IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Harold Weisberg,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CA No. 75-1996
	)	
Department of Justice,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Defendant, by its undersigned attorneys, hereby moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the issue of the thoroughness and scope of defendant's search for records responsive to plaintiff's Freedom of Information Act request. The ground for this motion is that, there being no genuine issue of material fact, defendant is entitled to judgment as a matter of law.

In support of this motion the Court is respectfully referred to defendant's Memorandum of Points and Authorities, attached hereto, and to the affidavits of Federal Bureau of Investigation Special Agents Martin Wood, Clifford H. Anderson, Bennie F. Brewer, Kenneth A. Jacobsen, Herbert Northcutt, Jr., Burl F. Johnson, Edward A. Shea, Edwin A. Waite, and William L. Deaton, and to the affidavits of Douglas F. Mitchell and Quinlan J. Shea, Jr., of the Office of Privacy and Information Appeals, Department of Justice, attached hereto.

Respectfully submitted,

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DEFENDANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

STATEMENT

Plaintiff filed this Freedom of Information Act (FOIA) lawsuit, pursuant to 5 U.S.C. §552, in order to gain access to certain documents in the custody of the Federal Bureau of Investigation (FBI) relating to the FBI's investigation of the murder of Dr. Martin Luther King, Jr., the so-called MURKIN investigation. Specifically, plaintiff sought access to various laboratory tests, photographs, and documents or reports made available to certain specified authors. See Complaint, para. 4. On August 5, 1977, the parties entered into a stipulation which, inter alia, required the FBI to search for, retrieve, and process for release to plaintiff the following:

> 1. FBI Memphis Field Office files pertaining to "the Invaders," the Sanitation Workers' strike, James Earl Ray, and the MURKIN file
>
> 2. MURKIN files in the FBI's Atlanta, Georgia; Birmingham, Alabama; Los Angeles, California; New Orleans, Louisiana; and Washington, D.C. Field Offices
>
> 3. MURKIN files pertaining to John Ray, Jerry Ray, James Earl Ray, and Carol and Albert Pepper in the Chicago, Illinois and St. Louis, Missouri Field Offices of the FBI

In addition, the parties agreed that duplicates of documents found in field offices but already processed at FBI Headquarters would not be processed again, but that attachments

missing from FBIHQ documents, if found in the field offices, would be processed for release to plaintiff. Furthermore, it was agreed that documents found in the field offices which contain notations, but are otherwise duplicate of FBIHQ documents, would be processed.

In response to plaintiff's FOIA request, as refined by the August 1977 Stipulation, the FBI retrieved from the FBIHQ central records system files captioned MURKIN; Invaders; Memphis Sanitation Workers' Strike; Committee to Investigate Assassinations; James Earl Ray; Judge Preston Battle; and James H. Lesar. Wood Aff., para. 2. The records contained in these files were processed and the non-exempt portions thereof released to plaintiff as completed, the final release occurring on August 8, 1977. Wood Affidavit, para. 2.

During July and August 1977, the eight FBI Field Offices enumerated in the Stipulation were searched for relevant files, which were forwarded to FBIHQ for processing and release to plaintiff. The materials from the Memphis Field Office were released to plaintiff on October 1, 1977; those from the other seven Field Offices were released on November 1, 1977. Wood Affidavit, para. 3.

The mode of search in the field offices was as follows. Each field office searched its general index to retrieve all records and/or exhibits relating to Dr. King's assassination and/or to specific events, organizations, or individuals as required by the August 1977 Stipulation and plaintiff's FOIA request. Each field office then reviewed the records and exhibits so located and forwarded to FBIHQ copies of the materials except for those previously directed to or received from FBIHQ or the Memphis Field Office which did not contain substantive notations. Waite Affidavit, paras. 2-3; Shea Affidavit, paras. 203; Johnson Affidavit, paras. 2-3;

Northcutt Affidavit, paras. 2-3; Jacobsen Affidavit, paras. 2-3; Brewer Affidavit, paras. 2-3; Anderson Affidavit, paras. 2-3; Deaton Affidavit, paras. 2-3.

The affidavit of Douglas F. Mitchell, Attorney-Advisor, Office of Privacy and Information Appeals, Department of Justice, lists each file retrieved in response to plaintiff's FOIA request by subject, file number, and office in which the file was located. Mitchell Affidavit, para. 2, and Enclosure 3, attached thereto. During the course of his duties, Mr. Mitchell checked the field office records transmitted to FBIHQ against two inventories of main files relating to Dr. King and his assasination. One inventory was compiled in December 1975 after the Department of Justice instructed each of the Federal Bureau of Investigation's fifty-nine field offices -- including the eight offices relevant to this litigation -- to submit inventories of all main files in their offices relating to Dr. King and his assassination. The second inventory, compiled in August 1977, resulted when the eight field offices pertinent to this litigation were instructed by FBIHQ to resubmit inventories of assassination files in accordance with the August 1977 Stipulation. Mitchell Affidavit, para. 6. Mr. Mitchell compared these two inventories with each other, and then against the actual field office records transmitted to FBIHQ pursuant to this litigation. Mr. Mitchell found, insofar as it could be determined by this process, that documents representing each of the files described by the eight field offices in the two inventories were, in fact, transmitted to FBIHQ for processing and release to plaintiff. Mitchell Affidavit, para. 7.

Certain items of tangible evidence -- e.g., cigarette butts, bed linens, laundry marks, and the like -- which could not be reproduced were not sent from the field offices to

FBIHQ. In addition, certain files were not forwarded to FBIHQ because they contained investigatory reports known to have been previously filed in FBIHQ. On the other hand, several items not listed on the two inventories, apparently because they did not exist when the inventories were drawn up, were forwarded to FBIHQ for processing and release to plaintiff. Mitchell Affidavit, para. 7.

On September 14, 1977, the FBI informed plaintiff that several field offices had not sent copies of certain enumerated items to FBIHQ for processing. Plaintiff was asked which of these items he wished to have processed for release, and he responded by letter dated September 17, 1977. Mitchell Affidavit, para. 8, and Enclosures 1 and 2, thereto. As explained in paragraph 8 of the Mitchell Affidavit, all of the items in which plaintiff expressed an interest have been processed with limited exceptions, also explained in the affidavit. Three items from the Atlanta Field Office -- a list of motor vehicles and license plates stolen in Georgia; a polygraph chart; and a Delta Airlines computer printout -- will be made available to plaintiff upon request. Mitchell Affidavit, para. 8.

In addition to the materials described above, plaintiff has been furnished, pursuant to his request, the non-exempt portions of the FBIHQ main files and "see" references pertaining to Oliver B. Patterson and the main files on Patterson located in the FBI's St. Louis Field Office. See Appendices A and B, attached hereto. Furthermore, the so-called "Long Tickler File," also requested by plaintiff, was released to him on November 20, 1978. See Appendix C, attached hereto.

Defendant submits, therefore, that it has thoroughly searched its files and that it has retrieved and processed for release to plaintiff all records relevant to plaintiff's FOIA request as refined by the August 5, 1977, Stipulation.

ARGUMENT

The parameters of the scope of the search in this litigation (i.e., the offices which had to be searched and the individuals for whom a file search was required) were set by plaintiff's FOIA request as modified by the August 5, 1977, Stipulation signed by the parties. The sole remaining question, therefore, is whether the quality or thoroughness of the search conducted by the FBI comports with the requirements of the Freedom of Information Act, 5 U.S.C. § 552, as amended.

The Freedom of Information Act was signed into law by President Lyndon B. Johnson on July 4, 1966. In his bill-signing statement, the President stated:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits.

H. Rept. No. 92-1419, 92nd Cong., 2d Sess. (September 20, 1972) 1, in Joint Committee Print, Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, 94th Cong., 1st Sess. (March 1975), p. 8 (hereafter "Source Book").

To facilitate this purpose, while at the same time enabling the agency whose records are sought to efficiently fulfil a given request, 5 U.S.C. § 552(a)(3) requires that records be reasonably described by the individual seeking them. The term "reasonably described" is defined in the legislative history as follows:

> A "description" of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

H. Rept. No. 93-876, 93rd Cong., 2d Sess. (March 5, 1974) in Source Book, pp. 125-26. See also Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Bristol-Myers Co. v. F.T.C., 424 F.2d 935, 938 (D.C.Cir. 1970), cert. denied, 400 U.S. 824 (1970). The FOIA was not intended to impose an unreasonable burden on agencies, nor to require them to collect a "mass of information." Tuchinsky v. Selective Service System, 418 F.2d 155, 157 (7th Cir. 1969). Accord: Irons v. Schuyler, 465 F.2d 608 (D.C. Cir. 1972), cert. denied, 409 U.S. 1076 (1972).

Defendants submit that the definition of a reasonably described record goes as well to the quality of the search the agency must perform. Marks v. Department of Justice, supra, at 264; Mason v. Callaway, 554 F.2d 129 (4th Cir. 1977), cert. denied, 434 U.S. 877 (1977), reh. denied, 434 U.S. 935 (1977). In other words, the agency must use "a reasonable effort" to locate records within a given category, but need not unreasonably burden itself or collect a mass of information to satisfy a request.

Perhaps the most succinct statement of what constitutes a thorough agency search is that found in Goland v. C.I.A., et al., Civ. No. 76-1800 (D.C. Cir. May 23, 1978) (attached hereto as Appendix D).

> In order to prevail on an FOIA motion for summary judgment, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." In determining whether an agency has met this burden of proof, the trial judge may rely on affidavits. Congress has instructed the courts to accord "substantial weight" to agency affidavits in national security cases, and these affidavits are equally trustworthy when they aver that all documents have been produced or are undentifiable

> as when they aver that identified documents are exempt. The agency's affidavits, naturally must be "relatively detailed" and nonconclusory" and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits.

Slip. Op. at 24 (citations omitted).

Goland involved plaintiffs' request for all CIA records concerning the legislative history of the agency's governing statute as well as all documents used to prepare for congressional testimony. Plaintiffs received some records, but argued that further documentation "must exist." Slip. Op. at 25, 26. On the basis of two sworn affidavits executed by the responsible agency official, the District Court held -- and the Court of Appeals affirmed -- that the agency's search for responsive records was thorough and complete. The Court of Appeals found the agency's affidavits to be adequate on their face to demonstrate the thoroughness of the search, and held that:

> . . . even if [additional] documents do exist and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search. It is well established that an agency is not "required to reorganize [its] files in response to [a plaintiff's] request. . . and that if an agency has not previously segregated the requested class of records production may be required only "where the agency [can] identify that material with reasonable effort."

Slip. Op. at 26-27 (citations omitted).

Subsequent to the Goland decision, the CIA discovered additional documents responsive, in part, to plaintiffs' original request.

When the existence of the additional documents became known, plaintiffs moved to vacate the original affirmance. At the rehearing, the Court of Appeals held, inter alia, that the discovery of the new documents did not require a reversal of the finding that the original searches conducted by the Agency were thorough.

> As a substantive matter, the mere fact that additional documents have been discovered does not impugn the accuracy of the Wilson affidavits. The issue was not whether any further documents might conceivably exist but whether CIA's search for responsive documents was adequate. The Wilson affidavits never stated that no further documents existed; they merely described the scope of the searches that had been undertaken and stated that no additional documents could be located absent an extraordinary effort not required by the FOIA. As we indicated in our opinion, an agency is required only to make reasonable efforts to find responsive materials; it is not required to reorganize its filing system in response to each FOIA request. The circumstances surrounding the discovery of additional documents as described in CIA's letters of 14 and 23 June do not contradict the statements made in the Wilson affidavits. According to CIA, the discovery of these documents was entirely adventitious. They were found by the law librarian in the course of independent research on projects unrelated to the Goland litigation. The documents were not indexed; they were found, only after extraordinary effort, stored in cardboard boxes primarily among the 84,000 cubic feet of documents at CIA's retired-records center outside of Washington. According to CIA, the documents "could not have been found under normal FOIA procedures." Thus, it would appear that the new facts before us now do not really conflict with the facts as presented to the district court and reflected in the record upon which our decision was based, and would not, as a substantive matter, prompt us to vacate our affirmance.

Goland v. CIA, Civil No. 76-1800 (D.C. Cir. March 28, 1979), at 7-8 (attached hereto as Appendix E and hereafter "Goland II") (citations omitted, emphasis in original).

The proposition that the agency need not make an extraordinary effort to locate documents, and that the thoroughness of the search may be established by affidavit is supported by several cases in addition to the two Goland decisions. See, for example, Marks v. Department of Justice, supra, at 264 (FBI search of the Central Records System and Electronic Surveillance (ELSUR) indices was adequate compliance with FOIA request); Weisberg v. CIA, et al., Civil No. 77-1977 (D.D.C. January 4, 1979), at 2 (attached hereto as Appendix F) ("Affidavit . . . states that all identifiable records have been retrieved . . . and the only way to improve upon the search would be to undertake a page-by-page review of all records in the CIA"); Piccolo v. Department of Justice, Civil No. 78-1518 (D.D.C. January 9, 1979), at 2 (attached hereto as Appendix G) ("the government's contention that it has diligently searched its files is supported by affidavits."); Hunt v. CIA, et al., Civil No. 78-146 (E.D. Va., October 4, 1978), at 5 (attached hereto as Appendix H) (". . . agency not obligated to search every nook and cranny of every office which might conceivably contain documents . . .").

Defendant's affidavits clearly and beyond any reasonable doubt establish that the FBI has conducted a thorough and complete search of its files, as defined by plaintiff's request and the stipulation. Defendant has comprehensively searched both the index to its Central Records System and its ELSUR index, retrieving, processing, and releasing to plaintiff the non-exempt portions of the files identified thereby. To do more would require an unreasonably burdensome page-by-page review of each document in each file

maintained by the FBI. Such a requirement is posed neither by the Act itself, nor its legislative history, nor the case law.

Plaintiff has from time to time, alleged that defendant possesses relevant documents within the scope of his request and the stipulation for which no accounting has been made. The Courts which have confronted this issue have uniformly held that conclusory allegations by a plaintiff that records "must" exist or that records have been secreted do not raise a genuine issue for trial. Marks v. CIA, supra, at 264; Goland v. CIA, supra, at 26; Weisberg v. Department of Justice, et al., Civil No. 75-226 (D.D.C. October 5, 1977), at 21-22 (attached hereto as Appendix I); Weisberg v. CIA, supra, at 1-2; Wild v. HEW, Civil No. 4-72 Civ. 130 (D. Minn. August 24, 1978), at 6-8 (attached hereto as Appendix J); Lincoln National Bank v. Department of Justice, Civil No. 76-C-4531 (N.D. Ill. May 5, 1978, at 3-4 (attached hereto as Appendix K); Stassi v. Department of Justice, et al., Civil No. 78-967 (D.D.C. December 27, 1978) (Attached hereto as Appendix L). Addressing this issue in Marks v. CIA, supra, the Ninth Circuit Court of Appeals stated:

> To prevail, the Department of Justice must show that each document in existence which has been requested either has been produced, is unidentifiable, or is wholly exempt under the Act . . . . However, once the Department established through sworn affidavits that no undisclosed documents regarding Marks were contained in its relevant files, Marks was obligated to controvert that showing . . . Conclusory allegations unsupported by factual data will not create a triable issue of fact. . . .

578 F.2d at 263 (citations omitted; emphasis added). Accord: Stassi v. Department of Justice, supra, at 2-3; Goland v. CIA, supra, at 26; Ricks v. Turner, et al., Civil No. 77-1806 (D.D.C. September 26, 1978), at 3-4 (attached hereto as Appendix M); Heimerle v. Fiske, Civil No. 78-1388 (S.D. N.Y. March 2, 1979), at 6 (attached hereto as Appendix N).

In sum, defendants have accounted for all documents encompassed by and relevant to plaintiff's FOIA request and the stipulation entered into on August 5, 1977, which are retrievable through the index to the FBI's Central Records System.

CONCLUSION

For the foregoing reasons, defendants' Motion for Partial Summary Judgment should be granted.

Respectfully submitted,

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O R D E R

This cause having come before the Court on defendant's Motion for Partial Summary Judgment, the memoranda in support of and in opposition thereto, and the entire record herein, it is this ____ day of _____ 1979

ORDERED, that defendant's Motion for Partial Summary Judgment be, and it hereby is, granted.

_____

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing defendant's Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment and Order was mailed, postage prepaid this 11th day of May, 1979, to:

Mr. James H. Lesar
910 16th Street, N.W.
Suite 600
Washington, D.C. 20006

Betsy Ginsberg
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