UNITED STATES GOVERNMENT

Memorandum

DEPARTMENT OF JUSTICE

TO : Michael E. Shaheen, Jr., Counsel
Office of Professional Responsibility

DATE: JUN 8 1976

FROM Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

SUBJECT: Request of Estate of Dr. Martin Luther King

This is in response to your request for my views as to the legal implications of granting the request of attorneys for Mrs. Martin Luther King, Jr. and the King Estate for access to FBI materials relating to Dr. King and for participation in the Department's review of FBI activities relating to Dr. King.

1. The Access Request. I assume that the request for access to the materials furnished the Senate Select Committee and/or other materials related to Dr. King has been made informally and does not yet constitute a formal Freedom of Information Act request. If this is indeed the case, there are important reasons for handling the matter by direct, informal negotiation rather than as a formal Freedom of Information Act matter. The negotiation process would minimize questions such as the "right" of third parties to receive access to materials released to the King Estate, the time limits to be observed, the effect of granting preferred treatment to these requesters while others wait their turn, etc. These issues, as they relate to the Freedom of Information Act are discussed below.

The question of access to the materials can be considered separately from the question of participation in the review process of this Department although, of course, if participation in review were permitted access would be a necessary concomitant.. The King Estate's strongest argument for access is to those materials which have already been released to the Select Committee. The nature, if not the substance, of at least some of these materials has already been released to the

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public through the Select Committee Reports. It seems to me that we would be hard pressed to assert a blanket refusal of access to these materials. On the other hand, there may be a valid reason to insist on certain deletions either to avoid prejudice to our review of the case or to individual agents mentioned or to protect the privacy of others who may be mentioned in the materials. This would be a matter for negotiation. As a first step, I would suggest that the Attorneys be provided with a description or index of what was furnished to the Select Committee if they do not already have this.

I cannot comment in any depth on the request for access to other materials on Dr. King without knowing whether such materials exist, how extensive a search would be required to identify them, and what they contain. I would only note that an extensive search, at this time, to locate materials which have not been previously identified would almost certainly result in further delay in processing existing FOI requests since some of the same personnel would undoubtedly be required to make such a search.

Whether the question of access is considered under FOI or separately, I would strongly urge that the Department satisfy itself that Dr. King's immediate family is in accord with the access request. The Department should do everything in its power, even to insisting on written releases, to avoid getting caught in a crossfire between Mrs King, the children, and Dr. King, Sr. We should also take pains to protect the privacy of Dr. King's associates, in the course of any disclosure or access, unless we have a written waiver of privacy interests from them.

If the access request has been, or is subsequently, made under the Freedom of Information Act, several complex legal issues arise. These include the availability of exemptions as a basis for denying access, the general privacy issue as it relates to the status of the requesters, the possibility of giving preferred processing treatment as against our "wait in line" policy, and the question of fees.

a. Exemptions. The mere fact that some of these materials have already been furnished to the Select Committee does not preclude our claiming exemptions from access. Congress,

or its committees, acting in an official capacity, are essentially outside the FOIA, 5 U.S.C. 552(c), and the fact that Congress has received material does not place it in the public domain except to the extent that it may actually have been made public. Exemptions not claimed as against the Congress, might nevertheless be claimed against these requesters. Whether it is necessary and appropriate to claim such exemptions must be determined on the basis of the materials themselves, keeping in mind the possibility of future prosecution or other litigation.

b. Privacy. FOI exemptions 6 and 7(C) would be available to protect the privacy of individuals mentioned in the materials requested. The more difficult question is whether a privacy claim could be made on behalf of Dr. King to withhold materials from his widow or his estate. We know of no case law on the subject. We have, however, generally taken the position that a deceased has no legal privacy right under the FOI exemptions and that any privacy interest that exists concerning him is the derivative right of his personal representatives to protect their own privacy interest in the family name. Under this theory, information could not be denied to the personal representative on the theory that disclosure would constitute an invasion of Dr. King's privacy, but information furnished to the personal representative could be denied to some other person requesting it, on the theory that disclosure would invade the personal representative's derivative privacy interest. Such an approach, we would argue, would constitute an exception to the theory suggested in Ditlow v. Schultz, 517 F.2d 166 (D.C. Cir. 1975), that once information has been released to one party after a consideration of privacy exemptions under FOI it must be released to any party who seeks it. We repeat, however, that there are no court decisions on point and the risk is there that if we release information to the King Estate under FOI the claim will be made that the public at large then becomes entitled to it.

We have not discussed the Privacy Act since it more clearly applies only to living individuals who request their files from a system of records and that is not the case here.

c. Preferred processing. Due to our inability to handle the volume of requests received under FOI within the time limits imposed by that Act, we have adopted a policy of first come-first served with respect to the processing of FOI requests. While I am advised that three exceptions to this policy have been made, it may not be advisable at this time to make such an exception with respect to all or part of the King materials.

The reasonableness of our first come-first served policy is presently in litigation in several Courts of Appeals and has been briefed and argued in the Open America case in the D.C. Circuit. I am advised that the Court, in oral argument, specifically focused on the aspect of discrimination in our policy because of exceptions made in the past. If we make yet another exception in the King case, we can expect the discrimination argument to be raised anew.

On the other hand, it might be argued that preferred processing is justified in the King matter at least as to those materials already furnished the Select Committee. These materials have already been searched for and located and, I would assume, segregated in an easily retrievable form. Possibly some processing of the type which would be done under FOIA, such as deletion of the names of third parties, has already occurred. It might be argued then, that completion of this processing of the materials is not an exception to our first come-first served policy. Indeed, giving preferred treatment to the completion of processing on this material might, as a practical matter, strengthen an argument that the processing of any other materials should await its turn.

While I understand that the Civil Division feels strongly that we should not deviate from the first come-first served policy at this time, on balance I would recommend that, if there is an FOI request, preferred treatment be given to the Select Committee materials but any request for other materials be handled under the first come-first served policy.

d. Fees. Whether this request for access is handled as a unique negotiating matter or as an FOI request will, to some extent, inject the question of fees -- both search and duplication fees for material and attorneys' fees. This Department has no established procedure for collecting search or duplication fees for material made available outside the

FOIA. Under the FOIA, however, we have established fee schedules both for searching for information and providing copies of it. Fees are established pursuant to the express provisions of 5 U.S.C. 552(a)(4)(A) but the Act encourages the waiver of such fees "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 benefiting the general public." If a request for this material is made under FOIA we will be faced with the decision of whether or not to charge the King Estate the FOIA fees. An attempt to charge the fees would, I think, be viewed as outrageous; to waive the fees, however, we would have to find that disclosure to the King Estate would primarily benefit the general public. It is not clear at this time that the general public would ever be given access to any materials furnished the King Estate, thus making the finding of benefit to the public difficult. This underscores the desirability of handling the request outside the FOIA if at all possible.

The FOIA specifically provides for the award of attorneys' fees and other litigation costs to a party who substantially prevails against an agency in connection with an FOIA request. Here again, there are no definitive court decisions as to when such fees would be available. We are presently litigating the question whether attorneys' fees may be awarded when information has been made available prior to judgment, either because an agency which had refused information made it available after suit was brought or because an agency was sued prior to completion of the processing of a request and ultimately decided to make the information available. As far as I know, attorneys' fees have not been awarded prior to the filing of litigation for the cost incurred in agency negotiations. Nevertheless, the attorneys may see an advantage to pressing their claim as an FOIA matter in the hopes of obtaining fees; it is, of course, to our advantage to handle the matter outside of FOIA.

2. The Participation Request. The request to participate in the Department's review of the King matter would, of necessity, involve access to all or at least some of the material requested with the attendant problems of privacy already discussed. It would raise even more serious questions of due process and the exercise of prosecutorial discretion.

If private parties representing the interest of the victim were allowed to participate in the Department's review of the King assassination and the FBI's investigation of that assassination then it can be argued, as a matter of fundamental fairness, that James Earl Ray or his representative would have an equal right to participate. Similarly, any Bureau personnel who might be subject to disciplinary action because of their handling of the matter might also claim a right to participate. Should a review of the matter lead to a reopening of the assassination case and, subsequently, the indictment of someone other than Ray for participation in the crime, that individual might well move to dismiss such an indictment arguing that the victim's family exerted undue influence on the Department's decision to reopen and charge. Review by members of the public in a commission or other body especially established for that purpose would not necessarily create the same problems in an assassination case as prominent as the King case, but selective participation of the King Estate in a review otherwise being conducted by a governmental agency would create an unfortunate precedent and open this Department to charges of undue influence in the exercise of its responsibilities. In my view, we cannot risk either the charge of influence or the precedent.

The precedent that would be established by permitting the attorneys for the King Estate to participate in the Department's review of FBI harassment against Dr. King would have even worse impact. It would essentially involve the "victim's" family in the investigative stage of a case which could conceivably lead to prosecution or administrative action against FBI personnel. This would be the first step toward what Kenneth Culp Davis, in Discretionary Justice has proposed as an administrative proceeding for the exercise of prosecutorial discretion, a hearing on the decision to prosecute or not at which interested parties could present their conflicting views. Davis, of course, was primarily concerned with the ability of the prospective defendant to argue against a decision to prosecute, but if the victim's family can appear and present views fairness would seem to demand that the prospective defendant be represented as well.

I cannot believe that the Department would seriously consider the prospect of undertaking "hearings" at which victim and defendant could appear and be heard each time it investigates with a view toward possible prosecution. Yet if the King attorneys are invited to participate in this investigation, we would be hardpressed to deny either potential defendants or other victims' families the same right in the future. I would suggest that the Department categorically refuse actual participation by the attorneys for the King Estate in its review of this matter.