UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1996
U.S. DEPARTMENT OF JUSTICE, Defendant.	)	

MOTION TO STAY FURTHER PROCEEDINGS
PENDING COMPLETION OF REVIEW

Defendant by and through its counsel, the United States Attorney for the District of Columbia, hereby moves the Court, pursuant to subsection (a)(6)(C) of 5 U.S.C. 552, to stay the above-captioned proceedings insofar as it relates to paragraph 10 of the amended complaint, pending the completion of the Justice Department's review of the records which have been requested by the plaintiff in his December 23, 1975 request under the Freedom of Information Act, 5 U.S.C. 552, as amended by Pub. L. 93-502, 88 Stat. 1561. The grounds for this motion are that exceptional circumstances exist and the Federal Bureau of Investigation and the Department of Justice are exercising due diligence in responding to plaintiff's request.

In support of this motion the Court is respectfully referred to the affidavit of Quinlan J. Shea, Jr., which is attached hereto as Defendant's Exhibit A, to the affidavit of Donald L. Smith, Special Agent, Federal Bureau of Investigation, which is attached hereto as Defendant's Exhibit B, and to the memorandum of points and authorities filed herewith.

ROBERT N. FORD
Assistant United States Attorney

JOHN R. DUGAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Motion to Stay Further Proceedings Pending Completion of Review, together with supporting Memorandum of Points and Authorities, Exhibits, and a proposed Order have been mailed to the following on this 10th day of August, 1976:

James Hiram Lesar, Esq.
1231 Fourth Street, S.W.
Washington, D.C. 20024
Attorney for Plaintiff

Harold Weisberg
Route 8
Frederick, Maryland 21701
Plaintiff

JOHN R. DUGAN
Assistant United States Attorney
Room 3419 U.S. Courthouse
Washington, D.C. 20001
426-7261

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff	)	
v.	)	Civil Action No. 75-1996
U.S. DEPARTMENT OF JUSTICE, Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF REVIEW

Statement of the Case

This action seeks in reality judicial review of two of plaintiff's Freedom of Information Act requests directed to the Department of Justice relating to records pertaining to the assassination of Dr. Martin Luther King, Jr. The first part of this case relates to plaintiff's April 15, 1975 request for six (6) listed categories of information relating to the Department of Justice records involving the assassination of Dr. King. The second part of this case relates to plaintiff's December 24, 1975 amendment to this instant action, wherein plaintiff brought to the attention of the Court a new and additional administrative request of the Department of Justice for twenty-eight (28) listed categories of information relating to the assassination of Dr. King (Plaintiff's Exhibit F).

This motion to stay further proceedings relates to the subsequent request (see Plaintiff's Exhibit F). Counsel for the parties have appeared before this Court on numerous occasions and we have discussed the difficulties the FBI has encountered in even

the Department of Justice regarding the handling of cases of historical interest.

Subsection (a)(6)(C) of 5 U.S.C. 552 provides that "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding" to an FOIA request, "the Court may retain jurisdiction and allow the agency additional time to complete its review of the records" before proceeding to the merits of plaintiffs' claim. Although the Department of Justice has made every reasonable effort to process the plaintiff's subsequent FOIA request, exceptional circumstances have precluded the FBI and the Justice Department's Freedom of Information and Privacy Unit (the Unit) from completing their consideration of it. Defendant now moves the Court to stay further judicial proceedings until the FBI and the Unit have completed their review and the Deputy Attorney General has acted upon plaintiff's appeal.

In support of this motion, defendant submits herewith affidavits of Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy Unit (Defendant's Exhibit A), and Donald L. Smith, Special Agent FBI (Defendant's Exhibit B). These affidavits demonstrate that "exceptional circumstances" exist and that the Department of Justice is exercising "due diligence" in the initial processing and appeal of plaintiff's subsequent FOIA request. Moreover, the affidavit of Mr. Shea discusses the Department of Justice policy regarding FOIA requests of historical importance-public interest (paras. 12-13).

Argument

I.

The Court Should Stay Judicial Proceedings Pending the Completion of the Review and Subsequent Administrative Appeal of Plaintiff's

a case precisely on point which supports the instant motion. Open America v. The Watergate Special Prosecution Force, et al., C.A. No. 76-1371, decided July 7, 1976. In an opinion by Circuit Judge Wilkey, the Court decided a case of first impression, that is, under what time constraints administrative agencies should be compelled to act by a Court at the behest of the Freedom of Information Act plaintiff. The Court thoroughly reviewed the exceptional circumstances exception of the statute, §552(a)(6)(C) and concluded with respect to the Federal Bureau of Investigation that there was ample demonstration of exceptional circumstances and due diligence. The Court, in summary, held:

> . . . we interpret Section 552(a)(6)(C) to mean that "exceptional circumstances exist" when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits presribed [sic] by Congress in subsection (6)(A) become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis, except those where exceptional need or urgency is shown, is compliance with the Act. at pages 20-21.

With respect to the instant case, we submit the affidavit of Donald L. Smith (Defendant's Exhibit B) amply demonstrates the exceptional circumstances and due diligence of the FBI relating to plaintiff's subsequent FOIA request. Rather than quote extensively from the affidavit, defendant incorporates the affidavit herein by

Mr. Smith indicates in the affidavit the following:

> . . . Based on the preliminary estimate and past experience in processing FOIA requests, and with the qualifications set out in Paragraph (10), supra, in mind, the present rate of processing would allow the FBI to initiate processing of plaintiff's December 23, 1975, request within four months, considering the number of requests on hand and the FBI's present manpower, and assuming no further unforeseen difficulties. This is in continuance of the policy of attempting to give equal and fair treatment to all requesters despite the exceptional circumstances under which the FBI is operating. (Smith Affidavit, p. 9, Defendant's Exhibit B, Emphasis added).

Since the affidavit was executed on May 28, 1976, the proximate starting point for review of this subsequent FOIA request is October 1, 1976.

With respect to the fact that once the initial process has begun, the affidavit further indicates that it will take approximately four months to review the December 23rd request and we respectfully submit that this additional time is reasonable under the circumstances in view of the numerous categories of information requested by the plaintiff in his subsequent FOIA request. Moreover, once the FBI has completed its review, plaintiff is entitled to an appeal within the Department of Justice to the office of the Deputy Attorney General. A special unit has been created for purposes of administrative appeals in these FOIA cases. The chief of the Freedom of Information and Privacy Section, Quinlan J. Shea, Jr., has submitted an affidavit to this Court with respect to the instant action. Defendant contends the Shea affidavit likewise demonstrates the section is making a diligent, good faith effort to close the gap of its backlog of appeals. The establishment of the unit as a separate entity is an indication of the Department's commitment to discharging its obligation under the FOIA. As demonstrated in

difficulties in securing personnel to review these FOIA cases. Nevertheless, the unit has made great strides and should be given the opportunity to consider the merits of any appeal taken by the plaintiff in this case. As indicated in the Shea affidavit, "A reversal or a substantial modification of the initial response to the request for Justice Department records results from this procedure in over 50% of the cases appealed to the Deputy Attorney General." (Defendant's Exhibit A, p. 7). Because Mr. Shea's unit does not have the resources to conduct an initial review of plaintiff's FOIA request, it will not act on plaintiff's appeal until the FBI has completed its processing of the request. (Ibid., para. 17).

However, with respect to any appeal taken from decisions of the Civil Rights Division and/or the Criminal Division, the unit will consider merits of the appeal prior to awaiting the FBI review of the records under their control. 1/

Finally, the Smith and Shea affidavits demonstrate that there are numerous requests and appeals which preceded plaintiff's and there is nothing to suggest that the Department will not give plaintiff's December 23,1975 FOIA request the same careful attention that others receive, when it is considered in due course. The Department has been acting with due diligence under exceptional circumstances. Only the unanticipated flood of FOIA requests, coupled with unavoidable staff shortages during the start-up period following enactment of the 1974 Amendments, have prevented the Department from responding to plaintiff's request in a more timely manner. The FOIA contemplates

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1/ Defendant's counsel has filed a response to plaintiff's motion for certification of compliance with respect to the two divisions and one office within the Department of Justice, wherein plaintiff sought an order requiring documentation of the consideration of plaintiff's December 23, 1975 FOIA request. As demonstrated in the affidavits and exhibits attached thereto, certain portions

that where, as here, an agency has committed all available and appropriate manpower to the task, but cannot practicably meet the Act's time limits, it should be permitted to make its determination before the Court considers the case. Indeed, the Department's decision may make this judicial proceeding unnecessary or, at a minimum, greatly narrow the issues for a judicial resolution. As the Supreme Court has noted:

> A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. (McKart v. United States, 395 U.S. 185, 195 (1969).

A decision by the Court to adjudicate this case before the Deputy Attorney General has had an opportunity to make his determination, or to require the Department to consider plaintiff's appeal out of sequence, would give plaintiff an advantage not enjoyed by the other prior requests. See especially Open America, supra, at p. 17.

Conclusion

For the foregoing reasons, the Court should grant defendant's motion to stay any further judicial proceedings until the FBI has completed its review of plaintiff's FOIA request and the Deputy Attorney General has acted on plaintiff's appeal.

Earl J. Silbert

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v. CIVIL ACTION NO. 75-1996

DEPARTMENT OF JUSTICE,

Defendant.

/

AFFIDAVIT OF
QUINLAN J. SHEA, JR.

I, Quinlan J. Shea, Jr., being duly sworn, do hereby depose and state as follows:

1. I am Chief of the Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, United States Department of Justice. The Unit is responsible for processing internal administrative appeals to the Deputy Attorney General under the Freedom of Information Act, including an appeal by Harold Weisberg plaintiff herein, dated January 18, 1976. The statements made herein are based upon personal knowledge obtained in the course of my official duties.

2. The Freedom of Information and Privacy Unit became operational within the Office of the Deputy Attorney General on March 10, 1975. The text of the order establishing the Unit is set forth at 28 C.F.R. §0.18 (1975). The Unit was then known as the Freedom of Information Appeals Unit. Its primary obligation was to assist the Deputy Attorney General in making recommendations to the Attorney General concerning the disposition of appeals resulting from decisions on Freedom of Information Act requests filed with the various

August 1, 1975, the Attorney General delegated to the Deputy Attorney General authority to decide appeals under the Act. A copy of this Order is attached as Attachment A. I then assumed the role of furnishing advice to the Deputy Attorney General that he had previously performed vis-a-vis the Attorney General.

3. At the time of the Unit's establishment, it was also intended that I would furnish advice to the Deputy Attorney General on initial requests for records actually maintained in the Offices of the Attorney General and the Deputy Attorney General. This continues to be one of my responsibilities. In addition, since the Privacy Act of 1974 became effective on September 27, 1975, this Unit has performed the same advisory functions under that Act at both the appellate and initial request stages that it performs under the Freedom of Information Act. Over time, I have also become, of necessity, the Deputy Attorney General's staff advisor on all matters pertaining to these general areas of the law. As of this date, appeals under the Freedom of Information Act constitute well over 90% of the matters pending in my Unit. The initial requests and other related staff matters each take about as much time to handle as does the average appeal.

4. Prior to the formation of this new Unit, administrative appeals under the Act were processed by the Office of Legal Counsel. During the twelve months preceding creation of the new Appeals Unit, the Office of Legal Counsel had received and processed approximately one hundred such appeals. Based on this experience and an

increase to the 300-400 range during the next twelve months. Accordingly, at the time of the Unit's creation, it was anticipated that a staff of three or four attorneys and one or two secretaries would be sufficient to meet fully the responsibilities of the Department of Justice under the Act. These estimations proved to be a grievous miscalculation of events that were to occur -- events that no one could possibly have foreseen. Even if these circumstances had been anticipated, however, considerations other than workload would have hampered our ability to fill the manpower needs of the Unit and meet the responsibilities of the Department (see paragraph 7).

5. By the end of March, a little over three weeks after the Unit was established and I took charge of appeals administration, the Unit had already received 41 matters. During April, 75 more matters were received and, during May and June, another 160 and 147, respectively. This was a total of 423 matters in less than four months. During the same period, 85 files were closed. We received an additional 853 matters from July 1 to December 31, 1975, and completed the processing of an additional 446 during the same period. As can be seen from these statistics, the number of pending appeals grew substantially during 1975, but the rate of closings also increased as the year progressed.

6. From January 1, to June 30, 1976, the Unit received 918 matters, almost all of which were appeals under the Freedom of Information Act, and 700 were closed. This is a closing rate of more than 76%. As of June 30, 1976, there

7. Freedom of Information is a Congressionally mandated, but unfunded, Departmental activity. An important consequence of this fact is that each decision to assign personnel either to my Unit or to Freedom of Information/Privacy activities in any other component of the Department necessarily involves the diversion of those same individuals from other missions within the Department. During the first weeks of my tenure, I began the process of attempting to identify and recruit several additional attorneys of sufficiently high caliber to be assigned to the staff of the Deputy Attorney General. Efforts to solicit volunteers of this caliber from within the Department were unsuccessful, but quite time-consuming.[1/] In April, the inaccuracy of the Department's estimate of activity in this area was clear and I was authorized to hire several additional permanent personnel. It was simultaneously decided to "levy" certain of the Departmental components for "90-day detail" attorneys, the first of which joined my staff on April 7. Several other "details" arrived during the next few weeks. Almost immediately, however, as appeals flooded in during May, the true magnitude of the miscalculation became apparent. The Department then authorized a total permanent complement of eleven attorneys for the Unit. On May 5, a second permanent secretary began working here and on May 12, Mr. Rogers

1/ I expended considerable time in attempting to recruit from within the Department because outside hires require full F.B.I. background investigations. This results in a delay of between 2 and 3 months between the "hiring" of an attorney and his actual commencement of work. This was in fact the reason why attorneys finally hired from April to July did not actually begin to work in the Unit until July through November.

became the first permanent attorney to join my staff. On that same day, another "detail" arrived. On May 27, a third secretary was added and on June 2, the first of two "summer hire" law students was added, one of whom continued to work part-time until the end of her school year. A fourth secretary arrived on July 17 and two permanent staff attorneys on July 21. On August 18, two additional attorneys joined the permanent staff, followed by one each on September 2, September 29, November 3 and November 19. A trained para-legal joined my permanent staff on December 8. Early this year, I was authorized to recruit and hire four more professional personnel. At this time, the Unit's actual strength is ten permanent staff attorneys (including myself and Mr. Rogers), two "detail" attorneys, an Administrative Assistant, two para-legals, five secretaries and a clerk. Four law graduates will be joining the permanent staff during August and September, 1974, after they take their bar examinations and I am in the final stages of recruiting two additional attorneys.

8. Out of all of these various attorneys -- details and permanent -- only one brought to the Unit any experience with the Freedom of Information Act. Moreover, most of the permanent staff came from outside the Department and had no knowledge of Departmental operations. This is a complex legal area; the records of the Department of Justice are, in many instances, very sensitive. Accordingly, none of the new attorneys was immediately productive. Training occupied a greater and continually increasing part of my own time. This, coupled with the time spent in reviewing and editing their work product as they did begin to become of

to return to their regular positions not too long after they became productive members of my staff.

9. A complicating factor in our efforts to process our pending matters was a court order in a case involving the records in the Rosenberg case that imposed very short time limits for the necessary initial review by the F.B.I. and other Departmental components of their records. Deputy Attorney General Tyler had made a public commitment to the maximum possible disclosure of these records. This required me and members of my staff to engage in an actual review of a substantial quantity of unclassified materials which were intended by the components to be withheld in whole or in part and resulted in a large expenditure of man-hours during October and November. Similar orders have been entered by other courts, which have affected, adversely, our efforts to speed the disposition of all appeals. Another substantial complicating factor was the quite logical assignment to my Unit of the same responsibilities vis-a-vis the Privacy Act of 1974 that we perform in the Freedom of Information Act area.

10. As must be obvious from the foregoing, it has been impossible to meet the time limits imposed by the Freedom of Information Act for the processing of administrative appeals. Although I do attempt to keep the very "big" cases from impeding a reasonable flow of "little" cases, I have adopted a general practice of assigning appeals for processing by staff attorneys in their approximate order of receipt. I consider this both fundamentally fair and wholly consistent with the intent of Congress in this area. Ap-

their relative standing in terms of previously-received, unassigned cases. Save in those extremely rare instances where an appellant can demonstrate a real and substantial need for preferential handling, I adhere to this practice.

11. The processing of each of our matters is in no sense a "mechanical" operation. Each appeal, for example, receives the particularized treatment it requires. This depends, in large measure, on the nature and quantity of the materials to which access has been denied. Almost invariably, all of the records in question or a representative sampling are reviewed de novo by a member of my staff. The advice memorandum to the Deputy Attorney General is then written to encompass the legal and factual issues of the specific case, in light of his overall guidance to me that, although he considers an exemption to be a legitimate basis to deny access to any record, I am nonetheless to examine all withheld materials to see if any of them might be appropriate for release as a matter of the Deputy's discretion. A reversal or a substantial modification of the initial response to the request for Justice Department records results from this procedure in over 50% of the cases appealed to the Deputy Attorney General.

12. I am aware that Mr. James Lesar has urged the Court on behalf of his client Mr. Weisberg to require expedited consideration of his appeal to the Unit. The assassination of Dr. King is certainly a case of sustained public interest. Notwithstanding the fact that the crime occurred only a relatively few years ago, the historical importance of the fact of the assassination is obvious.

Although cases of historical importance and public interest such as this one are handled differently from other appeals, it is not the policy of the Department of Justice to give such cases preferential treatment by assigning them for processing more expeditiously than other cases. Moreover, there is no policy favoring their actual processing on an expedited basis, once they have been assigned.[2/] If anything, the rate of processing in these cases is usually slower than in the ordinary case. There are two reasons for this. First, these cases customarily involve a large number of records and they cannot be permitted to block the processing of the larger number of routine cases. Second, Attorney General Levi and Deputy Attorney General Tyler have directed that all non-exempt records in these files of public and/or historical interest are to be released, <u>together with every exempt record that can possibly be released as a matter of discretion</u>. This insistence upon maximum possible release is very time consuming, both for the components of the Department in processing the requests initially and for my Unit.

2/ Deputy Attorney General Tyler issued guidelines directing the maximum possible disclosure of records relating to the FOIA request of the sons of Julius and Ethel Rosenberg, but his expressed hope in that case that his guidelines would lead to the processing of the records involved "on a greatly expedited basis in the immediate future" must be read in the light of the critical fact that requests for access to those files had been pending in the Department for <u>several years</u>. A succession of Attorneys General had assured requesters that these records would be reviewed and, as far as possible, be released. Director Kelley had given the same assurance, as to FBI records. Unknown to these officials was the fact that very few of the records had been reviewed in August 1975 and almost none of them had been released. The Bureau was simply told to be as quick as reasonably possible in doing that which could and should have already been done--or, at least, well begun--over the several preceding years. A copy of the Deputy Attorney General's guidelines are attached hereto as Attachment B.

13. The care with which these cases of historical importance--public interest are processed is wholly inconsistent with expediting their processing. Notwithstanding an intent to release every possible record, there is still a need to withhold those exempt records the release of which would adversely affect some present vital interest of the Department. In most such cases, moreover, there is no need for expedited treatment. The interests of history are more likely to be served by our being permitted to take whatever reasonable time is necessary to resolve all doubts and close questions. Under the pressure of a time deadline, some doubts in the discretionary release area would simply have to be resolved in favor of a denial of access, to at least the possible ultimate detriment of the cause of history. It is my personal judgment that the policy of maximum possible release should be allowed to operate as to the records relating to the assassination of Martin Luther King. Now that the legal attacks on the conviction of James Earl Ray have been held to be without merit, I perceive no possible reason why we should not take the time necessary to process these records in accordance with that policy.[3/]

14. Because of the inherent unfairness in assigning cases for processing other than in turn, or in actually processing them on a deliberately expedited basis, the Department has never considered expedited treatment of any case without a formal request for such preferential handling.

3/ Even after components of the Justice Department had carefully reviewed records relating to the Rosenberg FOIA case in accordance with Mr. Tyler's guidelines, a considerable quantity of unclassified records was desired to be

Neither Mr. Weisberg nor Mr. Lesar has requested expedited administrative consideration by this Department. Were such a request to be submitted, the decision would be made thereon by Deputy Attorney General Tyler. Because of the historical importance of these records, it would, in my judgment, take a particularly strong showing to persuade the Deputy Attorney General to deviate from our normal procedures in this case.

15. Even after reading Mr. Lesar's Second Affidavit, dated June 30, 1976, I personally have difficulty in seeing how a decision to grant such expedited processing could be supported on the basis of the available facts. I am fully aware of Mr. Weisberg's great interest in certain assassination cases. On the other hand, I am aware of no factual basis on which the Department could or should grant him preferential handling to the detriment of senior requesters. It may be of interest to note that the speculation by her attorney that Judith Campbell Exner was in danger of being killed to silence her was determined by Deputy Attorney General Tyler not to constitute an adequate basis for requiring expedited consideration and processing of her request by the FBI. Even assuming that Mr. Weisberg is either an authority or expert on the King assassination, it is difficult for me to perceive how Mr. Lesar's speculation based on the alleged state of Mr. Weisberg's health should be entitled to any greater weight.

16. Assuming for the moment that Deputy Attorney General Tyler would consider granting expedited treatment on the basis that Mr. Weisberg had unique insights into the records that could result in an evaluation that could not be

obtained from the numerous other persons interested in the case, Mr. Tyler would undoubtedly require a more solid evidentiary showing of objectivity and expertise than Mr. Weisberg has made heretofore. The public is well aware that Mr. Weisberg holds and has expressed strong views on the question of the guilt of James Earl Ray; moreover, his self-professed status as the investigator for Mr. Ray would appear to undermine any claim that his views are essential for the "truth" about the assassination to come to light. See Attachment C. In any event, to accept Mr. Weisberg as "the most knowledgeable authority" in the area, or to conclude that there would be some public detriment if we were to be deprived of his "expert evaluation" of any documents released, should require the sort of credentials ordinarily associated with judicial acceptance of individuals as experts. So far, the Department has not been provided with any factual basis to support Mr. Lesar's assertion that Mr. Weisberg has any professional expertise which is not present in other persons interested in the King assassination. Without such a showing, I would have difficulty recommending that the Deputy Attorney General decide that sufficient public benefit in expediting processing for Mr. Weisberg exists to justify overriding the interest of all prior requesters who are patiently waiting for records from the Department.

17. The matter representing the appeal of Harold Weisberg was the 1,359th received by the Unit. His appeal has not been processed because there are several hundred other matters which were received prior to his that have not

receipt and consideration of the appeal would normally begin when his number comes up in sequence. Because the Unit lacks the personnel resources to conduct the review of records that is necessary to make an initial determination on access to Justice Department records, however, we do not act until there has been a determination by each relevant component of the Department to deny the request in whole or in part. Therefore, processing of plaintiff's appeal will not commence until there has been an initial determination by the component or components to which the request was referred. If, upon reaching plaintiff's appeal, any component has completed its review of records in its possession, we will begin the appellate process as to those records. In my judgment, the Department should be afforded the opportunity to act on plaintiff's appeal, but should not assign or process it out of sequence and thereby confer a preference on plaintiff not accorded the hundreds of other appellants who are waiting their turn. I estimate that this appeal will be assigned to a staff attorney for processing in approximately 30 to 45 days. The time required to process the appeal cannot be estimated at this time, but will depend on the nature and volume of material which must be reviewed. The initial determination of each component of the Department which has denied access to records will be reviewed

separately to the extent possible and plaintiff will be notified as soon as the processing of each component's records has been completed.

QUINLAN J. SHEA, JR.
Chief
Freedom of Information &
Privacy Unit
Office of the Deputy Attorney
General

District of Columbia: ss

SUBSCRIBED and SWORN to before me, Sharon Fulton, the undersigned Notary Public, this the 15th day of July, 1976, in the District of Columbia.

Sharon Fulton
Notary Public

My Commission expires: October 31, 1980

Seal:

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Clarence M. Kelley, Director
Federal Bureau of Investigation

DATE: AUG 8 - 1975

FROM : Harold R. Tyler, Jr.
Deputy Attorney General

SUBJECT: Your Request for Guidance in Processing the Rosenberg and Hiss Files Under the Freedom of Information Act

This is in response to your memorandum of July 28, 1975, addressed to Attorney General Levi, in which you sought specific guidance as to the release of Greenglass data and general guidance as to third party releases of investigatory records in subject cases of historical interest.

As to David and Ruth Greenglass, it is my judgment that they have no general privacy interest in any material obtained or derived from them, or pertaining to them [regardless of source], sufficient to withstand a request under the Freedom of Information Act submitted by any person. The only exception would be for material of an intimate or other purely personal nature that is wholly unrelated to the subject matter of the Rosenberg case. As a general proposition, I have concluded that the same standard applies to Julius and Ethel Rosenberg, Morton Sobell, Harry Gold, Anatoli Yakolev, Klaus Fuchs, Max Elitcher, Prof. Walter Koski, Louis Abel, Dorothy Abel, Dr. George Bernhardt, William Danziger, Elizabeth Bentley, James S. Huggins, Evelyn Cox and Ben Schneider. It may apply to Abraham Brothman, the Einsohns, Mrs. Elitcher and Oscar Vago; material from or pertaining to them should be very carefully considered by you in this regard before being withheld on privacy grounds.

With respect to the Hiss materials, I find no general privacy interest sufficient to support withholding under the amended Act as to Whittaker Chambers, Esther Chambers, Nathan Levine, Henry Julian Wadleigh, Mr. Touloukian, Dr. Meyer Schapiro, William Rosen, Hede Massing, Felix Inslerman and Burnetta Catlett. Any statements [or reports thereof] or official reports from Walter Anderson and Eunice Lincoln of the Department of State or from Ramos Feehan and Courtland Jones of the F.B.I. should be released. Careful consideration should be given before any decision is reached to withhold, on the basis of privacy, relevant material pertaining to any of the persons identified as Communists by Whittaker Chambers in the public testimony before the House Unamerican Activities Committee on

ATTACHMENT B

August 3, 1948. Given the nature of the Hiss trials, all material pertaining in any way to the Woodstock typewriter, the pumpkin films, the purloined documents themselves, the incident of the transfer of the car to Mr. Rosen via the Cherner Motor Company, the incident of the oriental rug, and the purchase by Whittaker Chambers in 1937 of the "other" farm near Westminster, Maryland, should be released, if possible.

As to many of the other persons from whom information or assistance was obtained in these two cases of historical interest, it may be appropriate to delete their names when initially releasing information furnished by them. Decisions as to other persons, however, will require careful and deliberate judgments as to whether the release of their identities would constitute unwarranted invasions of their privacy.

In several prior memoranda and letters, reference has been made to the Department's Policy Regarding Investigatory Records of Historical Interest [28 C.F.R. 50.8]. Although the "letter" of that provision may have been largely overtaken by the recent amendments to the Act, the policy set forth therein of encouraging the maximum possible discretionary release of records in these historical interest cases remains the policy of the Department of Justice. I also wish to call to your attention the communication of Attorney General Levi to several persons seeking access to the "pumpkin films." A copy of one such letter is attached hereto. With the exception of materials withheld on the basis of exemption 1, because they are properly classified and cannot be declassified or sanitized, the Attorney General stated that exemptions would be invoked as to the content of the films only if there is a "compelling reason" to do so. I consider that to be the proper standard to be applied as to investigatory records in the Hiss and Rosenberg files [e.g., to protect the identity of the informant against the Rosenbergs who is still furnishing information to the F.B.I. today].

As both of us are aware, the Department has been subjected to considerable criticism over our response to requests for records from the Rosenberg and Hiss files. I hope that the guidance I have provided in this memorandum will permit these matters to be processed on a greatly expedited basis in the immediate future.

Lillian Harold Weisberg
Coq d'Or Press ROUTE 8, FREDERICK, MD. 21701
Code 301/473-8186

December 4, 1975

Mr. Edward Levi
Attorney General
Department of Justice
Washington, D. C.

CERTIFIED - RETURN RECEIPT ADDRESSEE ONLY

Dear Mr. Levi:

On April 18, 1975, I requested certain still withheld FBI evidence in the assassination of Dr. Martin Luther King, Jr. When the Department did not comply with the law, my lawyer, Mr. Jim Lesar, filed an appeal directly with you on May 5 (copy attached). When you then did not comply with the law, he filed C.A. 75-1996 for me. Yesterday, December 3, in response to a letter stamp-dated December 1 and mailed the next day, he picked up what the FBI falsely represents as all this long-suppressed evidence I have long sought. I have now gone over it.

I am also investigator for James Earl Ray.

Examination of the material received confirms the suspicion I had when the Department's Mr. Varney Brown started asking Mr. Lesar, who also represents Mr. Ray, (to merge my stonewalled request with a later one by CBS) and to (get Mr. Ray's permission to include certain personal information about him.) Mr. Lesar recently filed an appeal before the sixth circuit court of appeals in Mr. Ray's efforts to obtain a trial.

The apprehensions I felt from long experience over the unnecessary and I believe illegal delay in acting on my proper request and then seeking to merge with it a later one by CBS is more than justified by an examination of what the FBI has supplied. It told Mr. Lesar that it supplied the material to CBS prior to delivering it to me or even letting me know although I had already filed C.A. 75-1996 for it.

What has been supplied is not as certified, all I requested. Rather is it a careful selection from the FBI's files that, if used by CBS, will inevitably be very prejudicial to Mr. Ray's interests and that of justice, especially at this crucial stage in his pursuit of long and deliberately denied legal and constitutional rights. The FBI cannot be other than deliberate in this, for all practical purposes imposing on the lack of understanding by CBS to stage a TV spectacular to frame Mr. Ray once again or taking advantage of the clear bias CBS has displayed on this general subject to put it in a position of doing exactly the same thing with allegedly official evidence.

What is not still suppressed - and there can be no doubt of the FBI's purposeful continued suppression of evidence embarrassing to it and exculpatory of Mr. Ray - together with other evidence I have collected and of which the Department has copies, proves the deliberateness with which Mr. Ray was framed when the FBI had proof he had not killed Dr. King. It also proves that Mr. Ray is the victim of perjury. The

ATTACHMENT C

Department has this proof, has suppressed it and has since perpetuated the success of this felony by violating my rights under 5 U.S.C. 552 with eight months of stonewalling.

When you announced you had ordered a new look inside the Department at this terrible crime, I wrote you telling you that you had put those divisions responsible for this miscarriage of justice in charge of investigating themselves. What has been given me of what I requested together with what I obtained in the past leaves no doubt that the Department's lawyers knew this and took other illegal acts to perpetuate it. (There is only the alternative that every Department lawyer in any way involved on any level is utterly incompetent.) I obtained some of this proof from the Department when federal district court in Washington awarded me a summary judgment in an earlier Freedom of Information Act case, 718-70. The history of that case proves that the Department confiscated from the willing British Government all official copies of that exculaptory evidence outside the files of the United States Government, classified it illegally, and then lied about it.

Tennessee authorities are also involved in this and are the users of the perjurious testimony known to the Department to have been perjurious.

This amounts to a conspiracy to deny Mr. Ray his civil rights as well as to keep him in jail for the rest of his life when the FBI had and suppressed proof that he did not kill Dr. King. I therefore call upon you to see to it that Mr. Ray is freed and to have an independent investigation - not another whitewashing self-investigation - of what amounts to a conspiracy within your Department to deprive Mr. Ray of his civil rights.

This endless official misconduct has also put the pro bono Ray defense to enormous cost for which there now should be proper and adequate compensation and the restoration of all costs.

Had the Department behaved in accordance with the law once I filed the April request, it would not have been necessary to do all the work represented by Mr. Ray's appeal. What the Department did was deliberately delay my proper request until after Mr. Ray's appeal was filed, then until after CBS made requests for its newest commercialization of these tragedies, and then again until after CBS had in effect paid off the FBI with a coast-to-coast whitewashing of the FBI's behavior in the investigation of the assassination of President Kennedy.

Sincerely,

Harold Weisberg

Exhibit A

Office of the Attorney General
Washington, D. C. 20530

TITLE 28 -- JUDICIAL ADMINISTRATION

CHAPTER I -- DEPARTMENT OF JUSTICE

PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE

PART 16 -- PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

Order No.

TRANSFER OF FUNCTION OF ACTING ON FREEDOM OF INFORMATION APPEALS TO THE DEPUTY ATTORNEY GENERAL

Under the Justice Department's regulations for administering the Freedom of Information Act, 5 U.S.C. 552, requests for access to Justice Department records, if denied by the head of a division, bureau, or similar component of the Department, may be the subject of an appeal by the requester to the Attorney General. The purpose of the present order is to enable the Deputy Attorney General

to act on the Attorney General's behalf upon the majority of such appeals, preserving to the Attorney General, however, the function of acting personally or assigning another official of the Department to act for him in designated cases, as well as in all cases where the initial determination to deny has been made by the Deputy Attorney General.

By virtue of the authority vested in me by 28 U.S.C. 509 and 510, and 5 U.S.C. 301 and 552, it is hereby ordered as follows:

1. 28 CFR Part 16, Subpart A, as amended, is hereby further amended as follows:

(a) §16.7, Appeals to the Attorney General from Initial Denials, is amended by redesignating subsections (b) through (f) as subsections (c) through (g), respectively, and by inserting a new subsection (b) to read as follows:

words "supplied to and maintained by" the words "maintained by and when necessary supplied to".

(4) § 16.8(b) (Maintenance of file open to public), is amended by striking the words "by the Attorney General".

2. Section 0.18 of 28 CFR Part 0, Subpart C, as amended, (Freedom of Information Appeals Unit) is hereby further amended by striking the words "the Attorney General".

Date: AUG 1 1975

Edward H. Levi
Attorney General

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v.

Civil Action No. 75-1996

DEPARTMENT OF JUSTICE,

Defendant

AFFIDAVIT

I, Donald L. Smith, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Section, Records Management Division, at FBI Headquarters (FBIHQ), Washington, D. C.

(2) Due to the nature of my official duties, I am familiar with the procedures followed in processing Freedom of Information Act (FOIA) requests received at FBIHQ, and I am also familiar with the December 23, 1975, five-page letter from plaintiff's attorney to the Deputy Attorney General, requesting access to 28 more categories of "records pertaining to the assassination of Dr. Martin Luther King, Jr." A copy of this letter, which was referred to the FBI on December 31, 1975, is attached as Exhibit F to plaintiff's "Notice of Amendments to Complaint" filed on December 24, 1975.

(3) In explanation of the status of plaintiff's latest FOIA request, the Court's attention is respectfully

(4) In 1973, the FBI received an average of approximately one FOIA request per day, an amount which could be processed without undue burden. In 1974, the FBI averaged over 37 requests per month. The amendments went into effect in February of 1975, the Privacy Act went into effect in September of 1975, and in that year the FBI received 13,875 requests pursuant to these two acts, an increase of more than three thousand percent over the previous year.

(5) The FBI has recognized and taken substantial action in terms of allocation of manpower and other measures to meet the tremendous administrative burdens imposed upon it as a result of the numerous requests for information from its files received under the FOIA and Privacy Act. A special Unit, solely designated to handle FOIA requests, became operational in October of 1973, at which time it consisted of eight employees, including three law-trained Special Agents. By locating and training additional personnel, this complement was doubled during 1974 to keep pace with the increased volume of requests. During 1975 further periodic increases in the personnel complement assigned solely to the processing of FOIA and/or Privacy Act requests were made by reassigning personnel from other substantive duties. By the end of 1975, 161 employees at FBIHQ were engaged solely in the processing of such requests, including 23 law-trained Special Agents. This did not include personnel from other Divisions at FBIHQ who are required to devote a substantial portion of their time, to the detriment of their other duties, to assist in the processing of these requests. Through additional increases this year, the FBI now has nearly 200 employees assigned full-time at FBIHQ to the

the expense incurred by the FBI in terms of both money and manpower has been enormous, [1] and I believe our overall investigative responsibilities imposed by statute may suffer as a result.

(6) Despite more than diligent efforts to comply with all requests, including plaintiff's, on an equitable basis, there have been unavoidable delays arising from the sheer volume of requests received and as a result of court orders requiring reassignment of substantial numbers of our personnel to process certain cases on a deadline basis. Selected examples of some of these orders are listed below.

(a) In Meeropol, et al. v. Levi, et al. (United States District Court for the District of Columbia, Civil Action No. 75-1121), this court issued an order on August 27, 1975, which required the FBI to inventory, by October 1, 1975, some 363 volumes of files (each of which averaged 150-200 pages), and by October 21, 1975, locate and inventory over 9,000 references, all of which represented material in the FBI's possession considered relevant to the Rosenberg espionage case. Additionally, all of the above material had to be reviewed, and those portions not exempt pursuant to the FOIA had to be made available to plaintiffs in that case by November 17, 1975, accompanied by a detailed index and justification for those portions of the above-described material which were withheld pursuant to the FOIA. This single court order required the FBI to assign approximately one half of all FOIPA personnel to the

1/ In House Report Number 93-876, dated March 5, 1974, to accompany H.R. 12471, the Committee on Government Operations

processing of the subject matter of one FOIA request, while the remainder of the complement attempted to process the thousands upon thousands of other FOIA requests which continued unabated.

(b) In Weinstein v. Levi, et al. (United States District Court for the District of Columbia, Civil Action No. 2278-72), the court issued an order on October 20, 1975, which required the FBI to furnish plaintiff an itemized inventory by December 1, 1975, of all documents he had requested under the FOIA (essentially, all pertinent material in our possession concerning the Rosenberg case, supra, plus an additional 152 volumes of files pertaining to the Alger Hiss perjury case) not previously furnished him, setting forth detailed justification with respect to any documents withheld pursuant to the FOIA. Additionally, the order required the FBI to make available to plaintiff, by December 15, 1975, all of the above-described material not exempt from disclosure pursuant to the FOIA. An additional 32 volumes of files also had to be reviewed in order to locate information plaintiff had requested. Although the court issued an order on November 25, 1975, extending the above-described deadlines until January 31, 1976, as well as limiting the inventory requirement to only that material not being furnished plaintiff, this order still required the FBI to assign a substantial portion of its FOIPA personnel to the processing of the subject matter of one request, to the detriment of all others, including plaintiff's.

(c) In Fellner v. U. S. Department of Justice (United States District Court for the Western District of Wisconsin, Civil Action No. 75-C-430), the court issued an order on December 17, 1975, requiring the FBI to review an additional

(d) This type of court order continues to be received. As recently as May 21, 1976, the court in Hayden v. U. S. Department of Justice (United States District Court for the District of Columbia, Civil Action No. 76-0288) issued an order giving the FBI just over three months - until September 1, 1976, - to review, process, and release to the plaintiff the non-exempt portions of, material responsive to his FOIA request not yet furnished him - estimated to be in excess of 17,000 pages of records. This will of course have the cumulative effect of further delaying our compliance with other requests, including those we are now processing and those which, like plaintiff's, are awaiting processing.

(7) The FBI has been making every reasonable, and sometimes extraordinary effort to comply with the unexpected demands of the Privacy Act and the amended FOIA. In consideration of the present and continuing increase in the workload of the FBI in fulfillment of its Congressionally-mandated investigative duties concerning violations of Federal statutes, and taking into account present budgetary and personnel limitations, it has been and continues to be an overwhelming burden for the FBI to respond to these requests with any greater speed. Of the 13,875 requests received in 1975, the FBI was able to respond fully to 7,699, and as of the end of that year, was processing an additional 1,004. This left a backlog of 5,172 requests which still required processing, preferably on the basis of date received to ensure fairness to all requesters. It is necessary to emphasize that each of these backlogged requests had been received before plaintiff's latest FOIA request of December 23, 1975. Meanwhile, in the first 19 weeks of this year, the FBI has received 5,170 additional requests, and they

(a) Upon receipt of each request, assuming the subject matter is reasonably identifiable (such as a named individual or individuals, or a named organization or organizations) the FBI initiates a search of its Central Indices, the result of which will indicate whether any files dealing with the subject matter of the request exist. In the case wherein no record of an investigation concerning the subject matter of the inquiry is located, the requester is so advised at this time. If the indices search indicates that files which might fall within the purview of the request do exist, the FBI so advises the requester, and then the request is placed in chronological order until the FBI is able to initiate the actual processing.

(b) The mechanical task of processing an FOIA request involves first reproducing an entire section of the file, in order to review and mark for deletions or exemptions, if any, where appropriate. From this working copy, additional copies are made - one for the requester and one for the FBI's own administrative control. Review consists of a line-by-line reading, with constant attention to matters which involve, among other considerations, the privacy and confidentiality of third parties, classified data, and other information which is exempt from disclosure pursuant to the FOIA. Classified material must be further reviewed by Special Agent personnel with expertise in the substantive area to which the particular document pertains, who must determine if the document meets the current classification criteria and which portion of the document is actually the part subject to classification. Thereafter, a determination will be made as to the release of

several succeedingly higher levels of examination and is finally furnished to the requester over the Director's signature. These examinations are made for the purpose of assuring that no material to which the requester is entitled is erroneously withheld, and conversely, no material which should be withheld pursuant to the FOIA is inadvertently released.

(d) The above-described procedure is followed without exception in every one of the thousands upon thousands of requests received, and the absence of any additional appropriations which would enable the FBI to acquire and train additional personnel for the processing has forced this task upon less than 200 people who have been diverted from their former assignments.

(9) Based on the FBI's experience to date in these matters, due diligence requires that the only fair way of ensuring that each request receives the legitimate attention it deserves is to process these requests in chronological order based on the date of their receipt, and this is the policy the FBI is presently following. The FBI has been required to make exceptions to this policy pursuant to the above-described court orders. In the not-too-distant future, such orders may become a vicious circle of self-defeating proportions, with the ultimate victims being those requesters who lack the resources necessary to institute legal action. It is not inconceivable that the FBI could soon reach the stage where all personnel are engaged solely in the processing of requests pursuant to court-imposed deadlines, to the detriment of the rights of all other requesters. This could well cause those requesters who are able to file suit, but who thus far have displayed an understanding of the FBI's burdens and have waited patiently for their requests to be processed, to institute legal action, which in turn could cause more court orders requiring

court-imposed deadlines could place the FBI in the position of expending so much manpower in attempting to comply with a court order in one case, that it would be held in contempt of a similar court order in a different case. Meanwhile, as stated above, those requesters who have not sued would still be waiting.

(10) I have attempted to make a preliminary estimate as to the length of time necessary before we can initiate the processing of plaintiff's latest FOIA request, and I have taken into consideration the date plaintiff's request was received, as well as the number of requests on hand awaiting processing prior to receipt of plaintiff's request. Caution must be exercised in interpreting this information, because there are variables involved over which the FBI has no control. The present rate of processing may be further disrupted by receipt of additional court-imposed deadlines requiring accelerated completion of the processing of one request, which would require reassignment of more personnel to that request, thus delaying our responses to all others. Another problem is that I cannot tell exactly how long it will take to respond fully to those requests received prior to plaintiff's, because I have no way of ascertaining whether each of these requests will result in fairly rapid processing (because the FBI does not possess an enormous amount of information responsive to that particular request), or a massive processing effort (because the FBI possesses thousands of pages of material responsive to that particular request). Thus, it is not possible to predict exactly when we will be able to initiate the processing of a request, and for the same reason it is not possible to predict exactly when the processing will be completed.

them. Based on the preliminary estimate and past experience in processing FOIA requests, and with the qualifications set out in Paragraph (10), supra, in mind, the present rate of processing would allow the FBI to initiate processing of plaintiff's December 23, 1975, request within four months, considering the number of requests on hand and the FBI's present manpower, and assuming no further unforeseen difficulties. This is in continuance of the policy of attempting to give equal and fair treatment to all requesters despite the exceptional circumstances under which the FBI is operating. The time span takes into consideration our practice of assigning several high-volume-type requests, such as plaintiff's, to each reviewer analyst in the FOIPA Section's Project Unit, which handles requests of this magnitude. We follow this procedure so that all other processing is not completely halted by the receipt of one high-volume request. This procedure allows us to simultaneously process as many high-volume requests as possible, albeit at a somewhat reduced rate, given our manpower and budgetary limitations. The alternative would be to devote all our resources to the processing of one high-volume request, causing us to give no response whatsoever to all others until processing was completed on the first.

(12) Because of the large but as yet undetermined volume of material which must be reviewed in order to fully respond to plaintiff's FOIA request, and the exceptional circumstances under which we are operating, as demonstrated in this affidavit, it would be nearly impossible at this time to give an accurate and realistic estimate as to the amount of time necessary to complete the processing of plaintiff's request.

consist of a request for identifiable (and thus retrievable) records, even if we possessed the responsive information, and that other portions have already been responded to by our compliance with his previous requests. However, the nature of plaintiff's latest request will still necessitate a page-by-page, word-by-word review of a tremendous volume of records to ensure that plaintiff is furnished all non-exempt material located falling within the 28 categories he lists. I therefore anticipate that within four months, when we hope to be able to initiate processing and thus acquire an idea of the total number of pages requiring review, we will be in a better position to give a meaningful estimate as to the total length of time necessary to completely comply with his request. Conversely, if we are in the meantime able to accelerate our rate of processing despite our increasing burdens, we will of course initiate the processing of plaintiff's request sooner than we now anticipate. In any event, plaintiff's request is being treated as equitably and expeditiously as possible, and all documents which can be released to him will be made available at the earliest possible date.

(13) Based on the facts set out above, I believe the FBI has made every reasonable good faith effort to comply with the letter and spirit of the amended FOIA. Delays have been encountered in processing all FOIA requests, including plaintiff's latest request, due to the exceptional circumstances caused by the tremendous volume of requests received, court-imposed deadlines for the processing of other requests, and lack of any appropriations enabling the FBI to devote the number of personnel necessary to the processing of requests

date of receipt, regardless of whether a requester institutes litigation, in order to give the most fair and equal treatment to all requesters.

Donald L. Smith

DONALD L. SMITH
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 28d day of May, 1976.

Margaret L. [illegible]
Notary Public

My commission expires 12/14/78.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	)	
v.	)	Civil Action No. 75-1996
U.S. DEPARTMENT OF JUSTICE, Defendant.	)	

O R D E R

This matter having come before the Court on defendant's motion to stay further proceedings insofar as it relates to paragraph 10 of the amended complaint pending completion of review, and the Court being fully advised in the premises and having concluded that defendant's motion is well taken, it is this _____ day of _____, 1976

ORDERED that defendant's motion to stay further proceedings relating to paragraph 10 of the amended complaint pending completion of review be, and the same hereby is, granted; and it is

FURTHER ORDERED that this action be, and the same hereby is, stayed until further order of this Court pending the completion of the administrative review and appeal of the plaintiff's December 23, 1975 Freedom of Information Act request.

_____
UNITED STATES DISTRICT JUDGE