

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

-v-

UNITED STATES DEPARTMENT OF JUSTICE,  
et al.,

Defendants

Civil Action No. 75-226

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS

As indicated in defendants' previously filed Opposition to Plaintiff's Motions to Strike, etc., defendants have undertaken a still further search for items set forth in plaintiff's motion to strike which plaintiff claims exist but have not been provided to him. The results of that additional search are set forth in the supplemental affidavit of Special Agent John W. Kilty attached hereto (Government Exhibit 3). In defendants' view, Mr. Kilty's two affidavits and the affidavit of Bertram Schur of E.R.D.A. establish that defendants have made every effort to comply in good faith with plaintiff's request for information, and that at this time have complied with plaintiff's request. Thus, a case or controversy within the meaning of Article III of the Constitution no longer exists. Defunis v. Odegaard, 416 U.S. 312 (1974); Golden v. Zwickler, 394 U.S. 102, 110 (1969). The fairness due plaintiff is also due defendants in this situation, and defendants respectfully request the lawsuit be dismissed as moot. Davis v. Ichor, 143 U.S.App.D.C. 183, 189, 442 F.2d 1207, 1213 (1970).

In his various discovery-related motions, previously opposed by defendants, plaintiff seeks to "elicit information which would aid plaintiff in establishing the degree of noncompliance with his freedom of information act request . . ." (emphasis added). At the outset, it seems clear that plaintiff begins with the presumption that defendants have not complied and that it would be very difficult, as a practical matter, for defendants to give any assurance which would satisfy plaintiff. However, plaintiff has cited National Cable Television Ass'n v. F.C.C., 479 F.2d 183 (D.C. Cir. 1973) for the proposition that discovery is required in these circumstances. Defendants submit that plaintiff's reliance on this decision is totally misplaced. In that case, the F.C.C. had declined to identify any documents relied upon for a proposed rulemaking and the Court of Appeals cited the usefulness of the discovery rules to resolve such questions. In the present case, however, defendants have submitted three affidavits detailing the documents which are available and which have either been provided or referenced to the public record, and describing what amounts to an extra effort to comply with this plaintiff's request. Furthermore, the law in this circuit does not require an agency to demonstrate absolute mechanical perfection in locating and producing documents but rather the agency is obliged to undertake in good faith a search for documents only to the extent that such a search is "reasonable":

Even where an agency has previously identified a class of materials, the passage of time may work such changes in the agency's personnel and records that production requires that identification begin anew. In such circumstances, production may be required only if the task imposed on the agency is not unreasonable. National Cable Television Assn., Inc. v. F.C.C., supra, 479 F.2d at 192.

Defendants submit that, at a minimum, they have made a reasonable search for documents requested by plaintiff and have rendered substantial compliance with his request. (See transcript of May 21, 1975 calendar call, p. 19)

A presumption of validity attaches to the actions of a federal agency. Cf. F.C.C. v. Schreiber, 381 U.S. 279, 296 (1965). Where, as in this instance, responsible officials have testified to their efforts to locate documents requested by plaintiff and have provided or referred plaintiff to documents which could be found, and have even provided additional documents not understood to be within plaintiff's request, there is no basis for permitting the far-reaching and burdensome discovery now sought by plaintiff, inquiring into methods of testing, etc. In his motion to strike and supporting affidavit, plaintiff has specified his specific areas of dissatisfaction, and the supplemental affidavit of Mr. Kilty deals with these. Defendants maintain that the nature of the discovery now sought by plaintiff is not only oppressive but unnecessary to a fair resolution of this case (see transcript of May 21, 1975 calendar call), that defendants have now made at the very least substantial compliance with plaintiff's request and that they are entitled to a ruling that this action is moot.

Wherefore, defendants respectfully request the Court to dismiss this action as moot.

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EARL J. SILBERT  
United States Attorney

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ROBERT N. FORD  
Assistant United States Attorney

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MICHAEL J. RYAN  
Assistant United States Attorney

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ORDER

Upon consideration of defendants' motion to dismiss this action as moot and the entire record herein, it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 1975,

ORDERED that defendants' motion to dismiss be and the same hereby is granted, and the instant is hereby dismissed as moot.

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UNITED STATES DISTRICT JUDGE