

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. :

MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO MOTION TO COMPEL
RELEASE OF CIVIL RIGHTS DIVISION INDEX

On January 12, 1981, plaintiff filed a motion suggesting that the Civil Rights Division of the Department of Justice had not produced all of its non-exempt records responsive to plaintiff's 1975 FOIA request in this case.

On January 26, 1981, the Department of Justice answered plaintiff's charge by, among other things, attaching to its Memorandum in Opposition to Plaintiff's Motion the affidavit of the Civil Division's former Freedom of Information/Privacy Acts officer, attorney Salliann M. Dougherty.

Ms. Dougherty explained that in December, 1977 she had undertaken a project to review relevant Civil Rights Division files "in an effort to ensure that the Civil Rights Division had fully complied with Mr. Lesar's Freedom of Information Act request [on behalf of Harold Weisberg]," which was then the subject of this lawsuit. As a part of this project, which was completed in May, 1978, an index was prepared for aid in determining whether Mr. Weisberg had received the records to which he was entitled. The project resulted in her determination that:

To the best of my knowledge, there are no Civil Rights Division records responsive to Mr. Lesar's request which have not been disclosed to him.

(Dougherty Affidavit, p. 3)

In his "Motion to Compel Release of Civil Rights Division Index," plaintiff now moves that the "index" which was compiled

in order to deal with his claims in the lawsuit, be disclosed to him.

Regardless of the privileged nature of these documents, plaintiff's request as a part of his FOIA action must fail because the documents requested were created several years after the making of plaintiff's FOIA requests. They were prepared in 1977 and 1978; the FOIA requests were made over 2-1/2 years earlier.

The Freedom of Information Act authorizes plaintiffs to maintain actions such as this one in order to obtain records "improperly withheld" by federal agencies. 5 U.S.C. § 552(a)(4)(B). The words quoted necessarily require that plaintiff must first request a document in existence, exhaust his administrative remedies and then sue for its release. Kissinger v. Reporters Committee, 63 L.Ed. 267, 284 (1980), and Kaminskas v. Department of Justice, No. H-76-511, p. 2 (D. Conn., January 11, 1978) (copy attached).

Plaintiffs who have sought to expand their actions under the Act to cover materials originated subsequent to their original document requests have been uniformly unsuccessful. Kaminskas v. Department of Justice, supra, at 3; Tuchinsky v. Selective Service System, 294 F. Supp. 803, 805 (N.D. Ill.) aff'd., 418 F.2d 155 (7th Cir. 1969); Disabled Officers' Association v. Rumsfeld, 428 F. Supp. 454, 459 (D.D.C., 1977); Lybarger v. Cardwell, 438 F. Supp. 1075 (D. Mass. 1977) aff'd., 577 F. 2d 764 (1st Cir. 1978).

Access to materials originating subsequent to original document requests have been described as requests for a "continuing subscription service for persons interested in [agency] files." Kaminskas v. Department of Justice, supra, at 4. This is an apt description of plaintiff's current motion.

Providing such a service is not required by the FOIA and,
consequently, the motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in
Opposition to Motion to Compel Release of Civil Rights Division
Index was mailed, postage prepaid, to:

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

this 23rd day of February, 1981.


WILLIAM G. COLE