



Rule 56, Federal Rules of Civil Procedure. (Emphasis added)

Plaintiff seeks by his motion to recover upon a "part" of his Freedom of Information Act "claim"; "20 days from the commencement" of this action has so long since expired that even an elephant with an exceptionally gifted memory would require mnemonic assistance in order to recall when it occurred; and defendant has moved for summary judgment (on more than one occasion, in fact, and for summary judgment as to less than the whole case, at that).

Moreover, the Court itself granted plaintiff's "Motion for Summary Judgment With Respect to Crime Scene Photographs Taken by Joseph Louw," filed in this case on September 6, 1977. Neither in this Court nor in the Court of Appeals did defendant ever argue that the form of the motion was improper.

Defendant seeks to inveigle the Court into ruling that plaintiff cannot do what Rule 56(a) expressly permits and what the Court has sanctioned by past practice. Thus defendant asserts that: "The Court has clearly stated in this case that motions such as plaintiff's current one are not properly 'motions for summary judgment' and that they will accordingly not be granted." (Defendant's Memorandum, p. 1, fn. 1, citing August 15, 1980 transcript, pp. 63-64) Defendant, as it customarily does, refers to the transcript without attaching either the pages cited or other relevant pages.

The Court's comments were made in the context of an argument on plaintiff's motions for partial summary judgment, a form the Court thought was wrong. The only time the Court described the pending motions as motions for summary judgment came immediately after counsel for defendant had so described them. (Transcript, pp. 63-64) Plaintiff's counsel argued that the styling of the motions was irrelevant, and that they could be treated as motions

to compel. (Transcript, p. 65) When plaintiff's counsel argued that plaintiff's motion for partial summary judgment with respect to six MURKIN records withheld in their entirety under Exemption 5 should be granted because defendant had failed to respond to it within the time required by the rules, defendant's counsel interrupted, and the following dialogue ensued:

MR. COLE I thought that this Court was saying that the partial summary judgments were not proper as to deciding these issues. (Emphasis added)

THE COURT: The Court is still going to sign an order compelling something.

MR. COLE: All right.

THE COURT: Call it what you will, it won't be an order for partial summary judgment. (Emphasis added)

Mr. COLE: The rationale behind our--besides the federal rules problem, we felt that the summary judgment method of doing this was that the Court has already ordered that there will be a sampling and that you look at the excisions on the basis of that sampling.

THE COURT: On the other hand, whole things that have been withheld, I don't think would come under that rationale if they haven't been really covered at all in any allegation.

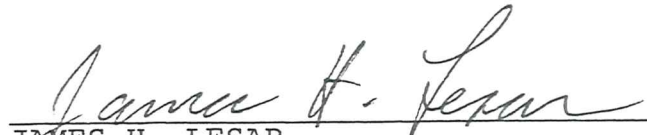
(Transcript, p. 66)

Plaintiff's present motion is for summary judgment, not partial summary judgment. This is a perfectly proper motion under the Federal Rules of Civil Procedure. All of the materials sought have been withheld in their entirety without any justification having been for the withholding. Unless defendant makes that justification in proper form--i.e., under oath by a person having personal knowledge of the materials being withheld--summary judgment must be granted. The Freedom of Information Act simply does not permit materials to be withheld in their entirety without such a showing.

Defendant has had ample opportunity to defend its action in withholding these materials. The obvious reason why it does not respond in proper form to plaintiff's motion is that doing so would force it to concede that it is wrongfully withholding a great volume of information which should have been released to plaintiff years ago. Indeed, as the attached affidavit of plaintiff Weisberg states, two-thirds of the serials listed in the attachment to plaintiff's motion were dealt with in his consultancy report, which was delivered to defendant some three years ago. At least as of that time defendant was on notice in writing that plaintiff challenged these withholdings. Under the August, 1977 Stipulation, defendant was to have responded to each of the withholdings complained of by Mr. Weisberg. To this date it continues its treacherous refusal to live up to its promise to do so.

The swift, sure, and just way to deal with defendant's bad faith behavior is to award summary judgment in plaintiff's favor and let defendant try and defend its conduct in the Court of Appeals, if it dares.

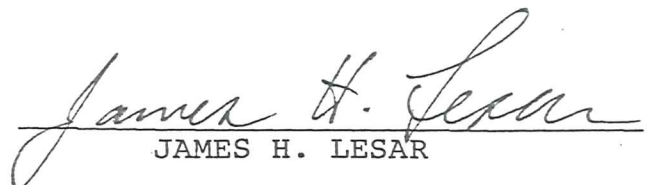
Respectfully submitted,

  
 JAMES H. LESAR  
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of March, 1981, mailed a copy of the foregoing Plaintiff's Reply to Defendant's Memorandum of Points and Authorities in Response to Plaintiff's Motion for Summary Judgment with Respect to Documents and pages Withheld in Their Entirety to Mr. William G. Cole, Room 3137, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

  
 JAMES H. LESAR

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

OFFICIAL TRANSCRIPT  
OF HEARING

DATE: August 15, 1980

PAGES: 1 - 67

GLORIA H. HORNING

Official Reporter  
6814 U. S. Court House  
Washington, D. C. 20001

Prepared for:  
PLAINTIFF

1 THE COURT: Now the rest of this we will never  
2 be able to go on and have everybody look in this file to  
3 see whether counsel has been done something with. Nobody  
4 expects, I am sure, that counsel had anything to do with  
5 the assassination.

6 So, consequently, the Court really would not feel  
7 that that is a matter -- or Mr. Weisberg, indeed. So that  
8 I really think there comes a time we really have to narrow  
9 what is required to be produced.

10 Now we have these documents and the copyright thing.  
11 We are going to get the photographs that have been the subject  
12 matter of lots of litigation. Whatever these things are,  
13 the Government will find out about the copyright on them  
14 and whether or not there is some reason why they shouldn't  
15 be turned over to you.

16 I would doubt sincerely that they have any intrinsic  
17 copyright value, since I don't believe he's planning on copying  
18 the contents in his book. But you will take care of that,  
19 will you?

20 MR. COLE: Your Honor, we only request an order  
21 telling us what to do and we will attempt to do it to the  
22 best of our ability. We hope that this Court will rule on  
23 the summary judgments that have been pouring out.

24 THE COURT: The Court is not going to grant any  
25 motions for summary judgment, because it thinks it's the

1 wrong form.

2 MR. COLE: Thank you, Your Honor.

3 THE COURT: We will, however, sign an order indicating  
4 what should still be searched and some -- either an affidavit  
5 returned to Mr. Weisberg on the subject matter as to what  
6 it contains, why it does not contain what he has asked for,  
7 or partially, whatever it is.

8 If anything is withheld, we would expect him to  
9 be given the reason why it is withheld or any deletions and  
10 we will also receive, in 45 days we understand, the additional  
11 checks so that we will be working on something substantive  
12 in the way of deletions.

13 MR. COLE: Thank you, Your Honor.

14 THE COURT: The document you were reading from  
15 and examining on you have just brought today, is it filed?  
16 Do we have the numbers? Is that something we can make up  
17 our order from?

18 MR. LESAR: It's on file. Mr. Weisberg's memorandum  
19 is on file. But that's a very lengthy document. Here it  
20 is. Plaintiff's Exhibit No. 1

21 THE COURT: Do you know what I am talking about?

22 MR. LESAR: Now I know what you are talking about.  
23 It's not on file. It's simply a typewritten page of my notes  
24 on his correspondence to me and perhaps the best thing would  
25 be for me to put it in some sort of form and file it with

1 the Court.

2 THE COURT: Please do. Because I have attempted  
3 to make some notes and then I am afraid I don't have them  
4 properly and I would like to get the correct ones; if they  
5 are going to be put to the trouble of looking them up, they  
6 ought to have the right numbers.

7 MR. LESAR: All right. Now, there are several  
8 other matters pending and I don't -- while they are styled  
9 motions for partial summary judgment, that's simply a question  
10 of nomenclature.

11 THE COURT: All right.

12 MR. LESAR: We can treat them as motions to compel  
13 or whatever, but they are things that are important to us  
14 that should be responded to.

15 There is, of course, the motion to require reprocessing  
16 of the headquarters documents.

17 THE COURT: Denied.

18 MR. LESAR: There is a motion for partial summary  
19 judgment with respect to six MURKIN documents that were with-  
20 held in their entirety under exemption 5. There has been  
21 no showing made that those documents are exempt. The Govern-  
22 ment has not responded to that motion.

23 And I would urge that there has been sufficient  
24 time for the Government to respond to that motion. The local  
25 rules allow for 10 days.



1 THE COURT: This was the 5th of June this one was  
2 filed that you are talking about

3 MR. LESAR: Yes. The local rules allow for 10  
4 days to respond or to seek an extension of time. The Government  
5 has not done so and I would urge that the Court simply treat  
6 it as conceded and order them to provide the documents or  
7 supply justification as to why they have not been provided.

8 MR. COLE: Your Honor, may I respond to this?

9 THE COURT: Yes.

10 MR. COLE: I thought that this Court was saying  
11 that the partial summary judgments were not proper as to  
12 deciding these issues.

13 THE COURT: The Court is still going to sign an  
14 order compelling something.

15 MR. COLE: All right.

16 THE COURT: Call it what you will, it won't be  
17 an order for partial summary judgment.

18 MR. COLE: The rationale behind our -- besides  
19 the federal rules problem, we felt the summary judgment method  
20 of doing this was that this Court has already ordered that  
21 there will be a sampling and that you look at the excisions  
22 on the basis of that sampling.

23 THE COURT: On the other hand, whole things that  
24 have been withheld, I don't think would come under that rationale  
25 if they haven't been really covered at all in any allegation.

1 He says exemption 5.

2 MR. COLE: Your Honor, if there is an exception  
3 to the method of determining the excisions on this case through  
4 the sampling method, then I think we have a right to know.  
5 If those items that have been completely withheld, for example,  
6 should all be examined and there should be a Vaughn v. Rosen  
7 affidavit prepared for all of those, that will be a substantially  
8 additional task.

9 To take six items and say we have that responsibility  
10 without an order of this Court I think would be improper.  
11 There's another request for 10 documents to be explained  
12 away. It can be done from now until Doomsday. And what  
13 we ask is that it all be required of us in one document,  
14 whatever this Court believes to be fair.

15 THE COURT: That's what the Court will do.

16 MR. COLE: I believe that we were already decided  
17 on that point.

18 THE COURT: This Court is in recess.

19 (Whereupon, at 11:45 a.m., the hearing in the above-  
20 entitled matter was concluded.

21  
22 REPORTER'S CERTIFICATE

23 This record is certified by the undersigned to  
24 be the official transcript of the above-entitled hearing.

25  
  
OFFICIAL COURT REPORTER