

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OFFICIAL TRANSCRIPT
OF HEARING

DATE: September 28, 1978

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Official Reporter

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Prepared for:

PLAINTIFF

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,)
Plaintiff)

v.

U.S. DEPARTMENT OF JUSTICE,)
Defendants)

Civil Action No. 75-1996

Washington, D. C.

Thursday, September 28, 1978

The above-entitled case came on for a status call
before THE HONORABLE JUNE L. GREEN, United States District
Judge, at 10:30 a.m.

APPEARANCES:

JAMES H. LESAR, ESQ.
For the Plaintiff

BETSY GINSBERG, ESQ.
For the Defendants

P R O C E E D I N G S

1
2 DEPUTY CLERK: Civil Action 75-1996, Weisberg v.
3 Department of Justice. Mr. Lesar for the plaintiff, Miss
4 Ginsberg for the defendants.

5 THE COURT: Miss Ginsberg?

6 MISS GINSBERG: Approximately one-half of the items
7 that Mr. Shea has identified on the basis of letters from
8 plaintiff as basic methodological, general kinds of questions
9 have been fully addressed by Mr. Shea's office and a letter
10 went out yesterday afternoon -- I gave copies to plaintiff
11 this morning -- explaining to plaintiff what has occurred in
12 answering some of his questions.

13 The kinds of things -- to give the Court two short
14 examples -- that are involved in this part of the review --
15 and I might add many of them involve proving negatives, which,
16 needless to say is not an easy thing to do -- there have been
17 claims that twice daily reports were given to the Attorney
18 General during the investigation of the assassination.

19 Mr. Shea's review has found no documents specifically
20 labelled "twice daily reports." However, it appears that there
21 are some documents which could have constituted such and he
22 has provided examples of these. They have already been re-
23 leased to plaintiff and Mr. Shea has merely cited these as
24 examples.

25 Another similar claim is the question of whether the

1 Attorney General ever ordered, in writing, the FBI to investi-
2 gate the assassination. Again, the review has shown no such
3 written document, although other documents previously provided
4 to plaintiff do contain references to a special request or an
5 oral request. But, apparently, no single written request.

6 Mr. Shea has also concluded that the FBI's handling
7 of the referrals has been accurate and complete and timely and
8 that the graph that the FBI provided to plaintiff, the beginning
9 of September, is in fact an accurate and complete representa-
10 tion of the travels of these referred documents.

11 It has also been agreed that in the future all re-
12 leases to requestors, other than Mr. Weisberg, relating to
13 Kennedy or King material, within the scope of plaintiff's re-
14 quests, will simultaneously be provided to him.

15 And, finally, Mr. Shea has provided a list of all the
16 files processed by location, subject, file number, and date of
17 release.

18 Mr. Shea has also concluded that the FBI has met all
19 of its burdens under the stipulation that was filed in this
20 court on August 5th, 1977.

21 However, that raises a problem. As I said, about
22 half of these issues have been dealt with. The problem that
23 Mr. Shea is facing now is that he cannot deal with the rest
24 of the issues until the question of the scope of this liti-
25 gation has been finally settled.

1 In other words, until the Court rules on whether
2 the FBI has fulfilled the obligations under the stipulation.

3 And as an example of the kind of problem that we are
4 running into, I brought just one short memorandum. The sub-
5 stantive text of this memorandum is not relevant, but the point
6 is it's a memorandum from Mr. Bishop -- I don't know who he is --
7 to Mr. DeLoach of the FBI.

8 The first sentence says "My memorandum of 5-13-68."
9 This memorandum appeared in the MURKIN files and has been re-
10 leased to plaintiff. However, the 5-13-68 memorandum is not
11 an attachment to this, is not in the MURKIN file and is not
12 in any of the other files covered by the stipulation.

13 So the question faced by Mr. Shea is does the FBI
14 have to go track down this other memorandum? And this is only
15 one of many instances where this kind of problem is going to
16 be raised.

17 And, as I said, until we are able to settle the scope
18 of the litigation and a question like this, there is going to
19 be not only delay now but the future possibility that the Court
20 will decide that we have to go back and check things like this.

21 Therefore, the Government is ready to move, within
22 the next 30 days and hopefully sooner, for partial summary
23 judgment on this issue of scope, our position being, of course,
24 that we have fulfilled the requirements set out in the stipu-
25 lation.

1 THE COURT: Where would you assume that a memorandum
2 such as this would be filed?

3 I think that becomes important, because I would cer-
4 tainly assume that it should have been filed under the Martin
5 Luther King assassination.

6 MISS GINSBERG: Well, Your Honor, may I show this
7 to Mr. Hartingh, because I am not an FBI agent?

8 THE COURT: Yes.

9 MISS GINSBERG: I am informed that the memorandum
10 would most likely be in the Gerold Frank file, who is the
11 subject of this memorandum.

12 However, the Gerold Frank file is not one of the
13 files that plaintiff's counsel and plaintiff and the Govern-
14 ment agreed would be searched a year ago.

15 THE COURT: It would seem strange to put down some-
16 thing that is obviously indicating they are interested in the
17 Martin Luther King assassination just because the man had
18 written a book on Gerold Frank.

19 Well, of course, we have some of our cases misfiled
20 as well. So who knows? Such as this one.

21 It certainly should have been, I would think, in
22 the King assassination file.

23 MR. LESAR: Your Honor, I think this gets back to
24 an issue that we repeatedly raised from the very first. From
25 the very first the Government kept saying, "We are going to

1 give them everything in MURKIN." And we said, "Giving us
2 everything in the MURKIN file is not going to give us every-
3 thing that complies with Mr. Weisberg's request."

4 The reason is that we have come to learn that the
5 FBI has all kinds of ways of filing documents other than what
6 would appear to be logical and a requestor has no way of know-
7 ing where in fact they are filed.

8 We have come across terminology indicating that
9 they have "do not record" files, they have "not recorded
10 serials", they have "dead" files, they have "new dead" files.
11 There are all kinds of inroads and byways where documents may
12 be and we don't have them.

13 And the request was not for what they put in a par-
14 ticular file. It was on documents pertaining to a subject.
15 It's really that simple.

16 In fact, one of the things we have learned is that
17 where we were told that we were being given documents from a
18 certain field office, the Atlanta Field Office files, for
19 example, we have subsequently learned, as a result of a dif-
20 ferent lawsuit, that the work sheets which were filed in this
21 case do not contain some of the records that were supposed to
22 have been reflected on it.

23 I filed a lawsuit which related to certain documents
24 that were given to the Office of Professional Responsibility
25 relating to the King assassination and that included 27 pages

1 of Atlanta Police Department records.

2 Well, 2 pages of those 27 pages were provided to Mr.
3 Weisberg in this case, and the work sheets show that the docu-
4 ments have only 2 pages. But in fact there were 27 pages.

5 So there are even missing pages in what has been
6 searched so far. In addition to that there is this problem
7 of the FBI's way of filing things.

8 We cannot frame a request based on an FBI file, at
9 least until we know the existence of the file and the file
10 number. All we can do is frame a request according to the
11 subject matter.

12 And that is what we have done and from the very first
13 we repeatedly said that we were not going to accept the pro-
14 cessing of the MURKIN file as compliance, because it obviously
15 didn't comply.

16 Now we have just been given proof that it doesn't
17 comply, because they have records on Gerold Frank and Mr.
18 Weisberg's request asks for material on Gerold Frank specifi-
19 cally. His April 15, 1975 request asks for materials on
20 Gerold Frank.

21 So that is going to be our position. The Government
22 can file its motion, but we are going to oppose it and oppose
23 it vigorously.

24 MISS GINSBERG: I would like to respond to a couple
25 of things. Plaintiff's counsel just mentioned that Gerold

1 Frank was included in the April 1975 request. The fact is we
2 are operating under a stipulation filed with the Court and ap-
3 proved by the Court in August of 1977. And the Gerold Frank
4 file is not a part of that stipulation.

5 Furthermore, the question of this particular memo,
6 if one does read it, it has to do exclusively with the fact
7 that Gerold Frank wanted to write a book about the assassina-
8 tion and was asking to be able to interview FBI agents and look
9 at files for that purpose and was told, apparently, that
10 certainly at the time he made his request, in 1968, that the
11 Bureau could not even consider such a matter until the prose-
12 cution was completed.

13 This has nothing to do with the actual investigation
14 of the assassination. It's a peripheral matter, obviously,
15 about an author who wants to write a book, but not a question
16 of an investigation of the assassination.

17 And it seems to the Government that the only way to
18 settle these kinds of questions, as I said, is to finally put
19 it on paper, give it to the Court, and let the Court decide, and
20 maybe we can at least get rid of one part of this case and
21 go on to something else.

22 MR. LESAR: Your Honor, the question is not whether
23 or not the documents relate to the assassination of Dr. King.
24 It is whether or not they relate to his request. It's that
25 simple. And his request is quite clear. He wanted the

1 materials on Mr. Frank.

2 THE COURT: I might say that this Court operates under
3 a handicap, because the court file has been lost, when you
4 are talking about files, so I really don't have before me
5 what stipulation I signed.

6 MR. LESAR: First of all, on the stipulation, I
7 would mention two things very quickly.

8 First of all, the stipulation did not -- and I am
9 going from memory, but my memory on this is pretty certain, I
10 think, the stipulation did not -- by any means say we were
11 going to forego our right to documents in other files.

12 The stipulation says that if they meet certain obli-
13 gations then we will forego a Vaughn v. Rosen. It doesn't say
14 that we are going to forego Mr. Weisberg's right to get the
15 documents he requested from other files.

16 And yet that is what the Government is trying to
17 make it mean.

18 THE COURT: Let's see what it actually says. It says:

19 It is hereby stipulated by and between counsel for
20 the parties, that upon Federal Bureau of Investigation's repre-
21 sentation to the Court herewith, that processing of the FBI
22 Memphis Field Office files pertaining to "the Invaders", the
23 Sanitation Workers Strike, James Earl Ray, and the MURKIN
24 file is undertaken immediately by defendants, and will be
25 completed by October 1, 1977; that defendants will provide a

1 worksheet inventory of the released documents; that process-
2 ing of MURKIN files from the FBI field offices in Atlanta,
3 Birmingham, Los Angeles, New Orleans, and Washington, D.C.,
4 as well as the processing of files relating to John Ray,
5 Jerry Ray, James Earl Ray, Carol and Albert Pepper in the
6 Chicago and St. Louis field offices MURKIN files, will be
7 completed by November 1, 1977; that duplicates of documents
8 already processed at headquarters will not be processed or
9 listed on the worksheets, but attachments that are missing
10 from headquarters documents will be processed and included if
11 found in field office files as well as copies of documents
12 with notations; that releases of documents and accompanying
13 worksheets will be made periodically as they are processed;
14 that administrative appellate review of the documents will
15 take place prior to their release; that in the course of this
16 processing all exemptions will only be assessed in strict
17 conformance with the May 5, 1977, guidelines of Attorney Gen-
18 eral Griffin Bell relating to the Freedom of Information Act,
19 and the provisions of the Freedom of Information Act itself;
20 that in consideration of the foregoing commitment by the FBI
21 and the Department of Justice, plaintiff will hold in abeyance
22 filing a motion to require a Vaughn V. Rosen showing with res-
23 pect to the foregoing FBI files, including the Headquarters
24 files already processed; and further that, upon defendants'
25 performance of these commitments by the specified dates,

1 Plaintiff will forego completely the filing of said motion;
2 that plaintiff will hold in abeyance objections to specific
3 deletions until the target dates specified above have passed,
4 with the clear understanding of both parties that plaintiff
5 has not waived his right to contest specific deletions after
6 the passing of these dates.

7 MR. LESAR: It says not a word about foregoing any-
8 thing by way of documents in other files. It limited itself
9 solely to the question of the Vaughn v. Rosen motion and, in
10 addition, they did not meet the terms of the agreement.

11 They did not provide work sheets for all the field
12 office files, they did not make periodic deliveries. Instead,
13 they waited until the day before the deadline and dumped 6,000
14 pages of documents on Mr. Weisberg's doorstep in a box too
15 heavy for him to lift.

16 And, also, I think that there are probably other
17 problems with the stipulation. Obviously, if we now know that
18 they did not provide all the documents in the Atlanta Field
19 Office that they should have, and we now know that the work
20 sheets make no reference to -- and we were not provided with --
21 25 pages of some Atlanta Police Department records, then they
22 did not comply with it in that sense either.

23 So I think it's perfectly clear that, one, the stipu-
24 lations do not cover what the defendant is trying to make it
25 cover; and, secondly, that they did not meet their obligations

1 under the stipulations.

2 THE COURT: I expect we don't want to lose this
3 copy.

4 MISS GINSBERG: The Court can keep that.

5 THE COURT: You have another one?

6 MISS GINSBERG: Yes.

7 THE COURT: We had better start making a new file.

8 MISS GINSBERG: I simply can't allow Mr. Lesar to
9 continue with these kinds of misrepresentations that he is
10 making. And I am afraid I have to burden the Court with another
11 piece of paper.

12 This is a copy of the letter that Mr. Shea sent to
13 Mr. Lesar and the Court will see on this chart that since the
14 filing of the stipulation, rather than dumping 6,000 pages of
15 documents, periodic releases were made, beginning with
16 August 19 and August 30, then September 15 and September 29,
17 October had several releases, ending with October 26, 1977.

18 The stipulation called for the processing to be com-
19 pleted on November 1st. This shows that at least that that
20 portion of the stipulation was complied with.

21 MR. LESAR: Your Honor, our understanding was quite
22 clear that they were going to process each of the files and
23 give them to Mr. Weisberg in manageable segments. That's why
24 we had the provision in there that they would be delivered to
25 him as they were processed. They were not.

1 As a matter of fact, we later learned -- when we
2 get the work sheets, we find they were processed long before
3 they were sent to Mr. Weisberg and they were held in these
4 extremely -- there was at least one batch from, I think it was,
5 the Memphis Field Office that arrived all in one fell swoop,
6 when Mr. Weisberg was away from his home, 6,000 pages at once.

7 It was just clearly against the understanding that
8 we had come to.

9 THE COURT: This is water over the dam. Let's not
10 dig up all the things that happened in the past and see where
11 we are going in the future.

12 MR. LESAR: Your Honor, I do have some possible sug-
13 gestions. I do think that it is possible to handle some parts
14 of this case by having the Government move to sustain its
15 burden under certain exemptions, for example.

16 There are some things which I think will probably
17 have to await Mr. Shea's completion of his report. But, for
18 example, it seemed to me clear, from reading Mr. Weisberg's
19 reports that were submitted to Mr. Shea's office, that the
20 Government has in some cases claimed an institutional -- what
21 we call an institutional 7(d) exemption.

22 Claiming, for example, that all police departments
23 or all reports submitted by Scotland Yard or the Royal Canadian
24 Mounted Police are per se exempt.

25 Now if they are going to take that position, then it

1 seems to me that they can move for summary judgment and we can
2 contest that and the Court can rule on it and that would re-
3 solve that issue.

4 I think we ought to wait until Mr. Shea makes a
5 determination, because that is one of the issues that is raised
6 by Mr. Weisberg's reports.

7 It may be that there are some other ways of handling
8 this. But I do not -- I do think that the scope of the re-
9 quest -- and, again, the scope of our request does not pertain
10 just to the Bureau.

11 Although it is the Bureau's activities that are the
12 subject of Mr. Shea's review. But the request goes to other
13 units of the Department of Justice. So we've got that problem,
14 too.

15 And, you know, at some point we can either have a tri-
16 al or the Government can move for summary judgment. I have no
17 particular druthers at this point.

18 THE COURT: Well, the case is going to get terminated
19 some time. I hope sooner rather than later.

20 MISS GINSBERG: There is no point, it seems, to move
21 for partial summary judgment on such questions as the institu-
22 tional 7(d) until Mr. Shea has finished his review.

23 But the Government is going to move for partial sum-
24 mary judgment on this question of search and scope and, as I
25 said, we will have our motion in within 30 days.

1 THE COURT: Well, how does Mr. Shea visualize his
2 time schedule on this?

3 MISS GINSBERG: He was not able to give me a time
4 estimate at this point. As I explained, some of the questions
5 do turn on the scope issue.

6 Also, he has begun to work on the specific exemptions,
7 but apparently is not far enough into it so that he can esti-
8 mate.

9 And I might also inform the Court that although he
10 had three people working on this originally, two of them have
11 transferred to other offices. So he has only himself and
12 Doug Mitchell working on it now. And the other people in his
13 office are apparently all new and it would be a remedy worse
14 than disease to put them onto a complicated case like this.

15 So it will take some time. However, it is being
16 given a very, very high priority.

17 THE COURT: Well, we will act on any papers that are
18 ripe before us when they are here. And I think we'd better not
19 get too far along on this thing without seeing you again.

20 How about coming in on the 26th of October?

21 MISS GINSBERG: That will be fine.

22 THE COURT: October 26 at 10 o'clock.

23 MISS GINSBERG: Thank you, Your Honor.

24 MR. LESAR: Thank you.

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(Whereupon, at 10:50 a.m., the hearing in the
above-entitled case was concluded.)

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REPORTER'S CERTIFICATE

This record is certified by the undersigned to be
the official transcript of the above-entitled hearing.


OFFICIAL COURT REPORTER