

Civil Action No. 03-2545

MEMO ON 2012 REMAND

On April 16, 2012, Jefferson Morley's orally argued his second appeal to the U.S. Court of Appeals for the District of Columbia for records on CIA case officer George Joannides ("Joannides"). Joannides managed the Directorio Revolucionario Estudantil ("DRE") during the period before President Kennedy's assassination when it was in contact with alleged assassin Lee Harvey Oswald. The CIA's operational files are normally exempt from search and review under the Freedom of Information Act ("FOIA"). However, in the first appeal in 2007, the Court of Appeals ruled that the operational records on Joannides were not exempt from search and review.

As a result, the Court of Appeals ordered that on remand the CIA had to search its operational files for records pertaining to Joannides. Although it did release a couple of hundred pages of records, it withheld 295 documents in their entities. (Because the CIA described the number of pages in many of the records as "various," it is not known what actual page count was.) The District Court once again sustained the CIA's exemption claims, and Morley again appealed.

A three-judge panel hear the appeal orally argued on April 16, 2012. On April 27, 2012, the Court handed down a per curiam judgment. The result was what appears at first glance to be a very narrow victory, but which may in fact turn out to have broader implications.

In withholding the materials at issue, the CIA had invoked FOIA exemptions 1 (national security classification), 2 (personnel rules and practices), 3 (intelligence sources and methods and the CIA officers, titles, organization components, etc.), Exemption 5 (the deliberative process privilege), and Exemption 6 (personal privacy). This seemed to indicate that each exemption claimed covered each document at issue in its entirety.

Morley was able on appeal to exploit a vulnerability exposed by the Supreme Court's March 2011 decision in the Milner. In that case,

The Supreme Court totally revamped the interpretation of Exemption 2 as it had been expostulated by the D.C. Circuit (and other courts) for the previous three decades. It went back to the plain meaning of the exemption and limited it to only “records relating to the issues of employee relations and human resources;” that is, to matters such as cafeteria rules and employee parking regulations. Thus, it eliminated all kinds of information such as FBI T-symbols and informant code symbol numbers, routing directions, filing instructions and markings of all kinds which had previously been withheld.

In his opening brief, Morley noted that only Exemption 2 had been claimed for two of the withheld documents, and that given the nature of Exemption 2, it was most implausible that it could apply to the entire document. The CIA’s appellate brief admitted this was true with respect to one of the documents and released it. The entire content of the document says: “Office of Censorship,” under which appeared the date 1/12/58.” With respect to the second document, the CIA claimed that as a result of an “administrative error,” it had failed to note the document was also protected in its entirety by Exemptions 1, 3, and 6. It did not explain the nature of the “administrative error” which led it overlook the classification markings which are required to appear on a national security classified document.

Ostensibly, there is only one issue to be decided on remand-- whether the Exemption 1, 3, 5 and 6 claims are coextensive with its Exemption 2 claims. The CIA claimed that they are. However, when the CIA’s proof on this point was subjected to grilling by the Court of Appeals panel, its case faltered, Thus, on remand, the CIA will have to conduct a renewed analysis of whether the Exemption 2 materials are segregable from the other exemption claims. This might not yield much information except for the fact that when the CIA last reviewed these documents in 2008, a different executive order on national security classification was in effect. In 2009, President Obama issued a new executive order, which has somewhat liberalized the possibilities of disclosure. Under past precedent, on remand the CIA will have to conduct a new analysis of its Exemption 1 (national security) claims, and it is possible that this may result in the release of additional information.