

Dozens of Civil Rights-Era Files Will Be Released In Settlement of D.C. FOIA Case

By Christine N. Walz,

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In a significant victory for advocates of government transparency, the FBI has agreed to release records documenting the work of photographer Ernest Withers as an informant in Memphis during the civil rights era. The settlement, believed to be the first of its kind involving a civil rights-era informant, is the culmination of a nearly two-and-a-half year long FOIA lawsuit in a Washington, D.C., federal court case, *Memphis Publishing Company v. Federal Bureau of Investigation*.

Withers was the most well-known photographer from the era, creating some of the iconic images of the Civil Rights Movement through the trust and unparalleled access the leadership gave him. After Withers died in 2007, the *Commercial Appeal* filed a FOIA request for his FBI file. Documents the FBI released in response to this request confirmed what the *Commercial Appeal's* reporter, Marc Perrusquia, had already determined through intrepid reporting: that as Withers was earning the confidence of the movement's leadership that gave him special access, he also was reporting their plans to federal officials.

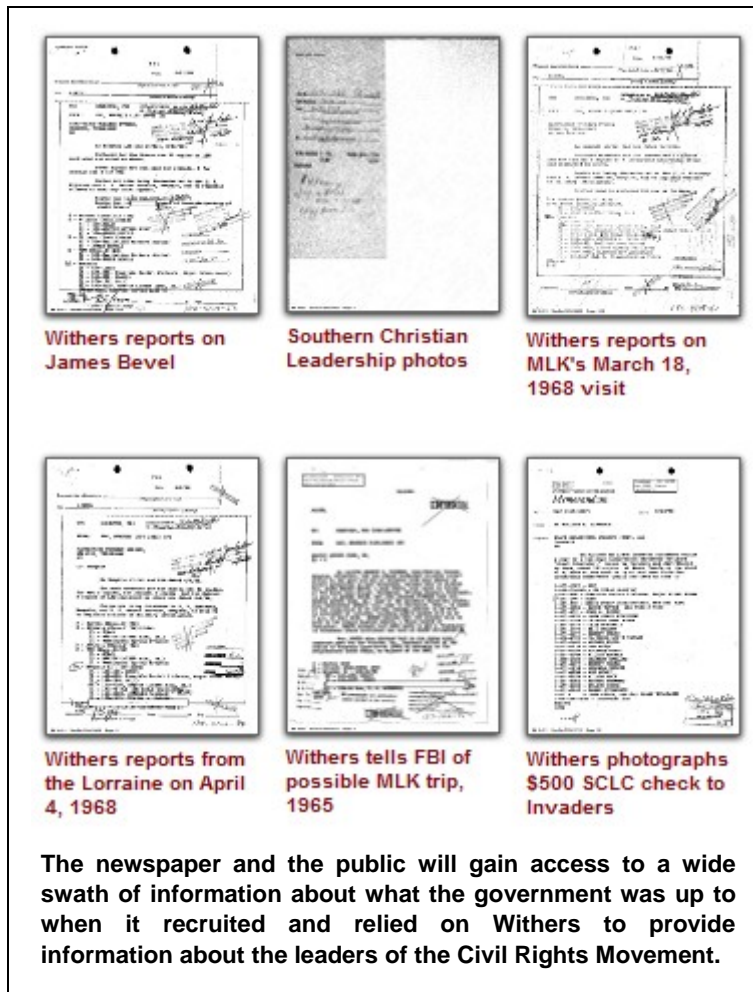
Initially, despite having released documents referencing Withers as confidential informant number "ME-338-R," the FBI refused to acknowledge that Withers was a paid

informant. Relying on a rarely-invoked provision of the Freedom of Information Act, the FBI opted to, under these circumstances, treat Withers' informant records as "not subject to" the Freedom of Information Act.

It was not until a year ago, when a federal judge in Washington D.C. in the newspaper's FOIA case ruled that the FBI could no longer deny Withers' role as a confidential informant, that the FBI released any records. Last fall, despite the Court's ruling and their decision to release a few relevant records, the FBI continued to fight the newspaper's efforts to open Withers' full file.

After a series of rulings favorable to the newspaper, U.S. District Court Judge Amy Berman Jackson reminded the bureau in open court that, "to protect the information, the Government [would] have to establish in this courtroom in 2012 that when the FBI spied on Reverend Dr. Martin Luther King 50 years ago the 'information was compiled for law enforcement purposes' 'in the course of a criminal investigation' or a lawful national security investigation." She further admonished the FBI about its reliance on the law enforcement exemptions to withhold historical documents and questioned whether "the United States of America today, under the leadership of this Administration, this Attorney General, this Department of Justice and this FBI is fully committed to the course of litigating the questions that need to be litigated to

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establish the availability of the exemption..."

At Judge Jackson's urging, the parties agreed to non-binding mediation. These settlement discussions produced an unprecedented and creative resolution to the FOIA lawsuit. Under the settlement, over the next two years, the National Archives and Records Administration (NARA) will release portions of 70 archived FBI investigative files in which Withers participated as an informant, and which contain copies of the records from the FBI's informant file. Those 70 cases include the FBI's investigations of Dr. Martin Luther King Jr., the Southern Christian Leadership Conference, the NAACP, and the black power and peace movements between

1958 and 1976. The FBI also has agreed to pay the newspaper \$186,000 in legal fees.

The compromise allows the FBI to protect the integrity of its informant program by not turning over the discrete informant file intact. At the same time, the NARA release opens up large portions of the same records. In the end, the newspaper and the public will gain access to a wide swath of information about what the government was up to when it recruited and relied on Withers to provide information about the leaders of the Civil Rights Movement.

Christine N. Walz and Charles D. Tobin with Holland & Knight LLP in Washington D.C., along with David M. Giles, Deputy General Counsel, The E.W. Scripps Co. in Cincinnati, represented the Commercial Appeal and its reporter.

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