UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MOTION FOR WAIVER OF SEARCH FEES AND COPYING COSTS

Comes now the plaintiff, by and through his attorney, and moves the Court for an order waiving all search fees and copying costs for records made available as a result of this action.

Plaintiff further moves that all search fees and copying costs previously charged him in this action be restored.

A Memorandum of Points and Authorities is attached hereto.

Respectfully submitted,

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

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of November, 1976, mailed a copy of the foregoing Motion For Waiver of Search Fees And Copying Costs to Assistant United States Attorney John Dugan, 3419 United States Courthouse, Washington, D. C. 20001.

JAMES HIRAM LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES

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

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

A Department of Justice regulation, 28 C.F.R. §16.9(a), authorizes Departmental officials to make a determination that search and copying charges "are not in the public interest because furnishing the information primarily benefits the general public." Accordingly, on November 4, 1976, plaintiff's counsel wrote Deputy Attorney General Harold R. Tyler, Jr. and requested that he make that determination. (See Exhibit 1) This request for a waiver was inherent in plaintiff's reservation of his right to recover such charges when he initially began to receive to receive records in this action.

More than three weeks have passed without any response having been made to plaintiff's November 4 request that the Department of Justice waive search and copying charges with respect to records

made available to him in this case. Because Freedom of Information Act cases are required to be expedited and there is an urgent public interest in the assassination of Dr. Martin Luther King, Jr., the failure of the Deputy Attorney General to make a timely determination of the waiver issue is tantamount to a denial of plaintiff's request. The Deputy Attorney's de facto denial of a waiver is "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." 5 U.S.C. §706. Accordingly, plaintiff urges that the Court treat the Deputy Attorney's failure to act as the denial which in reality it is and countermand it.

That the disclosure of the records sought by plaintiff in this case "primarily benefits the general public" is beyond question. This is reflected, for example, in the December 23, 1975, letter of Mr. Quinlin Shea, Jr., Chief of the Freedom of Information and Privacy Unit, in which he alludes to "the great public interest in the King case." (See Exhibit 2) A more recent example is the page two story in the Washington Post of November 18, 1976, a copy of which is attached hereto as Exhibit 3. This story was based on documents made public as a result of this lawsuit.and was circulated by Associated Press throughout the nation. Still other instances of public interest and benefit have been cited by plaintiff in his November 4 request to the Deputy Attorney General for a waiver. (See Exhibit 1)

The point is sufficiently obvious that there is no need to belabor it. The opinion of Judge Doyle in Michael Lee Fellner v. United States Department of Justice, a copy of which is attached hereto, makes clear the considerations which mandate that plaintiff be given a waiver of search fees and copying costs in this action.

Respectfully sumbitted,

JAMES HIRAM LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of plaintiff's motion for a waiver of search search fees and copying costs and the entire record herein, it is by the Court this _____ day of December, 1976, hereby

ORDERED, that the defendant waive all search fees and copying costs for records made available to him in connection with his Freedom of Information Act requests for records pertaining to the assassination of Dr. Martin Luther King, Jr.; and it is further

ORDERED, that the defendant restore to plaintiff all search fees and copying charges previously paid by him in connection with his requests under the Freedom of Information Act for records pertaining to the assassination of Dr. Martin Luther King, Jr.

UNITED STATES DISTRICT COURT

EXHIBIT 1

C.A. No. 75-1996

JAMES H. LESAR
ATTORNEY AT LAW
1231 FOURTH STREET, S. W.
WASHINGTON, D. C. 20024

TELEPHONE (202) 484-6023

November 4, 1976

Mr. Harold R. Tyler, Jr.
Deputy Attorney General
U. S. Department of Justice
Washington, D. C. 20530

Re: Weisberg v. Dept. of Justice, No. 75-1996

Dear Mr. Tyler:

As you are aware, I represent Mr. Harold Weisberg in his Freedom of Information Act lawsuit for records pertaining to the assassination of Dr. Martin Luther King, Jr.

The Freedom of Information Act provides:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. §552(a)(4)(A).

Under Department of Justice regulations you are authorized to make a determination that search and copying charges "are not in the public interest because furnishing the information primarily benefits the general public." I hereby request that you make that determination with respect to records made available to Mr. Weisberg as the result of his requests for King assassination materials.

There can be no doubt but that the information sought by Mr. Weisberg "can be considered as primarily benefiting the general public." Mr. Weisberg is the author of Frame-Up: The Martin Luther King/James Earl Ray Case. In Frame-Up Mr. Weisberg published and analyzed Department of Justice records on Dr. King's assassination which he obtained as the result of a previous Freedom of Information Act lawsuit, Weisberg v. Department of Justice, et al., Civil Action No. 718-70. I regard myself as an authority on the assassination of Dr. King. For the past six years I have served as attorney for James Earl Ray, the accused assassin of Dr. King. I am also thoroughly familiar with the available literature on Dr. King's assassination. I know of no way in which the general public can gain access to these Department of Justice records or

any discussion of them except through Mr. Weisberg's book.

Mr. Weisberg has completed approximately two-thirds of a manuscript for a second book on the assassination of Dr. King. The uncompleted part of this book awaits compliance with Mr. Weisbergs Freedom of Information requests. When compliance has been achieved and the manuscript is completed, it will contain copies of some of the Department of Justice records obtained as a result of this lawsuit and an analysis of these and other documents to which he has gained access. In this manner Mr. Weisberg will again provide the general public with access to information and records not provided by other writers and therefore not readily available to it.

Mr. Weisberg is a recognized authority on the assassination of Dr. King. At the request of the House Select Committee on Assassinations, Mr. Weisberg has conferred with its chief counsel, Mr. Richard Sprague, and some members of the Committee staff, in order to advise them on the conduct of their probe into Dr. King's assassination.

Mr. Weisberg's work on Dr. King's assassination and the conviction of James Earl Ray raises fundamental questions about the integrity of American institutions. I believe that it is very important that the truth or falsity of Mr. Weisberg's charges be discussed and resolved on the basis of all the information which can legitimately be made public. Yet this will not be possible unless the Department of Justice waives the search and copying charges in this case. Mr. Weisberg simply does not have the money to pay the copying charges, let alone the search fees, for the great volume of documents which fall within the scope of his requests.

I have only sketched the reasons why release of these documents to Mr. Weisberg will be "primarily" of benefit to the general public. There are still other ways in which the release of these documents without charge can be considered to benefit the general public. For example, Mr. Weisberg intends to leave his files on the assassinations of Dr. King and President Kennedy to a scholarly institution as an historical archive. The University of Wisconsin, in particular, has already expressed a desire to be the repository for this archive. The documents obtained as a result of this lawsuit will be a part of this archive and will thus be made available to other scholars for study.

The United States Court of Appeals for the District of Columbia has recently recognized that Mr. Weisberg's Freedom of Information Act lawsuit for the results of scientific testing

done in the investigation of President Kennedy's murder seeks to obtain information of interest not only to Mr. Weisberg but "to the nation" as well. Mr. Weisberg's present suit for King assassination records also serves the national interest. The charge made by Mr. Weisberg is that Dr. King, a political leader of considerable importance, was assassinated by someone other than the man convicted of the crime, and that those who were responsible for his murder have escaped detection, prosecution, and punishment. This is a very serious charge. It is obviously in the national interest that it be discussed fully and knowledgeably on the basis of all the information which can legitimately be made available to the public. Mr. Weisberg is the instrumentality through which this may be accomplished. Yet this can only be if the Department of Justice makes it possible by waiving the search and copying fees.

Should you so require, I will provide you with affidavits by myself, Mr. Weisberg, and others in support of this request for a waiver of the search and copying charges for these documents. If you do wish supporting affidavits I would appreciate it if you would inform me of this as soon as possible. I would also like you to indicate what standards, if any, you have established for determining whether or not a request for waiver should be granted.

Sincerely yours,

James H. Lesar

James H. Lesar

cc: John Dugan, Esq.
Judge June Green

EXHIBIT 2

C.A. No. 75-1996

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

DEC 23 1975

James H. Lesar, Esquire
1231 Fourth Street, S.W.
Washington, D. C. 20024

Dear Mr. Lesar:

The purpose of this letter is to correct a minor error in the letter of December 1, 1975, in which Deputy Attorney General Harold R. Tyler, Jr., informed you that materials requested by your client Harold Weisberg concerning the assassination of Dr. Martin Luther King, Jr., would be made available to him. The error occurred in the second sentence of the third paragraph of the letter, which read: "'Spectrographic or neutron activation analyses' [item number 2 of the request] were made only on the clothing worn by Dr. King at the time of his death."

In fact, as is perfectly obvious from one page of the F.B.I. records released to your client as a result of the letter of December 1, 1975, neutron analysis of the murder and test bullets was effected. In addition, spectrographic tests were made of the bullets, as recorded on three other pages of released materials. Additional copies of the four pages in question are attached hereto.

Although our error would have been caught by anyone with expertise in this area, I nevertheless felt that I should make the actual situation a matter of record in view of the great public interest in the King case.

Very truly yours,

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

EXHIBIT 3

C.A. No. 75-1996

FBI King Probe: 7 John Willards, Laundered Shorts

Associated Press

A pair of men's shorts with an unusual laundry mark was one of the clues FBI agents pursued in their search for the assassin of Dr. Martin Luther King Jr. in 1968, according to newly disclosed FBI files.

Agents also investigated seven men named John Willard because the suspected assassin used that name when he checked into a rooming house near the hotel where King stayed on his fatal visit to Memphis.

Those details emerged in a review of 442 pages of FBI files on its investigation of the April 4, 1968, slaying of the civil rights leader. The FBI released the documents from a total of 18,000 pages to comply with requests under the Freedom of Information Act. There was no indication when additional files would be made public.

A House committee is investigating the King slaying.

The first batch of papers dealt with the investigation's early days and did not refer to James Earl Ray, who was arrested in London on June 8, 1968, and later pleaded guilty to shooting King. Ray, serving a 99-year prison term, has since recanted and is seeking to change his plea and go to trial.

The papers showed that hundreds of FBI agents chased scores of rumors and tips and tried to use such clues as the shorts and a man's T-shirt to trace the killer's identity. The underwear was found in a suitcase the assassin apparently left at the rooming house.

Agents called on the Textile Marking Machine Co. of Syracuse, N.Y., for help in tracing the laundry markings. The theory was that pinpointing the laundry that washed the assassin's underwear might provide additional clues to his identity and whereabouts.

Calls to all of Textile's sales representatives "disclosed that only one area of the United States (the Northeast) utilizes this code system," one memo said. Agents were ordered to check out a three-page list of laundries that might have made the marking.

The documents do not indicate whether the laundry mark was ever traced. Nor do they show whether any of the John Willards became involved in the case.

Agents in New York asked the American Express Co. for credit records on anyone named John Willard. The company came up with seven, all with different middle names or initials.

Agents found one John Willard at home in Oxford, Miss., and determined that he had been mowing his lawn at the time King was shot.

Another John Willard in Harlan, Ky., was found to have an "excellent reputation," and at age 65, with a "heavy build, receding hairline, gray hair and moustache," he bore no resemblance to the murder suspect, the Louisville FBI office reported.

Very little of the material dealt with the possibility of a conspiracy to kill King. Some memos indicated that agents investigated whether the Minutemen, a right-wing group, or the Ku Klux Klan had planned the assassination. Leaders of both groups were investigated.

The FBI checked out scores of tips, particularly after newspapers published an artist's sketch of the suspected assassin.

A tipster in San Francisco told of an Air Force buddy who had "said he would kill King if he ever came to Memphis." A woman reported that her husband had been told by an Abilene, Tex., service station attendant about a man who had stopped for gas and "said he was going to Memphis to take care of the leaders of the demonstration."

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL LEE FELLNER,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

OPINION AND ORDER

75-C-430

Plaintiff has renewed an earlier motion for an order requiring defendants to waive the costs of processing and duplicating documents, the furnishing of which to plaintiff by defendant has been ordered by this court on December 17, 1975. Defendant opposes this motion. Defendant has moved to be relieved from furnishing any further documents as required by the December 17, 1975 order until plaintiff pays to defendant the unpaid balance of the search and copy fees generated to date, and defendant has moved for an order requiring plaintiff to remit any appropriate future copy fees within 10 days of his receipt of further documents.

This opinion and order are directed to these competing motions.

For the purpose of deciding these motions, I find as fact those matters set forth below under the heading "Facts."

FACTS

Plaintiff is a journalist who intends to publish and disseminate the information which he has obtained and may yet obtain from the defendant pursuant to his request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. His purpose in doing so is "to enlighten the public as to possible abuses of power by agencies of the federal government." The records requested are those compiled by the Federal Bureau of Investigation (FBI): regarding the political activities, political involvements, political affiliations, and other activities of certain individuals who reside in the Madison, Wisconsin, area, or have resided there, or who may have engaged in activity there; regarding certain organizations which may have engaged in activity in the Madison area; regarding political activity that may have occurred in certain buildings in the Madison area; and regarding certain events that may have occurred in the Madison area.

There has been considerable national news coverage and national public interest in the existence and extent of possible political surveillance by the FBI in various parts of the country. There has been considerable news coverage and public interest in the Madison area in possible FBI political surveillance both locally and nationally, in this plaintiff's request for information from the defendant, and in this present law suit by this plaintiff to compel disclosure of the information requested.

In his attorney's initial March 25, 1975, letter of request for the information under the FOIA, plaintiff requested waiver of fees pursuant to § 552(a)(4)(A), stating only that the purpose of his request for the information was "to evaluate potential local violation of civil liberties by federal investigatory agencies." The waiver of fees was denied by defendant.

On about December 18, 1975, plaintiff submitted a renewed request to the defendant for waiver of the fees, this time providing the defendant with affidavits and a brief containing the matters which I have found as fact in the three preceding paragraphs of this opinion. On December 26, 1975, defendant denied the renewed request for waiver of fees, with the following explanation by the Deputy Attorney General:

> The Department of Justice receives numerous requests for information -- accompanied by requests for waivers of fees -- from media personnel and others who assert that their work will benefit the general public. If every such request were to be granted simply because the information sought is of interest to some small portion of the American public and/or could be used by, for example, media personnel "in the Madison community," the resultant expenditure of public funds would be great. Although I personally waived a large search fee in the Meeropol [Rosenberg] case, that case involved sustained, national public interest and possibly unique historical significance. There is absolutely no parallel between Mr. Fellner's request involving an "important local news story" and the Rosenberg case, because your client's request simply does not involve any significant benefit to the general public. Accordingly, I have concluded, as did Director Kelley, that the interests of the general public appear

> more likely to be served by the preservation of public funds. I am enclosing a copy of my statement at the time of the Meeropol search fee waiver which will, I trust, put the present situation into proper perspective.1/

The statement referred to by the Deputy Attorney General concerning the Meeropol search fee waiver on December 1, 1975 was to the effect that the search fees in that case amounted to $20,458; that the magnitude of the sum demonstrated that the defendant must review all such fee waiver requests with great care; that the defendant "cannot grant waivers unless an overriding public interest is convincingly established;" that the Rosenberg case (the subject of the Meeropol waiver request) was "close to being unique in terms of both current public interest and historical significance;" that requiring payment of the search fees could delay or even prevent the release of some or all of the records concerning which no compelling reason for withholding exists; that such delay or prevention of release would frustrate defendant's decision to release as much information as possible concerning the Rosenberg case; and that the waiver of the search fees was in the

1/ The words "in the Madison community" and "an important local news story" appear within quotation marks in the Deputy Attorney General's letter refusing the waiver, without explanation of the source of the quotes. The phrase "in the Madison community" appears in several of the affidavits submitted by the plaintiff in support of his waiver request in this context: "...the ultimate release to the public of documents...will be of general public benefit in informing the public as to the existence or nonexistence of the controversial activities by a federal government agency in the Madison community." If this is the source of the Deputy Attorney General's quotation, the significance of the words is not as it appears in his statement. I have been unable to locate the source of the quoted phrase "an important local news story." I appreciate, however, that the record in this court may not include everything submitted to the defendant by the plaintiff in support of the request for a waiver. In any event, while news of plaintiff's FOIA request to the defendant and news of the present lawsuit are probably fairly characterized as "a local story," it is much less clear whether news of the content of the documents disclosed and to be disclosed would be a local story only.

public interest in that particular case because the release of the records would "benefit the general public far more than it will any individual requester." (The waiver in Meeropol reached only the search, not the copying, fees.)

The unpaid balance of the search and copy fees generated to date is $422. The fees yet to be generated will be copy fees at the rate of 10 cents per page released. It has been estimated by defendant that there were 15,600 pages to be reviewed for release or non-release. If the court's order of December 17, 1975 has been complied with, about 3,600 pages remain to be reviewed. If the 3,600 pages were to be released in their entirety, the additional copy fee would be $360.

Furnishing copies of the pages and portions of pages to be released is the course of action which defendant prefers, as contrasted with permitting plaintiff to inspect the original records themselves. However, defendant has not been requested to permit inspection of the originals by the plaintiff (as compared with furnishing copies), and thus has not been called upon either to grant or deny such a request.

OPINION

The FOIA (§552(a)(4)(A)) provides that in order to carry out its provisions, each agency shall specify a

schedule of fees "limited to reasonable standard charges for document search and duplication and [providing] for recovery of only the direct costs of such search and duplication." Thus, Congress has imposed upon users of the service a portion of that expense attributable to their use, but strictly limited to direct costs of search and duplication. This reflects both a desire that taxpayers generally not be saddled with the entire costs of services benefitting only or primarily specific persons, and a desire that access to public information not be impeded by excessive expense to those seeking access. The latter purpose is accentuated by the further sentence of the subsection, which contains the language presently at issue: "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public."

Defendant's decision not to waive or reduce the fee in the present case is subject to judicial review. 5 U.S.C. § 702; Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 156 (1970); Barlow v. Collins, 397 U.S. 159, 166 (1970). See Paramount Farms, Inc. v. Morton, 527 F.2d 1301, 1303 (7th Cir. 1975). However, a large measure of discretion clearly has been vested in the defendant, and it appears that its

exercise of this discretion may be overturned only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law...." 5 U.S.C. § 706.

Were it not for some of the specific language employed by the Deputy Attorney General in denying a waiver to the plaintiff, I would be strongly disposed to refrain from any interference with the exercise of defendant's discretion in this case. More to the point, if the administrative decision to waive or not to waive the fees properly depends upon comparing a case like the Rosenberg case with the present case in terms of the scope and intensity of public interest in the release of information, there would be no basis for disturbing it.

However, in his letter to the present plaintiff and in his statement in connection with the waiver of fees in the Meeropol request (apparently intended by him to be incorporated by reference in his denial of this plaintiff's request), the Deputy Attorney General appears to have adopted one or more of the following standards in passing upon requests for waivers: whether the information sought is of interest to a large or small portion of the American public; whether the information sought relates to a subject of sustained, national public interest and possibly unique historical significance; whether a particular release of records will benefit the general public far more than it will any individual requester; and whether "an overriding

public interest is convincingly established." The Deputy Attorney General's statements do not make clear which of these varying standards has actually been applied in the present case, but the standard expressed most emphatically in his Meeropol statement is this: "...the Department... cannot grant waivers unless an overriding public interest is convincingly established."

This latter standard clearly does not conform to the statutory language: whether "...furnishing the information can be considered as primarily benefitting the general public." I think it appropriate that the Deputy Attorney General be provided the opportunity to review his decision in this case and, if he elects to do so, to make more explicit the standard by which the defendant proposes to exercise its discretion with respect to waivers or reductions of fees.

I am persuaded in this direction, too, by Department of the Air Force v. Rose (United States Supreme Court, No. 74-489, April 21, 1976), 44 Law Week 4503. Rose dealt with the exemptions from disclosure under FOIA, rather than with waiver or reduction of fees. However, those requesting the documents in Rose were editors or former editors of a publication (New York University Law Review) and their purpose was to explore certain systems and procedures within an executive department (disciplinary systems and procedures at the military service academies). The Court remarked

upon "the public's stake in the operation of the [Honor and Ethics] Codes [administered and enforced at the Air Force Academy] as they affect the training of future Air Force officers and their military careers...." and described these matters as "subject to such a genuine and significant public interest." 44 Law Week, at 4508. The present case also involves an intention to publish the information to be provided, and the public interest in the existence or non-existence of political surveillance by the FBI, and in the nature and scope of such surveillance if it exists, seems as genuine and significant as the public interest in the honor and ethics codes in the military service academies. I do not conclude, of course, that any information which is non-exempt must be furnished without requiring payment of search and copying fees. I consider Rose significant here only as it may bear on the meaning of the statutory language "primarily benefitting the general public."

With respect to plaintiff's motion for an order requiring defendant to waive the search and copying fees, I will refrain from entering a decision until June 1, 1976, or later, in order to provide the defendant the opportunity to reconsider the matter and, if it elects to do so, to clarify and amplify the basis upon which waiver is refused.

With respect to defendant's motion for relief from the December 17, 1975 order, it appears that although on

June 20, 1975, defendant initially denied plaintiff's request for a waiver of fees, it has not insisted until very recently upon prepayment. Also, it has made no showing whether the copying fees yet to be generated will be substantial. It does not appear that interruption of the disclosure schedule pending a resolution of the waiver of fees question is appropriate.

ORDER

It is ordered that defendant's motion filed April 19, 1976 for relief from the order of this court entered December 17, 1975 is DENIED.

It is further ordered that a ruling is reserved on plaintiff's motion filed April 21, 1976 for an order requiring defendant to waive fees for search and copying.

Entered this 28th day of April, 1976.

BY THE COURT:

James E. Doyle

JAMES E. DOYLE
District Judge