MURI

#14

NOV 10 1975

Quinlan J. Shea, Jr.
Director, FOI/Privacy Appeal Unit

Walter W. Barnett
FOI Coordinator
Civil Rights Division

WWB:ssj

DJ 144-72-668

12/10

FOI Appeals #139 (Lesar) and #989 (CBS News) - M. L. King, Jr., assassination

This memorandum is submitted in connection with the appeals noted above, both of which are being taken from denials by the FBI of records it has concerning the murder of Dr. Martin Luther King, Jr.

1. Our obvious and only concern is that release of FBI records in this case not impede the possible trial of James Earl Ray if the pending proceedings in the federal courts result in his withdrawing the guilty plea earlier entered in state court. As I see it, this could occur in one of two ways - either by there being prejudicial pre-trial publicity or by giving Ray and his counsel more records earlier than would be permitted under the criminal discovery rules applicable in Tennessee courts. These two concerns are reflected in exemptions 7(B) and 7(A), respectively and it is their applicability that is here at issue.

2. At this writing, we must disclaim knowledge of two facts which are obviously relevant and which I assume your Unit is determining: first, the extent to which the ten (10) requested items are relevant to the prosecution or defense of Mr. Ray, either directly or in connection with other items and, second, the extent, if any, to which any of the records has already been made public (see CBS appeal letter of 10/28/75, pp. 4-5). Our concern, of course, only goes to records which would be relevant to determining Ray's guilt and does not encompass records which are in the public domain already.

3. Jeffrey Axelrad, the Civil Division's FOI expert, tells me that there are no helpful decisions yet on exemptions 7(A) or 7(D). The AG's Memorandum of February 1975 is not of much assistance, either; indeed, it notes, with respect to 7(B), that there is "no specific explanation of it . . . in the legislative history" (p. 8). Accordingly, we have little guidance to inform our judgment in this area.

Nevertheless, this Division is greatly concerned by the possibility that pre-trial publicity could make trying Ray in a Tennessee court more difficult or impossible if it comes to that. Such an occurrence would be particularly bad if the publicity at issue were engendered in whole or in part by this Department's release of materials not now in the public domain. Accordingly, we request your office to recommend against disclosure of any records which (a) bear on Ray's guilt or innocence and (b) are not now themselves items of public record.

I recognize that predictions as to whether release of a record will "deprive a person of a right to a fair trial" or "interfere with enforcement proceedings" are inherently speculative. In this case, the importance to the nation of a proper resolution of the responsibility for Dr. King's death make it imperative that this Department exercise the greatest caution in releasing materials which could affect or be used in subsequent court proceedings.

The facts that Ray's appeal is currently pending before the Sixth Circuit and that the decision cannot, of course, be predicted does not obviate our concern, but is instead the major source of concern, since it is this proceeding which makes concrete the possibility of a trial. This differs from a case in which a convicted criminal has not actually petitioned for habeas corpus. Refusing to disclose here would not set a precedent requiring that no criminal files be disclosed

if habeas is possible, for with most habeas petitions, the trial has occurred and all evidence is already in the public domain, */ where as here, there has not yet been a trial.

4. Our concerns would be diminished if Ray formally joined in Lesar's request and were clearly put on notice that his requesting and obtaining records (a) would obligate DJ to provide the same materials to others under the Act, and (b) should be seen as a waiver of "pretrial publicity" rights at least with respect to the records released.

5. Once your staff has finished its analysis of the records requested, how they implicate Ray and whether any has been made public, please share that with this Division prior to making a recommendation to the Deputy Attorney General. Assistant Attorney General Pottinger has asked me to insure that he has an opportunity to consider personally the facts of these requests and make a recommendation to the Deputy Attorney General if warranted.

---

*/ Indeed, many habeas petitioners would be seeking essentially to have evidence admitted in the first trial (and thereby public) excluded during a second trial.