

UNITED STATES GOVERNMENT RECEIVED
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Memorandum ATTORNEY GENERAL

JUL 12 1976

TO : The Attorney General

DATE: 12 JUL 1976

FROM :  Rex E. Lee
Assistant Attorney General
Civil Division

RMRader:dpb
Tel: x3374

SUBJECT: Request of Estate of Dr. Martin Luther King, Jr.
for Tapes, Transcripts and other Materials Re-
sulting from FBI Wiretapping and Surveillance

This will respond to the request from Mr. Jack Fuller of your office on July 2, 1976 for advice as to whether certain FBI tapes, transcripts and other materials relating to the late Dr. Martin Luther King, Jr. and the civil rights movement should be provided to the King estate without a formal request under the Freedom of Information or Privacy Acts or court order. You have asked for our views in light of two pending lawsuits which were recently filed entitled Bernard S. Lee v. Clarence M. Kelley, et al., U.S.D.C., D.C., Civil No. 76-1185 and Southern Christian Leadership Conference v. Clarence M. Kelley, et al., U.S.D.C., D.C., Civil No. 76-1186. Both actions seek production of certain tape recordings, transcripts and memoranda resulting from alleged electronic eavesdropping and wiretapping. Total money damages of \$6,000,000 are also sought. The SCLC suit, brought by the organization with which Dr. King was associated, is primarily concerned with alleged wiretapping and electronic surveillance of its New York and Atlanta offices in 1964, while the Lee suit alleges an illegal surveillance of the Willard Hotel in the spring of 1963 during a civil rights meeting of Dr. King and associates which Mr. Lee attended.

In testimony before the Senate Select Committee to Study Governmental Operations (the Church Committee), the FBI acknowledged wiretapping the SCLC headquarters for some time during the 1960's, as well as bugging Dr. King's hotel rooms on at least 16 occasions, including an electronic surveillance of the Willard Hotel in January 1964. See Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Book III, S. Rep. No. 94-755, 94th Cong., 2d Sess. 81, 120 (1976). According to the FBI, the Church Committee did not request and was not furnished the tapes and transcripts of the surveillances themselves, but only testimony and documentation as to their occurrences and durations. Thus, release of information provided to the Church Committee, now in the public domain, would probably have little,



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if any, effect on the SCLC or Lee lawsuits. On the other hand, release of FBI tapes, transcripts and other materials resulting from FBI bugging of Dr. King, SCLC, Bernard Lee or others has the potential for impairing the defense of these lawsuits and encouraging the filing of new lawsuits as well. This conclusion is based upon the assumption that materials released to the King estate will become available to the plaintiffs in these actions, either directly or because it will result in the waiver of any privilege the government may have with respect to these materials.

We understand from Mr. James Farrington of the FBI and his staff, with whom attorneys from our office recently met, that some of the surveillance materials held by the FBI on Dr. King and the civil rights movement have been classified as high as Top Secret. We are told that the transcripts and related materials are in a voluminous file in which classified matter has not been segregated from nonclassified matter. Accordingly, our attorneys were not permitted to review even the material which would be arguably relevant to the SCLC and Lee lawsuits to determine how damaging substantively its release at this time might later prove.


Of course, any unauthorized wiretapping or surveillance would give rise to a cause of action under the Bivens doctrine against individual FBI agents and their superiors, regardless of the fruits of the unauthorized surveillance, if those individuals acted without good faith and a reasonable belief in the validity of their actions. But it may be that the instant lawsuits are primarily concerned with production and/or expungement and destruction of FBI tapes and transcripts rather than money damages against individual FBI agents and their superiors. Release of unedited tapes and transcripts could therefore undermine the agents' bargaining position with respect to the damage claims in these lawsuits.

In addition, the claims of these plaintiffs and potential plaintiffs for production of the FBI tapes and transcripts in their unedited state, based upon a fear of public disclosure and embarrassment, are mutually inconsistent. If the purpose of releasing the materials to the King estate or other parties is simply to inform the individuals of the data on record, appropriate deletions can be made by the FBI so as not to compromise classified information, the identity of informants with a reasonable expectation of anonymity, or the identity of

innocent third parties whose names have also been recorded. If, on the other hand, the FBI files are to be expunged by release of this material to the King estate, such an action would be inconsistent with relief sought by plaintiffs in the SCLC and Lee actions, which seek court impoundment of these materials under a protective order to avoid such public disclosure of their contents. Under these circumstances, we might consider filing a third-party action in these cases or a separate action in which we interplead the nonclassified materials and ask that the Court determine to whom and under what circumstances these materials should be surrendered. We are led to understand that the FBI has no need or desire to retain the unclassified materials subject to the demands in question.

We conclude that the unrestricted release of the requested materials to the King estate might well impair defense of the two lawsuits already filed and others that may be filed, although to what degree cannot be determined without examination and analysis. More significantly, the materials are already the subject of competing and inconsistent claims, some of which will be defeated by turning the material over to the estate. The procedure which appears likeliest to protect the government from these risks is to obtain a court adjudication regarding the nonclassified material (while attempting to protect information which necessarily must remain classified), in a proceeding in which all, or at least the principal, claimants can be made parties. Our recommendation is not to turn over the materials as requested but, instead, to explore this latter approach.

A copy of this memorandum was shown to Mr. George Calhoun, Acting Chief, Special Litigation Section, Criminal Division, who agrees with our conclusions. Mr. Calhoun suggests an additional objection to voluntarily surrendering the FBI materials to the King estate.

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Thus, release of the materials to the King estate might compound any legal injury caused to King by the FBI wiretapping and electronic surveillance.