April 22, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Statement of the Case

On November 28, 1975, plaintiff filed this suit under the Freedom of Information Act, as amended, 5 U.S.C. 552, seeking an order of the Court compelling disclosure pursuant to his April 15, 1975 request for six (6) listed categories of information from the Department of Justice pertaining to the assassination of Dr. Martin Luther King, Jr. (Exhibit A, Complaint).

By letter dated December 1, 1975, Harold R. Tyler, Jr., Deputy Attorney General, advised plaintiff's attorney that he had "decided to modify Director Kelley's action in this case and to grant access to every existing written document, photograph and sketch which I consider to be within the scope of Mr. Weisberg's request" (a copy of the December 1, 1975 letter is attached as Exhibit I to plaintiff's motion to compel answers to interrogatories). Plaintiff and his attorney responded separately to the Deputy Attorney General's December 1, 1975 letter and objected to the narrowing of plaintiff's request for the six categories of materials (Exhibits G and L, Ibid.).

On December 24, 1975, plaintiff's attorney filed in the instant action a "Notice of Amendments to Complaint" adding a

new paragraph (paragraph 10) to the complaint. In this paragraph, plaintiff referred to his new and additional administrative request of the Department of Justice for twenty-eight (28) listed categories of information pertaining to the assassination of Dr. King. (Plaintiff's Exhibit F).

Defendant filed an answer to the amended complaint and asserted in the Fourth Defense that as to the new Freedom of Information Act request the Court lacked jurisdiction over the complaint for plaintiff's failure to exhaust his remedies.

On January 8, 1976 plaintiff filed a set of interrogatories and thereafter on February 10, 1976 defendant filed a motion for a protective order. At the calendar call held the next day, February 11, 1976, this Court denied the motion for a protective order and required defendant to answer or object to these interrogatories.

On February 23, 1976 defendant filed answers and objections to plaintiff's first set of interrogatories. 1/

A month after defendant's counsel filed the answers and objections (and two days before the calendar call held in this case), plaintiff filed the motion to compel answers to interrogatories, which motion was based almost exclusively on plaintiff's affidavit consisting of eighty-four (84) paragraphs.

Plaintiff's affidavit was executed on March 23, 1976 which is the same day plaintiff and his counsel met with three Special Agents of the Federal Bureau of Investigation to discuss and

---

1/ Plaintiff's attorney, by letter dated February 23, 1975, wrote to Thomas Wiseman, Special Agent of the FBI in charge of the plaintiff's FOIA request and, pursuant to Deputy Attorney General's letter of December 1, 1975, plaintiff finally gave the FBI written assurance that the plaintiff would pay the necessary search and reproduction costs (Attachment P to plaintiff's motion to compel; see also Director Kelley's response dated March 9, 1976, Attachment Q, Ibid.).

make further disclosures pursuant to his April 15, 1975 FOIA request (Defendant's Exhibits 1 and 2 attached and incorporated herein). Plaintiff makes no reference to this meeting in his affidavit, nor the results of the disclosures made on that day.

On March 26, 1976, a second calendar call was held in the instant action and at that time defendant's counsel stated:

> ". . . we [the FBI] 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.
>
> "Now, we are prepared to indicate that further investigation will take place in the Memphia [sic] field office, which is probably the only logical place where any other files would be located and we are prepared to indicate that will be done within 30 days." (Transcript of Status Call held on March 26, 1976, Tr. 3).

The FBI has requested the information from its Memphis field office and will review the additional photographs that fall within the scope of plaintiff's April 15, 1975 FOIA request. Employees of the FBI expect to meet with plaintiff and his attorney at a mutually convenient time before the next scheduled calendar call in this case to disclose whatever additional photographs are deemed within the scope of the request and not exempt by any provision of the Freedom of Information Act.

In light of the fact that plaintiff's motion to compel is almost exclusively based on plaintiff's own affidavit, defendant's counsel submits in opposition to his contentions the attached affidavits of Thomas L. Wiseman, Special Agent, FBI, Supervisor of the Freedom of Information-Privacy Act Section at FBI Headquarters (Government Exhibit 1), and John W. Kilty, Special Agent, FBI, Chief of the Elemental Analysis Unit of the FBI Laboratory, FBI Headquarters (Government Exhibit 2).

Argument

I

Plaintiff and his attorney have made numerous contentions in their memorandum and affidavit filed with the motion to compel answers to interrogatories. In large measure, we submit these contentions are based on their presumption or conclusion that employees of the FBI are dishonest and are intentionally trying to hide from plaintiff and his attorney various documents and photographs which fall within the scope of their April 15, 1975 FOIA request. We strongly disagree and urge this Court to deny their motion for the reasons stated below.

This case does not represent the first occasion where plaintiff and his attorney have directed such allegations of dishonesty to defendant's employees. In plaintiff's FOIA action entitled Weisberg v. U.S. Department of Justice, et al., Civil Action No. 75-226, Judge Pratt, after several calendar calls and upon consideration of various motions, dismissed on grounds of mootness plaintiff's FOIA case seeking disclosure of spectrographic analyses and other tests made by the FBI for the Warren Commission in connection with the investigation into the assassination of President John F. Kennedy. On July 15, 1975, Judge Pratt stated:

> . . . I have spent a good deal of time going over the papers that were filed in this case, and I am satisfied in my own mind that there has been a good-faith effort on the part of the government, and that the government has complied substantially with its obligations under the Freedom of Information Act.
>
> Accordingly, I am going to grant the government's motion to dismiss this matter as moot.
>
> Mr. Lesar, you are familiar with going to the Court of Appeals, and you may have some gentleman there who will tell me I am wrong. They have done that before.
>
> But let me say parenthetically, that you don't get cooperation from people by calling them

liars and kicking them in the face. And I should think that you and Mr. Weisberg would have learned that by this time.

I think the government has been oppressed by a lot of the requests, which I think are completely above and beyond anything that you are entitled to. I don't think the government is required in this type of a case to go out and take depositions of people and get affidavits from everybody under the sun. (Tr. 18-19) [Emphasis added].

It is particularly appropriate at this point to state that defendant is not now claiming any documents and photographs coming within the April 15, 1975 request are exempt from disclosure in view of the Deputy Attorney General's letter of December 1, 1975 (Plaintiff's Exhibit I). Even though plaintiff and his attorney were of the opinion that the Deputy Attorney General unnecessarily restricted plaintiff's April 15, 1975 request, it is undisputed that plaintiff waited almost three months, i.e. until February 23, 1976, to give the FBI written assurance that the plaintiff would pay the necessary search fees and reproduction costs that is required by the Department of Justice regulations (Plaintiff's Exhibit P; see also Exhibit Q). A meeting was held on March 23, 1976 with plaintiff; yet his affidavit in support of this motion was executed this same date without regard to the disclosures of that date. It is highly questionable why plaintiff would file this affidavit with the knowledge that plaintiff would be meeting with FBI agents to review materials that he was granted access.

At the calendar call held on March 26, 1976, plaintiff's attorney made the point that no pictures of the scene of the crime were disclosed in the March 23, 1976 meeting. It does not necessarily follow, as plaintiff would have it, that the FBI is purposefully suppressing evidence; since after all, the State of Tennessee had the jurisdiction over the substantive crime involving the assassination of Dr. Martin Luther King, Jr.

Moreover, as noted above, defendant's counsel indicated on March 26, 1976 at the calendar call that a further check for items falling within plaintiff's April 15, 1975 request will be directed to the Memphis field office. While we were not required to do this by order of Court, it is consistent with this Court's January 20, 1976 opinion in the case of Meeropol v. Levi, Civil Action No. 75-1121, which involves a FOIA request for documents relating to the investigation and prosecution of Julius and Ethel Rosenberg. This Court stated:

> Lastly, questions were raised as to the completeness of the FBI search and inventory in that no field offices were inventoried. It is clear that an inventory of all 59 FBI field offices would be counterproductive. However, a search and inventory of files fitting plaintiffs' request is in order as concerns the FBI field office in Albuquerque, New Mexico. This would assure that no stone has been unturned in the area where the David Greenglass investigation occurred and which was of significance to the Rosenberg investigation and within plaintiffs' request. [Emphasis added].

II

Purpose of Discovery

Plaintiff's attorney seeks this discovery allegedly for the purpose of testing defendant's employees' credibility on the completeness of the search. As noted above, it seems clear that plaintiff begins with the presumption that defendant has not complied and that it would be very difficult, as a practical matter, for defendant to give any assurance which would satisfy plaintiff. However, plaintiff has cited National Cable Television Assn. v. FCC, 156 U.S.App.D.C. 91,479 F.2d 183 (D.C. Cir. 1973), for the proposition that discovery is required in these circumstances. Defendant submits that plaintiff's reliance on this decision is totally misplaced. In that case, the FCC had declined to identify any documents relied upon for a proposed rulemaking

and the Court of Appeals cited the usefulness of the discovery rules to resolve such questions. In the present case, however, at the direction of the Deputy Attorney General, the FBI, by letter dated December 3, 1975, released all the documents that were in the headquarter's file and later on March 23,1976, they furnished plaintiff the additional material which was requested by plaintiff after plaintiff's attorney gave written assurance he would pay the fees (Government Exhibit 1, p. 23). Furthermore, the law in this circuit does not require an agency to demonstrate absolute mechanical perfection in locating and producing documents but rather the agency is obliged to undertake in good faith a search for documents only to the extent that such a search is "reasonable":

> Even where an agency has previously identified a class of materials, the passage of time may work such changes in the agency's personnel and records that production requires that identification begin anew. In such circumstances, production may be required only if the task imposed on the agency is not unreasonable. National Cable Television Assn. v. FCC, supra, 479 F.2d at 192.

III

Plaintiff's Affidavit

Plaintiff's motion to compel is supported in large measure not by his counsel's memorandum, but rather, he relies on plaintiff's affidavit which consists of eighty-four paragraphs. This procedure has placed defendant's counsel in a difficult position in preparing an adequate response.

In order to set the record straight, we have been forced to submit to the Court two affidavits of FBI agents which attempts to respond to each of plaintiff's paragraphs.

We recognize, however, that the Court is also placed in a difficult and burdensome position to read plaintiff's affidavit and then defendant's counter affidavits before ruling on each of the

interrogatories and responses. We submit that this would be unnecessary had plaintiff promptly given defendant written assurance he would pay the search fees (instead of waiting until February 23, 1976) and awaited the subsequent disclosure that was made on March 23, 1976.

Defendant's counsel was prepared to submit a motion to dismiss or, in the alternative, for summary judgment at an earlier date, but we nevertheless intend to submit this motion following the review of the materials located in the Memphis field office. As noted in the concluding paragraph of Thomas L. Wiseman's affidavit:

> VII The FBI is being placed in the near-impossible position of attempting to prove a negative. Plaintiff is now claiming, inter alia, that there is further information in our possession which he desires, but as I have stated, we simply do not possess the records which he claims we do. At the direction of the Deputy Attorney General, we furnished plaintiff, by our letter of December 3, 1975, all information we could locate and release which the Deputy Attorney General deemed responsive to plaintiff's request, and we had done this before we were notified by the Department of Justice that plaintiff had instituted this litigation. On March 23, 1976, we furnished plaintiff the further material which his attorney's letter of February 23, 1976, stated he was interested in and would pay the special search fees for. There is nothing more we can do in response to plaintiff's request except, as stated above, he will be furnished all non-exempt material falling within the scope of his request located in the search of our Memphis Field Office. (Government Exhibit 1).

IV

Plaintiff's December 23, 1975 FOIA Request

By letter dated December 23,1975, plaintiff directed to the Department of Justice a new FOIA request with twenty-eight (28) listed categories of evidence pertaining to the assassination of Dr. King. The next day, plaintiff filed a notice of amendment to the instant complaint. It is clear at the time this amendment was filed this Court had no jurisdiction over this FOIA

request since the plaintiff had not exhausted his administrative remedies. We submit this Court should not condone such a practice by joining it with the instant action, and hence, should dismiss paragraph 10 of the complaint.

As this Court is aware, the Civil Rights Division of the Department of Justice has been able to review this subsequent request of the plaintiff and has made an offer of partial disclosure. However, because of the volume of FOIA requests that have been directed to the FBI (in 1975 the FBI received 13,875 requests pursuant to the FOIA and the Privacy Act), the FBI has not yet been able to reach plaintiff's December 23, 1975 FOIA request. If the Court does not dismiss this paragraph 10, we will request this Court to stay consideration of this FOIA request until the FBI completes its review, and we will demonstrate that pursuant to 5 U.S.C. 552(a)(b)(C) that the FBI has been exercising due diligence in responding to this request and additional time is required. On April 1, 1976, Judge Smith held that the FBI demonstrated special circumstances and due diligence in a FOIA case and granted the FBI four months to complete their review. Capital Hill News Service, et al. v. United States Department of Justice, Civil ACtion No. 75-2184.

For these reasons, defendant respectfully requests that plaintiff's motion to compel be denied.

EARL J. SILBERT
United States Attorney

ROBERT N. FORD
Assistant United States Attorney

JOHN R. DUGAN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of plaintiff's motion to compel answers to interrogatories, defendant's opposition thereto and the affidavits incorporated therein by reference, and further upon consideration of plaintiff's interrogatories, defendant's answers and objections thereto and it appearing to the Court that the answers and objections were proper, it is by the Court this ____ day of _____,1976

ORDERED that plaintiff's motion to compel be, and the same is hereby, denied.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Compel Answers to Interrogatories and a proposed Order have been made upon counsel for plaintiff, James Hiram Lesar, Esq., 1231 Fourth Street, S.W., Washington, D.C. 20024, by mail on this 22nd day of April, 1976.

JOHN R. DUGAN
Assistant United States Attorney
Room 3419 U.S. Courthouse
Washington, D.C. 20001
426-7261

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v. Civil Action No. 75-1996

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant

AFFIDAVIT OF THOMAS L. WISEMAN

I, Thomas L. Wiseman, being duly sworn, depose and say as follows:

I I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information - Privacy Acts (FOIPA) Section at FBI Headquarters (FBIHQ), Washington, D. C.

II Due to the nature of my official duties, I am familiar with the procedures we follow in processing Freedom of Information Act (FOIA) requests received at FBIHQ, and our full compliance with plaintiff's April 15, 1975, FOIA request. I am familiar with Plaintiff's First Set of Interrogatories, which deal with our response to his April 15, 1975, request, having answered same. I have read and am also familiar with the contents of plaintiff's affidavit dated March 23, 1976, which also concerns our methods of complying with his April 15, 1975, request and our answers to the interrogatories.

III The purpose of this affidavit, which is submitted with the affidavit of Special Agent John W. Kilty, is to set forth the pertinent facts concerning the allegations made in plaintiff's affidavit and to correct the erroneous statements he has made therein. In the interest of brevity, I am attempting to limit my responses to only those of plaintiff's allegations which bear any relevance to this litigation.

GOVERNMENT Exhibit 1

If, in the opinion of the Court, other allegations made by plaintiff are relevant to the issues presented here, a supplemental affidavit will be submitted which will furnish the Court the correct information concerning these allegations. Further, my affidavit treats only our method of compliance with plaintiff's FOIA requests. The allegations plaintiff has made regarding the general area of our Laboratory procedures, which I honestly do not believe are the proper subject of this litigation, are dealt with in the affidavit of Special Agent Kilty, since they are within his area of expertise.

IV The subparagraphs listed below are numbered to correspond to the paragraphs in plaintiff's March 23, 1976, affidavit:

1-22 These allegations are irrelevant to this litigation, and therefore no factual correction of them is deemed necessary.

23 The proper use of interrogatories and the proper subject matter of FOIA litigation are for the Court to determine, and it is therefore not deemed necessary to speculate on these matters in an affidavit.

24 The subject matter of this allegation is not within my personal knowledge.

25 Plaintiff's unsubstantiated characterization of Defendant's Answer to Plaintiff's First Set of Interrogatories is incorrect. Regarding plaintiff's claim in the last sentence of this allegation that he has "personal knowledge of documents which (he has) requested from the Department of Justice but which have not been yet given (him)," he has made this same claim in another FOIA suit with which I am familiar that he has filed against the Government. He has made this same claim in letters with which I am familiar that he has written to the Department of Justice and the FBI. He has made this same claim in meetings which I have attended or have knowledge of, that have been arranged by the FBI in an attempt to identify and comply with his various FOIA

requests. He has never, to my knowledge, offered factual support for these claims. On March 23, 1976, the day plaintiff executed his affidavit, representatives of the FBI, whose services were desperately needed elsewhere in connection with their official duties, spent an entire afternoon with plaintiff and his attorney, furnishing plaintiff additional material he had requested, and attempting to explain it to plaintiff. At this meeting, which was the latest of those arranged between representatives of the FBI and plaintiff and/or his attorney, in which we have gone far beyond what is required by the FOIA in order to resolve plaintiff's various questions and requests, he once again claimed to possess "proof" that he had not been furnished all material he had requested. He was told, as he has been told in the past, that we would welcome any documentary assistance from him which would enable us to more completely comply with his request. As in past meetings, this offer was made several times during the March 23, 1976, meeting, but each time plaintiff would move to another subject, or make some further claim which had no basis in fact. Again, as in past meetings, plaintiff made his offer to immediately furnish his "proof" orally. Again, as in the past, we explained to him that we are receiving FOIA requests at a rate in excess of 55 per day, and it is impossible, because of the tremendous administrative problems involved, to respond to oral requests. We again invited him to furnish any written material which would assist our personnel who conduct the searches of our records, in locating any additional records he feels we possess which would be responsive to his request. We have never received any sort of written assistance containing this "information" plaintiff claims would direct us to other records.

26 Plaintiff is correct in his allegation that the answers to the interrogatories do not describe the search which was made for the documents he requested nor state who made

that search. This is so because the interrogatories do not request this information. In response to plaintiff's allegation that the answers do not state they are based upon all information available from all FBI files pertaining to the assassination of Dr. King, I reiterate that the interrogatories did not request this information, which in any event would seem to be self-evident. However, for the information of the Court, the answers are of course based upon all information available in the files we reviewed. We conducted a complete and thorough search of all central records located at FBIHQ concerning the King assassination. We conducted the same search in response to plaintiff's request and interrogatories that we utilize in our own day-to-day retrieval of necessary information in connection with our normal duties, which, because of our uniform reporting rules and filing procedures, enable us to be certain that we maintain, in one centralized location, all pertinent information in possession of the FBI deemed worthy of retention which has been acquired in the course of fulfilling our investigative responsibilities. In view of this, I believe it would be extremely unreasonable to assume the FOIA requires the FBI, in order to respond to each of the 13,875 requests we received in 1975, each of which is at least as equally legitimate as plaintiff's, must conduct a search of the files of each of our 59 Field Offices. If this were to be required, I believe, based upon my knowledge and experience, that the FBI might as well be closed down, because our remaining resources would be completely inadequate to perform the official duties Congress has imposed upon us. However, with respect to plaintiff's FOIA request, we have once again gone beyond what we feel is required by the FOIA and have instituted a search of the files of our Memphis Field Office in order to ensure that we have furnished all releasable material in our possession which is in any manner within the scope of his request. The Memphis Office is the only logical remaining repository of information which would be responsive to plaintiff's request,

inasmuch as it was in Memphis that Dr. King was killed, and our Memphis Field Office had primary responsibility for the investigation. As plaintiff and his attorney were advised in Court over three weeks ago, any releasable material located in this search which is within the scope of plaintiff's request will be furnished him in the very near future. The final sentence of Paragraph 26 of plaintiff's affidavit alleges that I do not state that my answers to plaintiff's interrogatories "are based on information contained in files belonging to or in the custody or possession of the Department of Justice's Criminal, Civil, and Civil Rights Divisions." Plaintiff is entirely correct in this allegation, inasmuch as I, as a Special Agent of the FBI, supervising a search of FBI files, cannot swear to what information is contained in files other than the FBI's. As I stated above, and as I stated in the answer to Interrogatory No. 25, the files searched were FBIHQ files.

27 The first sentence of Paragraph 27, containing plaintiff's recollection of plaintiff's attorney's recollection of what I allegedly told plaintiff's attorney, is incorrect. Special Agent Kilty, who is assigned to the FBI Laboratory, personally conducted the review necessary to respond to certain categories of plaintiff's request, primarily those dealing with Laboratory matters. I, in my supervisory capacity in the FOIPA Section of FBIHQ, am responsible for the overall supervision of the processing of plaintiff's request, and therefore am the only representative of the FBI who is legally competent to answer plaintiff's interrogatories. The last sentence of Paragraph 27, to which the Court's attention is respectfully drawn for a further understanding of the problems we have encountered in this case, and as another example of the type of statement plaintiff swears to, requires no factual response beyond denial.

28 Although plaintiff is in error as to the number of interrogatories which were not responded to, and he errs further in alleging that Deputy Attorney General

Tyler's December 1, 1975, letter "redefined" plaintiff's request and required a new information request, he properly states our position that the interrogatories are directed at information outside the scope of his FOIA request, and also properly states the fact that he did not give written assurance that he would pay the fees for the special search necessary to locate the additional records.

29 On December 3, 1975, before we were notified by the Department of Justice that plaintiff had instituted this litigation, we furnished plaintiff's attorney, pursuant to plaintiff's FOIA request, 18 photographs and 73 pages of records, much of which was FBI Laboratory material setting forth the results of very complicated examinations which would require even an expert a great deal of time to review, digest, and comprehend. Yet, plaintiff admits in this allegation that as soon as he received this material he wrote Attorney General Levi and informed him that the FBI had not complied with his request. The attention of the Court is respectfully drawn to his December 4, 1975, letter (attached as Exhibit K to plaintiff's affidavit), in which plaintiff claims that the United States Department of Justice, the FBI, numerous and unnamed "Tennessee authorities" (presumably law enforcement and prosecutive officials connected with the James Earl Ray case) and even by implication, the Columbia Broadcasting System, have engaged in a conspiracy to keep James Earl Ray "in jail for the rest of his life when the FBI had and suppressed proof that he did not kill Dr. King." I cannot comprehend how any reasonable construction or interpretation of the FOIA could possibly result in a belief that a claim of this sort is the proper subject of litigation involving the FOIA.

30 This allegation is correct, and no further response is deemed necessary other than again respectfully drawing the Court's attention to the entirety of plaintiff's December 7, 1975, letter, a copy of which is attached to his affidavit as Exhibit L.

31 The first sentence of plaintiff's Paragraph 31 is incorrect. Deputy Attorney General Tyler did not "rewrite" plaintiff's request so as to "suppress the vital information" plaintiff allegedly seeks. Deputy Attorney General Tyler's December 1, 1975, letter states "... I have decided to ... grant access to every existing written document, photograph and sketch which I consider to be within the scope of Mr. Weisberg's request." The body of the letter goes on to describe the complete release being made of all records located falling within the various categories of plaintiff's FOIA request. The latter portion of the letter could not be more clear. Mr. Tyler states that he has not included the results of ballistic tests performed on rifles other than the one owned by Mr. Ray. The letter then states, as directly as possible:

> "If Mr. Weisberg wishes access to them, he should make a specific written request to Director Kelley, Attention: Special Agent Thomas Wiseman, agreeing to pay both the costs of reproduction and the special search fees which will be necessary to locate and identify the same as provided by 28 C.F.R. 16.9(b)(6). In addition, in an effort to save your client considerable expense, I have construed Item No. 6 so as not to encompass the several hundred photographs in Bureau files of Dr. King's clothes, the inside of the room rented by Mr. Ray, or various items of furniture and personal property. If Mr. Weisberg, does, in fact, wish copies of these photographs, he should make a further request for them and agree to pay the reproduction and special search costs which will be involved."

Plaintiff and his attorney did write letters to defendant in December of 1975, complaining that plaintiff had not been furnished all records he felt the FBI should possess which would be within the scope of his request. However, none of these letters complied with Mr. Tyler's clear and simple directions that plaintiff provide written assurance he would pay the fees for the necessary searches. It is plaintiff, not the Department

of Justice or the FBI, who has been on notice since receipt of Mr. Tyler's letter of December 1, 1975, and yet he did not provide this assurance until nearly three months later, when by plaintiff's attorney's letter of February 23, 1976, these assurances were finally furnished.

32 Plaintiff is correct in his belief that several facts must be considered in order to judge whether the FBI and plaintiff have acted properly regarding plaintiff's FOIA requests. Plaintiff's allegation that Mr. Tyler's insistence on written assurance that the special search fees would be paid was "merely a pretext to deny and delay" his access to records is without merit. There was no "pretext to deny:" Mr. Tyler's December 1, 1975, letter could not have more clearly stated the fact that he would be given these records if he would agree in writing to pay for the search necessary to locate them. There was no "pretext to delay:" The sheer volume of thousands upon thousands of requests we have received has been more than sufficient to cause numerous delays in our responses to these requests; we have no reason to invent "pretexts" to cause us additional problems, by "delaying" access to records which are in fact subsequently furnished.

33 This paragraph is irrelevant to this litigation. Again, we have enough administrative problems in complying with the FOIA, and cannot afford to conduct special searches at everyone's request, only to find after we have conducted these searches that, if a requester is not satisfied with the results thereof, he refuses to pay for the time it took to conduct this search. This would even further delay our responses to the thousands of legitimate requests we receive.

34 Plaintiff correctly alleges that all initial special search fees were waived, but I do not believe our prior accomodation to plaintiff has any relevance to the issue plaintiff is raising here. Mr. Tyler's December 1, 1975, letter sets forth his discretionary decision to waive the special search fees for

the material furnished, and to require assurance that the reproduction and special search costs for any additional material plaintiff indicates he desires will be paid. Plaintiff admits that he promptly prepaid the 25 percent of estimated special search fees required by him by the Department of Justice Civil Rights Division, while at the same time arguing that it was burdensome for him to furnish the written assurance of payment which Mr. Tyler asked of him, when a prepayment was not even required. He promptly paid $80 to the Civil Rights Division, yet delayed for nearly three months furnishing us the written assurances requested, and then alleges that it is we who acted improperly.

35 All parties agree that plaintiff's attorney advised the Department of Justice and the FBI in his December 29, 1975, letter, as well as other letters, that plaintiff "wanted all the documents which Mr. Tyler had 'eliminated' from (his) original request." But in none of these letters did plaintiff or his attorney agree to pay for the search necessary to locate the documents, which was clearly requested in Mr. Tyler's letter of December 1, 1975. The attention of the Court is respectfully drawn to the second sentence of plaintiff's Paragraph 35 in which he states, "in the months that followed, Mr. Wiseman did not phone or write my attorney and remind him that he could not process my renewed request until he had received a written assurance of my willingness to pay the search fees and copying costs." Mr. Tyler's December 1, 1975, letter, states this; also, with the voluminous amount of requests which I am required to supervise the processing of, I know of no provision in the FOIA which additionally requires me to remind plaintiff's attorney of the contents of a letter which was sent from Mr. Tyler to plaintiff's attorney, nor of any provisions which require me to ensure that neither plaintiff nor his attorney are guilty of forgetfulness or negligence. By the above-quoted sentence, plaintiff admits that he was put on notice that written assurance was required; any further argument he makes on this point is

irrelevant. Subsection (c) of 28 C.F.R. 16.9, from which plaintiff cites, states in part: "... the requester shall be notified of the amount of the anticipated fee or such portion thereof as can be readily estimated. In such cases, a request will not be deemed to have been received until the requester is notified of the anticipated cost and agrees to bear it." (Emphasis supplied.) We advised him in our letter of March 9, 1976, that we were "unable to furnish an estimate of the special search fees which must be incurred," and neither plaintiff nor his attorney objected to this in any conversations with representatives of the defendant that I am aware of, and the fees were finally paid without protest at the March 23, 1976, meeting. Subsection (e) of 28 C.F.R. 16.9, from which plaintiff also cites, refers to advance deposits only, and is irrelevant since, as I stated above, in an attempt to further accomodate plaintiff we had requested no advance deposit, but only a written assurance that he would pay.

36 Plaintiff is again avoiding the basic issue here, which has been discussed in previous paragraphs. He was requested to provide written assurance he would pay the necessary special search fees; he did not do so. In an attempt to assist plaintiff in avoiding payment for material which Mr. Tyler felt he would really not be interested in, Mr. Tyler gave plaintiff simple directions to follow if he really wanted this material. Plaintiff waited nearly three months to comply with these directions. Once he complied, we advised him in eight working days that we were searching for the additional material, and in fact made it available to him two weeks later, at his convenience. Thus, were it not for plaintiff's delay, for the time necessary to write a one sentence letter plaintiff could have reviewed all this material before the end of 1975, and the Court and both parties to this litigation could have been saved a great deal of time and effort.

37 As I have attempted to explain, no letters written by anyone in the Department of Justice or the FBI have "denied (plaintiff) access to materials which were within the scope of (his) initial request." In response to plaintiff's allegation

further on in Paragraph 37, concerning the point of whether the FBI had any doubt about his willingness to pay for any special search fees, one additional fact should be brought to the attention of the Court: On December 22, 1975, plaintiff's attorney called me and indicated that he expected us to initiate and complete this special search in one day, and to have the material available to plaintiff on December 23, 1975. Not only did plaintiff's attorney fail to give me even an oral promise during this conversation that the special search fees would be paid, but he indicated that he was not even sure that he would pay the $22.10 reproduction charges for the material we had already furnished him nearly three weeks prior to that conversation. Although the $22.10 fee was finally paid, with the thousands upon thousands of requests we must process, we cannot afford to make an exception to the law in a case like this when at one point the requester's attorney has expressed doubt as to whether he will pay properly assessed charges for material already furnished him. The final sentence of plaintiff's Paragraph 37 once again alleges that Mr. Tyler denied plaintiff access to these records. This is false. Mr. Tyler told him the records would be furnished him, and they were in fact furnished nearly one month ago.

38 I am unaware of any "gratuitous merging" of plaintiff's request with a later one filed by CBS News. Plaintiff is correct in his allegation "... that Director Kelley's March 9 letter did not deny my attorney's statement that he knows of at least two Freedom of Information lawsuits where well-known millionaires have not been charged a cent by the Department of Justice for searching for records requested by them." We do not have the time, nor does the FOIA require us, to attempt to respond to these sort of claims. What we have done, and what the FOIA does require, is to make every reasonable effort to comply completely with plaintiff's FOIA requests. At our March 23, 1976, conference with plaintiff, referred to earlier in my affidavit, plaintiff again mentioned two millionaires, but either could or

would not provide details concerning this irrelevant issue. From my own personal knowledge, I can state that I know of no cases fitting those which he describes here, although if they did exist they would be meaningless to this litigation. With regard to plaintiff's allegation concerning "four years of costly litigation over records which the FBI now claims never existed," the complaint in this case was filed November 28, 1975. I cannot claim knowledge of what records exist or do not exist in our millions of files, and can only do so after a specific file has been searched pursuant to a specific request. Plaintiff was advised in Mr. Tyler's December 1, 1975, letter that he was being furnished all records located pursuant to his request, and I agree with plaintiff that the case should have been mooted then.

39 This paragraph is irrelevant, with the possible exception of the last sentence. The additional ballistic tests and photographs had not been compiled at the time of Mr. Tyler's letter of December 1, 1975, and Mr. Tyler's statements concerning them were simply rough estimates of the amount of material falling within these categories presumed to be located in FBIHQ files. The actual amount of records falling within these categories is somewhat smaller, as plaintiff is aware, since he reviewed these records at the March 23, 1976, meeting.

40 As I stated earlier, the affidavit of Special Agent Kilty, submitted herewith, sets out the scientific data we have already attempted to explain to plaintiff at our half-day meeting with him on March 23, 1976. In response to Paragraph 40 of plaintiff's affidavit, please refer to Special Agent Kilty's affidavit.

41 The case plaintiff cites in this paragraph, in which the United States District Court for the District of Columbia granted the Government's motion to dismiss as moot on July 15, 1975, is irrelevant to this litigation. We are not in court to compare the FBI's investigative procedures with whatever

methods plaintiff would use to investigate the assassination of a President, nor do we wish to engage in a "battle of scientific experts" in an FOIA suit. In response to plaintiff's "documentary proof" claim in the last sentence of his Paragraph 41, as I have stated earlier, we have given plaintiff numerous opportunities to assist us in locating records identifiable with the subject matter of his requests by furnishing us written information, but he has never done so.

42 This paragraph is irrelevant to this litigation. As I stated earlier, if the Court desires the facts surrounding plaintiff's allegations concerning our processing of plaintiff's request for material concerning the assassination of President Kennedy, for its information in judging plaintiff's good faith in this litigation, we will provide them.

43 Please refer to Special Agent Kilty's affidavit for the correct information concerning this allegation. We are not in court to convict or acquit James Earl Ray; we are here to prove we have complied with plaintiff's FOIA requests.

44 Aside from the fact that plaintiff's request was never effectively received until he sent his letter dated February 23, 1976, finally agreeing to pay the special search fees, no further response is deemed necessary to this allegation. Plaintiff has been furnished the results of all firearms examinations conducted in this case, with the material which did not involve the "death bullet" or "Mr. Ray's rifle" having been furnished him at the March 23, 1976, meeting.

45 As demonstrated in Paragraph 44, supra, the allegations made in Paragraph 45 are false. Plaintiff has been furnished all notes and reports which were generated in the FBI Laboratory during examinations of the "death bullet" and "Mr. Ray's rifle." Exactly what plaintiff is referring to when he alleges that he has been given "no reports and no complete tests or test results" is not known.

46 As plaintiff has been advised in meetings and correspondence, he has been furnished all material within the scope of his request. It is thus ipso facto that we have not conducted tests falling within the scope of his request of April 15, 1975, which have not been given to plaintiff. Therefore, he is in as good a position as the FBI "to list the tests or examinations performed on the King assassination evidence," and I believe it would be mere harassment to require us to do this again. Further, I fail to understand how stating the dates of these examinations would lead to a determination as to "whether or not the defendant has complied with (his) request." Please refer to Special Agent Kilty's affidavit for further correct information concerning this allegation.

47 Plaintiff's unsubstantiated allegations concerning the FBI's report-writing procedures are false. Also, as I stated above, I know of no rational reason why the dates of examinations would assist in a determination as to whether plaintiff has been given authentic copies of the documents he requested, even if his false allegations were true. Please refer to Special Agent Kilty's affidavit for further correct information concerning this allegation.

48 As stated previously, plaintiff has been given the results of all ballistic tests, including those examinations which did not involve the "death bullet" or "Mr. Ray's rifle," the results of which were furnished plaintiff on the day he executed his affidavit.

49 Please refer to Special Agent Kilty's affidavit for the correct information concerning this allegation.

50 Since plaintiff has been furnished all material concerning all ballistic examinations conducted, he already possesses the information he asks for in his fifth interrogatory. As explained above and in Special Agent Kilty's affidavit, the dates of these examinations are meaningless. I continue to assert the exemption contained in Title 5, United States Code, Section 552 (b)(7)(C), to protect the identity of persons conducting these

examinations inasmuch as this is exempt from mandatory disclosure as it would constitute an unwarranted invasion of personal privacy.

51 The repetitious allegations plaintiff makes in this paragraph have been dealt with in my immediately preceeding paragraphs. With respect to the last sentence in plaintiff's Paragraph 51, I believe that since we are now in litigation, it is for the Court to determine whether we have completely complied with his requests for all ballistic examinations, and it is for the very purpose of protecting our personnel from the time-consuming activities plaintiff admits to planning in his last sentence that I have asserted the (b)(7)(C) (privacy) exemption concerning their names. The FOIA does not require the FBI to release names of its personnel to assist a plaintiff in taking depositions, nor, as the Court is aware, are these names necessary.

52 The proper interpretation of the (b)(7)(C) (privacy) exemption is left to the Court; I do not feel it is proper to attempt to set out law instead of facts in an affidavit, but I believe that plaintiff's interpretation of the (b)(7)(C) exemption is obviously incorrect. The latter portion of plaintiff's Paragraph 52, in which the manner of our past compliance with other FOIA requests plaintiff has submitted to the FBI is alleged, is irrelevant to this litigation. I am familiar with plaintiff's prior FOIA request for Kennedy assassination material. I believe it is pertinent to note that, in dismissing plaintiff's suit (which plaintiff cites in his Paragraph 52), the Honorable John H. Pratt, United States District Court Judge, stated:

> "Well, I have spend a good deal of time going over the papers that were filed in this case, and I am satisfied in my own mind that there has been a good-faith effort on the part of the Government, and that the Government has complied substantially with its obligations under the Freedom of Information Act.

"Accordingly, I am going to grant the Government's motion to dismiss this matter as moot.

"Mr. Lesar, you are familiar with going to the Court of Appeals, and you may have some gentlemen there who will tell me I am wrong. They have done this before.

"But let me say parenthetically, that you don't get cooperation from people by calling them liars and kicking them in the face. And I should think that you and Mr. Weisberg would have learned that by this time.

"I think the Government has been oppressed by a lot of the requests, which I think are completely above and beyond anything that you are entitled to. I don't think the Government is required in this type of a case to go out and take depositions of people and get affidavits from everybody under the sun.

"I think that in relying on Mr. Kilty for two affidavits and also on the gentleman from the Atomic Energy Commission, they did all that they were required to do."

53 Plaintiff's speculations as to our motives are incorrect and improper. In response, the Court is respectfully referred to Paragraph 51 of my affidavit.

54 In addition to my previous discussion concerning plaintiff's previous paragraphs, please refer to Special Agent Kilty's affidavit for further correct information concerning this allegation.

55 No factual response is deemed necessary to this allegation.

56 No factual response is deemed necessary to this allegation, other than noting that once again plaintiff claims to possess "evidence" without giving factual support for same.

57 No factual response is deemed necessary to this allegation.

56(a) (in response to plaintiff's second paragraph numbered 56) No factual response is deemed necessary to this allegation.

57(a) (in response to plaintiff's second paragraph numbered 57) No factual response is deemed necessary to this allegation, other than reiterating that we are not going to engage in a "battle of scientific experts" in an FOIA suit.

58 No factual response is deemed necessary to this allegation.

59-73 Please refer to Special Agent Kilty's affidavt for the correct information concerning these allegations. I respectfully reiterate my belief that the purpose of this FOIA litigation is not to judge Mr. Ray's guilt or Mr. Weisberg's scientific knowledge.

74 Plaintiff is correct in that perhaps my answer to his Interrogatory No. 17 should have been more clear to avoid any incorrect inferences. I meant my answer to mean that we furnished plaintiff all photographs of the bathroom windowsill taken by the FBI Laboratory which had been located in our search of FBIHQ files. I did not mean to leave the implication, nor do I claim, that the FBI possesses every picture ever taken, no matter by whom, or when, of the windowsill. We complied with plaintiff's request by furnishing him all photographs we had located in our file search pursuant to his request.

75 Plaintiff has been furnished all photographs and reports concerning the FBI Laboratory examination of the windowsill. Conclusions drawn by plaintiff or anyone else from the material furnished plaintiff have no bearing whatsoever on the subject matter of this litigation.

76 This allegation is irrelevant. Plaintiff knows that photomicrographs of the windowsill were taken, since he was furnished them, as he admits in the second sentence of his Paragraph 75.

77 This allegation is also irrelevant, since plaintiff also knows that the examination he describes in Paragraph 77 was conducted. All results of this examination were furnished him, specifically in the FBIHQ report to our Memphis Field Office dated April 11, 1968. He was also furnished all notes concerning the FBI Laboratory examination of the window-sill.

78 My answers to plaintiff's interrogatories correctly state that "there were no other suspects in the case in addition to James Earl Ray." Plaintiff correctly stated in his interrogatories that "on April 17, 1968, FBI Special Agent Joseph H. Gamble filed a conspiracy complaint with the United States Commissioner in Birmingham, Alabama." The complaint states that "on or about March 29, 1968, at Birmingham, Alabama, ... Eric Starvo Galt (subsequently determined to be identical with Mr. Ray) and an individual whom he alleged (emphasis supplied) to be his brother, entered into a conspiracy which continued until on or about April 5, 1968, to injure, oppress, threaten, or intimidate Martin Luther King, Jr. ... In furtherance of this conspiracy, Eric Starvo Galt did, on or about March 30, 1968, purchase a rifle at Birmingham, Alabama,... ." This complaint was dismissed on December 2, 1971. There were no other suspects in the case in addition to James Earl Ray. In response to plaintiff's allegation in Paragraph 78 that "I personally delivered to the FBI a sketch and a picture of another suspect but these were not among the sketches and photographs provided me," with all due respect to plaintiff, I can only reiterate that, pursuant to his FOIA request, we conducted a complete and thorough search of all central records located at FBIHQ and, based on the data submitted by plaintiff with his request, we located all records contained in our FBIHQ files which are in any way responsive to plaintiff's requests. We conducted the same searches in response to plaintiff's FOIA requests that we utilize in our day-to-day retrieval of necessary information in connection with our normal duties, which, because

of our uniform reporting rules and filing procedures, enable us to be certain that we maintain, in one centralized location, all pertinent information in possession of the FBI deemed worthy of retention which has been acquired in the course of fulfilling our investigative responsibilities. In addition, as I have previously stated, in order to ensure that we have completely complied with plaintiff's requests, we have gone beyond that which we feel is required by the FOIA and advised plaintiff that we will also search the files of our Memphis Field Office and in the very near future furnish him all releasable information located in this search which is within the scope of his request. The final sentence of plaintiff's Paragraph 78 consists of another unsubstantiated claim for which he furnishes no factual support, and no response is deemed necessary. As with the material he claims he gave us, we offered him the opportunity at the March 23, 1976, meeting to assist us with documentation of this claim, but he failed to do so.

79 Plaintiff alleges in Paragraph 79 that my answer to his Interrogatory No. 27 is deliberately non-responsive, inasmuch as his interrogatory is not limited to cigarette remains found in the white Mustang. I quote from plaintiff's April 15, 1975, FOIA request: "On behalf of Mr. Harold Weisberg I am requesting disclosure of the following information on the assassination of Dr. Martin Luther King, Jr.: ... 4. The results of any scientific tests performed on the butts, ashes or other cigarette remains found in the white Mustang abandoned in Atlanta after Dr. King's assassination and all reports made in regard to said cigarett remains." (Emphasis supplied.) As plaintiff's attorney was advised in Mr. Tyler's December 1, 1975, letter, "the Department of Justice (and this, of course, includes the FBI) never received any 'butts, ashes or other cigarette remains' from the 'white Mustang abandoned in Atlanta,' and for that reason did not

perform any scientific tests thereon." Furthermore, the letter went on to advise that a two-page schedule of all evidence acquired from the Mustang was being furnished - without charge - to plaintiff, even though he had not requested this information.

80 Plaintiff is correct in his allegation that the FBI conducted some examination on cigarette butts. They were recovered in New Orleans, Louisiana, not Atlanta, Georgia, and were recovered in an apartment, not a white Mustang. Plaintiff is also correct in his allegation that the FBI has not provided him with a single report on them, and for the reason that we have not provided them to him, the Court is respectfully referred to the quoted material setting out plaintiff's FOIA request referred to in the preceeding paragraph.

81 No factual response is deemed necessary to this irrelevant allegation. Plaintiff is mistakenly accusing the FBI of withholding material he did not request, and also once again attempting to adjudge James Earl Ray's guilt in this FOIA litigation.

82 Again, as last described in my Paragraph 78, we have done everything possible to fully comply with plaintiff's FOIA request of April 15, 1975. If my answers to plaintiff's Interrogatory Nos. 30 through 34 are interpreted as non-responsive, I certainly do deny that the FBI withheld from plaintiff any photographs and sketches located pursuant to his FOIA request. The last sentence of plaintiff's Paragraph 82 is another unsubstantiated claim for which he furnishes no factual support, although he has been offered numerous opportunities to do so. I repeat that, as plaintiff has been advised, we will also furnish him all non-exempt material within the scope of his April 15, 1975, request located in our Memphis Field Office.

83 My answers to plaintiff's Interrogatory Nos. 35 through 39 are true and correct. As Mr. Tyler advised plaintiff's attorney in his December 1, 1975, letter, "... no 'information, documents, or reports made available to any author or writer' can be identified as such in our records. To avoid any

misunderstanding, I wish to advise you that no release of any materials relating to the death of Dr. King has been made to any persons other than law enforcement or prosecutive authorities, except for the so-called 'extradition papers' which were shown in 1970 to Bernard Fensterwald, Jr., Esq., then the attorney for your client Mr. Weisberg, and which are in the public domain." We have conducted a massive and detailed review of all FBIHQ files concerning the King assassination, and have located absolutely no indication that any information whatsoever (except for that noted above, and that made available to the general public) from these files has been furnished by us to any person other than law enforcement or prosecutive authorities. Plaintiff's attorney, in his December 29, 1975, letter to the Deputy Attorney General, states, "I think it is relatively simple for you to ascertain what materials are included in this request (referring here to information pertaining to the King assassination furnished to various authors, etc.) if you will just make a few inquiries of the appropriate authors, writers, and FBI officials." I have contacted those FBI officials who would be aware of any information such as this, and they have all been unable to furnish any information which would be responsive to this portion of plaintiff's request. My interpretation of the FOIA is that neither we nor the Deputy Attorney General are required to make "inquiries of the appropriate authors (and) writers" in order to respond to plaintiff's FOIA request. It is suggested that if plaintiff truly believes information of this nature exists, and he truly desires this information, that he make inquiries of the individuals he names in his original request and in his interrogatories, whom he implies possess this information. It also might be noted parenthetically that, in connection with his request for "photographs from whatever sources," that he contact the sources he names in his interrogatories, to acquire the information he apparently believes exists. Regarding all the allegations plaintiff makes in the remaining portion of his Paragraph 83, which are unsubstantiated

and have no factual support furnished with them, I cannot, in a sworn affidavit, address any claims plaintiff makes concerning activities of individuals (in most cases unnamed) who have nothing to do with the FBI. I can only again reiterate, and swear to, the fact that we have done everything reasonably possible to comply completely with plaintiff's FOIA request of April 15, 1975.

84 The only allegation contained in this paragraph which is relevant has already been dealt with; the searches we conducted in response to plaintiff's FOIA request and in furnishing the answers to his interrogatories were made of all FBIHQ files pertaining to our investigation regarding the assassination of Martin Luther King, Jr.

V Although in this and Special Agent Kilty's affidavit we have in effect answered plaintiff's interrogatories, it is my belief that plaintiff is attempting to obtain through these interrogatories information to which he is not entitled pursuant to the FOIA. Portions of his interrogatories make requests for information which does not consist of "identifiable records." The interrogatories also request information which has to be created, inasmuch as we do not presently possess this information in record form. The interrogatories request that the identities of certain FBI personnel be disclosed, which I feel would be a violation of these individuals' right to privacy, and thus exempt from release pursuant to subsection (b)(7)(C) of the FOIA. Furthermore, the interrogatories would require that we furnish information which plaintiff did not even request access to in his April 15, 1975, FOIA request. Finally, answers to most of the questions propounded in the interrogatories are contained in the material we have already furnished plaintiff, as well as in the December 1, 1975, letter to plaintiff's attorney from the Deputy Attorney General.

VI We have interpreted the FOIA as conferring a duty upon the FBI to furnish a requester all reasonably identifiable, non-exempt agency records presently in our possession which could

logically be deemed responsive to his request, and to give the requester an opportunity to avoid payment of substantial special search fees for additional material, which even if located, would appear to bear only a peripheral relationship to the subject matter of his request. We follow both the letter and the spirit of this interpretation in our response to all FOIA requests, including plaintiff's. We do not interpret the FOIA as requiring the FBI to conduct an individual's scientific and/or historical research for him by creating information which we ourselves do not presently possess in record form.

VII The FBI is being placed in the near-impossible position of attempting to prove a negative. Plaintiff is now claiming, inter alia, that there is further information in our possession which he desires, but as I have stated, we simply do not possess the records which he claims we do. At the direction of the Deputy Attorney General, we furnished plaintiff, by our letter of December 3, 1975, all information we could locate and release which the Deputy Attorney General deemed responsive to plaintiff's request, and we had done this before we were notified by the Department of Justice that plaintiff had instituted this litigation. On March 23, 1976, we furnished plaintiff the further material which his attorney's letter of February 23, 1976, stated he was interested in and would pay the special search fees for. There is nothing more we can do in response to plaintiff's request except, as stated above, he will be furnished all non-exempt material falling within the scope of his request located in the search of our Memphis Field Office.

Thomas L. Wiseman

THOMAS L. WISEMAN
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 21st day of April, 1976.

Marguerite F. Dunn
Notary Public

My commission expires 12/4/77.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v.

Civil Action No.
75-1996

UNITED STATES DEPARTMENT
OF JUSTICE,

Defendant

AFFIDAVIT OF JOHN W. KILTY

I, John W. Kilty, being duly sworn, depose and say as follows:

I I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned as Chief of the Elemental Analysis Unit of the FBI Laboratory at FBI Headquarters (FBIHQ), Washington, D. C. I possess a Bachelor's degree in chemistry, and have been assigned to the Laboratory for more than ten years. I have testified numerous times in Federal, state, and local courts as an expert witness.

II I have read and am familiar with plaintiff's Freedom of Information Act (FOIA) request dated April 15, 1975, for specified categories of material relating to our investigation concerning the assassination of Dr. Martin Luther King, Jr. I personally conducted the search of FBIHQ files for all material relating to the FBI Laboratory which would be responsive to plaintiff's request. I have read and am familiar with Plaintiff's First Set of Interrogatories and his affidavit dated March 23, 1976, filed in this litigation.

III The purpose of my affidavit, which is submitted with the affidavit of Special Agent Thomas L. Wiseman, is to set forth the pertinent facts concerning the allegations made in plaintiff's affidavit and to correct the erroneous statements he has made therein, as they apply to FBI Laboratory

Government Exhibit 2

procedures and the scientific data plaintiff requested and was furnished. Most of the questions concerning these procedures and data which plaintiff raises in his affidavit were explained by me to him in the meeting we had on the day plaintiff executed his affidavit, March 23, 1976. At several points throughout this meeting, I asked plaintiff if he had any additional questions concerning the Laboratory procedures and scientific data which he would like explained to him, and I fully responded to all of his questions.

IV The paragraphs listed below are numbered to correspond to the pertinent paragraphs in plaintiff's affidavit:

40 Most items in plaintiff's Interrogatory No. 1 cannot be answered by giving the type of test which would be employed because many of these items themselves demand conclusions which cannot be made no matter what kind of scientific test is employed. For instance, Item (A) asks the type of examination and tests which would be used to determine whether or not bullet or bullet fragments have a common origin. Elemental analysis is used to determine the composition of bullets and bullet fragments. If bullet A has the same composition as bullet B, our report would say that bullet A came from the same homogeneous source of lead as bullet B, or another source of lead with the same composition as bullet B. This does not associate bullet A with bullet B to the exclusion of all other bullets. If bullet A is different in composition from bullet B we point out this fact and say that bullet B could not have come from the same homogeneous source of lead as bullet A; however, we point out that bullets of more than one composition are often represented in a single box of ammunition. There are situations where the composition of a bullet is so substantially different from the composition of another bullet that it can be said that the two bullets could not have come from the same box. Our Laboratory and several other laboratories have demonstrated that several different compositions of lead are often represented in a single box of cartridges. In my meeting with plaintiff on March 23, 1976, he mistakenly commented that if the

"death bullet" was different in composition from the bullets left in the gun the "death bullet" could not have come from the same source of lead as the bullets left in the gun. In this case, more than one composition of lead was represented among the bullets examined. These compositions were compatible with different compositions often found in the same box of cartridges. Item (B) asks what kind of tests would be used to determine which bullet or bullet fragment struck which person or object or which particular part of a person or object. There are no tests available which will specifically associate a bullet or bullet fragment to the exclusion of all other bullets or bullet fragments with a particular hole in a person or object. There are tests available which will determine if a hole in a person or object or a dent in an object could have been caused by being struck by a bullet. In this case, emission spectroscopy was used to determine the composition at the edges of holes in certain garments and this composition was compared with cloth taken from areas distant from the holes. Item (C) asks what examinations are used to determine whether a specific bullet or remnant thereof can be identified as having been fired from a particular rifle. Generally, firearms examinations are used to answer this question. Firearms examinations are also involved in answering Item (D). Item (E) asks what tests would be used to determine whether a specific bullet or remnant thereof can be identified as having been fired from a particular cartridge case. Generally, it is not possible to determine if a particular bullet was part of a particular cartridge before it was fired, to the exclusion of all other cartridges. It is possible to say that a particular bullet could not have been fired from a particular cartridge case if the bullet, for instance, is of a different caliber from the cartridge case. A .22 caliber bullet could not have been part of a .38 caliber cartridge case. Items (G) and (H) involve elemental analysis of smears or fragments which may be around a dent or hole in an object. Elemental analysis cannot associate these smears or fragments with a particular bullet to the exclusion of all other bullets because many times the smears or fragments are too limited for complete analysis, or if the

fragments were of proper size to conduct an adequate compositional analysis these fragments could have been deposited by any bullet which had this composition. Each bullet does not have a unique composition. Item (H) cannot be answered reasonably. If, for instance, a hole or dent was identified as having been made by a hammer, it appears safe to say it was not caused by a bullet. Going back to Items (C) and (D), it is pointed out that many times no conclusion can be reached regarding the possibility of a bullet being fired or not fired from a certain gun. Some of the reasons for not being able to reach a conclusion are that there are not sufficient individual characteristic marks remaining on the bullet, there is an inability to identify consecutive test bullets with each other due to changing barrel conditions, and/or the barrel of the gun is heavily leaded.

43 Firearms examinations, compositional analyses (neutron activation and emission spectroscopy), document examinations, blood examinations, soil examinations, etc., were performed on items of evidence submitted in this case. Plaintiff's April 15, 1975, letter did not request the results or notes on Laboratory examinations other than firearms, compositional analyses, and on cigarette butts he mistakenly claimed were recovered from an automobile in Atlanta.

46 It is doubtful that if I were again to go through the notes generated in the Laboratory, that I would be able to determine what dates various examinations were performed. As I recall, some of the notes were dated and other notes were not dated. Based on my years of experience, I fail to see how the dates of these particular examinations would have any relevance to their conclusions.

47 The fact that the Laboratory reports which have been furnished to plaintiff bear dates one to three weeks after Dr. King was killed is not remarkable. Time is required to conduct examinations of physical evidence and a report cannot be furnished until the examinations are completed. The Laboratory reports do not include the dates upon which various examinations were conducted.

Plaintiff's allegation that a "Reader's Digest" article states that the rifle had been test fired twelve hours after Dr. King's death has no connection with the date of the Laboratory report which included the results of the firearms examinations.

49 Plaintiff made this same claim at the meeting of March 23, 1976, and at the time I explained how he had misunderstood the materials he had been furnished due to his ignorance of the scientific symbol for "similar to." I explained that the firearms expert had indicated in the material furnished plaintiff, that based on his experience and knowledge, the general rifling characteristics of the bullet were the same as those produced by any one of numerous rifles. The firearms expert then listed these rifles. The material furnished plaintiff did not indicate these rifles had been "used" or that there were "any reports or results on these rifles." Based on my educational background and Laboratory experience, and with no disrespect intended for plaintiff, I believe that many of the questions he has raised in his affidavit stem from his lack of knowledge or understanding of even basic laboratory procedures, much less the relatively sophisticated examinations.

54 There is no record of the date on which the three color photographs of Q64 (the "death bullet") were taken. Based on my experience and knowledge gained in the FBI Laboratory, I would assume that these photographs were taken shortly after the bullet was received in the Laboratory.

59 The FBI has no "comparison photographs" of the "death bullet." No photomicrographs were taken of this bullet inasmuch as it was not possible to effect an identification between this bullet and test bullets from the questioned rifle. It seems obvious that where there is no identification between the "death bullet" and test bullets, that no "comparison photographs" would be taken - they would have absolutely no prosecutive or evidentiary value. Plaintiff is correct in his allegation that the prints of Q64 which were given him were made recently. These prints were made in late November, 1975, from negatives which were made in 1968.

60 Competent firearms examiners do not make comparisons between test bullets and a questioned bullet by examining photographs or photomicrographs. The comparisons are made by

examining the bullets themselves, using a comparison microscope. It is immaterial that the markings which plaintiff apparently refers to are "obscured by the manner in which the three photographs" were taken.

61 Plaintiff is correct in his allegation that these photographs were not taken for scientific purposes. These photographs have nothing to do with the firearms examiner's opinion concerning the bullet and the gun.

62 These photographs are the only photographs taken of the "death bullet." Plaintiff is correct in his allegation that these photographs are "utterly incompetent for ballistic purposes." These photographs were taken for the purpose of recording the general appearance of the bullet when it was received at the FBI Laboratory.

63 My previous paragraph furnishes the reason for taking these pictures. The pictures were not taken for CBS or as a part of the firearms examination. As I stated previously, and for the reasons I gave, there were no photographs or photomicrographs of the "death bullet" taken for firearms identification purposes.

64 There were no photographs taken of any test bullets fired from the questioned rifle. The Q64 bullet was compared with the test bullets fired from the questioned rifle. For the reasons I previously gave, no photographs were taken of these comparisons inasmuch as no identifications were effected.

65 Plaintiff has been furnished the spectrographic analysis of the bullet jacket of Q64 along with the spectrographic analysis of the bullet jackets from the other cartridges recovered at the scene which have bullets physically the same as Q64. Plaintiff has been furnished the spectrographic analysis and neutron activation analysis of the lead core of the "death bullet" along with the spectrographic analysis and neutron activation analysis of the cores of the bullets physically the same as Q64. No spectrographic examination or neutron activation was conducted on the "empty shell and the powder remaining in it." There was no reason to conduct any compositional examinations on the "empty shell" and powder. Plaintiff has been furnished the

results of the spectrographic examination of the areas surrounding the holes in Dr. King's jacket, shirt, and tie, along with the spectrographic analysis of the fabric taken from areas distant to the holes. As a point of information, had the firearms examiner been able to positively associate the Q64 bullet with the rifle, no compositional analysis would have been conducted on the bullet jacket or core of the bullet or any of the bullets from the cartridges found at the scene of the crime. Normally, compositional analysis has value only when it is not possible to effect an identification between the bullet and the gun. The next best thing to do is to attempt to associate the lead in the questioned bullet with the lead in the bullets of cartridges which may remain in the gun or be recovered from a suspect.

66 The notes that plaintiff has been furnished regarding the compositional analyses are the only notes we have. Due to what I believe is lack of knowledge, plaintiff is placing too much stock in the results of a compositional analysis of Q64 and the bullets from the cartridges left at the scene.

67 The first two sentences of plaintiff's Paragraph 67 are essentially correct. His next sentence concerning the fact that only one element, lead, is present on any of the clothing is also correct, but it is misleading. The minute smears of material which may be deposited on the edges of clothing when a bullet passes through the clothing are very difficult to test for. It is not at all unusual to find only lead, or perhaps lead and copper; in many cases, no foreign material can be detected around the hole in a piece of clothing. Plaintiff has been furnished a listing of elements in the jacket material of Q64 and the other bullets recovered at the scene which were physically identical to Q64.

68 See my Paragraph 67 above.

69 Plaintiff has been furnished all "results" of the spectrographic and neutron activation tests. Also, at the March 23, 1976, meeting he requested and obtained copies of the calculations in the neutron activation tests, although his original request stated he wanted only the results.

70 The quantitative measurements made by the emission spectrograph were not absolute measurements, but were relative measurements, which were the only necessary object of that examination. Plaintiff has been furnished all "results" of the examination.

71 Based upon my knowledge and experience, I am not aware what plaintiff refers to when he comments about "normal practice" in the first sentence of his Paragraph 71. In a review of the neutron activation results, it is seen that only one element, antimony, was measured. The cores of the bullets examined had relatively high amounts of antimony present. The concentration of antimony varied from bullet to bullet, except for a general similiarty between Q64 and Q4. These differences in antimony concentrations are quite typical of differences we encounter in the cores of bullets from the same box of cartridges. As pointed out previously, there is no guarantee that all the bullets in a single box of cartridges will have the same composition.

72 The "stated conclusions" which plaintiff is asking for with regard to the spectrographic and neutron activation tests are included in the copies of the reports which he has been furnished.

73 The material plaintiff has been furnished indicates that spectrographic examinations were conducted on April 19 and April 22, 1968, and apparently also on April 11, 1968. (It is difficult to read the April 11, 1968, date on the notes.) The dates on which the neutron activation examinations were conducted are obtained by referring to the pages of notes which were furnished plaintiff at the March 23, 1976, meeting. The exact reason for not having the reports dated a day or two after the completion of the examinations, since this is not pertinent, is not known. However, it is easily possible for several days to pass between the completion of the analysis and the date of the report.

The above information was obtained by me in my official capacity, and is based on my knowledge and experience, and my review of FBIHQ files as they pertain to FBI Laboratory procedures and data concerning the investigation of the assassination of Dr. Martin Luther King, Jr.

John W Kilty

JOHN W. KILTY
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and Sworn to before me this 20th day of April, 1976.

Marguerite F. Davis
Notary Public

My commission expires 12/14/78.