, then submit a list of names that appeared in it. Then he states:

"This still not enough to show nexus above and beyond the fact they appear in MURKIN file."

Mikva: What's the privacy invasion of a search?

Koppel: --admits that documents do exist.

Mikva: How does that even get disclosed?

Starr(?): Is it your position, to come back to the facts of this case, that providing a list of names without more will not do?

Koppel: That is correct, Your Honor.

Q: Is it your position that that is all that was done here, there's no supplementation so as to demonstrate any nexus at all?

Koppel: That is correct, Your Honor. There was no indication that these individuals have any meaningful role in the King assassination investigation.

Mikva: --That's separate from public interest ...

--questions about relevancy/public interest standards "Must demonstrate some relevancy?"--is relevancy an Executive Branch standard engrafted on to the Act--

Koppel: Not an Executive Branch engraftment. It is the logical result of the interaction between the Freedom of Information Act and the Privacy Act as Antonelli court recognized.

Koppel: The District Court never gave the Government a chance to brief the "substantially prevailed" issue.

--Koppel goes into claim that standard of review of "substantially prevailed" determination is not "clearly erroneous." but stricter standard.

Koppel: --says standard of review is legal, not factual.

Starr: --asks if "substantially prevailed" determination is "strictly legal, not a mixed question of law and fact."

Koppel:--says that you could say it is legal or you could say it is mixed question of law and fact.

Starr: One could say anything, but isn't it more principled to say...

--regarding time estimates, Koppel says "first few years were entirely estimated"

--panel member, probably Starr, asks whether it is Government's theory that the world began with the 1974 Amendments and

the 1969 requests had no bearing on the matter. Koppel says that's right.

LESAR

Lesar: ... although we did not feel we were required to do so, the district court directed us to show nexus between the King assassination and individuals on the December 23rd request.

We complied with that directive. Mr. Weisberg and I both filed rather lengthy affidavits.

--Bork asks where they are in the appendix. Lesar replies that he doesn't think they are in the appendix, but they are in the record at 212.

--On processing of field office records holding "substantive, pertinent notations," Lesar refers to documents unearthed by Shea review contained at 569-L/M of the appendix, quotes from omitted notations to show type of material denied Weisberg.

--Mikva asks question on how district court's award of 50% risk incentive squares with Supreme Court's decision in Blum v. Stinson.

Starr: What is your response to Mr. Koppel's statement to the effect that the issue of substantially prevailed was not in fact briefed by the Government below?

Lesar: I thank you for bringing that up. The Government chose not to brief it. I think it has waived its substantially prevailed argument. *** Then when we moved for attorney fees, I briefed the issue all over again. They declined to respond to that issue. Their brief at page two says they are not briefing ... ***

Koppel: *** Simply untrue. *** --Says couldn't brief it because court had already denied their motion for reconsideration.

Koppel: --don't dispute that Weisberg substantially prevailed with respect to King assassination photographs, but argues that didn't benefit public.

Argues that with respect to fee waiver, fee waiver was result of the administrative process, if anything, it resulted from the decision made by Judge Gesell in the Kennedy assassination case.