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August 4, 1983

Mr. Leonard Schaitman
Assistant Director, Appellate Staff
Civil Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Weisberg v. Department of Justice,
Civil Action No. 75-1996; D.C. Cir.
Nos. 82-1229, 82-1274, 83-1722, 83-1764

Dear Mr. Schaitman:

As you are aware, the District Court awarded Mr. Weisberg $93,926.25 in attorney's fees and $14,481.95 in litigation costs in the above Freedom of Information Act case. Thus, the total award comes to $108,408.20.

Both parties have informally indicated interest in possible settlement of this case. At the suggestion of Mr. John M. Rogers of your staff, I am writing to set forth a settlement proposal. Because of the length and complexity of this case and your unfamiliarity with the specific details, I will first summarize some of the salient points presented by the cases pending on appeal as they impact on settlement.

The Government has appealed the award of $108,408.20 to Mr. Weisberg. In my judgment, there is a substantial liklihood that further litigation will result in an increase in the total award made to Mr. Weisberg.

To begin with, a principal Government objection to the award, that Mr. Weisberg did not "substantially prevail" within the meaning of 5 U.S.C. § 552(a)(4)(E), is simply untenable. The Government released more than 50,000 pages of documents to Mr. Weisberg after it repeatedly represented to the Court (in February-May, 1976) that the case was moot. Indeed, the Government moved for summary judgment on no less than three occasions before finally obtaining it, and after each motion, including the last and successful one, additional records were released to Mr. Weisberg.

Although the FBI initially represented that field office records only duplicated the Headquarters records released to Weisberg, it ultimately released thousands of pages of field office records which did not duplicate the Headquarters documents. Although the FBI initially maintained that it did not have photographs of the

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Martin Luther King assassination crime scene, it eventually released many such photographs, including 107 photographs obtained from Time, Inc. which the FBI claimed were not agency records or else were exempt pursuant to 5 U.S.C. § 552(b)(3)(by virtue of the Copyright Act) or 5 U.S.C. § 552(b)(4). See Weisberg v. U.S. Dept. of Justice, 203 U.S.App.D.C. 242, 631 F.2d 824 (1980).

Although the FBI was unable to locate the "missing" Long tickler file, an important file containing significant information not duplicated in other King assassination records provided Weisberg from the FBI's Central Records, it was ultimately located on the basis of information which Weisberg himself provided to Mr. Quinlan J. Shea, Jr., the then-Director of the Office of Privacy and Information Appeals. Through his persistence, Mr. Weisberg achieved the release of Civil Rights Division documents after CRD personnel had sworn that all responsive documents had been released. He also forced disclosure of field office records indicating the nature and extent of the FBI's gargantuan files on its "security" investigation of Dr. King.

In addition to the foregoing accomplishments, which is by no means an exhaustive list, Mr. Weisberg also obtained a fee waiver for the records involved in this litigation.

In view of these accomplishments, which were achieved in the face of Government opposition, the Government's chances of overturning the District Court's finding that Weisberg "substantially prevailed" are, in my view, nil.

If the Government cannot win on the "substantially prevailed" issue, its efforts on appeal are likely to do little more than increase the amount of the award. Weisberg will be entitled to attorney fees for work done in the Court of Appeals to defend his award against the claim that he is entitled to nothing because he did not "substantially prevail". Even if the Government should succeed in reducing the size of the award somewhat, such a reduction would probably be a pyrrhic victory at best. Weisberg's attorney's fees for handling these appeals is likely to amount to $15,000 to $20,000.

There are other factors which may substantially increase the present award. First, there is a question as to whether the District Court awarded the appropriate hourly rate. Weisberg submitted evidence to support a $100 per hour rate, but the District Court rejected this evidence because it consisted of awards in non-FOIA cases. Instead, she relied upon the fact that Weisberg's attorney had accepted compromise settlements in two FOIA cases and awarded him the $75 hourly rate he had accepted in those cases. She thus ignored the fact that the $75 rate was a compromise, not a market rate, and she failed to take into consideration the passage of several years since the $75 per hour rate had been agreed upon. If

the Court of Appeals were to find that she erred in settling on a $75 per hour rate, this could increase the base award by $20,872.50 even if applied only to the 834.9 hours for which the District Court found compensation is due. Amplifying the revised base award of $83,489 by 50%, the contigency factor which the District found appropriate, would then result in a total attorney's fees award of $125,235. The addition of the litigation costs presently owed Mr. Weisberg would raise the overall award to $139,716.95.

This does not take into account other factors which could further increase the total award. The District Court subtracted 36.7 hours from the total of 86.7 hours which was spent on the motion for attorney's fees itself, thus reducing the award by $2,752.50. The total time spent on this issue does not appear excessive when compared with other cases. In Environmental Defense Fund v. Environmental Prot., 217 U.S.App.D.C. 189, 209, 672 F.2d 42, 62 (1982), which involved a roughly comparable claim of hours expended on the case-in-chief, the EDF sought reimbursement for 114.4 hours of time spent on the attorney's fees issue, which is approximately 31% more than was claimed here. The Court of Appeals approved all but 9.75 hours which was spent on a peripheral "timliness" issue. 217 U.S.App.D.C. at 210. If the Court of Appeals should find that the 86.7 hours spent on the attorney's fees issue in this case was not excessive, this could add between $2,752.50 (at $75 per hour) and $3,670 (at $100 an hour) to the award.

The District Court initially ruled that Weisberg was entitled to payment for work he had performed as the Justice Department's consultant. Although she later reversed herself, she made it clear that she did not approve of the Department's having "welched" on a deal struck in chambers. In denying Weisberg's motion to reconsider her reversal, she found that it was "more probable than not" that a Justice Department attorney had offered to pay Weisberg for the consultancy at the rate of $75 per hour.

On cross appeal Weisberg will again raise the issue of his right to be paid for work which he conscientiously performed at the insistence of the Department and the Court on the promise that he would be paid for it. Should he prevail in the Court of Appeals, the Department will owe him $10,000 for his consultancy work (he has waived the amount of his claim above $10,000 to give the District Court jurisdiction). In addition, the Government would then also owe Weisberg for the work done on the consultancy issue in District Court. The District Court excluded 44 hours or $3300 (at the $75 hourly rate) from its award because of its ruling that Weisberg did not prevail on this issue. If the Court of Appeals reverses, Weisberg would then receive attorney fees not only for this excluded work but also for work which was done on this issue when Weisberg moved the Court to reconsider its ruling.

Weisberg will also contend on appeal that the fee award should be increased because of the Government's bad faith conduct. The District Court found that the Government engaged in obdurate conduct, but she ruled that the equitable power to award fees to a successful party when his opponent engages in such conduct has been displaced by the explicit statutory provision in the Freedom of Information Act for an award of fees. Should the Court of Appeals conclude that the District Court erred in this respect, a considerable increase in the award could result.

In addition to the foregoing matters, which impact directly on counsel fees, there remain other issues relating to the scope and adequacy of the search, the withholding of materials, the need to reprocess records in accordance with the historical case standard, etc. In my judgment it is virtually certain that some, if not all, of these issues will require the Court of Appeals to reverse the District Court and remand the case for further proceedings.

Here I wish to draw your attention to two issues in particular. The first is the adequacy of the search. The two FOIA requests in this lawsuit contained twenty-eight numbered items. Instead of conducting a search for the materials sought by each of these items, as it is required to do, the FBI sought to substitute its Headquarters file on the MURKIN investigation for the actual terms of the request. When questioned in open court about whether any search has been made for specific items of Mr. Weisberg's December 23, 1975 request, the FBI's case expert testified that no search had been made for materials responsive to those items. There is no FBI affidavit attesting to such a search. As Quinlan Shea noted in a March 27, 1980 memorandum, although in a different context, the FBI has been recalcitrant, to say the least, in searching for materials related to the King and Kennedy assassinations. (A copy of Shea's memorandum is attached hereto.) Under these circumstances, the Court of Appeals has no alternative but to remand the case.

The second issue concerns withholdings. Mr. Shea conducted a review of the FBI's deletion claims. He testified that he personally believed that there was much deleted material which did not qualify for withholding and should be restored. In granting summary judgment, the District Court recognized that "[s]ubstantial cause exists to defeat the application of exemptions 7(C) and (D)" in circumstances where, as in this case, information already known to the public is being withheld. Most importantly, the FBI's two Vaughn indices failed even to provide a sample of all the different exemptions claimed and in fact showed that the Bureau was unable to justify the withholding of some materials for which it had made exemption claims. Indeed, the FBI's Vaughn sample released important

substantive information previously withheld under Exemption 1. Where the FBI continued to justify its withholdings in its Vaughn index, these claims were vigorously disputed by Weisberg's counter-affidavits. I do not believe that the Court of Appeals can or will uphold summary judgment based on a Vaughn sample which admits that sampled materials were erroneously withheld. Nor do I believe that it can or will sustain summary judgment with respect to exemption claims for which no representative sample is included in the Vaughn index. A remand is thus inevitable for this issue, too.

Despite the strength of his case, as briefly outlined above, Mr. Weisberg recognizes that there is much to be said for ending this protracted litigation. In fact, two years ago, after his life was nearly ended by a massive circulatory blockage, he sought to have the case dismissed. But for the Government's opposition, it would have been dismissed.

Mr. Weisberg also recognizes that there is something to be said for being paid now rather than at some indefinite time in the future. In view of these considerations, we are prepared to settle this case for $99,000. This is a substantial reduction of approximately 10% in the present award of $108,408.20. As part of the settlement, Mr. Weisberg will, of course, withdraw his cross-appeals.

If you are interested in pursuing settlement along these lines, I would appreciate it if you could let me know as soon as possible, as I will soon have to begin work on the appeals unless it is clear that there will be no need to do so.

For your information, my vacation plans have been altered slightly. I will now be leaving August 27 and returning September 4th or 5th.

Sincerely yours,

James H. Lesar

James H. Lesar

United States Department of Justice

OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

WASHINGTON, D.C. 20530

MEMORANDUM

March 27, 1980

TO: Robert L. Saloschin, Director
Office of Information Law and Policy

FROM: Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals

SUBJECT: Freedom of Information Requests of Mr. Harold Weisberg

Reference is made to Mr. Flanders' memorandum to you dated March 4, subject as above.

I have no strong objection to placing this subject on the agenda of the Freedom of Information Committee, although I see no real need to do so. I disagree with many of the assertions in Mr. Flanders' memorandum. I do not agree that the Bureau has searched adequately for "King" records within the scope of Mr. Weisberg's numerous requests. In fact, I am not sure that the Bureau has ever conducted a "search" at all, in the sense I (and, I believe, the FOIA) use that word. It is confusing two totally different matters -- the scope of his requests administratively and the scope of a single lawsuit which we claim is considerably narrower than his administrative requests. Not really touched on in Mr. Flanders' memorandum, but very much involved in this matter, is the issue of what are "duplicate" documents for purposes of the Freedom of Information Act. The Bureau has rejected -- still informally, but very emphatically -- the position I espouse (and with which you agreed in your informal comments on my earlier memorandum to you). Lastly, but very important, is the matter of the scope of the fee waiver granted to Mr. Weisberg. In my view (and as intended by me at the time it was granted), the waiver extends to all records about the King assassination, about the Bureau's investigation of the King assassination (not at all the same thing), about the "security investigation" on Dr. King, and about the

Bureau's dealings with and attitudes towards its "friends" and its "critics" as they relate to the King case. The key point is that it extends to records by virtue of their subjects and contents, to the extent they can be located with a reasonable effort -- and is not determined by where and how the Bureau has filed the records. Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited, factual extent. I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

It is perhaps unfortunate that Mr. Weisberg is the principal requester for King and Kennedy records. He has heaped so much vilification on the FBI and the Civil Division -- a considerable part of which has been inaccurate and some of which has been unfair -- that the processing of his efforts to obtain these records has almost become an "us" against "him" exercise. My view has always been that the two cases are too important to the recent history of this country for that attitude to have any permissible operation.

The problem I have is that, although I know that what the Bureau wants the Committee to approve would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Abourezk Subcommittee, I do not have the time to carry out the extensive research that would be required for me adequately to represent Mr. Weisberg's interests before the Committee, in an effort to avoid the very real blot on the Department's escutcheon which would result from the approval of the Bureau's position. Accordingly, if this matter is to be placed on the Committee's agenda, I strongly recommend that Mr. Weisberg and his lawyer, Jim Lesar, be invited to attend and participate in the discussions.

cc: Vincent Garvey, Esq.
Civil Division

Inspector Flanders
Federal Bureau of Investigation