

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MARK A. ALLEN,  
Plaintiff,

v.

DEPARTMENT OF DEFENSE, et al.,  
Defendants.

Civil Action No. 81-2543

FILED  
AUG 24 1984

JAMES F. DAVEY, Clerk

MEMORANDUM

This matter came before the court on cross-motions for summary judgment with respect to defendant Defense Intelligence Agency's ("DIA") withholding of certain information pursuant to exemption 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(6), and on a second set of cross-motions for summary judgment with respect to plaintiff's entitlement to a fee waiver for documents processed by defendant Central Intelligence Agency ("CIA"). For the reasons stated herein, summary judgment is granted, with one minor exception, in favor of defendant DIA on the exemption 6 issue, and in favor of plaintiff on the fee waiver issue.

BACKGROUND

Plaintiff is a researcher on the Kennedy assassination who seeks access to records of communications that took place between the United States House of Representatives Select Committee on Assassinations ("HSCA") and the DIA and CIA relating to the

Kennedy assassination. During the course of administrative proceedings and this action, numerous documents have been released by both the DIA and the CIA. This court previously ruled on defendants' initial exemption claims, see Memorandum dated March 4, 1983, and after additional disclosures a second set of cross-motions was filed with respect to documents still withheld by the DIA. The DIA claims that certain documents are protected by FOIA exemptions 1 and 3, and that other information is protected by exemption 6, 5 U.S.C. §552(b)(6). Plaintiff initially challenged the adequacy of the DIA's search, but later dropped that challenge and also conceded that the DIA properly withheld the documents it claimed to be protected by exemptions 1 and 3.<sup>1/</sup> Plaintiff argues vigorously, however, that the information being withheld pursuant to exemption 6 should be released. With one exception,<sup>2/</sup> that information consists of the names of individuals identified in 36 letters from HSCA to the DIA during the course of HSCA's investigation. The DIA has released the letters, but claims that the identity of the individuals named therein is protected by FOIA exemption 6, which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. §552(b)(6). Brigadier General Donald W. Goodman, DIA Chief of Staff, has filed an affidavit which describes the letters containing the deleted names sought and sets forth the agency's reasons for non-

disclosure under exemption 6, see Goodman Declaration, attached to DIA's Motion for Partial Summary Judgment, at ¶33(i).

Plaintiff also seeks a fee waiver for copying costs involved with the CIA's release of documents during the course of this action. Plaintiff alleges that he is a respected scholar on the Kennedy assassination and that he plans to use the information obtained in this lawsuit for public purposes, the public having a strong interest in the subject. The CIA argues that plaintiff has not properly demonstrated either his intent to use the information sought for public purposes or the public's interest in the documents released.

#### DISCUSSION

##### A. The Exemption 6 Issue

The facts relevant to the dispute over whether the deleted names should be disclosed are not in dispute, as described above. In this, as in all FOIA cases, the agency bears the burden of justifying nondisclosure by demonstrating the applicability of the claimed exemption through submission of detailed affidavits, the averments of which must be accorded substantial weight absent evidence of agency bad faith, see Hayden v. National Security Agency, 608 F.2d 1381, 1387 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). Here, the agency's affidavit is detailed and, combined with the documents released with redactions, provides the court with sufficient information on which to base its de

novo review of the agency's exemption 6 claim.<sup>3/</sup>

In conducting its review of an exemption 6 claim, the court must determine whether the agency has carried each of three burdens. First, the agency must demonstrate that the requested file is appropriately classified as "personnel," "medical," or "similar." Second, the agency must demonstrate that release of the information sought would violate substantial privacy interests. If these two burdens are met, then a balancing test must be applied. In order to prevail, the agency must show that the substantial interest in personal privacy is not outweighed by the public interest in disclosure. Sims v. Central Intelligence Agency, 642 F.2d 562, 573 (D.C. Cir. 1980).

Plaintiff does not contest DIA's assertion that the information sought is contained in "similar files" under exemption 6, and Department of State v. Washington Post Co., 456 U.S. 595, 102 S.Ct. 1957 (1982), makes it clear that the "similar files" requirement must be broadly construed to cover all information that pertains to particular individuals. Since such individual identifying information is sought here, the court's inquiry should be focused on the issue of whether release of the names sought would constitute a "clearly unwarranted invasion of privacy," and not on the "similar files" requirement. Id., 456 U.S. at 602, 102 S.Ct. at 1961.

The court finds that the DIA has amply demonstrated that disclosure of the information sought would violate substantial

privacy interests. Plaintiff seeks the names of individuals targeted for questioning by HSCA. Some of the redacted documents reveal that these individuals were members of controversial organizations suspected to be involved in the Kennedy assassination. It is true, as plaintiff points out, that many of the letters do no more than request information on named individuals, and that there is nothing on the face of many of the redacted documents that indicates that the individuals named therein were suspected of involvement in the assassination. Nevertheless, the court agrees with the agency's contention that "the mere fact that an individual's name might be associated with the investigation of assassinations could be detrimental to him" and could impinge on a substantial privacy interest by subjecting such persons to "embarrassment, damage to personal reputation, harassment and various forms of prejudice." Goodman Declaration at ¶33(i). Although Department of Air Force v. Rose, 425 U.S. 352, 380 n.19, 96 S.Ct. 1592, 1608 n.19 (1976), makes it clear that to be protected, threats to privacy interests must be "more palpable than mere possibilities", Rose itself upheld the deletion of the names of cadets investigated during Air Force disciplinary hearings, and courts have repeatedly held that association with a criminal or similar investigation is a fact with serious privacy implications, see, e.g., Fund for Constitutional Government v. National Archives, 656 F.2d 856,

864 (D.C. Cir. 1981), citing Baez v. Department of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980); Lamont v. Department of Justice, 475 F. Supp. 761, 781 (D.D.C. 1979); Ray v. Turner, 468 F. Supp. 730, 735 (D.D.C. 1979); Congressional News Syndicate v. Department of Justice, 438 F. Supp. 538, 545 (D.D.C. 1977). In fact, the court in Fund for Constitutional Government went so far as stating that "[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation", which the court held equally applicable with regard to targets of the Watergate Special Prosecutor's investigation. Id., 656 F.2d at 864. The disclosure of investigative records that identify individuals as targets or sources of information, in the absence of criminal charges, would expose such individuals to "public embarrassment and ridicule and place [them] in the position of having to defend [their] conduct without the benefit of a formal judicial proceeding." Congressional News Syndicate, 438 F. Supp. at 545. Such is certainly the case here, as disclosure of an individual as a source of possible information on the notorious Kennedy assassination would subject him to invasive scrutiny and require him to explain his involvement and disaffirm his complicity. Plaintiff's contention that it is "insulting" to suggest that mere association with an investigation creates an inference of guilt portrays a completely unrealistic view of human nature.

that, if accurate, would do away with the necessity for most of the constitutional protections we have found essential to create and safeguard the presumption of innocence. In the context of exemption 6, courts have stressed that disclosure of information which merely "may identify an individual with another who may have engaged in illegal activities may result in the type of invidious comparison which would constitute a "clearly unwarranted invasion of personal privacy." Ray v. Turner, 468 F. Supp. at 735; accord, Lamont, 475 F. Supp. at 782 (upholding non-disclosure of the names of "third parties suspected by the FBI or otherwise mentioned in the file, ... confidential sources, and interviewees" named in plaintiff's FBI file). Therefore, plaintiff's contention that disclosure is required of the names of persons whose guilt is not implicated on the face of a HSCA letter must be rejected -- mere association with the Kennedy assassination as an "interviewee" creates the type of unfavorable inference that impinges on a substantial privacy interest.<sup>4/</sup>

Having found that the agency is justified in its claim that disclosure of the names sought would violate substantial privacy interests, those interests must be balanced against the public's interest in disclosure of the names sought. As discussed below, the court finds that the Kennedy Assassination is a matter of great public interest, and therefore disagrees with the agency's contention that the public has no legitimate interest in

disclosure of HSCA/DIA correspondence. But the appropriate inquiry into the public's interest must be specific to the information sought, and not to the subject in general. Plaintiff claims that the information he seeks enables the public to scrutinize "the Committee's [HSCA's] work and the cooperativeness of various federal agencies asked to assist in the inquiry" and will benefit the public by enabling "scholars to write and speak as fully and as accurately as possible about the controversy concerning the assassination and the investigations of it." Memorandum in Support of Plaintiff's Cross-Motion for Partial Summary Judgment on the Exemption 6 Issue at 5. The court finds, however, that plaintiff and the public can scrutinize HSCA's work and agency cooperation based on the redacted letters that have been disclosed; the names contained in those letters would be of public interest only insofar as they provide leads to possible independent investigations. Such investigations, however, would cause the very invasion of privacy and personal harassment that exemption 6 is designed to protect. Further, as the Lamont court pointed out, the small public interest in learning the names of persons interviewed during the HSCA investigation is even further reduced by the public harm that would result if investigation interviewees could not be assured of their privacy and would consequently be more reluctant to cooperate with legitimate investigations. Lamont, 475 F. Supp. at 782; see also Diamond v. FBI, 532 F. Supp. 216, 224-25 (S.D.N.Y. 1981). After



balancing the weighty privacy interest of those named in the HSCA correspondence against the minimal public interest in disclosure, the court agrees with the agency that disclosure would constitute a "clearly unwarranted invasion of privacy." DIA has carried its burden of proving that the information at issue was properly withheld under FOIA exemption 6.

B. The Fee Waiver Issue

Along with his original FOIA request to the CIA, plaintiff requested that "search and copying fees be waived as provided for under the Act." Exhibit 1, attached to Plaintiff's Motion for Partial Summary Judgment As to Waiver of Copying Costs. ("Plaintiff's Fee Motion") Plaintiff stated that he was "presently engaging in a program of scholarly research concerning the work of the [HSCA]," and that he felt that the records sought "are of important historical value and therefore would significantly benefit the public." Id. The CIA denied plaintiff's fee waiver request by letter dated July 27, 1981, and stated that the request was denied for the following reasons:

(1) the fact that release of any of this information would not be of significant benefit or usefulness to the public in light of the vast quantity of information already in the public domain concerning the assassination of President John F. Kennedy; (2) the fact that the House of Representatives has indicated to this Agency its judgment that such material not be publicly released without its prior written concurrence; and (3) the fact that the House Select Committee on Assassinations has, with the publication of its voluminous report and findings, made a

determination as to what information concerning the assassination of President John F. Kennedy was significant enough to warrant the expenditure of public funds to release in printed form. Any materials not published in the House Select Committee's public study was determined by Congress to have insufficient usefulness or benefit to the public to warrant the expenditure of any further public funds to make it available to the public. In light of the foregoing, we have determined that it would not be in the public interest nor serve any interest of the government to grant your request for a fee waiver.

Plaintiff's Fee Motion, Exhibit 8. Plaintiff appealed the fee waiver denial within the agency, arguing that the public is intensely interested in the Kennedy Assassination, that not all relevant material has been published, and that HSCA would have published more material if it had had funds to do so. Id., Exhibit 9. Plaintiff enclosed with this appeal letter an article from the Washington Post outlining the efforts of plaintiff and other scholars to uncover withheld documents from HSCA's investigation. The CIA denied plaintiff's appeal, for reasons similar to those initially expressed by the agency. Id., Exhibit 11. Plaintiff now argues that the court should reverse the agency's fee waiver denial, and defendant CIA has filed a cross-motion in support of its decision.

Section 552(a)(4)(A) of FOIA provides that

documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the public.

5 U.S.C. §552(a)(4)(A). This court has jurisdiction to review the CIA's fee waiver denial, and must uphold the agency's decision unless it finds it to be arbitrary and capricious, Eudey v. Central Intelligence Agency, 478 F. Supp. 1175 (D.D.C. 1979); accord, Allen v. F.B.I., 551 F. Supp. 694, 696 (D.D.C. 1982). In this case, as in the almost identical case of Allen v. F.B.I., supra, the court finds that the CIA's fee waiver denial was arbitrary and capricious.

Defendant makes much of the argument that the agency was not presented with sufficient information by plaintiff to enable it to conclude that he would disseminate the documents he sought to the public, and that plaintiff's assurances of such intent at this point are irrelevant and of poor evidentiary value. There are two problems with this argument. First, plaintiff stated in his initial request that he was engaged in scholarly research on the assassination. When a matter of such obvious public interest is involved and the agency is presented with no indication that the requester is incompetent to engage in scholarly research, then such a representation should create a presumption that the documents requested will be used to benefit the public, see Allen, 551 F. Supp. at 697; Wooden v. Office of Juvenile Assistance, 2 G.D.S. ¶81,123 (D.D.C. 1981). As plaintiff points out, the legislative history of the fee waiver provision indicates that it was intended to aid historians and scholars because their work is presumed to be beneficial to the public.

In this case, the plaintiff has already been deemed a serious researcher into the Kennedy assassination, see Allen v. CIA, 626 F.2d 1287, 1289 (D.C. Cir. 1980), and defendant's argument that an evidentiary hearing on this issue is necessary must be rejected because it would be a waste of judicial resources. In fact, defendant's argument that the CIA did not know of plaintiff's intention to use the documents sought for scholarly purposes benefitting the public is incredible in light of the fact that Allen v. CIA, supra, in which the court noted plaintiff's scholarly interest in the assassination, was litigated all the way through the United States Court of Appeals for the District of Columbia before plaintiff's requests in this case were even filed.

Second, as plaintiff also points out, the CIA itself did not justify its fee waiver denial on the belief that plaintiff would not disseminate the documents sought to the public. The court cannot accept such a post hoc rationalization for agency action. Review of the arguments actually advanced by the agency for fee waiver denial -- that the information sought would not benefit the public because there is already voluminous information on the assassination available, and because Congress and HSCA have already determined what information is of interest to the public -- does not convince the court that the agency acted reasonably in denying the fee waiver. Again, when the CIA made the

determination that the information sought was not of public interest, Allen v. C.I.A. had already been published, in which the court stressed that the Kennedy Assassination is an event "in which the public has demonstrated an almost undying interest," Id., 636 F.2d at 1300; accord Allen v. F.B.I., 551 F. Supp. at 697. The CIA's position nevertheless is that Congress and HSCA should make and have made the final determination as to what information is of public interest, and that their judgment is reflected by what they have already published. But plaintiff's stated goal in his research is to review and critique HSCA's investigation in light of allegations that important facts were never revealed. Certainly, the court should not permit the CIA to justify the placement of practical impediments to plaintiff's (and the public's) ability to explore the quality and openness of HSCA's investigation by relying on what HSCA and Congress have decided to disclose. The public has a strong interest in the workings of governmental entities such as HSCA and the agencies involved in the investigation; the core value of FOIA is to ensure that such entities are subject to public scrutiny. Even if the court were to ignore the judicially noticable fact that the public is interested in documents that may shed further light on the Kennedy assassination, the fact that the documents sought in this case relate to the workings of governmental entities alone creates a significant public interest. Even if plaintiff should conclude that the documents he receives demonstrate that

HSCA's investigation was thorough and that all significant information was contained in HSCA's reports, the public would still have an interest in the documents because HSCA's conclusions would thereby be confirmed by an independent researcher and public confidence in the investigation would be bolstered. The CIA should not be able to use copying fees as an obstacle to plaintiff's entitlement under FOIA to documents of such obvious public interest, Allen v. F.B.I., 551 F. Supp. at 697. Accordingly, plaintiff's motion for partial summary judgment on the fee waiver issue will be granted.

An appropriate Order accompanies this Memorandum.

  
UNITED STATES DISTRICT JUDGE

#### Footnotes

1. In an Opposition to DIA's Motion for Partial Summary Judgment filed September 12, 1983, plaintiff challenged the adequacy of DIA's search, arguing that it was not thorough because DIA had been sloppy in referring to certain attachments that were not produced. On November 18, 1983, defendant filed a reply wherein it represented to the court that a compromise had been worked out on the search issue, see Nov. 18, 1983 Reply at 2 n. \*. Defendant also correctly pointed out that plaintiff did not challenge defendant's withholding of certain documents based on exemptions 1 and 3. Id. Plaintiff's cross-motion for partial summary judgment, filed September 12, 1983, only addresses the exemption 6 issue. The court will therefore not address the adequacy of the search issue, since plaintiff has conceded its adequacy. Similarly, the court will grant defendant's summary judgment motion with respect to exemptions 1 and 3.

2. One of the redacted documents, attached as Exhibit 1 to Plaintiff's Cross-Motion for Partial Summary Judgment with Respect to Materials Withheld by DIA Under Exemption 6, apparently does not involve redaction of names. That document is a letter from HSCA to the Secretary of Defense which requests access to certain documents. The letter has been released, but the description of the documents requested has been redacted.

3. As discussed supra note 2, however, one of the documents was released with redaction of a list of documents, not names. The agency's affidavit does not distinguish this document, and it is not obvious to the court that the redacted information therein consists of descriptive material that would identify individuals and bring the redactions within exemption 6. Therefore, the court will deny defendant's summary judgment motion with respect to this document, and will order that it be released with more specifically drawn redactions as strictly necessary to prevent disclosure of identifying information protected by exemption 6.

4. Plaintiff stresses that many names associated with the assassination have already been released to the public. Defendant has conceded that several of the names originally withheld were previously released, but defendant has since disclosed those names on all documents containing them. Hence all names now being withheld are names of persons not previously associated with the assassination. Defendant contends, through the Goodman affidavit, that the reason such persons have not been previously associated with the assassination is that, "in the vast majority of cases, no information whatsoever was discovered" connecting them with the assassination. Goodman Declaration at

¶33(i). Hence the individuals whose names are being withheld are, in the majority of cases, those who were in no way involved with the assassination. Yet these individuals were targeted for questioning by HSCA, and disclosure of that fact could create an unjustified inference of involvement. As Lamont, supra, noted, the privacy interests of interviewees whose involvement is peripheral or non-existent are even weightier than the privacy interests of those directly involved in the investigated activity, Lamont, 475 F. Supp. at 782. The court thus believes that the fact that the names sought have not previously appeared in the extensive Kennedy assassination reports counsels against disclosure, not, as plaintiff argues, in favor of disclosure.



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ORDER

JAMES F. DAVEY, Clerk

This matter came before the court on two sets of cross-motions for partial summary judgment. After careful consideration of these motions, the oppositions thereto, and the record in this case, and for the reasons set forth in the accompanying Memorandum, it is, by the court, this 24<sup>th</sup> day of August, 1984,

ORDERED that defendant Defense Intelligence Agency's Motion for Partial Summary Judgment, filed August 23, 1983, is granted with respect to all document except the document attached as Exhibit 1 to Plaintiff's Cross-Motion for Partial Summary Judgment; and it is further


ORDERED that defendant shall release the document attached as Exhibit 1 to Plaintiff's Cross-Motion for Partial Summary Judgment, without redactions except as strictly necessary to prevent disclosure of identifying information protected by FOIA exemption 6; and it is further

ORDERED that Plaintiff's Cross-Motion for Partial Summary Judgment With Respect to Materials Withheld By Defense Intelligence Agency Under Exemption 6 is denied; and it is further

ORDERED that Plaintiff's Motion for Partial Summary Judgment as To Waiver of Copying Costs is granted; and it is further

ORDERED that Defendant Central Intelligence Agency's Motion for Partial Summary Judgment as to Fee Waiver Denial is denied; and it is further

ORDERED that there shall be a status conference in this case on October 11, 1984 <sup>at 4:30 am</sup> to discuss the remaining issues in this litigation, if any.

  
UNITED STATES DISTRICT JUDGE