

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

.....
HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 75-1996

U. S. DEPARTMENT OF JUSTICE,

Defendant
.....


MOTION UNDER VAUGHN V. ROSEN FOR AN INVENTORY
DETAILED JUSTIFICATION, ITEMIZATION AND INDEXING

Comes now the plaintiff, Harold Weisberg, and moves the Court for an order:

1. Directing the Department of Justice, including the Federal Bureau of Investigation, the Office of Professional Responsibility, and the Criminal, Civil, and Civil Rights Divisions, to deliver to plaintiff within 30 days an inventory reasonably describing each of the files, records, and documents pertaining to Dr. King and his assassination held by them and in their care, custody, and control.
2. Requiring the Department of Justice, including the Federal Bureau of Investigation, the Office of Professional Responsibility, and the Criminal, Civil, and Civil Rights Divisions, to provide within 30 days a detailed justification for any allegations that the documents requested by plaintiff are exempt from disclosure under the Freedom of Information Act, including an itemization and index which correlate specific statements in said justification

with actual portions of the requested documents. See Vaughn v. Rosen, 484 F. 2d 820, 826-828, cert. den., 415 U.S. 977 (1974).

Respectfully submitted,



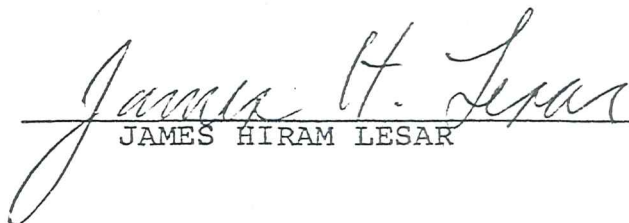
JAMES HIRAM LESAR
1231 Fourth Street, S. W.
Washington, D. C. 20024

Attorney for Plaintiff

DATED: May 17, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of May, 1976, delivered a copy of the foregoing Motion Under Vaughn v. Rosen for an Inventory, Detailed Justification, Itemization and Indexing to the office of Assistant United States Attorney John Dugan, Room 3419, United States Courthouse, Washington, D. C. 20001.



JAMES HIRAM LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

AFFIDAVIT OF JAMES HIRAM LESAR

I, James Hiram Lesar, being first duly sworn, depose as follows:

1. I am attorney for Harold Weisberg, plaintiff in the above-entitled action.
2. I am today filing a motion under Vaughn v. Rosen for a detailed justification of the withholding of the documents requested by Mr. Weisberg. I am forced to take this action because it is clear that the Department of Justice is not attempting to comply in good faith with Mr. Weisberg's requests for documents pertaining to the assassination of Dr. Martin Luther King, Jr.
3. To date the Civil Rights Division of the Department of Justice has provided Mr. Weisberg with 34 documents totalling 64 pages. Another 40 pages were excluded by Mr. Weisberg because they were simply copies of pleadings in the James Earl Ray case.
4. Of the 64 pages obtained from the Civil Rights Division, only eleven are dated before the March 10, 1969, guilty plea of James Earl Ray. Some 35 of the 64 pages consist of the correspon-

dence (together with attachments) exchanged between Mr. Bernard Fensterwald, Jr., one of Ray's attorneys, and the Department of Justice. In view of the fact that the Civil Rights Division had the responsibility to investigate any violation of civil rights in connection with the slaying of Dr. King and is known to have conducted several reviews of the King assassination evidence since 1970, it is not possible for me to believe that this meager production of documents represents a good faith attempt to comply with Mr. Weisberg's requests.

5. Moreover, those documents which the Civil Rights Division has thus far delivered to Mr. Weisberg refer to other documents which he has not been given. For example, the December 27, 1968 letter from Mr. Stephen Pollak to Mr. Percy Foreman refers to a letter from Mr. Foreman of November 23, 1968, to Mr. J. Edgar Hoover, which Mr. Weisberg has not yet been given. A November 4, 1968 memorandum from Mr. Pollack to the Director of the FBI refers to "your memorandum of November 1, 1968," which also has not been given to Mr. Weisberg. And the October 4, 1968, letter from Mr. Pollak to Shelby County District Attorney General Phil M. Canale refers to "24 additional reports and memoranda dated between May 10, 1968, and August 30, 1968, with respect to the James Earl Ray matter," which Mr. Weisberg has not been provided.

6. The Criminal Division of the Department of Justice has thus far provided us with 20 documents totaling 22 pages. Even this small offering contains references to other documents which Mr. Weisberg has not been given. For example, the October 29, 1968 letter from Michael Dresden & Co. is referred to in the November 4, 1968, letter to Dresden: ATTN: Michael Eugene. The July 31, 1968

letter from Mr. Fred Vinson to the Director of the FBI refers to a July 26, 1968, memorandum by the Director entitled "Assassination of Martin Luther King, Jr." which Mr. Weisberg has not been given.

7. On May 5, 1976, Mr. Weisberg and I conferred at FBI headquarters with Special Agent Thomas L. Wiseman and another FBI official. The Department of Justice had previously denied having any photographs of the scene of the crime. At this meeting, however, we were shown more than 100 photographs, some of which were photographs of the scene of the crime.

8. The Department of Justice had also previously asserted that there never were any suspects in the murder of Dr. King other than James Earl Ray. This, too, proved false, as we were shown photographs of other suspects than James Earl Ray at the May 5 conference.

9. At the conclusion of this conference, Mr. Weisberg informed Mr. Wiseman that he had not been shown all photographs of the scene of the crime, nor even all photographs of the scene of the crime taken by photographer Joseph Louw of the Public Broadcast Laboratory and sold to Time magazine. He specifically mentioned a photograph of man wearing a holstered pistol.

10. As attorney for James Earl Ray, it is obvious to me that the Department of Justice should have other photographs of the scene of the crime that were not shown us. For example, the photographs shown us did not include a single photograph of the bundle containing the alleged murder rifle which was placed in the doorway to Canipe's Amusement Center and found there by a Deputy Sheriff immediately after Dr. King was shot.

11. Nor were we shown all photographs and sketches of all suspects in the assassination of Dr. King.

12. Although the defendant has represented to us that the Memphis Field Office of the Federal Bureau of Investigation would be searched for documents pertaining to Mr. Weisberg's request, the only records said to have been provided us as a result of the Memphis search are photographs. No non-photographic records have been provided us as a result of the Memphis search.

13. Attached hereto as Exhibit Y is a copy of a May 11, 1976 letter from FBI Director Clarence Kelley to me. With respect to the 15 photographs mentioned at the bottom of page one of this letter, the defendant has not produced any letter from Time, Inc. requesting that the Department of Justice withhold any of the photographs which the Department of Justice obtained from it.

14. The FBI has thus far not provided a single document specified in Mr. Weisberg's December 23, 1975, request for records pertaining to Dr. King's assassination. At the May 5, 1975, conference, Special Agent Thomas Wiseman made it quite clear that the FBI's efforts at locating documents requested by Mr. Weisberg are confined solely to his April 15, 1975, request.

15. The defendant has still not provided any justification for masking the documents provided Mr. Weisberg.

16. Attached hereto as Exhibit X is a memorandum from Mr. Stephen Horn to Assistant Attorney General J. Stanley Pottinger concerning plaintiff's Freedom of Information request for documents pertaining to the assassination of Dr. King. This memorandum shows that contrary to the representations made to this Court by Special Agent Thomas Wiseman in his affidavit, plaintiff's request was merged with a request from CBS. Mr. Wiseman was present at the October 30, 1975, conference at which the response to these requests was discussed.

17. Mr. Horn's memorandum also shows that the motivating factor in considering action on Mr. Weisberg's April 15, 1975, request was not a desire to conform to the requirements of the Freedom of Information Act but a desire "to avoid being 'blasted' (on the air) by CBS for being 'uncooperative'". Attached hereto as Exhibit Z is a similar memorandum on an FOI request for documents pertaining to the Rosenberg case which shows that the Department of Justice resists requests for information in political cases by every device possible.

18. Because Mr. Weisberg and I have both been out-of-town at differing intervals for the past six days, I have been unable to meet with him to prepare a more specific affidavit in support of this motion. I have, therefore, executed this affidavit in considerable haste to provide the Court with some means of addressing the merits of the Vaughn motion.

James H. Lesar

 JAMES HIRAM LESAR

WASHINGTON, D.C.

Before me this 17th day of May, 1976, deponent James Hiram Lesar has appeared and signed this affidavit, first having sworn that the statements made therein are true.

My commission expires

July 31, 1979

Janith A. Hartzell

 NOTARY PUBLIC IN AND FOR
 THE DISTRICT OF COLUMBIA

EXHIBIT X

J. Stanley Pottinger
Assistant Attorney General

November 3, 1975

Stephen Horn
Attorney
Criminal Section

SH:vap
DJ 144-12-663

Freedom of Information Requests:
Martin Luther King File

On October 30, 1975, I attended a meeting at the Hoover Building for the purpose of discussing two FOIA requests received by the Department requesting certain FBI reports and evidentiary materials concerning the King investigation. Present were Volney Brown of the FOIA Appeals Unit headed by Quinlan Shea, and Tom Bresson and Tom Wiseman of the Bureau's FOIA Unit.

The subject requests are attached. One is from CBS, which, as you know, is preparing to air a documentary on the assassination on November 30, 1975; the other from Harold Weisberg, who is represented by James Lesar, Ray's attorney. Weisberg is acting in the capacity of Lesar's "investigator". Lesar has represented to Brown that, if need be, Ray himself will join in their FOIA request.

We have, of course, previously taken the position that the disclosure of King materials (the FBI scale model of the scene of the crime) would prejudice Ray's right to a fair trial, should he secure a new one, and this cannot be disclosed. I still strongly advocate this position.

If my reading of Brown was correct, the FOIA Unit may be viewing this from a slightly different perspective:

cc: Records
Chrono
Murphy
Allen
Horn

Brown expressed Shea's desire to avoid being "blasted" (on the air) by CBS for being "uncooperative". While I took the approach that the FOIA Unit should formulate an appropriate legal argument against disclosure and seek court approval of what I believe to be a strong fact situation for non-disclosure, the thrust of Brown's comments was that the case law could support disclosure under these circumstances. However, he did state that he may in the final analysis, adopt our position.

There is some question as to whether some of the requested materials have already been made public, in one form or another, either at the extradition proceeding in England, the "mini-trial" wherein the state prosecutors made a proffer to satisfy the Court that there was a basis for the guilty plea, or the evidentiary hearing in U.S. District Court on Ray's petition for habeas corpus (the denial of which is on appeal to the Sixth Circuit). The FBI is making efforts to determine the answer to this question and is in contact with Tennessee authorities.

I told Brown that the fact that evidence may have been released in one form may not justify its release in another. In other words, from the perspective of prejudicial pre-trial publicity, I see a big difference between the affidavit of an FBI expert, already made public, and the disclosure of the actual raw data and photographs upon which he formulated his opinion. (Obviously, CBS and Weisberg see the difference too, why else go through the FOIA process to get material already a matter of public record?)

The possible legal theories for non-disclosure is not the present issue. What is important now is whether the

- 3 -

Department decides to contest disclosure in court, if at all legally practicable, or make disclosure in the immediate future. The Deputy Attorney General should have the views of this Division as well as that of the FBI Unit.

I have drafted a memo for your signature if you are inclined to agree with my position.

EXHIBIT Y

OFFICE OF THE DIRECTOR



UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

May 11, 1976

James H. Lesar, Esq.
1231 4th Street, S. W.
Washington, D. C. 20024

Dear Mr. Lesar:

Reference is made to the meeting of May 5, 1976, between you and your client, Mr. Weisberg, and representatives of the FBI. In accordance with your wishes expressed at this meeting, enclosed is a copy of a receipt signed by Special Agent Thomas L. Wiseman for the \$87 check for special search fees and reproduction costs.

As you were advised at the May 5, 1976, meeting, our Memphis Field Office had been requested to search their records for any additional material which might be responsive to your Freedom of Information Act request dated April 15, 1975, not available at FBI Headquarters. At this meeting you were shown 14 photographs of suspects in the King assassination investigation; of these 14 photographs Mr. Weisberg selected five that he desired copies of which will be reproduced and furnished him. Also, a set of aerial view negatives of the crime scene and vicinity were displayed. Mr. Weisberg did not care to receive copies of any negatives viewed.

Additionally, 107 photographs, the property of Time, Incorporated, but in possession of the FBI, were displayed to Mr. Weisberg and he was advised that Time, Incorporated, had not granted authority to release copies of these photographs, although they had no objection to his viewing them. Mr. Weisberg indicated that he would be interested in obtaining copies of 15 of these photographs and he was advised that he would have to request these of Time, Incorporated. The reproduction of these 15 photographs by the FBI is exempted by the following subsections of Title 5, United States Code, Section 552:

- (b) (3) information specifically exempted from disclosure by statute;
- (b) (4) commercial information obtained from a person and privileged or confidential.



James H. Lesar, Esq.

In addition to the above material, Mr. Weisberg was advised that our Memphis Field Office had furnished a group of photographs which were provided to the FBI by a non-Federal law enforcement organization which has specifically requested that this material continue to be held confidentially. One other photograph was received from another non-Federal law enforcement organization. This photograph depicts an individual taken under circumstances implying criminality and its disclosure would be an unwarranted invasion of this individual's privacy. Therefore, these photographs are exempted from disclosure by the following subsections of Title 5, United States Code, Section 552:

- (b) (7) investigatory records compiled for law enforcement purposes, the disclosure of which would:
 - (C) constitute an unwarranted invasion of the personal privacy of another person;
 - (D) disclose the identity of a confidential source, or confidential information furnished only by the confidential source.

Finally, you were given the reason why a picture of James Earl Ray was being withheld because its disclosure would be an unwarranted invasion of his privacy, and thus exempted from disclosure by the following subsection of Title 5, United States Code, Section 552:

- (b) (7) investigatory records compiled for law enforcement purposes, the disclosure of which would:
 - (C) constitute an unwarranted invasion of the personal privacy of another person.

As you have previously been advised we believe this discretionary release completes our response to your Freedom of Information Act request dated April 15, 1975.

James H. Lesar, Esq.

The 10 photographs you selected for reproduction from a review of crime scene photographs during the March 23, 1976, meeting with representatives of the FBI are available. The reproduction costs are forty cents each for the twenty black and white photographs, and three dollars each for the eight color photographs for a total of \$32.

Sincerely yours,


Clarence M. Kelley
Director

Enclosure

EXHIBIT Z

OPTIONAL FORM
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

FOI REQUEST - - SHORT FUGES

UNITED STATES

Men

SPECIAL

MAR 10 1975

TO : Kevin J. ...
Deputy
Criminal

GPO : 1974 O - 350-744

FORMERLY DJ-294

FORM DOJ-294
6-11-74

FROM : *uj* George W. Calhoun, Deputy Chief
Internal Security Section

GWC:jem

SUBJECT: Proposed Response to FOI Request
for Rosenberg Files

file
[Signature]
3/1

Attached hereto is a proposed response with which I disagree. However, for reasons which follow, I am forwarding it to you for your consideration.

The attached FOI request is one of the most definitive requests I have ever seen. I have no doubt in my mind what they want - - they want everything having to do with the Rosenberg case.

When I saw our initial proposed response, I spoke with Mr. Davitt, and he agreed that we could not send it out for the scope of the request was sufficiently clear for us to make an estimate and so advise the requesters. It appears from the attached buckslip that Mr. Davitt may have changed his mind.

146-41-15-133
DEPARTMENT OF JUSTICE

The approach we have adopted in our letter is that because there is some confusion about one minor aspect of the request, we will not only not process it, but we will not even estimate what the rest of the request will cost to complete. It is this very type of foot dragging that prompted a revision of the FOI, and I do not believe we can continue to treat FOI requests this way in the future in light of the new amendments. In short, I think this request is sufficiently clear for us to make an estimate of the total cost and so advise the requesters. I also believe that we should probably start re-reviewing the files for there is little doubt in my mind that the Rosenbergs' sons will not be able to afford to pay for the review. (There have been fund-raising activities for this purpose).



Exhibit 3

*Discussed with Calhoun
& ltr. approved 3/13. will have
mtg. meeting re FOIA.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U. S. DEPARTMENT OF JUSTICE, :
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Defendant :
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O R D E R

Upon consideration of plaintiff's motion for an order directing the defendant to deliver an inventory of records pertaining to Dr. Martin Luther King, Jr. and his assassination and produce a detailed justification for any records or portions thereof allegedly withheld under the exemptions to the Freedom of Information Act, 5 U.S.C. §552, and the entire record herein, it is by the Court this _____ day of _____, 1976, hereby

ORDERED, that the Department of Justice, including the Federal Bureau of Investigation, the Office of Professional Responsibility, and the Criminal, Civil, and Civil Rights Divisions, deliver to plaintiff within 30 days an inventory reasonably describing each of the files, records, and documents pertaining to Dr. King and his assassination held by them and in their care, custody and control; and it is hereby further

ORDERED, that the Department of Justice, including the Federal Bureau of Investigation, the Office of Professional Responsibility, and the Criminal, Civil, and Civil Rights Divisions, provide within

30 days a detailed justification for any allegations that the documents requested by plaintiff are exempt from disclosure under the Freedom of Information Act, including an itemization and index which correlate specific statements in said justification with actual portions of the requested documents.

UNITED STATES DISTRICT JUDGE