

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, et al.,

Defendants.

DEFENDANT'S MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

I. Introduction

Plaintiff brought this action pursuant to the Freedom of Information Act, 5 U.S.C. §552, inter alia, seeking to enjoin defendants Griffin Bell, Benjamin Civiletti and Quinlan Shea, Jr., from withholding a determination of his request for a waiver of all search and copying fees involved in the release of FBI Headquarters records pertaining to the assassination of President John F. Kennedy. Plaintiff also seeks to effectively enjoin defendant Clarence M. Kelley^{1/} from releasing the remaining 40,000 pages of FBI Headquarters records pertaining to the assassination of President Kennedy to other requesters until after the FBI has made them available to him. For the reasons set forth below, there is no basis for the issuance of a preliminary injunction in this case and defendants respectfully suggest that plaintiff's motion should be denied.

^{1/} The Department of Justice, rather than the individuals named, is the proper party in this action.

II. Argument

A. A DETERMINATION OF PLAINTIFF'S REQUEST FOR
A WAIVER OF ALL SEARCH FEES AND COPYING
COSTS HAS BEEN MADE.

Plaintiff is seeking injunctive relief to compel a determination whether or not to grant him a waiver of the costs of searching for and reproducing the documents requested. A final determination on this matter has now been made. See Exhibit B to defendants' Motion To Dismiss. Since the relief sought has been granted, as is discussed in defendants' Motion To Dismiss, this issue has been rendered moot. There is no need for this Court to compel defendants to make a determination that has already been made.

B. THE DOCUMENTS IN QUESTION WILL BE MADE
AVAILABLE TO PLAINTIFF.

The Freedom of Information Act provides, inter alia, that upon proper request an agency "shall make the records promptly available to any person." 5 U.S.C. §552(a)(3) [emphasis added]. The documents at issue here will be made available to plaintiff and to the general public on January 18, 1978, at the FBI Reading Room in Washington, D.C. These records are not being "withheld" from plaintiff. 5 U.S.C. §552(a)(4)(B).

Indeed, the thrust of plaintiff's Complaint is not that defendants have improperly refused to make these documents "available," but rather that defendants have improperly refused to give plaintiff his own personal set before they are made available to the general public.

C. PLAINTIFF CAN OBTAIN COPIES OF THE DOCUMENTS
IN QUESTION WHEN HE PAYS FOR THEM OR OBTAINS
A WAIVER.

The Freedom of Information Act further provides that any person may obtain copies of the documents upon payment of search and reproduction fees as provided in agency regulations or upon obtaining a waiver or reduction of those fees. [5 U.S.C. §552(a)(4)] Plaintiff's waiver request has been granted in part. He

has no right to keep all other requesters from examining these materials. These documents which are the subject of numerous FOIA requests have been determined not to be exempt from disclosure. Therefore the FOIA requires prompt disclosure to all. 5 U.S.C. §552(a)(3).

D. PLAINTIFF HAS NOT MET HIS BURDEN OF PROVING THAT HE IS ENTITLED TO A PRELIMINARY INJUNCTION.

The standard of granting preliminary injunctive relief in this circuit is set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958). That decision discusses four factors to be considered in determining whether a preliminary injunction should be issued: (a) whether there is a substantial likelihood of plaintiff's success on the merits; (b) whether the plaintiff will suffer irreparable injury without an injunction; (c) whether the injunction will injure other parties, and (d) whether the injunction is consistent with the public interest. See also Hamlin Testing Labs, Inc. v. Atomic Energy Commission, 337 F.2d 221 (6th Cir. 1964); Associate Securities Corp. v. S.E.C., 283 F.2d 773 (10th Cir. 1960).

Plaintiff has failed to satisfy even one of these criteria. Plaintiff is not likely to prevail on the merits. Indeed, the sole argument that plaintiff offers to satisfy this criterion is based on his misapplication of Open America. For the reasons set forth in defendants' Motion To Dismiss, plaintiff's remaining causes of action are of dubious merit.

Plaintiff has failed to demonstrate that he will be irreparably injured without a preliminary injunction. Plaintiff's assertion of harm only addresses the question of the determination on his request for a fee waiver, a question now rendered moot.

Harm will result to others if a preliminary injunction is granted. The real parties at interest here are not Clarence Kelley, the FBI or the Department of Justice, but rather the

other 118 requesters and the general public to whom the documents are to be made available on January 18, 1978. If defendants are forced to delay the scheduled release at this late date documents which clearly must be disclosed under the Freedom of Information Act will not be made available to the public as required by the Act. Moreover, persons with a substantial interest in these materials, including representatives of the press, who have made arrangements to be at FBI Headquarters to avail themselves of these documents would be denied their rights to examine these materials and would be forced to return to Washington at a time which meets with plaintiff's approval.

Plaintiff has failed to demonstrate that the issuance of the preliminary injunction would be in the public interest. Apart from plaintiff's veiled and questionable assertion that the public should be denied access to these records unless first given the benefit of his digestion and evaluation, plaintiff has treated no other interest but his own. To the contrary, recognizing the widespread public concern in the documents in question, the public interest will be best served by their immediate release to the public at large.

III. Conclusion

As established above, plaintiff's motion for a preliminary injunction and the supporting memorandum of points and

authorities filed therewith fail to establish a basis for the relief sought. The motion, under these circumstances, must be denied.

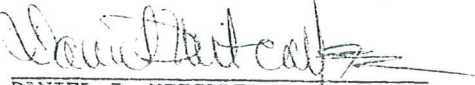
Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney


LYNNE K. ZUSMAN


PAUL F. FIGLEY


DANIEL J. METCALFE


JOANN DOLAN

Attorneys, Department of Justice
Civil Division, Room 6332
10th & Pa. Ave., N.W.
Washington, D.C. 20530
Tel: 739-3664

Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 77-2155

GRIFFIN BELL, et al.,

Defendants.

ORDER

On consideration of plaintiff's Motion For Preliminary Injunction and the memoranda of points and authorities filed by the parties in support thereof and in opposition thereto, and upon the Court's finding that this cause is not appropriate for preliminary injunctive relief inasmuch as the requirements for such relief are not satisfied, Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958), it is by the Court this _____ day of January, 1978,

ORDERED that plaintiff's Motion For Preliminary Injunction be, and it hereby is, denied.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing Defendants' Memorandum In Opposition To Plaintiff's Motion For Preliminary Injunction and proposed Order upon plaintiff, by depositing a copy thereof in the United States Mail, first class mail, postage prepaid, to:

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

and by hand delivery to:

James H. Lesar, Esquire
910 16th Street, N.W.
Suite 600
Washington, D.C. 20006

this 12th day of January, 1978.


DANIEL J. METCALFE