

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AFFIDAVIT OF JAMES H. LESAR

I, James H. Lesar, first having been duly sworn, depose and say as follows:

1. I am attorney for plaintiff in the above-entitled cause of action.

2. I execute this affidavit upon personal knowledge and on the basis of information made available to me by my client, Mr. Harold Weisberg.

3. I have read the April 30, 1980 affidavit of Mr. Gerald L. Liebenau submitted in support of defendant's opposition to plaintiff's motion for partial summary judgment regarding ten documents which the FBI referred to the CIA.

4. In his affidavit Mr. Liebenau states that the ten CIA referrals presently at issue are "CIA-originated documents retrieved by the Federal Bureau of Investigation (FBI) from its records in response to plaintiff's FOIA request for documents on Martin Luther King, Jr. and James Earl Ray." He also asserts that nine of the ten documents retrieved from the FBI's MURKIN files and referred to the CIA "were dealt with" in Civil Action No. 77-1997, a suit which Mr. Weisberg brought against the CIA. (This lawsuit is now on appeal as Case No. 79-1729. It was orally argued in the Court of Appeals on May 19, 1980.)

5. While Mr. Liebenau does not expressly state that the ten MURKIN CIA referrals presently sought by Weisberg in this case are identical to those "dealt with" in Civil Action No. 77-1997, his affidavit tends to give that impression.

6. However, any such impression is untrue. The documents at issue in Civil Action No. 77-1997 involve, inter alia, CIA copies of CIA records on Dr. King, Dr. King's assassination, and James Earl Ray. The documents at issue in this case include, inter alia, FBI records pertinent to the assassination of Dr. King and its investigation. Even if the Government could show that the ten MURKIN records referred to the CIA by the FBI that are presently at issue in this case are identical in content and phrasing to the ten documents allegedly "dealt with" by the CIA in Civil Action No. 77-1997, this would still not establish that the records are identical. For example, the CIA copy of a particular document may contain notations which are not present on the copy of the same document that is contained in the FBI's MURKIN files. The reverse is also true. The FBI copy may contain notations that the CIA copy does not have.

7. The records furnished by the CIA in Civil Action No. 77-1997 were assigned arbitrary numbers. Four of the nine CIA documents listed in the Document Disposition Index which accompanied the May 25, 1978 affidavit of Mr. Robert E. Owen remain withheld in toto by the CIA. (See Attachment 1, pages from Mr. Owen's Document Disposition Index which correspond to the documents listed in the Liebenau Affidavit.) The other five, which were released in part, do not include any FBI file or other identifications which would make it possible to make a positive identification of them. The Owen Document Disposition Index does not identify any of the CIA documents listed in the Liebenau Affidavit as being an FBI referral.

8. In processing the abstracts of MURKIN records which were provided to Mr. Weisberg earlier this year, ten were withheld and replaced with referral slips indicating that they had been referred to the CIA. Obviously, if any of these abstracts relate to MURKIN records that were referred to the CIA in 1978 and released in part in Civil Action No. 77-1997, there is no basis for withholding in 1980 what was released in 1978.

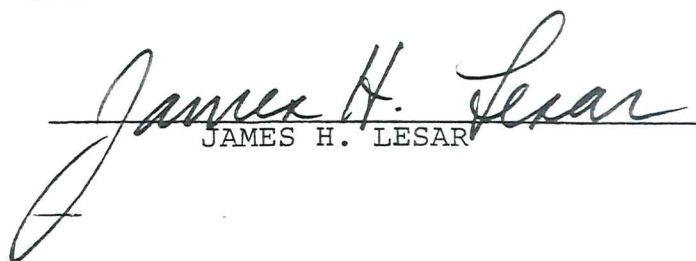
9. The ten MURKIN abstracts said to have been referred to the CIA are serials 860, 1371, 1549, 2341, 2505, 3119, 3238, 3515, 3562, and 3785. In checking these serial numbers in the Office of Professional Responsibility (OPR) notes on the FBI's MURKIN records, Mr. Weisberg found that the OPR notes reveal what was not disclosed by the CIA in Civil Action No. 77-1997 nor by the FBI in this case. For example, the OPR note on Serial 3515 reads:

"Italian Intelligence Service--advised of JER w/description--requested to maintain watch." This information has been withheld by both the FBI and the CIA. Similarly, the OPR note on Serial 3119 is that "A Panamanian black negotiated for a job in Alabama with one" whose name is withheld and who thinks the black Panamanian "may be implicated" in the assassination. This is another illustration of FBI and CIA withholding of nonexempt information.

10. In his opinion in Civil Action No. 77-1997, Judge John Lewis Smith, Jr. made no ruling on the Government's Exemption 1 claims. (The CIA affidavits in that case alleged that the information was classified under Executive Order 11652. Although the new Executive order, E.O. 12065 became effective before the case was decided, the Government made no showing that the information was properly classified under its provisions.) He did uphold the Government's Exemption 3 claims, which were based on the CIA statute (50 U.S.C. §§ 403(d)(3) and 403g) which requires the Director of Central Intelligence to protect against the unauthorized

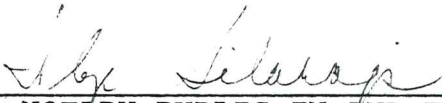
disclosure of intelligence sources and methods. However, he failed to make any finding that release of the withheld information could reasonably be expected to result in the disclosure of intelligence sources and methods. (A copy of Judge Smith's opinion in Civil Action No. 77-1997 is found at Attachment 2)

11. On June 8, 1978, Allen H. McCreight, then Chief, Freedom of Information/Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, wrote Mr. Weisberg in regard to the declassification of some MURKIN material and the release of some documents that had been referred to other Government agencies. When Mr. Weisberg issued a subpoena duces tecum in connection with depositions taken in this case, the Government's copy of this letter was produced with the note that appears on pages 4-5 entirely deleted. (This practice was also followed with respect to other documents supplied in response to the subpoena duces tecum.) Recently, in response to a request by Weisberg's counsel, the Government furnished Weisberg with the complete unredacted text of this letter. (A copy of the unredacted copy is found at Attachment 3) The text of the letter states that Mr. Weisberg is being furnished with attachments that consist of documents which contain information received from other Government agencies and which were referred to those agencies for review. Attachment E to McCreight's letter is described as being "17 documents referred to the Central Intelligence Agency, consisting of 35 pages." With respect to the ten CIA referrals which Weisberg now seeks, the Government claims that "all ten documents are CIA material and may not be released by the FBI." (Memorandum in Opposition, p. 2) But both text of the McCreight letter and its now released note show that information referred to other agencies may be released by the FBI.


JAMES H. LESAR

DISTRICT OF COLUMBIA

Subscribed and sworn to before me this 23rd day of May,
1980.



NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

NOTARY PUBLIC