UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S "MOTION TO PLACE DIRECTOR OF OFFICE OF PRIVACY AND INFORMATION APPEALS IN CHARGE OF CASE, ETC."

INTRODUCTION

On February 26, 1980, this Court filed a "Finding as to Scope of Search" which held that a proper and good faith search had been made of FBI headquarters Murkin files and field office files for documents responsive to the two FOIA requests in this case. A second order provided a sampling test by which the Court would determine the propriety of the Department of Justice's deletions in documents released to plaintiff.

For nearly a year these two orders have provided the framework for a final resolution of this five year old lawsuit. They are also at the heart of defendant's Motion for Summary Judgment filed with this Court of December 10, 1980. In plaintiff's most recent motion to which this memorandum responds, however, plaintiff follows his recent pattern of ignoring those two rulings by this Court. In a new twist, he also ignores the statutory provisions for judicial review in the FOIA.

ARGUMENT

II. PLAINTIFF'S DEMAND THAT "THE COURT SHOULD PLACE THE DIRECTOR OF THE OFFICE OF PRIVACY AND INFORMATION APPEALS IN CHARGE OF THE CASE" SHOULD BE REJECTED

Plaintiff first demands in his motion that the Court place the Director of the Office of Privacy and Information Appeals "in charge of this case" in lieu of the Court. Plaintiff's request is without merit.

5 U.S.C. § 552(a)(4)(B) expressly states that a district court will conduct a de novo review to determine whether records have been improperly withheld. It does not provide for the abdication of this responsibility to an employee of the Executive Branch, not even to an employee in the Justice Department. The second provides:

> On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine that matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. (emphasis added)

Consequently, there is no basis under the law for the Court to transfer its authority over this case as requested by plaintiff.

Even if such a procedure were possible, it is hard to believe any court would agree to relinquish control over even the most trying case because of the desires of one party. Such a decision would be incredible in this case where the party has only agreed to be bound by decisions of the Department of Justice official "if" the Court issues an order in the precise three-part form he has offered. (See plaintiff's memo., p. 7).

As proposed by plaintiff, such an order would force the Department of Justice "to follow [the] instructions" and "agree to be bound" by "determinations" of an employee of the Department, who while doubtlessly highly capable, is not the Attorney General. While plaintiff characterizes this as "a unique and generous offer" (Plaintiff's memo., p. 7), defendant believes itself bound to proceed through procedures as provided by statute.

The rationale for plaintiff's "offer" is particularly baffling at this time. As stated above, this Court has now ruled on the "scope of search" for FBI documents and has in its custody the sampling of documents which it will use to rule on

the deletions. Consequently, an orderly conclusion of the case by the Court seems clearly in prospect. In seems inexplicable then that plaintiff is now requesting another review by the very Justice Department official who two years ago judged the original compliance to have "ranged from quite good to almost excellent." (Transcript of Hearing before this Court, January 12, 1979, p. 5.)

Rather than offering a serious means of ending this case quickly and inexpensively as claimed, (Plaintiff's memo., p. 5), plaintiff's remarkable "offer" seems instead to be merely a way of challenging both the Court's order regarding "scope of search" and the adequacy of the Court-mandated sampling technique. (Plaintiff's memo., p. 5) These challenges are coupled with the threat that a future ruling by this Court granting defendant's motion for summary jdugement (apparently under any circumstances, or at any time) "will be futile because plaintiff will go to the Court of Appeals." (Plaintiff's memo., p. 5). While no one, certainly not the defendant, can doubt plaintiff's willingness to appeal a decision in this or any other case, such knowledge cannot and should not have any bearing on the Court's exercise of control over the case in order to decide any issue that may yet remain.

II. PLAINTIFF'S "ALTERNATIVE FOR AN ORDER (1) COMPELLING SAID DIRECTOR TO ACT UPON PLAINTIFF'S ADMINISTRATIVE APPEALS AND (2) REQUIRING THE FBI TO REVIEW EXCISIONS COMPLAINED ABOUT BY PLAINTIFF" SHOULD BE REJECTED

Plaintiff has proposed an "alternative" plan for the Court's consideration. He argues that the Court should (1) compel the Office of Privacy and Information Appeals of the Justice Department to decide "each of plaintiff's administrative appeals" and (2) compel the FBI to file a report reviewing each excision "complained about by plaintiff." (Plaintiff's memo, pp. 5-6).

Regarding the first of these two quite separate "demands", it is obvious that the review of plaintiff's outstanding administrative complaints with the Office of Privacy and Information Appeal is a matter that is beyond the scope of this

lawsuit. If Mr. Weisberg is not happy with the actions or lack of actions by that office, his remedy is filing a complaint as he has done recently in Weisberg v. Department of Justice, C.A. No. 81-0023, now pending in this Court.

It is worth noting that the office of the Justice Department about which plaintiff is complaining in this Part of his motion (and about which he complained in the newly filed lawsuit referred to above), is the same office to which he asks this court to deliver "control of this case" in Part I of the motion. The head of that office whom he commends in Part I is here accused of not acting on plaintiff's administrative appeals "despite the passage of years." The demand for an order from this court forcing him "to act upon the many appeals which plaintiff has lodged with that office..." (Plaintiff's memo., p. 6) thus seems particularly unusual.

Plaintiff's second "alternative" demand is that the Court order the FBI to file what seems to be a new Vaughn v. Rosen index, this time for documents selected by the plaintiff, rather than the sample ordered by the Court.

This demand again ignores this court's February 26, 1980 ruling. In that order, this Court decided that the Court would have the sampling done on a random basis involving every 200th document. Plaintiff obviously is dissatisfied with this procedure, even before the Court has ruled on the sample, and now wishes to have the Court adopt a system that would bequeath total discretion to the plaintiff. The Department of Justice once again prefers to rely on the Court's judgment rather than the plaintiff's.

CONCLUSION

In his motion, plaintiff advocates profound changes in the Court's handling of this case. Such changes would seriously undermine recent advances toward concluding five years of

litigation. Defendant strongly urges that plaintiff's demands be rejected and that the Court continue to exercise its power to arrive at a just and proper decision.

Respectfully submitted,

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ORDER

After consideration of plaintiff's "Motion to Place Director of Office of Privacy and Information Appeals in Charge of This Case, Etc.", and memoranda supporting and opposing that motion, this Court

ORDERS that the motion be, and hereby is DENIED.

Dated: _____

_____
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Statement of Points and Authorities In Opposition To Plaintiff's "Motion To Place Director of Office of Privacy and Information Appeals in Charge of Case, Etc." was served by mailing true copy, United States Mail first class postage prepaid, to:

Mr. James H. Lesar
2101 L Street, N.W.
Suite 203
Washington, D.C. 20037

this 9th day of February, 1981.

William G. Cole

WILLIAM G. COLE