

The documents in question are currently located in eight boxes stored at the offices of the Special Masters. It is undisputed that, at the time the documents were identified by the OIG as documents it wished to examine, the documents were located inside the office premises of Hamilton. OIG nonetheless contends, and the Special Masters apparently agree, that because the documents were marked or designated as “trash”, any privilege or custodial control over the documents by Hamilton has been waived.

The determinative factor is not the nature of the “trash” but its location. Applying principles set forth by the U.S. Supreme Court and the D.C. Circuit Court, the curtilage serves as a bright line, within which government officials are not free to search. The documents in question had not yet been turned over to third-parties, and therefore Hamilton’s reasonable expectation of privacy had not been abandoned.

The landmark case in “trash search doctrine” is California v. Greenwood, 486 U.S. 35 (1988), in which the Supreme Court concluded that the defendants, suspects in a drug investigation, had no reasonable expectation of privacy in the garbage left on the curb outside their home. The narcotics agent instructed the trash collector to separate Greenwood’s trash, which was tied in opaque plastic bags, and turn it over to her. Id. at 37. The agent searched the garbage and found evidence of narcotics use. Id. at 37-38. This information from the drug search was used to support an affidavit for a search warrant. Id. at 38.

The Court cited three factors to support its conclusion: (1) society recognizes that garbage is accessible to “animals, children, scavengers, snoops, and other members of the public”; (2) a person relinquishes control over the property when he voluntarily turns the trash over to a third-party; and (3) one could not expect the police to

avert their eyes from information that is readily accessible to the public or a third-party. Id. at 40-41.

The Court employed an objective approach as to whether the Fourth Amendment applies to a particular case, looking primarily to the ease of public access to the area in which the trash is located. Id.

The Court in Greenwood favorably quoted the D.C. Circuit Court's observation in United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984), that "the overwhelming weight of authority rejects the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the curtilage [sic] thereof." In Thornton, the defendant disposed of a white plastic garbage bag in a trashcan located in an alley. The police removed the bag from the trashcan and discovered evidence of an illegal gambling operation. Id. at 41.

The court in Thornton appear to adopt a "bright line" approach, that is, that the curtilage serves as a constitutional bright line, beyond which government officials are free to search. Under this approach, location is the determinative factor. If the garbage is placed outside the curtilage of the dwelling, then no Fourth Amendment protection exists.

Here, Hamilton had not placed these documents in an area particularly suited for public inspection sufficient to defeat its claim of Fourth Amendment protection, and therefore maintained its reasonable expectation of privacy for the documents. Indeed, the documents in question were still completely within the Hamilton Office premises.

Current counsel for Hamilton (who were not retained until later in March, 1998) have reviewed the contents of the boxes and determined that there are materials contained therein that are proprietary in nature, and not related to any of Hamilton's

HUD work. Hamilton asserts that these documents, along with some documents that may be covered by the attorney-client privilege, are not responsive to the OIG's subpoenae and they should not be produced or made accessible to the OIG. Hamilton is currently a defendant in a sealed lawsuit brought against it by a disgruntled competitor, and Hamilton is concerned that these documents may inappropriately find their way into the hands of that competitor. This grave concern is not unfounded, as Hamilton has already seen a vivid description in a newspaper article of sealed Court proceedings before this very Court. See Attachment B. Those proceedings involved the overall issues to which this motion is related, and the article describes those proceedings even though the press and public had been excluded.

Hamilton has no objection to a review of these documents by the Special Masters, which Hamilton understands has already taken place. Although not wishing to burden further the Special Masters in their task, Hamilton merely desires that the Special Masters include these documents among those for which it has already been charged with the initial determination of responsiveness to the OIG subpoenae. OIG will not be harmed by this procedure, yet Hamilton may be severely harmed if the OIG is given immediate access to these documents.

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of April, 1998, a copy of the foregoing Exception to Recommendation of the Special Masters was served, via first-class mail, postage prepaid, on the following:

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