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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
Plaintiffs,)
vs.) Civil Action 75-226
UNITED STATES DEPARTMENT)
OF JUSTICE, et al.,)
Defendants.)

Tuesday, July 15, 1975
Washington, D.C.

The above-entitled matter came on for hearing in
open court on a Motion to Dismiss before THE HONORABLE
JOHN H. PRATT, United States District Judge, commencing at
10:25 a.m.

APPEARANCES:

JAMES LESAR, Esquire, appearing on behalf of the
plaintiff.

MICHAEL J. RYAN, Assistant United States Attorney,
appearing on behalf of the defendants.

RICHARD L. MATTSON, C. S. R.
OFFICIAL COURT REPORTER
ROOM 6800, U. S. COURTHOUSE
WASHINGTON, D. C. 20001

P R O C E E D I N G S

1
2 THE CLERK: Weisberg vs. Department of Justice,
3 75-226.

4 Mr. Lesar for the plaintiff; Mr. Ryan for the
5 defendant.

6 THE COURT: Mr. Ryan, I think you have got a
7 motion to dismiss.

8 MR. RYAN: May it please the Court, good morning,
9 Your Honor. That's correct.

10 For the record, my name is Michael J. Ryan, an
11 Assistant United States Attorney, representing the defendants
12 in this action.

13 Your Honor, we have filed a motion to dismiss. We
14 have had several calendar calls in this action, at which the
15 complaint has been raised by plaintiff on a number of occasions
16 that we have not provided the documents which plaintiff seeks.

17 Your Honor, we have, in addition, a motion to
18 dismiss, we have filed three affidavits. We filed two
19 affidavits from Special Agent John Kilty of the FBI
20 indicating to the best of his knowledge all documents of
21 which the FBI is aware of have been provided the plaintiff.

22 We have also filed an affidavit from Mr. Bertram
23 Schur, S-c-h-u-r, who is Associate General Counsel of the
24 Energy Research & Development Administration, indicating that
25 they did not really have any documents falling within plaintiff's

1 request, but any copies of documents which they retained,
2 which the FBI had, that they would also go ahead and just
3 provide those to plaintiff.

4 Your Honor, so that we have come to the point now
5 in this case where we believe that the action has been
6 commuted by defendants' providing to the best of their knowledge
7 all of the documents of which they are aware of which come
8 within plaintiff's request.

9 And in our view, we have gone the last 100 yards
10 and have made every good-faith effort to comply, every reason-
11 able effort to comply with plaintiff's request.

12 Plaintiff has filed an opposition to our motion
13 to dismiss, Your Honor, and I would just like to single out
14 certain statements which I think are indicative of the
15 difficulty.

16 THE COURT: How about the second sentence which is
17 underlined?

18 "As of July 10, 1975, plaintiff has not received a
19 single page of the documents which he requested under the
20 Freedom of Information Act we filed this suit to obtain."

21 MR. RYAN: Your Honor, we have great difficulty
22 when we are faced with a statement like that. I think what
23 I was going to say is that -- and on page 2 of that same
24 document, the motion to dismiss, the second paragraph up
25 from the bottom, the plaintiff's counsel has indicated that the

1 whole history of the Freedom of Information Act rejects the
2 notion that the government's affidavits can be taken in good
3 faith.

4 We have submitted these affidavits, Your Honor,
5 based on the best knowledge available that we have, and it
6 seems to me we have a theory of law that is introduced in
7 this case that our affidavits indicate we are lying because
8 plaintiff says so in his affidavits.

9 With all due respect, Your Honor, we submit that
10 the burden is on the government under the Freedom of Informa-
11 tion Act to either provide the documents or indicate why they
12 are being withheld under one or other of the exceptions.

13 We are not arguing that any of the exemptions
14 apply to any of the information in this case. We are coming
15 forward and indicating that we are trying to provide the
16 information to the plaintiff.

17 We have filed an initial affidavit from Mr. Kilty
18 and an affidavit from the General Counsel of the Energy
19 Research & Development Administration indicating that we felt
20 we had provided all the documents.

21 At the last calendar call we had in this matter,
22 Your Honor, indicated that if there were any missing documents
23 that plaintiff's counsel could sit down with government counsel
24 and indicate which documents the plaintiff felt had not yet
25 been provided.

1 Well, we did not follow that route, but the
2 plaintiff did file a motion to strike our affidavit, and
3 attached an affidavit from plaintiff in which he indicated
4 there were materials which absolutely had not been produced.

5 Well, we went back to the drawing board, Your
6 Honor, and we have conducted a further search of the FBI,
7 and we submitted an supplemental affidavit for Mr. Kilty
8 dealing with those specifically-identified documents which
9 had allegedly been withheld, and we believe at this point,
10 Your Honor, that we have gone the last mile, and that we
11 have borne our burden under the Freedom of Information Act.

12 Now, in response to our motion to dismiss,
13 there are a couple of affidavits, Your Honor, submitted by
14 plaintiff, and the first affidavit of Mr. Weisberg indicates
15 that in this affidavit I address the FBI's motivation for
16 its continuing cover-up of basic scientific information about
17 the assassination of President Kennedy:

18 I explained where the FBI lies about having
19 complied with my requests for the disclosure of these basic
20 scientific tests, when in fact it has not.

21 And so on and so forth.

22 It concludes that paragraph with the statement
23 that the FBI for the past 11 years, the FBI has suppressed
24 from the American people certain knowledge that a conspiracy
25 killed President Kennedy.

1 Your Honor, this is his theory, and he is
2 entitled to his opinion.

3 THE COURT: If I recall it, Mr. Weisberg
4 volunteered at a recent hearing that he did not subscribe
5 to any conspiracy hearing. I am referring to page 22 of
6 the recent transcript. I don't know where we stand.

7 MR. RYAN: Your Honor, the problem that I see in
8 this case is that the Freedom of Information Act is an act
9 which imposes certain burdens on the government. We feel
10 we have sustained those burdens. Plaintiff has a theory
11 which indicates that the FBI and the Warren Commission have
12 deceived the American public and until the FBI supplies
13 information which substantiates that theory, we haven't borne
14 our burden under the Freedom of Information Act.

15 We would submit that that is just not so. We
16 think that the law in this circuit entitles us to the same
17 fairness -- entitles the defendants to the same fairness
18 that the plaintiff is entitled to.

19 After going on and on and on with this case, that
20 at a certain point in time, the Court is in a position to
21 determine that compliance has been made with plaintiff's
22 request and that the case is simply over with.

23 We would submit on the basis of our affidavits,
24 Your Honor, we have attempted to show a reasonable good-
25 faith effort to comply with plaintiff's request.

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As I indicated, we are not relying on any exemption of the Freedom of Information Act. We are not trying to argue that any information is exempt. We are simply trying to comply with the request and provide the information.

We believe that the burden which the Freedom of Information Act imposes has been met, although we obviously, from plaintiff's affidavits, have not met the burden which plaintiff has imposed in this case.

Thank you very much, Your Honor.

THE COURT: Thank you, Mr. Ryan.

MR. LESAR: Your Honor --

THE COURT: Want to give your name for the reporter, please?

MR. LESAR: Yes, my name is Jim Lesar. I am representing Mr. Harold Weisberg.

Mr. Ryan has filed a motion to dismiss, and it is our contention that that motion to dismiss cannot be granted because there is a factual issue in dispute here, and that is whether or not there has been any compliance at all with Mr. Weisberg's request for the final reports on the tests made which he has requested.

We not only have not been given any such final reports, but there has been no under-oath, first-person statement stating that those reports do not exist.

We have not been provided even with some of the

1 documents which the government has attempted to substitute
2 for final reports.

3 Internal references make clear there are other
4 documents in existence, such as microscopic studies. We
5 have been given no copies of that.

6 It is beyond comprehension that some of these
7 basic tests were not performed in connection with the
8 investigation of President Kennedy's assassination.

9 The Court cannot accept -- it cannot dismiss this
10 matter because there are affidavits, conflicting affidavits.
11 There are two ways that I see that we can resolve this:

12 One is to proceed with discovery and hope that
13 it will be resolved by that relatively easy procedure.

14 And the second is to proceed with a trial of
15 the cause and establish whether or not these documents exist.

16 Mr. Ryan has tried to maintain that there is --
17 has been a good-faith effort on the part of the government
18 to locate these documents. That lack of good faith is
19 established by the record, which shows the government has
20 persistently stalled on this case; that it has --

21 THE COURT: Stalled on this case?

22 MR. LESAR: Yes, Your Honor. You will recall that
23 this case began by you giving a couple of extensions of
24 time. There has been, as long ago as May the 2nd, I
25 specified --

1 THE COURT: This suit was only filed less than
2 five months ago, and here you are having a resolution of it
3 right now. I think you have got pretty prompt treatment.

4 MR. LESAR: Well, there has been no answer to our
5 interrogatories which were filed a couple of months ago.
6 I think that is an indication of a lack of good faith.

7 THE COURT: They weren't required to file
8 interrogatories. I told them to file affidavits addressed
9 to the matter of the interrogatories.

10 MR. LESAR: Yes, and they didn't do that.

11 THE COURT: Well, that is a question of opinion.

12 MR. LESAR: Well, if they have done that, I would
13 like to see where they have done it.

14 The only attempt that they made to address any
15 of the interrogatories in the affidavits was an assertion
16 in Mr. Agent Kilty's May 13 affidavit that there had been
17 spectrographic and neutron activation analysis performed on
18 certain specified items.

19 We then pointed out --

20 THE COURT: Let me ask you this:

21 When the complaint was originally filed, did
22 you request neutron activation analyses?

23 MR. LESAR: Pardon? I missed the first part of
24 the question.

25 THE COURT: I say when the complaint was filed

1 originally, did you request neutron activation analyses?

2 MR. LESAR: Yes.

3 THE COURT: Where?

4 MR. LESAR: At both ERDA and the Department of
5 Justice.

6 THE COURT: I am talking about the complaint
7 you filed in this court?

8 MR. LESAR: Yes.

9 THE COURT: Where is it in the complaint?

10 MR. LESAR: Your Honor, I will have to check it.

11 THE COURT: I can shortcut it a little bit. The
12 specific thing, and I am not holding you to this, but I just
13 want to point out the language that has been used.

14 You point out for the past nine years, the
15 plaintiff has been trying to obtain the results of certain
16 spectrographic analyses which were made by the FBI for the
17 Warren Commission's part of the investigation of the
18 assassination of President Kennedy, and you refer to the suit
19 that you brought.

20 And paragraph 6, another letter to the Deputy
21 Attorney General, requesting the disclosure of the spectro-
22 graphic analyses and adding to that a request for other
23 scientific tests that were conducted by the Warren Commission.

24 My point is that you don't talk in terms of
25 neutron activation analyses in haec verba. You talk in

1 terms of spectrographic analyses and other scientific
2 reports.

3 MR. LESAR: Your Honor, if you would check
4 plaintiff's Exhibit D to the complaint, which is my letter
5 to Mr. Bender, secretary of what was then the U.S. Atomic
6 Energy Commission --

7 THE COURT: Yes, I see that.

8 MR. LESAR: You see it specifies the test. In
9 the request to the agencies they were specified.

10 THE COURT: All right.

11 MR. LESAR: Now, I suppose the simplest indication
12 of lack of good faith, aside from the self-contradictory
13 affidavits, where Mr. Kilty says in his May 13 affidavit
14 that something was performed and he has located tests on that,
15 and then when we point out we have not been given it, in his
16 next affidavit he says that it wasn't done.

17 Aside from that, you -- the government has a very
18 simple and easy way to address this without allowing us to
19 put up the objections that we have raised, and that is to
20 get affidavits from the people who conducted the tests
21 saying what tests were conducted.

22 The government hasn't done that. And I submit
23 that that shows their lack of good faith. Very simple and
24 very easy; they have done it in previous cases. They did
25 it in Weisberg vs. General Services Administration, and

1 they can do it here, without having this matter pushed off
2 time and time again.

3 The other way to do it is for them to address
4 the interrogatories. They are very simple and straight-
5 forward interrogatories they can address; their refusal to
6 do that, and again this is a departure, they did answer
7 interrogatories in Weisberg vs. General Services
8 Administration, is another indication of their lack of good
9 faith.

10 THE COURT: Well, you not only say they lack
11 good faith, but you say the record conclusively demonstrates
12 that both affiants lied.

13 You and Mr. Weisberg bandy about these materials
14 with considerable ease and are very quick to impugn motives.

15 MR. LESAR: Well, I think we have provided the
16 Court with considerable --

17 THE COURT: If you were not in the context of a
18 courtroom, you might get yourself faced with a lawsuit.

19 MR. LESAR: We will be making the same statements
20 out of court, and I have no fear there will be no lawsuit.

21 THE COURT: You mean you have no fear there will
22 be a lawsuit.

23 MR. LESAR: I mean I have no fear there will be a
24 lawsuit, right.

25 I would like to address myself to one other

1 statement made by Mr. Ryan, in which I think he misleads the
2 Court.

3 He says that Mr. Schur has stated in his affidavit
4 that ERDA does not have any of these documents. Mr. Schur's
5 language is much more careful than that.

6 His affidavit does not say that they do not have
7 any such documents. It says they did not prepare any such
8 documents.

9 Now, I would like to raise once again, I filed a
10 motion to compel answers to interrogatories. The Court of
11 Appeals in the National Cable Television Case has indicated
12 that that is a proper way to proceed.

13 The numerous Freedom of Information Act cases
14 which are filed in this district are replete with examples
15 in which plaintiffs are allowed discovery, and I think that
16 is not only the most practical way to resolve the problem
17 that we are now faced with, but it is my client's right to
18 have that discovery implemented.

19 THE COURT: Thank you, Mr. Lesar.

20 Mr. Ryan?

21 MR. RYAN: Thank you, Your Honor.

22 Your Honor, I believe it was about May 2 we also
23 had a status call in this case, and plaintiff submitted
24 certain interrogatories to the defendant at that status call.
25 I transmitted them to the agency.

1 Your Honor, if those are the interrogatories read,
2 one will see that they are the most broad and general
3 nature; that they inquire into methods of testing. And
4 Your Honor, it is not for me to say what the methods of
5 testing that are now used at the FBI are vis-a-vis the
6 methods that were used back in 1963 and '64, when the
7 assassination of President Kennedy was being investigated.

8 We would submit all of this research which really
9 is outside the bounds of plaintiff's Freedom of Information
10 Act request should not have to be borne by the FBI.

11 Your Honor, just as a point of information, as of
12 July 11, 1975, the Freedom of Information Act Unit at the
13 FBI had received 5748 requests just this year since the
14 beginning of the year.

15 THE COURT: Does every suit against the government
16 under the Freedom of Information Act go automatically to the
17 FOIA Section of the Justice Department?

18 MR. RYAN: That's right, Your Honor. They have
19 established a new --

20 THE COURT: They have got the duty of digging up
21 this stuff wherever it is in the government, is that correct,
22 if it's available?

23 MR. RYAN: They screen every Freedom of Informa-
24 tion Act, whether it is brought against the CIA, FBI,
25 Department of HEW, whatever agency is involved, Your Honor.

1 Now, at that calendar call, Your Honor requested
2 or instructed the defendants to deal with those interroga-
3 tories in the affidavit. And we feel that the relevant
4 inquiries such as contained in those interrogatories have
5 been dealt with in the affidavit submitted to the Court.

6 That is, what documents exist at the Bureau which
7 fall within plaintiff's request.

8 Now, we have provided two affidavits from
9 Special Agent Kilty, and in those affidavits we have
10 indicated what we understand plaintiff's request to
11 encompass.

12 The first affidavit details our understanding
13 of his request as a result of a meeting which we had with
14 plaintiff and our attempt to comply fully with that request.

15 At a subsequent calendar call, plaintiff objected
16 and said no, the Bureau has still not provided us with all
17 the documents, so we went back and conducted a further search
18 for documents, and provided another affidavit from Agent
19 Kilty.

20 Your Honor, it just boils down to the fact that
21 the Freedom of Information Act provides a certain test which
22 the government is required to meet. In terms of the param-
23 eters of this case, we feel we have demonstrated as a legal
24 matter that we have carried the burden in the case.

25 Many of the questions which plaintiff asks regarding

1 testing can be answered by reading the Warren Commission
2 Report.

3 We do not feel that the Freedom of Information Act
4 imposes an additional burden upon the defendant to provide
5 expert opinions outside the bounds of the Freedom of
6 Information Act, which is what we would say essentially is
7 what these interrogatories call for, when the interrogatories
8 are read specifically.

9 Your Honor, I think that basically deals with
10 our position in this case, and if there are any questions or
11 anything, again we have tried to be accommodating to
12 plaintiff, to ask him to come forward with whatever his
13 problems are, and he has set forth those specifically, I
14 think they were in paragraphs 26 through 29 of his affidavit.

15 He requested this calendar call be stayed pending
16 the FBI's resolution of the specific areas of his dis-
17 satisfaction, which he put forward in paragraphs 26 through
18 29 of his last affidavit.

19 We took that and addressed paragraphs 26 through 29
20 in his last affidavit in this most recent affidavit of
21 Agent Kilty. It is just beyond counsel for the government
22 to determine what else we can do to carry our burden in this
23 case and we submit that at this point in time, the defendants
24 are entitled to the same fairness accorded to a plaintiff in a
25 civil action, and that the case is moot.

1 Thank you, Your Honor.

2 THE COURT: Mr. Lesar?

3 MR. LESAR: Yes, sir.

4 Your Honor, I would like first to correct a mis-
5 statement that Mr. Ryan made when he said that we did not
6 meet with him after the May 21 calendar call, and
7 specify the documents which we referred to during that
8 calendar call that had not been provided us. We met here in
9 this courtroom until it was closed, and then we had a brief
10 meeting thereafter in the hall, and we specified those
11 then, and we specified them in Mr. Weisberg's affidavit.

12 Now, to give you an example -- first of all, the
13 government has gone to inordinate lengths to provide us with
14 materials which we not only did not request, but which we
15 explicitly said we did not want.

16 This is a package of nearly 300 pages of materials
17 we not only did not request, but expressly said we did not
18 want. It includes some 15 photographs. It is done at
19 considerable expense to the government and the taxpayers are
20 paying for it, and yet we did not request it.

21 THE COURT: When were those supplied? March 14?

22 MR. LESAR: No, those were supplied about 14
23 days ago when Mr. Ryan came to my front door to deliver them,
24 along with the motion to dismiss.

25 In Mr. Kilty's most recent affidavit, his June 23

1 affidavit, he states, contradicting his previous affidavit,
2 "Further examination reveals emission spectroscopy was
3 used to determine the elemental composition of the borders
4 and edges of holes in clothing and metallic smears
5 present on a windshield and curbstone."

6 Your Honor, the government itself has provided
7 us with the evidence that that statement is false.

8 This is a page which refers to specimen Q-15,
9 which is that test. We have not been given the results of
10 that test. The only thing that this page indicates is that
11 the test was conducted.

12 THE COURT: You got that from the government, did
13 you?

14 MR. LESAR: We got it both from the Department of
15 Justice, and I think also from ERDA, which also belies
16 ERDA's claim that they do not have any of these documents,
17 if that claim has been made, as Mr. Ryan asserted that it
18 had been.

19 I think it is quite evident a motion to dismiss
20 is not proper here. We have factual issues that have got
21 to be resolved and the best way of resolving them is further
22 implementation.

23 Since we have had no discovery, to implement
24 the discovery, and then we will see where we stand.

25 THE COURT: Well, I have spent a good deal of time

1 going over the papers that were filed in this case, and I
2 am satisfied in my own mind that there has been a good-faith
3 effort on the part of the government, and that the govern-
4 ment has complied substantially with its obligations under
5 the Freedom of Information Act.

6 Accordingly, I am going to grant the government's
7 motion to dismiss this matter as moot.

8 Mr. Lesar, you are familiar with going to the
9 Court of Appeals, and you may have some gentleman there
10 who will tell me I am wrong. They have done that before.

11 But let me say parenthetically, that you don't
12 get cooperation from people by calling them liars and kicking
13 them in the face. And I should think that you and Mr.
14 Weisberg would have learned that by this time.

15 I think the government has been oppressed by a
16 lot of the requests, which I think are completely above and
17 beyond anything that you are entitled to. I don't think
18 the government is required in this type of a case to go out
19 and take depositions of people and get affidavits from every-
20 body under the sun.

21 I think in relying on Mr. Kilty for two affidavits
22 and also on the gentleman from the Atomic Energy Commission,
23 they did all that they were required to do.

24 And having said that, we will take a recess until
25 return of court.

1 MR. LESAR: Your Honor, may I address the Court?

2 THE COURT: Go ahead.

3 MR. LESAR: I want to state again that all that
4 we asked for in the complaint were results. We have not yet
5 received a single page in compliance with that request.

6 With respect to --

7 Secondly, I would like to state that
8 substantial compliance is not and never has been a ground
9 for dismissing a Freedom of Information Act request, and
10 thirdly, Mr. Weisberg and I did not begin by presuming
11 that the government would lie. That fact is established by
12 its own affidavits, and we have tried persistently over the
13 years to cooperate with the government, and there has been
14 no cooperation in return.

15 All we have done is to lay out the facts as they
16 are.

17 THE COURT: Thank you, Mr. Lesar.

18 We will stand recessed until further call.

19 (Whereupon, the hearing was adjourned.)

* * *

20 C E R T I F I C A T E

21 I, RICHARD L. MATTSON, Official Court Reporter,
22 do hereby certify that the foregoing transcript is a complete
23 and accurate transcript of the proceedings contained therein.

24 

25 RICHARD L. MATTSON