UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

I. DEFENDANT'S SUPPORTING MATERIALS DO NOT JUSTIFY THE RELIEF SOUGHT

On February 26, 1980, this Court ordered the Department of Justice to prepare a Vaughn v. Rosen index "justifying the deletions made on every 200th document released or to be released to the plaintiff." On April 25, 1980, the Department filed a vague motion for "partial" summary judgment which was accompanied by an attempt at a Vaughn index.

The scope of the Department's motion is variously described in its submission. The motion itself seeks "summary judgment dismissing plaintiff's remaining claims . . . as described in the attached memorandum." (Emphasis added) The attached memorandum addresses only the issue of excisions in certain documents released by the FBI and the Civil Rights Division of the Department of Justice. It does not say a word about other pertinent issues that have been raised repeatedly in this case, such as whether there has been a search of all "see" references, whether all responsive records have been produced by the Civil Rights Division of the Department of Justice, and whether the Office of the Attorney General, the Office of the Deputy Attorney General and other units of the Department of Justice have records responsive to Weisberg's

requests that have not yet been produced. Nevertheless, the memorandum concludes by stating that: "For the above reasons, defendant DOJ's motion for partial summary judgment should be granted dismissing all remaining claims in this case." (Emphasis added) (Memorandum, p. 7) And in yet another formulation, the proposed Order which accompanies the motion would have this Court dismiss with prejudice "plaintiff's claims against defendant . . . except for claims of attorney and consultancy fees, for which the court retains jurisdiction."

The supporting materials proffered by the Department in no way justify an order of the scope sought in its motion. Once again the Department is trying to end this case by trick and strategem rather than by dealing forthrightly with the issues that remain. Not only does the Department's motion fail to demonstrate that its claims of exemption are justified, it in fact manages to show the opposite. But even if the Department could prevail on all claims of excision, this still would not dispose of other issues which remain in this case, such as whether the Civil Rights Division, the Office of the Attorney General, the Office of the Deputy Attorney General and other components of the Department of Justice have records responsive to plaintiff's request which have not yet been provided. In this regard it should be pointed out that plaintiff has pending motions for partial summary judgment with respect to documents offered plaintiff by Director Kelley's letter of September 14, 1977, with respect to ten MURKIN records referred to the CIA, and with respect to Civil Rights Division records not previously provided him; and, in addition, he has a pending Vaughn motion for an inventory, index, and detailed justification of the records of six components of the Department of Justice.

Finally, as will be shown below, the Department's Vaughn sampling is inadequate to dispose even of those claims of exemp-

tion it specifically addresses, much less than those it does not.

II. THE DEPARTMENT'S VAUGHN INDEX CANNOT JUSTIFY EXCISIONS MADE ON DOCUMENTS NOT INCLUDED WITHIN THE SAMPLING

More than 50,000 pages of records have been released in this case. In the Headquarters MURKIN records, which consist of approximately 6,000 serials, there are more than 4,000 serials which contain excisions purportedly made on Exemption 7(C) grounds, and more than 1,000 serials in which 7(D) was cited as the basis. (See May 28, 1980 Affidavit of James H. Lesar, ¶3) The Department, having made a sampling, said to be one out of every 200 documents released, argues that all of its claims of exemption should be upheld.

The first difficulty with this is that the Freedom of Information Act requires the agency to meet the burden of demonstrating entitlement to an exemption. Both the Act and the case law also require that the agency demonstrate that there are no segregable non-exempt portions of the materials withheld. As a general rule the agency must make a particularized showing that the information withheld is within the exemption claimed and that its release will cause the kind of harm that Congress sought to protect against. Without such a showing there is no basis upon which a court may conclude that the exemptions claimed have been properly taken. Here no showing has been made at all with the exception of the few documents for which a justification has been undertaken in the Department's Vaughn sampling.

A second difficulty arises from the nature of the sampling made here. A sample of 1 out of every 200 documents is totally inadequate for making any overall generalization about the overall correctness of the Department's withholdings. The Department selected a total of 147 documents for its sampling. Of this small

number, 90 have no excisions whatever. (May 14, 1980 Weisberg Affidavit, ¶169) This means that the Department has attempted to justify excisions on only 57 documents. Since there are perhaps 10,000 or more documents on which excisions have been made in this case, this means that the sampling represents only one-half of one percent of the records on which excisions were made.

One result of this is that there has been no justification attempted at all to explain withholdings made under most of the exemptions claimed. For example, the sampling does not include a single example of the use of Exemptions 1, 2, 3, 5, 6, 7(A) and 7(F), all of which have been used to withhold information in this case. (May 14, 1980 Weisberg Affidavit, ¶101)

Obviously, the Court cannot sustain excisions made under these exemptions because no showing at all has been made with respect to their use.

III. THE DEPARTMENT'S VAUGHN SAMPLING SHOWS THAT ITS WITHHOLDINGS IN THIS CASE CANNOT BE JUSTIFIED

The Department's memorandum in support of its motion for partial summary judgment acknowledges that the FBI now admits to "two errors in the original exemption claims." (Memorandum, p. 2) Actually, more errors than this are admitted to in the affidavit of Martin Wood. However, in a sampling of only one out of every 200 documents, this alone would indicate that more than 400 errors were made in the processing of records in this case. This is not an inconsequential number of wrongful claims to exemption.

Moreover, the FBI now in effect concedes that it cannot justify the excision of the names of FBI agents from these records. This vindicates the verbal order that this Court issued in June, 1976, that such excisions should not be made unless the Department was prepared to brief the issue. Although the Department never

briefed the issue, the FBI continued to excise the names of FBI Special Agents and other law enforcement officials. The result is that literally thousands of these excisions were made. There was no basis for excising this information then and there is no basis for upholding such deletions now. Yet if the Department's motion is granted, there will be a de facto ratification of these claims, even though they were made in contempt of this Court's verbal order, and even though the FBI now says it has changed its policy.

The May 14, 1980 affidavit of Mr. Harold Weisberg submitted herewith demonstrates time and again that there is no basis for many of the the excisions that the FBI now attempts to justify in its Vaughn sampling. While there is no need to repeat all of the many examples which Weisberg addressed in his affidavit, some of the more salient and instructive ones will be noted in the context of the discussion of specific exemption provisions which follows:

Exemption 7(C)

Exemption 7(C) excepts information in investigatory files compiled for law enforcement purposes to the extent that the disclosure of such information would "constitute an unwarranted invasion of personal privacy." Because exemption 7(C) requires a that personal privacy interest be balanced against the public interest in disclosure, there is no per se coverage. Congressional News Syndicate v. United States Dep't of Justice, 483 F.Supp. 538, 543-544 (D.D.C. 1977). (Cited with approval by the United States Court of Appeals for the District of Columbia Circuit in its recent decision in Commom Cause v. National Archives and Records Service, Case No. 79-1637 (decided April 30, 1980), Slip. Op. at p. 11)(A copy is attached hereto as Exhibit 1) The agency must show that confidential identity information such as names, addresses, etc. was properly assured of confidential status. This is not possible

where, for example, witnesses were told that they would be expected to testify in public hearings about the matter. Poss v. NLRB, 565 F.2d 654 (10th Cir. 1977) Nor does Exemption 7(C) authorize withholding of routine information concerning persons arrested or indicted. Tennesseean Newspaper, Inc. v. Levi, 403 F.Supp. 1318 (M.D.Tenn. 1975)

In his letter of October 26, 1978, to plaintiff's counsel, Mr. Quinlan J. Shea, Jr., Director, Office of Information and Privacy Appeals, United States Department of Justice, wrote that: ". . . no 7(C) excisions can be upheld unless a specific reason can be articulated for doing so, sounding in personal information essentially unrelated to the assassination of Dr. King, or to the F.B.I.'s investigation of the crime." Based on this and on his personal examination of every excision from five FBI field office reports comprising 856 pages, Mr. Shea expressed the belief that on reprocessing of these documents "I believe that there will be relatively few excisions which will remain."

Unfortunately, the FBI has chosen to disregard the opinions of the Department's FOIA expert, Mr. Shea, and seeks to tough it out. The results are ludicrous. For example, it withholds the names of Claude and Leon Powell in order to protect their privacy. Yet their names have been released by the FBI in other documents and publicized on countless TV news stories, as well as in the print media. One of the Powells was even cited for contempt because he refused to testify before the House Select Committee on Assassinations. (May 14, 1980 Weisberg Affidavit, ¶¶ 210-212)

In general it may be said that the FBI's privacy claims are highly inconsistent and that they reflect its prejudices and dislikes, particularly its often racist attitudes. Its Exemption 7(C) claims, are therefore, highly suspect.

There is a high degree of public interest in most information contained in records on the assassination of Dr. Martin Luther King, Jr. In order to properly evaluate the manner in which the FBI investigated his murder, it is important that much of the information now being held under a claim of personal privacy be obtained. For example, there is obviously a strong public interest in learning the names of the two men who were registered at the William Len Hotel in Memphis, "appearing and leaving under mysterious circumstances at the time of the assassination." Yet although the names of many suspects have been disclosed, as well as withheld, theirs have been withheld, as well as released. (May 14, 1980 Weisberg Affidavit, ¶74)

Finally, it should be noted that although the Vaughn sampling consists of but a single document with no excisions, it, too, improperly excised materials from the documents it released under a claim of Exemption 7(C) and (D). This is well illustrated by the letter of appeal which plaintiff's counsel wrote the Attorney General on October 17, 1977. He attached to that letter a copy of a document with 30 excisions in it, 29 of which he had filled in from his knowledge of public source material. To this date there has been no response to his 1977 appeal of the Civil Rights Division excisions. (May 28, 1980 Lesar Affidavit, ¶5, Attachment 3)

Exemption 7(D)

As with Exemption 7(C), the FBI has excised much information under 7(D) which is public information rather than confidential information, as well as information which would not qualify under this exemption even if it were not already public. A particularly egregious example of the former is the attempt to jusity the excision of the identity of former Memphis policeman Marrell McCullough. Mr. Weisberg appealed the withholding of his name in

1977. In his testimony to this Court in 1979, Mr. Shea testified that Weisberg would be given the Marrell McCullough file. Prior to that, Mr. McCullough had testified before the House Select Committee on Assassinations. His testimony before that body is published. (May 14, 1980 Weisberg Affidavit, ¶¶201-206) Despite this, the FBI is still trying to justify the excision of his name.

It is apparent that the FBI has tried to stretch 7(D) far beyond the limited purposes it was intended to accomplish. For example, in Document 20 of the Vaughn sample, 7(D) is made for a person who was a source for the Los Angeles Times, not the FBI. In addition, his name appears to have been disclosed in other records the FBI has released. (May 14, 1980 Weisberg Affidavit, ¶182)

In addition to the improper use of 7(D) made evident by the few documents contained in the Department's Vaughn sampling, there is other evidence which is available to show its misuse. For example, the copy of MURKIN HQ serial 2622 which was given to Weisberg has a sentence deleted from it that is quoted in Volume XIII of the Hearings of the House Select Committee on Assassinations. That serial is a May 1, 1968 directive to four FBI field offices instructing them to conduct surveillance on James Earl Ray's relatives in their respective territories. One sentence deleted from the copy given Weisberg reads as follows: "You should also obtain all long distance telephone calls from their residences for period April 23, 1967 to the present time." Since the deleted sentence neither discloses a confidential source nor information obtained from a confidential source, 7(D) was improperly invoked. It should be noted that the excised information is very important and very much in the public interest to have, and that also indicates the possible existence of records which should have been provided Weisberg which have not been. (See May 28, 1980 Lesar Affidavit, ¶4, Attachments 1-2)

This and other evidence indicates that the FBI has used 7(D) in this case for corporate and insitutional sources of information. For example, it has been used to withhold the name of a company that provided information to the FBI, the Superior Bulk Film Co. (May 14, 1980 Weisberg Affidavit, ¶214)

This application of 7(D) to non-human sources such as banks, local law enforcement agencies, and all kinds of commercial, corporate and institutional enterprises is not warranted by the legislatige history of the exemption. Exemption 7(D) exempts from compulsory disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:

> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source.

The term "confidential source" is not defined in the FOIA. However, the legislative history of the Act rules out the possibility that Congress intended 7(D) to create a blanket exemption for federal agency copies of the records of local law enforcement agencies, corporations, or other non-human "sources." The Senate Amendment to Exemption 7 originally employed the term "informer" rather than "confidential source." In explaining the substitution, the Conference Committee said:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

(Emphasis added) H.Rep.No. 93-1380, 93d Cong., 2d Sess. 13 (1974)

This makes it clear that Congress intended to broaden the term "informer," a term which refers only to persons, to include persons other than paid informers. It obviously did not contem-

plate that the term would be expanded to include agencies, whether local, state, or federal, or corporations, or other non-human sources of information. If this were the case, it would be possible to defeat the intent of the FOIA by transferring records from one federal agency to another under a promise of confidentiality and then invoking Exemption 7(D).

Exemption 7(E)

The Department's Vaughn index states that Exemption 7(E) has been invoked for Document 91. The legislative history is explicit in stating that this exemption is not to be invoked for "routine techniques and procedures already well-known to the public." H. Rep. No. 1380, 93d Cong., 2d Sess. 12 (1974). However, the Wood affidavit fails to state that the technique sought to be protected in this document is not already well known to the public. Wiretapping, bugging, mail interception and the like are investigative techniques that are already well known to the public. (May 14, 1980 Weisberg Affidavit, ¶¶ 93-98)

IV. MATERIAL FACTS ARE IN DISPUTE PRECLUDING SUMMARY JUDGMENT

It is well established that a motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App. D.C. 402, 405, 514 F.2d 824, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in light most favorable to the party opposing the motion." United

States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App. D.C. 109, 113-114, 479 F.2d 201, 206-207 (1973). That responsibility may not be relieve through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, note 32, 151 U.S. App.D.C. at 271, 466 F.2d at 442. These principles have recently been reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in a Freedom of Information Act case, Weisberg v. United States Department of Justice, Case No. 78-1107 (decided April 28, 1980). A copy of the opinion in that case is attached hereto as Exhibit 2.

In this case many issues of material fact remain in dispute. These include the adequacy of the search for responsive documents by components of the Department of Justice, including but not limited to the adequacy of searches, if any, that have been made by the Civil Rights Division, the Office of the Attorney General, the Office of the Deputy Attorney General, the FBI, etc, and the propriety of the claims of exemption made by the FBI and the Civil Rights Division. For these reasons, summary judgment is inappropriate at this juncture.

CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of May, 1980, mailed a copy of the foregoing Opposition to Defendant's Motion for Partial Summary Judgment to Mr. William G. Cole, 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 COLUBMIA

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	:	
U.S. DEPARTMENT OF JUSTICE	:	
	:	
Defendant	:	

O R D E R

Upon consideration of defendant's motion for partial summary judgment, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1980 hereby

ORDERED, that defendant's motion for partial summary judgment be, and hereby is, DENIED.

. . . . . .

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	:	
Defendant	:	

PLAINTIFF'S STATEMENT OF GENUINE ISSUES
OF MATERIAL FACT IN DISPUTE

Pursuant to Local Rule 1-9(g) plaintiff adopts and incorporates as his statement of genuine issues of material fact that are in dispute the May 14, 1980 affidavit of Harold Weisberg and the May 28, 1980 affidavit of James H. Lesar that are submitted herewith.

Respectfully submitted,

James H. Lesar

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