UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant

Civil Action No. 75-1996

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

In response to six depositions which plaintiff noticed for June 12, 1979, defendant filed a motion for a protective order. Although plaintiff has rescheduled these depositions for July 5, 1979, the matter is not moot because defendant's motion seeks to stay all further discovery in this action "absent further Order of this Court." (Memorandum of Points and Authorities, p. 9)

The alleged justification for the motion for a protective order is that defendant's motion for partial summary judgment on the issue of adquacy of the FBI's search for records responsive to plaintiff's FOIA requests is a dispositive motion which "may make all discovery moot." (Memorandum of Points and Authorities, p. 2)

The truth of the matter is that even if this Court were to grant defendant's motion for partial summary judgment, which it should not, there would still remain issues on which discovery must be taken if this case is to move forward at any reasonable rate.

One such issue is whether there must be a reprocessing of the FBI Headquarters' MURKIN files. Plaintiff intends to file a motion asking that the Court order such a reprocessing. In order to properly prepare that motion, he needs to take the depositions which he has now scheduled for July 5, 1979. While defendant asserts that

"[p]laintiff's counsel was, of course, given the opportunity to cross-examine Mr. Shea" (Memorandum of Points and Authorities, p. 4) when he testified at the January 12, 1979 status call in this case, this stretches the actual courtroom reality considerable. Although not scheduled to be first that day, this case was the first one called on the morning of January 12, 1979. Mr. Shea testified virtually uninterrupted for perhaps twenty or thirty minutes. Then plaintiff's counsel was permitted to ask exactly four questions. Because defendant's counsel objected, the last question was never answered. At this point the Court effectively cut short the cross-examination by plaintiff's counsel, noting that ". . . I think you will realize we have a courtroom full of people who have other matters here and we are a little bit limited in how much longer we can spend on this." (January 12, 1979 Hearing, Tr., p. 32)

Many questions remain to be asked of Mr. Shea (and others) before plaintiff can effectively make his motion for reprocessing. Taking depositions is, in fact, the most effective and expeditious means of resolving this and other disputed issues in this case. Postponing this discovery can only delay the proper resolution of these issues.

A pattern has developed in plaintiff's various FOIA lawsuits. When plaintiff submits interrogatories, the government proclaims that if any discovery is to be had--and it generally opposed any and all discovery--then depositions are the appropriate means of discovery. On the other hand, if plaintiff notes depositions, then the government wails that if any discovery is to be had--and mind you, it ought not--then interrogatories are the appropriate form.

The United States Court of Appeals for the District of Columbia Circuit addressed this issue in Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 164, 543 F. 2d 308, 311 (1976), a decision studiously ignored by defendant, when it held that the

preferable form of discovery is depositions.

Plaintiff has been able to use interrogatories very effectively in some FOIA cases, particularly those in which national security was invoked as a bogus issue. This form of discovery has drawbacks, however. In the first place, interrogatories lend themselves to obfuscation, evasion, and stonewalling by government agencies that are adept in these practices. Secondly, they generally consume much more time than do depositions. Although they should be answered within thirty days under the Federal Rules of Civil Procedure, in plaintiff's cases they never are. In fact, it has usually bee necessary to file one or more motions to compel before any response to the interrogatories has been made at all. Once the answers are obtained, it turns out that many of the interrogatories are objected to and the responses to others are evasive and obfuscatory. In view of the age of this case, a more expeditious method of discovery should be utilized.

Defendant argues, contra the opinion of the Court of Appeals in Weisberg, supra, that "[d]epositions are particularly ill-suited to FOIA litigation . . . ." (Memorandum of Points and Authorities, p. 6) Indeed, defendant goes so far as to argue that the fact that the FOIA is directed at "agencies" and not "individuals" suggests "the inappropriateness of taking the testimony of agency officials and employees . . . ." (Memorandum of Points and Authorities, p. 5) However, the testimony of agency officials in discovery proceedings in FOIA cases is clearly authorized by the case law in this Circuit. See, e.g., National Cable Television Association, Inc. v. F.C.C., 156 U.S.App.D.C. 91, 479 F. 2d 183 (1973); Exxon Corp. v. F.T.C., 384 F. Supp. 755 (D.D.C. 1974); Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 543 F. 2d 308 (1976).

Defendant also asserts that allowing plaintiff to pursue discovery before the Court has considered its "dispositive motion"

would "place a substantial burden on the defendant." (Memorandum of Points and Authorities, p. 4) This is merely testimony of counsel, there being no evidentiary support for it whatsoever. The obvious fact of the matter is that defendant is willing to spend more time opposing discovery than it would take to get the discovery over and done with.

Plaintiff submits that there is ample justification for the discovery which he seeks. Once plaintiff manages to obtain some answers to questions under oath, defendant will no longer be able to assert that black is white, that defendant has conducted an adequate search for records responsive to plaintiff's requests when in fact it has not. This will measurably speed up the compliance with plaintiff's requests which is necessary before this case can be brought to a conclusion.

For the foregoing reasons, plaintiff asks that defendant's motion for a protective order be denied.

Respectfully submitted,

James H. Lesar

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of June, 1979 mailed a copy of the foregoing Opposition to Defendant's Motion for a Protective Order to Ms. Betsy Ginsberg, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of defendant's motion for a protective order, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1979, hereby

ORDERED, that defendant's motion for a protective order be, and the same hereby is, DENIED.

_____
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	C.A. 75-1996

AFFIDAVIT

My name is Harold Weisberg. I reside at Route 12, Frederick, Maryland. I am the plaintiff in this case.

1. In my affidavit of May 25, 1979, I state that Department moves in this instant cause have been intended to delay compliance and to restrict compliance to the degree possible and that, consistent with this intent, Department counsel, from the first, have underinformed, misinformed and even misrepresented to the Court. In that affidavit I took up item by item the representations of Department counsel in and relating to its Motion for Partial Summary Judgment of May 11, 1979, Memorandum of Points and Authorities and other attachments, including boilerplated affidavits.

2. In that affidavit I also undertook to show how Department counsel sought to expand a Motion for Partial Summary Judgment to cover all questions relating to my requests in their entirety although in fact the Motion relates only to the Stipulation of August 1977 and that incompletely and misleadingly.

3. I have read defendant's Motion for Protective Order and Memorandum of Points and Authorities of May 29, 1979 (hereinafter the Motion). This Motion engages in the same practices, is tainted by unfactual and misleading representations and also is phrased to extend to all matters involved in this long litigation, not merely what ostensibly is addressed, the taking of depositions as they may be relevant to defendant's Motion for Partial Summary Judgment.

4. My initial information requests were made in 1969, more than a decade

ago. This suit was filed in 1975, three and a half years ago, when my renewed requests and appeal both were ignored. I received no response until after I filed the complaint and then under the first of the Department's rewritings of my actual requests.

5. Many material facts remain in dispute. My noticing of the taking of depositions is not limited to what may be relevant to the Stipulation.

6. There is no reference to the Stipulation in the Motion. By content it is not limited to what may be relevant to the Motion for Partial Summary Judgment as it in turn may be relevant to the Stipulation. Instead, there is still another effort to broaden another Motion to include the entire case, to foreclose any other developments in it and to create still more delays in the entire case. Whatever the Court's decision, that can be appealed, making still further delays. If granted, the Motion for Parial Summary Judgment would not and could not be dispositive of the entire lawsuit.

7. As a matter of fact, there is no conflict between the taking of depositions and, if the Court should grant it, partial summary judgment.

8. I have had prior experience with Department and FBI counsel in the taking of depositions. Never have I known them to fear interrupting to prevent an answer to any question. Nor have I known any FBI special agents to be reluctant to refuse to answer.

9. There are many existing factual questions relating to scope and good faith of the searches and to the processing of the records provided that have nothing at all to do with the Stipulation even if it remains viable, which I believe is not the case.

10. (I note that this question, which I have raised over and over again in person, in writing and in court, is ignored in both motions.)

11. SA Thomas Wiseman had no connection with the Stipulation or searches or compliance under it.

12. Department counsel's newest effort to extend the scope of a motion to encompass all matters involved in the litigation is reflected by the following quotations from the Motion:

A. "... defendant seeks an order <u>barring all discovery in this litigation</u> ..." (Motion. All emphasis added.)

B. "The facts surrounding this Freedom of Information Act (FOIA) lawsuit are fully set forth in the Memorandum of Points and Authorities accmpanying defendant's Motion for Partial Summary Judgment ..." (Argument, page 1.)

(This also is not a factual statement in that nothing except some aspects of the Stipulation are addressed in the Motion for Partial Summary Judgment. It does not address and in fact ignores most of "The facts surrounding this" lawsuit and most of thsee facts are not "fully set forth in the Memorandum ...")

C. "... all issues raised by this ... lawsuit." (Statement, page 1.)

D. "... a dispositive motion may make all discovery moot." (page 2)

E. "... any discovery may be rendered totally unnecessary by the resolution of defendant's motion on the merits ..." (page 5)

13. While Footnote 3 on page 8 admits some limitation, it still is phrased to apply to all searches in response to all Items of my requests and all issues relating to scope before the Court rather than narrowly, searches under the Stipulation:

"3/ Defendant's Motion for Partial Summary Judgment deals only with the scope of the agency's search for responsive records."

14. This lone admission of any limitation is required by the next sentence of the footnote,

"Plaintiff's Notice of Deposition, however, states that the subject matter of the depositions will be "all issues" related to this lawsuit."

15. All these direct quotations seek to extend the sweep of the present Motion to be all-inclusive rather than in any way restricted to the underlying actuality of the Motion for Partial Summary Judgment, limitation to searches under the Stipulation.

16. However, if what remains of this footnote is factual, then there is need for discovery to resolve questions that have existed throughout this litigation:

"The primary issue in the lawsuit is of course, the propriety of the exemptions claimed by defendant."

17. I believe the good faith of all the searches and compliance by all Department components are also "primary" issues. But even on "the propriety of the exemptions claimed by defendant" I have written many letters and appeals and I have provided a long memorandum addressing "the propriety of the exemptions claimed by defendant" only to have them virtually totally ignored. This means that

after three and a half years of stonewalling and of not responding to countless specifications accompanied with hundreds of copies of records the Department now seeks to stall all those questions still longer by foreclosure of any discovery.

18. The first subheading under Argument claims that any "Discovery Is Unnecessary and Inappropriate at This Time." (page 2) This is argued despite the admission that after three and a half years there still exist "primary" questions about "the propriety of the exemptions claimed by defendant."

19. Here it is further argued that this Court should "protect a party from undue burden or expense," this party being the Department. The actual burdens are imposed by the Department on my counsel and me.

20. No matter what I have done in this instant cause to effectuate compliance and to end noncompliance, the Department has been virtually nonresponsive. The few exceptions came to pass only when all efforts to stall and stonewall had visibly come to what had to be regarded as a de facto end. Even when the FBI and the Department sought and obtained the Stipulation, they began by overt and nullifying violation of it. To the best of my recollection, this remains entirely undisputed by the FBI and the Department. Instead, they ignore the question entirely.

21. It is a very real burden for one in my situation to have to seek to exercise any discovery in a lawsuit three and a half years old. It is a very real burden for one whose only regular income is a modest Social Security check to have to pay a court reporter. It is a very real burden for my counsel, whom I cannot pay, to take this additional time, more so when the Department has refused his request for fees. Yet it is undisputed that I did not receive a single piece of paper until after I filed the complaint and then received about 50,000 pages. It is a very real burden when, whether or not the "primary" one, the Department admits there exist questions of material fact about "the propriety of the exemptions claimed by defendant" and steadfastly refuses to do anything about them.

22. It also was a very real burden on all parties other than the Department for the Department to delay for so long its oft-promised Motion for Partial Summary Judgment relating to the Stipulation when the Stipulation required full and complete compliance by November 1, 1977, and then, in May of 1979, provided affidavits

executed more than a half-year earlier. (At least one of these is identical with a 1977 affidavit signed by the same FBISA.)

23. With but a single exception those affidavits attesting to the search are by those who do not claim first-person knowledge.

24. In contrast, all persons included in my Notice have relevant first-person knowledge.

25. As my affidavit of May 25, 1979, states, the Shea and Mitchell affidavits are quite limited. Mr. Shea's is limited to a single Paragraph of Mr. Mitchell's and has an explicit disclaimer on all else.

26. The Motion (claims (page 3) that the Department has met its "statutory burden of proof through affidavits by agency officials." It does not state what is true, that all these affidavits are disputed under oath. It does not reflect the fact that there has been no rebuttal of any of my affidavits.

27. Ignoring my disproof of the Department's affidavits does not validate those disproven affidavits. Rather does ignoring my affidavits assure that material facts remain in dispute.

28. "Plaintiff's counsel was, of course, given the opportunity to cross-examine Mr. Shea," the Motion states. (page 4) If this statement is not factually incorrect, it is an exaggeration of reality, as examination of the transcript of the calendar call of January 12, 1979, makes clear. What follows is a statistical representation.

29. The entire transcript consists of 33 pages, of which the first 23 are a virtual monologue by the Department's witness, Mr. Shea. Mr. Lesar then addressed the Court for about two pages and Department counsel for about a page. What the reporter mistakenly captioned "Direct examination" begins on page 28. Mr. Lesar has the opportunity to speak less than 14 lines in seeking to elicit from Mr. Shea what "should be restored to the documents." (page 28) Mr. Lesar asked for Mr. Shea's "personal evaluation" of these restorations. Mr. Shea responded, "I want to thank you for asking me that question, Mr. Lesar. I'm under oath. The answer to the question is that I'd put them (the withholdings) back." (page 30) When Mr. Lesar asked Mr. Shea to "detail" the "areas of disagreement" between him and the FBI, Department counsel interrupted and argued whether

withholdings are "really the issue," consuming in lines almost exactly the same amount of time Mr. Lesar was permitted for what the Motion represents as "the opportunity to cross-examine Mr. Shea." The Court curtailed Mr. Lesar, stating, "I rhink you will realize that we have a courtroom full of people who have other matters here ..." (page 32, lines 13-15)

30. "Of course," in the words of the Motion (page 4), this is much less than "Plaintiff's counsel was ... given the opportunity to cross-examine Mr. Shea."

31 Mr. Lesar was expecting me to be present to assist him but that was impossible, as I have previously informed the Court. It is I, not Mr. Lesar, who raised factual questions with the FBI, Mr. Shea and other Department personnel. Me. Lesar does not have intimate personal knowledge of those details.

32. As soon as I read the transcript I prepared a memorandum on Mr. Shea's testimony and the exchanges that followed it. This includes the fidelity to fact of representations made to the Court. As a courtesy I sent a copy to Mr. Shea. Four months have passed and Mr. Shea has neither written nor spoken to me about this memorandum. Because it addresses the actual meaning of Mr. Shea's testimony, which I have not been able to cross-examine, I attach a copy as Exhibit 1.

33. As Exhibit 1 shows, Mr. Shea's testimony was in generalities with remarkably few specifics but in summary it adds up to the need to reprocess the records that have been provided because improper withholdings are so extensive within them.

34. This is why Department counsel, aware of the truth, sought to lead the Court to believe that these withholdings are not "really the issue."

35. In this connection I refer again to the violation of the Court's Order not to withhold FBI names, issued long before the beginning of any MURKIN records processing. Despite the Court's Order, throughout all the first two-thirds of the FBIHQ MURKIN records the FBI did - deliberately - withhold FBI names and other similar names within the Court's Order. This guaranteed the denial of relevant information throughout two-thirds of these records. They remain withheld. There are other unjustifiable withholdings.

36. "... no prejudice would result to plaintiff should this motion be

granted," it is argued at the bottom of page 4. This case is now three and a half years old, Mr. Shea testified to improper withholdings that since have not been restored, I am getting older and my health has deteriorated since the complaint was filed. Much prejudice to my interests comes from any unnecessary additonal delay. Any additional unnecessary delay is opposed to the letter and spirit of the Act and its legislative history, which I have read. All delays deny me of rights under the Act. They jeopardize my possibilities of using the information I seek. Delay is additionally prejudicial because it wearies the Court.

37. There is no claim to any real need for delay in the Motion for Protective Order. This is a case the Attorney General has held to be historical, requiring maximum possible disclosure, not the endless seeking of legal nits to be picked to further delay compliance and my possibilities of either using the information in my own work or serving the public role that has been forced upon me, including by Department counsel.

38. On page 5 it is alleged that "nowhere has plaintiff suggested circumstances demonstrating the need for discovery ..." (emphasis added) In my many detailed affidavits of numerous attachments and in all else I have provided the Department in writing, not the least of which is the lengthy consultancy memorandum required of me, I have more than "suggested" this need. The thin-paper file of carbon copies of my letters to the FBI is about two and a half inches thick and is without FBI response. I have provided the Department with hundreds of pages of copies of its own records reflecting denials and withholdings as part of countless appeals. These also do much more than "suggest" the need.

39. With all the consideration that can be given to zealous effort to meet adversarial responsibility, I believe the Department's argument against depositions that beings on page 5, particularly the representation that "Depositions are particularly ill-suited to FOIA litigation" on page 6, is not made in good faith. I have prior experience with the Department's position on depositions in FOIA cases. To now it is diametrically opposite this present representation.

40. When I lacked even a modest Social Security check for regular income and I undertook discovery by interrogatories, as the present Motion argues in the better means at the bottom of page 6, the same Department, under the same Act, prevented it by arguing successfully that interrogatories are inappropriate and depositions are the only proper means.

41. In addition, it is my experience that refusal to respond to interroga-

tories is commonplace and false representations in those the Department has provided is not unknown.

42. In C.A. 75-226, because I could and can ill afford to take depositions, I undertook discovery by interrogatories. The Department then opposed this means of discovery and on its representation to that court prevailed. As the same Department, with one of the same signatories, argued in its brief in No. 75-2021, "He has inexplicably chosen the one - interrogatories . least likely to result in his receiving what he alleges he wants .... Depositions of the agents, whose names are known to Weisberg, would seem to be the appropriate course." (page 10, Brief for the Appellees)

43. On this the Department prevailed. The appeals court's July 7, 1976, decision concludes with language not surprisingly not mentioned now by the Department:

> The data which plaintiff seeks to have produced, if it exists, are matters of interest not only to him but to the nation. Surely their existence or nonexistence should be determined speedily on the basis of the best available evidence, i.e., the witnesses who had personal knowledge of events at the time the investigation was made. This cannot be done by interrogatories addressed to a party, although this might serve to narrow the scope of inquiry. It must be done with live witnesses either by deposition or in court.
>
> Decades ago Dean Wigmore said that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." We think it time for the trial court to start the engine running, and thereafter make detailed findings as to what the evidence adduced establishes. Accordingly, we remand this case to the District Court for further proceedings under the Freedom of Information Act not inconsistent with this opinion.

44. Department counsel is well aware of this decision. It also is included in one of Mr. Shea's letters referred to in the Memorandum on page 4.

45. When the same Department and with one of the same signatories argues in this case that "Depositions are particularly ill-suited to FOIA litigation" and encourages substitution of written interrogatories after having argued and established exactly the opposite in C.A. 75-226, questions of good faith are raised. They are magnified by the Department's failure to inform the Court of this most pointed and relevant of decisions on the question of depositions in FOIA cases while citing many others in this longest part of its Argument. There is no mention at all of C.A. 75-226 or No. 75-2021 by the Department.

46. The Department now seeks to engage in mind-reading relating to my

alleged intention "to probe the process by which agency officials reached their conclusions..." (page 8) This representation is directly opposed to what the appeals court told the Department and me, that in the nation's interest I must seek to establish the existence or nonexistence of the information not provided.

47. Despite the exercise of discovery on remand in C.A. 75-226, the FBI continued to withhold relevant information, sending that case back to the appeals court on its opposition to my continuing to take the depositions the Department itself had argued were appropriate. It then also claimed burdensomeness. In the interim, by means other than Department cooperation in meeting the mandate of the appeals court, I established the deliberate withholding of exactly the information the appeals court directed be obtained in the nation's interest. The question was on the existence or nonexistence of records relating to the performing of certain scientific tests on basic evidence in the assassination of President Kennedy. Only after that case was back before the appeals court for the fourth time did I find proofs in precisely the files the FBI and the Department refused to search when I asked it. I obtained part of those files outside of C.A. 75-226. What I then found also proves the deliberateness of repeated false swearing about the searches at FBIHQ and about the results of those searches. Only on deposition did I learn of testing all records of which were and remain withheld. On deposition also I learned which other files were required to be searched and had not been searched. I obtained some of those files in C.A. 78-0322. When I persevered in that case, after compliance had been assured, an additional 25,000 pages of records were provided. Only then did I obtain copies of the deliberately withheld pertinent records sought to have been memory-holed in a field office. This required years of diligent effort. (My first request was in 1966.)

48. The Department's position is that it can withhold from and misrepresent to the district court and then object to the presentation of newly-obtained and directly relevant information to the appeals court as in conflict with the "settled judgment" principle. There is no case I recall in which I did not find deliberatley withheld and relevant records after the record before the district court was closed. In one case, after I provided the appeals court with newly-obtained proof of deliberate misrepresentation under oath to the district court, withheld records

were provided the very day the Government's brief was due at the appeals court. From this and other similar personal experience I believe that seeking to deny me the opportunity to take depositions has as a purpose an effort to prevent my proving deliberate and knowingly improper withholding and a persisting refusal to search relevant files in this instant cause.

49. That there is improper withholding at this late date in this instant cause was elicited from Mr. Shea during the brief questioning permitted my counsel and quoted above. (paragraph 29) Mr. Shea did not voluntarily testify to and my counsel was not able to question him about the many detailed specificiations of noncompliance I provided in numerous appeals or to the searching of unsearched files I have identified to him. He did testify that with regard to the so-called Long tickler I led him to what remains of it after the FBI had not been truthful with him about it. Deposing Mr. Shea is essential in this case so that his testimony can be complete and not limited to what Department counsel asked of him. I am certain that his testimony will not be in accord with prior Department representations to this Court and for this reason is opposed.

50. Moreover, I believe his testimony would rebut the "exempt from mandatory disclosure" argument (page 8). I believe he would testify that this is not the proper representation of standards applicable to historical cases and that they require maximum possible disclosure and maximum possible use of administrative discretion.

51. At this point (page 8) the Motion does acknowledge the existence of what it terms "the primary issue," the "propriety of the exemptions claimed by defendant." All whose depositions I noted have information relevant to resolving this "primary issue."

52. There is no reasonable basis for the allegation that I intend mind-reading or that my concern is with "the process of by which agency officials reached their conclusions." My concern is for compliance, for obtaining the information sought now for more than a decade and for making more complete and accurate the record on which the Court will render judgment.

53. The cited appeals court decision in No. 75-2021 is also ignored where it is suggested that my testimony be by affidavit (all my affidavits having been

ignored to now) and not by deposition. From my prior experience I believe the real reason Department counsel oppose my giving the live testimony consistent with the appeals court decision comes from prior Department counsel's experiences in confronting my knowledge of the matters in question. He declined the Court's and my counsel's offer of me for further cross-examination. Neither he nor other Department counsel has produced any rebuttal to that testimony.

54. Whether or not intended as a formality, the Motion cites in its support "the entire record herein." The entire record includes my many long and detailed affidavits that have not been contested. These affidavits attest to the infidelity of the Department's representations and to the deceptive, misleading and misinformative nature of the FBI's affidavits. These affidavits also attest to false swearing. Thus the Motion claims to be supported by proof of official false swearing and other misrepresentations that are without dispute in "the entire record herein."

55. There is almost no day on which I do not come to more evidence of unfaithful representations and intent not to comply in my FOIA cases. The most recent illustrations are of the day before I received the Motion. I attach as Exhibit 2 the amplification of the appeal I sent Mr. Shea.

56. "Previously processed" is the claim made to withhold copies of most field office records. The FBI refuses to cite the record that is the allegedly previously processed and identical form of these records. I appealed this as a form of withholding when I first saw the claim. (My appeal has not been acted on.) Nonetheless the FBI has persisted in the practice since then. In his attached affidavit to the Motion for Partial Summary Judgment Mr. Shea disavowed approving this "previously processed" claim. It now turns out that the previously processed claim is made for records also allegedly referred to other agencies. A record cannot be both withheld and referred to another agency and allegedly disclosed when "previously processed." Referrals of the present, it now turns out, also include the transcripts of testimony that were published by the Warren Commission in 1964.

57. As Exhibit 2 also reflects, FBI SA Burl Johnson, who executed the Memphis office affidavit attached to the Motion for Partial Summary Judgment, had knowledge

of the existence of other relevant files to which his affidavit does not refer and which were not searched for compliance under the Stipulation or on any other basis. SA Johnson was an Invaders case agent and was required from this work to have knowledge of the existence of files and of the indexing. All indices are an Item of my requests. SA Johnson's affidavit makes no reference to any Memphis indices. All records relating to the Invaders is another Item of my requests.

58. From my knowledge as a subject expert and of this case and its underlying records, I believe one of the real reasons the protective order is sought is an effort to prevent my obtaining more evidence of deliberate misrepresentation to the Court, particularly on scope and MURKIN, of other deliberate noncompliance, and of other acts intended to prevent and delay compliance and to prolong this case.

59. I am alleging bad faith and I am alleging that bad faith has characterized the case from the outset, when the Department first undertook to rewrite my requests. It then ignored my writing it that I wanted compliance with my actual requests, not its substitution. Once the Department decided it could no longer avoid providing some records, it launched upon a stonewalling campaign, beginning with refusing to send me any records until I gave it written blank-check assurances of payment. This one device led to a long stalling of everything. First the Department violated its own regulations by not giving me an estimate of cost and specifying the deposit desired. Then AUSA Dugan, after promising to inform his client that my counsel and I would provide written assurances once I was given this estimate, did not do so.

60. Perhaps the most conspicuous example of bad faith is the matter of the consultancy forced upon me. In addition to the encapsulation provided by my counsel in his May 29, 1979, request that the Court direct the Department to pay me for those services, I believe other facts are relevant in assessing motive for filing motions with ulterior purposes.

61. Prior to the forcing of the consultancy on me I offered several alternative proposals. I considered them better suited to the Department's alleged interests. None of my proposals would have required as much of my time or any great cost for the Department. One proposal was that the FBI, Department counsel

and the appeals personnel consult me by phone if they had any questions about the specifics of noncompliance I had already provided in writing. (See paragraph 38) Another is that one of the paralegals or other personnel reveiw what I had written and then consult me about any questions and have access to my files. For none of these or similar services would I have expected payment. And it is not I who asked for payment but the Department which offered it.

62. Hiring me as a consultant and paying me was the Department's idea. First of all, it smacks of impropriety because I was forced to work for the agency I was suing. Meeting the obligation of a consultant required me to safeguard the Department's interest as opposed to my own in matters before the Court where the Department, not I, engaged in improper acts and was vulnerable from this. I did provide these cautions, which required that I disclose in advance what I might want to raise in court. In addition, it forced me to spend the time FBI and Department personnel should have spent in going over the letters I had written to the FBI and were readily available in Washington. This was and I believe was intended to be a waste of my time for me. It prevented my using that time on other work that as a result I will never be able to do. For months it also was used as an excuse for a complete lack of any forward motion in this case and in any compliance by the Department.

63. Once I provided that long and detailed memorandum I heard not another word from anyone in the FBI or elsewhere in the Department about it. No questions were asked. Not a single item raised in it was questioned or discussed with me. No action of any kind followed it. No specification of any basis for dissatisfaction with it or request for clarification of any phrasings was made. Neither Mr. Shea nor anyone on his staff asked me any questions about it or provided any new records or correctedcopies of records from which there were what now is admitted to be improper withholdings.

64. Given the conditions under which I prepared that memo and did the underlying work, this is truly exceptional. Perfection is not a human state. I was under great time and other pressures because of the extraordinarily large volume of records I had to read and because I had developed another serious health problem and was required to take time to cope with it. That also was an unusually

severe winter. After the generous applicstion of chemicals, my tree-lined lane, the length of a football field, was iced six and more inches thick over its entire length. Until the end of March, despite my age and health, I had to work at chipping off this ice for as much as I could intermittently every day when the weather or my physical condition did not preclude it. Finally, in order to get the memorandum done, I had to buy dictating and transcribing machines. I had never used them before and I have had no use for them since. As I now recall, I did not even have time to read and correct the memorandum. I did not delay providing it until I had time in the belief that I would be required to go over it with the Department in any event. (Had it been my intention to run up the bill, this would have provided an excellent and legitimate opportunity. In fact, I am certain my time records are not complete. I have never had occasion to keep such records and I am certain that on some occasions I forgot to.)

65. Under these and other circumstances, I believe it is inevitable that there should have been some questions about the memorandum and its contents. Yet I received no question and not a single word of any other kind from anyone in any part of the Department.

66. Failure to respond with any kind of added compliance when the memorandum is of such length, detail and specificity is, I believe, an additional indication of bad faith and of the consultancy having been forced upon me, through misrepresentation to the Court, as another means of stonewalling this case and compliance with my requests.

67. If the Court rejects both of the more recent Department Motions, even if this is not appealed, the Motions will nonetheless have had the effect of further delaying compliance, taxing the Court and wasting more time for my counsel and me.

68. Why this should be official intent and practice in this case may not be apparent to a nonsubject expert. The real questions involved in study of the official investigations of political assassinations are lost in the confusion and misunderstanding coming from official obfuscations on one side and wildly irresponsible conspiracy theorizing on the other. The combination, particularly with the executive agencies investigating themselves and able to dominate the investigations

by the Congress, has prevented any thorough official investigation.

69. From the time of the first book on the assassination of President Kennedy and the Warren Commission, which was my first book, dating to February 1965, almost all the major, factual disclosures that are embarrassing to the executive agencies originate with me. This also is true of the assassination of Dr. King. My book on it remains the only factual book that accurately brings to light faults and failures in the official investigations. New information about both crimes that is embarrassing to the executive agencies comes from my FOIA requests and lawsuits. With a single exception I recall no factual and relevant addition by either House of Congress. This relates to the scientific study of the tape of the Dallas police broadcasts when the President was killed. That tape was forced on the House committee by one friend of mine, based on preliminary analysis performed on it by still another friend of mine whose most recent consultation with me was during the preparation of this affidavit. Of the more recent sensational developments I brought to light the existence of a motion picture, existence of which the FBI kept secret. It stated the film does not even show the building from which the FBI claims Lee Harvey Oswald alone fired all shots in the Kennedy assassination. Following up on these suppressed records, which I obtained in C.A. 78-0322, still another friend, with whom I work and am currently working, obtained that film and published an entire newspaper page of still photographs from it showing the presence of <u>two</u> moving images where the FBI claims only Oswald was. The new evidence of some of the testing withheld from the court in C.A. 75-226 includes the removing of samples for testing in the FBI Laboratory of the point of impact of another shot. I brought this shot to light in my second book, in 1966. I did not obtain the proofs held secret by the FBI until 1978, despite 1966 request. All of the supposedly "new" medical evidence, which disproves the medical findings of the Warren Report, was published in facsimile in my 1975 book, the last book I was able to publish. In the King assassination those seemingly new and also sensational proofs taken to mean James Earl Ray lied before the House committee were actually obtained in this instant cause. (The House committee merely obliterated the identifications of the FBI Lab in showing them on TV.)

70. The so=called internal investigation of the FBI's performance in the King assassination by the Office of Professional Responsibility (OPR) was an

investigation of what is not relevant in the crime, the FBI's campaign against Dr. King. However, I published the broad outlines of it more than five years earlier. As my prior affidavits show, I came across the first known indication of the FBI's Cointelpro activities in 1969 and gave this information to the Department only to be defamed for it by the FBI, which thus was able to avoid exposure until after the 1974 amending of the investigatory files exemption of the Act, for which I have some responsibility.

71. So it is that I and my FOIA suits present the fear of embarrassment to the executive agencies.

72. It is because I am not a "conspiracy theorist" and because my work from the first has addressed the functioning of the agencies of government in time of and following these great crises that special efforts are made to delay and prevent my work that otherwise, to this day and despite the fact that it is the first and the most voluminous work in the field, remains without any substantial criticism and without a single complaint of unfairness made to me by anyone.

73. The political assassinations are "family jewels" cases for the executive agencies, especially for the FBI and the Department. Throughout my many affidavits I have avoided arguing the facts of the King assassination and have referred to them where necessary in addressing compliance and noncompliance relating to specific issues. However, if the Court would care to see the glitter of a few of these "family jewels," I can open the lid on request.

74. The actual purposes served by the Department's motions are to delay and if possible prevent my work by keeping me bogged down in unnecessary litigation while to the degree possible avoiding the disclosure of records that are embarrassing to the Department and a number of its components, not only the FBI.

Harold Weisberg

HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 4th day of June 1979 Deponent Harold Weisberg has appeared and and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1982.

Lillian Weisberg

NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND

LILLIAN WEISBERG NOTARY PUBLIC FREDERICK CO., MD.

Not Read

Memorandum to: Quinlan J. Shea, Jr.
From: Harold Weisberg
Subject: 1/12/79 Status Call in C.A. 75-1996

A combination of circumstances that could not be foreseen turned your 1/12/79 testimony around, resulting in a situation that may have led to a victory party by the FBI and Civil Division, but I believe means still another indefinite extension of C.A. 75-1996 far into the future with considerably more cost for all parties and I also believe many more serious problems for the government.

It was not possible for me to be at that status call. I had been awake since 4 a.m. that morning. I didn't oversleep and miss the bus. When I heard on the radio that the Frederick County schools were closed and I could see only about an inch of snow, I phoned the state police. I was told there was an underlayer of ice and that only the most urgent need to travel could justify the attempt. As you know, I am under medical injunction against even bruising myself because of the high level of anticoagulant on which I live. Were it not for this hazard to my life from simple accident, I would have regarded that particular status call as urgent enough for me to risk an accident.

As a result of the combination of circumstances, the Court was misled. I am without doubt about this and will cite the transcript. I think it was not intentional on your part. My interest is not in theory but in actuality and its consequences, real and potential.

What happened surprises me entirely in one area and in part in another. Where I am completely surprised is in being foreclosed from cross-examination, alas, not for the first time. What surprises me in part is the misrepresentation by Department counsel of how and why you were in court. I did not expect that gross a distortion. That misrepresentation changed the character of your testimony - from impartial expert to adversary, inappropriate for an FOIA appeal function.

It is not ego that impels me to say that my presence and participation were essential for the Court's fact-finding function. Mr. Lesar is an expert on the law, on the prior defense of James Earl Ray and to the degree necessary for the Ray defense on the King assassination. He is not a subject expert on the assassination or on the FBI's investigation, which in my belief was not an investigation of the crime itself. Embarrassment over t at is one of the causes of the present situation in this case and one of the reasons the case has been dragged out as the FBI and the Department have dragged it out.

From some expectation of what could ensue, when I phoned Mr. Lesar to tell him I could not be in court, I gave him a message for Betsy Ginsberg, to tell her that I am not Bar Kochba but am a Maccabee. He tells me she did not understand this. So I'll explain it.

I am but one person, whereas the Department has great wealth and power. We have become adversaries. I believe if there is to be any solut on to adversary contention, it can be forwarded by each adversary understanding the other.

Bar Kochba led the mass suicide of Jews at Messada. The Maccabees fought in defense of their belief in approximately the same historical time frame.

By now the FBI and the Department s ould not have to be persuaded that I am not Bar Kochba. Before now the Department should have had someone think through to the end what it means if I continue to be a Maccabee. I'm sorry that this was not part of Ms. Ginsberg's early education or history studies and we'll all be sorry if the Department does not come to an understanding of this and an evaluation of all its costs regardless of the ultimate end. In this the Department might want to have due regard for more recent history and its prior history with me.

When I received the transcript, I marked it up for a number of purposes. When I began the draft of a long analysis in the form of a memo to you.

When the judge foreclosed cross-examination, I did not have to be there to know that we have to ask to take your deposition and perhaps that of a number of others, depending on what would emerge in your testimony. I wanted to do all the preparation from the transcript while reading it, without having to go over it again.

Also, I don't believe in the practice of surprise law. I do not believe that this leads to justice. If you were familiar with the literature on political assassinations, you would know that I alone, a nonlawyer, defended the adversary system. Not one of the lawyers and philosophers who have written books has done this.

The case record holds many embarrassments for the government. Not one was a surprise because I informed government representatives in advance that each would become necessary.

That is what I also am doing now.

My wife had just begun the retyping of this long memo when there was another unforeseeable circumstance - her new typewriter malfunctioned. It had to be taken back for a major overhaul. This made further delay inevitable.

Meanwhile, the weather presents problems with which I must live. Our lane, which carries the runoff water of a large hillside, is the length of a football field. It also is shaded from the sun. It freezes over. Last year, when we had

rain atop a snow, we were so heavily iced in I could not use my car for several weeks. When I finished clearing the lane, working on it daily, it was the end of March. The last ice I removed, at the road end, was still six inches thick. To prevent a repetition, I must work at this regularly, to the degree I can.

In part because of the greater burden the retyping now will be for my wife and in part from a rethinking, I am not retyping and sending you the even longer memo. Instead, I present some arguments and will address some questions I see in this case. The longer draft can still serve any need Mr. Lesar may have in taking any depositions.

For whatever purpose you addressed only broad considerations of general character in your testimony, I suppose you expected to be asked questions relating to specifics. That was aborted when virtually no questioning was permitted.

The result is a major distortion of both the case and reality. If this led to a victory celebration, it also, I believe, gives the government new and serious problems.

You may not agree with my beliefs but I give them for the Department's consideration, if there ever is anyone in authority in a vast bureaucracy who tries to evaluate all factors. Neither the FBI nor Department counsel do, want to, will spontaneously or have.

The FBI wants not to comply with my request and wants to use this case for a variety of ulterior ends. It has succeeded. This has been hurtful to me. To make this possible Department counsel, all of them to now, have indulged in excesses of adversary zeal. Whatever right there may be in this in other litigation, I believe it is inappropriate under FOIA and from this and other factors in the end can be very hurtful to the Department as well as to the FBI separately. This has happened in the past.

One of the major distortions is of what is at issue in this case. Another is of roles in it. Still another is of the processing of what has been provided to now.

There emerges from a reading of this transcript a gross distortion of me, my attitudes and even why you were there and what is at issue. The situation is of Geoffrey Saxe's poem of the Six Wise Men of Hindustan. All were blind. When led to an elephant, each felt a different part and described a different object. Feeling the leg led one to believe it was a stout oak. The tail was a snake to another. Etc.

These distortions are not accidental. Whether or not intended, as I believe

they are, they are the inevitable result of FBI and counsel policy and practice. At every point I have made what I regard as an adequate record that includes, I believe, proof of deliberateness in this. In part that is what I also am doing now.

In addressing your testimony, I begin with why you were there to begin with. It is not from "our feeling," Ms. Ginsberg's representation on page 3. It is because I asked it. Obviously, I could not ask you in advance what you would testify to, as Ms. Ginsberg could, but I could and did expect to question you through my counsel, as I am certain you expected.

It is not only that I asked for your testimony, which is misrepresented by one of these excesses of adversarial usage, but I asked for it in a special way. I asked Mr. Lesar to ask the Court to call you so that you would appear not as an adversary but as an impartial expert. Ms. Ginsberg made you an adversary. The situation also made you an adversary in other ways, in part because your very generalized statement was left unquestioned and unexplained and then was distorted and extended by counsel.

As a result your testimony is subject to partisan interpretation, some of which can be quite hurtful to me, and it is misleading.

It is reasonably possible to read your testimony and wind up asking what you were talking about. At no point does your testimony address specific issues and questions of specific fact relating to compliance in this case. Limiting your testimony to a partial study of FBIHQ MURKIN files, while it may have served a different purpose in your mind and intent, magnifies the distortion that resulted.

FBI and counsel distortions are old in this case. For you and the Department and for a partial record I trace this.

One distinction is essential. It is between what I requested and the Department's thus far successful substitution.

In March 1969 I began requesting the information I want for my own work. These and later requests are all in the case record.

In March 1969, as the case record also shows with copies of the actual documents, on high level the FBI decided not to comply with my request. This was approved by the Director. A decade of noncompliance is not the FBI's stalling record with me. It began with my May 23, 1966 request. The Director then agreed that it not be complied with, also in the record. The FBI's concoctions and concepts of that era, false and irrelevant as they are, still dominate it, its attitude and its acts and decisions.

Later, as other records state, the FBI even connived with a since retired

Special Agent for him to file a spurious lawsuit to "stop" me, the actual word of still another SA retiree. Thus the history of the 1974 amending of the investigatory files exemption began. This, I suggest, ought not be lost sight of with what the FBI and the Department have done to this case and to the Court as well as with my request itself and with the Department's substitution, including the processing of it.

Right after Mr. Lesar was able to file this action for me, there was an earlier official substitution. It reached me over DAG Tyler's signature. I immediately wrote and protested this attempt to replace my actual request with a formulation more to the Department's liking. I recall no response. Thereafter the Department pretended that its substitution was my request, a malpractice indulged again with the amended complaint and the FBIHQ MURKIN substitution.

None of this would have been possible without misrepresentation to the Court.

Not long before Mr. Tyler's letter there was a conference at the FBI in which Civil Rights Division attorney Stephen Horn participated and about which he wrote a memo to his boss. That memo also is in this case record. A paraphrase is that because CBS-TV had filed a request for some of the same information and beca se they did not want to be clobbered on the air by CBS, they would have to do something but with me they would turn me down first and later cook up some legal justification for it.

In a sense, this is what was done in the Tyler letter. Mr. Horn's recommendation became policy. To the degree possible it was followed. When stonewalling alone was inadequate, misrepresentation and new substitution were added. The record on this is clear in court from the first status call on.

Partisanship, ulterior purposes and changes in counsel may blind the government to this. All counsel played tricks, beginnin with AUSA John Dugan's first of many shabby ones, not all of which were only stalling devices.

There was no processing of records after the complaint was filed, allegedly because I had not provided a deposit against costs. To assure this the FBI violated the CFR by not providing an estimate of costs and specifying the deposit desired. When I conveyed this to AUSA Dugan after the first calendar call, said I could not send the FBI a blank check and cited the CFR, he then failed to communicate my offer of a check once the amount was specified. He was more interested in talking summary judgment, as he did at the first calendar call three years ago.

Later only stonewalling purposes were accomplished by the Department's refusal to accept the amended complaint as what it was, an amended complaint. It also was not less than inefficient to treat this as a separate request on the same subject.

Months later the Department, whether or not at the FBI's behest, again made its own substitution for my request, this time with a false assurance to the Court, that it would comply with my request by providing me the entire FBIHQ MURKIN file. (As you should recall, you heard the identical false promise made to Judge Gesell in my C.A. 77-2155 and you have personal knowledge that as a result the Department is already defending three new FOIA suits this caused, with all matters far from resolved.) Although I then and since have insisted that this could not and would not comply with my request, the judge chose to believe the Department's representations. This altered everything. It cast me in an entirely different, unsought and unwanted public representative role in which I had to subordinate personal interest and defer the writing for which I had made the request to serve the public interest.

It simply is not possible that the FBI did not know it was deceiving the Court with these false assurances. It is unlikely that Department counsel was unaware. There is no doubt that I made the point and at the very least the disagreement was known to counsel. At no point did any Department counsel ask me any questions about this, not even as late as November 1977 when I mentioned it during the conference in Civil Division William Schaffer's office.

Coinciding with this misinforming and deceiving of the Court and with it what has dominated the case ever since is the "historical case" determination by the Attorney General. (I have not been given a copy and would appreciate one.)

When counsel informed the Court of this, the Court perceived correctly that this was no favor to me and stated that in effect it denied me my rights by giving all my work to others while imposing added burdens and responsibilities on me.

With this encapsulation of the background, we come to the obligations imposed on me, something not reflected in your testimony. This also brings us to your actual testimony, the uses and misuses that are possible, the context in which it was given and the fact of its having been aborted by no examination, no questioning.

Before going into these matters and your testimony, I call other considerations to the Department's attention. One is the philosophy of FOIA, its intent and purposes, the situation the 1966 Act was designed to correct and terminate and the abuses that led to the 1974 amendments, particularly of the investigatory files exemption. As a partisan and as a defeated partisan, the Department is probably unwilling to consider what I believe is the actuality - that this amending was the direct result of the Department's efforts to alter the Act and the intent of the Congress in the Act and to do this through me because it considered me an unpopular litigant who specializes in an unpopular subject. A simple means by which those who

had no personal involvement in that case (C.A. 2301-70) can comprehend this is by reading the short and controlling affidavit executed by since retired FBI SA Marion Williams and the completely false assurance to that court by AUSA Werdig that the Attorney General had determined that meeting my request was against public interest. (Williams is the one who said the FBI had to "stop" me, which appears to have been adequate credentials for an affidavit.)

It is apparent to me that the Department is currently engaged in a similar campaign based on the same evaluation of me and on the certainty that the courts are wearied and overburdened by some of these cases. What I believe should cause some worry in the Department is the possibility that some court or the Congress may examine responsibility for what has happened and is now happening in some of these cases, especially mine.

Once there was both the finding of historical case and the unilateral decision to provide the FBIHQ MURKIN records, I became surrogate for the public, if not also for history. I did not want to be. I do not want to be. But I am and there is nothing that in good conscience and good citizenship I can now do about it. Any examination of my life and work for the past three years leaves no doubt on any aspect of this. I laid aside a large manuscript of the book I had commenced and you can see it if you doubt me. Where there is no real possibility of doubt is the reflection of this in my appeals, first through the FBI and then to you. Most of what I appealed is not of personal interest to me or of any value in my own work. (In this I refer to noncompliance in the records as distinguished from my request, which has not been complied with and cannot be complied with from the records to which search was limited.)

In order to influence the judge to have me serve as Civil Division's consultant in this case, an improper request when I am the plaintiff and Civil Division provides Department counsel, the Division assured the Court in camera that I have unique knowledge and that compliance required my services as its consultant. The situation created by the Civil Division made it inadvisable for Mr. Lesar or me to make strong objection, although we both have strongly opposed the arrangement and had told the Civil Division this pointedly. The arrangement was not necessary because I had already provided to the FBI, in writing, all the information required.

I do not believe that it here is a digression to remind you and the Department that the burden of proof remains on it and that it cannot show good-faith search <u>in response to my request</u>. There is more it cannot show in meeting its burden of proof. This is one example. This is inevitable as a result of the diversion and delay from

what I regard as no better than trickery, the false pretense to the Court that there would be full compliance from the FBIHQ MURKIN file.

On this narrow question and before I received any MURKIN records, we cross-examined several FBI witnesses. We then elicited the testimony that most case records never reach Washington. This means that there is no innocence within the FBI or on the part of Department counsel with regard to the false pretense involved in the HQ MURKIN representations.

Let me illustrate with specifics what this mea s. I had to appeal the withholding of the names of two women, Marjorie Fetters and Claire Keating. This is not because I need their names. Rather is it because each slept with a different Ray and each was then associated in the FBI's expurgated records with the woman who did not sleep with a Ray. (There is a third with the third brother. The FBI disclosed her name where there is no possibility of this confusion. It is Naomi Regazzi.) My appeals, not from any personal interest or need, are to correct and perfect the record made imperfect and incomplete by the FBI and to avoid future harm from any misreading of the records by those who in at least most cases will not begin with my subject matter knowledge. This knowledge compels me to do what the FBI should have done on its own and has refused to do when I asked it, straighten out its own error in processing.

In both cases the FBI's own records disclose that the Fetters and Keating names and information are in the public domain. Hence there was neither the need nor the right to withhold the names. Additionally, Mrs. Keating caused additional publicity when she filed a lawsuit in which I happen to agree and sympathize with her. Fetters was an informant of the Newark office as well as Jerry Ray's paid bedmate.

There have been countless misuses of the (7)(C) and (D) exemptions to withhold the public domain. Often they can hurt the innocent. FBI misuse of exemptions in unnecessary withholding can cause harm. Because sex is a comprehensible privacy, I select these from among the many illustrations recorded in my communications with the FBI. The FBI was aware, if not from its own comprehension of what it read, from what I wrote it.

The second point I made has to do with what you actually testified to. Your testimony is not to compliance with my request. It does not even spell out compliance with the FBI MURKIN substitution. It is a report on your examination of part of that large file and then in generalities that remove it from the specifics of my appeals and from the context of my information request.

In addition to being partisan rather than impartial testimony, coming from

Ms. Ginsberg's representation of "our feeling" about what you should testify to rather than what I sought, specific testimony on specifics of compliance or noncompliance, your testimony becomes an unclear philosophical discourse in abstractions. In this it is subject to contradictory interpretations, not because you intended this but because there is an official need to make it mean other than what you actually said. I cannot and I will not leave it this way.

One possible misinterpretation for which the groundwork is laid, one not foreign to my experience with zealous Department counsel who seek to defend these cases by trying me, is the interpretation that you found my actual appeals not to be reasonable. You did not say this. It is, however, a possible interpretation of your words if they are taken out of context.

Where you refer to crank letters, for example, or to well-intended citizens writing the FBI, I have no such appeal before you. Your testimony does not reflect this. There is no relevance with regard to me. That you testified to it, a generality, appears to cast me in the role of appealing all those many withholdings that are of no interest to me and are not within my request. The record should be corrected here, too. It should not permit any such misinterpretation.

The other side of the same illustration is that when you made no reference to my actual appeals and did go into irrelevant examples and you gave the FBI good marks for its record on matters not in question or relevant, a broader application and an entirely unjustified one as it relates to this case can be foreseen. This would be unfair and quite prejudicial to me. It would be a major distortion of actuality in this case and with what I did appeal. On this the record also should be corrected.

There are other similar illustrations of possible misinterpretation for which I will take time if you desire.

The point I am making is that none of this is related to my request or appeals or is at issue. It thus does not constitute an endorsement of the processing of my request or of the overall of the FBIHQ MURKIN file. Therefore, it is not relevant at this juncture in this instant case.

I will come to the testimony I believe should have been made available to the Court. It requires diligence and effort to find the generalized formulation of it that is in your testimony.

There are only two, perhaps three, specifics of my actual appeals that you mentioned. Because of the artificiality of the FBIHQ MURKIN file and of your review that was limited to parts of it and from what appears to be your trust in the FBI's word, references to these appeals are factually inaccurate. One of them was misused by Department counsel. Clearly the judge was misled and reflected this, as I shall specify.

The name you did not mention is that of Charles Quitman Stephens. The name you mentioned is not correct in the transcript. Correctly it is Marrell McCullough. There never was any legitimate (7)(C) consideration with Stephens or any (7)(D) one with McCullough. The context for each is inaccurate. I explain, again as illustrative rather than inclusive. The existing written record, which was not within your review, is more than adequate. After two years it remains unrebutted. In fact, without any FBI word to me.

There are no secrets about Stephens' life and record and thus no real privacy issue. He is a war-damaged, violence-prone alcoholic who was fabricated into a witness first by a reporter's bribe and later by DJ CRD and the FBI. Between them, they took not fewer than three inconsistent affidavits from Stephens. The last was used in the Ray extradition. Stephens, a nonwitness, was converted by government representations into the only alleged "eyewitness." In fact, there was none.

Two weeks after the King assassination the FBI (and not it alone) showed Stephens a Ray photograph, seeking an identification. He made a negative identification. This was prior to the taking of any affidavit from him. The record of the interview and of the negative identification remain withheld. I would not expect these to be in the FBIHQ MURKIN file and my recollection is that the FBI was careful to avoid this. It is in the Memphis Field Office files, from which I did obtain a shaded paraphrase that does not accurately reflect what Stephens actually said.

My Stephens interest is not in details of his life even if the FBI's records include what is public knowledge and I have not seen these records. My interest is that of my request, an interest in evidence, in this case in particular false evidence which nonetheless was held to indicate guilt. Of course, learning that the government knew it was making false representation became an interest and I believe a proper and necessary one, one I wish the Department would come to share.

Perhaps without your intending it the representation of my Stephens interest appears to be the contesting of (7)(C) use: "... the individual who allegedly made the identification of Ray that was some part ... of the extradition request. Well, his personal life would go to his credibility or his ability to be a witness would certainly, I think, in the interest of history outweigh the privacy interest in that kind of case." (pages 12-3) You said you "have not had a chance to look at that" and then (page 13), "Turning to the 7(D) excision, the source protection matters." You used McCullough as your example.

As a generality I agree with this 7(C) standard. I wish that the FBI followed it with this and with other similar cases. It did not, even after appeal.

I do not expect you to find the withheld personal information about Stephens in FBIHQ MURKIN because of the FBI's built-in system of information withholding by keeping in the field offices what it wants not to be retrievable at FBIHQ but can, in an emergency, obtain from the field. I have given you proof of FBIHQ returning its copy of an embarrassing record to the field office, another appeal not acted on. These are only some of the reasons I have referred to the field offices as "memory holes." With your review limited to FBIHQ MURKIN, your testimony is further subject to misconstruction and misuse because you have no knowledge of existing records not in FBIHQ MURKIN. In a major historical case, by any measure a review on substance that is limited to FBIHQ records only is undependable, inadequate and incomplete.[1/]

This is further reflected in your second specific, McCullough. What you say is accurate, for the most part, but not relevant to my interest or any appeal:

> "As I understand it, Mr. McCullough was protected under 7(D) for a very good reason. He was affiliated (sic) wit the Memphis Police Department and he was their man inside a group called the Invaders. And when the files were first reviewed by the FBI from the files, there was no showing that he was anything other than just a police agent inside of an organization that was causing some difficulty down there." (page 13)

This sounds like what the FBI would have said but I do not believe it is completely true in terms of what is disclosed in the FBIHQ MURKIN files alone, as I'll explain.

McCullough was a policeman, not an affiliate or a police agent. The police also had informers in the group. In time those on whom McCullough spied came to suspect him. His spying usefulness ended and he was assigned to normal police duties. This meant that he was publicly known to be a policeman. He gave evidence in prosecutions, was found to have framed those against whom he testified, as case records I have examined reflect, and was given federal employment in Washington. (He was interviewed by the OPR at the Safeway Building.)

If your information is limited to McCullough's role in the Invaders, you have been seriously underinformed, meaning also misinformed. McCullough also penetrated the King Memphis party. At the moment of the crime he had just returned two of Dr. King's closer associates to the Lorraine Motel, where the party was quartered and where Dr. King was killed. McCullough had been driving them around.

That you were not aware of what I told the FBI about McCullough long ago is clear from your statement that only as a consequence of his House assassins committee testimony had the FBI "begun to reprocess the McCullough records."

I am the one responsible for the national exposure of McCullough's spying career through a reporter friend, Newsday's Les Payne, who followed leads I gave him when I was unwell and unable to continue my personal investigations. From this also, and long before the beginning of the processing of the FBIHQ MURKIN files, there was no 7(D) remaining for McCullough. The FBI knew of his exposure, if not from its own records, then because I told it, because it had Les Payne's stories and because there supposedly was an FBI investigation of them in Memphis. Director Kelley's letter reporting the investigation is in the case record, as the FBI and counsel should know.

The actuality is that while McCullough's committee testimony in and of itself should require a new look at the FBI's withholdings, the only reason this is now necessary is because of the stonewalling that has persisted since I first informed the FBI, about two years ago.

Between the time the FBI knew what was public about McCullough and his committee testimony, the situation was ripe for what was plucked from it, an enormous disinformation by Mark Lane and his publisher in his book Code Name Zorro and its promotion. There was extraordinary attention to the disinformation, which extended to prime time TV, coast-to-coast.

If my recollection is correct, the first mention of McCullough in the FBIHQ MURKIN file is as the first person to reach the side of the victim, Dr. King. I am certain he was accurately identified in these records. McCullough also appears in other and earlier FBIHQ files, those on the Invaders and on the sanitation strike. For the additional reason that the FBIHQ records disclose that McCullough's spying career was no long secret, there was no basis for withholdings relating to him.

This also gets into the area of the de facto withholding of the Louw/Life pictures, an issue that is being adjudicated. (For the record this began with FBI false swearing, that FBIHQ file search disclosed no pictures of the scene of the crime, whereas that source discloses three different sets of them.)

Looking at the actual McCullough situation another way, the view is not pretty in terms of the accomplishment if not the purpose of the withholding:

A spy penetrated Dr. King's party. He may or may not also have been one of the provocateurs who caused the violence without which Dr. King would not have returned to Memphis to be killed there. This police spy, who was a personal contact of the FBI, which also received xeroxes of his reports, was the first person to reach the victim. The FBI then undertook to hide his true identity, although that

was within the public domain. It swore falsely to hide the existence of a photograph that shows the spy, McCullough, crouched over the fallen Dr. King. And now, when it faces an element of compulsion, the reprocessing required in 1976 is attributed to his public testimony of late 1978.

If the situation is innocent, the FBI has made it look ugly.

As do the other illustrations I provide, this kind of thing impinges on the independence and the integrity of the Department's review authority, a matter I would hope might concern the Department.

You next (page 14) approach a different element of 7(D) use with the same problems of artificial FBIHQ MURKIN limitation and lack of context: "... cited to protect the actual documents furnished by the Memphis Police Department, the Royal Canadian Mounted Police and New Scotland Yard."

Where this is true the truth is too small a percentage of the overall. There are other questions that cannot be ignored, one being of waiver. Some of the withholdings are of political nature. Most are of names, known names, known to be police personnel, some of rank.

The question is not of couments alone. While the withholdings do not permit a definitive statement, I believe many are disclosed but in partisan, selective form, some in their entirety.

With regard to the known names of these police, this case is historical. In a fair percentage of the instances, the names are those of subpoenaed witnesses, names narrated at the guilty plea hearing, names made public by the police units involved. The only apparent purposes of withholding them are obstruction and harassment. No privacy is protected, no secret sources are hidden.

If withholdings outside the FBIHQ MURKIN files, which do not include the very extensive domestic intelligence files that are part of my request and are within my appeal, are considered, political purposes are apparent. These range from the FBI's traditional desire to hog credit to the creation of confusion in any study of the domestic intelligence files, most of which never reached Washington and a large percentage of which have already been destroyed. With the cross-over between the domestic intelligence activity and the situation that led to Dr. King's return to Memphis and his killing, there is obvious and important historical interest as there is need for full disclosure to offset the Lane and similar disinformations. As you are aware, I have sought to defend the FBI from Lane's defamations and fabricated accusations. Or, there is an FBI interest in full disclosure, too.

The content of some of the Memphis police records has been used publicly and

selectively. The result of partial use includes false reports that relate to the allegedly basic facts of the crime and the incrimination of Ray.

Memphis police records have been disclosed to me, hundreds of pages of them. I am aware of FBI affirmations to the contrary. Obviously, I can produce these copies if the FBI continues to misrepresent the description of the records it processed and gave me.[2/]

While with foreign police the more common question is of the withholding of nonsecret names, I'll provide examples of disclosed Scotland Yard records.

Disclosed records tend to lead to the belief the FBI wants to be held by others. There was coast-to-coast TV use by the House assassins committee of a previously disclosed record that made Ray look guilty of robbing the London bank with which he was not charged.

Can there be selective disclosure under the claim to a need for total withholding lest international police collaboration collapse ruinously?

Then there was the FBI's production of a live witness, Alexander Eist, a Ray warder, to be a prominent, televised perjurer before the same committee. He and the committee both credit the FBI with arranging for his testimony that I am telling you the FBI knew in advance would be perjurious - but would also be the kind of perjury that supports its record in this crime as well as its claimed solution.

In 1976 the FBI disclosed to me records establishing the falsity of the Alexander Eist testimony it arranged for late 1978. If the London Legat records have not been purged, it is inevitable that they hold more of this withheld information that by the Eist testimony becomes additionally important historically. (Again, I have no personal interest in this but pursue public responsibilities.)

I know of no way you can perceive this fr m FBI MURKIN files alone and my actual police appeals are not limited to it.

I can provide other illustrations. I have addressed those you raised to reflect how impossible a meaningful review of actual compliance is from FBIHQ MURKIN records only and to show how misleading testimony based on it only actually is.[3/]

That the Court was misled is clear on page 25: "Well, it sounds to me as though some of the points raised by Mr. Shea that if Mr. Weisberg wished to call to their attention specific cases, like the McCullough case, they would have something to go on."

This two years after I first took it up with the FBI, the identical case.

Ms. Ginsberg sought to exploit this on the next page, asking that I assume the burden of proof: "... allow the plaintiff a period of reasonable time to come back to us to show us,' 'Yes, on this page I do need this agent's name, on this page I do need the street address,' and the like."

I will not consider doing any of this, over and above what I did long before this misrepresentation by Department counsel. What I have done of this description is the length of not less than two book manuscripts. The pretense that I had not done this is an added and less accidental deception. Government counsel, of Civil Division, has knowledge of my long consultancy memo, for example.[4/]

Prior to the processing of any Murkin records, the Court ordered that no FBI names be withheld (6/11/76). Prior to that, as the record shows with a copy of his letter I have given you, Director Kelley stated policy, that in historical cases FBI names are not to be withheld.

I regard the withholding of these names after the Order as contemptuous and I am not about to let the FBI or counsel waste more of my time and life in providing such added specifics. These names should never have been withheld to begin with. Until the Act was amended in 1974, they had not been withheld. The Warren Commission, with the then Director's approval, printed a great volume of FBI reports in facsimile, without a single such excision in the estimated 10,000,000 words of its 26-volume appendix. There were no such withholdings from the thousands of FBI records available at the Archives, which provided xeroxes of them.

This represents an inappropriate effort to bypass a years-old appeal that has not been acted on and in fact is contrary to your testimony.

This exhausts the specifics of what Department counsel (page 3) presented as the results of "the re-review of the records in this case," what the Department represents "was our feeling ... at this point it would be most appropriate for him to report directly to you (the Court) as to what he found."

In a historical case of this significance, where in an erroneous and understated account of the volume of FBI files alone the Attorney General stated there were more than 200,000 outside of FBIHQ, this "report" is of two names only where admittedly the 7(C) and (D) exemptions were overused. Some "report," some "re-review!"

In a case in which I have been dragged to the courtroom more times than I can or want to remember; where the judge was imposed upon as extensively, the Department's practice in this case; two names, an indefinite reference to other police components and general, often meaningless and irrelevant generalities is what it is the "feeling" of the Department is "most appropriate" as the complete "report" of what an extensive "re-review" has "found" - after three years?

(If this is a "re-review" I do not recall any results of any earlier "review."

In a case in which I have provided the Depart ment with a single book-length accounting of specifics of noncompliance abstracted from longer and ignored accounts

of the specifics of noncompliance written earlier to the FBI, and have in addition provided other specifics of noncompliance and explanations of them, all in writing, plus hours of time in personal explanations, often accompanied by copies of the FBI's and other records. This is all there is of the "report" except what is philosophical, general or irrelevant?

I use irrelevant in the sense of applicability to my appeals and with regard to the protested withholdings from the records provided. The testimony is not irrelevant in other ways because it was misused by Department counsel in still another Department effort to rewrite the Act through me and to try once again to place the Department's burden of proof on me.

There is still another impropriety in the previously quoted effort of Department counsel (page 26), to have the court have me specify, "Yes, on this page I do need the agent's name, on this page I do need that street address." It is incredible to me that the Department would so ignore the purposes, language and legislative history of the Act and its amending. I tell you straight out that as a matter of principle it is none of the Department's business why I "need" any public information. The information is within the Act and required to be released or it is exempt. Period.

Few efforts could be as subversive of the Act as an official demand to know the requester's purposes.

The Department knows that most of the kinds of narrow matters used as illustrative by Department counsel are not because I "need" them. Rather have I appealed them because of the role into which the Depart ment itself forced me, of serving public interest over my own.

And as you and the Department also know very well, I have gone to truly extraordinary lengths to provide precisely this kind of information to the FBI and the Department and had it ignored as close to totally as the FBI's well practiced stonewalling capability made possible, with Department tolerance, which means sanction.

Countless contemporaneous written communications to the FBI were sent as fast as I received and read the records that were provided over a period of many weeks. Sometimes I did this overnight. The student's long memo based on a selection from these communications was ignored for a year and then stonewalled. 5/

I repeat that the Department forced me to become the Civil Division's consultant and then refused to pay me or refund my cash costs. I provided a lengthy and detailed memo with full explanations, all based on what I had already given the

FBI. It details precisely what Department counsel, knowing better, sought to lead the Court to believe I had not done and must do under the Act. This is no less than an effort to deceive and mislead the Court. I castigate it for what else it is, an additional abuse of an aging and unwell man in what clearly is part of an ongoing official campaign to "stop" his work, that being the word used internally by the FBI in C.A. 2301-70, the case that led to the amending of the investigatory files exemption.

I repeat this because in practice, as the actuality, the generalities of this philosophical approach, of this effort to avoid all the specifics of my appeals and my allegations of noncompliance, and the false picture that I did not provide them constitute still another deception. I illustrate this with citation of these generalities, all appearing to have the purpose of saying the FBI processed the records well when the contrary is true of those in question.

"In terms of the volume of information released ... there really was not very much excised or withheld in terms of what I would describe as substantive information." (page 5)

You state no basis for any knowledge of what is or can be substantive with regard to the crime, the strike and political situation that led to the crime, the conditions in Memphis at that time or the FBI's investigation of them. I have given you examples of what is substantive that does not appear to be except to one who has considerable subject-matter knowledge. Moreover, what is substantive is not limited to the concepts of the FBI and its substitute for an investigation of the actual crime.

"Volume" is a deception if used as an evaluation. Let us take 50,000 as the number of pages so far disclosed to me. This is more than twice the size of the MURKIN HQ file to which your partial review was limited, deceptively represented by counsel as "the re-review." Let us take as 200 the number of words per page. (You may not know it but a large number are of closely typed single-spaced pages not characteristic of the FBI.) This means that about 10,000,000 words were released.

I have not calculated the number of excisions or their extent, although in the information I provided t e FBI and the Civil Division there is what is more material, their significance and where pertinent in individual cases, their extent. But let us suppose that only one percent of these pages was withheld. This is enormously less than was withheld. One percent would be only two words per page. By your artificiality one percent surely would be "not very much." But if we cast

aside the meaningless standard and stick to fact, it is 100,000 words. This is three times the length of a modern book, hardly "not very much." (Actually much more is withheld.)

I see no constructive purpose in what can be misleading and is an irrelevant formulation. I regard it as inappropriate in a report to a court. It defends the FBI's processing record by not addressing what is at issue in this case. It does not defend the FBI's record of processing of what is at issue. I have not appealed and there is no issue in what you referred to, such things as the multitudinous crank letters and reports of concerned but uninformed citizens. These are much of the file and of the information withheld, but they are not part of my request and are not what I appealed. They thus are not before the Court and are not properly part of any report to the Court of either a review or a feeling or what was found as a result of my actual appeal or as a report on compliance with my request.

You next say "There were errors, there were inconsistencies." (page 5) This is to say that there was improper withholding. What you do not say is that the FBI was witting if only because on a regular contemporary basis I provided precisely this information to it, as I did a year ago to the Civil Division. There has been knowledge of this, uncontested knowledge, usually within a few days of the commission of the "errors" or "inconsistencies." There has been no rectification, although some unkept promises were made.[6/] Instead, they were persisted in to create a difficult and costly situation, one that perpetuates noncompliance and now means either permanent noncompliance or going to the cost and trouble of undoing a wrong that was known to be a wrong when it was being perpetrated. A case in point that is quite comprehensible without explanation is the deliberate and continued violation of the Court's Order on the withholding of FBI names. That Order preceded the processing of the first MURKIN page.[7/]

After stating what I dispute, that not "very much" of what you called "substantive information" was withheld (page 5, lines 13-4), there is another generality that does not apply to this case: "... the initial processing of the headquarters MURKIN file really was quite good by 1976 standards and in the light of facts as they existed in 1976." (lines 19ff.)

Despite our disagreement over what is "substantive" in this case, by indirection you in effect admit that there was withholding of substantive information, obscured somewhat by bracketing with "volume." However much "not very much" may be by "volume," it is your testimony that "substantive information" was withheld.

Now on those alleged 1976 standards and facts, in this case the previously cited Order was of 1976 and the withholding of what was in the public domain was of

1976. Do you require more to agree that your generality has no application in this case? What pertinence is there in referring as a generality to whatever standards you say existed in 1976 under the unchanged Act where it holds no exemption permitting violation of a court order or the withholding of the public domain under claim of privacy protection and similar spurious representations?

Comparison with alleged 1979 standards is a further attempt to say that as a generality the FBI's processing "ranged from quite good to almost excellent" when you do not state that this relates to withholdings I appealed in this case. You also do not state that this evaluation relates to any question at issue in this case.

"Excellent" to violate a court Order in 1976 and thereafter? Or to withhold the public domain in 1976 but not in 1979?

The FBI might appreciate this overreaching by inapplicable generalities but I do not and I believe that when I have provided all the specifics I have and have had them neither acted upon on appeal or had the FBI claim they are not proper appeals, a report to the Court should concern itself with what is actual in this case and in reponse to my appeal of withholdings, not to generalized gobbledegook relating to nuts and the like, matters not in question.

Your testimony is subject to the interpretation that your review established that the processing of the records provided in this case ranges from very good to excellent, despite my appeals which have yet to be acted on. Unless you are prepared to make this specific testimony with regard to the appeals I have made and th e processing of the records over which I have appealed, including the violation of the court's Order and of the withholding of the public domain, I believe this also should be corrected voluntarily before I am impelled to defend myself, my interests and my reputation.

You testified (page 5, lines 23-4) that there are "errors" and "inconsistencies." Is it not the function of the appeals authority to see that the improperly withheld information is provided in compliance with the Act? This has not happened. As you did not testify, the FBI refuses to correct its errors. Unfortunately, this also is not included in the report to the Court.

After this you evaluate as "the most important" factor the existence of the House committee appointed to investigate this crime and the assassination of the President and the functioning of the executive agencies, the latter function, the sole legislative handle, not being mentioned (on page 6).

If as you state this and other "factors" mean that as of now the "material" that was withheld "just doesn't qualify, factually at least, for continued with-

holding," (page 6) why do I not have it? Why drag this further through the Court? Why not provide it and see if there remains noncompliance? Why pretend contrary to this, which is what the thrust of the whole thing does, that there was compliance and that I am niggling?

Why especially when "As a general proposition, I want to state that this is a conclusion with which the FBI agrees." (page 6, lines 24-5)

Did not the FBI tell you that this committee dates to 1976, when all that is true of it now was true then?

You next refer to the withholding of FBI names (page 7) as a generic and an inconsistency. If either the FBI or Department counsel so informed you, both should know better. It is not a mere inconsistency. It is a deliberate act, defended in court. This led to the Order. You return to this on the next page with another serious factual inaccuracy I presume you made in good faith, believing the FBI: "... the Bureau has already offered to, on a number of occasions to put back in the agents names and clear up that inconsistency."

This is not true. I ask that you provide any letter the FBI wrote me in which it so stated or made the offer. FBI letters accompanying more recent of the records I received make the same claim. The practice has not ended. It is persisted in in this case and in current JFK assassination cases, also historical cases. I do mean this literally. It is the current practice in the most recent records I have received and is the current practice in three of my other cases in court.

The fact is that the FBI has steadfastly refused to provide the excised names. I made a number of requests. At least two different FBI counsel from its Office of Legal Counsel, the AUSA and the Civil Division, all supported this withholding position, disputing your testimony. I cite the record, not what you were told.

But again, if the FBI is willing to reprocess these records it processed improperly, in deliberate violation of a court Order, why has it not done so at any time over the past three years, why does it continue with this improper practice in current cases, and why did it not attest to such a willingness in the Beckwith affidavit rather than at that recent date, the most recent affidavit it has provided, refusing to do so?

If I do not question your personal good faith in this representation, it does mislead if not deceive the Court. I regard that as serious.

The fair test, it appears to me, is not any allegedly expressed willingness

carefully kept secret from me but actual performance, which is not kept secret from me but appears to have been from you.

What is really in question, although one would never know it from Department counsel, is not the plaintiff but the FBI. This is further obfuscated with your next protection of the FBI (pages 9-10), which infers that I did not agree with two name withholdings. The fact is that I did agree, which makes this also a non-issue, one not necessary to raise at either the cost of what was not addressed or at the cost of the time available to my counsel.

This relates to the withholding of the names of two FBI SAs, the only two you found justified. You told me that one had infiltrated the Minutemen, known to me as violence-prone. I agreed to that withholding. When you said the second involved Dr. King, of all the agents involved in those dirty tricks it was easy to guess which one this was. I explained it to you, not you to me. I gave you the detail you did not go into, and before you could ask I said it should be withheld. (Not under the standards of the GAO report, as an example of standards. Rather in the interest of his family, as I see it.)

If you felt that you had to raise this nonissue, I feel it should not have been in any way that the Court could misunderstand or Department counsel at some future time misuse. In context it is not fair not to indicate that I agreed to these withholdings.

However, there is an interpretation of this that you did not provide and Department counsel chose to ignore in the prior quotation. This interpretation is that in all these many pages you reviewed you found only two cases in which you deem it justified to withhold FBI names. On this basis alone, even if there were not the Order and the Director's policy, why were they withheld to begin with and why was restoration of them refused so often, so long and the practice persisted in to this day?

At line 18 of page 11, in the quotation that follows you go into another and once again opposite-to-fact generality relating to privacy claims, I presume once again based on what you were told. You present as the actuality in this case what is not actual. This was promptly misused by Department counsel in this identical way. Your testimony suggests I have not done what allegedly I should do. The judge took it exactly this wrong way a few minutes later. If I do not believe or suggest that you had the intent to mislead or deceive, I want to be explicit in stating that the FBI and Department counsel are well aware of the truth and that the <u>actual</u> situation <u>in this case</u> is <u>not</u> reflected by:

"... particularly in historical cases, the Department of Justice and the Bureau have always been willing to reconsider any denial made on privacy grounds on the basis of some particularized information that may be furnished by a requester, a researcher or writer who comes back and says ... 'I think it is significant,' and then we have always reconsidered that kind of a request and usually it has been determined that it overrides the more or less across the board privacy line that we have tried to draw. And, of course, we are going to do that in this case, too."

If "we are going to do that in this case," may I ask when?

This case is more than three years old.

Through all these long years of my effort, this has not been done.

The fact is that I cannot estimate the number of hundreds of instances of my doing exactly what it is suggested I did not do and should have done. While in reality knowing what it is doing to meet its burden of proof is the responsibility of the government, not the requester, I have devoted an enormous amount of time, hundreds of pages of typing, to presenting this kind of information. A more total ignoring of it I cannot imagine. This makes your representation quite hurtful to me in this particular case and did have the effect of misleading if not deceiving. More so when with something else in mind, not specified in your testimony (page 12, lines 7ff.), you said of "the kinds of excisions I was just showing" that "there are certainly many of those that I personally would continue to affirm, absent such a particularized showing."

You did not "show." I presume you had the irrationals and well-intended but wrong citizens and such in mind, but they are not an issue in this case. This after the inaccurate representation of my record of informing in this case becomes additionally prejudicial and hurtful. I would hope that you would want to see to it that the judge does not continue to labor under the induced misimpression represented (page 25) where Mr. Lesar's effort to examine was cut off, a decision to which I believe this and similar testimony contributed.

"Particularized showing" is included in what never once was mentioned, all the specifics and details I did provide.

Earlier I referred to the Department's and FBI's effort to perpetuate improper withholdings through the most recent of its affidavits in this case, that of SA Beckwith of 8/11/78. While I could refer to much more in this regard, I limit myself to what is known as the Milteer/Somersett matter, threats against both President Kennedy and Dr. King. Some of these records are relevant in this case. I also filed a separate request many years ago and have received no response.

Such a "particularized detail," iterated and reiterated, was wasted, FBI norm.

The records remain withheld, even after I produced proof of the falsity of the representations made to persist in the withholdings and two fat volumes of these records released to another who requested them after I did and obtained them prior to the execution of the Beckwith affidavit.

Contrary to your testimony and the information on which I presume you based it, once the FBI and Department learned of the FBI's false statements under oath and the fact of the release to others, the FBI provided no records and the Department did not see to it that copies were provided.

This is typical of the actualities of this case, not what you were told by others and include in your testimony and not those glossy generalities.

With regard to "particularized showing," as I say above, at considerable cost to myself I have undertaken to do this from the first and in fact did exactly what the Court was led to believe I had not done and that if I had the FBI would have complied. Under these circumstances and particularly because this is another unfairness possible from your testimony, I hope you will want to take steps to make the record clear and accurate and that I will not face the need regarding this part of the testimony.

If you doubt the influence all of this had on the judge, I again refer you to page 25, lines 18ff.

Your testimony also illustrates that untruth can be conveyed by the literal truth if the truth is incomplete or out of context, as at page 14, lines 7ff:

> "...' the Memphis Police Department advised us that its documents were not to be released. Mr. Weisberg suggested in this case that we at least contact the Canadian and British Governments. I discussed this with Special Agent Beckwith and he was able to get this done by the Bureau. The Canadian Government has come back and said that its documents are not to be released. Our request to the British Government is still under consideration by the Home Office."

It simply is not accurate to represent the appealed withholdings by reference to documents only. Nor is it in any sense truthful to represent that no such documents have been released for they have been and recently were used on coast-to-coast TV by the House assassins committee. Most of the relevant appeals relate to the withholding of police names, willy-nilly, when there was no need and no justification. In virtually all, if not in fact each and every instance, the withheld police names were already public. Some were subpoenaed to be witnesses or were included in the guilty-plea narration. The names are of no interest to me in my personal work. The withholding, aside from harassment, serves only to create future confusion when there should be no unnecessary confusion in an historical case.

Even the name of a ranking RCMP official who held a press conference was and remains withheld. The names of those who arrested Ray, well publicized and not all alive, were and remain withheld. These withholdings relate to four countries, not the two you identified, and it includes other people in public and known functions, like the Canadian passport clerk in Lisbon and the Portuguese inspector of police, both of whom were narrated and I believe subpoenaed.

Xerox copies of hundreds of pages of Memphis police reports were given to me by the FBI, regardless of what you were told. With foreign police and the Memphis police, the FBI followed a practice of releasing those records when they serve to further what the FBI wants to have believed, especially of a political nature. At the same time the FBI withholds records that can contradict the FBI.

Scotland Yard, according to the FBI's records, did not want mention of Ray's participation in the robbery of a bank at Fulham, with which it did not charge him. This did not deter the FBI's making public disclosure of the actual documents and enabling their TV use by the House assassins committee. The Memphis police did not want public disclosure of the records of its vast domestic intelligence operation and its penetration of local groups associated with Dr. King's presence there. The Memphis police, despite action by the local federal court, burned its copies of these domestic intelligence records to prevent their disclosure under court order. However, because those hundreds of pages the FBI gave me tend to make it appear that the FBI's own extensive domestic intelligence operations were justified, the FBI had no reluctance in giving me copies of its records and those of the Memphis police.

The real question is of arbitrariness and capriciousness, a polite way of referring to what is really making propaganda under cloak of selective use of exemptions. There is also a question of waiver. Can the FBI give me copies of hundreds of pages and paraphrases of many other pages and then withhold other such records, including those paraphrased? Am I - are the Act and history - to be captive of the FBI's political interpretations and selections?

My interest in documents is limited to crime-related actualities. The official interpretation of these withheld records is public. Is no one to be able to check them for accuracy or omissions? My interest in police names, not mentioned in your testimony although I discussed it at length with the FBI, is recounted below.

I illustrate with a Scotland Yard record that was disclosed and was used on national TV by the House assassins committee. This is the note used in the robbery of the Fulham bank, which netted not much more than $200 United States value. That note was identified as lettered by Ray. This made it appear that Ray alone robbed

that bank, as he in fact swore to the committee. I am certain this is false, that another was involved. Whether or not this bears on conspiracy and however slight the possibility may be judged by officials, I believe there is no possibility too slight to be considered in a crime of this magnitude and with these consequences. Disclosure on a selective basis, as with this suggestion that Ray was entirely alone, amounts to the conversion of the Act into an instrument of official propaganda.

Nor is this the only disclosure by actual copy of Scotland Yard records. There is another in the record in this case. It is the record of a phone call to Ray in London from one Chandra Dutt. I received nothing else on or relating to this record, which was used for another purpose, to place Ray in a certain place in London. For all I know Dutt was an airline clerk, not a criminal associate. But the fact is contrary to the FBI's representations. There was also this disclosure of a Scotland Yard record for an FBI purpose. No other relevant records have been disclosed. We don't even know who Chandra Dutt is - innocent clerk or master criminal.

Still another Scotland Yard disclosure, again partial, is of the contents of Ray's wallet and luggage. What could be used for official purposes, without regard to any Scotland Yard interest or position, was disclosed to me in xerox form. All else was withheld. There is substantial reason to believe that what is withheld leads to a Ray associate or associates if not co-conspirators. Copies were provided of what could be given prejudicial interpretation and as made public was given a prejudicial racial meaning.

While without doubt some confidential relationship between police agencies is necessary to the police function, this need ought not be available as a special pleading for what amounts to official propaganda because of partial and prejudicial disclosure. Where there are no real police secrets, where only information allegedly related to a crime a decade in the past is involved, there is no proper police secrecy involved.

You report that only now has the FBI consulted these other police agencies. Two years ago I asked the FBI to do this with regard to the names the FBI withheld, which tended to create confusion in the records as disclosed with excisions. Finally, in the summer of 1977, it agreed to write such letters and provide copies. I agreed to abide by the decision on the names if the facts were set forth in full. When quite some time passed and I received neither copies of these letters that were to have been written nor any responses and the same withholdings were persisted in, as to this very day they are, I asked the FBI about this. It then informed me that it had not kept its word and would not.

This is not the only agreement the FBI made and then broke without informing me as I tried to work out acceptable compromises.

What the FBI now - two years later - appears to have done is alter the formulation of the request to guarantee a negative answer. Meanwhile, the stonewalling is perpetuated with the continued withholding of information long in the public domain, like the names of police who were subpoenaed, even the deceased. This serves no need, no legitimate purpose. It is harassment.

This and prior illustrations mock the Attorney General and the historical-case determination. They create confusion and bewilderment where none need exist. They make much more difficult any effort to study or assess the FBI's performance and accomplishment during and after this heinous crime. It is a Cointelproing of all interests other than FBI political interests.

I suggest this also mocks the entire appeals process if and when it is limited to taking the FBI's word and reviewing records of the FBI's own selection and searching. As the top reviewing authority, I encourage you to examine the information I provided prior to your review in the interest of your own integrity and that of your Office.

I interject this opinion and suggestion at this point rather than awaiting the end because it is clear from your testimony, first, that there was misrepresentation to you and also that you were unaware of the actual disclosure of actual records provided by Scotland Yard, and I add not by it alone. Your personal good faith may be without limit but in fact you are captive of the FBI when this can happen and in this sense review becomes a rubber stamp. You alone, with the greatest determination possible, cannot erect a corral around all the wild FBI elephants trampling the FOIA forest. The result is abuse of all parties, including plaintiff and Court, who must assume good faith and due diligence on the part of the reviewing authority and who in most cases do not have independent means of assessing or addressing these essentials of compliance in FOIA matters.

A case of this magnitude may come to an end at some point in the courts but in fact it is of an unending magnitude and significance. At some point all these malpractices and abuses will seriously embarrass the Department and the government, whatever the administration then may be.

It should be apparent that to this point in my review of your testimony you lacked information essential to your role, yet were called upon to give expert testimony.

I select this point for the interjection after noting the fact that there has

been disclosure of what it is represent cannot be disclosed without wrecking what all good people and certainly the courts want, interpolice cooperation, because of the dishonesty of the claim that there can be no disclosure when in fact there has been significant disclosure. With the propagandistic use of the disclosed records, the situation becomes a combination of the most serious abuses, not the least of which, in addition to what I have suggested, is the conversion of FOIA into an instrument for the protection of official propaganda.

If you ever get to a real review of the still stonewalled "other writers" Item of my request, you will learn that information from these other police agencies was selectively leaked to a sycophantic writer whose writing in favor of the FBI's solution to the crime, not recognized as propaganda, was a major turning point in the criminal case.

As I resume the page-by-page review of your testimony, I note also that those subjects I do not address as they appear are addressed in other contexts and at other places. I intend to ignore nothing of any consequence. I hope that a by-product will be to give the Department an independent means of assessing the actualities of reviewing the withholding of what the FBI is determined not to disclose in a major case in which there are such voluminous records, so many of which the FBI has squirreled away outside of FBIHQ.

Throughout, whether or not I use the word, I am always addressing what in this case, for various reasons and from varying perspectives, is substantive. I do not believe that under the Act this is a distinction of any meaning nor do I believe that the determination is vested in any official. In addition, as I am confident I can illustrate with countless specific cases, I do not believe that you can be certain of knowing or determining what is or can be "substantive" in a review limited to the FBIHQ MURKIN file.

Despite this, whether or not intended as a justification of continuing FBI withholdings, you state of the uses of 7(C) and (D) on pages 14 and 15, admittedly as "an aside, I would throw in here" that "the central theme" of the Bureau is that "they tried to release as much substantive information ... as they felt they possibly could." This is ridiculous when the FBI engaged, for one example, in wholesale withholding of what is and long before then was within the public domain. It is but another illustration of what I have termed review captivity by the FBI. Moreover, for years the FBI, supported by the Department, has continued these withholdings. They exist as of this day.

This memorandum holds many illustrations, if only a minor proportion of those

provided the FBI and Civil Division and they appear not to have provided you. It makes you and your Office look ridiculous, for it has you in the position of saying that the withholding of the names of supposedly important witnesses and much other information already in the public domain proves that the FBI "tried to release as much substantive information as they felt they could."

(I am at a loss to understand why Department counsel had you ignore my consultancy memo in your testimony. Counsel had a copy.)

When you follow this with reference to "technical" application of exemptions 7(C) and (D) (page 15), you again lack reference to the specifics I have provided or context with the subject matter and the public domain. Your description of the withheld information as "peripheral," still again without any specifics, at least suggests unimportance or frivolity. The record and the judge have inaccurate information and I face the Hobson's choice of responding and lengthening a large case record or fisking damage to my interest if I ignore it. From the permeating lack of specifics there is no certainty, but I believe it is probable if not certain that you were again philosophizing and not referring to the specific withholdings of my appeal.

The misrepresentation is magnified (beginning line 5) when you say, "I have discussed this with the Bureau and we are in agreement that we would certainly again (emphasis added) reconsider an excision of an identity on the basis of a particularized showing of need ..."

I am not aware that any showing of need is included in the Act under which the entire burden of proof for any withholding is on the government.

Worse, this is gross misrepresentation. First, there has been no prior review ("again reconsider") and I have received no replacement copies. Second, what in the world have I been doing for all these years and in all these many, many thousands of written words other than your testimony represents I have not been doing? I have from the very outset of this case done exactly that. I regard it as exceedingly unfair for there to be this ki d of misrepresentation of it. Whoever told you otherwise owes you, the Court and me an apology and a retraction.

For what other alleged purpose did the Civil Division pressure the judge into having me act as its consultant? For what other purpose did I waste all of that added time? (By this I mean that long before I had fully informed the FBI with countless "particularized showings." Once again I suggest that your study of the 8/11/78 Beckwith affidavit and my response will be illuminating to you on this score also.

Perfection is not a human condition and the FBI's excisions, as I have stated repeatedly, are of a nature that is certain to lead to misunderstandings and misidentifications. However, the Civil Division, the FBI and you have failed to call to my attention any serious error in this very long memo and it is of "particularized showings."

You address the use of exemption 2 (page 15, lines 19ff.) with a tacit admission of misuse, which is my allegation. For practical purposes this means 7(D). The standards are not identical. The FBI's misuse of exemption 2 is not accidental. It was used where I could rebut 7(D). Please also remember that your review is limited to FBIHQ MURKIN records. After they were processed, when I was complaining about claims to exemption 2, SA John Hartingh told my counsel and me that its use was not justified. I believe his words were "we should not have used it." Where another exemption fits and there is no meeting of the "solely" requirement, this is no exaggeration. However, what then ensued is a much more extensive use of exemption 2 in what you did not review, the field office records.

You refer to the source symbol and state what is truthful and I have already alleged in this case, that the symbol alone does not identify the source. One example is that it permits evaluation of both the source's information and of the FBI in its evaluation or representation of that information, more important in an historical case so redolent with the stench of the crime and of the past.

The withholding of FBI file numbers does not "tell the world that the individual Has been the subject of an unrelated FBI investigation." (page 16, lines 11ff.) This is clear not only from observation in this case but from the 4/10/78 Comptroller General's report. The disclosure of an FBI file number in fact discloses nothing about any individual not already disclosed by name disclosure.

What can be disclosed by the withheld file number includes other relevant records not searched and FBI improprieties. The fact is that outside of FBIHQ MURKIN records there are innumerable disclosures of file numbers in direct and unequivocal association with names. The difference is that in each case the names with relevant file numbers, both disclosed, are of those not liked by the FBI, almost invariably in a racist and political context.

This again gets to the inherent incompleteness and undependability of expert testimony allegedly to compliance and based on nothing outside the artificiality of the FBIHQ MURKIN file. I have told you and I repeat the field offices are the "cover" of and memory holes for FBIHQ.

Perhaps on this also you accepted the FBI's word.

Whatever the explanation, your testimony on this is not factual. It does not address what is actually withheld or why or any consequences or materiality. All, I believe, are significant in historical cases.

With regard to what you testified to relating to rap sheets and 7(C) (at the bottom of page 16), I am in general agreement. But with regard to some names in cases like this it is not necessary for the requester to make what you refer to as "particularized showings." Some are included within my request. Others, as with J. C. Hardin, Raul Esquivel and those of obvious significance in the FBI's own investigation, "particularized showing" is inherent, obvious in any reading of the disclosed records. These also are necessary in the sense of your Stephens reference on page 13, on credibility.

An example is the disguised and withheld source of the OPR's criticism of the FBI for alleged failure to investigate the possibility of a conspiracy based on information from those whose motives and credibility are very much in question and are, of course, relevant. You are aware of this as it related to "the Byers matter," the House assassins committee and its public hearings following orchestrated leaks. (The only alternative source of the leaks is the FBI and/or the Department.)

The OPR's and the House committee's criticisms of the FBI on this score are entirely unfair to the FBI. Each sought to use the FBI as a whipping boy. I have read all those kinds of reports with care. In no single case did the source have credibility. In all the cases where the FBI did not withhold records, the FBI proved without any doubt that the reports were not genuine. However, without knowledge of the records of those sources whose records are not available, evaluations become difficult if not impossible. I believe the withholding of any rap sheets is not in question in any other sense.

I have never claimed there are no legitimate privacy considerations in historical cases. With regard to this and to 7(D), the record is one in which I have called disclosure of what should not have been revealed to the FBI's attention and to yours.

Inherently, while avoiding saying so, you agree with me that exemption 6 should not have been used. (page 17, lines 10-12)

"I am not aware of any 7(E) excisions that are still being asserted by the Bureau for techniques and procedures." (page 18) The fact is I have appealed the use of this exemption in this and in other historical cases, without response. The

FBI has not even bothered to deny that the techniques and procedures are well known. I believe that one figure I used is how "Daniel Fit the Battle of Jericho," so old is that technique or procedure. The claim has even been made for "pretext."

Where you state there was little use of (b)(1) (page 18, lines 18ff.), I believe that in other files there was more extensive use.

What you describe as your "wrap up" begins at the bottom of page 19, first wit "the general methodology that was involved in filing documents ... processing of the request for those records ... but again based in substantial part on specific leads furnished by Mr. Weisberg in the sense of things he asked us to look at from this point of view, we have gone considerably beyond what I think the Freedom of Information Act customarily requires."

One of the reasons for this underscoring is several determinations by the Attorney General to which there here is no reference, the historical case determination and his 5/7/77 statement of FOIA policies and practices, which was not followed in this case. Your testimony does not address this.

And, unfortunately, there is that same artificiality of limitation to FBIHQ MURKIN.

In summary, you report that where I stated I was not provided with attachments you found those attachments missing. I was correct in this and Mr. Mitchell "even with access to the unexpurgated file ... cannot figure out what was the attachment." You do not state what was searched to locate these missing attachments. I am aware that the FBI claims it cannot find them. It is possible that in some mysterious manner all these significant records in this significant case were destroyed, as we have recently learned happened to a vast number of other delicate records - without any reported punishment.

The MURKIN and related records were moved and shifted on a number of times and to a number of places. They were searched without being moved on other occasions and for special other purposes, as to a degree the files themselves reflect. There were two reported internal "re-investigations" prior to those of CRD and OPR. Several committees of both Houses of Congress had to be served and were, over a period of several years.

On 11/29/76, which is a year after I filed suit, permission was asked to move all of 44-38861, FBIHQ MURKIN, to Room 4436 for the Congressional Inquiry Unit, according to a Not Recorded Serial in 44-38861 stamp-dated "167 DEC 1 1976." (This one record includes six names of FBI officials with knowledge.)

So, while it may well be that the numerous attachments are missing while

all the junk remains intact and that Mr. Mitchell did make extensive effort, your testimony does not specify the kind of search indicated for the retrieval of missing records that are known to have existed and of which there is no record of either authorized or unauthorized destruction.

I regret that because you offered opinions about FBI diligence you did not testify to your experience with one of those supposedly missing records that you did ultimately find, deformed and gutted to where it is no longer the same record. As you know, the FBI denied the existence of the so-called Long tickler and that when you followed up my leads you did obtain what remains of it. It bears no resemblance to what it was, the FBIHQ control record of the criminal case, with some three dozen subject breakdowns. I have received no explanation of the effort to memory-hole it, to withhold it even from you, of the desructions and alteration of what remains from its original form. This is a most serious matter to which I do believe it would have been appropriate for you to testify. More so when you did testify to a careful selection of what I specified was not provided and you did not find.

You refer to missing laboratory ballistics and ballistics-type tests as of a nature in which "the logical argument for thinking you might see it is quite good." Only, "We can't find one." (pages 21-22)

FBIHQ is not the only place to look for such missing records, here the most basic of all such essential testing and vital to the corpus delicti.

Despite the foregoing, especially with the hidden history of the now decimated Long tickler which you found through me despite the FBI's denial of its existence and later claim not to be able to find it, you testified that "in the processing or the filing within this MURKIN file ... I will say categorically at a minimum" there was no "monkeying here" and "these are invalid accusations." (page 22)

If you had specified which allegations you may have had in mind and what you mean by "monkeying," there would be something other than smoke for me to grapple with.

You also have a built-in evasion in the artifice of "this MURKIN file." But you do not even state that the unspecified accusations were made in connection with that file or it alone.

Using your own illustrations, you do not represent that disappearing records in prior cases is normal within the FBI or that not performing or not being able to find the results of vital lab tests is par outside my FOIA cases. (As you know, this also is true of essential JFK assassination records.)

Of course I am not objecting to a balanced effort to be fair to the FBI. You are aware that I have made this effort and am perhaps alone among those described as its critics in defending the FBI from unjust and unfair accusations. I do not regard this testimony as balanced and I regret very much it lacks specifics.

Give me substance, not smoke, a fair sample, and let's grapple on the specifics of allegedly "unfair accusations."

Here and now I'll provide a few illustrations you should have come across or, as I have suggested, both the FBI and Department counsel are withholding from you.

I received a worksheet reflecting there was but a single page to a record and that it was provided to me. Later I obtained proof that the FBIHQ MURKIN file, exactly the one you cited, held three copies of the record and that it is of 29 pages, all relating to prior Atlanta threats against the assassinated Dr. King. After this, as I have stated, when I drew this to FBI and Department attention, there were the phony copies provided with the false Beckwith affidavit. You do not define "monkeying." If this is not within your description of "monkeying," please give me your description. Let us then see if it would continue to be "categorical."

I select a second illustration of the many available to me because it not only is within the knowledge of Department counsel, which presented your testimony as its rather than as I requested, the Court's, but because it involves a commitment to the Court and an earlier commitment to me by the Civil Division. This is the matter of a photograph and sketch I loaned the FBI through the local residency of the Baltimore Field Office. In camera in November 1977, which is to say more than 14 months ago, the judge was assured that these and all relevant records would be provided promptly. This has not been done, despite the assurance to the Court. I underscore the added importance coming from that assurance and its influence in inflicting that detestable and unpaid consultancy on me. Even the records cited in those provided remain withheld along with the prints. Moreover, these records disclose that the prints were returned to the local residency. It did not return them to me. No records of their disposition, in fact no record of any kind, is provided from the files of the residency.

You may not include deceiving and misleading a judge as "monkeying," perhaps because both the FBI and the Civil Division are involved in it.

This was part of what I regard as a major disinformation operation. I have been seeking to end it for years. You may not regard contributing to a disinformational effort as "monkeying." I do. (The House assassins committee also got involved in this.)

You also may not regard stonewalling, as in refusing after my request to search the files I specified and provide my property and the withheld records as "monkeying" but I do.

How about swearing to the Court that there were no crime-scene pictures and basing this on an alleged search of the identical file you refer to when in fact there are not fewer than three different sets of crime scene pictures identified and described in that file? Not "monkeying?" Or that the spy McCullough hovers over the corpse in those Louw/Life pictures. Not "monkeying." "Categorically?"

You do not define "monkeying."

The newest dictionary I have (Scribners-Bantam) gives "to play, trifle or meddle with."

Take your choice.

I deny this testimony and ask for confrontat on on specifics. I regard this as unjustified criticism of me, particularly because of the role into which the Department has forced me in this case. I cannot let it go unchallenged. The consequences are potentially serious. So also is the inherent personal criticism and reflection on my work.

This is not at all to say that I c uld not have made an accidental mistake. I can't be certain, as who can be without access to more than what was withheld on any particular page? I am certain I intend no unfairness. I believe my record on accuracy is good and should not be brought into question as is done by this testimony with the vaguest of generalities.

In the context of adjacent testimony, this becomes more serious. as the thrust of adversary testimony and as a general application to me.

Just prior to your generous and volunteered allocation of credit to others, including me, you testify: "... as I have indicated, I want to reiterate it ... once we have something to go on, that the Bureau's already reprocessing certain substantive information. I used the McCullough example ..." (page 22, lines 16ff.) (emphasis added)

I also will be "categorical." I do not know what has been added to the MURKIN HQ file. You testified to its holding two volumes more than were provided to me. I also do not know what the FBI or Department counsel gave you, if anything. So I "categorically" - and not accusing you of intent to speak untruthfully - state that for the FBI and for the Department there is no lack of "anything to go on." There is a very large file of my direct communications to the FBI. There

are many pages of my ignored letters to the Civil Division. There is the detailed noncompliance memo by the student. There is my long, two-part consultancy memo, as I recall of something more than 250 pages. There are my many detailed and specific affidavits with their numerous attachments. There is anything but a lack of "something to go on," regardless of what you were told, what was before you or what you were asked to testify to. Whatever of the foregoing you may not have known, the FBI and Department counsel were aware.

I regard this as more hurtful to me because of what precedes it. At the top of page 20 you say that your quest was "based in substantial part on specific leads furnished by Mr. Weisberg ..." You could not have had in mind what is itemized in the preceding paragraph. You did not testify to what you had in mind. Those reading the record have no way of knowing. They and the judge were not told of what is itemized in the preceding paragraph and I believe is more than merely relevant.

I do not believe you intended or want anything other tha a fair and accurate record. I am perplexed and disturbed because I do not believe either a fair or an accurate record exists now. I cannot permit it to remain as it is. If no one else undertakes what I believe is necessary correction, I must, with vigor and detail and exhibits.

Now as for any alleged FBI reprocessing, to which you made several references, as of early February 1979 I have not received a single page of it. What I asked to be reprocessed three years ago has not been. I reemphasize that to this very moment the FBI has always represented to me exactly the opposite of this newfound willingness to which you testified. It has not informed me of any such intent or willingness. In welcoming and thanking you for this assurance I also press a caution - that all necessary to avoid any new problems resulting from any reprocessing be anticipated and avoided. With good faith this is possible. I believe it is prudent and necessary.

Your thanks to me, reserved for last "really for emphasis," was for my expressed willingness to help and for keeping that promise. This is clear on the record you have made and I thank you for it sincerely.

I wish that from the actualities of the hearing, over which neither of us had any control, it did not appear, in context, to be faint praise with much damning.

As I said earlier, with allusion to the Saxe poem, your testimony can be interpreted or misinterpreted in many ways. I have cited the understanding reflected by the judge and the exploitation by Department counsel. I have addressed

what I believe can be anticipated to be the interpretation of the FBI and what I regard as subject to misuse by Department counsel. However, this is not what you really did testify to. It requires great care and a close reading to grasp what, despite all the foregoing, you did testify to.

There was improper withholding, improper searching and processing, even within the artificiality of FBIHQ MURKIN. This became explicit in one of the two substantive questions my counsel was able to ask you.

You also volunteered with regard to "the more or less generic exemption ... the vast majority of excisions in terms of numbers ... there were a lot of them." (page 7)

Faced with several misrepresentations of the actualities, Mr. Lesar corrected Department counsel, who suggested the appeal relates to "all these relatively minor excisions." (page 27, especially lines 19-20) Mr. Lesar stated, "I do not know that we need every one of them," the word of the Court at that point. He continued, "I don't think that's the issue. I think the issue is whether or not the excisions should be restored ..."

As you are aware, you testified to no other kind of withholding.

First Mr. Lesar asked you (page 28) if "there are in fact generic categories of information which can be reprocessed as such throughout the entire MURKIN files and which in accordance with current standards, should be restored in the documents?"

You broke this into two different questions. With regard to "generic categories of information which can be reprocessed" and "should be restored" your answer was "yes, there are," followed by an explanation of your uncertainty about where to draw the "generic" line. You then addressed the second part, of "broad categories of people or large numbers of people that were taken out in virtually every instance. Subject to the caveat that I have made that at least a few of these, but I must admit fairly identifiable ones, would still be on a particularized basis."

This means that with regard to some of the withholdings that should be restored there must be what there should have been to begin with, decisions on a "particularized basis." Once we get away from that which is not in issue, like the nut letters, and the FBI's steadfast refusal to obey the Court's Order, there should be no problem other than of the FBI's own deliberate creation in withholding the public domain and persisting in other abuses even after prompt caution.

You correctly understand Mr. Lesar to mean "could they be done without having to focus, you know, too much on them individually. The answer to that would be yes." (page 28, lines 23-4)

Proper concerns for real as distinguished from imaginary questions of privacy and of what in this case in particular and historical cases in general, which follow in your response, need not present an immediate problem. Given good faith, they will not.

After your explanation, which had due regard for privacy questions, Mr. Lesar asked, "And what would your personal evaluation - leaving aside the Bureau's judgment, what would your personal evaluation be?" about these withholdings. (page 30, lines 10ff.)

"I'd put them back," you stated. If I may say so, "categorically."

One possible interpretation of your further explanation is that you may have been seeking a court Order requiring that the excisions be restored. You testified that "although I am an appeal authority I have to make it very clear that my - - I cannot by myself, as a career civil servant, overrule a component on a matter that I cannot persuade them that they were wrong." Administratively, you said, this would have to be by the Associate Attorney General. You added on this, meaning the actuality of the withholdings to which you testified, "the disputes resolution mechanism hasn't operated."

Department counsel here interrupted my counsel's extraordinarily brief examination and the Court then went on to the other cases awaiting attention.

From your correctly interpreted testimony as distinguished from the adversary cloak in which an effort was made to hide its actual meaning, it appears clear to me that your judgment and opinion, as the Department's appeals authority, is that for all practical purposes the FBIHQ MURKIN file must be reprocessed.

Department counsel has strong objections to this and with a neat little twist sought to hold me responsible for everything, in this case including "delaying" the cases of others.

This is insolent and improper when, after three years in court, the government does not even claim to have complied with the request and does not make even pro forma representation to having met its burden of proof.

It is arrogant when compared with the record in this case, a record in which false official representation is commonplace and defended - unrepented - and an Order is flagrantly and contemptuously violated.

This is indecent when I await compliance with my own requests of a decade ago and when the Depart ment and prior Department counsel turned this case around to deter compliance with my actual request and to impose a public responsibility, a great burden, on me. (All others are paid in this; I alone am not.) I doubt there

are unmet requests as old as mine or many requesters who are in my present situation or who have been bled by having so much extra work forced upon them in an effort to obtain not only compliance with requests - even acknowledgment of them.

Maybe you have older appeals but I doubt there can be many order requests and appeals that you have not been able to act on.

There is no part of the present situation in this case that is in any sense my responsibility. There is no appealed generic withholding the FBI was not aware was not justified at the time of the withholding. There are few misrepresentations it shunned, even of the Items of my request or the existence of records.

Actually, the real burdens are and have been on other parties, including me, as reprocessing also will present other burdens to me.

One of the perhaps not visible added burdens will be further delay in addressing my actual request in this instant cause, a matter never mentioned by the FBI or other Department components or Department counsel.

However, because this is an historical case and a significant one with current importances, I believe the reprocessing is essential.

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April, 1979, hand-delivered a copy of the foregoing Motion for Award of Attorney Fees and Other Litigation Costs to Mr. Dennis Dutterer, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001.

James H. Lesar

JAMES H. LESAR