UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEY'S FEE AND LITIGATION COSTS

Synopsis

This case arises under the Freedom of Information Act, 5 U.S.C. § 552. Section (a)(4)(E) of the Act authorizes the Court to make a discretionary award of attorney fees and litigation costs reasonably incurred in cases where the plaintiff has "substantially prevailed." This Court has already ruled that plaintiff has "substantially prevailed" in this litigation. December 1, 1981 Memorandum Opinion at 3.

Plaintiff seeks reimbursement for 904.6 hours of his attorney's time at a rate of $100 per hour. Thus, he seeks a base amount or "lodestar" award of $90,460.

Plaintiff further requests the Court to increase the lodestar award by 50% to take into account the highly contingent nature of his counsel's receiving compensation for his work. In addition, plaintiff seeks to have the lodestar award increased by 10% for exceptional results obtained in the case, and by 100% because of obdurate or bad faith conduct on the part of the defendant.

Plaintiff also seeks an award of litigation costs which he has reasonably incurred. The litigation costs for which he seeks reimbursement total $32,320.26, with $15,914.60 of this sum being at-

tributable to plaintiff's consultancy fee.

Preliminary Statement

A. A Brief History of the Case

This lawsuit was initially based on a Freedom of Information Act request which plaintiff made on April 15, 1975 for seven categories of records pertaining to the assassination of Dr. Martin Luther King, Jr. On April 29, 1975, then FBI Director Clarence M. Kelley responded by assuring plaintiff's counsel that the FBI's Laboratory Division "is attempting to locate and identify the requested material," and that "[e]very feasible attempt will be made to complete the processing of your request within thirty working days." Complaint, Exhibit B. Two months later Director Kelley wrote plaintiff's counsel that: "Your request for the results of certain Laboratory examinations, photographs, and sketches relating to the assassination of Dr. King is denied." As justification for this denial Director Kelley asserted that "the information you have requested could be vital to a prosecution of James Earl Ray," and that therefore it was immune under Exemption 7(A)! June 27, 1975 letter from Clarence M. Kelley to James H. Lesar, Exhibit J to Affidavit of Harold Weisberg filed March 25, 1976, in support of plaintiff's Motion to Compel Answers to Interrogatories. At the time, Ray had already been prosecuted. In fact, on March 10, 1969, he pled guilty to Dr. King's murder and was sentenced to 99 years.

On November 28, 1975, plaintiff filed this suit. By letter dated December 2, 1975, Director Kelley released some 71 pages of records responsive to Weisberg's April 15, 1975 request.

On December 23, 1975, plaintiff submitted a new FOIA request to the Department of Justice, this one listing 28 categories of records sought. The following day plaintiff amended his complaint

to include this request.

On January 2, 1976, defendant Department of Justice ("the Department") answered plaintiff's amended complaint. The third defense stated that the case was moot; the fifth defense averred that Director Kelley's December 2, 1975, letter had provided Weisberg with all the records he had requested.

On January 8, 1976, Weisberg served the Department with a set of 39 interrogatories which were designed to establish that the Department did have additional records responsive to his April 15, 1975 request. On February 10, 1976, the Department filed a motion for a protective order which asserted that discovery should be postponed where a dispositive motion is on file "or is about to be filed," and that "defendant will be taking the position that this action is moot in view of the disclosures granted the plaintiff after the filing of the instant action." Defendant's Memorandum of Points and Authorities in Support of Motion for a Protective Order, pp. 1-2.

At the first status call, held February 11, 1976, AUSA John R. Dugan told the Court that his client was preparing an affidavit "that will, I think, convince the Court and the plaintiff that this case is moot." He said he would be filing his mootness motion in two weeks. February 11, 1976 transcript, p. 2. It was never filed.

Weisberg's April 15 request included a demand for any crime scene photographs. At the March 26, 1976, status call his counsel asserted that he and his client had told by the FBI that the FBI did not have a single photograph of the scene of the crime. Tr., pp. 6-7. AUSA Dugan himself stated that, "we have assured plaintiff's counsel that the photographs and other documents that were disclosed are all that [are] in the FBI's possession at headquarters." Tr., p. 3. He indicated that the FBI would search the

Memphis Field Office for responsive materials, Tr., p. 3. Plaintiff's counsel indicated that other field offices would have to be searched for pertinent records. Tr., p. 6. AUSA Dugan again indicated that he was going to file a motion to dismiss or for summary judgment, but the Court told him that it wasn't going to get him anywhere, "so don't waste your time on it." Tr., pp. 10-12.

At the May 5, 1976 status call, AUSA Dugan told the Court that a search of the Memphis Field Office had indeed located crime scene photographs. In response to a question from plaintiff's counsel, Dugan indicated that it was his understanding that the FBI had searched the Memphis Field Office for anything that came with the April 15th request. Tr., at 3. However, it was not until September, 1977, that the FBI released to plaintiff a volume of material responsive to both his April 15 and December 23 requests. In a memorandum filed October 27, 1976, the Department represented that a search of field offices would be "counterproductive." Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Compliance and in Support of Defendant's Motion to Stay, filed October 27, 1976, at p. 5. This position was in line with the earlier testimony of FBI Special Agent Donald L. Smith that "everything that is in the field office, particularly in a case like this, would be at headquarters, particularly in the assassination of Dr. King." September 8, 1976 hearing transcript, p. 33. This misrepresentation, also made to plaintiff and his counsel by other FBI agents, was conclusively proven false by the delivery to plaintiff in 1977 of several thousand pages of field office records not contained in FBI Headquarters files.

At the May 5, 1976 status call Dugan again asserted that the Department was "going to support the further position that this action is moot" and also argued that the Court should dismiss the amended complaint filed four months earlier. Tr., at 5-7. At the

May 18, 1976 status call, AUSA Dugan stated that in three weeks the Department would file its motion for summary judgment. Tr. at 23. On June 2, 1976, the Department filed an affidavit by an FBI Special Agent which asserted that Weisberg had been furnished all non-exempt information responsive to his April 15 request. Second Affidavit of Thomas L. Wiseman, p. 14.

But rather than filing a motion for summary judgment, as promised, the Department switched tactics and next filed a motion to stay further proceedings on the basis of the decision of the U.S. Court of Appeals in Open America v. Watergate Special Prosecution Force, 178 U.S.App.D.C. 308, 547 F.2d 604 (1976), notwithstanding the fact that the Court had already indicated her belief that Weisberg's request had not even been handled in order. July 1, 1976 status call, Tr. at 12. In support of its motion the Department filed an affidavit by Mr. Quinlan J. Shea, Jr., then Chief, Freedom of Information and Privacy Unit, Office of Deputy Attorney General, U.S. Department of Justice. Mr. Shea asserted that "[t]he assassination of Dr. King is certainly a case of sustained public interest" and advanced two reasons for processing cases of historical interest more slowly than others, one of which was:

> Attorney General Levi and Deputy Attorney General Tyler have directed that all non-exempt records in these files of public and/or historical interest are to be released, together with every exempt record that can possibly be released as a matter of discretion. This insistence upon maximum possible release is very time consuming, both for the components of the Department in processing the requests initially and for my Unit.

(Emphasis in original) July 15, 1976 Affidavit of Quinlan J. Shea, Jr., ¶12. Ironically, the same official was to testify two and a half years later that materials which had been excised from the King assassination files no longer qualified for continued withholding, and that he thought the records should be reprocessed to restore the deleted materials. Testimony of Quinlan J. Shea, Jr.,

January 12, 1979 hearing, Tr. at 30-31.

On September 8, 16, and 17 this Court heard testimony on the Department's motion for a stay. The testimony established that the FBI had not been responding to numerous other FOIA requests by Weisberg, as well as the ones at issue in this case. The Court was convinced by this testimony that the FBI was not properly processing Weisberg's requests in this case, and it was this series of hearings on the Department's motion for a stay which forced the FBI to finally begin processing its Headquarters MURKIN file. In October, 1976, the FBI began making weekly releases of these records. Subsequently, as a result of the belated processing of his requests, Weisberg obtained documentary evidence that the FBI had engaged in a deliberate policy of not responding to his requests.

In August, 1977, the FBI agreed to search certain specified field offices, but only under the impending threat that otherwise it would be compelled to do a Vaughn v. Rosen inventory and index for the entire FBIHQ MURKIN file.

The foregoing is only a thumbnail sketch of some of the proceedings in this case during the first two years of its existence. Yet they suffice to give a bit of the flavor of the Department's extreme recalcitrance, of its willingness to engage in conduct which this Court has correctly characterized as "stonewall[ing]". January 5, 1982 Memorandum Order at 2.

Unfortunately, the Department's conduct grew even worse after the FBI Headquarters MURKIN records and specified field office files were processed. The FBI violated and disregarded the August 15, 1977 Stipulation regarding the processing of field office files in several important respects. It dumped 6,000 pages of field office records on Weisberg all at once in violation of the express terms of the Stipulation. It gave secret instructions to its field offices so that instead of forwarding to Headquarters for processing duplicates of Headquarters documents with notations, they were

instructed to send only those duplicates which contained "a substantive, pertinent notation other than an administrative-type directive." See October 26, 1978 letter from Quinlan J. Shea, Jr. to Mr. James H. Lesar (filed October 27, 1978), pp. 13-15.

By letter dated September 14, 1977, FBI Director Kelley listed certain records which the field offices had not copied and sent to Headquarters. He requested that Weisberg advise the FBI as to those he wanted under FOIA. By return mail Weisberg indicated those he wished to have. See September 17, 1977 Weisberg letter, Enclosure ¶3 to April 19, 1979 affidavit of Douglas F. Mitchell (filed May 11, 1979). Yet Weisberg never received these records. May 25, 1979 Weisberg Affidavit, ¶¶18-19. (Filed June 4, 1979)

The FBI continued to maintain in representations to plaintiff and the court that "everything that pertains to the assassination of Dr. Martin Luther King is in one file, the MERKEN (sic) file." Representation of FBI Special Agent John Hartingh at June 30, 1977 status call, Tr., p. 31. Yet this was plainly false. The Department's own counsel provided evidence that it was untrue at the September 28, 1978 status call when she referred to a May 13, 1968 memorandum from T.E. Bishop to Cartha DeLoach in regard to Gerold Frank's request to interview FBI agents for a book on the King assassination. It was not filed under MURKIN, though as this Court noted, "[i]t certainly should have been . . . ." September 28, 1978 Tr., pp. 4-8.

In an August 30, 1977 letter to Weisberg, James M. Powers, then Chief of the FBI's Freedom of Information/Privacy Acts Branch, staed that:

> A review of obliterations about which you have raised complaints will be conducted when we have completed the initial processing of all the files involved in this request.

See Exhibit 4 to Motion to Require Reprocessing of FBI's MURKIN

Headquarters Records (filed June 6, 1980). This was another FBI promise not kept. Instead of living up to it, which it could easily have done by reviewing Mr. Weisberg's correspondence on these matters, the Department embarked on a campaign to coerce Weisberg into acting as its paid consultant. After euchering the Court into putting its stamp of approval on this proposal, thus causing Weisberg to acquiesce in it, the Department then reneged on the deal. But despite Weisberg's persistent inquiries, it did not advise him of this until months later, after he had expended more than 200 hours of his time and some of his own money as well.

Unfortunately, this descent into the moral abyss did not exhaust the capacity of Departmental representatives for wrongful conduct. Recently one of these representatives has induldged in conduct which typifies the Department's unprincipled, bad faith behaviour in this case. Mrs. Lynne K. Zusman, in addition to trying to escape personal responsibility for events she engineered by testifying ten times during her deposition that she was never attorney of record in this case (Zusman Deposition pp. 19, 21, 31, 44, 53, 57-58, 63, 70, and 80), now claims that there never was any consultancy agreement, that she had no authority to bind the Department of Justice to such an agreement, that this Court may have been the one to propose the consultancy, and that Weisberg did not agree to do the consultancy. See August 15, 1982 Weisberg Affidavit, ¶¶35-37; Deposition of Lynne K. Zusman, 29-30. (When Departmental counsel Betsy Ginsberg tried at the May 18, 1978 status call to assert the non-existence of the consultancy agreement, this Court immediately corrected her, stating, "I believe it was agreed to in this Court's chambers.") And rather than answering perfectly valid questions pertinent to the consultancy matter, Mrs. Zusman resorted, inter alia, to personal attacks and malicious innuendos against Weisberg. See August 15, 1982 Weisberg Affidavit, ¶73; Zusman

Deposition, pp. 49-50.

B. Achievements of the Lawsuit

Despite the Department's obstructionism, its misrepresentations, and its repeated breaching of commitments or promises it made to plaintiff and to the Court, Weisberg's achievements in this case have been notable. They include the following:

1. The release of more than 50,000 pages of documents on the assassination of Dr. King after the Department repeatedly had declared that the case was either moot or ripe for summary judgment.

2. The release of thousands of pages of FBI field office records even though the FBI had represented that these records only duplicated what was in the FBI's Headquarters files.

3. The discovery and release of the Long tickler file, an event made possible because Weisberg himself suggested where to look for it. See October 26, 1978 letter of Quinlan J. Shea, Jr. to Mr. James H. Lesar thanking Mr. Weisberg for his assistance in helping to locate that "missing file." (The Shea letter was filed with the Court on October 27, 1978.)

4. The release of crime scene photographs which the FBI originally said it did not have.

5. Litigation over the status of certain crime scene photographs allegedly copyrighted by Time, Inc. resulted in a precedent-setting decision on unique and novel issues; viz., whethre copyrighted materials in agency files are "agency records" or otherwise exempt from disclosure under Exemptions 3 and/or 4. (For an extensive discussion of the case, see "The Applicability of the Freedom of Information Act's Disclosure Requirements to Intellectual Property," 57 Notre Dame Lawyer 561 (February, 1982).

6. The discovery during deposition and subsequent release of several thousand "abstracts" of King assassination documents con-

stituting an extremely valuable research and study tool. See Affidavit of Professor David R. Wrone filed February 8, 1980.

7. The release of Civil Rights Division documents after CRD personnel had repeatedly sworn that all responsive documents already had been released;

8. Inventories of field office records indicating the nature and extent of the FBI's gargantuan operations against Dr. King. These inventories were not brought to light by Congressional investigations such as those conducted by the Senate Select Committee on Intelligence Activies (the Church Committee) or the House Select Committee on Assassinations.

9. A complete fee waiver for all King assassination records.

It is further to be noted that although defendant moved for summary judgment or partial summary judgment on three occasions on the basis of claims that Weisberg was entitled to no more documents in this case, after each such motion, including the final award of summary judgment, Weisberg obtained additional records. Similarly, although defendant twice filed selective Vaughn indices in an effort to uphold its claims of excisions, these, too, resulted in further significant releases of information to Weisberg.

The foregoing recitation, although not an exhaustive summary of all the pertinent facts in this mammoth case, sets the background for plaintiff's motion for an award of attorney's fees and litigation costs.

ARGUMENT

I. PLAINTIFF QUALIFIES FOR AN AWARD OF ATTORNEY FEES AND COSTS BECAUSE HE HAS "SUBSTANTIALLY PREVAILED IN THIS LITIGATION

The Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E), provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in

> any case under this section in which the complainant has substantially prevailed.

This Court already has ruled that plaintiff has substantially prevailed in this litigation, so it is unnecessary to argue the point again. Nevertheless, in light of the fact that the Department already has appealed this Court's December 1, 1981, and January 5, 1982 orders on precisely this point, and out of an excess of caution, plaintiff again makes his argument.

In order to obtain an award of attorney fees in a Freedom of Information Act case, a plaintiff must show at a minimum "that the prosecution of the action could reasonably have been regarded as necessary and that the action had a substantial causative effect on the delivery of the information. Vermont Low Income Advocacy Council v. Usery, 546 F.2d 509 (2nd Cir. 1976). Cox v. Dept. of Justice, 601 F.2d 1 (D.C.Cir. 1979).

This case clearly meets this test. To begin with, the evidence adduced during these proceedings demonstrated that the FBI had a history of ignoring Weisberg's requests. Moreover, FBI Director Clarence M. Kelley had denied plaintiff's request on June 27, 1975, and no documents had been released in the more than seven months that transpired between the time of his April 15th request and the time he brought suit. In addition, after he brought suit the FBI made only a partial release of records responsive to the April 15th request and thereafter repeatedly declared over the next seven or eight months that the case was either moot or ripe for summary judgment. Other components of the Department of Justice made no response to his request until well over a year after it was made, even though they made no claim to a backlog. In addition, no effort was made by the FBI to comply with the December 23, 1975 request until nearly a year later, and then only because this Court put pressure on the FBI to get started on the request by

taking testimony during three days of evidentiary hearings in September, 1976. Even then the FBI balked at processing field office files until it was faced with the imminent liklihood of an order to process them and to undertake a Vaughn index of the 44,000 pages contained in the FBI Headquarters MURKIN file. Further disclosures--6,500 "abstracts," Civil Rights Division records, copyrighted crime scene photographs--were made to Weisberg only after he obtained Court orders.

Plaintiff also "substantially prevailed" by securing a fee waiver as a result of this Court's order that the Director of Privacy and Information Appeals justify his decision to allow only a partial waiver of fees. A requester can recover attorney's fees for successfully litigating an agency's refusal to waive fees. Wooden v. Office of Juvenile Justice Assistance, Civil Action No. 80-2866 (D.D.C. March 20, 1981).

On the basis of the foregoing facts it is evident that plaintiff had a reasonable basis for bringing suit, and that the suit had a substantial causative effect on the delivery of the information sought.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO AWARD ATTORNEY FEES IN THIS CASE

The provision for a discretionary award of attorney fees was added when the Freedom of Information Act was amended in 1974. The Senate Report on the amendments describes the purpose of the attorney fees provision as follows:

> Such a provision was seen by many witnesses as crucial to effectuating the original congressional intent that judicial review be available to reverse agency refusals to adhere strictly to the Act's mandates. Too often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information, allowing

> the government to escape compliance with the law. "If the government had to pay legal fees each time it lost a case," observed one witness, "it would be much more careful to oppose only those areas that it had a strong chance of winning." (Hearings, Vol. I, at 211)
>
> The obstacle presented by litigation costs can be acute even when the press is involved. As stated by the National Newspaper Association:
>
> > An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOIA matters in the courts once an agency has decided against making information available. This is probably the most underming aspect of existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by the Committee. (Hearings, Vol. II at 34)
>
> The necessity to bear attorneys' fees and court costs can thus present barriers to the effective implementation of national policies expressed by the Congress in legislation.
>
> * * *
>
> The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law.

S. Rep. 93-84, 93d Cong., 2d Sess. 17-19. ("Senate Report")

The attorneys' fees provision in the Senate bill to amend the Freedom of Information Act contained four criteria to guide a court in making its decision whether to award attorneys' fees: (1) the benefit to the public, if any, deriving from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the agency's withholding

had a reasonable basis in law. Senate Report, at 19.

However, these specifically enummerated criteria were deleted from the final version of the bill. The Report of the House-Senate conferees explained:

> By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 10 (1974)(hereinafter "Conference Report").

From this it is apparent that Congress intended courts to exercise their discretion more liberally than would have been allowed under the Senate criteria. However, in LaSalle Extension University v. FTC, 201 U.S.App.D.C. 22, 25, 627 F.2d 481, 484, the D.C. Circuit suggested that it may be an abuse of discretion for a district court to fail to consider each of the four factors. Accordingly, Weisberg addresses each of them below.

A. Benefit to the Public

The benefit to the public in this case is obvious and overwhelming. The Attorney General of the United States determined that this was a historical case; in recognition of the benefit to the public FBI Director Kelley determined to place a copy of the records released to Weisberg in the FBI Reading Room and the Director of the Office of Privacy and Information Appeals determined that Weisberg should be granted a complete fee waiver for copies of the records released. AUSA John R. Dugan recognized the role that Weisberg's suit played in this process, telling the Court: "Your Honor, he is the one that has triggered this complete review of the file. . . ." The Court did also, responding: "You see they [the

Office of Professional Responsibility and the House Select Committee on Assassinations] wouldn't have made this investigation if it hadn't been for Mr. Weisberg. . . ." October 8, 1976 hearing, Tr. at 5.

In addition, numerous news stories have resulted from the release of the records obtained by Weisberg. Weisberg personally assisted a number of news organizations which did news stories on the King assassination by providing them with materials obtained through this lawsuit. These include the New York Times, The Washing Post, the St. Louis Post-Dispatch, and Newsday, the largest nonmetropolitan paper in the country. He held a press conference in December, 1975, on the materials contained in the first release which the FBI made in response to his April 15 request, and he furnished CBS-TV with materials which they had not obtained in response to a request it had made that partially duplicated his. Records which Weisberg obtained on Oliver Patterson in this litigation formed the basis for a series of four page-one stories in the St. Louis Post-Dispatch, one of the nation's leading newspapers, and the many papers in its syndicate. Information which Weisberg obtained on the Invaders, a group of young Memphis blacks, was provided to Newsday's Pulitzer prize-winning reporter Les Payne, and this led to several front-page stories which were also syndicated, as well as to the exposure of an informer who had penetrated the Invaders, other black organizations and even Dr. King's party. (The informer was later called to testify by the House Select Committee on Assassinations.) See July 29, 1982 Weisberg Affidavit, ¶¶11-15.

The records which Mr. Weisberg has received are preserved exactly as he receives them for future deposit in a university archive. The records are made available students, newsmen, authors, and scholars. Duplicates of some records are already in two

colleges, some of the information obtained is used in seminars and teaching, and at least three "honors" papers have been based on it. July 29, 1982 Weisberg Affidavit, ¶¶16-19.

In addition, when this litigation is finished, Weisberg plans to complete the draft of his second book on the assassination of Dr. King which was two-thirds done when this case began. He will, of course, draw heavily upon the materials obtained through this lawsuit. July 29, 1982 Weisberg Affidavit, ¶¶1, 8, 17.

The Senate Report noted that under this first or "public benefit" criterion, "a court would ordinarily award fees, for example, where a newsman was seeking information to be used in a publication or a public interest group was seeking information to further a project benefitting the general public. . . ." Id. at 19. Under this criterion Weisberg clearly qualifies for an award of attorney's fees and costs.

B. Commercial Benefit to Plaintiff

This litigation has had, and will have, no commercial benefit to plaintiff. The nature of plaintiff's writing is such that his books are not and cannot be commercial. Weisberg keeps his books, most of which have been self-published, in print, even though it is uneconomic to do so, because this serves a public need. Moreover, the commercial value of his planned second book on the King assassination already has been ruined by the fact that information obtained as a result of this lawsuit already has been used by others. For example, UPI syndicated a series of articles based on records Weisberg obtained through this lawsuit and falsely claimed that it had obtained them under the Freedom of Information Act. See July 29, 1982 Wesiberg Affidavit, ¶¶1, 3-9. This Court recognized at the outset of this case that others would gain the benefit of the work Weisberg was doing to force release of the King assassination records, and that the commercial benefit to Weisberg would thereby

be diminished. October 8, 1976 hearing, Tr. at 4-6.

In addition, the Senate Report stated that under this second criterion, "a court would usually allow recovery of fees when the complainant was indigent or a nonprofit public interest group," and that "[f]or the purposes of applying this criterion, news interests should not be considered commercial interests." Id. at 19. These considerations alone make the "commercial interest" criterion inapplicable to the facts of this case.

There are, however, other considerations which also rule out "commercial interest" as a factor in this case. Where "government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior," an award of attorney fees can be made even if a requester has a private self-interest for, and received a pecuniary benefit from, his FOIA request. Senate Report at 19. See LaSalle Extension University v. F.T.C., 201 U.S.App.D.C. 22, 25, 627 F.2d 481, 484 (1980); Nationwide Building Maintenance, Inc. v. Sampson, 182 U.S.App.D.C. 83, 91-92, 559 F.2d 704, 712-713 (1977); Kaye v. Burns, 411 F.Supp. 897, 903-905 (S.D.N.Y. 1976).

This Court has made a finding that defendant "stonewalled" plaintiff's request for over a year after this suit was filed. January 5, 1982 Memorandum Order at 2. In his Preliminary Statement above, plaintiff gave many examples of defendant's obdurate behavior in this case. Thus even if Weisberg had a pecuniary interest in this suit, he could still properly be awarded attorney's fees.

The fact of the matter is, however, that Weisberg has no commercial interest in this suit and has spent more than $12,000 pursuing the public interest only to be gyped out of $15,914.60 owed him for services he rendered and costs he incurred as its consultant. (The affidavit of Lillian Weisberg, plaintiff's wife and bookkeeper, which is filed herewith lists out-of-pocket expendi-

tures totalling $11,894.59. Since that affidavit was executed other expenses, including more than $300 for the Second Metcalfe and Zusman depositions, have pushed that figure above $12,000.)

C. The Nature of Plaintiff's Interest in the Records

The Senate Report states that under the third criterion, "a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interested oriented, but would not do so if his interest was frivolous or purely commercial." Id. at 19.

As has been shown above, Weisberg's interest in the information sought is scholarly, journalistic and public-interest oriented. Under these circumstances the courts, consistent with the legislative history, have awarded attorney fees. Thus in Goldstein v. Levi, 415 F.Supp. 303, 305 (D.D.C. 1976), the court based its award of attorney fees on the plaintiff's status as a television producer who had sought information for use in a public television documentary and a book rather than for his personal commercial benefit. Accord, Consumers Union of United States v. Board of Governors of the Federal Reserve System, 410 F.Supp. 63 (D.D.C. 1975)(public interest type organization sought information for benefit of the general public). Weisberg sought the King assassination materials for the benefit of the general public, and the scholarly and journalistic uses which have been made of the materials released show that he has indeed fulfilled that role.

D. Whether the Agency's Withholding Had a Reasonable Basis in Law

The Senate Report states that under the fourth criterion, "a court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to

frustrate the requester." Id. at 19. Defendant's failure to promptly respond to Weisberg's requests and its stonewalling after he brought suit had no colorable basis in law, and has been pointed out above, the FBI had long engaged in a pattern of conduct designed to frustrate his requests. Moreover, to the extent that the plaintiff serves the public interest, this criterion is of diminished importance. Thus, according to the Senate Report a newsman would "ordinarily recover fees even where the government's defense had a reasonable basis in law, while corporate interests might recover where the withholding was without such basis." Id. at 20. Because Weisberg has served the public interest, including the news interest, this factor would not weigh against him in any event. Moreover, even if the Government has a reasonable basis for concluding that withholding is proper, this "does not preclude a recovery of costs and attorney fees. It is but one aspect of the decision left to the discretion of the trial court." Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C.Cir. 1977).

III. THE LODESTAR AWARD SOUGHT BY PLAINTIFF IS REASONABLE

The most authoritative decision in this Circuit on the factors which determine the amount of an attorney fees award is Copeland v. Marshall, 205 U.S.App.D.C. 390, 641 F.2d 880 (1980)(en banc). Copeland reaffirmed National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C.Cir. 1975), which adopted the formula set forth in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (1973)(Lindy I), and its successor case, Lindy II, 540 F.2d 102(1976)(en banc). As stated in Copeland, the basic formula is as follows:

> Any fee-setting inquiry begins with the "lodestar": the number of hours reasonably expended multiplied by a reasonable hourly rate. The figure generated by that computa-

> tion is the basic fee from which a trial court judge should work.

641 F.2d at 891.

In this case plaintiff seeks compensation for 904.6 hours of his attorney's time at the rate of $100 per hour. For the reasons set forth below, plaintiff believes that both figures are reasonable.

A. The Amount of Time

Plaintiff's counsel, James H. Lesar, submits herewith a 24-page itemization of the time he has spent on this case. This itemization lists and describes a total of 929.1 hours of work expended on this case. It should be understood that this is not all the time plaintiff's counsel actually spent on the case. First, in the first seven months after suit was filed plaintiff's counsel kept no records of his time--or else he has lost them. Thereafter, he began keeping records of his time and got progressively better at it. Where unable to document work which he obviously did, he has attempted to reconstruct the time spent by actually reviewing the work done; i.e., where he filed or reviewed a motion or wrote a letter but failed to record any time for this work, he has personally examined the motion or letter and estimated the amount of time it must have taken. He believes that his estimates are conservative, and that he did a great deal of work for which he now has no basis for even attempting to reconstruct and which is permanently "lost" so far as seeking remuneration for it is concerned.

Second, some time which was documented but which was clearly inconsequential, such as motions for extension of time, or which was clearly unproductive, was not included on the list at all. The total amount of time thus excluded is, however, not very great.

After preparing his itemization plaintiff's counsel has also decided that 24.5 hours should be eliminated because at least at

this time it cannot be considered productive. (If the cross-appeals in this case go forward and plaintiff wins in the Court of Appeals, some of the eliminated time will undoubtedly become compensable)

This leaves a total of 904.6 hours for which compensation is sought. This litigation has lasted nearly seven years. There have been some 39 status calls and hearings so far, and the docket entries alone run 21 pages. The case involves issues that are both legally and factually complex. Moreover, it has been to the Court Court of Appeals once already on a matter involving novel legal issues. Under these circumstances, the amount of time for which compensation is sought is entirely reasonable.

B. The Hourly Rate

Plaintiff's counsel seeks payment at the rate of $100 per hour. Given his experience in FOIA matters and the prevailing market rate for attorney services, this is a reasonable rate of compensation.

Plaintiff's counsel, James H. Lesar, graduated from the University of Wisconsin School of Law in 1969; he was admitted to the District of Columbia Bar in 1972. August 19, 1982 Affidavit of James H. Lesar ("Lesar Affidavit"), ¶3. He has had twelve years of experience litigating cases under the Freedom of Information Act. Id., ¶5. He has represented a dozen different clients in more than thirty cases filed in District Court. Id., ¶¶6-7. He has won a number of important legal victories, several of which have set important precedents. His FOIA cases also have resulted in the release of much information of great historical significance. Id., ¶¶9-13; Id., Attachment 1.

Mr. Lesar's FOIA cases are taken on a contingency basis, thus he has no established billing practice for this work. In the two

FOIA cases in which he has been compensated for his time, Mr. Lesar has accepted a compromise payment of $75 per hour. He currently charges $85 per hour for non-FOIA work in which he is not an expert and has no prior experience. Id., ¶¶21-23.

The reasonableness of hourly rates may be justified by citation to authorities. Environmental Defense Fund v. Environmental Prot., 672 F.2d 43, 54 (D.C.Cir. 1982)("EDF v. EPA"). A compendium of fee awards made in the District of Columbia since 1975 is found at Attachment 4 to the Lesar Affidavit. This shows fee awards ranging between $70-125 per hour.

Plaintiff relies particularly on North Slope Borough v. Andrus, 515 F.Supp. 961 (D.D.C. 1981), in which the District Court Judge made an inquiry as to the prevailing rates for environmental litigation in the Washington, D.C. area and thereafter approved rates, consistent with his findings as to the prevailing community rates, as follows:

Very Experienced Attorney	(over 20 years)	$125/hour
Experienced Attorney	(over 9 years)	$110/hour
Less Experienced Attorney	(4-8 years)	$80/hour
Inexperienced Attorney	(under 4 years)	$65/hour

In EDF v. EPA, EDF relied heavily on North Slope Borough. In opposing EDF's claims, EPA submitted its own list of cases. The Court of Appeals concluded that "[i]f anything, the submission by EPA tends to support EDF's claim on rates. EDF v. EPA, supra, 672 F.2d at 58, n. 11.

Given plaintiff's counsel's extensive experience in FOIA litigation, his request for payment at $100/hour seems to be in line with the cited authorities. Plaintiff also points out that according to well-established doctrine "a judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these

presumptions obviate the need for expert testimony. . . ." National Treasury Employees Union v. Nixon, supra, 521 F.2d at 322 n. 18, quoting Lindy I, supra, 487 F.2d at 169. See also Trustees v. Greenough, 105 U.S. 527, 537 (1882)(trial court "has a far better means of knowing what is just and reasonable than an appellate court can have"). Judges routinely decide questions of reasonable hourly rates based, at least in part, on their own experience. See, e.g., In re Swine Flu Immunization Products Liability Litigation, 89 F.R.D. 695, 703 (D.D.C. 1981)(trial court set hourly rates based solely on its knowledge of prevailing rates); Davis v. Bolger, 512 F. Supp. 61, 64-65 (D.D.C. 1981); Fells v. Brooks, 522 F. Supp. 30, 35 (D.D.C. 1981); Payne v. Travenol Laboratories, Inc., 74 F.R.D. 19, 21 (N.D.Miss. 1976); Becker v. Blum, 487 F. Supp. 873, 876 (S.D.N.Y. 1980); Meisel v. Kremens, 80 F.R.D. 419, 426 (E.D.Pa. 1978).

Plaintiff has supplied the Court with information concerning his counsel's experience and accomplishments. Plaintiff has also provided the Court with citations to recent fee awards in other cases. In combination with this Court's own knowledge of the prevailing rates for attorneys in this community and its personal observation of the quality of the work performed by plaintiff's counsel, this constitutes sufficient basis upon which to determine whether the request for payment at the rate of $100 an hour is reasonable. Plaintiff submits that it is.

Plaintiff seeks to have the $100 per hour rate applied to all services rendered by his counsel since 1975. Although courts have differed as to whether attorneys should be compensated at different rates for work done over a period of several years, the clear majority have held that counsel can claim their most recent fee rate for all services regardless of when they were rendered. Mader v. Crowell, 506 F. Supp. 484 (1981); International Travelers v. West-

ern Airlines, 623 F.2d 1255 (8th Cir., 1980). This is obviously preferable to attempting to calculate interest or the effects of inflation. Two recent cases in this jurisdiction indicate that courts will calculate awards for all services at the current rate. Roberts v. Solomon, 26 EPD ¶32039 (1981); Williams v. Civiletti, 25 EPD ¶31530 (1980).

Multiplying the $100 hourly rate sought by plaintiff's counsel times the number of hours reasonably expended (904.6) produces a "lodestar" amount of $90,460.

IV. THE COURT SHOULD INCREASE THE LODESTAR AMOUNT

Having determined the "lodestar," the court may then adjust this amount to reflect other factors. Plaintiff has identified three factors in this case which he contends warrant an increase in the "lodestar" amount.

A. The Contingent Nature of Success

In its en banc opinion in Copeland, the D.C. Circuit recently held that:

> Under statutes like Title VII, only the prevailing party is eligible for a court-awarded fee. An attorney contemplating representation of a Title VII plaintiff must recognize that no fee will be forthcoming unless the litigation is successful. An adjustment in the lodestar, therefore, may be appropriate to compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained.

641 F.2d at 892.

The risk of noncompensation is higher is some kinds of cases than in others. In some environmental litigation even a losing party may receive fees; and as Copeland noted, in Title VII cases, a "prevailing" party is eligible for fees. The risk of noncompensation in FOIA cases is much greater. First, the threshold test is

stricter: a plaintiff must not mere "prevail," he must "substantially prevail." Second, even if he "substantially prevails," it does not necessarily follow that he will receive attonrey fees. He must jump through still more hoops before he can actually collect.

Furthermore, it is generally recognized that the burden on a plaintiff in FOIA litigation is very high, for, as one experienced FOIA litigator put it, "a plaintiff's lawyer is at a loss to argue with precision about the contents of a document he has been unable to see. Not knowing the facts--that is, what the documents say--puts him at a real disadvantage when he is trying to convince a judge that the information should be disclosed instead of kept secret under whatever exemption the government has chosen to assert." R. Plesser, Using the Freedom of Information Act, 1 Litigation Magazine 35 (1975). The United States Court of Appeals has recognized this many times, stating that:

> In light of this overwhelming emphasis upon disclosure, it is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of concealed information. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unkown to the party seeking disclosure. In many, if not most, disputes under the FOIA, resolution centers around the factual nature, the statutory category, of the information sought.

Vaughn v. Rosen, 484 F. 2d 820, 823 (1973), cert. den., 415 U.S. 977 (1974).

In this case the risk was increased by the fact that the Freedom of Information Act had just been amended. Thus there was no well-established body of case law to furnish guidelines on a whole host of legal issues which might arise, including the attorney fees issue itself. The courts were hostile to the original FOIA, a fact which led to the need to amend it. It was uncertain how the judi-

ciary would react to the new legislation. There had been indications that some judges resented the efforts of Weisberg and other requesters to obtain information from the Government. For example, a member of the Court of Appeals panel which heard Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195)(1973) (en banc), the case which forced Congress to amend Exemption 7, contemptuously referred to Weisberg as "some plaintiff off the street" and derided FOIA requesters as "rummaging writers." In addition, it was known that critics of the official investigation into the King and Kennedy assassinations were not popular with the Government, to put it mildly, and that Weisberg was extremely unpopular with the agencies he had criticized; that is, the very ones he now demanded release thousands of records. All of these factors indicated the liklihood of a long and bitter lawsuit with uncertain results.

In asssessing the risks of non-compensation in Lindy Bros. II, supra, the Third Circuit noted three primary considerations: (1) the degree of plaintiff's burden at the time the suit was filed, including the factual and legal complexity of the case and the novelty of the issues; (2) the delay in receipt of payment; and (3) the risks assumed, indcluding:

> (a) the number of hours of labor risked without guarantee of remuneration; (b) the amount of out-of-pocket expenses advanced for processing motions, taking depositions, etc.; and (c) the development of prior expertisse in the particular type of litigation; recognizing that counsel sometimes develop, without compensation, special legal skills which may assist the court in efficient conduct of the litigation, or which may aid the court in articulating legal precepts and implementing sound public policy.

Lindy Bros. II, supra, 540 F.2d at 117.

The first consideration was addressed above. The second consideration, delay in the receipt of payment, was mentioned in Cope-

land as an additional factor which may be incorporated into a contingency adjustment. Copeland, supra, 641 F.2d at 893. The large amount of work required by this case has precluded plaintiff's counsel from taking other work. This resulted in a loss of income which was made doubly severe by the rapid rate of inflation in recent years coupled with the high rate of interest paid on savings. Plaintiff suggests that applying his counsel's current rate of $100 per hour to work done in past years does not fully compensate him for his loss, and that this should be considered in making the contingency adjustment.

With respect to the third consideration mentioned in Lindy Bros. II, the risks assumed in this case include both a very large amount of time--now approaching 1,000 hours by counsel plus an even greater expenditure of time by plaintiff himself--and very large out-of-pocket expenses. The out-of-pocket expenses incurred by plaintiff's counsel come to $4,201.78. See Lesar Affidavit, Attachment 3. Plaintiff's, excluding those incurred in connection with the consultancy, total over $12,000.

In view of the highly contingent nature of this litigation, the enormous investment of time made, and the large out-of-pocket expenses incurred, plaintiff suggests that a contingency factor of 50% per would be appropriate. Comparable or greater upward adjustments have been awarded in other cases. See, e.g., Lindy Bros. II, supra, 540 F.2d at 115-116 (100% incentive premium); National Association of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842, 850-851 (D.D.C. 1975)(100% bonus), rev'd on other grounds, 551 F.2d 340 (D.C.Cir. 1976), cert. den., 431 U.S. 954 (1977); Pealo v. Farmer's Home Administration, 412 F. Supp. 561, 567-568 (D.D.C. 1976)(50% increase). Such an award is particularly appropriate in this case where plaintiff has acted as a private attorney general vindicating a national policy of full information

disclosure and did so on a matter of paramount interest to the public and at great cost to himself.

B. Exceptional Results

Copeland states that "[w]here exceptional results are obtained --taking into account the hourly rate commanded and the number of hours expended--an increase in fee is justifiable." Copeland, supra, 641 F.2d at 894. Plaintiff suggests that exceptional results have been obtained in this litigation. These include, inter alia: (1) plaintiff obtained the Long Tickler file after the FBI said it could not locate it, and he did so by himself providing Department of Justice officials with information on where to search for it; (2) the discovery and compelled disclosure of several thousand "abstracts" of MURKIN records, an invaluable research tool for scholars; (3) forcing the FBI to locate crime scene photographs after it denied having them; and (4) obtaining inventories of the FBI's records pertaining to the campaign of harrassment it waged against Dr. Martin Luther King, Jr.

Because of these exceptional results, plaintiff believes a further 10% increase in the lodestar award is appropriate.

C. Obdurate Conduct

The lodestar may also be adjusted upward because of obdurate or bad faith conduct on the part of the defendant. See National Treasury Employees Union, supra, 521 F.2d at 322. Indeed, such behavior may justify a court in exercising its equitable powers to make an award of attorneys' fees even where such an award is not expressly provided for by statute. ". . . it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in 'bad faith, vexatiously, wantonly, or for oppressive reasons.'" Hall v. Cole, 412 U.S. 1, 5 (1973)(citations omitted).

This Court has already found that defendant engaged in conduct that was obdurate in nature. The Court has found that defendant "stonewalled" plaintiff's request for over a year after this suit was brought. On another occasion the Court characterized an affidavit filed by FBI Special Agent Horace P. Beckwith as "obstructionist" and asked that he leave the case and not return.

Unfortunately, this does not begin to exhaust the examples of bad faith conduct in this case. The FBI lied to plaintiff and his counsel and misrepresented to the Court by asserting that everything pertaining to the King assassination is contained in one file, the MURKIN file. It also misrepresented that everything contained in the field office files would also be in the Headquarters files. See Preliminary Statement, supra, at pp. 4-7. These misrepresentations were intended to deflect plaintiff's quest for pertinent records, and for a time they succeeded.

The FBI also broke promises and commitments it made to plaintiff and the Court. It promised to review the excisions about which Weisberg had complained after it completed processing, but it did not do so. It promised to send Weisberg certain listed field office records if he indicated which ones he wanted, but did not do so. It entered into a Stipulation with plaintiff, agreeing to process certain field office records and provide them all to him by certain dates, but to release them in reasonable segments as they were processed. Instead, it accumulated 6,000 pages and delivered them to him all in a jumble in a hugh box at the very last moment.

Unwilling to abide by its promise to review Weisberg's complaints about excisions and other matters, it sought to force him to become its paid consultant, then welched on the deal after Weisberg sought an interim payment based on the rate that had been offered him in a Sunday night phone call to his counsel by Mrs. Lynne K. Zusman, defendant's then counsel (who now claims she was never attorney of record).

The whole consultancy matter reeks of bad faith on the part of the defendant. Defendant now represents that Mrs. Zusman had no authority to contract on its behalf for Mr. Weisberg's services as a consultant. This necessarily implies that the Department was not acting in good faith at the November 21, 1977 conference in chambers during which Weisberg reluctantly agreed to act as the Department's paid consultant.

Bad faith conduct by a litigant undermines the integrity of the judicial system, impairs its efficiency and tarnishes its reputation. It inevitably wreaks damage on those victimized, and does so in ways that can never fully be set right. No court can countenance such behavior. Accordingly, plaintiff asks that the lodestar award be increased by 100% because of defendant's obdurate and bad faith conduct.

V. PLAINTIFF SHOULD BE AWARDED ALL HIS COSTS IN THIS CASE

A. Costs Exclusive of the Consultancy

Weisberg seeks costs, exlcusive of those incurred in the consultancy, in the amount of $16,405.66. Of this sum, $12,203.88 is for costs paid directly by Weisberg in connection with this litigation for expenses such as xeroxing, travel, phone calls, notary publics, etc. (The affidavit of Lillian Weisberg submitted herewith gives this figure as $11,994.59, but the Second Metcalf and Zusman depositions alone have added $309.29 to this amount. A supplemental affidavit by Mrs. Weisberg updating this figure will be filed later.) The remaining $4,201.78 is for out-of-pocket costs advanced by plaintiff's counsel for long distance phone calls, xeroxing, copies of slip opinions, etc.

Given the length and complexity of this case and the fact that Mr. Weisberg lives some 50 miles from Washington, these costs were certainly "reasonably incurred" and thus reimbursible under 5 U.S.C. § 552(a)(4)(E).

B. Consultancy Costs

Weisberg also seeks payment of $15,984.60 owed him in connection with the consultancy agreement. Weisberg incurred these costs not of his own volition but because the Department of Justice and this Court pressed him to act as the Department's paid consultant. Having agreed to do what he did not want to do, Weisberg lived up to his end of the bargain. He promptly began work, paid necessary expenses out of his own pocket, and kept Departmental representatives advised on what he was doing. At no time did the Department advise him to stop work. When he finished his two consultancy reports totalling over 200 pages, he submitted them to the Department. The Director of the Office of Information and Privacy Appeals then used them as the basis for his report to this Court.

Given these facts, the consultancy may properly be viewed as a litigation cost reasonably incurred by Weisberg and thus reimbursable under 5 U.S.C. § 552(a)(4)(E).

Alternatively, the Court may award Weisberg this sum by virtue of its equitable powers to award attorney fees and costs to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall v. Cole, supra, 412 U.S. at 5.

CONCLUSION

For the reasons aforesaid, this Court should award plaintiff attorney's fees and costs in the amounts specified herein.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22203
Phone: 276-0404

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

This matter comes before the Court on plaintiff's motion for an award of attorney's fee and litigation costs and defendant's opposition thereto. Having given careful consideration to the papers in support of and against the motion, and to the entire record herein, the Court makes the following findings:

1. Plaintiff has "substantially prevailed" in this litigation within the meaning of 5 U.S.C. § 552(a)(4)(E);

2. Plaintiff is eligible for a discretionary award of fees under 5 U.S.C. § 552(a)(4)(E);

3. Plaintiff has benefitted the public interest by compelling the release of records about the assassination of Dr. Martin Luther King, Jr.;

4. In light of the experience and accomplishments of plaintiff's counsel, evidence of the prevailing rate in the Washington, D.C. area for similar services and the Court's own familiarity with legal fees charged in the community for comparable work, the Court finds that $_____ per hour is a reasonable hourly rate for work done by plaintiff's counsel.

5. The number of hours reasonably expended by plaintiff's counsel in this litigation is _____ hours.

6. Multiplying the hourly rate of plaintiff's counsel times the number of hours of work reasonably expended, the Court finds that plaintiff's counsel is entitled to a basic fee or "lodestar"

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 counsel for plaintiff in the above-entitled cause of action.

2. In 1962 I received a B.A. degree from the University of Illinois (Champaign-Urbana, Illinois), where I majored in History and had a minor in foreign languages (Spanish, German and Portuguese). During the next two years I completed all course work required for a Master's degree in History and also passed two foreign language exams (French and German) required of Ph.D. candidates. However, before I could write my Master's thesis, I was drafted into the Army.

3. I received my J.D. degree from the University of Wisconsin in 1969. I was admitted to the practice of law in the District of Columbia in 1972.

4. I am a member of the District of Columbia Bar, the United States Supreme Court Bar, and the bars of the United States Courts of Appeals for the Fifth, Sixth, Eleventh and District of Columbia Circuits.

5. I have had extensive experience litigating cases under the Freedom of Information Act ("FOIA"). This experience began in 1970. One case which I handled prior to the amendment of FOIA in

1974 was Weisberg v. Department of Justice, 160 U.S.App.D.C. 71, 489 F.2d 1195 (1973), cert. denied, 416 U.S. 993, 94 S.Ct. 1405, 40 L.Ed. 2d 772 (1974). Although this case was ultimately lost in the courts, it set such a bad precedent that Congress reversed it legislatively when it amended the investigatory files exemption in 1974. See 120 Cong. Rec. S 9336, daily ed., May 30, 1974.

6. I have represented more than a dozen different clients in Freedom of Information Act lawsuits. These clients have included such diverse persons as a convict, a law student, and the former General Counsel and Staff Director of the House Select Committee on Assassinations, Professor G. Robert Blakey.

7. Altogether I have represented FOIA plaintiffs in more than thirty cases filed in District Court. In most of these cases I was (or am) the sole attorney representing the plaintiff and in the rest, with but a few exceptions, the participation of the other attorney has been only nominal.

8. I have filed thirteen actions on behalf of Mr. Weisberg alone. A number of these cases have been significant either legally and/or historically. A summary of many of them is contained in The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Westport, Connecticut: Greenwood Press, 1980), compiled by Delloyd J. Guth and David R. Wrone. See Attachment 1.

9. I have also handled several FOIA cases at the Court of Appeals level. On four occasions the Court of Appeals has sustained my client's position in published opinions. These are: Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976); Weisberg v. United States Dept. of Justice, 200 U.S.App.D.C. 312, 627 F. 2d 265 (1980); Weisberg v. U.S. Dept. of Justice, 203 U.S. App.D.C. 242, 631 F.2d 824 (1980); and Allen v. Central Intelligence Agency, 205 U.S.App.D.C. 159, 636 F.2d 1287 (1980). These cases are frequently cited in briefs submitted on behalf of FOIA

plaintiffs, and they are extensively cited in two well-known works on the Act: namely, Federal Information Disclosure, a leading treatise by James T. O'Reilly, and Litigation Under the Federal Freedom of Information Act and Privacy Act (7th edition), Morton H. Halperin and Allan Adler, eds.

10. In addition to the above cases, I achieved a significant victory in Weisberg v. General Services Administration, Civil Action No. 2052-73, a case in which Mr. Weisberg sought the 86-page transcript of the executive session of the Warren Commission held on January 27, 1964. At the time this suit was filed, this transcript had been withheld from the public for nearly a decade on the pretense that it was classifed Top Secret in the interest of national security. During the course of the suit, the Government submitted affidavits by former Warren Commission General Counsel J. Lee Rankin and the Director of the National Archives, Dr. James B. Rhoads, both swearing that the transcript had in fact been classified pursuant to Executive Order 10501. Ultimately, Judge Gerhardt Gesell ruled that the government had not shown that the transcript was properly classified pursuant to Executive order and thus had failed to substantiate its Exemption 1 claim.

11. The decision of the United States Supreme Court in EPA v. Mink, 410 U.S. 73 (1973) was generally thought to have all but ended the possibility of successfully using FOIA to obtain records purportedly classified pursuant to Executive order. Because Judge Gesell's decision in Weisberg v. General Services Administration, supra, came after Mink but before the 1974 amendments to Exemption 1, some law review articles have noted the significance of Judge Gesell's unpublished memorandum opinion. Thus, Professor Elias Clark wrote that Judge Gesell's decision and a subsequent opinion by the District of Columbia Circuit had "pecked away at the seemingly absolute bar of Mink. . . ." Elias Clark, "Holding

Government Accountable: The Amended Freedom of Information Act," 84 Yale Law Review 741 (1975) at 753, n. 57. See also, Comment, "Freedom of Information: Judicial Review of Executive Security Classifications," 28 University of Florida Law Review 552 (1975) at 564, n. 103.

12. Although Judge Gesell ruled that the Government had not shown that the January 27 Warren Commission executive session transcript was entitled to protection under Exemption 1, he did find that it was immune from disclosure under Exemption 7. But before Weisberg could appeal his ruling, the GSA elected to "declassify" the transcript and release it to the public. The release of this transcript led in turn to the release of the Warren Commission's January 22, 1964, executive session transcript. These transcripts revealed that the Warren Commission was critical of the FBI for reaching its conclusion that Lee Harvey Oswald alone killed President Kennedy without running out "all kinds of leads." The Commission felt that the FBI had boxed it into a position where it had to endorse the FBI's assertion that Oswald, and Oswald alone, was responsible for the President's murder. As one member of the Commission put it: "they [the FBI] would like to have us fold up and quit." As the Commission's General Counsel expressed it: "They found the man. There is nothing more to do. The Commission supports their conclusions, and we can go on home and that is the end of it." January 22, 1964 transcript, pp. 12-13. In my judgment the release of these transcripts contributed in a major way to the changed climate of opinion which made it possible for the House of Representatives to vote, in 1976, to establish a Select Committee to investigate the assassination of President Kennedy. The historical importance of these transcripts and of the lawsuit which resulted in their release has been recognized in a book published by the University of Wisconsin-Stevens Point Foundation Press: The

Freedom of Information Act and Political Assassinations: The Legal Proceedings of Harold Weisberg v. General Services Administration, Civil Action No. 2052-73, David R. Wrone, editor.

13. Another significant legal victory occurred in Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155, in which Judge Gesell ruled that my client was entitled to a free copy of 40,000 pages of Kennedy assassination records which the FBI was to release --and did release--to the public on January 18, 1978. This ruling led to a decision by the then Director of the Office of Privacy and Information Appeals, Mr. Quinlan J. Shea, Jr., to award Mr. Weisberg a fee waiver, effective both retroactively and prospectively, for all Department of Justice records on the assassinations of President Kennedy and Dr. Martin Luther King, Jr. As a result, Mr. Weisberg so far has obtained an estimated 300,00 pages of records on these assassinations. So far as I am aware, ıe only other fee waiver which potentially approaches this in magn ıude is that awarded to Mr. Mark A. Allen in Allen v. Federal Bureau of Investigation, et al., Civil Action No. 81-1206. However, no documents have actually been released in that case as of yet.

14. From 1970-1976 I represented James Earl Ray in his attempts to overturn his plea of guilty to the murder of Dr. Martin Luther King, Jr. I was associated in these endeavors with Mr. Bernard Fensterwald, Jr., Mr. Ray's lead counsel, and Mr. Robert I. Livingston of Memphis, Tennessee, who acted a local counsel. I wrote virtually all of the briefs and looked after the daily conduct of the case. In 1974, as a result of a habeas corpus petition which I drafted and which Mr. Fensterwald argued orally, the United States Court of Appeals for the Sixth Circuit ordered a "full-scale judicial inquiry" into the circumstances surrounding Mr. Ray's guilty plea. Ray v. Rose, 491 F.2d 285 (1974). I conducted the examination of James Earl Ray and most other witnesses who testi-

fied in his behalf at the two-week evidentiary hearing which was held in October, 1974.

15. I have both written and lectured on the assassinations of President Kennedy and Dr. Martin Luther King, Jr. in the context of the Freedom of Information Act. In 1974 I wrote an essay on the Freedom of Information Act and the assassination of President Kennedy which was included in the book Whitewash IV: Top Secret JFK Assassination Transcript by Harold Weisberg. This essay was later excerpted and published in an anthology of writings on these assassinations, The Assassinations: Dallas and Beyond: A Guide to Cover-Ups and Investigations (New York: Random House, 1976), Peter Dale Scott, Paul L. Hoch, and Russell Stetler, editors.

16. In April, 1975, I lectured on the assassination of Dr. Martin Luther King, Jr. at a symposium held at the New York University School of Law. In November, 1976, I delivered a series of paid lectures on the King and Kennedy assassinations and the Freedom of Information Act at the University of Wisconsin-Stevens Point. The University videotaped these lectures for later use by students and scholars.

17. In 1978 I was invited to attend the Judicial Conference at Hershey, Pennslyvania and did attend.

18. From 1975 to 1980, I devoted the major portion of my time to Freedom of Information Act cases. Nearly all of these cases were public interest oriented, and almost all of them resulted in the release of very significant information which had long been withheld from the American people. The full significance of the substantive information made public as a result of Mr. Weisberg's FOIA lawsuits has not yet been apprehended. However, a good example of the importance of the substantive content of these records concerns the "Bronson film" of the assassination of President Kennedy. The records which led to the discovery of this film were re-

leased as a result of Weisberg v. Webster, et al., Civil Action No. 78-0322, Mr. Weisberg's suit for the Dallas Field Office files on the assassination of President Kennedy. Although it spent millions of dollars investigating the assassination of President Kennedy, the House Select Committee on Assassinations was unaware of the significance of this film until it was brought to their attention by private citizens who became aware of it as a result of the records released by Mr. Weisberg's suit. The significance of the film is that photographic experts say it shows two images in motion in two adjoining windows on the 6th floor of the Texas School Book Depository at the exact spot and time when Lee Harvey Oswald is alleged to have been there alone.

19. Because my FOIA cases are "public interest" cases and my clients lack the financial resources to be able to pay me for my work, I represent them on what is in effect a very high-risk contingency basis. I get paid only if and when my client "substantially prevails" within the meaning of 5 U.S.C. § 552(a)(4)(E). In practice this often means that even if I win I lose because of the delay in getting paid. Moreover, even if I obtain most of the records which the Government has withheld from my client, I do not necessarily "substantially prevail" for purposes of attorney fees. For example, in Weisberg v. General Services Administration, Civil Action No. 75-1448, a suit for three Warren Commission executive session transcripts, two of the three transcripts were released to Mr. Weisberg on the day the Government's brief was due in the Court of Appeals. Notwithstanding this, the district court accepted the CIA's assertion that these transcripts had been declassified because of the proceedings of the House Select Committee on Assassinations and thus were not released to the public because of Weisberg's suit. This finding was upheld by the Court of Appeals, with the result that nearly 500 hours of work expended by me went entirely uncompensated.

20. I have filed ten FOIA lawsuits in Mr. Weisberg's behalf since the amended FOIA went into effect in 1975: three in 1975, three in 1977, three in 1978, and one in 1981. Six of these lawsuits have now been concluded. I have received attorney's fees in only two of the six cases, a fact which itself indicates the high risk of taking FOIA cases on a contingency basis. Even more illustrative of the risk factor is the fact that although I spent a minimum of 970 hours on these six cases, I received compensation for only 82 hours. Dividing the total compensation received in these two cases by the 970 hours I spent on all six, I find that my overall rate of pay for work done on cases which have been completed comes to $6.34 per hour. Because much of the work done on these cases was not documented, particularly in the early years, the true rate of pay may actually amount to half this figure.

21. In 1978 I sought payment for work done in Weisberg v. Griffin Bell, et al., Civil Action No. 77-2155, at the rate of $85 per hour. Because the case involved only 74 hours of compensable time and I needed to settle the attorney's fee issue as expeditiously as possible, I settled the case for $75 per hour. Similarly, in 1982 I sought compensation at the rate of $100 per hour for work done in Weisberg v. Department of Justice, Civil Action No. 81-0023. That case involved only 8.2 hours of compensable time, so I again compromised, accepting payment at the rate of $75 per hour.

22. Because of the contingency nature of my Freedom of Information Act work, I have no established billing practice with regard to such work.

23. I currently charge $85 per hour for non-FOIA work in which I am not expert and have no prior experience.

24. When I took this case I accepted a very considerable risk that I would receive either no compensation at all or only partial

compensation for my work. At that time the Freedom of Information Act only recently had been ameded to allow for attorney fees and it was at best unclear what standards the courts would employ to determine when a plaintiff had "substantially prevailed" within the meaning of 5 U.S.C. § 552(a)(4)(E). Similarly, there was no developed case law to guide in determining when a plaintiff who had "substantially prevailed" was entitled to a discretionary award of attorney fees. Moreover, although Congress had amended Exemptions 1 and 7 to increase access to Government records of the kind sought in this case, no established body of case law existed in 1975 to delineate the scope and application of these exemptions. Nor was there any prior case law on such novel questions as whether copyrighted materials are "agency records" or otherwise exempt from disclosure under the Act pursuant to 5 U.S.C. § 552(b)(3) or (b)(4). (I have just become aware of a recent law review article, "The Applicability of the Freedom of Information Act's Disclosure Requirements to Intellectual Property," 57 Notre Dame Lawyer 561 (February, 1982), by Renee G. Rabinowitz, which extensively discusses the decisions of this Court and the Court of Appeals on the application of Exemptions 3 and 4 to copyrighted records. The article states that this Court's February 9, 1978 decision is "[t]he only judicial determination of whether Exemption 4 applies to copyrighted materials" and that the Court reached the correct result. Ibid., pp. 576-575.)

25. In addition to the risk of non-compensantion or reduced compensation, I also assumed a very large burden by committing myself to spend the time needed to litigate a case of this magnitude. This has had very definite adverse consequences for me and my family. It has greatly limited the areas of law in which I have had time to gain experience; it has also greatly curtailed the income which I would otherwise have earned over the past seven years. The rapid inflation of the past several years coupled with the high rate of interest paid on savings and investments has made my loss

doubly severe.

26. Attachment 2 to this affidavit is an itemization of the time which I have expended on this case to date. Because I not infrequently failed to record my time, particularly in the early years of this case, it is my belief that this itemization may understate the amount of time actually spent by as much as 50%.

27. Attachment 3 is an itemization of expenses which I have incurred during the course of this case. Again, because careful records were not always kept, especially during the early years, the figures given generally underestimate the costs actually incurred. For example, in the 1975-1977 period, I incurred a number of parking charges in connection with court appearances in this case. However, I am presently able to document only one such charge because I either failed to obtain or lost other parking receipts.

James H. Lesar

JAMES H. LESAR

ARLINGTON COUNTY, VIRGINIA

Subscribed and sworn to before me this 19th day of August, 1982.

NOTARY PUBLIC IN AND FOR
THE STATE OF VIRGINIA

My commission expires _____.

Attachment 1 Civil Action No. 75-1996

chronological and documentary evidence contradicts the Court on the nature of the relationship of the Kennedy family to the evidence.

162. C. John Nichols v. United States of America. October term, 1973. The Supreme Court of the United States.

Nichols petitioned the Supreme Court for a writ of certiorari. The Court denied cert. 93 S. Ct. 268, 409 U.S. 966, 34 L. Ed. 2d 232.

163. D. Historical note. Robert M. Brandon v. Jack M. Eckard, Administrator, General Services Administration, et al. DC CA No. 74-1503. United States Court of Appeals for the District of Columbia. Judges Wright, Tamm, and Wilkey.

A major reference to Nichols v. United States, Tenth Circuit No. 71-1238, occurs in the opinion of the court by Wright. Brandon sought to gain access to certain items in the Vice Presidential papers of Nixon but was precluded by the terms of the contract between Nixon and the GSA. The District Court had denied Brandon access, in part basing its summary judgment upon Nichols, ruling that Brandon was not a party to the agreement and thus had no right to access. Judge Wright opined, however, that the Tenth Circuit did not cite any authority nor discuss the FOIA's history or purposes in asserting that one who was not a party to an agreement has no standing to object to the agreement or its terms. "With deference," said Wright, "we reject this attempt to create a novel barrier to FOIA plaintiffs as clearly inconsistent with congressional intent." On 22 Dec. 1977 the Appeals Court vacated the lower court's judgment and sent the case back for reconsideration of recent legislative and legal developments in the field of FOIA. 569 F. 2d 683.

Smith, Robert P.

164. Robert P. Smith v. Department of Justice. Civil Action No. 1840-72. United States District Court for the District of Columbia.

Critic sought FBI records relating to Oswald and certain FBI laboratory examinations or other reports. No report handed down.

Weisberg, Harold.

Suits for disclosure of scientific evidence pertaining to the assassination of President John F. Kennedy.

Spectro I

165. A. Harold Weisberg v. United States Department of Justice. Civil Action No. 2301-70. United States District Court for the District of Columbia. Judge John Sirica.

In complaint filed in District Court on 3 Aug. 1970, Weisberg sought the disclosure of the "spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally."

Weisberg was represented by Washington, D.C. attorney Bernard Fensterwald, Jr. The Department of Justice was represented by Thomas A. Flannery, United States Attorney for the District of Columbia, and Assistant United States Attorneys Joseph M. Hannon and Robert M. Werdig, Jr.

Weisberg sought these records in the belief that if the laboratory tests had been properly done they would disprove key findings of the Warren Commission.

On 6 Oct. 1970 the Department of Justice filed a motion to dismiss, or, in the alternative, for summary judgment. The Department contended that Weisberg was not entitled to copies of these records because they were protected by the Act's investigatory files exemption. The Department maintained that this exception to the Act's mandatory disclosure requirements was a blanket exemption which protected all of the FBI's investigatory files from disclosure.

On 9 Nov. 1970 the Department filed an affidavit by FBI Special Agent Marion E. Williams which claimed that the release of "raw data" from its investigative files to any and all persons who requested them "would seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities . . . ." It speculated that the release of such information could lead to "exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of suspected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage." It concluded by warning that: "Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent . . . ."

During oral argument before Judge Sirica on 16 Nov. 1970, Assistant United States Attorney Robert M. Werdig told the Court that the Attorney General of the United States had determined that it was not in the "national interest" to divulge the spectrographic analyses. This representation was made even though the Freedom of Information Act had specifically eliminated "national interest" as a ground for nondisclosure because it was too vague.

Ruling from the bench and without making any findings of fact, Judge Sirica granted the Department's motion to dismiss.

No evidence has ever been produced to substantiate Werdig's claim that the Attorney General had determined that it was not in the national interest to divulge the spectrographic analyses. Several years after Werdig made this assertion, Weisberg obtained records which show that at least by 1972 Department of Justice officials were trying to get the FBI to make a discretionary release of such records in order to avoid a possible adverse legal precedent which would be harmful to the FBI's interests.

166. B. Harold Weisberg v. United States Department of Justice. DCCA No. 1026. United States Court of Appeals for the District of Columbia Circuit. Judges: Chief Judge David L. Bazelon, Senior Circuit Judge John A. Danaher, Judge Frank R. Kaufman.

This case arose from Weisberg's appeal of Judge Sirica's order granting the government's motion to dismiss in Civil Action No. 2301-70. On appeal Weisberg was again represented by Bernard Fensterwald, Jr., with James H. Lesar serving "of counsel." The Department of Justice was represented by Walter H. Fleischer, Assistant Attorney General L. Patrick Gray, III, Thomas A. Flannery, Harold H. Titus, Jr., Barbara L. Herwig, and Alan S. Rosenthal.

On appeal Weisberg attacked the affidavit of Marion E. Williams as conclusory and far-fetched. He contended that the spectrographic analyses had not been compiled for a "law enforcement purpose," but rather as a result of a request by President Lyndon B. Johnson that the FBI conduct a special investigation for the President; that the Freedom of Information Act's "investigatory files" exemption did not extend blanket protection to all FBI files; and that the Department had failed to show that disclosure of the spectrographic records would result in any harm to the FBI's law enforcement functions.

On 28 Feb. 1973 the Court of Appeals issued its opinion. The majority opinion, written by Judge Kaufman and concurred in by Chief Judge Bazelon, held that the Williams affidavit was "most general and conclusory" and "in no way explains how the disclosure of the records sought is likely to reveal the identity of confidential informants, or subject persons to blackmail, or to disclose the names of criminal suspects, or in any other way to hinder F.B.I. efficiency." Specifically holding that the Department had the burden of proving "some basis for fearing such harm," the Court reversed Judge Sirica and remanded the case to him for further proceedings.

Given FOIA's explicit language and criteria, Senior Circuit Judge John A. Danaher curiously but confidently dissented, "it is unthinkable that the criminal investigatory files of the Federal Bureau of Investigation are to be thrown open to the rummaging writers of some television crime series, or, at the instance of some 'party'

off the street, that a court may by order impose a burden upon the Department of Justice to justify to some judge the reasons for Executive action involving Government policy in the area here involved." After offering his opinion that "the law . . . forfends against [Weisberg's] proposed further inquiry into the assassination of President Kennedy," he concluded his dissent with a Latin phrase emblazoned in capital letters: "REQUIESCAT IN PACE."

The Department of Justice petitioned for a rehearing by the full court. The Court of Appeals granted the Department's petition and vacated the panel decision. The case was then orally argued before the nine active members of the Court, Chief Judge Bazelon and Circuit Judges Wright McGowan, Tamm, Levanthal, Robinson, MacKinnon, Robb, and Wilkey, plus Senior Circuit Judge Danaher.

On 24 Oct. 1973, the Court of Appeals upheld Judge Sirica's original ruling by a 9-1 vote. Senior Circuit Judge Danaher wrote the majority opinion; Chief Judge Bazelon filed the lone dissent.

Factually inaccurate where it touched upon the events surrounding the assassination of President Kennedy, the Court's en banc opinion held that where Department of Justice files "were investigatory in nature" and "compiled for law enforcement purposes," they are exempt from compelled disclosure. 489 F. 2d 1195 (en banc), cert. denied, 416 U.S. 993. Because this meant that law enforcement agencies could protect virtually all their files simply by asserting that they had been compiled as a result of an investigation made for law enforcement purposes, this decision eviscerated the Freedom of Information Act. Ultimately, however, Congress amended the investigatory files exemption and specifically overrode the decision of the Court of Appeals in the Weisberg case.

167. C. Harold Weisberg v. United States Department of Justice. United States Supreme Court. No. 73-1138.

Weisberg filed a petition for a writ of certiorari seeking to have the Supreme Court review the decision of the Court of Appeals. Weisberg argued that the Court of Appeals' decision marked the first time that any Court of Appeals had converted the investigatory files exemption into a blanket exemption protecting all files said to be (1) investigatory in nature, and (2) compiled for law enforcement purposes, even though the agency had failed to show any conceivable harm which might result from disclosure. Weisberg contended that this interpretation of the investigatory files exemption was in direct conflict with the decisions of other Courts of Appeals and stressed the important implications the case had for the viability of the Freedom of Information Act. However, the Supreme Court denied certiorari, 416 U.S. 993, 94 S. Ct. 2405,

40 L.Ed. 2d 772. Only Justice William O. Douglas voted to grant certiorari.

Spectro II

168. A. Harold Weisberg v. United States Department of Justice and United States Energy Research and Development Administration. Civil Action No. 75-0226. United States District Court for the District of Columbia. Judge John Pratt.

In 1974 Congress amended the Freedom of Information Act. Public Law 93-502 (Act of November 21, 1974), 88 Stat. 1563. In amending the investigatory files exemption, Congress specified its intention to override the en banc decision of the United States Court of Appeals for the District of Columbia Circuit in Weisberg. Senator Edward Kennedy asked Senator Hart, on the floor of the Senate, whether Hart's proposed amendment to the investigatory files exemption would override the Weisberg precedent and some other D.C. Circuit cases which followed it. When Senator Hart replied that it would, Senator Kennedy announced his support for the measure. It was then enacted over President Gerald Ford's veto.

On 19 Feb. 1975, the effective date of the Amended Freedom of Information Act, Weisberg again filed suit for the spectrographic analyses made in connection with the investigation into President Kennedy's assassination. This time he also requested records on or pertaining to neutron activation analyses and other scientific tests on the physical evidence associated with the President's murder.

During the proceedings in front of Judge John Pratt, the FBI submitted two affidavits by FBI Special Agent John W. Kilty, who was assigned to the FBI Laboratory. The first Kilty affidavit swore that the FBI had examined the President's clothing, the presidential limousine windshield, and a piece of curbstone allegedly struck by bullet by means of neutron activation analysis. When Weisberg sought the records of this testing, Kilty then executed a second affidavit in which he directly contradicted his first affidavit by declaring that "upon further examination" the President's clothing, the windshield, and the curbstone had not been examined by means of neutron activation analysis. Notwithstanding this blatant discrepancy, Judge Pratt granted summary judgment in favor of the government, ruling that the case was moot because the Department had "substantially complied" with Weisberg's request. This ruling was based on the government's claim that it had produced "all available" records sought by Weisberg.

169. B. Harold Weisberg v. United States Department of Justice et al. DCCA No. 75-2021. United States Court of Appeals for the District of Columbia Circuit. Judges Spottswood W. Robinson III, Malcolm R. Wilkey, William Jameson.

In this appeal Weisberg was represented by James H. Lesar. Justice Department attorney Michael Stein argued the case for the appellees. Assistant Attorney General Rex E. Lee, United States Attorney Earl J. Silbert, and Justice Department attorney Leonard Schaitman were also on the brief for appellees.

On appeal Weisberg argued that the government had not met its burden of showing that each document sought had been produced and that there were material facts in dispute, particularly as regarded the existence or nonexistence of certain records, which precluded summary judgment. Weisberg argued that it was essential that he be allowed to undertake discovery on this issue. District Judge Pratt had foreclosed Weisberg's attempts to obtain answers under oath to his interrogatories, labeling them "oppressive."

The case was argued on 3 June 1976. Barely a month later, and just three days after the 10th anniversary of the enactment of the Freedom of Information Act, the Court of Appeals issued its opinion reversing Judge Pratt. The opinion, written by Judge Wilkey, held that there were issues of material fact in dispute, and that Judge Pratt should not have dismissed Weisberg's interrogatories as oppressive. In remanding the case to the district court, the Court of Appeals declared that, "[t]he data which [Weisberg] seeks to have produced, if it exists, are matters of interest not only to him but to the nation." Saying that the existence or nonexistence of these records "should be determined speedily on the basis of the best available evidence," the Court of Appeals stated that on remand Weisberg must take the testimony of live witnesses who had personal knowledge of events at the time the investigation was made. 177 U.S. App.D.C. 161, 543 F. 2d 308.

In addition to its significance as a legal precedent establishing the right of discovery in Freedom of Information Act cases, this decision is important because comparison with its earlier en banc decisions reflects a changed attitude towards the Freedom of Information Act and a reversal of the Court's opinion of Weisberg and his work.

170. C. Harold Weisberg v. United States Department of Justice et al. Civil Action No. 75-0226. United States District Court for the District of Columbia. Judge John Pratt.

On remand Weisberg utilized three forms of discovery: interrogatories, depositions, and requests for the production of documents. He took some 400 pages of deposition testimony from four FBI agents who had personally participated in the testing of items of evidence in the assassination of President Kennedy. The evidence developed on remand directly contradicted the affidavit of FBI Agent Kilty in which he swore that neutron activation analysis had not been performed on the presidential limousine windshield. After first testifying that he could not recall whether the windshield scraping had been subjected to neutron activation analysis, FBI Special Agent John F. Gallagher then admitted, when confronted with evidence that the specimen had in fact been submitted to the nuclear reactor, that he had tested it.

Through discovery Weisberg also established that the spectrographic plates and notes on the testing of the curbstone were allegedly missing. This fact had been concealed from Weisberg and the district court when the case had first been before Judge Pratt in 1975. For example, while Kilty's affidavits had asserted that Weisberg had been provided with "all available" records within the scope of his request, they did not provide the essential information that records which had been created had not been provided him because, it was conjectured, they were "destroyed" or "discarded" during "routine housecleaning."

The discovery materials obtained by Weisberg are significant in a number of respects. If the deposition testimony of the FBI agents can be credited, it discloses a picture of the FBI Laboratory as bungling, uncoordinated, amateurish, inept, and anything but thorough, precise, and reliable. It is a portrait quite opposite to the highly-touted reputation that the FBI Lab has cultivated in the press and elsewhere.

The deposition testimony reveals ignorance of fundamental facts by the FBI agents who conducted the investigation of the President's murder. For example, FBI Special Agent Cortlandt Cunningham, who did the original ballistics testing of CE399, did not know that it had been wiped clean before it was sent to the FBI Lab. Agent Gallagher could not remember testing key items of evidence and when asked to circle possible bulletholes on a photograph of the President's shirtcollar, he circled the buttonholes.

The testimony of the FBI agents is suspect at critical points. Their testimony is also marked by extreme personal antagonism towards Weisberg.

In addition to the discovery he undertook, Weisberg also put into the record some important affidavits and exhibits which address both the official version of the

President's assassination and the credibility of the government's claim that he had been provided all the records he sought. This included not only the lengthy affidavits which he himself executed, but an affidavit by an actual witness to the Kennedy assassination, James T. Tague, who apparently received a minor wound on his cheek when a fragment ricocheted off the curbstone which the FBI tested (seven months after the fact) by means of spectrographic analysis. The Tague affidavit ties in with the spectrographic plates and notes on the curbstone which the FBI claims were destroyed or discarded and with Weisberg's testimony that the curbstone was patched and that the FBI knew when it tested it that it had been altered from its original state.

Through the affidavits and exhibits which he submitted to the district court, Weisberg also maintained that photographic evidence shows that the alleged bulletholes in the President's shirtcollar do not overlap and that the tears in the shirtcollar and the nick in the President's tie were not caused by a bullet but by the fact that the tie was cut off by a scalpel during emergency medical efforts. During his deposition, former FBI Special Agent Robert A. Frazier, who at the time of the President's assassination was head of the FBI Laboratory, testified that he had ordered an FBI Agent, he thought it was Special Agent Paul Stombaugh, to conduct an examination of the President's shirtcollar to determine whether the alleged bulletholes overlapped. However, the FBI has not produced any report or records pertaining to any such examination.

After establishing that records had been created which he had not been given, Weisberg noted the deposition of FBI Special Agent John W. Kilty, the agent responsible for conducting the search for such records. However, Judge Pratt quashed Kilty's deposition before Weisberg's counsel had even been served with the motion to quash the deposition. Subsequently, Judge Pratt granted the FBI's motion for summary judgment, again finding that there were no genuine issues of material fact in dispute and that the FBI had given Weisberg all the documents it had. 438 F. Supp. 492.

171. D. Harold Weisberg v. United States Department of Justice et al. DCCA No. 78-1107. United States Court of Appeals for the District of Columbia. Judges: Chief Judge David L. Bazelon, Judges Spottswood Robinson III, and Francis L. Van Dusen.

Case was orally argued before the Court of Appeals on 20 Mar. 1979. James H. Lesar represented Weisberg. John H. Korns argued the case for the appellees; also on the brief for appellees were United States Attorney Earl J. Silbert and Assistant United States Attorneys, John A. Terry, Michael W. Farrell, and Michael J. Ryan.

In asking the Court of Appeals to reverse Judge Pratt for the second time, Weisberg's counsel reviewed the history of the scientific testing of JFK assassination evidence and presented the evidence for the existence of records not provided Weisberg. He contended that summary judgment had been inappropriate because there existed genuine issues of material facts in dispute; namely, whether the records said to have been destroyed or discarded had in fact been destroyed or discarded and whether there had been a thorough search for allegedly missing records. He pointed out that the government had not sworn under oath that all relevant files had been searched and that the records provided Weisberg showed that only certain files had been searched. He also asserted that Judge Pratt had violated well-established principles of summary judgment. Thus, instead of evaluating the evidence to see whether material facts were in dispute, Pratt had resolved the factual issues himself. In addition, he had not applied the principle that matters of fact are to be viewed in the light most favorable to the party opposing summary judgment.

While the case was pending before the Court of Appeals, Weisberg obtained new evidence further discrediting the government's claims that important JFK assassination evidence had been "destroyed" or "discarded" during "routine housecleaning." This evidence, which Weisberg sought to bring to the attention of the Court of Appeals, over the government's vehement protests, showed that the FBI was under instructions not to destroy or discard its records on its investigation of the assassination of President Kennedy and that periodic reviews of field office records had been made to assure that the evidence was being maintained.

Suits for Warren Commission executive session transcripts.

Transcripts Suit I

172. Harold Weisberg v. General Services Administration. Civil Action No. 2052-73. United States District Court for the District of Columbia. Judge Gerhard Gesell.

On 13 Nov. 1973 Weisberg filed suit for the transcript of the Warren Commission executive session held on 27 Jan. 1964. For several years prior to filing suit, Weisberg had repeatedly requested disclosure of the 27 Jan. transcript. However, the National Archives and Records Service, the custodian of the transcript, had rejected his demands, claiming that the transcript was classified "Top Secret" on grounds of national security.

Warren Commission member Gerald R. Ford had previously published parts of the 27 Jan. transcript, including some extensive and purportedly verbatim quotations, in his book Portrait of the Assassin [706]. On 5 Nov. 1973

during the Senate hearings on his nomination to be Vice President, Ford swore that he had used only publicly available materials in his book. This testimony prompted Weisberg's suit for the transcript which Ford had used in his book, but which had been denied him.

In response to Weisberg's suit, the government submitted two affidavits from high government officials. National Archivist Dr. James B. Rhoads swore that the 27 Jan. transcript was classified Top Secret under Executive Order 10501. J. Lee Rankin, formerly Solicitor General of the United States and General Counsel of the Warren Commission, swore that the Warren Commission had instructed him to classify its records and that he had ordered top secret classification of the 27 Jan. transcript.

Weisberg met these claims head on. He accused Rhoads and Rankin of having filed false affidavits and supported his charges with numerous records taken from the Warren Commission's own files. He argued that these records showed that Ward & Paul, the Commission's reporting firm, had routinely "classified" all records, even housekeeping records, without regard to the content of the records.

On 3 May 1974 Judge Gesell ruled that the government had not shown that the 27 Jan. transcript was properly classified. However, he went on to decide the case in the government's favor, ruling that under the decision of the Court of Appeals in Weisberg v. U.S. Department of Justice, 160 U.S.App.D.C. 71, 489 F. 2d 1195 (en banc) cert. denied, 416 U.S. 993 ("Weisberg I"), it was exempt from disclosure as an investigatory file compiled for law enforcement purposes. In a motion for reconsideration, Weisberg pointed out that the government's answers to interrogatories showed that no law enforcement agency or official had seen the 27 Jan. transcript until at least three years after the Warren Commission had ceased to exist. The motion for reconsideration was promptly denied.

Weisberg planned to appeal Judge Gesell's decision. But the National Archives suddenly "declassified" the transcript and, ignoring its court-sanctioned exempt status as an investigatory file compiled for law enforcement purposes, made it available to Weisberg on 14 June 1974. The eighty-six page transcript contained no material which could have placed the national security in jeopardy nor any indication that it would be used for law enforcement purposes.

Two years after he obtained the 27 Jan. transcript, Weisberg obtained documents during a subsequent lawsuit which showed that the National Archives had withheld the transcript at the insistence of the CIA, purportedly to protect its "intelligence sources and methods." In affidavits filed in other lawsuits, Weisberg has repeatedly asserted,

without contradiction, that the 27 Jan. transcript did not in fact reveal any such "sources and methods."

The disclosure of the 27 Jan. transcript was followed by the release of the transcript of the Warren Commission executive session held on 22 Jan. 1964, for which Weisberg and Dr. Paul Hoch had submitted a new request. The contents of these two transcripts had a devastating impact on the credibility of the Warren Commission's findings. They revealed that the Commission distrusted and feared the FBI, that it knew that the FBI had reached its conclusion that Oswald was "the lone assassin" without having made a thorough investigation to determine if there had been a conspiracy, and that the Commission lacked the courage to investigate rumors that Oswald had worked for the FBI.

These revelations ended any lingering questions as to whether the Warren Commission had conducted a thorough investigation of the President's assassination and disclosed the whole truth in its Report. They helped create the climate of opinion which later caused the House of Representatives to establish a select committee to investigate the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. Case record and transcripts printed verbatim in Wrone [110].

Transcripts Suit II

173. A. Harold Weisberg v. General Services Administration. Civil Action No. 75-1448. United States District Court for the District of Columbia. Judge Aubrey E. Robinson.

On 4 Sept. 1975 Weisberg filed suit for copies of all Warren Commission executive session transcripts which remained suppressed. These consisted of the complete transcripts of the 19 May and 23 June 1964 executive sessions, and pages 63-73 of the transcript of the 21 Jan. 1964 session.

The General Services Administration cited various grounds for continuing to withhold these transcripts, including some claims of exemption which had not been made when Weisberg had requested them in previous years.

The main ground for continuing the suppression of the 21 Jan. and 23 June transcripts rested upon GSA's allegations that making them available would result in the release of classified information which would endanger the national security by disclosing "intelligence sources and methods." The primary justifications for withholding the 19 May transcript were assertions that it was exempt from disclosure because: (1) its release would constitute an unwarranted invasion of the personal privacy of two Warren Commission staff members whose continued employment and access to security classified

information were discussed at that session; and (2) it contained discussions of policy matters which were immune from disclosure under the Freedom of Information Act's fifth exemption, which excepts "inter-agency or intra-agency memorandums or letters" from disclosure.

During the initial discovery phase of the lawsuit, the government refused to identify the subject of the 23 June transcript on the ground that this was classified information. When Weisberg produced a letter from the National Archives to The New Republic which stated that Soviet defector Yuri Ivanovich Nosenko was the subject of the 23 June transcript, Judge Robinson ordered the government to answer Weisberg's interrogatory on this point. The government then admitted that Nosenko was indeed the subject of the 23 June transcript.

The government repeatedly resisted Weisberg's attempts to exercise discovery. Nevertheless, he did obtain some useful materials. For example, he learned that the 27 Jan. 1964 executive session transcript had been withheld at the behest of the CIA, purportedly to protect its intelligence "sources and methods." He also learned that several copies of the 21 Jan. and 23 June transcripts were missing; and that although they were allegedly classified in the interest of national security, no attempt to locate the missing copies had been made.

The government submitted two affidavits by a CIA official, Charles A. Briggs, who claimed that the 21 Jan. and 23 June transcripts had been properly classified in accordance with the applicable Executive Order and that the national security would be damaged if they were made public. Ultimately, Judge Robinson accepted these affidavits at face value and ruled that these two transcripts were immune from disclosure under Exemption 3 of the Freedom of Information Act. In his 4 Mar. 1977 order granting summary judgment to the GSA, he also ruled that upon in camera inspection of the 19 May transcript, he found it to be protected by Exemption 5 because it contained "policy discussions" by members of the Warren Commission.

174. B. Harold Weisberg v. General Services Administration. DCCA No. 77-1831. United States Court of Appeals for the District of Columbia. Judges: Chief Judge David L. Bazelon, Judges Spottswood W. Robinson III and Edward Tamm.

On appeal Weisberg contended, with respect to the 21 Jan. and 23 June transcripts, that (1) the district court had erroneously ruled that they were protected under Exemption 3 by virtue of a statute which requires the Director of Central Intelligence Agency to protect intelligence sources and methods from "unauthorized disclosure" without considering whether they were properly classified; (2) he had been denied discovery essential to an effective

adversarial testing of the government's claims that the transcripts were exempt; and (3) the district court should have examined the transcripts in camera with the aid of his classification expert to determine whether they were being properly withheld. With respect to the 19 May transcript, Weisberg also argued that Exemption 5 should not apply because the Warren Commission was defunct.

While the case was pending before the Court of Appeals, Weisberg found new materials relevant to the issues and attached them as an addendum to his Reply Brief. He contended that some showed a deep-seated animosity toward him which gave the GSA a strong motive for withholding nonexempt records from him. In support of this contention, he submitted records showing that: (a) the National Archivist had directed that the 27 Jan. 1964 Warren Commission executive session transcript be withheld from Weisberg because releasing it would "encourage him to increase his demands;" (b) FBI Director J. Edgar Hoover had ordered the FBI not to respond to Weisberg's Freedom of Information Act requests; and (c) the Secret Service and the National Archives had conspired to deny Weisberg access to a nonexempt record by transferring it from the former to the latter.

Weisberg also submitted materials undermining the credibility of the CIA's affidavits which declared that the release of the 23 June transcript would endanger the national security. Thus, the CIA affidavits had proclaimed that the disclosure of the 23 June transcript would endanger the life of Soviet defector Yuri Ivanovich Nosenko. But Weisberg's addendum contained magazine articles and excerpts from Edward Epstein's newly published book Legend [381] which revealed, with the help of CIA officials, information about the identity and whereabouts of Nosenko, information which the CIA had sworn had to be protected.

The government moved to strike Weisberg's Reply Brief and/or the Addendum on the grounds that the new materials were not properly before the Court of Appeals. The Court of Appeals responded by ordering Weisberg to file a motion for new trial in the district court. It also ordered the district court to decide the motion within thirty days of its filing.

175. C. Harold Weisberg v. General Services Administration. Civil Action No. 75-1448. United States District Court for the District of Columbia. Judge Aubrey E. Robinson.

On 12 May 1978 Weisberg filed a motion in district court asking that it grant him a new trial on the basis of newly discovered evidence. In addition to the evidence previously reproduced in the Addendum to his Reply Brief, Weisberg added the fact that Nosenko's picture had been published in The Washington Post of 16 April 1978.

The government opposed the motion for new trial, contending that the "newly discovered evidence" was only irrelevant double or triple hearsay. When Weisberg moved to take the deposition of the CIA's affiant, Mr. Charles A. Briggs, the government moved to quash it. Judge Robinson granted the motion to quash and also denied the motion for a new trial.

176. D. Harold Weisberg v. General Services Administration. DCCA Nos. 78-1731 and 77-1831. (Consolidated.) United States Court of Appeals for the District of Columbia Circuit. Judges: Chief Judge David L. Bazelon, Judges Spottswood Robinson III and Edward Tamm.

Weisberg took a separate appeal from Judge Robinson's denial of his motion for a new trial. This new appeal, Case No. 78-1731, was consolidated with Case No. 77-1831, in which briefs had already been submitted to the Court. Weisberg's brief in this new appeal argued that the district court had abused its discretion in denying his motion for a new trial on grounds of newly discovered evidence and fraud on the part of the government.

On the day the government's brief was due in court in this new appeal, counsel for GSA announced that the 21 Jan. and 23 June transcripts had been "declassified" and would be made available to Weisberg. The pretext for this action was that the transcripts had been "declassified" as the result of a request by the House Select Committee on Assassinations made in connection with testimony regarding Nosenko before that committee. At the same time the government also moved for complete dismissal of Case No. 78-1731 and partial dismissal of Case No. 77-1831, with which it had been consolidated, on grounds that all issues save those pertaining to the 19 May transcript were now moot.

Weisberg opposed the motion to dismiss. However, on 12 Jan. 1979 the Court of Appeals granted it. But the Court also ordered the district court to vacate its orders with respect to the 21 Jan. and 23 June transcripts and stated that the district court might, upon motion, consider such post-dismissal matters as it thought appropriate.

On 13 Feb. 1979 the only remaining issue before the Court of Appeals, the status of the 19 May transcript, was orally argued. On 15 Mar. 1979 the Court issued an order affirming the district court's finding that the 19 May transcript was exempt from disclosure.

177. E. Harold Weisberg v. General Services Administration. Civil Action No. 75-1448. Judge Aubrey E. Robinson.

In May, 1979 Weisberg filed a motion for an award of attorney fees and costs in district court, arguing that the release of two of the three transcripts he had sought

meant that he had "substantially prevailed" in this litigation and thus qualified him for such an award. This issue is still pending in district court at this time.

Suits for Federal Bureau of Investigation records.

FBI Records Suit I

178. Harold Weisberg v. Griffin Bell et al. Civil Action No. 77-2155. United States District Court for the District of Columbia. Judge Gerhard Gesell. (Originally assigned to Judge George Hart.)

Suit under the Freedom of Information Act for preliminary injunction or other forms of relief, the object of which was to compel the Department of Justice to provide Weisberg with free copies of approximately 80,000 pages of FBI Headquarters' records on the assassination of President Kennedy.

The lawsuit was precipitated by an FBI plan to make these records available to the press in two unmanageable batches of 40,000 pages each, while effectively excluding Weisberg from having any meaningful access to them. The first batch was released on 7 Dec. 1977. Although Weisberg had requested many of these records as long as ten or twelve years before, the FBI had not responded to his requests as required by the Freedom of Information law. After stalling for many years, the FBI announced release of these Headquarters records but told Weisberg that he had a choice of either purchasing the entire 80,000 pages for some $8,000 or going to Washington, D.C. to search for what he had requested in the records placed in the FBI Reading Room in the J. Edgar Hoover Building. Lacking funds to pay for copies of these records and unable to drive to Washington, D.C. every day from his home fifty miles away, Weisberg brought suit instead.

At a hearing held on 16 Jan. 1978 Judge Gerhard Gesell heard oral argument. James H. Lesar represented Weisberg. The Department of Justice was represented by Paul Figley, Lynne K. Zusman, Daniel Metcalfe, and Jo Ann Dolan, attorneys, Department of Justice, Assistant Attorney General Barbara Babcock; and Emil Moschella, Legal Counsel for the FBI.

At the conclusion of the hearing Judge Gesell found that Weisberg "has made a unique contribution in the area by his persistence through the courts and before Congress, without which there would be no disclosures" of FBI records on the assassination of President Kennedy. Considering such factors as Weisberg's indigency, the poor state of his health, the contribution he had made to public knowledge on the subject, the refusal of the FBI to even respond to his Freedom of Information Act requests, and his role in forcing Congress to amend the Freedom of

Information Act so as to make the investigatory records of the FBI and other law enforcement agencies available to the public, Judge Gesell ruled that the "equities are very substantially and overwhelmingly in [Weisberg's] favor." Accordingly, he ordered the FBI to provide Weisberg with a free copy of the approximately 40,000 pages of records scheduled to be released on 18 Jan. 1978.

As a result of this decision, Judge June L. Green ordered the Department of Justice to explain the basis of its decision to grant Weisberg only a partial waiver of copying costs in Weisberg v. Department of Justice, Civil Action No. 75-1996, his suit for records pertaining to the assassination of Dr. Martin Luther King, Jr. This led to a decision by the Department of Justice to grant Weisberg a waiver of all search fees and copying costs for all of its records on both the King and Kennedy assassinations.

To date Weisberg estimates that he has received more than 200,000 pages of FBI records without charge. This achievement is unique in FOIA litigation.

FBI Records Suit II

179. Harold Weisberg v. Clarence M. Kelley, Griffin Bell, U.S. Department of Justice. Civil Action No. 78-0249. United States District Court for the District of Columbia. Judge John Lewis Smith. (Initially assigned to Judge Louis F. Oberdorfer.)

Filed 13 Feb. 1978. Suit to obtain copies of all FBI Headquarters' worksheets and other records on the JFK assassination and records related to requests for and processing and release of those documents. James H. Lesar represented Weisberg. Emory J. Bailey and Lynne K. Zusman, attorneys, Department of Justice; Barbara Allen Babcock, Assistant Attorney General, and Earl J. Silbert, United States Attorney for the District of Columbia, attorneys for the government. Several thousand pages of material is involved. Of the 2,500 pages obtained in 1978, obfuscation of them was apparent and is now in litigation.

FBI Records Suit III

180. Harold Weisberg v. William H. Webster, Griffin Bell, Federal Bureau of Investigation, United States Department of Justice. Civil Action No. 78-322. United States District Court for the District of Columbia. Judge John Lewis Smith. (Initially assigned to Judge Louis F. Oberdorfer.)

Filed 24 Feb. 1978. Suit for disclosure of records of FBI's Dallas Field Office on the assassination of JFK and to provide complete and accurate copies of material released. James H. Lesar, attorney for Weisberg. Daniel

J. Metcalfe and Lynne K. Zusman, attorneys, Department of Justice; Earl J. Silbert, United States Attorney for the District of Columbia, Barbara Allen Babcock, Assistant Attorney General, attorneys for the government. By early 1979 Weisberg and Lesar had uncovered vast quantities of essential records, including scores of films, suppressed eyewitness testimony which contradicts the official reconstruction of the crime, reports of tests done of additional possible bullets, and others. Records agreed to be provided include an index to written communications for the first two years and an index to their content.

FBI Records Suit IV

181. Harold Weisberg v. Federal Bureau of Investigation, William H. Webster, United States Department of Justice, and Griffin Bell. Civil Action No. 78-420. United States District Court for the District of Columbia. Judge A. Robinson on the related case rule moved case to Judge John Lewis Smith.

Filed 10 Mar. 1978. Suit for disclosure of records of FBI's New Orleans Field Office on assassination of JFK. James H. Lesar attorney for Weisberg. Daniel J. Metcalfe and Lynn K. Zusman, attorneys, Department of Justice; Earl J. Silbert, United States Attorney, Barbara Allen Babcock, Assistant Attorney General, attorneys for the government.

Suit for meaningful pictures of JFK's clothing.

182. Harold Weisberg v. General Services Administration. Civil Action No. 2569-70. United States District Court for the District of Columbia. Judge Gerhard Gesell.

Suit to obtain meaningful photographs of JFK's clothing in the National Archives, those available being inadequate and needlessly unclear. Gesell dismissed the complaint on the government's request but directed the Archives to provide Weisberg with photographs of the clothing. Contrary to Court directive and its own rules, the Archives merely showed some photographs which they selected to Weisberg, but would not give him copies.

Suits for disclosure of official records pertaining to the assassination of Dr. Martin Luther King, Jr.

183. Harold Weisberg v. United States Department of Justice, United States Department of State. Civil Action No. 718-70. United States District Court for the District of Columbia. Judge Edward M. Curran.

Filed 11 Mar. 1970. Suit for the disclosure of official records pertaining to the extradition of James Earl Ray. Bernard Fensterwald and William G. Ohlhausen, attorneys for Weisberg. David J. Anderson and Harland F. Anderson,

attorneys, Department of Justice, and William D. Ruckleshaus, Assistant Attorney General, attorneys for the government.

184. Harold Weisberg v. United States Department of Justice, Civil Action No. 75-1996. United States District Court for the District of Columbia. Judge June L. Green.

Filed 28 Nov. 1975. Suit for disclosure of records pertaining to the assassination of Dr. Martin Luther King, Jr. James H. Lesar, attorney for Weisberg. John R. Dugan and Robert N. Ford, Assistant United States Attorneys, Earl J. Silbert, United States Attorney for the District of Columbia, Barbara Babcock, Assistant Attorney General, and Lynne K. Zusman and Betsy Ginsberg, attorneys, Department of Justice, for the government.

185. Harold Weisberg v. Central Intelligence Agency, National Security Agency. Civil Action No. 77-1997. United States District Court for the District of Columbia. Judge John Lewis Smith.

Filed 21 Nov. 1977. Suit for records pertaining to Dr. Martin Luther King, Jr., James Earl Ray, and the assassination of Dr. King. James H. Lesar, attorney for Weisberg. JoAnn Dolan, Daniel J. Metcalfe, Lynne K. Zusman, attorneys, Department of Justice, Earl J. Silbert, United States Attorney for the District of Columbia, and Barbara Allen Babcock, Assistant Attorney General, attorneys for the government.

186. Harold Weisberg v. United States Department of Justice. DCCA No. 78-1641. United States Court of Appeals for the District of Columbia. Hearing scheduled 6 June 1979.

Appeal from Civil Action No. 75-1996. James H. Lesar, attorney for Weisberg. Michael L. Limmel and Leonard Schaitman, attorneys, Department of Justice, Earl J. Silbert, United States Attorney for the District of Columbia, and Barbara Allen Babcock, Assistant Attorney General, attorneys for the government.

Suits for disclosure of official records pertaining to the assassination of Dr. Martin Luther King, Jr., by James H. Lesar.

187. James Lesar v. Department of Justice. Civil Action No. 77-0692. United States District Court for the District of Columbia. Judge Gerhard A. Gesell.

Filed 21 April 1977. Suit for disclosure of Report to the Attorney General by the Office of Professional Responsibility on the FBI's Martin Luther King, Jr., assassination and security investigations and the voluminous appendix materials thereto. James H. Lesar, pro se. Daniel J. Metcalfe, Jeffrey Axelrad, and Lynne K. Zusman, attorneys,

Department of Justice, Earl J. Silbert, United States Attorney for the District of Columbia, and Barbara Allen Babcock, Assistant Attorney General, attorneys for the government.

188. James Lesar v. Department of Justice. DCCA No. 78-2305. United States Court of Appeals for the District of Columbia. Hearing to be scheduled.

Part V: Photographic Evidence

(1) OSWALD IN NEW ORLEANS

Only a portion of the pre-22 Nov. 1963 photographic record has been assembled by the federal investigative agencies, the WC and its staff, and New Orleans law enforcement agencies. Much of the photographic record was ignored. The critics have not given studied attention to the subject. Listed are just six films of Oswald in New Orleans that relate to his political activities.

189. Doyle, James Patrick.

Motion picture taken by tourist of Oswald's 9 Aug. 1963 handbill operation depicting those who assisted him and those who waited in the background as well as another profile of Oswald. Essential evidence known to the FBI but not provided WC. Weisberg [1901], pp. 175, 316, 505.

190. Martin, Jack.

Motion picture taken by tourist of Oswald's 9 Aug. 1963 handbill operation. The FBI did not turn over to WC.

191. WDSU-TV (1).

On 12 Aug. 1963 the New Orleans station filmed Oswald's court appearance outside the Municipal Court of New Orleans.

192. WDSU-TV (2).

On 16 Aug. 1963 the New Orleans station filmed Oswald distributing leaflets in front of the Trade Mart.

193. WDSU-TV (3).

On 21 Aug. 1963 the New Orleans station made a sound film of Oswald at their studio following a radio appearance.

194. WWL-TV.

On 16 Aug. 1963 cameraman Bob Jones of the New Orleans station filmed Oswald plus another person distributing

Attachment 2 Civil Action No. 75-1996

ITEMIZATION OF ATTORNEY'S TIME

DATE	HOURS	DESCRIPTION
4/15/75	*1.0	FOIA request
5/2/75	*0.1	review of 4/29/75 Kelley letter
5/5/75	*0.3	Lesar-Levi appeal letter
5/23/75	*0.1	review of 5/21/75 letter
6/5/75	*0.1	review of 6/5/75 Rogers letter
6/30/75	*0.2	review of 6/27/75 Kelley letter
11/28/75	*2.0	draft of complaint
12/2/75	*0.4	review of 12/1/75 Tyler letter
12/2/75	*1.5	review of 12/1/75 Kelley letter and enclosed documents
12/23/75	*4.0	12/23/75 FOIA request
12/23/75	*0.2	phone call to SA Thomas L. Wiseman
12/23/75	*0.1	phone call to AUSA John R. Dugan
12/24/75	*0.3	notice of amendments to complaint
12/25/75	*0.1	review of 12/23/75 Shea letter
12/29/75	*2.5	Lesar letter to DAG Tyler
12/29/75	*0.1	Lesar letter to SA Wiseman
12/29/75	*0.1	Lesar letter to DAG Tyler
1/6/76	*0.2	review of answer to complaint
1/7/76	*3.0	first set of interrogatories
1/18/76	*0.1	Lesar letter to AG Levi
1/29/76	*0.1	Notice of filing of exhibits
2/7/76	*0.3	review of James P. Turner letter and draft of response

*Items marked by asterisk are estimates based on a careful review of the work done.

DATE	HOURS	DESCRIPTION
2/11/76	*2.0	status call and preparation therefore
2/12/76	*0.2	review of motion for a protective order
2/21/76	*0.2	review of 2/19/76 Shea letter
2/23/76	*1.5	letter to SA Thomas L. Wiseman
2/26/76	*0.5	review of objections to interrogatories
3/4/76	*0.1	phone conversation with AUSA Dugan
3/5/76	*0.5	Lesar letter to Wiseman
3/8-12/76	*20	work on Weisberg Affidavit
3/16/76	*0.2	review of 3/9/76 Kelley letter
3/23/76	*1.5	conference at FBIHQ
3/26/76	*1.5	motion to compel answers to interrogatories
3/26/76	*1.5	status call
3/26/76	*1.5	review of materials at FBIHQ
4/7/76	*0.8	Lesar letter to AG Levi
4/8/76	*0.1	review of defendant's motion for enlargement of time
4/10/76	*0.1	review of court Order of 4/9/76
4/19/76	*0.2	review of 4/16/76 Turner letter
4/21/76	*1.5	review of CRD documents at office of Mr. Gross
4/22/76	*0.1	stipulation
4/26/76	*3.5	review of defendant's opposition to motion to compel answers to interrogatories and affidavits of SAs John W. Kilty and Thomas L. Wiseman

DATE	HOURS	DESCRIPTION
4/29/76	*0.3	review of 4/26/76 letter from AAG Richard L. Thornbugh
5/3/76	*0.1	Lesar-Turner letter
5/4/76	*0.3	request for production of documents
5/5/76	*1.5	status call
5/5/76	*1.0	conference with FBI agents at FBIHQ
5/7/76	*0.1	review of 5/5/76 letter from Robert L. Keuch
5/14/76	*0.2	review of 5/11/76 Kelley letter
5/17/76	*3.0	Vaughn v. Rosen motion; Lesar affidavit
5/17/76	*1.0	Trip to FBIHQ to receive photographs
5/18/76	*2.0	status call
5/19/76	*0.5	Lesar-Kelley letter
5/26/76	*0.2	review of 5/25/76 Turner letter
5/26/76	*0.2	phone conversation with SA Thomas Parle Blake
5/29/76	*0.1	review of 5/28/76 Kelley letter
6/4/76	*0.8	review of defendant's memorandum to the court
6/10/76	*2.0	status call
6/26/76	5.0	motion for certification of compliance; Lesar Affidavit
6/29/76	4.0	motion to compel Vaughn showing; Lesar affidavit
6/30/76	4.0	motion for certification of compliance
7/1/76	2.5	status call
7/13/76	*0.1	review of 7/1 Rogers-Lesar letter
7/16/76	0.2	phone call from Bagley

DATE	HOURS	DESCRIPTION
7/18/76	0.2	review of 7/16/76 Turner letter
7/20/76	5.0	conference with client
7/26/76	0.3	phone calls--James P. Turner, Walter Barnett
8/9/76	4.0	Weisberg affidavit for motion to compel
8/10/76	6.5	work on Weisberg affidavit
8/12/76	*0.9	review of defendant's reponse to motion for certification of compliance
8/13/76	*1.5	review of motion to stay further proceedings pending completion of review
9/8/76	3.0	evidentiary hearing
9/8/76	3.5	conference with client
9/8/76	1.0	preparation for hearing
9/15/76	8.5	preparation for evidentiary hearing
9/16/76	5.5	preparation for evidentiary hearing
9/16/76	3.5	evidentiary hearing
9/17/76	2.5	conference with client
9/17/76	3.5	evidentiary with hearing
9/29/76	4.0	preparation for hearing
9/30/76	2.5	status call and preparation
9/30/76	*0.4	notice of filing of attached exhibits
10/8/76	*0.8	motion to compel forthwith and total compliance and for recovery of costs
10/8/76	*2.0	status call
10/29/76	*2.0	review of defendant's memorandum of points and authorities in opposition to plaintiff's motion for compliance and supplemental points and authorities in support of defendant's motion to stay
11/2/76	0.3	phone conversation with John R. Dugan re JER waiver and return call

DATE	HOURS	DESCRIPTION
11/2/76	1.5	review of documents received
11/4/76	3.0	conference with client
11/4/76	*2.0	Lesar letter to Tyler re fee waiver
11/19/76	*2.5	plaintiff's memorandum to the court
11/30/76	2.0	motion for waiver of search fees and copying costs
12/17/76	*0.4	review of defendant's response to plaintiff's November 30, 1976 notice of filing of attached exhibits
12/29/76	*0.4	review of defendant's response to Court's oral order requiring production of certain documents
12/31/76	*0.3	review of defendant's supplemental points and authorities in support of defendant's motion to stay and in response to plaintiff's memorandum to the court filed November 19, 1976
2/8/77	*0.6	Lesar-Griffin Bell re fee waiver
3/3/77	*0.2	review of supplemental points and authorities in suport of motion to stay
5/2/77	1.5	status call
5/28/77	*0.1	review of 5/26/77 Shea-Lesar letter
6/7/77	2.5	conference with FBI agents at FBIHQ
6/14/77	*0.2	Lesar letter to DAG
6/27/77	2.5	research on copyright question
6/28/77	2.0	review of file
6/29/77	9.5	preparation for hearing; draft of statement read at hearing
6/30/77	2.5	hearing
7/6/77	2.5	conference with Lynne Zusman
7/6/77	1.0	conferencw with Weisberg, SA John Hartingh

DATE	HOURS	DESCRIPTION
7/15/77	*0.1	Review of 7/12/77 Shea-Lesar letter
7/22/77	0.5	conferencw with Zusman on changes in stipulation
7/27/77	*0.2	review of Flaherty letter to Lesar
7/28/77	2.0	conference with Zusman
7/29/77	*0.1	review of 7/27/77 Shea letter to Lesar
8/3/77	*0.4	motion under Vaughn v. Rosen to require detailed judtification, itemization and indexing by Office of Professional Responsibility
8/12/77	1.0	status call
8/24/77	*0.3	review of opposition to Vaughn by OPR
9/2/77	3.0	draft of Weisberg affidavit
9/5/77	2.5	motion for summary judgment on Louw photographs
9/6/77	3.0	motion for summary judgment on Louw photographs
9/14/77	0.5	research at GWU on fee waiver issue
9/15/77	0.5	research on fee waiver issue
9/15/77	0.5	phone conference with client
9/15/77	0.1	phone conversation with SA Hartingh
9/15/77	1.5	phone calls to Hartingh & Weisberg
9/15/77	*1.5	status call
9/17/77	1.0	letter to AUSA John R. Dugan
9/20/77	*0.8	review of defendant's motion for partial summary judgment
9/22/77	*0.3	review of 9/20 Turner letter to Lesar
9/26/77	2.0	research on copyright issue

DATE	HOURS	DESCRIPTION
9/27/77	4.0	research on copyright issue
9/28/77	1.0	letter to Les Whitten
9/29/77	*0.1	stipulation
10/1/77	*0.1	review of 9/30/77 Flaherty letter to Lesar
10/2/77	4.0	work on opposition to defendant's motion for summary judgment
10/10/77	2.0	letter to Schaffer
10/11/77	4.0	opposition to defendant's motion for partial summary judgment
10/11/77	2.0	opposition to defendant's motion for partial summary judgment
10/12/77	6.0	opposition to defendant's motion for partial summary judgment
10/17/77	*0.7	Lesar letter to Bell
10/20/77	2.0	Wrone affidavit
10/21/77	0.2	phone conversation with Schaffer
10/30/77	2.0	work on fee waiver motion
10/31/77	2.0	work on fee waiver motion
10/31/77	0.2	talk with Lynne Zusman
11/1/77	0.2	phone conversation with Dugan
11/2/77	0.5	status call
11/2/77	1.5	meeting with Durgan, Hartingh, Matthews and Weisberg
11/2/77	1.0	preparation for status call
11/3/77	*0.3	Lesar letter to Hartingh
11/4/77	1.0	research on attorney's fees

DATE	HOURS	DESCRIPTION
11/5/77	*0.1	review of Kelley-Lesar letter
11/9/77	1.0	research on copyright issue
11/11/77	4.0	conference with Schaffer, Zusman, et al. and preparation therefore
11/14/77	3.5	memorandum to the court
11/16/77	2.0	preparation for conference
11/17/77	5.0	conference with Zusman, et al., conference with client
11/18/77	*1.0	review of photographs at FBIHQ
11/19/77	*0.1	stipulation
11/21/77	3.5	in chambers conference; meetings with client and Dugan and Hartingh
12/2/77	0.2	Fensterwald privacy waiver
12/2/77	*0.1	Lesar-Kelley letter
12/2/77	*0.1	Lesar-Flaherty letter
12/8/77	*0.1	review of 12/6/77 Shea-Lesar letter
12/13/77	*0.1	stipulation
12/19/77	0.2	Lesar-Hartingh letter
12/26/77	*0.1	Lesar-Zusman letter
1/7/78	2.0	phone calls to Weisberg; letters to Zusman and Bell
1/15/78	*0.9	review of defendant's opposition to plaintiff's motion for waiver of all search fees and copying costs
1/26/78	*0.1	Lesar letter to Civiletti
1/26/78	*1.5	conference with Zusman et al.
1/31/78	*0.6	letter to Schaffer

DATE	HOURS	DESCRIPTION
2/11/78	*0.5	review of court's opinion of copy-right issue
2/15/78	*0.5	phone conversation with Dan Metcalfe
2/15/78	*1.2	Lesar letter to Metcalfe
3/5/78	0.2	review of opinion and order of 3/3/78
3/7/78	1.5	status call
3/15/78	*0.1	review of McCreight letter to Lesar
3/25/78	*0.2	review of notice of filing and attached affidavit of Quinlan J. Shea, Jr.
3/28/78	*0.5	Lesar letter to Zusman
4/2/78	*0.2	review of 3/31/78 Shea-Lesar letter
4/9/78	*0.1	review of 4/7/78 letter from Zusman
4/26/78	*0.7	motion for partial summary judgment
5/10/78	*0.5	review of defendant's cross motion for summary judgment
5/14/78	*0.2	review of defendant's report to the court and attached affidavit of Lynne K. Zusman
5/16/78	4.5	draft of Lesar affidavit and memorandum to the court
5/17/78	1.3	status call
5/18/78	*2.5	notice of filing of Weisberg affidavit and review thereof
5/23/78	*2.5	notice of filing of Weisberg affidavit and review thereof
5/24/78	*2.0	status call
5/29/78	3.3	Weisberg affidavit
6/22/78	3.5	Vaughn motion
6/24/78	2.0	Vaughn motion

DATE	HOURS	DESCRIPTION
6/26/78	5.0	Vaughn motion
6/27/78	3.5	status call; meeting with Ginsberg
7/2/78	1.8	review of Weisberg notes on correspondence with FBI
7/6/78	*4.0	letter to Shea
7/7/78	*0.7	Lesar letter to Ginsberg
7/15/78	*0.1	review of 7/14/78 Schaffer letter
7/29/78	*1.3	review of 7/27/78 Shea letter to Lesar and tasking memo to his staff
8/9/78	2.3	review of Beckwith affidavit
8/9/78	*2.5	Lesar letter to Shea
8/10/78	*0.1	review of 8/8/78 Schaffer letter
8/15/78	1.7	letter to judge
9/6/78	*3.5	review of Weisberg affidavits, notice of filing
9/14/78	1.6	status call
9/18/78	*0.1	Lesar letter to Shea
9/28/78	1.0	status call
9/29/78	*0.2	review defendant's motion to strike
9/29/78	*0.9	review of 9/27/78 Shea letter to Lesar
9/29/78	0.7	phone coversation with Quin Shea
9/29/78	*0.2	review of defendant's motion to strike
10/11/78	4.7	opposition to defendant's motion to strike
10/12/78	5.3	opposition to defendant's motion to strike
10/13/78	1.3	opposition to defendant's motion to strike

DATE	HOURS	DESCRIPTION
10/26/78	*1.5	stauts call
10/27/78	*1.0	review of 10/26/78 Shea letter
11/7/78	1.7	review of appellant's brief in Case No. 78-1641
11/21/78	1.0	status call
11/21/78	2.0	conference with Quin Shea
12/15/78	*1.5	notice of filing; letter to judge
12/23/78	3.0	review of Long tickler file
12/24/78	2.5	review of Long tickler file
12/28/78	1.8	review of Weisberg affidavit; notice of filing
1/2/79	*1.2	review of Weisberg affidavit; notice of filing
1/4/79	*0.2	phone call--Cole
1/10/79	3.7	conference with Weisberg/Shea
1/12/79	*2.0	status call
1/19/79	*0.3	Lesar letter to McCreight
1/20/79	1.9	notes on appellant's brief; research, Case No. 78-1641
1/21/79	2.5	research--Case No. 78-1641
1/23/79	2.7	review of case file for 78-1641
1/24/79	2.9	research, Case No. 78-1641
1/25/79	4.4	research, Case No. 78-1641
1/26/79	1.6	research, Case No. 78-1641
1/29/79	5.5	work on appellee's brief, No. 78-1641
1/30/79	4.5	work on appellee's brief, No. 78-1641

DATE	HOURS	DESCRIPTION
1/31/79	5.5	work on appellee's brief, No. 78-1641
2/1/79	3.6	work on appellee's brief, No. 78-1641
2/2/79	5.3	work on appellee's brief, No. 78-1641
2/3/79	4.0	work on appellee's brief, No. 78-1641
2/4/79	5.5	work on appellee's brief, No. 78-1641
2/7/79	3.5	work on appellee's brief, No. 78-1641
2/8/79	4.0	work on appellee's brief, No. 78-1641
2/9/79	5.0	work on appellee's brief, No. 78-1641
2/10/79	4.2	work on appellee's brief, No. 78-1641
2/11/79	7.0	work on appellee's brief, No. 78-1641
2/12/79	5.0	work on appellee's brief, No. 78-1641
2/14/79	2.5	work on appellee's brief, No. 78-1641
2/15/79	6.0	work on appellee's brief, No. 78-1641
2/16/79	4.5	work on appellee's brief, No. 78-1641
2/18/79	3.5	research, Case No. 78-1641
2/19/79	2.5	work on appellee's brief, No. 78-1641
3/6/79	0.5	motion to expedite oral argument
5/16/79	0.3	review of defendant's motion for partial summary judgment
5/17/79	1.0	research
5/18/79	0.6	phone conference with client
5/21/79	*0.2	notice of depositions
5/21/79	*0.2	motion for extension of time to oppose defendant's motion for partial summary judgment
5/24/79	0.4	phone conversations with client

DATE	HOURS	DESCRIPTION
5/25/79	0.3	phone all to client
5/26/79	1.5	review of case record
5/26/79	1.5	review of Weisberg affidavit
5/27/79	2.3	review of Weisberg affidavit and work on motion for partial summary judgment
5/30/79	3.3	opposition to motion for summary judgment; review of defendant's motion and affidavits; two phone calls to Weisberg
5/31/79	10.7	opposition to defendant's motion for summary judgment
6/1/79	5.3	opposition to defendant's motion for summary judgment
6/2/79	1.5	opposition to defendant's motion for summary judgment
6/3/79	6.8	opposition to defendant's motion for summary judgment
6/4/79	7.2	opposition to defendant's motion for summary judgment
6/5/79	6.0	preparation for oral argument in Case No. 78-1641
6/6/79	1.5	preparation for oral argument in Case No. 78-1641
6/7/79	*0.1	Notice of filing
6/8/79	0.5	motion for partial summary judgment on issue of "substantially prevailed"
6/9/79	1.0	motion for partial summary judgment on issue of "substantially prevailed"
6/10/79	1.5	motion for partial summary judgment on Memphis index; notice of depositions
6/11/79	3.0	opposition to defendant's motion for protective order
6/14/79	2.0	reply to opposition to motion for order on payment of consultancy fee

DATE	HOURS	DESCRIPTION
6/20/79	*0.1	stipulation
6/26/79	*0.2	Lesar-Beckwith letter and subpoena
6/27/79	*0.2	review of defendant's supplemental memorandum in support of motion for a protective order and reply to plaintiff's opposition to motion for protective order
7/3/79	6.0	preparation for depositions
7/4/79	5.5	preparation for depositions
7/5/79	5.0	Wiseman deposition
7/6/79	1.0	preparation for Wiseman deposition
7/6/79	5.0	Wiseman deposition
7/7/79	*0.1	review of court orders
7/19/79	2.5	request for production of documents; notice of deposition; motion for reconsideration
7/27/79	*0.1	review of defendant's opposition to plaintiff's motion to reconsider and vacate court's order of 7/6/79
9/18/79	*0.1	Lesar letter to Cole
9/18/79	*0.1	phone call--Cole
10/10/79	4.0	preparation for depositions
10/11/79	2.5	preparation for depositions
10/11/79	6.0	Wiseman deposition
10/12/79	2.5	preparation for Kilty deposition
10/12/79	3.0	Kilty deposition
11/28/79	1.0	status call

DATE	HOURS	DESCRIPTION
12/3/79	2.0	preparation for depositions
12/4/79	3.2	preparation for depositions
12/5/79	6.2	preparation for depositions
12/6/79	5.3	depositions
12/6/79	3.0	preparation for depositions
12/7/79	4.0	depositions
12/12/79	3.0	depositions
12/13/79	6.0	preparation for depositions
12/14/79	6.5	preparation for depositions
12/15/79	*0.2	review of 2/13/79 Cole letters
12/17/79	2.5	Mitchell deposition
12/17/79	1.0	preparation for Shea deposition
12/17/79	1.0	preparation for Mitchell deposition
12/18/79	5.0	preparation for Shea deposition
12/19/79	4.5	Shea deposition
12/20/79	1.5	status call
12/20/79	1.5	preparation for status call; conference with client
12/20/79	*0.7	motion for partial summary judgment with respect to abstracts
12/20/79	2.0	conference with client after status call
12/22/79	*0.3	review of defendant's memorandum in opposition to motion for partial summary judgment as to abstracts
12/24/79	0.3	phone calls to client
12/26/79	4.5	conference with client
12/26/79	*0.5	motion for extension of time
12/27/79	0.7	letter to Cole

DATE	HOURS	DESCRIPTION
12/28/79	1.0	opposition to motion for summary judgment
12/29/79	5.5	opposition to motion for summary judgment
12/30/79	6.8	opposition to motion for summary judgment
12/31/79	9.0	opposition to motion for summary judgment
1/2/80	1.2	review of 12/29/79 Weisberg affidavit
1/2/80	1.0	motion for order directing FBI to provide records as promised 9/14/77
1/2/80	2.3	reply to defendant's opposition to motion for partial summary judgment as to abstracts
1/2/80	1.0	preparation for argument of summary judgment motions
1/3/80	1.0	preparation for argument on partial summary judgment motions; conference with client
1/3/80	1.4	hearing on summary judgment motions
1/3/80	0.4	conference with client on abstracts, motions
1/4/80	0.2	conversation with Cole re abstracts
1/7/80	0.2	phone call to client re submission of abstracts in camera
1/8/80	0.3	conference on abstracts
1/18/80	0.6	letter to Wrone re abstracts; phone call from Cole re Kelley letter response and abstracts
1/18/80	0.2	phone call re abstracts and talk with Cole

DATE	HOURS	DESCRIPTION
1/28/80	2.0	Lesar affidavit; motion under Vaughn v. Rosen
2/8/80	2.9	status call
2/22/80	0.4	phone call re affidavit, Flanders letter
2/25/80	4.0	preparation for hearing
2/26/80	3.0	hearing
3/10/80	*0.1	Lesar letter to Cole
4/7/80	*0.2	review of Cole letter to judge
4/8/80	2.5	motion for partial summary judgment re CIA referrals
4/19/80	*0.1	review of 4/17/80 Shea letter to Weisberg
4/22/80	*0.1	review of 4/21/80 Flanders letter to Weisberg
4/27/80	*0.1	review 4/25/80 Cole letter to Lesar
5/9/80	*0.1	review of 5/7/80 Cole letter to Lesar
5/19/80	2.0	review of CRD files
5/20/80	4.3	motion for partial summary judgment re CRD records
5/21/80	1.0	Lesar affidavit for reply to defendant's motion for partial summary judgment
5/22/80	1.0	Lessar affidavit for reply to defendant's motion for partial summary judgment
5/23/80	3.0	reply to defendant's opposition to motion for partial summary judgment
5/27/80	8.5	opposition to defendant's motion for summary judgment
6/3/80	1.4	motion for partial summary judgment on records of AG and DAG
6/3/80	1.0	motion for partial summary judgment for 6 MURKIN documents

DATE	HOURS	DESCRIPTION
6/5/80	2.8	motion for reprocessing of MURKIN Headquarters documents
6/16/80	0.4	letter to Cole
7/2/80	*0.1	review of Cole letter to Lesar
7/3/80	0.1	phone call to Shea
7/3/80	0.6	phone call to Weisber re FBI letter on fee waiver
7/7/80	0.6	motion for reprocessing of field office records
7/7/80	2.0	calls to Weisberg, Shea
7/9/80	*0.1	review of 7/7/80 Cole letter
7/9/80	*0.1	review of 7/8/80 Shea letter
7/10/80	2.4	review of Weisberg correspondence, draft of letter to Cole
7/10/80	*0.1	Lesar letter to Cole
7/11/80	*1.2	Lesar letter to Cole
7/12/80	*0.6	letter to Cole
7/13/80	*0.3	letter to Cole
7/14/80	*0.1	review of Flanders letter to Weisberg
7/15/80	1.6	letters to Cole
7/19/80	*0.1	review of 7/17/80 Cole letter to Lesar
7/21/80	*0.1	Lesar letter to Cole
7/25/80	1.0	response to memorandum in opposition to motion for partial summary judgment
7/26/80	*0.2	Lesar letter to Cole
8/7/80	2.7	response to memorandum in opposition to motions for partial summary judgment
8/12/80	3.0	draft of letter to Cole

DATE	HOURS	DESCRIPTION
8/13/80	3.1	letters to Cole
8/14/80	6.1	preparation for hearing
8/15/80	3.0	hearing on pending motions
7/27/80	0.1	notice of clarification
9/24/80	0.1	phone call to Cole
9/25/80	*0.1	review of Cole letter
10/28/80	0.3	phone call from Zvengali
11/15/80	*0.2	Lesar letter to Cole
12/4/80	*0.2	Lesar letter to Cole
12/6/80	*0.1	review of 12/5/80 Cole letter to Lesar
12/24/80	0.6	motion to compel release of NAA/Spectro
12/29/80	0.7	motion to compel production of FBI lab ticklers
1/8/81	0.6	two calls to client re spectro and NAA materials, etc.
1/7/81	0.6	phone call to Weisberg
1/8/81	2.0	review of Weisberg affidavit
1/9/81	1.7	review of Weisberg affidavit; opposition to motion for summary judgment
1/9/81	7.2	opposition to motion for summary judgment
1/10/81	5.5	opposition to motion for summary judgment
1/12/81	4.6	opposition to motion for summary judgment
1/12/81	*0.1	Lesar letter to Cole
1/22/81	0.2	phone call to client

DATE	HOURS	DESCRIPTION
1/23/81	0.7	motion to put Shea in charge of case
1/26/81	3.0	motion to put Shea in charge of case
1/30/81	2.5	plaintiff's reply to memorandum of points and authorities opposing motions (1) to compel further search; and (2) disclose previously processed records
2/1/81	*0.1	review of 1/30/81 Bresson letter
2/2/81	0.8	reply to defendant's response re spectro and NAA
2/14/81	3.0	motion for summary judgment re MURKIN Headquarters records entirely withheld; review of worksheets
2/16/81	2.0	motion for summary judgment re entirely withheld documents
2/17/81	1.0	status call
3/20/81	2.4	motion to compel
4/3/81	0.6	preparation for status call
4/4/81	1.2	preparation for status call
4/5/81	3.5	preparation for hearing
4/6/81	1.5	preparation for hearing
4/6/81	3.0	hearing
5/28/81	0.4	phone calls to client
6/2/81	1.6	research on Rule 41(a)(2)
7/11/81	1.0	research on Rule 41(a)(2)
7/13/81	3.1	motion for voluntary dismissal
7/13/81	3.2	response to motion for reconsideration
9/9/81	0.4	conference with client re affidavit
9/10/81	2.2	reply to opposition
9/11/81	2.1	reply to opposition

DATE	HOURS	DESCRIPTION
12/7/81	0.8	review of Court's order of 12/1/81
12/8/81	1.0	phone conversations with Cole, judge's clerk
12/9/81	0.2	phone call to client
12/10/81	2.0	preparation for status call
12/11/81	1.0	status call
12/11/81	0.2	call to client
12/24/81	1.1	review of motion for extension of time to comply with 12/1/81 order, review of notices of filings
12/28/81	0.6	review of notice of filing
1/4/82	1.5	response to defendant's motion for extension of time to comply with 12/1/81 order
1/5/82	4.2	opposition to motion for reconsideration
1/11/82	0.4	phone conference with client re 1/5/82 order
1/15/82	1.9	motion to amend orders
1/27/82	6.2	work on attorney's fees and costs
2/3/82	0.2	conversation with Cole re consultancy
2/5/82	0.2	called client re cancellation of status call
2/16/82	1.0	status call
2/20/82	3.3	motion for payment of consultancy fee; two phone calls to client
3/12/82	0.2	notice of appeal
4/12/82	0.4	call to client re stay of appeals
4/13/82	1.1	review of memorandum of points and authorities in opposition to consultancy

DATE	HOURS	DESCRIPTION
4/14/82	0.7	subpoenas
4/16/82	0.1	call to Cole
4/21/82	0.2	call to Cole re Metcalfe and Zusman depositions
4/21/82	0.2	calls to client and Cole re rescheduling of Metcalfe deposition
4/27/82	0.1	call to Cole re deposition
5/12/82	0.2	reviewed defendant's motion for protective order
5/14/82	.5	opposition to motion for protective order
5/15/82	1.3	reviewed opposition to motion to pay consultancy fee
5/18/82	0.1	called Cole
5/18/82	0.1	called Cole
5/19/82	0.2	called Cole
5/26/82	2.5	preparation for Metcalfe deposition
5/27/82	0.7	preparation for Metcalfe deposition
5/27/82	1.7	Metcalfe deposition
5/27/82	0.4	call to client
5/29/82	1.5	reviwed Weisberg affidavit
6/4/82	0.2	called Cole re discovery, status call
6/7/82	0.2	phone call re discovery & status call
6/8/82	1.5	supoena, letter to Cole
6/14/82	0.7	status call
6/14/82	0.3	conference with client
6/16/82	0.1	called Cole re Zusman deposition

DATE	HOURS	DESCRIPTION
6/18/82	0.1	phone conversation with Cole
6/18/82	0.1	phone conversation with Cole
7/1/82	0.5	phone conference with client
7/6/82	2.0	preparation for Zusman deposition
7/7/82	1.5	preparation for Zusman deposition
7/7/82	3.0	Zusman deposition
7/7/82	0.2	call to client
7/8/82	0.3	phone call to Cole re discovery materials
7/9/82	0.3	notice of deposition, letter to Metcalfe
7/9/82	0.8	memorandum in response to Court's 7/1/82 order
7/10/82	1.5	read cases re consultancy issues
7/13/82	0.7	preparation for Metcalfe deposition
7/13/82	1.3	Metcalfe deposition
7/15/82	1.2	read cases re consultancy issues
7/16/82	0.5	read cases re consultancy issues
7/20/82	2.3	read Zusman and Metcalfe depositions
7/21/82	1.3	read Zusman and Metcalfe depositions
7/21/82	1.9	reply to opposition to payment of consultancy fee
7/22/82	8.3	reply to opposition to payment of consultancy fee
7/24/82	0.2	phone call to client re attorney fee application
7/28/82	5.4	motion for attorney fees
7/29/82	4.7	motion for attorney fees
7/30/82	5.6	motion for attorney fees

Date	Hours	Description
7/31/82	8.1	Attorney fees motion
8/2/82	7.6	Attorney fees motion
8/3/82	4.8	Attorney fees motion
8/4/82	.5	Attorney fees motion
8/18/82	3.0	Attorney fees motion
8/19/82	7.9	Attorney fees motion
8/20/82	10.6	Attorney fees motion
8/21/82	10.5	Attorney fees motion

Attachment 3 Civil Action No. 75-1996

ITEMIZATION OF EXPENSES

Postage	$ 156.13
xeroxing and copies of slip opinions	102.07
Parking	2.50
Telephone	3783.58
Nimmer on Copyright	157.50
TOTAL:	$4201.78

Attachment 4 Civil Action No. 75-1996

A COMPENDIUM OF FEE AWARDS IN D.C.

Adams v. Weinberger, C.A. No. 3095-70 (D.D.C. 1976)	$100/hour in school desegregation case
Kelsey v. Weinberg, C.A. No. 1660-73	$100/hour in school desegregation case plus 50% bonus
NAACP v. Bell, 448 F. Supp. 1164	$100/hour in civil rights case
Bachman v. Pertchuk, 19 EPD §9043 at ¶6500 (D.D.C. 1979)	$85/hour plus 15% incentive award in Title VII case
National Association for Mental Health v. Weinberger, 68 F.R.D. 387 (D.D.C. 1975)	effective rate of $122.50 an hour
Smith v. Kleindienst, 8 FEP §753 (D.D.C. 1974), aff'd sub nom. Smith v. Levi, 527 F.2d 853 (D.C.Cir. 1975)	$75/hour in individual Title VII action
Palmer v. Rogers, 10 EPD §10499 (D.D.C. 1976)	§75/hour for individual Title VII action
Hammond v. Balzano, 10 EPD §10333 (D.D.C. 1975)	$75/hour in individual Title VII action
Foster v. Mumford, C.A. No. 74-9191 (D.D.C. 1978)	$79/hour
Calvin-Humphrey Corp., et al. v. District of Columbia, et al., 77 Wash. Law Rept. 109, pp. 757-761 (April 22, 1981)	$125/hour for successful challenge to District taxing procedures
Roberts, et al. v. Solomon, C.A. No. 77-2188 (D.D.C. 1981)	$100/hour in class action
Consumers Union of United States v. Board of Governors of the Federal Reserve System, 410 F. Supp. 63 (D.D.C. 1975)	$75/hour in FOIA case

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

My name is Lillian Weisberg. I reside at 7627 Old Receiver Road, Frederick, Maryland. I am the wife of the plaintiff in this instant cause, an experienced bookkeeper, and I keep his books.

1. My husband's and my offices are at opposite ends of our home. It is his practice to note expenditures and file them in a plastic envelope for me to post in our books. Sometimes he fails to note expenditures and sometimes he fails to allocate them. There are undoubtedly other expenditures in this case that I am not able to allocate to it and did not allocate to it in our books. I have a separate account for each of my husband's FOIA cases. What follows is a tabulation I made from my books, with the exception of part of the item of xeroxing for Mr. Lesar, xeroxing of which my husband made no record. Part of that item is based on Mr. Lesar's estimate, which he informs me he made from his copies.

Transcripts and depositions	$3,246.71
Xeroxing	6,980.99
Telephone	262.29
Travel expense	1,209.73
Pictures	108.08
Notary fees	11.50
Postage	75.29
Total	$11,894.59

3. The item of travel expense includes all the means by which my husband got affidavits and many copies of records to Mr. Lesar in this case and travel to confer with Mr. Quinlan J. Shea, Jr., and his staff after the Court asked that my husband cooperate with him. Mr. Shea then was Director of FOIPA

appeals. It also includes the cost of getting the materials to the post office, to the Greyhound terminal for express handling to Washington, transportation to and from notaries public and in getting records to Mr. Lesar for the depositions.

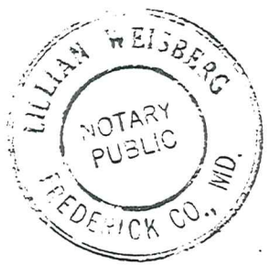
4. Of the xeroxing item, $1,625.00 is Mr. Lesar's estimated figure.

5. "Transcripts and depositions" includes the cost of transcripts of the calendar calls, payments to the court reporter for taking and preparing the deposition testimony, etc.

6. I am a notary public and I make this statement subject to the penalties for perjury. My commission exyires July 1, 1986.

Lillian Weisberg

LILLIAN WEISBERG



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

My name is Harold Weisberg. I reside at 7627 Old Receiver Road, Frederick Maryland. I am the plaintiff in this instant cause.

1. Before I filed this lawsuit I had, as I informed the Court at the outset, completed about two-thirds of the draft of a book on the assassination of Dr. Martin Luther King, Jr., and its investigation. Six years earlier I filed several requests of defendant pertaining to it. Those requests were ignored by order of highest authority. In 1971 I published a book that remains the only definitive and accurate book on this assassination that is not in accord with but is critical of the official account. The partial draft of the second book was intended to update the earlier work. This draft is based on my own original investigative work and my work as investigator for the accused assassin, James Earl Ray. As Ray's investigator, I alone conducted the investigations that persuaded the sixth court of appeals to order an evidentiary hearing and for that hearing. Preparatory to that hearing, by order of federal district court in Memphis, Tennessee, I participated in discovery. I also located witnesses for it. None of my work was rebutted by either the FBI or Tennessee authorities. That court finally held that guilt or innocence then were immaterial.

2. All of this work made me a unique expert on that assassination. This was recognized by the Department of Justice in several ways, including in the finding of its FOIPA office and in its request that I become its consultant in my suit against it.

3. When a book is nonfiction, particularly if it deals with major national issues, such as this terrible crime and how government agencies performed when confronted by it and thereafter, even if a book is a commercial success, it also serves important noncommercial and public purposes. Such a book serves important public needs as official agencies did not and cannot and will not try to do. If there is to be any alternative to blind acceptance of all official decisions and acts by the public, then the private researcher, investigator and writer is essential. There is no other way for the public to be informed. This was foreseen by those who founded our nation and it is one of the distinctions between a representative society and authoritarianism and totalitarianism.

4. My books are not and cannot be commercial. Because of publisher fear of criticizing the Warren Commission and the FBI, I was forced to become a publisher to open the subject of that crime and its investigation. I have kept in print all the books I published, although it is uneconomic to do so, because it serves a public need. No large and wealthy publisher has done this, not even with best-sellers. After I was seriously ill and could not afford it, I reprinted my third book, which was about to go out of print. I did this notwithstanding the fact that my last book had not yet returned the cost of printing alone. If I live long enough to recapture only the printing costs of the reprint of the third book, I will be happy and many years past my present 69. I have no way of promoting and advertising these books. They are sold only by mail, by me, and only when I am asked for them. They sell from their reputations and because they are listed in the standard directories, like Books In Print. Almost all of the present limited demand for them is from libraries, colleges, scholars and those interested in the subject matter.

5. Even if it were not true that my books are not and cannot be commercial, as the Court recognized in 1976, defendant in this case made any commercial success impossible. Before then, as the case record also reflects, defendant decided to make everything I obtained available to others so that I would be denied the possibility of recovering even my costs and the first use of the information obtained. First use is a norm of scholarship. When I obtained some of the information used to procure Ray's extradition from England (in C.A. 718-70), copies were made available to others on defendant's initiative. In this instant cause, defendant's counsel told the Court, when I had received only a few pages, that everything I obtained

would be made available to others as soon as I received it. Obviously, this is ruinous to any commercial possibilities of any book as the Court then stated. When the Court was attempting to expedite what compliance there later was, in trying to explain the alleged need for foot-dragging, defendant's counsel stated that "because of the public interest the entire Martin Luther King assassination file will be processed, and will be made public on a partial basis as soon as they complete a certain amount. I think 400 or 500 pages. That is the objective of the FBI at this time." The Court said, "Well, you know I don't have any feeling that one person is entitled/something to more than another one. On the other hand, I do think that the FBI's own basis was first-come-first-served, and, certainly, Mr. Weisberg was first in on that. It seems, since his request for this information goes back farther than any of these others, it is rather unkind, to say the very least, and illegal to say the most, to prevent his having these things in timely fashion ahead of the other people. Certainly, what he has been attempting to do is to get some sort of scoop on the deal, I gather, in his book, or his publications, and if he comes after everything else, it, obviously, will have little or no value.... it seems to me that while that may not be something that is for the Court to go into on a Freedom of Information case, it is a fact, just the same, and having him come after the other people is scarcely treating him in the fashion that the Freedom of Information Act is supposed to be handled." When defendant's counsel said, "he is not getting it after," the Court corrected him saying, "Well, you see what is actually happening in this case, and that is, all of these things will be made available because they must be made available to the two organizations you are talking about: one, the committee from the Congress which is going to reopen the whole thing; the other one the Professional Responsibility section. So that they will have it. There will be nothing withheld from them, I assume, because there can't be, and so these things, as they come along, we assume they will make some of them public. Now, by the time all of these things are made public and these people make their reports from time to time, obviously, Mr. =eisberg's requested documentation will be worthless or practically worthless." Defendant's counsel then admitted, "Your Honor, he is the one that has triggered this complete review of the file and that is what we are doing." The Court then said, "you see, they wouldn't have made this investigation if it hadn't been for Mr. Weisberg." A little later he tried to pretend that neither the OPR

nor the Congressional committee would disclose any records, that none of the information would be made public. The Court said, "We don't know that, do we?" He then pretended, "I don't understand the significance of that." The Court then said, "as the Court understood your statement, as these things are made available to these people, they will be made public -- quotes. I believe that is what you just said. When it is made public, he is scooped. He is no longer going to come out with something astounding that the other people haven't had.... When it is made public, it is made public, and when these things are turned over to him, I am sure they are also to be made public, just as they were in the Rosenberg situation. There isn't any question but that they will.... But the point is the longer it is delayed, insofar as he is concerned, it will be practically worthless."

6. The Court was correct. Defendant's OPR published a lengthy report, obtained as much attention for it as possible and it disclosed a large quantity of records, including FBI records. The House committee published 13 printed volumes that include a great volume of the records produced in this still unended case. Moreover, all the committee's hearings were broadcast on coast-to-coast radio and reported in the newspapers and a number were televised nationally. The most dramatic of the committee's exhibits consisted of FBI records I obtained in this instant cause.

7. Not content with this, the FBI then got the international news service, UPI, to make a request for some of the records I obtained, led UPI to believe that they were disclosed only as a result of its request, and then UPI syndicated a series of articles in which I was not only denied first use of my work but in which UPI took credit for my work. This, too, is ruinous to commercial and all other possibilities of any work of nonfiction.

8. By these and other similar means, defendant decided to and did ruin any possibilities of any book I would write before I could write it. Simultaneously, defendant kept me tied up in this very long and costly litigation. In fairness to the government and to the historical record, it should be concluded before I write.

9. The case record also reflects, without any contradiction or dispute of any kind, that prior to this litigation the FBI decided it had to "stop" me and my writing - the word of several FBI agents - by tying me up in litigation. I obtained those records outside of this instant cause but I did provide them along

with an affidavit that remains entirely undisputed.

10. With regard to this assassination and that of President Kennedy and their investigations, because of their great importance and my expertise in both, I have been in a public role and have, to the best of my ability, attempted to serve it fully, fairly and openly. Because mine is a scholarly rather than a commercial endeavor, I have helped all who asked help, including those whose uses could hurt me and who are what are normally regarded as competitors.

11. Contrary to defendant's representation to this Court, I have not been provided with all records pertaining to the scientific testing. Some were the first records provided. As soon as I received those that I did receive, I held a press conference and made copies available to the press. CBS-TV had made a limited request that partially duplicated mine. I gave CBS copies of what it had not obtained. I also provided copies to others of the media who were not able to attend that press conference.

12. Drawing on information I obtained in this instant cause as well as by my prior work, I assisted a number of major and minor elements of the media. I spent quite a bit of time with CBS-TV, which was preparing a "special" on the King assassination, even though I had every reason to believe that I could not agree with what it produced. (And I did not) I also used this information in helping many others, including the wire services, and a number of large newspapers. Some have their own syndicates and syndicated this information widely. These include the New York Times, the Washington Post, the St. Louis Post-Dispatch, and Newsday, which is the largest nonmetropolitan paper in the country.

13. Because the Rays are of the St. Louis area, the Post-Dispatch has additional interest in this subject. I provided it with copies of many of the records I received, including entire files, and it reported that information extensively, including by syndication to other newspapers. For example, the records on Oliver Patterson, an FBI informer, made a series of four page-one stories for it and the many papers in its syndicate.

14. With regard to the Items of my requests pertaining to a group of young Memphis blacks calling themselves the Invaders, the information I provided Newsday's Pulitzer prize-winner, Les Payne, led to several front-page stories it also syndicated and to the exposure of an informer who had penetrated the Invaders

and other black organizations and even Dr. King's party. (Later the informer was called to testify by the House committee.)

15. With regard to that House committee, although I perceived that from the start it was wedded to the FBI's account of the crime, I nonetheless spent time with its staff, provided records and assisted it as much as I could until confronted with an irreconcilable conflict. Its published hearings include a 50-page analysis I provided of some of its evidence. In preparing this I used information obtained in this instant cause. (The House committee got little more from the FBI than I obtained in this instant cause, nothing of substance. The FBI's own records, now in the case record, reflect the fact that initially it planned to restrict the House committee to the MURKIN HQ records only.)

16. Aside from these and other public uses, the widespread use and publication of information that was withheld until I obtained it in this lawsuit, there have been a number of scholarly uses of it after I made it available. Some of it is used in seminars and in teaching and at least three "honors" papers are based on it. (An honors paper requires at least as much time as a major course for a full year plus the preparation and acceptance of a paper that is the equivalent of a thesis.) Duplicates of some of these records, including the entire Invaders and sanitation workers strike files, are in two colleges and in use by their students.

17. Major uses of this information remain to be made, aside from my own writing. (I believe it would be unfair to defendant if my writing precedes the end of this case.)

18. As a practical matter, the enormity of the records disclosed in itself denies access to them, so, because I preserve all records that I receive exactly as I receive them for future deposit in a university archive, I made extra copies of the more significant records and filed them by subject. From this large file I provide information to others who request it, including the press.

19. All of my records will be deposited at the University of Wisconsin, pursuent to the request of the Wisconsin Historical Society. However, as I have come to what could be of immediate use and interest, I provided it with duplicate copies. I have spoken and conducted seminars there. These were videotaped by the University. These videotapes were used on state-wide public TV and made available to other colleges and high schools, where they are used in teaching.

HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 29th day of July 1982 deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1986.

NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
Plaintiff,	:	
V.	:	C. A. 75-1996
U. S. DEPARTMENT OF JUSTICE,	:	
Defendant.	:	

AFFIDAVIT

My name is Harold Weisberg. I reside at 7627 Old Receiver Road, Frederick, Maryland. I am the plaintiff in this case.

1. Three days after I completed the first part of an affidavit addressing defendant's bad faith (my previous affidavit), I received from my counsel a copy of Defendant's Supplemental Memorandum In Opposition to Motion to Pay Consultancy Fee (the Memorandum). What defendant seeks to do in this Memorandum completely confirms the forecast of my previous affidavit, that the many and various dirty tricks pulled by Mrs. Lynne Zusman when she was deposed were deliberate, were intended to prejudice, were deliberately nonresponsive and fabricated for ulterior purposes, and for the most part are simply untruthful.

2. In this affidavit I address the additional bad faith of the Memorandum, its unfactual and less than honest character, faults that examination of the case record reflects are not accidental and are defendant's policy and practice.

3. I will be caused additional delay and my counsel and I have additional time pressures in filing this affidavit because of another manifestation of defendant's bad faith, refusal to abide by the directive of the Court that copies of all pleadings be sent directly to me. From the time the Court so directed defendant's counsel, and he agreed, to now, I have not received a single filing directly from him.

4. This also is not accidental and it is not the only refusal by defendant's counsel to do as directed by the Court, although he said he would. Until present defendant's counsel was assigned to this case, because of my distance

from Washington, impaired health and delays in the mails, I had an arrangement with all defendant's counsel in all my cases for copies of all filings to be sent directly to me. I offered to pay the costs but was declined and defendant did do that, in all cases. Once present defendant's counsel was assigned to this case, he terminated that practice and refused to reinstate it even when I offered again to pay the costs. This also was then done by the other defendant's counsel in the other cases, even though I told them I would pay all costs. It thus appears that the practice is concerted, is policy, and regardless of the instruction and desire of the Court, defendant's stonewalling and obstructive policies prevailed and continue to prevail.

5. When the defendant in an FOIA case is less than completely honest, and even more, when such a defendant is dishonest, the plaintiff is at a considerable disadvantage because the courts tend to give weight to official affidavits. The plaintiff also faces a Hobson's choice, between what nobody wants, a long affidavit in which he addresses all he can address and a short affidavit that, while avoiding length, risks having the defendant prevail because the Court accepted a representation he did not address. In the past I have opted for the long affidavit and the record is clear: defendant ignores them because he cannot dispute me on matters of fact.

6. As I indicate in my previous affidavit, defendant appears to assume that the Court would accept unquestioningly whatever defendant states and would ignore anything I file. With my record in this and all other cases, it cannot be believed that defendant would not assume that I would check defendant out. This indicates that defendant is not concerned that I might prove defendant's representations and statements to be misleading, deceptive and untruthful. In doing this, I was greatly assisted by the Memorandum, which directed me to these proofs. They appear below.

The Memorandum's Misuse of Mrs. Zusman's Deposition Testimony

7. The Memorandum draws heavily upon what my previous affidavit shows are Mrs. Zusman's false and defamatory evasions and digressions. In each and every instance cited below, she was not responding to the question asked. In each case she contrived these untruths and misrepresentations, whether or not in collaboration, for the improper uses now made of them by defendant. This was so obvious that, without knowledge of the Memorandum, I was able to forecast it in my previous affidavit.

8. The Memorandum extends this, as I show below, to call "into serious question" the good faith of this Court.

9. On page 4 the Memorandum quotes her testimony that "There was no agreement entered into." (Page 4) This is repeated in different formulations in this Memorandum. The unquestionable fact is that an agreement was entered into in chambers. That is the only reason Mrs. Zusman arranged for the in-chambers conference, as I detail in my previous affidavit. There is no question but that I began work immediately, reported progress and problems to defendant immediately, including to Mrs. Zusman, and I was never told to stop because "there was no agreement entered into." When I filed my consultancy report, it was not returned to me with any claim that "there was no agreement entered into." In fact, as my previous affidavit states, Mrs. Zusman herself told the Court what the FBI was to do after my consultancy report was received. William Schaffer, Mrs. Zusman's superior, confirmed existence of the agreement in open court, when he offered to pay me at a rate neither the court nor I would accept. This was repeated thereafter by Ms. Betsy Ginsberg, also in open court, after she became counsel of record. The plain and simple truth is the claim that there was no agreement was cooked up long after I filed my consultancy report and on deposition Mrs. Zusman just made up what seemed to be expedient in what now is a clear effort to defraud me.

10. (Checking the Memorandum's citations discloses additional proof of Mrs. Zusman's untruthfulness in testifying that she was never counsel of record in this case, one of the knowingly untruthful means by which she pretended to be without any responsibility. In my previous affidavit I quoted what she stated at the March 7, 1978, calendar call, that she would be succeeded by Ms. Betsy Ginsberg. I now find that she also appeared "on behalf of the defendant" at the May 24, 1978, calendar call.)

11. At this point (page 4) the Memorandum also quotes the fabricated defamation that my counsel and I "both have been very manipulative in this whole thing." If ever there was a case of the victim being denounced for the rape, this is it. As my previous affidavit states, I resisted agreeing to become defendant's consultant in my lawsuit against defendant; on behalf of defendant, Mrs. Zusman arranged the exceptionally hurried in-chambers conference; there, in the presence of several other lawyers in defendant's employ, she pressured the Court to have me

agree to be defendant's consultant; despite the many handicaps created by defendant, despite complete nonresponsiveness, I did what defendant asked me to do; it was of considerable value when used by the Director of FOIPA appeals; only to be accused of being "very manipulative" and "trying to capitalize." This is outrageous and it is indecent.

12. Mrs. Zusman's gratuitous insult, that I am mentally ill - which, no doubt, is why she, personally, saw to it that I would be defendant's consultant - is quoted on page 5: "I have no idea of what your client's understanding of reality was, either as it pertains to the facts concerning this matter at litigation or anything else." I address this disgusting slur to avoid response in my previous affidavit.

13. This Memorandum, in its obviously preplanned continuation of the same baseless campaign of personal vilification, manages to rebut Mrs. Zusman's and defendant's false claim that I was to have prepared no more than a list when (at the end of the footnote on page 2) it refers to my "alleged research." This formulation is to avoid what defendant has yet to acknowledge, that I provided my consultancy report, defendant did not return it, and it was of considerable use to defendant's appeals office. Because the dishonest purposes of the Memorandum would not be served by admitting the truth, it resorts to this device. This also suggests, as Mrs. Zusman stated forthrightly and untruthfully, that my work as defendant's consultant was no more than my usual work. It was not. My research is an entirely separate matter. It has stacked up rather well on questions of fact in contention with this defendant in this and all other cases. However, at this point, the representation of what I was to have done under the consultancy states the opposite of what Mrs. Zusman swore to. The rest of the quotation is "alleged research clarifying his own allegations against the Department of Justice." The Memorandum here admits the phoniness of defendant's present claim that I was to have submitted a "non-narrative list" of records only. A list only can "clarify" nothing. Nor is any "research" usable in a "non-narrative list." Thus the Memorandum itself states that I was to have done more than prepare a mere list because I was to provide information explaining the impropriety of the withholdings, what for ulterior purposes is referred to as "research."

The Memorandum Makes Unfactual and Untruthful Statements

14. The Memorandum repeats the claims that "no official was ever authorized to make a contract on behalf of the Department of Justice with Mr. Weisberg" and "no Justice Department official, with or without contractual authority, ever purported to enter into a contract with Mr. Weisberg." (page 2) There is no question but that Mr. Schaffer first asked me to become the Department's consultant and offered to pay me what he referred to as the going rate. There is no question but that Mrs. Zusman, accompanied by the AUSA and FBI representatives, pressed the Court as much as she could to have me agree to be the Department's consultant and promised I would be paid "generously." There is no question but that I did agree. There is no question but that along with complaints about defendant's nonperformance I began to report progress immediately. There is no question but that Mrs. Zusman herself informed the Court on March 7, 1978, that I had begun. There is no question but that on several occasions counsel of record and Mr. Schaffer confirmed the existence of a contract by offering to pay me for my work, only at a rate the Court and I would not accept. The only real question, if the Department really believes that a number of its lawyer employees, Mrs. Zusman, Mr. Schaffer and others, undertook such obligations without authority,[15] why the Department has not filed charges against them. It is incredible that, with the Court party to the matter and knowing full well that as a result of its efforts I did agree to the offer; and with the Court, without contradiction, having repeated this and other such confirmations of the existence of the agreement, that such a brazen false representation would be made. It likewise is incredible that not until I demanded overdue payment was this hoked up. The Court was never disputed on this. None of my letters were answered or disputed, and if the Department actually believed I was making it all up, or being "manipulative," in Mrs. Zusman's words, I was never written to and told this. Nor, when my counsel's letter was replied to, was he.

15. The Memorandum engages in untruthfulness on its own in an effort to hide the fact that pertinent discovery records were long withheld from me. It states in the footnote on page 3 that, "Certain records sought by Weisberg's counsel were in the possession of Government counsel and were produced shortly after they were requested without formal discovery." It is my impression that I subpoenaed them several times, from 1978 to 1982, and all those times they were withheld. They also

were not provided when the Court directed that they be provided. It is no coincidence that these withheld records are inconsistent with defendant's present representations. They even reflect the fact that I was to have been provided with assistance and was to have been repaid for authorized expenses incurred. This is entirely inconsistent with the false claim that there never was any agreement.

16. The Memorandum repeats Mrs. Zusman's slur about my alleged claim to official persecution, anti-Semitism and the ruin of my poultry farm, addressed in my previous affidavit. Here, however, it is footnoted to what is not in the Zusman deposition or in any other record in this case. The Memorandum refers to "his many disagreements with the Government over the years." It also states what Mrs. Zusman did not state, that I was "forced out of the State Department." These indicate that counsel drew upon defamatory FBI records, some entirely fabricated, as my previous affidavit states. These quotes certainly are not among Mrs. Zusman's contrived defamations.

17. All of this is prelude to another misrepresentation of what Mrs. Zusman actually testified to when she could no longer divert, digress and evade. The Memorandum quotes only her improper responses, her fabrications. However, as my previous affidavit reflects, when she was pressed by my counsel and required to make direct response, she did not say anything like that I am "simply unreadable." My counsel read her portions of the letter supposed to be attached to the Memorandum as its only exhibit. (It is not. See Paragraphs 19ff. below) She admitted that each thing she was read was quite comprehensible and she could not and did not specify anything in it that she did not understand. (Of course, defendant has never asked me to explain or rephrase anything.) This selective use of the Zusman deposition, quoting only her contrived fabrication that she had to and did correct, is less than honest. From my extensive experience I believe it is not accidental.

18. As part of this defamation fabricated for purpose of defrauding me, this Memorandum also quotes Mrs. Zusman as stating that I am "not able to meaningfully communicate." This also is one of her nonresponsive throw-ins, on which more below. I address this also in my previous affidavit because it is obvious that she would not have pressed to have me be defendant's consultant if she really believed it.

19. All of this is prelude to the false representation of my letter quoted from Mrs. Zusman, that it is disorganized, confused and not easily comprehended.

This Memorandum expands her admitted untruth to have it mean that "besides being difficult to read, the letter indicated that the writer was not interested in constructively working on any project with the Department of Justice." I don't know what the throw-in "constructively" can mean or, if anything, was intended to mean. It is used to imply that I was not performing under the consultancy agreement when the exact opposite is true of that letter and the others. To emphasize this, this Memorandum quotes how its one exhibit "begins," which is not how it "begins" at all. Defendant's counsel apparently assumed that the Court would not read the rather poor copy of an original which is its only attachment, for it also pretends that there is no basis for what is quoted in the footnote on page 6, "There has been more than enough time for you to have responded to my last letter if you sent it by some of the FBI's tame FOIA snails. That you have not, in my view, bears on the Department's and your personal good faith in this matter of my involuntary servitude all of you imposed on me in this matter by misrepresenting to the judge."

20. Why the Memorandum has as an exhibit a letter not quoted but not the one quoted is not explained. If it were attached it would be clear that representations made about it are not factual. However, it is clear that what Mrs. Zusman said about it, quoted like scripture in the Memorandum, is deliberately false. The letter is quite comprehensible. I have reread it, as the Court can, and there is nothing in it that is "unreadable," "disorganized" or "confusing." It begins reflecting the existence of the agreement, with Mrs. Zusman in charge, and complaining that it had taken two weeks to get any kind of response to a simple question from her. She finally told my counsel "to forget about John Dugan's concern about the tapes I am to send getting lost in the internal mail, to just send them to her." I return to this later, saying that, from their nonperformances and nonresponsiveness, "I have my own apprehensions about your (plural) good faith." With regard to "Dugan's legitimate apprehension over what can happen to an only tape in the mails," I reported, "I will not be mailing any tape until I have been able to make a dub to protect against loss or other contingency. As of Thursday my auxiliary tape recorders had not been picked up by Sony (from our local store) for repair."

21. I reported how far my review had progressed, how many hours it had taken and, based on that, estimated how many more it would require. Next I told Mr. Schaffer, "I am awaiting some tangible evidence of good faith." I cited as the

first of "many available" evidences of other than good faith the fact that "you personally have not informed me of the compensation I am to receive." I added that while he had told me "the rate for consultancies I have no idea what that is."

22. "This is an unusual situation you have created," I wrote, "in part by misrepresenting to the judge that I had refused to be your consultant in my suit against you." But, I continued, "I had in fact said and written you that I would, upon demonstration of good faith, beginning with the FBI's responses where it could respond." I concluded this subject with what leaves absolutely no doubt about the fact that I was acting as defendant's consultant: "While I do not like the situation and do feel, based on my experience since your initial offer, that this is merely another device for stalling me and misleading the judge, I have proceeded in good faith and this will continue."

23. In the light of this language, that despite my many misgivings I not only "have proceeded in good faith" but that "this will continue," it is apparent that any contrary representation by defendant and by Mrs. Zusman is consciously and deliberately false. I am quite specific in stating that I have performed and will continue to perform under the consultancy even though "I do not like the situation" and regard it as "merely another device for stalling me and misleading the judge."

24. With regard to the misleading of the Court, this letter is specific. Mrs. Zusman told the Court that "I had refused to be your consultant" when "in fact I had said and written you that I would, upon demonstration of good faith, beginning with the FBI's responses where it could respond."

25. To understand the rest of what I reported it is necessary to recall that first Mrs. Zusman and then she and Mr. Schaffer told my counsel and me essentially what they had admitted to the Senate, that I had reason to complain about the FBI's deliberate noncompliance, particularly about the ignored 25 requests in the record of this instant cause, and that the Civil Division was determined to do something about it. I called this and a number of other matters to Mr. Schaffer's attention, and reminded him that I had heard nothing more about them. I reminded him in this connection "that your own division has yet to comply with my PA request of two years ago," and of the other continuing noncompliances in this instant cause. I referred to the letter in which, with regard to withheld Civil Rights

Division (CRD) records, I was told that the final administrative appeal left me no alternative to suit. I reminded him that he and Mrs. Zusman both had told me they wanted to avoid unnecessary litigation and that my options had been eliminated by defendant. I warned him that this could be embarrassing and, again in my role as defendant's consultant, "you will be hard put to find a case you will want to defend less than one in which Civil Rights is defendant. I am not going to take time to spell it all out because when I have in the past I have not even had acknowledgment. I meet my obligation to you, I believe, when I inform you. I offer the opinion that in this case it may be particularly embarrassing." (Here again, there is no possibility of misunderstanding. I had accepted the consultancy and was performing under it.)

26. Defendant did not see fit to let the Court know that I had been asked, as part of the consultancy, to help defendant avoid unnecessary litigation. This is consistent with defendant's failure to make a single truthful representation about it. Quite aside from the major purpose, relating to noncompliance in this instant cause, if defendant had heeded the advice I gave on CRD's noncompliance, two lawsuits would have been prevented and a considerable amount of time for defendant, defendant's lawyers and the courts would have been saved. However, as defendant's record and my extensive personal experiences reflect, this is quite the opposite of defendant's real FOIA intention. It is another evidence of bad faith that defendant forces unnecessary litigation and then bewails the cost in time and money. These deliberately wasted costs are part of the campaign to gut the Act.

27. When Mrs. Zusman swore, as she did swear and as the Memorandum pointedly quotes her as swearing (on page 5) with regard to my letters, "I have no understanding of what your client's understanding of reality was, either as it pertains to the facts concerning this matter at litigation, or anything else!" and when she additionally swore, as the Memorandum quotes her as swearing at the same point, that what I wrote is "disorganized" and "confusing;" when she employed language that defendant's counsel paraphrased as "simply unreadable," she swore to what she knew was not true. The letters themselves, in her hands and those of her counsel, leave no doubt on this score.

28. Because the Memorandum infers that there is something wrong with my

reference to "the FBI's tame FOIA snails," I note that this letter includes examples of long and unnecessary delays by FBI FOIPA. I note that four and a half years after that letter, and not counting all the other documents originally withheld and later disclosed in this instant cause, I received a single pertinent record of some 6,000 page.

29. The Memorandum concludes by saying that I claim I was "misled by Department of Justice officials into believing that there was a contract to perform consultancy work for the Government" by claiming that this is not "credible" and by saying that therefore "Weisberg's own good faith must, instead, be called into serious question." In making this allegation the signatories to the Memorandum also call into "serious question" the good faith and integrity of the Court. My position is and always was that there was a consultancy agreement and that I performed as agreed to. The Court on several occasions said there was an agreement and held that there was in ordering that I be paid. The baseless attack on me and my integrity therefore also is an attack on the Court and its integrity.

30. To underscore this, the Memorandum has a footnote which begins by stating that "On April 7, 1982, Mr. Weisberg was informed in writing of the Department's position that no contract had been formed." This means that it took the Department five years to "inform" me of what is not truthful. It also is claimed that defendant made the "point" that there was no consultancy at the "hearings" of May 17, May 24 and June 26, 1978, given as June 24 in the Memorandum. Consistent with virtually 100 percent of defendant's allegations, this is not the truth.

31. At the May 17 status call defendant's counsel said of the consultancy that it "was not apparently agreed to until some time in January at which time this whole controversy about the rate of the fee for the consultancy arose." This acknowledges that there was an agreement. The January date is a fiction, as the Court noted in correcting Ms. Betsy Ginsberg, saying that "it was agreed to in this Court's chambers." Ms. Ginsberg said, "in part, I think your honor is quite correct. However, there is correspondence from the other side that indicates it wasn't -- it was agreed to, but it wasn't firmly agreed to." She then said that they had decided to pay me $30 an hour and the Court found that figure inadequate. (Pages 4-5)

32. Ms. Ginsberg's representation that my letters reflect other than an agreement is not true. I specifically said that despite misgivings I had been performing and would continue to perform.

33. At this point I digress to state that in this exchange the Court gave the lie to another of defendant's interminable fabrications, that I was to go over every document again: "I don't believe he is going to raise the question as to each document, is he?" (page 7) The Court's recollection of what was agreed to in chambers is correct. It also is in accord with that I wrote defendant. My counsel then gave an accurate account of what was to have been included in my report.

34. At the May 24 status call Mr. Schaffer, having dodged the subpoena by having the marshals lied to, as I detail in my previous affidavit, confirmed that an "agreement" and a "contract" were"offered" and he confirmed the $30 offer. He added of the meeting at which he made the offer, "No rate was discussed at that meeting and no other details of the contract." He testified that "there were subsequent discussions between Mr. Lesar and Mrs. Zusman on the subject" of these other details. He followed this up with a voluntary admission that I am worth much more. (Pages 2-3) This is an admission that there was the "agreement" or "contract," both his words, and that there were subsequent discussions of its provisions, which there most assuredly were, on November 21, 1977.

35. Mr. Schaffer appeared without the subpoenaed records. Details of the subpoena ducking appear on transcript pages 10-11.

36. That the offer was made and accepted is stated by the Court on Page 6. The Court then gave defendant two options, paying me or "the whole department will have to comply with doing what they were required to do in the first place, forthwith. Now, take the choice." (Page 6) After this the Court stated, "can't we ... not have the government welch on the deal?" (Page 7) Obviously, if there is no "deal" it cannot be welched on.

37. Defendant had to spend much time searching the voluminous transcripts - and ignore and misrepresent very much - to find the Court's comment on June 26, 1978, misrepresented as meaning that the consultancy/agreement had "come apart." Any reading of the transcript discloses that what the Court was referring to is not the agreement but defendant's nonperformance. The question was of "just an endless number of these instances of unjustifiable withholdings," what my consultancy

report reflects. (Page 4) My counsel is followed by defendant's counsel, who represented she was "hoping we could get" from me "specific deletions and that we could sit down and talk about them." (Page 6) She claimed what is not true, that I had never provided this. I did, in letters to and conferences with the FBI and at that time in the consultancy report. In correcting her (on page 7) my counsel informed the Court I also had done this in the consultancy. It is the deletions, not the agreement, and my counsel's statement that providing the "particular things" to which the Court referred "was the object of the consultancy," that the Court addressed in saying, "I know it was and that fell apart."

38. Even if this were not true and even if in the Court's opinion the consultancy agreement "fell apart," there still was the agreement, I did perform as I was to have performed under it and I provided my consultancy report.

39. There also is no doubt that the Court was referring to the deletions and withholdings from what immediately follows in the transcript, the Court's statement that I had "a burden to indicate what" deletions I was "objecting to." (Page 7) My counsel's response states that "the pattern is overwhelming that page after page contains unjustifiable deletions, deletions that were made in defiance of this Court's verbal order ..." He then stated that I had provided my consultancy report and that he had "just reviewed the first 164 pages ..." and it "is massive and overwhelming." (Page 7-8) This, of course, is why defendant must make unfactual and dishonest claims and allegations, because my consultancy report is "massive and overwhelming" on improper and unjustifiable deletions and withholdings.

40. That calendar call was on deletions and withholdings. Defendant's counsel stated what is not true, that I had not provided information pertaining to deletions and withholdings. My counsel corrected her in detail, even providing examples from what he had at hand illustrating these improper withholdings. The Court stated, "The Court does not think they have indicated good sense in their utilization of exemptions," particularly because "The Attorney General has said that he is treating it as an historical situation." The Court added, "Apparently the people searching these have not realized that." (Page 17) The Court then suggested, "You can sit down together and decide something to try to get these matters ironed out." (Page 17) That defendant did not do because I had provided "massive" and

"overwhelming" proofs already. Defendant's counsel's response was again deceptive and misleading, "What we need is exactly" that, "we need that information. ... But we have never gotten" it. (Page 18) This, too, was untruthful as my counsel immediately pointed out. He stated that I had provided this information and that in addition he had provided a listing of them prepared by a student, referred to in my previous affidavit. He described it and stated, "We gave them that. No response. None whatsoever." The immediate response of the Court was, "I will expect a response to that document ... we will want some answer in 30 days at the outside." (Page 19) When those "answers" were provided under oath by FBI FOIA Supervisor SA Horace P. Beckwith, as I recount in my previous affidavit, they were so blatantly dishonest, including even fake documents, the Court banished SA Beckwith. (No additional "answers" or response of any kind, no withdrawal of what I believe is perjury, ever followed.)

41. Rather than saying that the consultancy agreement had "come apart," the Court had just informed my counsel that my consultancy fee could be included in his counsel fees when he presented them.

42. It is apparent that the Memorandum was not provided in good faith; that it is another display of the bad faith that I have documented throughout this long and costly case; that it misrepresents and states what is not true; and that it is intended to be prejudicial. Rereading the three transcripts cited in the Memorandum provides a vivid reminder of the persistency with which defendant's counsel misrepresented and said what is not true to the Court. If the Court, trusting defendant, had not been told what is not true, defendant would have been required to reprocess the MURKIN records long ago. This is what Mr. Shea testified was necessary. Defendant also would have been compelled to make the searches then and since not made. In an internal memorandum now in the case record Mr. Shea accused the FBI of being untruthful to the Court and to me and of not making proper searches. This memorandum, also in bad faith, was withheld from me under spurious claim to exemption but was provided to another litigant. Without defendant's bad faith throughout this case - attested to by defendant's own Director of FOIPA appeals - it would have ended long ago and the country and history would have been better served.

HAROLD WEISBERG

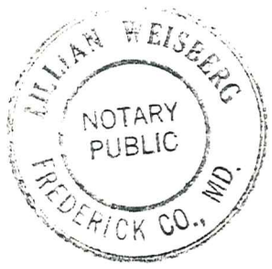
FREDERICK COUNTY, MARYLAND

Before me this 16th day of August 1982 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1986

Lillian Weisberg

NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND



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

My name is Harold Weisberg. I reside at 7627 Old Receiver Road, Frederick Maryland. I am the plaintiff in this case.

1. In this affidavit I address plaintiff's bad faith because bad faith is an important factor in the matters of the consultancy and counsel fees and because it will be a factor if this case goes up on appeal despite my efforts to avoid it.

2. Because of my medical and physical limitations, of which I have informed the Court, practical considerations restrict me to misrepresentations made at the many calendar calls and in the deposition testimony of Mrs. Lynne Zusman.

3. I was hospitalized for the first of three major surgeries about Labor Day 1980. Before then I reviewed the transcripts of the calendar calls and prepared a summary of them for my counsel. Because it now is not possible for me to review all those many transcripts again, I draw upon this summary. It is not and cannot be all-inclusive. There are many other illustrations of defendant's bad faith.

4. Throughout this long and costly litigation, I have alleged bad faith without so much as a pro forma denial by defendant. All my many affidavits remain ignored, and thus undisputed in this and in almost all other matters. As the case record reflects, most of the bad faith addressed in these prior affidavits is by the FBI, although other components also provided misrepresentations and outright untruth. The FBI also presented phony records as genuine.

5. In this and in other FOIA litigation defendant has accredited me as a unique expert, an expert on the terrible crimes of the assassinations of President Kennedy and Dr. Martin Luther King, Jr., and their investigations. Defendant

conducted the most extensive of the official investigations and mine is the most extensive investigation of defendant's functioning at those times of great crisis and thereafter.

6. To the degree defendant has disclosed records on and about me, it also is disclosed that, for all the expertise of defendant's various components, they could not fault my work, which includes seven books, on any factual basis. Defendant's disclosed records also state explicitly the intent to "stop" me by tying me up in litigation. Defendant's conduct in this case, as in all my other FOIA cases, is consistent with this scheme to "stop" me, put on paper a decade and a half ago. I have provided these and other similar records in this case. They are entirely uncontradicted.

7. There was no legitimate need for this case to be prolonged. Indeed, there was no need to force the matter to litigaton, save that in 1969, consistent with this 1967 scheme, it was ordered on highest authority that my requests be ignored. They were entirely ignored until I filed suit. Thereafter, there was endless stonewalling and repetitious misrepresentations, all serving the purpose of the old scheme to "stop" me by tying me up in unnecessary litigation.

THE CONSULTANCY

8. In the matter of the consultancy it soon became clear that the Court and my counsel and I were imposed upon by defendant's bad faith. My specification of this bad faith in previous affidavits also is entirely undisputed. The record is clear: I made many and repeated efforts to persuade defendant to abide by the commitment made to the Court and to me and to perform on its part of the agreement. I never received a single response. Now I find that defendant's bad faith in the consultancy matter has been carried to a new and indecent extreme by Mrs. Zusman's testimony. She defamed and maligned without any basis in fact. She also made significant misstatements under oath. One of the most significant is that she was not responsible for the consultancy being foisted off on the Court and on me.

9. In order to escape her personal responsibility for defendant's failure to perform in any aspect of the consultancy matter, Mrs. Zusman developed flexible and selective bad memory. Whenever she was confronted with her own record, with documents and facts she could not dispute, her memory failed; but remarkably, whenever she could defame and fabricate in the expectation of getting away with it

because she was not aware of any existing documentary contradiction, her memory revived and she recalled in great detail what did not happen and could not have happened. Consistent with this she ran off at length in speeches that were irrelevant and immaterial as well as unfactual and defamatory. This is the means by which, as a skilled lawyer can, she avoided response to questions she did not want to answer. It is in this filibustering that she fabricated false and prejudicial defamations. However, with regard to her personal responsibility in the matter, she slipped up and, without pretense of failed memory, repeatedly attested to what is untrue, as I specify below.

Background of the Consultancy

10. The consultancy was first proposed by defendant at a Friday, November 11, 1977, conference arranged by Mrs. Zusman. This came as a complete surprise to me because nothing preceding it even suggested so exceptional if not unheard of a concept, that the government would hire the plaintiff to act as its consultant in his suit against it. To explain so unusual a proposal, I was told that I could do for defendant what its vaunted FBI and all its fine lawyers could not do. While I had other objections to it, including the fact that I was suing the agency that would be employing me,I immediately objected because the consultancy was not at all necessary and because I wanted to spend what time remains to me on the large work on which I had been engaged for a decade and a half. Mrs. Zusman arranged for and participated in this conference. She also presided over the second conference, on Friday, November 18, 1977. Based on my prior experiences with the FBI and its in-house counsel, I refused to attend the second conference unless Deputy Assistant Attorney General William Schaffer were there. He assured me he would be. When I got there, he was not although it was held in his private office.

11. Prior to each of these conferences, I prepared a talking paper, hurried notes identifying matters I believed should be discussed. I gave copies to the FBI and Civil Division lawyers. However, it soon became apparent that, despite the ostensible purpose of the conference, for me to do what I prepared to do, defendant's representatives had their own agenda and, with few exceptions, wanted to do nothing about the matters I raised. Rather than receiving specifications of noncompliance, Mrs. Zusman arranged for representatives of

various components to make speeches about how diligently and completely they had already complied, which they had not. This wasted most of the allotted time. The case record reflects the large number of records these components disclosed thereafter. (The misrepresentations also reflect bad faith.) At the second conference, still without rejecting the consultancy, I made several counterproposals. One was that defendant's paralegals could go over my numerous and detailed letters to the FBI and the notes on the disclosed records I had prepared for my counsel and select illustrations of improper withholdings and of searches not made. I said that if the paralegals could not consult with me by phone, they could work at my home where I would be available for consultation, without cost. While defendant now claims to have made this offer and that I rejected it, that untruth serves obvious improper purposes and on the face is incredible. There is no doubt at all that I did not want to be defendant's consultant and that I made the counterproposal. The plain and simple truth is that what I had already provided to the FBI in writing established its refusal to make proper searches and its unjustifiable withholdings. Defendant, aware of this, had to cook up subterfuge after subterfuge to avoid it. At the November 21, 1977, meeting in chambers I restated my position as straightforwardly as I believed proper.

12. One of the major questions of that time was the reprocessing of the FBIHQ MURKIN records. The Court was misled into believing that all these records were processed after "Operation Onslaught" but the truth is the opposite: all were processed by "Onslaught" agents. Some of this processing was so very bad I refused to accept any more records processed by SA T. N. Goble. Goble was removed and returned to his field assignment and the FBI, through Supervisor John Hartingh, promised that those sections would be reprocessed. (It never happened. Instead, thereafter, in this and in all my other FOIA cases, defendant withheld from the worksheets the identifications of the processors so I could never again prove who did the bad processing, who withheld what should not be withheld. The "privacy" claim was made to withhold these names, despite the prior Order of this Court that such names not be withheld.) At a series of meetings with the FBI in 1976 and 1977 I gave it many copies of its own records in which there had been unjustifiable withholding and copies of records which reflected the existence of other pertinent records not provided. I also wrote it about these things, often and in detail.

I do not recall a single restoration of these unjustifiable withholdings or the reporting of a single search to locate and process the records not even looked for.

13. As soon as I received the first MURKIN records disclosed in this historical case, I reported to the FBI that it was withholding extensively what was public domain. I offered to provide indexed books on the subject and my index to the transcripts of the two weeks of evidentiary hearing in Ray v. Rose in federal district court in Memphis, Tennessee. The index to the transcripts of the hearing was declined and the FBI told me it had and was using the indexes in these books, a palpable untruth.

14. Although the FBI had declined to use these indexes, to make their use more convenient in reprocessing, I had them consolidated and typed. I provided copies to the Civil Division, the FBI and the appeals office at these November 1977 conferences. Had there been a good-faith intention of not withholding what was within the public domain, this consolidated index would have been of great assistance and saved much time. However, defendant's clear intent was not to correct error in compliance but to prolong this case as much as possible. Quinlan J. Shea, Jr., was presented as defendant's witness and prepared his long statement in a manner intended to convey the notion that, by and large, the processing was adequate, but he did not actually state this and, when cross-examined, stated that the improper withholdings were of such a nature that the records required reprocessing. That also never happened because it is opposite defendant's intentions and clear record.

15. My presentation of a number of copies of this consolidated index and my renewed offer of the card index to the evidentiary hearing confronted defendant with a problem, as did my reluctance to acting as defendant's consultant. These indexes alone immediately identified a large part of what was within the public domain and had been withheld. Their use would have left no reasonable doubt, more than a year before Mr. Shea's testimony, that the records required reprocessing. Their use by a paralegal with access to me would have left no doubt at all about the need to reprocess. But defendant was determined not to reprocess these records and not to make real searches so my counterproposals were not acceptable.

16. Meanwhile, under the Stipulation, beginning November 1 the FBI was required to respond to my written specifications of improper withholdings, something it to this day has not done. Thus, suddenly, urgency in the consultancy developed.

It provided an immediate, if wrongful, excuse for the FBI not to respond to what I had already provided it in writing and for more prolonged stonewalling. Internal records I later obtained are specific in stating the FBI's awareness that it was deliberately violating the Stipulation. (This is additional evidence of bad faith.)

Mrs. Zusman Arranged for the Consultancy Agreement and Was Attorney of Record

17. The second conference, of Friday, November 18, 1977, lasted into early afternoon. My counsel phoned me either that evening or on Saturday to inform me that Mrs. Zusman had just informed him of having set up the meeting in chambers for Monday, November 21, the very first working day after this conference, when there had been no time at all for defendant's representatives to consider my counter-proposals. It is obvious that Mrs. Zusman arranged for the in-chambers meeting almost as soon as she left that second conference. Although my presence was essential, Mrs. Zusman did not even phone me to determine whether I would be available or if I had transportation to Washington. Her deposition testimony (at page 27) reflects her awareness of my transportation problem and the medical conditions that cause it.

18. The Court's acceptance of Mrs. Zusman's representations rather than mine left me no real choice and I agreed to be defendant's consultant. From chambers defendant's representatives led my counsel and me to the office of AUSA John Dugan. It there became clear just how hastily Mrs. Zusman had improvised. Defendant's representatives were ready with nothing and among themselves could agree to nothing. The FBI's representatives, for example, refused to have their local agent accept the tapes of my dictation so they could reach defendant safely. There was no dictating equipment for me, no recording tapes and no provision for either. There was nothing written out to confirm any detail of the consultancy and, despite numerous efforts, I never could get any response at all on these matters. Because my own tape recorder was not working, I had nothing to use for dictation. Defendant was to have provided this equipment but did not. Having caused this delay, defendant thereafter complained about the delay, attributing it to me, and then claimed, falsely, that until receipt of my consultancy report nothing more could be done. (After I provided my consultancy report, neither the Civil Division nor the FBI ever addressed it.) This, too, left me no real alternative. Although I could ill afford it and had no other use for it, I was forced to purchase this equipment at

a cost of about $500.00. Records disclosed under discovery reveal that I was to have been provided with dictating equipment and that after I purchased it was to have been reimbursed, but I have not been. (This cost is not in the bill presented because, although I have no need for it, the equipment is in my possession.)

19. From the time Mr. Schaffer absented himself from the second conference, there is no doubt that Mrs. Zusman was in charge. However, she did nothing at all to move her own project forward, did all she could to delay it and is not about to admit this now.

20. While Mrs. Zusman told the Court that I would be compensated "generously," neither she nor anyone else responded to any of my inquiries about the rate of compensation or anything else until this could have embarrassed defendant in another of my cases, before Judge Gesell. Then, after two months and on a Sunday night, the night before that other hearing, Mrs. Zusman phoned my counsel. He then phoned me to tell me she had offered $75 an hour, which I accepted. Civil Division records disclosed under discovery reflect its concern over being embarrassed before Judge Gesell and its deciding to phone my counsel to avoid such embarrassment.

21. Shortly after the hearing before Judge Gesell, at which the Civil Division lost, my counsel phoned me to tell me that he had been informed by Dan Metcalfe, who is attorney of record in my C.A. 78-0322, that because Mr. Metcalfe considered $75.00 an hour too high for any expert other than a lawyer, he pesonally "torpedoed" it. I have read the transcript of Mr. Metcalfe's deposition and, while he states he cannot recall this exact formulation, he does admit that he had and expressed opposition.

22. Faced with this internal dissension, defendant welched on its offer. Faced with having welched, nothing is more convenient than the claim to lack of recollection.

23. From the record, of which the foregoing is only part, Mrs. Zusman had the need to pretend that she was not in a position of responsibility. If she admitted otherwise, particularly after defendant's filings in which it is now claimed that there never was any consultancy arrangement and that neither she nor anyone else had authority to arrange it - which really means that she misrepresented to the Court and defrauded me - Mrs. Zusman's ailing memory was suddenly healed.

She testified that she was without any responsibility because she was not on the case and that others, among whom she included Mr. Metcalfe and Ms. Betsy Ginsburg, were defendant's attorneys of record. On deposition she stated this ten different times, unequivocally and without claim to impaired recall. Each of these times she was untruthful.

24. Her denials of being on this case and of being attorney of record and her statements that only others were are in the deposition transcript on pages 19, 21, 31, 44, 53, 57, 57-8, 63, 70, 81. Her favorite self-replacement was Mr. Metcalfe, who she stated was both the attorney handling the consultancy matter and the attorney of record (pages 53, 63, 70 and 81).

25. In fact, Mr. Metcalfe was never attorney of record in this case; and for the entire period in question, identified by the deposition exhibits as December 1977 and January 1978, Mrs. Zusman was the attorney of record. She first appeared at the calendar call of November 2, 1977, and she was the attorney of record at least until after the calendar call of March 7, 1978, when she informed the Court that thereafter Ms. Betsy Ginsburg would be. During the entire period about which she was questioned, Mrs. Zusman was the only attorney of record. (AUSA John Dugan resigned in November 1977. His last calendar call was November 2, 1977.)

There Is No Real Question of Fact About the Consultancy Agreement

26. Because there is no real question of fact about the consultancy, defendant's filings alleging that there never was any such agreement fly into the face of the case record. If Mrs. Zusman did not conform with defendant's position, she would be refuting defendant's claims and allegations. This she could not do, particularly because she had already filed an affidavit that does not state the facts. She could not deny herself under oath.

27. A recapitulation of these facts is essential to an understanding of what Mrs. Zusman, an experienced lawyer, really was up to in her deposition testimony.

> A. The consultancy proposal was advanced at a time of crisis for defendant. At that time, under the Stipulation, defendant was required to respond to what I had written the FBI. In addition, for months the Court had expressed concern over unnecessary delays. And, although the FBI had agreed to reprocess some of the FBIHQ MURKIN sections and to consider my complaints about noncompliance, it had not done so.
>
> B. Beginning after the first calendar call, my counsel and I met with the FBI on a number of occasions. At each meeting I specified unjustifiable withholdings and in most meetings I identified other noncompliances.

At many of these meetings I presented the FBI with copies of its improperly processed records and other records establishing improper processing. After the first of the FBIHQ MURKIN records were provided, I also gave the FBI many detailed written specifications of the above.

C. At no time did the FBI or any other of defendant's components claim that anything I provided was not comprehensible.

D. I was reluctant to become defendant's consultant - in my law suit against defendant - and I regarded the consultancy as unnecessary. I provided alternatives that were unwelcome because they would rapidly establish noncompliance. Involving the Court in chambers was a hasty improvisation for which no real preparation was made by defendant. The purposes of the in-chambers conference were kept secret from me so I could not prepare for it - even consult with counsel about it. Defendant, acting through Mrs. Zusman, arranged for the in-chambers conference on the Friday afternoon preceding that Monday morning conference.

E. At all times, including at the conference with defendant's representatives immediately after the in-chambers conference, it was clear beyond any question that all I was to do is review my letters to the FBI and the notes on the FBIHQ MURKIN sections I had prepared for my counsel and then provide defendant with a report in which I identified each of the withholdings of which I had a written record and explain why I believed each was improper. Without dispute, this is what I did do.

F. At no time did I agree to make a new study of the more than 44,000 pages of FBIHQ MURKIN records. That would have required an extraordinary amount of time that at my age and with my serious medical problems and limitations I would not have undertaken under any circumstances. I cannot conceive of defendant paying a consultant for the great amount of time that would have required. The cost would have run well into six figures.

G. The FBI refused to accept tapes of my dictation for transmittal through its channels. I was unwilling to entrust only-copies to the mail. Mrs. Zusman personally authorized my wife to transcribe these tapes. My wife has never been paid.

H. The only real delay in preparation of the consultancy report was contrived by defendant, who was to have to provided dictating equipment and never did. It was always understood that the other requirements of my work would not be sacrificed for the consultancy. I could not and would not, for example, not do what was required of me by other litigation.

I. At no time was I told I was to do no more than provide a list of contested claims to exemption and I would not under any circumstances have considered that this could have served any useful purpose. It would not, for example, have explained how any claim was improper. Moreover, there is no need for any expert or consultant to do no more than prepare a list of numbers from already existing records. A clerk could do that. A consultant is a subject-matter expert or one with a special know-how, not a clerk. One does not engage a consultant to perform as a clerk and one does not pay for clerical functions at consultancy rates. The mere fact that I was engaged as defendant's consultant refutes Mrs. Zusman's fictional claim of convenience, that I was to be no more than a replacement for her clerks. (See Paragraphs 53-60 below.)

J. From the moment I agreed to become defendant's consultant, in chambers on Friday, November 21, 1977, there never was any doubt about it and that I was working on it. At the above-mentioned conference in the office of AUSA Dugan and, when the required tapes were not provided, I agreed to get them. That night I drove into the city of Frederick, bought them and sent defendant the receipted bill. (It also remains unpaid.)

K. Thereafter, by letters and through my counsel, I kept defendant fully and accurately informed. This includes progress reports, reporting the consequences of defendant's failure to provide the promised dictating equipment, and an estimate of the additional amount of time completing the preliminary review would require.

L. Defendant never responded to any of my letters, including those asking for the rate of pay.

M. Mrs. Zusman was attorney of record for the entire period covered by the discovery records about which she was questoned on deposition. She first appeared in this case on November 2, 1977, and she remained attorney of record until after the calendar call of March 7, 1978, when she informed the Court she would be succeeded by Ms. Betsy Ginsburg. Daniel Metcalfe was never attorney of record in this case. In addition, at the November 18, 1977, conference, Mrs. Zusman informed my counsel and me that Mr. Schaffer, who was absent, had put her in charge of all matters for which we met.

N. At no time after I filed my consultancy report did defendant write me or phone me or speak to me about it. I received no complaints of any kind or in any form. However, Quinlan J. Shea, Jr., then Director of FOIPA appeals, did find it useful and so stated. He also testified that, as my consultancy report reflects, the FBIHQ MURKIN records required reprocessing. In his testimony he went out of his way to praise the help I provided. This includes the consultancy report.

O. After I began pressing for payment, after I filed copies of my consultancy report, defendant acknowledged that there had been an agreement and that I had performed under it. In open court defendant offered to pay at a $30 rate, which the Court and I found unacceptable.

28. With regard to the final item in the preceding Paragraph, defendant demonstrated exceptionally bad faith. My counsel had given the marshal's office a duces tecum subpoena for Mr. Schaffer. He was to have appeared at the coming calendar call with all records pertaining to the consultancy. When my attorney told me early in the morning of that calendar call that the marshals had not served the subpoena because they had been told Mr. Schaffer was out of town, I immediately told my attorney that this was a trick to avoid service. I asked him to phone Mr. Schaffer without identifying himself to the secretary, he did, and Mr. Schaffer answered the phone. My counsel then told him of the subpoena and that his presence was required in about an hour with those records. He asked that Mr. Schaffer bring them. Mr. Schaffer did appear but without these records. Later, when the Court directed that all pertinent records be provided, present defendant's counsel withheld all of those that, after additional stalling, were provided for the depositions. None of these withheld records is congenial to defendant's recent pretense that there never was any consultancy arrangement. These long-withheld records also reflect that defendant did not provide the promised dictating equipment and was to have repaid me when I finally had to buy it myself.

False Pretenses, Evasions, Irrelevancies, Misrepresentations, Fabrications and Defamations in Zusman Deposition

29. Had Mrs. Zusman testified to the foregoing facts, the least of her and defendant's problems would be the fact that she would have acknowledged that defendant had misled the Court and gypped me. She would have acknowledged that defendant had knowingly filed spurious claims and allegations. She would have disputed herself under oath. Because she did not dare do these things, she resorted to a claimed lack of recall, to evasions, misrepresentations, fabrications, defamations and many irrelevancies, and she did "recall" what was not factual or true. In this she also wasted much of the time taken by the deposition and not infrequently was able to avoid direct response to simple questions. To frustrate the working of Wigmore's engine she resorted to these tricks throughout. She filibustered and then, personally and through counsel, claimed that her time was being wasted.

30. Questioning was limited to a short span of time, from the time of the in-chambers conference she arranged for November 21, 1977, through the period of my letters to defendant about the consultancy, the end of January 1978. Those letters were addressed to her or routed to her by Mr. Schaffer. The exhibits also included the letter my counsel wrote when mine received no response and defendant's internal memoranda concerning those letters and the consultancy.

31. Essential to understanding of what she did on deposition are these facts: she was counsel of record for that period; she arranged for the in-chambers conference at which, without regard to fact, she pressured the Court to have me act as defendant's consultant, representing that this was essential to compliance; without question this consultancy was agreed to in chambers, I began to perform immediately and did provide my consultancy report; she promised that I would have dictating equipment, did not provide it and did not respond to my letters about it; lack of dictating equipment precluded my dictating anything until, finally, I had to buy that equipment; throughout the entire period covered by her testimony I could not and did not file any material of any kind, and I so informed defendant in the letters about which she was questioned; at the same time and by the same means I informed defendant of the work I had done, would do, the time spent on it and the estimated time required for completion of that part of the consultancy, which would

bring me to where I could dictate my report; what I was to do is what I did do, prepare a report limited to the withholdings previously reported in my unanswered letters to the FBI and in the memos on the MURKIN sections I prepared for my counsel as I received and examined them; and I did not complete and file my consultancy report until several months after the time period about which Mrs. Zusman testified.

32. These facts mean, among other things, that when she swore to the alleged character of my "material" it was pure fabrication. The exhibits about which she was questioned and which she read left no possibility of doubt or misunderstanding. When she filibustered to testify that I had filed "material," she knew this was impossible not only because she, personally, was responsible for it being impossible but because that also is clear beyond question in the exhibits she had before her and read.

33. It also is essential to understanding her and defendant's ploys and intentions to bear in mind that she never once made any reference to my later consultancy report; that nobody representing defendant ever wrote me about it or asked me a single question about it or alleged that it was not comprehensible, not usable or not what I was to have done; that as of today defendant ignores it entirely, save for the assistance it provided to Mr. Shea and his testimony that the MURKIN records required reprocessing; and that this consultancy report and the time I spent on it had nothing to do with my regular work and, in fact, was a barrier to my doing my regular work. Also, Mrs. Zusman, when finally pinned down, found nothing incomprehensible or factually incorrect in the letters about which she was questioned and, when asked for an example of her claim to incomprehensibility, was able to provide none.

False Pretenses, Misrepresentations and Fabrications Pertaining to the In-Chambers Conference and the Reaching of the Consultancy Agreement

34. Basic to defendant's representations are the false pretenses that there was never any consultancy agreement and that I never agreed to it. These false pretenses require the additional false pretenses that what transpired in chambers did not transpire and that what happened in open court also did not happen. When it was expedient, Mrs. Zusman claimed no recollection at all; and when it was expedient to fabricate, she claimed to recall what was neither possible nor reasonable. All of her testimony is not credible. It cannot be believed that she,

personally, arranged for so unusual if not unprecedented an agreement in such haste and urgency while keeping its purposes entirely secret from me, and has no recollection of the agreement and her role in it. She did admit that she had no knowledge of any other plaintiff ever having been hired as defendant's consultant in any FOIA case and that in itself this was quite unusual. Simultaneously, she pretended that everyone else, including the Court, initiated the proposal and that she did not and did not push its acceptance in any way. (Pages 26ff.)

35. Her recollection did not include "who requested that conference," which she had done, or who was present, meaning who she had arranged to be present. (Pages 26-7) She did not "recall whether you informed Judge Green at that in-chambers conference that Mr. Weisberg had refused the consultancy," although obviously, if I had accepted the proposal earlier, there was no reason to bother the Court about it. She did not recall whether I "was reluctant to go along with it" or whether I "raised issues concerning the F.B.I.'s bad faith or requested some kind of evidence of good faith." (Pages 27-8) Saying that "I don't want to cut short your question," she tried to by stating that "the only association that I had with that meeting was" over Mr. Dugan's "frustration," over which, she claimed, he wanted to be relieved. (Pages 28-9) (In fact, Mr. Dugan had resigned as AUSA, had to be replaced as defendant's counsel, and she replaced him.) When asked if "As a result of the conference in the Judge's chambers did Mr. Weisberg agree to do the consultancy," she replied, "That is not my recollection." In the volunteered filibustering that followed, she testified that the consultancy was the Court's idea, not hers: "...in the course of my experience in litigation I have been present many times in Judge's chambers in which they pressed the parties to resolve a lawsuit by settling it, and that the Judge put forward her, or his, views quite strongly, and indicated that this is what the court thinks would be in everybody's best interests ... Somehow the only recollection that I have ... is that this fell into that same kind of pattern." (Pages 29-30) She also claimed to have no recollection at all of the meeting she arranged for in Mr. Dugan's office after the in-chambers conference although, forgetting this testimony, she did testify to recollection of what transpired there. (Page 30)

36. In avoiding a question pertaining to the letter in which I reported what progress I had made on the consultancy, had defendant ever responded to that

letter, she wandered off into a long series of irrelevancies and defamations. (Pages 38-9) These included the opinion that I did not intend to perform and was not even capable of it. (Page 39) She was asked if she had really asked the judge "to approve a deal in which the Department of Justice was to hire Mr. Weisberg as a consultant and you had no basis for doing so." (Pages 39-40) Her counsel objected but she wanted to speak. In her rambling she stated that "we did not seek to have her put her stamp of approval on it, there was no misrepresentation involved." (Page 40) She was asked, "Well who proposed the idea?" Her answer was, "Well both parties were present but I really don't know. It could have been she --" Asked, "The Judge proposed it?" she testified "we were present because at that point in time both parties thought that some kind of an agreement could be worked out. I'm sure that is why we were there." (Psge 41)

37. This is palpably untrue and it is contradicted by her preceding slur. Only if I had not agreed to the consultancy was there any reason to involve the Court. The consultancy was not proposed by the Court but by Mrs. Zusman. She had seen to it that I could not and did not know why she arranged the in-chambers conference so I could not have expected that "an agreement (on the consultancy) could be worked out." If she really believed I was not capable, she would have had every reason to oppose any consultancy proposed by anyone else.

38. She was asked, "Who was pushing it?" (the consultancy). She said what also is inherently incredible, "I don't think anyone was pushing for it." She then was asked, "Mr. Weisberg certainly wasn't, was he?" In her evasions she again claimed no recollection at all and finally "assumed" that "the reason that we were all there was that we wanted her (the Court) to know that we were discussing it." This obvious untruthfulness also is refuted by her later claim which appears below, that my counsel and I tried to gyp defendant in allegedly being what she termed "manipulative."

39. Not one word of Mrs. Zusman's testimony regarding the in-chambers conference and the consultancy agreement reached there is correct or truthful.

Defendant's Failure to Provide Dictating Equipment Stalled Everything and Mrs. Zusman Knew This and Was Responsible For It

40. Mrs. Zusman's claim of no recollection at all of the meeting following the in-chambers conference (Paragraph 35 above) is not credible because of the nature of that meeting and because she recalled some of what happened there. It

is consistent with her need to disassociate herself from what stonewalled this long and costly litigation and what amounted to no less than a dirty trick defendant played on the Court and me. It also is required by one of her many baseless defamations, as stated below, that I resorted to a "smoke screen" to avoid doing what I had not avoided doing.

41. She presided over the meeting in Mr. Dugan's office. There she faced the obduracy of the FBI, which refused even to accept my dictation tapes. She also faced the immediate problems created by her hasty improvisation for which she had made not a single preparation. Among these was the lack of the equipment I would require for dictating my report which defendant agreed to provide and then was not ready to at that time and later did not provide. In order to proceed with as much dispatch as possible, I agreed to try to use my tape recorders and to buy the tapes, for which she said I was to be reimbursed. (I was not.) My recorders were inoperative. I tried without success to get them repaired locally and informed defendant.

42. Having made it impossible for me to complete my report, defendant meanshile kept telling the Court what was not true in any event, that until I provided the report, defendant could do nothing about noncompliance.

43. That I did keep defendant informed in all particulars, including the need for dictating equipment, and that Mrs. Zusman had knowledge of this is disclosed by her own testimony:

> "I kept asking what was going on and were we getting material from Harold, and what was happening, and I remember someone reporting to me that nothing was happening because at the outset there was a problem with the tape recorder that Harold owned which he was going to use, and some issue as to the tape." (Page 24)

44. Mrs. Zusman was asked why neither she nor anyone else responded to my letters about this. For all the world as though, even if it were true, it constituted a response, at several points she characterized her and defendant's failure to perform as my "smoke screen." For example (page 31), when she could not explain her failure to respond to my letters, she stated, in a nonresponse than ran on for more than a page, "the issue about the tape recording equipment was, as it were, a smoke screen." Although in the letter about which she was questioned I reported what I had done and how much more time would be required to complete that aspect of the consultancy, she attributed this imaginary smoke screen to "Mr.

Weisberg did not want to do the work." Obviously, when I reported having worked for 80 hours, whether or not I wanted to do the work, I was doing it and there could not have been any "smoke screen" involved.

Misrepresentations and Fabrications About What I Was to Do and, Without Her Acknowledgment, Did Do

45. Mrs. Zusman claimed that there was no consultancy agreement, yet she simultaneously testified that I did provide material under it. However, during the period to which she testified I did not provide anything at all. Later, and obviously not until after I completed it, I provided the 200-page consultancy report. Her testimony that I provided "material" in December 1977 and January 1978 is a complete fabrication. She made it up so she could pretend falsely that I did not do what I was to have done, that it was not usable and that it was incomprehensible.

46. One of her untruths is that "Mr. Weisberg was to review the approximately 44,000 pages in the MURKIN investigation which had already been released to him and to make an inventory or listing of the deletions which he was raising questions about, and the Government components, the Federal Bureau of Investigation, agreed, in the Court's chambers, to go back to its records and to review whatever specific complaints Mr. Weisberg raised." She first stated this at the March 7, 1978, calendar call.

47. This amounts to an acknowledgment that there was the consultancy agreement that she and defendant now pretend there never was. She acknowledged that the FBI did agree to review and respond to what I provided, as it also was required to do under the Stipulation. The fact is that as of today it has not done so.

48. It is not true that I ever agreed to reread all those 44,000 pages and my counsel corrected her immediately, stating that her representation "is not true. We have made it very explicit ... that he cannot do that. The amount of time involved in that would simply be impossible." He stated, without contradiction, that under the in-chambers agreement "Mr. Weisberg would review his notes and his correspondence (with the FBI) on what he had been provided."

49. This untruthful statement by Mrs. Zusman is the first record of her fabrication, that I was to do no more than "make an inventory or listing of the

deletions which he was raising questions about."

50. Although she knew better and also had already been corrected in open court, Mrs. Zusman resorted to this same contrivance, this deception and misrepresentation in her deposition testimony. What she should have known from the FBI, what the FBI knew without doubt and what Mr. Shea later confirmed, is that any reading of what I had already provided the FBI disclosed that, at the very least, there were major problems with compliance, that there were many, many unjustifiable withholdings, and that the records required reprocessing. In this context the only apparent explanations for her trying to convert the agreed-to consultancy into what it was not and could not have been are deliberate stonewalling of this case; perpetuating noncompliance in it because, inevitably, compliance would be embarrassing to defendant, not to the FBI alone; and avoiding paying me. Because in her deposition testimony she was improvising as she went, was filibustering and rambling in her nonresponses and evasions, she also slipped up and, without intending it, admitted that I was not to prepare only a list.

51. But she did try to limit her testimony to this version, each time accompanying it with some kind of defamation or other misrepresentation. For example, when she was asked, after much of her evasiveness, "What did you expect him to do?" She began by slipping in the underscored irrelevant and untruthful, the pretense that there had been no consultancy agreement: "... <u>if we were going to have an agreement with him</u>, he was going to produce specific references in a non-narrative form." When my counsel asked, "What do you mean by non-narrative form," her counsel interrupted, after which she rambled into more irrelevancies, adding nothing except more baseless defamations. (Pages 34-6)

52. My consultancy report <u>does</u> consist of "specific references." It is not and it could not be in "non-narrative form," as she well knew.

53. One of her involuntary admissions that I was to provide more than a list is her representation of defendant's intent as "how to get Mr. Weisberg's work, which he was doing anyway in ongoing fashion, how to get it in a form where the government could evaluate whether his complaints were unjustified, or whether, on the other hand, the government would continue to feel that the material which was not made available to him was being withheld properly." (Page 11) As with virtually everything Mrs. Zusman said, there is an irrelevancy that serves a dishonest purpose.

It is not true that the consultancy was in any way part of my "ongoing work." It was a major interference with my own work. I could have written a book in that time. Moreover, there is no way in the world that Mrs. Zusman could have known or even suspected what she slipped in in her zeal to make it appear falsely that, because the consultancy was work I was doing anyway, I really ought not to be paid for it. In fact, she knew that what she said is not truthful. She was well aware of the fact that I had completed my study of all the records provided and that I had already filed my complaints with the FBI. This is the very reason for her arranging those conferences in Mr. Schaffer's office. More, those complaints are what I was to have used and did use in the consultancy report.

54. Correcting endless untruths does require considerable space and Mrs. Zusman was unusually adept in slipping in these untruthful and prejudicial digs.

55. However, it is obvious that, if the government were going to "evaluate," it required information it did not have. Otherwise, it deliberately withheld what it knew it should not withhold.

56. This also is true of another of her babblings to avoid direct and honest response. She repeated the same thing in a different way, saying that what defendant wanted was "input from you in a form we can make sure that the F.B.I. goes over it and identifies it, and then decisions can be made whether they are improper withholdings." (Page 33) For these "decisions to be made," it was necessary for defendant to have information not employed in making the original denials. This is not and cannot be done with a list. It requires and I did provide the information needed for these "decisions" to be made. This gets to some of defendant's and Mrs. Zusman's real problems. I did do what was asked of me and it establishes the need to which Mr. Shea later testified, the need to reprocess the MURKIN records. But defendant was determined not to do that and thus pretends that I did not do what I was asked to do. (Here I emphasize the significance of defendant's not answering any one of my many letters or having the FBI "go back over its records" after receipt of my consultancy report and "review" what I called to defendant's attention. (See Paragraph 46 above.)

57. What makes Mrs. Zusman's misrepresentation more glaringly deliberate is the fact that prior to the consultancy I provided such a list, at her request. If she had found it adequate, there would have been no need for her to press the

consultancy on the Court in chambers. The history of that matter also underscores the fraudulent nature of the allegations that I am incomprehensible, cannot communicate and supplied only what was not "usable" - this, of course, in reference to what did not even exist.

58. In response to Mrs. Zusman's request and with her approval, I asked an American University pre-law student to go over my letters to the FBI and simplify them in the form of a list. My counsel gave her list to defendant. Typically, defendant promptly stonewalled and ignored the list, too. When defendant was representing falsely in court that nothing more could be done about compliance until my consultancy report was reviewed - and I never heard from defendant about it and it was ignored in court - my counsel pointed out that this list had received no response. The Court directed defendant to address it under oath. In response, SA Horace P. Beckwith provided a very long affidavit with 52 attachments, under date of August 11, 1978.

59. That the FBI could address the matters raised in my letters to it is obvious because it did. That more than a list is required also is obvious from what next happened.

60. Cunningly it was arranged for the Beckwith affidavit to reach me after the last rural mail before the coming calendar call. Someone in the Frederick post office regarded a certified package to me from the FBI as important enough for me to be phoned. I picked it up and had part of a weekend in which to review the Beckwith affidavit and prepare my own. As a result, I was able to prove that it was falsely sworn and that in some instances he actually supported the improper withholdings by providing false attachments. I displayed several volumes of disclosed FBI records that he swore had to be withheld from me, although I had informed the FBI that the information was within the public domain, and I came close to proving that nothing he swore to was credible and in most case was obviously untruthful. I provided the Court with copies of the actual records in question and with Beckwith's/defendant's fakes. I also informed the Court that defendant had been using a supervisor who was nearing retirement and in a very vulnerable position to execute affidavits because SA Beckwith was an unindicted co-conspirator in the conspiracy case involving former Acting FBI Director L. Patrick Gray and two former assistant directors. The Court banished Beckwith, who had sat silently

during my counsel's reporting of what my examination of his affidavit disclosed. And rather than withdrawing the falsely-sworn affidavit illuminated with fakery, defendant later asked that what I had disclosed about him be expunged. Meanwhile, the FBI still has not addressed - after four years - what it simply cannot address without perjury and fakery, the specifications of noncompliance prepared by an undergraduate from my letters to the FBI. And, typically, defendant, having agreed to pay that student, did not do so.

61. Defendant, making what it turns out was improper claim to exemption, withheld from me the entire text of an internal memorandum written about my litigation by Mr. Shea. That record was disclosed to another litigant in another case. My counsel provided the Court with a copy. Mr. Shea stated that the FBI had been untruthful, had not kept its promises to the Court and to me and that it had pertinent records that had not been searched for. I cite this as additional evidence of bad faith known to defendant and counsel and as a reflection of the value of the information I provided.

62. It thus is apparent that Mrs. Zusman invented a convenient false pretense, that she knew it was not truthful, and that there is motive in this in the inability of defendant to make honest and pertinent responses to the complaints I addressed to the FBI or my consultancy report. This adds dimension to defendant's bad faith because it is used in an effort to defraud me.

Other Misrepresentations About My Work

63. When Mrs. Zusman referred to my work or "material," she was not referring to the report I provided. She was questioned only about the short period of about two months after the in-chambers agreement and she never volunteered anything about the report I did provide. As stated above, it was several more months before I was able to provide that 200-page report. Each of her references to my alleged work was part of a diversion, digression, evasion or intended defamation. And nothing she said about it was responsive to any question. In what she testified, quoted below, she did not claim lack of recall and she testified to what she knew was impossible. She testified that during this brief period I had sent "material" in, which is not true and which the records in her hands established was impossible. What she says about my work is 100 percent fabricated because it did not exist then and never did exist.

64. At one of the points where Mrs. Zusman pretended that at the in-chambers conference I did not accept the consultancy and therefore there was no such agreement, she was reminded of the letters about which she had parried questions, what I had said about needing dictating equipment, and she admitted recalling this. My counsel asked her what she never did respond to, "How could that problem have arisen if Mr. Weisberg had not agreed to/do the consultancy?" She spent two pages avoiding response, including making one of her false "smoke screen" allegations, ending with,

> "I would periodically ask whether Weisberg was sending in the work so the F.B.I. could focus on what the deletions and withholdings were that were in dispute, so that we could move along. The responses given to me by my staff, as I recall, were that nothing usable (sic) was forthcoming, and basically there had been no change in the kinds of material that Weisberg had produced before the conference." (Pages 30-32)

65. Repeatedly Mrs. Zusman parried questions pertaining to my letter reporting how I had already spent 80 hours on the consultancy. She had to do this or admit that she had answered untruthfully in claiming that I had not even agreed to be defendant's consultant. She was asked if my letter did not indicate "very definitely that he was going forward with the project." She was not content to answer simply and truthfully. Instead, she stated, "Yes, it sounds that way," and then immediately launched into a fantasy, "It sounds as though he is producing material (which it does not suggest in any way and which I had not) but it does not indicate whether this material is in a form that is any different from the material that he had been producing." (Pages 32-33) As she wandered about in complete fabrication, she added, "And if in fact he spent 80 hours in that time period collecting notes and so forth and so on, all that that indicates is that he was continuing to work in the same fashion." (Page 34) It does not and it cannot do anything of the sort. It indicates no more than that I was preparing the information required for the consultancy report, and she knew it. The letter before her and about which she was being questioned is specific in stating that it would be another 80 hours before I would be in a position to dictate anything, the "material" to which she refers in her knowingly untruthful and intendedly prejudicial volunteering of the entirely unresponsive.

66. Avoiding the question, "What did you do in response" to my letter concerning the rate of pay for consultants (Page 56), she launched into another character assassination, "all of us began to experience frustration in dealing with

the case because we were not aware of any change in what Mr. Weisberg was producing." (Page 57) My letter, which was before her, is stamp-dated as having reached her January 3, 1978. The letter told her that I had not been able to dictate anything because of the lack of dictating equipment and could have provided nothing. Moreover, bearing on her intent to fabricate, she also had before her an internal memo on a staff conference, over her name, in which it is complained that, as of a month later, they had not received "any work product resulting from his efforts." (Page 69) There thus appears to be no reasonable doubt that Mrs. Zusman knew she was testifying falsely. There is no doubt at all that defendant's own records, before her and about which she was being questioned, are explicit in stating that I had not provided any of the "material" about which she testified in such extensive and defamatory detail.

67. As she made it up as she went, she also made up that what I allegedly provided, which was absolutely nothing as of that time, was not "usable." She pretended that her allegation, that I am "not able to meaningfully communicate," is responsive to the question, "What did you expect him to do?" Asked to provide a single illustration, she could say only that this is "my recollection of what was going on in that time period" - in which I had provided nothing at all! (Pages 34-35) She added to this that I never provided itemization "of specific documents, specific pages in documents ... that he was contending should not have been excised." This is doubly false because I did precisely that in many letters to the FBI and later in the consultancy report. Because there is nothing like this in my letter of December 11, 1977, about which my counsel was trying to question her (or in any other letter), he asked her what she based her testimony on. Instead of responding, she launched into renewed defamation. (Page 37) He then read parts of the letter to her and asked if she had "any trouble understanding what he was talking about." She admitted that she did not have any trouble understanding anything I wrote. (Page 38) She also claimed she could not remember if any of my letters were answered. (Page 39) Not one was ever answered.

68. Perhaps because I cannot "communicate" and cannot write what is "usable" the first of my seven books, written in haste in four weeks, appeared in nine printings here and in England. Perhaps that also explains why defendant never complained of any inability to communicate in my many affidavits and why the FBI

and Mrs. Zusman and her own Civil Division never asked me to explain anything I ever wrote. And, of course, it explains why Mr. Shea went out of his way to praise my assistance in his testimony.

Mrs. Zusman Did Not Eschew Portraying Me as a Crook

69. In her pretense that there was no consultancy agreement and still talking about that nonexistent "material" she testified about, Mrs. Zusman, who could hardly admit that the rate she said I would be paid had been "torpedoed" by her then underling, was impelled to portray me as a crook. Instead of responding to the question asked, she declaimed,

> "I don't think that anyone thought that you thought that the United States government through Bill Schaffer was offering (sic) to pay your client, to subsidize him, at the expense of the taxpayer to simply continue producing what he had been producing previously ... I don't think that I ever thought for a moment, nor did any of my staff, that you thought we were going to subsidize Mr. Weisberg to just continue to do what he had been doing previously." (Page 56)

She represented that what I had not provided was "for his own self-interest." (Page 39) She had no reluctance in calling my counsel a crook, either:

> "I think that you had both been very manipulative in this whole thing, and I think that it was clear that you tried to capitalize on a spirited (sic) proposal by Mr. Schaffer, which was never accepted by you or your client." (Page 71)

70. At several points she actually testified about what had not yet been put on paper, that it was my "entire life." Consistent with this she let herself go to an incredible extent: she said the consultancy I had resisted to the degree possible - her project - was my project! "... and by this project I mean the research that he was doing on the JFK assassination (sic) and that he was continuing to work with documents that he received from the F.B.I." (Page 54) Obviously, there is no connection between my own work and the consultancy and equally obviously, before the consultancy was first proposed, she knew that I had reviewed all the records provided.

71. Because when he made modest efforts to end her tirades her counsel threatened to end the deposition (Pages 48-49) and because she and her counsel were complaining about the time taken by the deposition, which really was the time she deliberately wasted in filibusters and nonresponses, my counsel had to restrict himself to a few direct questions. To two ultimately he did receive responses that are the direct opposite of her volunteered defamations and nonresponses. She

did admit knowing from my letters that I was working on the consultancy and had not rejected it; she did admit that my inquiry about the rate of pay was "reasonable;" but she never did answer "what did you do in response" to my letters about the consultancy. (Pages 56-57) She did nothing at all. I never received any response.

Mrs. Zusman's Other Defamations Are Not Accidental and Are Intended to Prejudice

72. My counsel was trying to learn from Mrs. Zusman if there had been any response to my letters asking about the consultancy rate and if not why not. She would do anything but answer. So he asked her, "Should there have been a response?" She began evasions and digressions that ran on for several pages with "I don't understand your question." It is beyond doubt that Mrs. Zusman does understand the question, "Should there have been a response" to my inquiry about the consultancy rate. At one point she interrupted my counsel to state, "I think that is an irrelevant question." Soon she was stating, "I don't know what you mean by 'shouldn't there have been.'" He repeated the question again and she said, "Jim, you're arguing the case and this is not in court." (Pages 46-48) She would do anything but answer, and her preferred alternative was usually defamation. He tried a different approach, "doesn't the December 17 letter refer to a specific matter, the consultancy?" She responded with complaint about the time taken by the deposition she was filibustering, the importance of her responsibilities and a not excessively modest tribute to herself for her "cooperation." She began this outburst with "Where are you getting that?" (Page 49)

73. She had been claiming that I was under a misapprehension because there was no consultancy agreement. My counsel asked her, if I were under any misapprehension, why did she not answer my letters and tell me that. (Pages 49-50) Instead of answering, she launched into a tirade of personal vilification of me, one that is irrelevant, inappropriate, misleading and reflective of intent to prejudice:

> "In the course of being involved in litigation in the FOIA area involving your client either you or he at some point spoke at length of his own personal view that the United States government has persecuted him, and that he had at one time been an employee of the State Department and that he left the State Department because of rampant antisemiticism (sic), and that he undertook to raise chickens in Frederick, Maryland, and that as soon as he had a successful chicken farm going that some part of the federal government, and I forget whether it was the Army or whatever it was --"

74. My lawyer objected and she insisted, "Let me finish." He objected

again and she insisted, "No." He told her, "It is not relevant to the question," which, after all, pertained to her failure to respond to my letters inquiring about her consultancy and its rate of pay. When my lawyer tried to get her back to the question, her counsel interjected so she could resume with "... I have no idea of what your client's understanding of reality was," about anything at all. "It is relevant (to) the fact that he described, or you described to me, his feeling that he had been persecuted by the State Department." (Pages 50-51)

75. I have never kept my views secret and I have never had any occasion to discuss them with Mrs. Zusman. I have never had any "bull session" with Mrs. Zusman. I recall meeting with her on four occasions only, all at her request and never without my counsel. I met with her so she could take my counsel and me to Mr. Schaffer's office, twice in that office, and in chambers, continued in Mr. Dugan's office. However, in this, contrary to her claimed poor memory, she displays a rather remarkable memory, albeit of the irrelevant and not entirely accurate. I do not attribute persecution to the State Department or any other agency of government. I have stated and I believe the record shows that defendant, aided and abetted by the Mrs. Zusmans in its employ, has been pursuing its 1967 decision to "stop" me and my writing by stonewalling my information requests and by misuse of litigation.

76. However, it does happen that Mrs. Zusman had an occasion to reflect her personal as well as her official "idea" of what my "understanding of reality was," particularly "in the course of being involved in FOIA litigation involving" me. By a remarkable coincidence, this was of the time of the consultancy agreement.

77. Counsel for a public interest group with whom I have never had any contact heard about the list of about 25 long-overdue FBI FOIA requests I provided in this instant cause and gave it to the Senate's FOIA subcommittee. It held a hearing on October 6, 1977, about a month before defendant's first proposal of the consultancy. Defendant's witnesses were Allen H. McCreight, then the FBI's FOIPA chief; Mr. Shea; Mr. Schaffer and Mrs. Zusman.

78. Mr. McCreight refused to promise the Senate that requests then more than a decade old would be complied with and as of today they have not been.

79. Mr. Shea testified that he would "never be satisfied with the FBI's

handling of" my requests. He added that "if you are looking for a Department of Justice representative to defend that sort of practice in 1969, 1970, or at any other time, I am not going to do it." The chairman again asked about those 25 ignored requests and Mr. Schaffer referred to a meeting with my counsel and me, the one Mrs. Zusman had just arranged without letting us know she was going to boast to the Senate about it. Mr. Schaffer added that my cases are not "routine." He testified, "I can assure you that the Department is going to try to do something about his requests as a whole ... Mr. Weisberg does have reason to complain about the way he was treated in the past. We in the Civil Division are going to try to do something to straighten out all of these cases."

80. Mr. Schaffer and Mrs. Zusman misled the Senate committee. I know of nothing "we in the Civil Division" did to straighten out anything except:

a. prolong every lawsuit to the degree possible (and this instant cause is one of three not yet ended);
b. make no effort to effect compliance with those 25 other ignored requests, which could avoid unnecessary litigation;
c. not comply with my FOIPA request of it;
d. tie me up in this consultancy for which they continue to refuse to pay me while simultaneously they ignore my consultancy report and its specifications of noncompliance; and
e. resist bitterly and vigorously all of the many subsequent disclosures of pertinent records known to exist when Mr. Schaffer and Mrs. Zusman gave this testimony.

81. Mrs. Zusman then described perpetuating noncompliance, which is her and defendant's record, as a constructive accomplishment, a special kind of effort. She took most of two printed pages for self-praise because she and Mr. Schaffer "did make the time to see Mr. Weisberg and Mr. Lesar ... discussing the problem. This is the type of effort that we are now putting forth."

82. From these admissions to the Senate, it is clear that any lack of contact with reality is not mine; and from defendant's subsequent record, particularly the bitter-ending resistance to compliance presided over by Mrs. Zusman, that lack of contact with reality is not psychological.

83. While the rest of Mrs. Zusman's knowing and deliberate misuse of this litigation in an effort to prejudice the Court and to fabricate untruths and defamations for the misuse of her former associates - which I expect any day now - is utterly irrelevant, it is a cleverly distorted defamation and it is now part of the Court's records in which it must be corrected, for the present and for the future.

84. I did not just leave the State Department, in which I had an excellent record, I was fired - without charges and without a hearing - under the so-called McCarran Rider, later declared unconstitutional by the Supreme Court. There were ten of us, nine Jews and one married to a Jew. I arranged for the defense of the entire group, although I did not know and still have never seen or spoken to seven. I knew two only because the government brought us together in the same division. Our pro bono counsel were Thurman Arnold, former appeals court judge and former head of defendant's Anti-Trust Division when I cooperated with it and did for it work the FBI did not do; Paul Porter, who had been head of the Federal Communications Commission; and Abe Fortas, later Supreme Court justice. Messrs. Arnold and Porter had known me earlier, when I was an investigative reporter. Both knew that the paranoidal inference that I was subversive was baseless. My work, with which Mr. Arnold was familiar, was the exposure of Nazi cartels and their interference with our defense efforts. Large fines were assessed and major Nazi-front corporations were vested by our government after my exposures were published. J. Edgar Hoover himself wrote a letter praising my work. One of Mr. Arnold's assistants asked me to become and I did become an unregistered British agent in economic warfare because we were not yet at war. (With regard to the inference that I was some kind of "red," all of my anti-Nazi exposures were of the time of the Nazi-Soviet pact, the shibboleth of that period.)

85. The State Department rehired me with a public apology and I resigned.

86. With regard to the chicken farming, which was not in Frederick, the Civil Division forced litigation that was entirely unnecessary. It lost and thus made it possible for me to establish an important principle of law that was confirmed by the Supreme Court. This cost the government much but has been of great value to many others who suffered aviation damage.

87. The Civil Division appears to have my name flagged for special noncompliance treatment because when I made an FOIPA request for the records pertaining to that litigation, neither the request nor appeal received any response. However, when my wife later made a similar request in her name, she received some of them. I knew what she was provided was incomplete because I had seen those records under court-ordered discovery. Defendant refused to permit me to have copies and there is a limit to how much any private person can litigate.

88. Bearing on the prejudice that exists against me - and not only in the Civil Division - and on inspiration of bad faith, the FBI made the inadequate, deceptive and unsuccessful investigation in that case. It actually "fixed" a witness who later realized what he had done and voluntarily confessed it to my wife and me. It also gave the government lawyers the most frightful fabrication, that my wife and I annually celebrated the Russian Revolution. This is what it made of an annual religious gathering at our farm after the Jewish high holidays - which are some time before the anniversay of the Russian Revolution. From the records I received, processed by those who had no concept of truth - or as Mrs. Zusman might put it, no contact with reality - the FBI made wide distribution of this infamous libel, including to the White House, the Congress and to those involved in my FOIA cases, from Attorneys General down.

89. I have no need to apologize for being a farmer or for our winning all the top honors in my area of farming. I won first prize for the entire country in raising chickens, I was the "National barbecue king" and for several years I was the Maryland chicken-cooking champion. My wife was the National chicken-cooking champion.

90. Our farming was ruined by low-flying military helicopters, to the satisfaction of the Defense Department, which conducted its own investigation. It also assigned a lawyer on its general-counsel staff to represent my wife's interest and mine and to work out an amicable settlement, which it did do. The Army insisted on litigating and, despite the opposition of the Department of Defense, the Civil Division accommodated it. Although the FBI's internal records reflect that it claims that in this loss it saved the government a small sum, in the first case citing mine as precedent, the plaintiffs were awarded $5,000,000.

91. None of Mrs. Zusman's attempts to prejudice and defame has anything to do with the consultancy or the questions about it that she did not answer or answered with other than truth. It has nothing to do with the questions she was asked and did not answer about the letters pertaining to the consultancy that were addressed to her or routed to her. It is, however, a bad-faith example of the traditional dirty trick of the bankrupt lawyer, an effort to try the case on the opposing side. In this case it is even more indecent because I am the injured party and Mrs. Zusman is directly responsible for that injury. It is another

example of the deliberate loading of a court record with dishonest representations for the further bad-faith demonstrations I anticipate in the misuses for which it is clearly designed and intended.

92. Because I am not able to work rapidly now and because, as I indicate above, I anticipate that my counsel may have need for what I have completed, I will provide the second part of this affidavit separately, as soon as I am able to complete it.

HAROLD WEISBERG

FREDERICK COUNTY, MARYLAND

Before me this 15th day of August 1982 Deponent Harold Weisberg has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires July 1, 1986.

Lillian Weisberg

NOTARY PUBLIC IN AND FOR
FREDERICK COUNTY, MARYLAND