UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY STONE, et al., Plaintiffs, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	)	Civil Action No. 87-1346 CRR

RESPONSE TO PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

The case law cited in defendants' opening memorandum authoritatively endorsed the action of the Federal Bureau of Investigation (FBI) in deleting the names of FBI and local law enforcement personnel from FBI records on the assassination of Senator Robert F. Kennedy pursuant to Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. §552 (b)(7)(C).

Furthermore, the validity of the FBI action is emphatically underscored by the recent decision of the Supreme Court in U.S. Dept. of Justice v. Reporters Committee, 109 S. Ct. 1468 (1989). In fact, as a result of Reporters Committee, plaintiffs' submission is now beside the point. Because of the significance of Reporters Committee in the application of Exemption 7(C), we begin this memorandum by discussing that decision, and then address certain contentions of plaintiffs.

DISCUSSION

I. Reporters Committee Underscores The Validity Of The FBI's Action In This Case

A. The Decision in Reporters Committee

1. Introduction

Reporters Committee arose from a request under the FOIA, 5 U.S.C. § 552, for access to FBI criminal history records, or "rap sheets," of certain individuals. Unanimously reversing the earlier decision of our Court of Appeals (816 F.2d 730 (D.C. Cir.), modified on rehearing, 831 F.2d 1124 (D.C. Cir. 1987)), the Supreme Court held that the individual subjects of such records have significant privacy interests concerning their dissemination, and that the release of such information would further no "public interest" of the sort FOIA was intended to serve. Therefore, the Court held that the release of the information was "unwarranted" under the statute.

The relevance of Reporters Committee is not limited to rap sheets, however. Indeed, the striking thing about the Supreme Court's opinion in that case is the extent to which it grapples with fundamental matters such as the nature of the "privacy" interests Congress meant to protect under FOIA, and the circumstances under which the release of information is nevertheless "warranted" by the core policies that FOIA was meant to serve. The Court's discussion of these issues provides an unusually comprehensive road map to the application of Exemption 7(C) of FOIA.

First, the Court made clear that Congress has given a broad meaning to the term "privacy" under this statute, encompassing the individual's interest in "control[ling] information concerning his or her person." See 109 S. Ct. at 1476. Second, the Court removed any doubt that might have existed regarding the relevance of the individual requester's identity and purposes to a proper balancing of the interests regarding disclosure: with limited exceptions not relevant here, such factors have "no bearing" on this inquiry. See id. at 1480. Third, the Court gave substance to the "public interest" side of the balance by clarifying that only the furtherance of FOIA's core purpose of informing citizens about "what their government is up to" can warrant the release of information implicating individual privacy interests. See id. at 1481-82. Finally, the Court responded to the Court of Appeals' concerns regarding the judicial manageability of case-by-case public interest balancing (see 816 F.2d at 740-41) by pointing out the usefulness and propriety of categorical decisions regarding types of government files the release of which would characteristically involve an unwarranted invasion of privacy. See 109 S. Ct. at 1483.

2. The Emphasis on Privacy

The Supreme Court granted certiorari in Reporters Committee out of concern for "values of personal privacy" that are threatened if FOIA is used to force the wholesale disclosure of information about individuals from government files. See 109 S. Ct. at 1475. That concern, of course, merely reflects the will

of Congress, which described the individual's right of privacy as "equally important" as FOIA's broad policy of disclosure (see S. Rep. 813, 89th Cong., 1st Sess. 3 (1965)), and therefore made the release of information concerning individuals subject to a balancing test -- unique among the FOIA exemptions -- that calls for disclosure only where the invasion of privacy is "warranted" by the public interest. See 552(b)(7)(C).

Accordingly, the Court began its analysis in Reporters Committee with a fundamental inquiry -- the meaning that Congress ascribed to the multifaceted term "privacy." The Court rejected the "cramped notion of personal privacy" advanced by the plaintiffs in that case, who had dismissed a person's privacy interest in an FBI rap sheet as negligible on the theory that the underlying events on rap sheets -- arrests, convictions, and related matters -- were all "public" and had been previously disclosed. See 109 S. Ct. at 1476. Flatly rejecting that view, the Supreme Court held that "privacy" under FOIA "encompass[es] the individual's control of information concerning his or her person." 109 S. Ct. at 1476. The Court held that the individual's interest in control over information is not only within the common understanding of the term "privacy," but is at the heart of the legal concept of privacy. See id. at 1476-77 & n.16. Accordingly, the Court recognized that even where information has been available to certain persons, the interest of the individual subject in restricting further dissemination can be of great importance.

The Court further noted that Congress itself has consistently understood privacy interests in such broad terms. The Court found support for this conclusion not only in Exemptions 6 and 7(C) themselves, but also in the Privacy Act of 1974, 5 U.S.C. § 552a, and in other FOIA provisions reflecting the policy that the deletion of "identifying details" was intended to be a common means of protecting "significant privacy interests" while permitting access to information about government activities themselves. See id. at 1477-78 (citing 5 U.S.C. §§ 552(a)(2), 552(b)).

3. The Public Interest

As important as the privacy analysis in Reporters Committee is to the present case, it is the Supreme Court's holding regarding the public interest side of the balance that completely vindicates the earlier case law on the point at issue, as well as the defendants' action. Reporters Committee makes clear that the identity of the particular FOIA requester can have "no bearing" on the analysis, and that the only "public interest" that can warrant the release of information implicating privacy concerns is the ability of the requested records to elucidate the workings of the federal government. Under these principles, plaintiffs cannot assert a public interest that outweighs the privacy interests of the law enforcement personnel.

In Reporters Committee, the Supreme Court flatly held that "whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made." 109 S.

Ct. at 1480 (emphasis in original). This principle followed, the Court pointed out, because "the identity of the requesting party has no bearing on the merits of his or her FOIA request."1/ Id. Accordingly, the Supreme Court has definitively endorsed the principle that -- as our Court of Appeals has put it -- "Congress granted the scholar and the scoundrel equal rights of access to agency records." Durns v. Bureau of Prisons, 804 F.2d 701, 706 (D.C. Cir. 1986), vacated on other grounds, 108 S. Ct. 2010 1987).2/

Reporters Committee also makes clear that the evaluation of the "public interest" for these purposes is not to be a standardless and "idiosyncratic" inquiry (cf. 816 F.2d at 741), but "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny."'" 109 S. Ct. at 1481 (quoting Department of the Air Force v. Rose, 425 U.S. 352, 372 (1976)). In other words, a disclosure of information about an individual does not serve the "public interest" merely because it is interesting or socially beneficial

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1/ The Court noted an exception to this principle where "the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." Id. This exception has no application here, as no person is requesting access to his own records.

2/ This analysis also undercuts one of plaintiffs' arguments regarding the privacy side of the balance, the use of the names by historians. Reporters Committee makes clear, however, that release to one third-party requester requires release to all, and therefore that it is the invasion of privacy engendered by the public release of information that must be weighed on the privacy side of the balance.

in some broad sense,[3/] but only if it aids "the citizens' right to be informed about 'what their government is up to.'" Id. (quoting EPA v. Mink, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

Under this standard, the information plaintiffs seek would not add to the public interest side of the balance, because it "reveals little or nothing about an agency's own conduct." Reporters Committee, 109 S. Ct. at 1481. The substantive information has been released; it is only names that have been withheld. Furthermore, the identities of those FBI Agents having a significant role in the investigation, i.e., having knowledge of the deployment, coordination and institutional activities of the FBI investigation were released. As the Supreme Court noted in Reporters Committee, "the names of the particular cadets [in Rose] were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code." 109 S. Ct. at 1482. Similarly, the Court rejected the request for rap sheets of persons reputed to have had improper dealings with a Member of Congress concerning defense contracts because such information "would tell us nothing directly about the character of the Congressman's behavior. Nor would it tell us anything about the

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3/ See 109 S. Ct.,. at 1481 n.20 (FOIA not designed to "'mak[e] the government's collection of data available to anyone who has any socially useful purpose for it'" (quoting Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974, 11 Harv. Civ. Rights-Civ. Lib. L. Rev. 596, 608 (1976))); id. at 1482 (while there is "some public interest" in the release of individual rap sheets, "that interest falls outside the ambit of the public interest that the FOIA was enacted to serve").

conduct of the Department of Defense * * * in awarding one or more contracts * * *." Id. (emphasis in original). In the present case, the individual names of law enforcement personnel "tell us nothing" about how the federal government conducted its investigation. Thus, no facts raising a possible countervailing public interest were demonstrated or are evident in this case.

Plaintiffs' assertion that it wants the names in order to develop more information about the RFK assassination and its investigation is the same as that rejected in Halloran v. Veterans Administration, No. 88-6180 (5th Cir. 1989) (copy attached).4/ There too, the applicable public interest was served by the release of substantive information, and the Court rejected the effort to get the identities of third parties. Slip op. at 4001. The Court quoted from Miller v. Bell, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982), in which the Court upheld the nondisclosure of the identities of FBI agents mentioned in FBI investigation records:

> [T]he substance of the information in the FBI files has been exposed in its entirety, and only the names of the FBI agents deleted .... The documents thus reveal the entire course ofthe investigation and the facts uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation. We find any public interest in pursuing the completeness of and adequacy of the investigation beyond this point to be minimal in the extreme. 661 F.2d at 630-31.

4/ Handwritten changes on the last page were by the Clerk's office.

Miller applies with greater force in this case in light of (1) the subsequent Reporters Committee decision; and (2) the fact that the FBI has disclosed the names of those employees with knowledge of its institutional activity in the investigation.

Plaintiffs seek to satisfy the public interest criterion by asserting that they will use the names to contact the law enforcement personnel to develop additional substantive information. However, such an attenuated connection to FOIA's core purposes is plainly insufficient under Reporters Committee. The proper test, as articulated there, "must turn on the nature of the requested information and its relationship to 'the basic purpose of the [FOIA].'" 109 S. Ct. at 1481 (quoting Rose) (emphasis added). Since the names and addresses at issue here cast absolutely no light on the workings of government, they are not imbued with the sort of "public interest" that can warrant an invasion of privacy by the release of information. The Court rejected the attenuated arguments made by plaintiffs in Reporters Committee on the ground that the disclosure "would tell us nothing directly about" governmental activity. See 109 S. Ct. at 1482 (emphasis added).

Plaintiffs' contentions in this case are akin to the prior law of this Circuit calling for the consideration of "secondary effects" of disclosure based on uses to which the information might be put (See Ditlow v. Shultz, 517 F.2d 166, 171-72). Under Reporters Committee such arguments -- which inevitably depend

upon particular uses for requested information -- are no longer permissible.

II. Plaintiffs' Arguments For Disclosure Of The Names Of Law Enforcement Personnel Are Without Merit

We believe that the foregoing discussion of Reporters Committee makes it abundantly clear that the FBI's action in withholding the names of law enforcement personnel was correct. The case law preceding Reporters Committee similarly justified the withholding of the identities of law enforcement personnel. We see no reason to burden the Court with a repetition of the discussion of that authority at pages 2-3 of our opening memorandum.[5/] Plaintiffs' voluminous submission is merely an

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5/ This Court has in numerous instances, protected the names and privacy interest of law enforcement personnel. For a few recent instances, see, e.g., Gonzalez v. U.S. Department of Justice, No. 88-0913 (October 25, 1988) (Richey, J.); Uribe v. Executive Office for United States Attorneys, No. 87-1836 (May 23, 1989 (Sporkin, J.); Oglesby v. Department of the Army, No. 87-3349 (May 22, 1989) (Johnson, J.); Kirk v. U.S. Department of Justice, 704 F. Supp. 288 (1989) (Revercomb, J.); Larson v. Executive Office for United States Attorneys, No. 85-2575 (November 22, 1988) (J.H.Green, J.). Judge Greene has protected the identity of investigative personnel but not clerical employees. See Downs v. FBI, No. 87-0301 (March 29, 1988). However, the disclosure of the names of clerical empoloyees is not in accordance with the heavy weight of authority. See e.g., Gonzalez and Kirk. Even plaintiffs' declarant, Quinlan J. Shea (Tab 15) would not have required release of the names of clerical personnel. We can conceive of no public interest that would warrant intrusion into the privacy of clerical employees, especially in light of Reporters Committee. We contend that the invasion of privacy of the clerical personnel would be substantial. We also note that, "even a small and potentially uncertain invasion of privacy engendered by the release of identifying information may nonetheless be 'unwarranted' if there are no public interests supporting disclosure of the particular information." Halloran, supra, at 4000. For the reasons we have stated, we also submit that withholding of the names of non-FBI (footnote continued)

effort to have this Court overturn the established precedent on this issue. We have the following comments on plaintiffs' submission.

1. One of the dominant and pervasive concerns in plaintiffs' papers is for historiography. See, e.g., page 15 of plaintiffs' memorandum. That simply is not a relevant criterion under Reporters Committee. The "core purpose" of FOIA is to "contribut[e] significantly to public understanding of the operations or activities of the government." 109 S. Ct. at 1483 (emphasis in original). Therefore, it is entirely irrelevant to the public interest side of the scale that historians may find the names of law enforcement personnel of interest.

2. Plaintiff is simply incorrect in asserting that the public interest side of the scale is enhanced by release of the names. As we have stated above, the substantive information has been released, as well as the names of those persons knowledgeable of the institutional aspects of the FBI's investigation. The release of names would not add (and certainly not add significantly) to the public's knowledge of the operations and activities of the government. Moreover, as we have also pointed out above, the use to which the information might be put is made irrelevant by Reporters Committee.

3. Plaintiffs argue that the government has not shown any specific evidence that law enforcement personnel would be

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(footnote continued from previous page)
law enforcement personnel is justified. (Copies of all the unpublished decisions cited herein are attached).

harassed or injured by the release of names; that the documents relate to investigations twenty years ago; and that the investigation was not controversial. The latter two claims were anticipated in defendants' opening memorandum, at 3-4, and we see no need to repeat our response here. Plaintiffs' contention that the government must show specific evidence of harm is not supported by the case law. Neither Reporters Committee nor the cases protecting the identities of law enforcement personnel turned on specific evidence of harm. The rationale of the cases is that revelation of the identity of law enforcement personnel would carry with it the potential of harm, and that is what makes the invasion of privacy unwarranted.

In Halloran v. Veterans Administration, supra, the Court ntoed that "we are not required to determine with absolute certainty the effects of releasing the information in controversy. Indeed, as already noted, exemption 7(C) requires only that we find that the disclosure of the records or information 'could reasonably be expected to constitute' an unwarranted invasion of privacy before nondisclosure is authorized." Id. at 3397. Then, quoting from Lesar v. Department of Justice, 636 F.2d 472, 488 (D.C. Cir. 1980),[6] the Court stated: "[I]t is difficult if not impossible, to anticipate all respects in which disclosure might damage reputations or lead to personal embarassment or disclosure. The

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6/ The Court of Appeals itself had quoted from and affirmed Lesar v. Department of Justice, 455 F. Supp. 921, 925 (D.D.C. 1978).

Court went on to hold: "We thus do not require that the government detail the precise harm which disclosure would inflict upon the privacy interests of each individual; rather, it must only show that release of the information 'could reasonably' result in an unwarranted invasion of privacy." Id.

4. Plaintiffs seek to bolster their position by asserting that release of names of law enforcement personnel "would have been consistent with the Department of Justice's practice in other cases of historical importance." Plaintiffs' Memorandum at 29, quoting the Declaration of Quinlan J. Shea, who was the Director of the Office of Privacy and Information Appeals. However, there was no blanket practice of releasing the names of law enforcement personnel in cases of historical importance. See Declaration of Richard L. Huff, filed herewith. Such a blanket practice would have been violative of privacy of the law enforcement personnel, because the mere "historic" nature of the case does not constitute a public interest showing that warrants the invasion of privacy of law enforcement officers. Indeed, Lesar v. Department of Justice, 636 F.2d 472 D.C. Cir. 1980) is itself a case in which the Court upheld the withholding of names of law enforcement personnel in a case of historic importance. Similarly, in Senate of Puerto Rico v. U.S. Department of Justice, 823 F.2d 574, 588 (D.C. Cir.), the Court recognized "the importance of the Senate's investigation" into the killing of two Puerto Rican political activists at Cerro Maravilla, but upheld

invocation of Exemption 7(C) based on the privacy concerns of FBI agents.

With further regard to the asserted practice in historical cases, the Declaration of Mr. Huff filed herewith states that names were released in only two cases, under the special circumstances obtaining there, and not all names were released. There was and is no blanket policy or practice of release of names in cases of historical significance, nor could there be consistent with the privacy interest of law enforcement personnel.

Plaintiffs also argue that, in connection with a book by Ralph Blumenthal, the names of FBI agents are mentioned. Memorandum at 26 and Blumenthal declaration. We file herewith the Declaration of Frank J. Storey, Special Agent in Charge of the Kansas City, Missouri Field Office of the FBI, and of William J. Baker, Assistant Director of the Criminal Investigative Division of the FBI, telling the circumstances of the granting of access to Mr. Blumenthal to FBI employees. Mr. Storey states: "[T]he individuals Mr. Blumenthal interviewed and whose names he cited in his ACKNOWLEDGEMENTS were either Executive level officials, testified in open court or their names were a matter of public record in documents filed with the Court." Furthermore, the issue in this case is whether disclosure of names of law enforcement personnel here would constitute an unwarranted invasion of their personal privacy. We have shown that it would, because there is no public interest showing that

outweighs their privacy interest. The facts of another case are not material. Moreover, it would not serve any useful public purpose if government agencies have to fear that, if they grant access to employees in one or more cases, other employees would lose the protection of their privacy. Such an approach would only discourage agencies from providing any access to employees.

CONCLUSION

For these reasons, it is respectfully submitted that defendants' motion for summary judgment should be granted and plaintiffs' motion should be denied. This action should be dismissed with prejudice.

Respectfully submitted.

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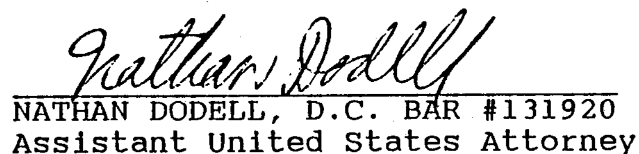

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