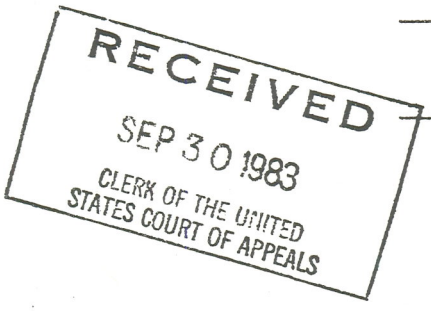
BRIEF FOR APPELLANT/CROSS-APPELLANT WEISBERG

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 82-1229



HAROLD WEISBERG,

APPELLANT/CROSS-APPELLANT

V.

U.S. DEPARTMENT OF JUSTICE,

APPELLEE/CROSS-APPELLEE

AND CONSOLIDATED NOS. 82-174,
83-1722 and 8301764

On Appeal from the United States District Court for the District of Columbia, Hon. June L. Green, Judge

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JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Weisberg

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Appellant/Cross-Appellant	:	
	:	
v.	:	Case Nos. 82-1229, 82-1274,
	:	83-1722, 83-1764
DEPARTMENT OF JUSTICE,	:	
	:	
Appellee/Cross-Appellee	:	

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The undersigned, counsel of record for Harold Weisberg, certifies that the following listed parties and amici, if any, appeared below:

Harold Weisberg (Plaintiff)

U.S. Department of Justice (Defendant)

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

James H. Lesar

JAMES H. LESAR

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BRIEF FOR APPELLANT/CROSS-APPELLANT WEISBERG

STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that the defendant had conducted an adequate search for records responsive to plaintiff's Freedom of Information Act request.

2. Whether the district court erred in sustaining agency's exemption claims where: (a) agency's Vaughn sampling index did not include examples of each exemption claimed by it; (b) agency's Vaughn index resulted in releases of previously withheld materials; and (c) plaintiff adduced evidence that claims which agency tried to justify were also erroneous.

3. Whether evidence of error in FBI procedures for identifying "previously processed" records precluded summary judgment and requires reprocessing of field office files.

4. Whether the district court erred in ruling that agency did not owe consultancy fee to plaintiff because there was no binding and enforceable contract.

5. Whether the district court, in deciding plaintiff's attorney's fees application, erred in its ruling on hourly rate, in excluding some time spent on fee application, and in denying increase in award for delay in payment.

One part of this case was previously before this Court in Weisberg v. U.S. Dept. of Justice, 203 U.S.App.D.C. 242, 631 F. 2d 824 (1980).

STATUTES AND REGULATIONS

The text of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is reproduced in the Addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

The parties to this lawsuit are Harold Weisberg ("Weisberg"), plaintiff/cross-appellant, and the United States Department of Justice ("the Department"), defendant/cross-appellee.

Weisberg appeals from the following orders of the district court, all of which were entered by the Hon. June L. Green:

1. The memorandum opinion and order of April 29, 1983 denying plaintiff's motion for partial reconsideration of the court's order of January 21, 1983. [R. 281, 282]

2. The memorandum opinion and order of January 20, 1983 insofar as they decided issues regarding plaintiff's application for attorney's fees adversely to him and insofar as they vacated the court's December 1, 1981 and January 5, 1982 orders granting plaintiff's motion for an order requiring defendant to pay a consultancy fee to plaintiff. [R. 263-264]

3. The memorandum and order of January 5, 1982, dismissing this action. [R. 231]

4. The memorandum opinion and order of December 1, 1981 granting summary judgment in favor of defendants. [R. 223, 224]

5. The order of September 11, 1980, insofar as it denied plaintiff's motion to require reprocessing of the FBI's Headquarters MURKIN records. [R. 182]

6. The court's finding of February 26, 1980 as to the scope of search. [R. 150]

STATEMENT OF THE CASE

A. BACKGROUND

This case arises under the Freedom of Information Act ("FOIA") 5 U.S.C. § 552. The plaintiff, Mr. Harold Weisbert, has been recognized by scholars as "the premier authority" on the assassination of President Kennedy.[1/] He is also an authority on the assassination of Dr. Martin Luther King, Jr. His contribution to the fund of public knowledge about these two tragedies has been enormous, and the role he has played in trying to ensure that information disseminated to the public is complete and accurate and not false or misleading is well-known among those knowledgeable on theese subjects.[2/]

Washington journalist Les Whitten has stated, for example, that he has found Weisberg's research "invaluable and even vital in pursuing the news; that he is reliable and accurate and his assessments of the importance of documents he has provided me and that I have turned up on my own have been extraordinary; that I have found him uniquely reliable among the so-called 'critics.'" Whitten has also stated of Weisberg that "he has steered me away from several

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1/ The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Westport, Connecticut: Greenwood Press, 1980), compiled by DeLoyd J. Guth and David R. Wrone, "Introduction" at xxvi.

2/ See, e.g., affidavits of Howard Roffman and David R. Wrone. [R. 52]

stories looked plausible, but turned out under Weisberg's counselling to be false; that without such counselling and documentation, I would have printed false stories, ... that, finally, I seldom if everwrite a piece touching on the assassinations without bouncing if off Weisberg." Affidavit of Leslie H. Whitten, ¶¶ 4, 7. [R. 52]

When he filed this suit in November 1975, Weisberg had written six published books on the assassination of President Kennedy which were critical of the official account. In addition, he was also author of the only book which contended that James Earl Ray was not the sole assassin of Dr. Martin Luther King, Jr.[3/]

On March 10, 1969, James Earl Ray entered a plea of guilty to the assassination of Dr. King. Two weeks later Weisberg wrote then FBI Director J. Edgar Hoover and requested information on the Ray case so he could include it in his book on the King murder. He noted that another writer, Clay Blair, Jr., author of The Strange Case of James Earl Ray, had thanked the FBI for the information and assistance it had given him. He asked that he be provided this same information, and he also requested such records as ballistics proof, photographs of the scene of the crime, and evidence that persuaded the FBI that Ray was acting entirely alone. [R. 28]

The FBI never responded to this request for information, and Weisberg later learned that the request itself was given a"100" file

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3/ Frame-Up: The James Earl Ray/Martin Luther King Case (New York: Outerbridge & Dienstfry, 1971).

number, the FBI's designation for "Subversive Matter." He also later learned of an FBI policy of not responding to his requests for information. That policy was expressed in an October 20, 1969 memorandum from one high FBI official, Alex Rosen, to another, Cartha "Deke" de Loach, which states: "Weisberg by letter in April, 1969, requested information on the King murder case for a forthcoming book. It was approved that his letter not be acknowledged."[4/] October 12, 1977 affidavit of Harold Weisberg, Attachment 1.[50]

B. APRIL 15, 1975 REQUEST

The 1974 amendments to the Freedom of Information Act became effective on February 19, 1975. On April 15, 1975, Weisberg made a request for information which in part repeated what he had asked for in 1969. Specifically, requested information on the King assassination falling within seven enumerated categories:

1. The results of any ballistics test.

2. The results of any spectrographic or neutron activation analyses.

3. The results of any scientific tests made on the dent in the windowsill of the bathroom window from which Dr. King was allegedly shot.

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 cigarette remains.

4/ The FBI's deliberate refusal to respond to Weisberg's requests was brought to the attention of Congress in 1977. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 95th Cong., 1st Sess., on Oversight of the Freedom of Information Act (Sept. 15, 16, Oct. 6, Nov. 10, 1977), pp. 139-141, 174-175, 941-942. See also "Agency Implementation of the 1974 Amendments to the Freedom of Information Act, "Report on Oversight Hearings by the staff of the Subcommittee on Administrative Practice and Procedure of the U.S. Senate, 95th Cong., 2d Sess. (Committee Print, March 1980), p. 71 n. 4.

5. All photographs or sketches of any suspects in the assassination of Dr. King.

6. All photographs from whatever source taken at the scene of the crime on April 4th or April 5th, 1968.

7. All information, documents or reports made available to any author or writer, including but not limited to Clay Blair, Jeremiah O'Leary, George McMillan, Gerold Frank, and William Bradford Huie.

Complaint, Exhibit A. [R. 1]

By letter dated April 29, 1975, FBI Director Clarence M. Kelley acknowledged receipt of this request and stated that "our Laboratory Division is attempting to locate and identify the requested material." He assured Weisberg that "every feasible effort will be made to complete the processing of your request within thirty working days...." Complaint, Exhibit B. [R. 1]

Weisberg elected to treat this as a denial of his request and appeal. Complaint Exhibit C. [R. 1] By letter dated May 21, 1975, Mr. Quinlan, J. Shea, Jr., Chief, Freedom of Information Appeals Unit, iformed Weisberg's counsel that he would be advised of the action on his client's request by the Attorney General "in a further communication to be dispatched not later than June 5, 1975, unless a delay authorized by Section 552(a)(B) is required....." Complaing, Exhibit F. [R. 1] By letter dated June 5, 1975, Richard M. Rogers, Deputy Chief, Freedom of Information Appeals Unit, wrote Weisberg's counsel that it had proven impossible to complete the processing of the appeal "as the result of circumstances within the purview of 5. U.S.C. 552(a)(6)(B)...." He promised, however, that "[y]ou will be advised

of the decision of the Attorney General in a further communication to be dispatched not later than June 19, 1975." Complaint, Exhibit E. [R. 1]

The June, 1975 deadline passed without any further communication regarding the decision of the Attorney General. However, on June 27, 1975, FBI Director Clarence Kelley did write a letter to Weisberg's counsel stating that his request "for the results of certain Laboratory examinations, photographs, and sketches relating to the assassination of Dr. Martin Luther King, Jr., is denied." To support this denial, Director Kelley invoked Exemption 7(A) and cited the fact that an appeal from the denial of a writ of habeas corpus on behalf of James Earl Ray was pending in the Sixth Circuit. He also asserted that a search of FBI central files in connection with item 7 of Weisberg's request "reveals no information regarding Dr. King's assassination was made available to any author or writer." March 23, 1976 Weisberg Affidavit, Exhibit J. [R. 10]

C. WEISBERG FILES SUIT: NO CRIME SCENE PHOTOGRAPHS

By November 28, 1975, Weisberg had received no documents responsive to his April 15, 1975 request, so he filed suit.

On December 1, 1975, Deputy Attorney General Harold Tyler acted upon Weisberg's May 5, 1975 appeal,[5/] stating that ~~he had~~

5/ CBS News, which was preparing to air a documentary on Dr. King's assassination, had also requested some of the same materials sought by Weisberg. There is some evidence that the Department was motivated to make these releases "to avoid being 'blasted' (on the air) by CBS for being 'uncooperative'." See November 3, 1975 memorandum from Stephen Horn, Attorney, Criminal Section, to Assistant Attorney General J. Stanley Potinnger. [R. 15]

he also stated:

> It may be that the Department has no photographs "taken at the scene of the crime" [item number 6 of the request], in the sense your client uses the phrase. To the limited extent that we have photographic and other materials that depict physical conditions or events, they will be released to Mr. Weisberg.

March 23, 1976 Weisberg Affidavit, Exhibit I. [R. 10]

The following day, December 2, 1975, FBI Director Kelley released 73 pages of documents and 18 photographs in response to Weisberg's request. There were no crime scene photographs among the materials released.

On December 23, 1975, Weisberg submitted a new, much longer request containing 28 categories of records, including some with a number of subparts. He then amended his complaint. [R. 3]

On December 29, 1975, Weisberg's counsel responded to Tyler's December 1 letter by protesting that Tyler had rephrased the April 15 request so as to exclude most of the records sought. He made it clear that the request was broadly worded. He defined the request for "all photographs taken at the scene of the crime" to include "all of the buildings and areas in the immediate vicinity of the crime site," stating that it would include, for example, "photographs taken of the fire station, the rooming house at 418 1/2 to 422 1/2 S. Main Street, and any areas in between or adjacent thereto," as well as photographs of the interior of any of these buildings and of any of these buildings and of any objects found in them." March 23, 1976 Weisberg Affidavit, Exhibit M. [R. 10]

On January 2, 1976, the Department answered Weisberg's amended complaint. [R. 4] The third defense stated that the case was moot; the fifth defense averred that Kelley's December 2 letter had provided Weisberg with the records he had requested.

On January 8, 1976, Weisberg served the Department with a set of 39 interrogatories which were designed to establish that the Department did have additional records responsive to the request. [R. 5] On February 10, 1976, the Department filed a motion for a protective order which asserted that discovery should be postponed where a dispositive motion is on file "or is about to be filed," that this was particularly true in a Freedom of Information Act case "where defendants are permitted to establish their defenses via affidavits," and that "defendant will be taking the position that this action is moot in view of the disclosures granted the plaintiff after the filing of the instant action." Motion for a Protective Order, p.2 [R. 7]

The first status call was held the following day. Counsel for the Department repeated this theme, variously asserting to the court that, "I think the case filed prematurely," "I think that in a matter of time this case is going to prove to be moot," and "we have indicated that we will be filing a motion in two weeks that we hope will demonstrate that this case is moot." Tr. 2-3. [R. 8]

The district court required the Department to answer the interrogatories, but the answers were not responsive. For example,

Interrogatory No. 30 asked: "Did the FBI obtain photographs of the scene of the crime taken by Mr. Ernest Withers?" The FBI's nonresponsive answer was:

> The Deputy Attorney General advised plaintiff's attorney in his letter of December 1, 1975, that ". . . In an effort to save your client considerable expense, I have construed item No. 6 (of plaintiff's FOIA request) 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, you should make a further request for the and agree to pay the reproduction and special search cost which will be involved." Plaintiff has never given the Department of Justice or the Federal Bureau of Investigation any assurance that he is willing to pay the necessary search fees.

[R. 9]

Similar nonresponsive answers were made to three other interrogatories which sought to discover whether the FBI had obtained crime scene photographs from other sources, including the police, new agencies, reporters, private citizens, etc. See Defendant's answers to interrogatories, Nos. 31-33. [R. 9]

These responses contrived a pretext for not answering Weisberg's interrogatories. There was no basis for the pretext: two weeks earlier Weisberg told the Department's counsel that he would pay the search fees as soon as a specific sum was demanded of him[6/]

6/ Department of Justice regulations require notification that requester be notified of estimated search and copying fees in excess of $25.00 28 C.F.R. § 16.9(c)(e).

and pointed out to him that he had paid the depoist on an anticipated search fee for Civil Rights Division documents as soon as a specific sum had been demanded of him. March 23, 1976 Weisberg Affidavit, ¶¶ 28-36. [R. 10] By February 23, 1976, the FBI still had not provided any estimate as to search costs; however, in view of the FBI's intransigent position that it would not conduct any search for crime scene photographs until it had received written assurances of payment, and to avoid further delay, Weisberg's counsel wrote the FBI that Weisberg would pay the necessary search fees, subject to his right to recover them. March 23, 1976 Weisberg Affidavit, Exhibit P. [R. 10]

On March 9, 1976, the FBI informed Weisberg that it would "begin our search to compile the photographs and records you have requested." March 23, 1976 Weisberg Affidavit, Exhibit Q. [R. 10] On March 23, 1976, Weisberg met with the FBI at FBI headquarters to review the photographs it had compiled. Although he was shown "photographs of hairpins and ... beer cans, everything except the basic evidence of the case," he has not shown any crime scene photographs. March 26, 1976 Transcript, p. 9. [R. 16] At this meeting, Weisberg told the FBI that he knew that FBI had crime scene photographs.

Three days later Department counsel informed the court that the FBI would make a search of its Memphis field office for photographs and other materials responsive to Weisberg's request. March 26, 1976 Tr., p. 3. [R. 16]

On April 9, 1976, the Memphis field office notified FBI headquarters ("FBIHQ") that it had located numerous crime scene photographs, including 107 pictures taken by Mr. Joseph Louw, a photographer who was on assignment for Public TV when Dr. King was killed, 47 photographs taken by the Memphis Police Department, and 1 cannister containing photographic negatives of aerial view of the Lorraine Motel and vicinity taken by the U.S. Corps of Engineers. September 2, 1977 Weisberg Affidavit, Attachment 4. [R. 46] The Memphis field office also listed a number of photographs of suspects in the assassination, another item of Weisberg's April 15 request.

On May 5, 1976, Weisberg and his counsel were again shown photographs at FBIHQ. This time they were shown more than 100 photographs, some of which were crime scene photos. In addition, although the Department of Justice had previously asserted that there never were any suspects in the King assassination other than James Earl Ray, [7/] they were also shown photographs of suspects other than Ray. And Weisberg continued to assert, even after the May 5 meeting, that he had not been shown all crime scene photographs. May 17, 1976 Lesar Affidavit, ¶¶ 7-11. [R. 17]

By letter dated May 11, 1976, FBI Director Clarence Kelley informed Weisberg's counsel that the 107 crime scene photographs taken by Mr. Louw were the property of Time, Inc., and were protected from disclosure under Exemption 3 (by virtue of the Copyright Act,

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7/ December 1, 1975 letter from Deputy Attorney General Tyler to James H. Lesar. [R. 10]

17 U.S.C. 101, et seq.) and Exemption 4. Director Kelley also stated that photographs "provided to the FBI by a non-Federal law enforcement organization which has specifically requested that this material continue to be held confidentially" were exempted from disclosure under 5 U.S.C. § 552(b)(7)(C) and (D). May 17, 1976 Lesar Affidavit, Exhibit Y. [R. 17]

At a status call held on May 18, 1976, the question of the exempt status of the photographs andother materials being withheld from plaintiff was raised. Counsel for the Department indicated that the Department would file a motion for summary judgment in three weeks. Tr., 23. [R. 18] It never happened. In September, 1977, Weisberg moved for summary judgment on the issue of the exempt status of the 107 copyrighted photos obtained by the FBI from Time, Inc., and the Department cross-moved. [R. 47, 48] The district court ruled in Weisberg's favor and the Department appealed. The Court of Appeals affirmed the district court's decision that the photographs were "agency records" subject to the FOIA, notwithstanding Time, Inc.'s copyright claim, but remanded the case for further proceedings required by Rule 19. Weisberg v. U.S. Dept. of Justice, 203 U.S. App. D.C. 242, 631 F.2d 824 (1980). On remand it proved unnecessary to seek the joinder of Time, Inc., as contemplated by this Court, and Weisberg was furnished these photographs.

Ultimately, the FBI also dropped its Exemption 7(C) and 7(D) claims for the Memphis Police Department's crime scene photographs, and these, too, were furnished to Weisberg.

D. DEFENDANT'S MOTION TO STAY PROCEEDINGS

On June 2, 1976, the Department filed an affidavit by FBI Special Agent Thomas Wiseman which asserted that Weisberg had been furnished all nonexempt information responsive to his April 15th request. Second Affidavit of Thomas L. Wiseman. [R. 19] At a status call held on June 10, 1976, Department counsel indicated once again that he was going to file a motion to dismiss. Tr., pp. 10-11. [R. 22] He also indicated that he was prepared to file an affidavit and then a motion regarding when the FBI would reach Weisberg's December 23, 1975 request. Tr. 14, 14. [R. 22]

On August 10, 1976, the Department moved not to dismiss but for a stay of further proceedings, citing as grounds the decision of this Court in Open America v. Watergate Special Prosecution Force, 178 U.S. App. D.C. 308, 547 F.2d 604 (1976). In support of its motion the Department filed an affidavit by Mr. Quinlan J. Shea, Jr., then Chief, Freedom of Information and Privacy Unit, Office of Deputy Attorney General, U.S. Department of Justice. Mr. Shea asserted that "[t]he assassination of Dr. King is certainly a case of sustained public interest" and advanced two reasons for processing cases of historical interest more slowly than others, one of which was:

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

(Emphasis in original) July 15, 1976 Affidavit of Quinlan J. Shea, Jr., ¶ 12.[8/] [R. 26]

On September 8, 16, and 17, the district court heard testimony from FBI agents relevant to the Department's motion for a stay. [R. 29, 40] At the conclusion of these hearings, the FBI began processing its headquarters records on the MURKIN[9/] investigation.

E. FIELD OFFICE FILES

For nearly two years after suit was brought, the FBI resisted any search of its field office files. In April, 1976, it was forced to search its Memphis field office for crime scene photographs and photographs of suspects. Although FBI Director Kelley's May 11, 1976 letter had promised a search of the Memphis Field Office "for any additional material which moght be responsive to your [April 15, 1975 request] not available at FBI Headquarters," and although this statement was repeatedly called to the attention of the court and the Department, no non-photographic materials were provided by the Memphis Field Office.

8/ Ironically, two and a half years later the same official testified that material which had been excised from the King assassination files no longer qualified for continued withholding, and that he thought the records should be reprocessed to restore deleted material. Testimony of Quinlan J. Shea, Jr., January 12, 1979 hearing, Tr. at 6, 28-31. [R. 89]

9/ This is the FBI's acronym for its investigation into the murder of Dr. King.

Indeed, even though the FBI had located crime scene photographs in the Memphis Field Office, it continued to maintain that its field office files simply duplicated what it had at Headquarters. FBI Special Agent Donald Smith testified at a hearing held on September 8, 1976, that "... everything that is in the field office, particularly in a case like this, would be at headquarters ...." Tr., p. 34. [R. 40] And, in a memorandum filed October 27, 1976, the Department represented that a search of field offices would be "counterproductive." Memorandum of Points and Authorities ... in Support of Defendant's Motion to Stay, p. 5. [R. 32]

In August, 1977, faced with the threat that it would have to Vaughn its entire MURKIN Headquarters file, the FBI agreed to search certain specified field offices for their records on MURKIN and sertain other subjects, such as "the Invaders," the Memphis-Sanitation Workers Strike, and members of the Ray family. A Stipulation entered into by the parties required the FBI to adhere to strict processing standards and time deadlines. In return for the FBI's commitments, Weisberg agreed to hold in abeyance a motion to require a Vaughn v. Rosen showing with respect to these files, including the Headquarters files already processed, and upon the FBI's performance of these commitments by the specified dates, to forego completely the filing of said motion. The Stipulation provided, however, that Weisberg did not waive his right to contest specific deletions after the FBI had met its commitments. [R. 44]

However, in violation of the express terms of the Stipulation, the FBI failed to release the field office documents "periodically

as they are processed," and instead accumulated 6,000 pages and mailed them to Weisberg at the very last moment, in one large carton too large to lift or even move, and which was not accompanied by any inventory or list of the enclosures, which included more than 20 different file designations that were totally disorganized. November 20, 1978 Weisberg Affidavit, ¶¶ 7-11. [R. 87] In addition, unbeknownst to Weisberg, Headquarters did not instruct its field offices to send to Headquarters for processing "copies of documents with notations," as required by the Stipulation; instead, the field offices were instructed to send only those duplicates of Headquarters records which contained "a substantive, pertinent notation other than an administrative-type directive." [Emphasis in Shea letter) October 26, 1978 letter from Quinlan J. Shea, Jr. to James H. Lesar, pp. 13-15. [R. 84]

These secret qualifications on the kinds of records to be processed and released pursuant to the Stipulation came to light as a result of an administrative review conducted by Mr. Shea as head of the Department's appeals office. Shea stated that his office could not determine "whether in fact this inconsistency of language resulted in the failure of any field office to supply all 'documents with notations,' because the decisions as to which records should be forwarded to Bureau Headquarters for processing were made at the field offices." With regard to the Memphis records, which were searched and processed at Headquarters, he stated that "the practice of processing only those duplicate records that contained substantive field office notations was followed. In his report to Lesar, he included

at Tab G, some typical examples of the types of Memphis Field Office notations not considered to be substantive, and therefore not processed and released. He concluded that he had no alternative but to ask "whether you and your client are satisfied with the result in this area. If you are not, it seems to me that the issue should be resolved in your favor." Id.

Weisberg was not satisfied with the result. The examples given of notations withheld by the Memphis Field Office because they were not "substantive" included significant information. However, the matter was not resolved in Weisberg's favor. The FBI did not reprocess these records and make available those copies with notations which had been previously withheld.

A second issue with respect to the processing of the field office records concerned those which were withheld on the grounds that they had been "previously processed." On November 15, 1980, Weisberg filed a motion to compel the FBI to disclose these records on the grounds that the FBI did not actually compare the field office records withheld under this claim with the Headquarters records which allegedly had been "previously processed." In support of his motion, he pointed out that in Weisberg v. Webster and Weisberg v. FBI, Civil Actions 78-0320 and 78-0420, the same claim had been made for Dallas and New Orleans field office records on the assassination of President Kennedy. Utlimately, however, the FBI had been forced to admit that 2,369 pages of Dallas field office records had been with-

held as "previously processed" when in fact they had not been provided and could not even be found at Headquarters. June 16, 1980 affidavit of Harold Weisberg, ¶18. [R. 184]

F. THE DEPARTMENT'S SUMMARY JUDGMENT MOTIONS

The Department repeatedly sought to end this litigation by prematurely moving for summary judgment (or partial summary judgment) on the issues of the scope and thoroughness of the search and the adequacy of its exemption claims. The first two motions, filed May 11, 1979 and December 13, 1979, dealt with the search issue. [R. 128] The first of these motions was denied by order dated August 27, 1979. [R. 120] After the second motion, district court issued a very limited "Finding As To Scope of Search" which stated that "proper and good faith search has been made for all items responsive to plaintiff's request in the FBI Headquarters' Murkin files and in all files of the FBI field offices, with the exception of the Frederick residency." [R. 150]

The last two motions, filed April 25, 1980 and December 10, 1980, focused on the Deaprtment's attempts to justify its exemption claims. [R. 153, 187] The first of these motions was denied by the district court on September 11, 1980, at which time the court also directed the Department to file a second Vaughn index. [R. 182] After the filing of the second Vaughn index, the Court did grant summary judgment in favor of defendant, though it did so conditionally,

in its order of December 4, 1981. [R. 224]

1. The Search Issue

At a status call on June 30, 1977, FBI Special Agent John Hartingh told the court that

> ... from the FBI point of view, everything that pertains to the assassination of Dr. Martin Luther King, is in one file, the Mercken (sic) file.

Tr., P. 31. [R. 41] The FBI view was not found on fact.[10/] Records relating to the King assassination do in fact exist outside the MURKIN file. Departmental counsel gave one very good example of this at the September 28, 1978 status call when she referred to a May 13, 1968 memorandum from T.E. Bishop to Cartha DeLoach in regard to Gerold Frank's request to interview FBI agents for a book on the King assassination. It was not filed in the MURKIN file. Tr., pp. 4-8. [R. 81]

Weisberg contended throughout this litigation that his requests could not be limited to the MURKIN file, nor even to the FBI. In a September 17, 1977 letter to the Department's counsel, Weisberg's attorney noted that he and Weisberg were not familiar with all components of the Department of Justice and did not know whether some of them had records relevant to the King assassination

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10/ The FBI further claimed that the field office MURKIN files contained no records not at FBIHQ. See Ante, p. 7

so they could not specify all components which should be searched. He went on to identify four components where he and his clients had reason to believe relevant records would be found: Office of the Attorney General, Office of the Deputy Attorney General, Office of Legal Counsel, and Community Relations Service.[12/] In opposing the Department's December 13, 1979 motion for partial summary judgment, Weisberg also listed the Internal Security Division. December 28, 1979 Weisberg Affidavit, ¶63. [R. 135]

Weisberg also contended that the FBI was required to search not only its Central Records files, but also its divisional files. Weisberg was told by FBI Special Agent Hartingh that the divisions do not have their own files, that all records are kept in Central Records. May 25, 1979 Weisberg Affidavit, ¶150. However, this was disrupted by the deposition testimony of Douglas Mitchell, an employee in the Department's appeals office. Id., ¶32.

On November 11, 1980, Weisberg filed a motion to compel a further search which contended that there had been no search at all for many of the items of his requests, particularly those set forth in his request of December 23, 1975. In support of his motion,

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12/ Weisberg has received some records from the Office of the Attorney General and the Office of Deputy Attorney General and the response of these components is no longer at issue in this case.

Weisberg cited the August 15, 1980 testimony of a Department employee, Miss Constance Fruitt. She testified that because no privacy waiver had been provided for individuals listed in item No. 11 of the December 23rd request, no search had been made. She conceded, however, that a file on one individual listed in item No. 11 had been provided to another requester without his having been required to submit a privacy waiver. Tr., pp. 39-42. [R. 181] However, in opposing plaintiff's motion to compel a further search, the Department took the position that the Privacy Act prohibited even a search. Tr., April 6, 1981 Hearing, pp. 55-71. [R. 213] The district court ultimately decided this issue against Weisberg.

Apart from these broad search issues, Weisberg also pointed to many more particular issues, such as the FBI's failure to search and locate the "Lawn tickler", December 28, 1979 Weisberg Affidavit, ¶44 [R. 135]; the absence of any search for "receipts of items of physical evidence," a specific item of his April 15, 1975 request, February 20, 1980 Weisberg AFfidavit, ¶67; records on J.C. Hardin, May 25, 1979 Weisberg Affidavit, ¶199-201; records on the investigation which the New Orleans Field Office was ordered to conduct of Raul Esquivel, Sr., May 16, 1978 Weisberg Affidavit, ¶191.

2. DEFENDANT'S EXEMPTION CLAIMS

On February 25, 1980, the district court ordered the Department to prepare a Vaugh v. Rosen index justifying the deletions made

on every 200th document released or to be released to Weisberg. [R. 149] The resulting index was objected to by Weisberg on several grounds. Of the 147 documents sampled, 90 contained no excisions whatever. Of the 57 remaining documents representing, by Weisberg's estimate, only one-half of one percent of the records on which excisions were made, there was not a single example of the use of Exemptions 1, 2, 3, 5, 6, 7(A) and 7(F), all of which were used to withhold information in the case. May 14, 1980 Weisberg Affidavit, ¶101. [R. 165] The FBI in effect conceded that it could not justify the excision of the names of FBI agents. (In June, 1976, the judge had issued a verbal order against routinely deleting the names of FBI agents unless the Department chose to brief the issue. The issue was never briefed; the FBI simply ignored it.

Additionally, the Department also admitted to "two errors in the original exemption claims" (other than the names of FBI agents) in the 57 documents with deletions. Moreover, in a counter-affidavit Weisberg took issue with those excisions which the FBI sought to justify. With respect to the Exemption 7(C) deletions, he noted, for example, that the FBI justified the withholding of the names of Claude and Leon Powell, even though their names had been released by the FBI in other documents and had been publicized on countless TV news stories and in the print media. He further noted that one of the Powell brothers had been cited for contempt because he refused to testify before the House Select Committee on Assassinations ("HSCA").

With respect to Exemption 7(D) claims, he asserted that the FBI had excised much information that was public information rather than confidential information, as well as information which would not qualify for this exemption even if it were not already public. He noted, for example, that the FBI attempted to justify the excision of the identity of former Memphis policeman Marrell McCullough, that he had appealed the withholding of the McCullough's name in 1977, that Mr. Shea had testified in 1979 that he would be given the McCullough file, and that prior to that McCullough had testified before the House Select Committee on Assassinations and it had published his testimony. May 14, 1980 Weisberg Affidavit, ¶¶201-206. [R. 165]

Moreover, he pointed out that in addition to the improper use of Exemption 7(D) which was reflected in the Vaughn index, other evidence was available to show its misuse. For example, the copy of MURKIN HW serial 2622 which the FBI gave Weisberg had a sentence deleted from it that is quoted in Volume XIII of the Hearings published by the HSCA. The FBI deleted from Weisberg's copy of this serial, which is a May, 1968 directive to four FBI field offices instructing them to conduct surveillance on James Earl Ray's relatives, the sentence: "You should also obtain all long distance telephone calls from their residences for period April 23, 1967 to the present time." May 28, 1980 Lesar Affidavit, ¶4, Attachments 1-2. [R. 165] Since this delection disclosed neither a confidential

source nor information obtained from a confidential source, Weisberg maintained this was further evidence of the FBI's misapplication of Exemption 7(D).

Regarding Exemption 7(E), Weisberg noted that the FBI's Vaughn index failed to state that the technique sought to be protected in Document 91 was not already well-known to the public. He asserted that invesigative techniques such as wiretapping, bugging, mail interception and the like are investigative techniques that are already well-known to the public. May 14, 1980 Weisberg Affidavit, ¶¶93-98. [R. 165]

In light of the showing made by Weisberg, the district court denied the Department's motion for partial summary judgment and ordered it to prepare a new Vaughn index. The Department did so and again filed for summary judgment. Weisberg again opposed the motion and again pointed out to the flaws in the Department's Vaughn showing.

He pointed out that even as augmented by a second sampling, the Vaughn index did not include a single example of the use of exemptions 3, 5, 6 and 7(F). The second Vaughn index did include examples of the uses of exemptions 1 and 7(A) for the first time, but Weisberg noted that the only example of exemption 7(A) in the new sample was in fact dropped, as were several exemption 1 claims.

Moreover, Weisberg again took issue with the justifications attempted by the Vaughn index. He noted that with regard to Exemption 7(C), Mr. Shea had stated that ".... no. 7(C) excisions can be upheld

unless a specific reason can be articulated for doing so, sounding in personal information essentially unrelated to the assassination of Dr. King, or to the FBI's investigation of the crime." October 26, 1976 letter of Quinlan J. Shea to James H. Lesar. [R. 84] Yet in the second Vaughn index the FBI again withheld the names of Claude and Leon Powell, just as it had done in the first. January 6, 1981 Weisberg Affidavit, ¶175. With respect to Exemption 7(D), he noted that in the first Vaughn index the FBI had used that exemption for a person who was a source for the Los Angeles Times, not the FBI, and that the same (mis)use of this exemption was made in Document 31A of the new Vaughn.

Notwithstanding these and many other points made by Weisberg, this time the district court sustained the Vaughn showing and awarded summary judgment in favor of the Department.

G. THE CONSULTANCY

Throughout the litigation, Weisberg protested both the FBI's failure to conduct an adequate search and its excisions in, and withholding of, documents. As he reviewed the documents provided him, Weisberg wrote detailed letters complaining about specific deletions, withholdings and failures to search. On August 30, 1977, James M. Powers, then Chief of the FBI's Freedom of Information/Privacy Acts Branch, wrote Weisberg that:

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

See Plaintiff's Motion to Require Reprocessing of MURKIN Headquarters Records, Exhibit 4. [R. 168]

This did not happen. However, on November 11, 1977, Weisberg and his counsel met in the Department of Justice Building with Deputy Assistant Attorney General William Schaffer, Mrs. Lynne Zusman, Chief, Freedom of Information and Privacy Acts Section, Civil Division, U.S. Department of Justice, and several FBI agents to discuss the resolution of problems preventing the conclusion of this case. May 16, 1978 Lesar Affidavit, ¶1, [R. 67] Hereafter,("Lesar Affidavit")

During this conference, Schaffer proposed that the Department hire Weisberg as a consultant to review MURKIN records and advise the Department on wrong excisions and other matters, such as the existence of other records which had not yet been produced. While Weisberg did not reject this proposal outright, he did resist it. Lesar Affidavit ¶¶4-5. [Id.]

On November 21, 1977, Mr. Weisberg met in the chamgers of this Court with his counsel, Mrs. Zusman, AUSA John R. Dugan, and FBI agents. During the conference the government set forth its proposal that Weisberg act as its paid consultant. Weisberg again indicated his reluctance to undertake this obligation, stating several times that he wanted a sign of good faith from the government before he agreed to become its consultant. Lesar Affidavit, ¶6. [Id.]

After the district court commented that the government was not going to pay him as its consultant, then disregard his criticisms, he agreed, in response to a direct question by the Court, to undertake the consultancy. Lesar Affidavit, ¶7 [Id.]

On November 25, 1977, Weisberg wrote schaffer concerning the consultancy. He explained how he would go about the task, and he stated, "I will do what I was asked as rapidly as possible...." He also enclosed a receipt in the amount of $22.60 for dictation tapes which he had purchased and asked for reimbursement of this expense. Lesar Affidavit, Attachment 1. [Id.]

On December 11, 1977, Weisberg again wrote Schaffer. He told Schaffer that he had spent 80 hours on the consultancy and estimated that it would take about two hours per Section to complete the work. He also noted that he had not been informed of what compensation he was to receive. Although he expressed his belief that the government was stalling him, he asserted "I have proceeded in good faith and this will continue." Lesar Affidavit, Attachment 2. [Id.]

On December 17, 1977, Weisberg wrote Schaffer again. Referring to the consultancy as "this matter of my involuntary inservitude all of you imposed upon me by misrepresenting to the judge," he again raised the question of his compensation, stating: "You stipulated the normal consultancy rate. I did not ask what it is. Lynne was not able to tell Jim what it is." Lesar Affidavit, Attachment 2. [Id.]

On December 26, 1977, Weisberg's counsel wrote to Mrs. Zusman explaining that Schaffer had not responded to Weisberg's inquiries about his rate of pay and requested that she find out. He also inquired about the possibility of an interim payment to Mr. Weisberg. Lesar Affidavit, ¶11. February 22, 1983 Lesar Declaration, Exhibit 10. [R. 274]

On Sunday evening, January 15, 1978, Zusman called Weisberg's counsel at his home and inquired whether $75 per hour would be enough to compensate Weisberg. Lesar Affidavit, ¶12. [R. 67] This offer to pay Weisberg at the rate of $75 per hour came on the evening before a hearing was scheduled in front of Judge Gerhard Gesell in the case of Weisberg v. Bell, Civil Action No. 77-2155, on the questin of whether Weisberg was entitled to a fee waiver for copies of 100,000 pages of FBI records on the assassination of President Kennedy.

After checking with his client, Mr. Lesar informed Mrs. Zusman that Weisberg had agreed to accept the Department's offer. On January 18, 1978, Weisberg wrote Mrs. Zusman a letter alluding to many events connected with the fee waiver hearing in front of Judge Gesell on Monday, January 16, 1978. Beginning his letter with "I am not clear on what you meant by a letter on Monday." He later stated, "If what you wanted to know is how much time I've put in it is about 100 hours." He also indicated that he doubted he would be able "to get back on the review of my noted before next week." Lesar Declaration, Exhibit 14. [R. 274] On January 26, 1978, Mr.

Lesar met with several Department attorneys, including Mrs. Zusman. On that occasion he also raised again the possibility of an interim payment to Weisberg. July 22, 1982 Lesar Affidavit, ¶4. [R. 253] Mrs. Zusman told him that he should write a letter to Schaffer explaining the nature of the agreement, what Weisberg had done and would do, the number of hours he was claiming compensation for, and his desire for an interim payment. At the same time, Zusman put pressure on Lesar to have Weisberg get on with the consultancy project, stating that Weisbert "could better devote his time to the tasks involved in his consultancy arrangement with the Department" than spend them on another of his cases. And she reminded Lesar that the district court "had clearly placed the burden on Mr. Weisberg to review these material..." The handwritten notes taken by a Justice Department attorney on the January 26 meeting reflect that Zusman also told Lesar that the FBI was "not going to do anything until they get Weisberg's list." Lesar Declaration, Exhibits 15-16. [R. 274]

On January 27, 1978, Weisberg again wrote Zusman. Noting the Department's failure to inform him in writing what he would be paid for the consultancy work, he stated: "You finally did tell Jim verbally. Why not in writing? Why is the bill for the tapes I bought immediately not even acknowledged? Lesar Declaration, Exhibit 17. [R. 274]

By letter dated January 31, 1978, Lesar did as Zusman had directed. He wrote Schaffer requesting an interim payment of $6,000 for 80 hours of work at the rate of $75 per hour. As suggested by Zusman, Lesar sent her a complimentary copy of his letter to Schaffer. Lesar Affidavit, ¶¶14-15; Attachment 5. [R. 67]

Lesar's letter was received by the Department on February 2, 1978. No response of any kind was made until Lesar received a phone call from a Justice Department attorney, Dan Metcalfe, on February 15, 1978. The purpose of his call was "to let him know that there's a problem with $75.00 per hour." Lesar Declaration, Exhibit 21. See also, Id., Exhibit 20. [R. 274]

At a March 7, 1978 status call, Zusman reaffirmed the Department's commitment to pay Weisberg for his consultancy work, describing its offer to pay him a fee as "generous and unique" and "highly unusual." Tr., p. 7. [R. 63] She also complained about not yet having received the work product from Weisberg's consultancy. Tr., p. 3 [Id.]

On March 28, 1978, not having heard further from the Department about the dispute over the consultancy rate to be paid Weisberg, his counsel raised the issue in a letter to Zusman. Lesar Declaration, Exhibit 22. [R. 274] On April 7, 1978, Zusman responded. Addressing herself to her Sunday evening phone call on January 15, 1978,[13/]

13/ At one point the letter incorrectly places the date of the phone conversation as March 15, 1978; at another it is correctly given as January 15, 1978.

she stated that "the purpose of my phone call was to re-state the intention of the government to support this plan and by so doing, prevent it from being raised as an issue the following day at the hearing on your client's preliminary injunction motion in Civil Action No. 77-2155." Although she admitted that she had mentioned the $75 per hour rate, she claimed that she had not in fact offered it, and that her recollection was that she had said that Schaffer would have to make the final determination on the matter. Lesar Declaration, Exhibit 22A. [R. 274]

Thereafter, the dispute as to whether and how much Weisberg should be paid came before the district court on several occasions. At a status call on May 10, 1978, the district court stated that an offer had been made in chambers to pay Weisberg for his work, although no dollars and cents figure was mentioned. Tr., 4-5. [R. 158] When the Department asserted, at a hearing held on May 17, 1978, that "[t]his offer was not apparently agreed to until some time in January ....," the court replied: "I believe it was agreed to in this Court's chambers."[14/] Tr., 4. [R. 72] In an order issued December 1, 1981, the court granted plaintiff's motion for an order requiring defendant to pay him a consultancy fee, and this was reaffirmed in its order of January 5, 1982. [R. 223-224, 230-231] Subsequently, however, by its order of January 20, 1983, the court vacated the part of these orders pertaining to the consultancy and denied plaintiff's motion for payment of the consultancy

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14/ The in-chamber conference took place on November 21, 1977.

fee. [R. 263-264] Weisberg moved for reconsideration, but this was denied by the court's order of April 29, 1983. [R. 281-282]

ARGUMENT

I. THE DEPARTMENT DID NOT SUSTAIN ITS BURDEN OF DEMONSTRATING THAT IT HAS CONDUCTED AN ADEQUATE SEARCH FOR RECORDS RESPONSIVE TO WEISBERG'S REQUESTS.

To prevail in a Freedom of Information Act lawsuit, "the defending agency must prove that each document that falls within the requested class either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Association, Inc. v. F.C.C., 156 U.S. App. D.C. 91, 479 F.2d 183 (1973). In order to meet its burden of demonstrating that it has conducted a thorough, good faith search, an agency must detail the scope of the search and the manner in which it was conducted. Weisberg v. United States Dept. of Justice, 200 U.S. App. D.C. 312, 317, 627 F.2d 365, 372 (1980). Agency affidavits which "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized," are insufficient to support summary judgment on the search issue. Id. 200 U.S. App. D.C. at 318, 627 F.2d at 373. Furthermore, even if the agency affidavits are detailed and nonclusory and are submitted in good faith, "the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order."

Founding Church of Scientology, Etc. v. Nat. Sec. Agcy., 197 U.S. 305, 317, 610, F.2d 824, 836 (1979).

Lastly, the agency "bears the burden of establishing that any limitations on the search it undertakes in a particular case comport with the obligation to conduct a reasonably thorough investigation." McGehee v. C.I.A., 697 F.2d 1099, 1101 (D.C. Cir. 1983).

A. The Search was Unreasonably Limited

The search in this case was unreasonably limited. The Department of Justice failed to search all of its components which might have responsive documents. For example, no search of the Internal Security Division, the Community Relations Service or the Office of Legal Counsel was substantiated. The FBI insisted, contrary to the testimony of an employee of the Department's Freedom of Information and Privacy Acts appeals unit, that its divisions do not have their own records. Hence, it made no search of its divisional records.

In addition, the FBI attempted to restrict its search to its MURKIN file despite evidence that other relevant documents existed outside MURKIN. It made no showing that it had searched the invividual items of Weisberg's December 23, 1975 request. Indeed, it is clear that the only items on that list which the FBI made a particularized search for were those which it was required to search

pursuant to the August, 1977 Stipulation between Weisberg and the Department. The remaining items it either did not search or refused to search.

The FBI's refusal to search certain items of the December 23, 1975 request without a privacy waiver was unjustified. The FOIA exemptions which implicate privacy values are Exemptions 6 and Exemption 7(C). Both require a balancing of the right of privacy against the public interest in disclosure before it can be determined whether or not they will support the withholding of information. Thus, in order to justifiably invoke these exemptions, a search for possibly responsive records and a review of their content must first be undertaken. If the content of the records is such that the agency takes the position that it can neither confirm or deny the existence of the records, then the district court may resolve the matter by in camera inspection, including ex parte affidavits. But "[b]efore adopting such a procedure, the district court should attempt to create as complete a public record as possible." Phillipi v. Central Intelligence Agency, 178 U.S. App.D.C. 243, 246-247, 546 F.2d 1009, 1012-1013 (1976).

B. "Previously Processed" Records

In processing field office records for Weisberg, the FBI withheld many on the grounds that they had been "previously processed" and released to him. However, Weisberg obtained evidence in another case, Weisberg v. Webster, Civil Action No. 78-0322, that the FBI procedures for identifying "previously processed"

field office records are flawed. In that case it was discovered that the FBI erroneously withheld 2,369 pages of Dallas Field Office records on the assassination of President Kennedy as "previously processed" when in fact they had not been processed and released at all. Thus, Weisberg adduced relevant evidence which placed in dispute the sufficiency of the FBI's identification procedures. This precluded summary judgment in the Department's favor. There simply is no evidence in the record which shows that its procedure for identifying "previously processed" records is reliable, and there is countervailing evidence which suggests that it is not.

A second circumstance regarding the field office records also demands a reprocessing of these records. A Stipulation entered into between the parties provided that field office records which were duplicates of Headquarters documents would be provided to Weisberg if they contained "notations." FBIHQ directed, however, that the field offices only provide duplicates which had "substantive, pertinent" notations. The Department's appeals officer stated that under the circumstances, this matter should be resolved in Weisberg's favor if he was not satisified with the result. Since the Department has chosen not to reprocess these records in accordance with the Stipulation signed by the parties, this Court should require it to do so.

C. Particularized Search Issues

In addition to the search issues listed above, there are many particularized search issues pertaining to matters such as

records on the investigation which the New Orleans Field Office was ordered to conduct on Raul Esquivel, Sr., records on J.C. Hardin, the Lawn tickler, etc. On remand the FBI must be required to describe with particularity its efforts to locate such records.

II. THE DEPARTMENT DID NOT SUSTAIN ITS BURDEN OF SHOWING THAT ITS EXEMPTION CLAIMS WERE JUSTIFIED

The Department submitted two Vaughn indexes in this case. Each one resulted in the release of information that previously had been withheld from Weisberg. Each index also tried to justify the continued withholding of information which did not qualify for exemption. Moreover, even taken together they failed to include examples of all the kinds of exemption claims made by the Department in this litigation.

In Vaughn v. Rosen, 484 F.2d 820, 826 (D.C.Cir. 1973), this Court devised a detailed indexing and justification procedure which it deemed necessary because the:

> existing customary procedures foster inefficiency and create a situation in which the Government need only carry its burden of proof against a party that is effectively helpless and a court system that is never designed to act in the adversary capacity. It is vital that some process be formulated that will (1) assure that a party's right to information is not submerged beneath governmental obfuscation and mischaracterization, and (2) permit the court system effectively and efficiently to evaluate the factual nature of disputed information.

The Vaughn sampling procedure simply cannot be used to justify withholdings in circumstances where the Vaughn index itself shows that there have been wrongful withholdings. To hold this would pervert the intended use of this procedure and turn it into a mechanism for allowing the Government to avoid rather than carry the burden placed upon it in FOIA litigation.

There especially can be no justification whatsoever for relying on a Vaughn index to support claims of exemption which are not even sampled. Yet in this case, as noted above at page 27, there were no examples at all of the use of exemptions 3, 5, 6 and 7(F), and the only 7(A) claim which appeared was dropped. The district court's decision upholding the Department's exemption claims on the basis of a Vaughn index which showed many examples of wrongful withholding and no examples of several exemptions was in error and must be reversed.

III. THE CONSULTANCY AGREEMENT BETWEEN WEISBERG AND THE DEPARTMENT IS A BINDING AND ENFORCEABLE CONTRACT

The district court found that no consultancy contract was formed between Weisberg and the Department because "essential terms were never agreed upon." Memorandum Opinion of January 20, 1983 at 24. There is no dispute that the parties agreed on the nature of the work to be performed. Furthermore, the district court found that there was agreement on the place the work was to be done and the rate of compensation. Thus, with regard to rate of compensation, the court found that it was "more likely than not that Ms.

Zusman offered to pay Mr. Weisberg $75 an hour in a conversation with plaintiff's counsel in March 1978.[15/] April 29, 1983 Memorandum Opinion at 3.

In fact, the court's holding that no contract was formed rests entirely on her finding that the parties did not agree on the number of hours to be worked. The court's ruling must be reversed for two reasons.

First, the court erred in finding that there was no agreement as to duration. It is evident from the facts of this case that the duration of the contract was fixed by the size of the task to be performed. Mr. Weisberg was given a specific job and it was agreed that he would complete it. As in many tasks performed under contract, it was not known at the outset how long it would take to complete it. That the parties did not initially agree on a time certainly is not surprising; indeed, it is difficult to see how the parties could have known what figure to chose. Essentially, the parties understood that Weisberg's employment would last as long as it took to complete the tasks at hand. This is what the parties agreed to and it was all they could agree to at the outset. In addition, as soon as he had a basis for estimating how long it might take him to complete the project, Weisberg promptly informed the Department. At no time did the Department tell Weisberg to stop working or to work to a certain point and then quit. To the contrary, the Department pressed him to do more work to complete the project.

The court's holding would essentially deprive individuals of the right to contract in all situations where the duration of the service to be performed could not be initially ascertained.

Secondly, the court offered no authority for the proposition that an otherwise valid employment contract should be considered unenforceable simply because there was no agreement as to its duration. To the contrary, the prevailing view is that such an agreement might be considered terminable at will or after a reasonable time, but would not be deemed invalid. Lewis v. Harcliff Coal Co., 237 F. Supp. 6 (D.C.Pa. 1965) Murray on Contracts, §27 (ed ed. 1974). Here the Department never attempted to terminate the consultancy arrangement until the work was complete. Furthermore, there has been no allegation that the time spent on the project was unreasonable. It must therefore be found that a valid contract was formed and that Weisberg is entitled to the full amount claimed.

The District Court erred in finding that Weisberg is not entitled to relief under the doctrine of Quasi-Contract.

Assuming arguendo that no enforceable contract existed because of failure to agree on the term of duration, there is ample authority on which to award monetary relief under the doctrine of "quasi" or "implied in law" contract. As stated in Williston on Contracts:

> The same principles apply where the parties have attempted to make a contract which is void because its terms are too indefinite, but where

> one party has, in good faith, and believing that a contract existed, performed part of the services which he had promised in reliance upon it. He has performed those services at the request of the other party to the contract, and in the expectation, known to the other, that he would be compensated therefor. Here is a sufficient basis for an implication in law that reasonable compensation would be made.

Williston, § 1480

Additional authority is found in Corbin on Contracts, § 95:

> Effect of part performance on an indefinite agreement. The determination of the intention of the parties and the interpretation of their words may both be largely affected by their conduct in the course of a transaction. The fact that one of them, with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consumate and intend to be bound thereby. *** In this way indefiniteness may be cured, or at least reduced. The fair and just solution may then be the enforcement of promises rather than a decision that no contract exists. One of the alternatives open to the court is a "quasi-contractual" remedy of restitution....

If an agreement is too indefinite and uncertain for enforcement, but performances of value have been received under it, a restitutionary remedy is available. See Tompkins v. Sandeen, 67 N.W.2d 405, 243 Minn. 256 (1954).

In the case of Marta v. Nepa, 385 A.2d 727 (Del. Supr. 1978) one party alleged that the alleged contract was unenforceable because there was no agreement as to compensation. The court disagreed:

> The circumstances of the case permit a recovery based on quasi contract, the general rule barring recovery for indefinite time of terms in contract is not applicable where the party performing the

> services expected to be paid." 13 Williston on Contracts § 1575; Bellanea Corp. v. Bellanea, 169 A.2d §20 (Del. Supr. 1961).

In the case at bar, the court held that no quasi-contract relief was appropriate for two reasons: (1) the Department did not benefit from Weisberg's work, and (2) Weisberg should have realized that further terms needed to be agreed upon before he proceeded with his work.

Both findings of fact are clearly erroneous. The Department did benefit from Weisberg's work. Weisberg provided two lenghty reports to the Department and these served as the basis for the administrative review of the FBI's performance by the Departmental appeals office. The use the Department made of these reports is reflected in two lengthy reports which Mr. Shea made to Mr. Lesar and which the Department filed in court. See September 27 and October 26, 1978 reports from Quinlan J. Shea, Jr. to James H. Lesar. [R. 84] This review culminated in Mr. Shea's testimony regarding his review at the hearing held on January 12, 1979.

With respect to the court's second finding, Weisberg did realize that the rate of pay needed to be clarified and he and his counsel repeatedly wrote the Department about this. This matter was resolved when Ms. Zusman offered to pay him at the $75 per hour rate and he accepted. As he was under direct pressure from the Department and indirect pressure from the court to complete his work, he did so.

IV. THE DISTRICT COURT ERRED IN CONSIDERING HOURLY RATE, EXCLUDING TIME SPENT ON ATTORNEY'S FEE APPLICATION, AND DECLINING TO INCREASE AWARD TO ACCOUNT FOR DELAY IN PAYMENT

A. Time Excluded

The district court excluded 36.7 hours from the total reimbursable time expended by Weisberg's counsel because she thought the time spent on the fee application itself was excessive. Although substantial time was spent on this issue, it does not appear to be out-of-proportion when compared with other cases. In Environmental Defense Fund v. Environmental Prot., 217 U.S.App.D.C. 189, 209, 672 F.2d 42, 62 (1982), which involved a roughly comparable amount of time spent on the case-in-chief, the EDF sought reimbursement for 114.4 hours of time spent on the attorney's fees issue, which is approximately 31% more than was claimed here. This Court approved all but 9.75 hours which EDF spent on a peripheral "timliness" issue. Weisberg's counsel should be reimbursed for the full amount of time spent on his fee application. The time spent on the fee application did not include time spent reconstructing time records as the district court apparently believed. January 20, 1983 Memorandum Opinion at 17.

B. An Adjustment for Delay in Receipt of Payment Should Have Been Made

The District Court declined to adjust the lodestar to take into account delay in payment because "the hourly rate is based on present hourly rates." Id. at 20. However, this

only takes into account back delay, not forward delay. A FOIA plaintiff is not entitled to interest on an award of attorney's fees, as this Court ruled in Holly v. Chasen, 205 U.S.App.D.C. 273, 639 F.2d 795 (1981). However this Court did suggest in that opinion that the possibility of a substantial delay in payment of a fee is a factor which the court may wish to take into account in considering a fee application. Id., 205 U.S.App.D.C. at 276.

C. The District Court Should Not Have Excluded Non-FOIA Cases in Considering Hourly Rate

The District Court awarded Weisberg's counsel $75 an hour. He sought $100 an hour, based in part on the finding in North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981), that the hourly rate for an experienced attorney (over 9 years) in the D.C. area was $110 per hour. The District Court excluded non-FOIA cases from consideration in setting the hourly rate. This is at odds with EDF v. EPA, supra, where the Court found that a listing of recent awards under a range of fee statutes should be accorded weight in determining the prevailing rate. 672 F.2d at 58 n. 11. The approach in EDF is consonant with both the prevailing view that awards under other fee provisions are relevant, see, e.g., Knighton v. Watkins, 616 F.2d 795, 800 (5th Cir. 1980); Population Services International v. Carey, 476 F. Supp. 4, 10 (S.D.N.Y. 1980), and with the fact that "lawyers engaged in a litigation pratice ordinarily do not vary their rates . . . depending on

the subject matter of the litigation." Berger, Court Awarded Attorneys' Fees: What Is Reasonable?, 126 U. Pa. L. Rev. 281 321 n. 160 (1977).

Moreover, it is at odds with the legislative history of the FOIA, where Congress made it clear that prior experience in implementing other fee provisions should serve as a guidepost for courts assessing reasonable fees in FOIA litigation. See, e.g., H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 607 (1974); S. Rep. No. 92-854, 93d Cong. 2d Sess. 17-20 (1974).

In addition, the district court's $75 an hour rate was not based on current market rates at all, but seems to have rested primarily on the rate Weisberg's counsel negotiated in two cases concluded two and five years ago.

CONCLUSION

For the reasons stated above, the Department failed to conduct an adequate search in this case or to justify the validity of its excisions through a Vaughn sampling technique. Summary judgment was therefore improper. In addition, the Department and Weisberg had a binding and enforceable consultancy contract and the Department should be ordered to pay Weisberg for the work he performed at the agreed upon rate.

Respectfully submitted,

JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Weisberg