

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.

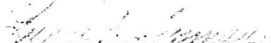
MOTION TO DISMISS


Defendants, by their attorneys, hereby move the Court to dismiss the above-captioned action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the Court lacks jurisdiction over the subject matter of this action and that the Complaint fails to state a claim upon which relief can be granted. In support of this motion, the Court is respectfully referred to the memorandum of points and authorities filed herewith.

Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney


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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS

Preliminary Statement

This action was filed by plaintiff Harold Weisberg on December 19, 1977, seeking declaratory and injunctive relief in connection with the forthcoming release by the Government ^{1/} of the second and final segment of the FBI Headquarters investigation file materials concerning the assassination of President John F. Kennedy. ^{2/} Plaintiff is one of more than one hundred individuals or groups who have, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, requested access to some, if not all, of these materials. ^{3/} He seeks to have the Government "enjoined from

^{1/} The Federal Bureau of Investigation, which is presently engaged in the final preparations for this release, has recently announced (and has directly notified plaintiff) that its target release date is January 18, 1978. The materials will not be released prior to that date.

^{2/} The first half of these investigation file materials, totalling in excess of 40,000 pages, was released on December 7, 1977, and is readily available to all for public inspection and/or reproduction at the FBI Reading Room in Washington, D.C. It is anticipated that complete sets of the total file materials will be placed in other research facilities in the near future.

^{3/} Approximately 118 different parties have filed at least one Freedom of Information Act request pertaining to some portion of these materials. Although the sheer magnitude of both the materials and the number of different FOIA requests received from individual parties has complicated such an assessment, it appears that approximately 45 parties, including plaintiff, have in the aggregate requested access to substantially all of the investigation file materials.

withholding" this second segment of file materials from him personally at this time,^{4/} and "enjoined from further withholding" a determination of his request for a waiver of all search fees and duplication costs in connection with these documents.^{5/}

In essence, plaintiff seeks through this lawsuit an order from this Court compelling the Government to transmit these materials to him personally, free of charge, before making them available to all other requesters and to the public in general. Defendants respectfully suggest to the Court that this action is wholly lacking in merit and for the reasons set forth below should be summarily dismissed.

I. Plaintiff's Claim Concerning
Withholding Of Documents From
Him Personally At This Time
Should Be Dismissed For Failure
To State A Claim

The gravamen of plaintiff's complaint in this litigation is his sweeping claim of some special personal entitlement to the materials which are very soon to be released to the public by the Government. It is upon the basis of plaintiff's theory that he should have private, preferential access^{6/} to

4/ See note 7 infra. Defendants have opposed plaintiff's Motion For Preliminary Injunction by separate memorandum filed with the Court this date.

5/ Plaintiff's request for a special "public interest" waiver of all fees under 5 U.S.C. §552(a)(4)(A) was made by his counsel's letter of November 19, 1977, which is attached to the Complaint as Exhibit 7. As is described below, plaintiff's request for waiver of copying costs has been denied (no search fees will be assessed in connection with this release) and his claim with respect to the withholding of this determination is now moot.

6/ See, e.g., Complaint ¶¶20, 21 & 24 ("... deprived him of the opportunity to commercially profit from the use of the newly released records and the information contained in them in his books, interviews, lectures and consultancies on this subject;") (emphasis added); plaintiff's Memorandum Of Points And Authorities in support of his Motion For Preliminary Injunction at 3 ("... irreparable harm will be done plaintiff, as he cannot use documents which he does not have to earn his livelihood."). But see text at page 7, infra.

disclosable Government records that he seeks injunctive relief from this Court.^{7/}

Yet this is a theory of plaintiff's own devise, one which in fact has no basis in the pertinent statute and is even antithetical to statutory policy. The Freedom of Information Act, of course, does not recognize any special private entitlement of one individual requestor of access to documents viz other requesters or the public in general. As the Supreme Court has noted, a requester's ". . . rights under the Act are neither increased nor decreased by reason of the fact that [he] claims an interest in the [documents sought] greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). See also Renegotiation Board v. Bannerkraft Co., 415 U.S. 1, 24 (1974); EPA v. Mink,

^{7/} Plaintiff seeks both a preliminary injunction prohibiting the Government "from withholding the remaining batch of 40,000 pages of FBI Headquarters records on the assassination of President Kennedy from [him] until after the FBI has made them available to other requestors," and "an order in the nature of mandamus" compelling the Government to provide copies of all such records ". . . to plaintiff at his residence in Frederick, Maryland no later than the date upon which the next batch of said records is made available to other requestors." Complaint at 9, 10 (emphasis added). The relief requested by plaintiff, if granted, would have the effect of limiting the rightful access of others to the materials at issue, thereby contravening both the spirit of Open America and the Freedom of Information Act itself. Once a determination to release has been made and the processing of that release is complete, records should promptly be made available to the public. See 5 U.S.C. §552(a)(3).

That plaintiff phrases his requests for relief as such indicates that he attempts through this lawsuit to litigate a theoretical cause of action other than the standard FOIA claim challenging an agency's determination not to release information deemed exempt from disclosure under 5 U.S.C. §552(b). This action, of course, should not be viewed as raising a standard FOIA claim because, even aside from the fact that all pertinent file materials either have been or soon will be released, plaintiff's Complaint does not allege with anything even approaching the requisite level of specificity those details concerning the administrative processing of his various FOIA requests which would be necessary to a proper statement of such a claim.

410 U.S. 73, 79, 92 (1973); N.L.R.B. v. Hardeman Garment Corp., 557 F.2d 559, 561 (6th Cir. 1977). Thus, the Freedom of Information Act in no way supports plaintiff's claim for relief.^{8/}

Nor does the case of Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), in any way authorize the maintenance of this cause of action. Although plaintiff relies upon that case heavily (albeit only generally) in his papers,^{9/} the Open America decision does not speak to the manner in which an agency such as the FBI may effectuate public disclosure of materials which are responsive to multiple FOIA requests.^{10/} Rather, as the Court of Appeals itself took pains to point out, that case adjudicated only the plaintiffs "claim of absolute right to have their [FOIA] request processed within the statutory ten-day and twenty-day periods" specified at 5 U.S.C. §552(a)(6)(A) and (B). 547 F.2d at 609 & n.9. After reviewing the unforeseen enormity and difficulty of the

^{8/} It should be noted that nowhere in his otherwise comprehensive papers does plaintiff even attempt to assert a specific statutory basis under the Freedom of Information Act for the relief sought in this lawsuit.

^{9/} See Complaint at 8-10; Plaintiff's Memorandum Of Points And Authorities in support of his Motion For Preliminary Injunction at 2. It should be noted that plaintiff has failed to explain, beyond the level of bare assertion, how or where this decision imposes a pertinent "mandate" upon the Government.

^{10/} Again, the relief sought in this lawsuit centers around the manner in which the materials at issue are to be disclosed to the general public and FOIA requesters such as plaintiff. In substance, this lawsuit challenges the Governments' right (or, in fact, its obligation) to make these materials simultaneously available to all interested persons (general public and FOIA requesters alike) on equal terms. Such a disclosure issue, and its underlying considerations of the public interest, is separate and distinct from the matter of the orderly and efficient administrative processing of FOIA requests.

demands placed on the FBI by the Freedom of Information Act,^{11/} the Court of Appeals concluded that the FBI had admirably met these demands with a fair and orderly processing procedure which, although not yielding the unrealistically short response periods sought by Congress, obviously constituted good faith compliance with the Act. Id. at 614, 616. In so doing, the Court of Appeals also tendered its endorsement of the FBI's dual processing policies of "assigning all requests on a first-in, first-out basis" and of efficiently handling particularly burdensome and complex requests as "project requests."^{12/}

It is just such a "project request" -- perhaps the largest and most burdensome such project yet confronted

^{11/} See 547 F.2d at 612-13. The Court of Appeals left little doubt but that the "deluge" of FOIA and Privacy Act requests experienced by the Government in recent years has exceeded almost exponentially the stated expectations of Congress, to the point at which these demands, at least in the case of the FBI, "may reasonably be viewed as 'exceptional circumstances.'" Id. at 612.

^{12/} Id. at 612-13, 616. The Court of Appeals' opinion describes the FBI's "two-track" processing system as follows:

To expedite this necessarily tedious process, requests are separated into difficult and simple requests, identified respectively as "project requests" or "non-project requests". Project requests customarily involve handling thousands of pages of documentary materials.

Id. at 612. As recognized by the Court of Appeals in Open America, the FBI makes it a matter of policy to assign FOIA requests for processing according to an orderly, chronological system, though in major "project request" situations, such as is certainly the case here, multiple FOIA requests for all or portions of the same group of materials are often processed within the same time frame, leading to a single release of oft-requested materials. Defendants are confident that this "makes good sense administratively." Id. at 619 n.6 (Leventhal, J., concurring).

by a federal agency -- which is involved in the matter presented before the Court here. The FBI Headquarters investigation file materials concerning the assassination of President Kennedy are exceptionally voluminous and are of extraordinary interest to FOIA requesters and to the public in general. For these reasons and because of the numerous and varied FOIA requests made with respect to these materials, the FBI has efficiently assembled together all of these materials and is now prepared to release the last segment of them to all, thereby satisfying the public's interest as well as the specific FOIA requests made by plaintiff and scores of others. As indicated above, the materials in this second segment release -- as is presently true with respect to the first segment -- will be readily available to all interested persons or their representatives. ^{13/}

Defendants respectfully submit that there exists no basis under statute or precedent upon which the particular FOIA requester here before this Court can state what amounts to a claim for private, preferential access to these materials, and that such a claim should be summarily dismissed.

^{13/} It is evident on the face of plaintiff's Complaint that, inter alia, he resides in the Washington, D.C. metropolitan area and that he or any representative of his would be close to the materials which he seeks. See Complaint, ¶2.

By contrast, it should be noted that there exist numerous other similar FOIA requesters who reside at great distances from Washington, D.C.; those parties who have also requested fee waivers in connection with these materials have had their requests denied. See Exhibit A at 2.

II. Plaintiff's Claim Concerning Withholding
Of Fee Waiver Determination Should Be
Dismissed As Moot

As a necessary corollary to his claim for preferential access to the materials at issue, plaintiff also seeks an order from this Court enjoining the Government from "withholding" a determination of his request for waiver of all fees in connection with these materials.^{14/} Such a determination has now been made at both the initial and appellate levels and plaintiff has been advised of the Government's final decision to grant a 40% partial waiver based upon a balancing of all relevant considerations, including the public interest.^{15/} See 5 U.S.C. §552(a)(4)(A). Accordingly, defendants submit that this claim has been rendered moot by events subsequent to the filing of the Complaint and therefore should be dismissed. See DeFunis v. Odegaard, 416 U.S. 312 (1974); Securities and Exchange Commission v. Medical Committee For Human Rights, 404 U.S. 403 (1972); Powell v. McCormack, 395 U.S. 486 (1969).

Conclusion

For the foregoing reasons, and for such further reasons as are set forth in Defendants' Memorandum Of Points And Authorities In Opposition To Plaintiff's Motion For Preliminary Injunction, defendants respectfully suggest

^{14/} See note 5 supra.


^{15/} See Exhibits A and B. Defendants respectfully submit that, for the reasons explained to plaintiff in these decision letters, the awarded 40% partial waiver is both reasonable and appropriate under the instant circumstances and is in no way arbitrary or capricious as applied to plaintiff. See also note 13 supra.

that their Motion To Dismiss should be granted and this
action should be summarily dismissed.

Respectfully submitted,

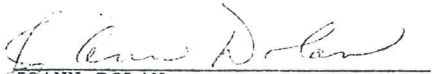

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ORDER

Upon consideration of defendants' Motion To Dismiss, the papers filed with respect thereto, and the entire record herein, and it appearing to the Court that this action should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, it is by this Court this ____ day of January, 1978,

ORDERED that defendants' Motion To Dismiss be, and it hereby is, granted; and it is further

ORDERED that this action be, and it hereby is, dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing defendants' Motion To Dismiss and accompanying memorandum of points and authorities, exhibits, 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

Exhibit A

January 9, 1978

James H. Lesar, Esq.
Suite 500
910 Sixteenth Street, N. W.
Washington, D. C. 20006

Dear Mr. Lesar:

Your letter of November 19, 1977, on behalf of your client, Mr. Harold Weisberg, to the Deputy Attorney General, has been forwarded to the Federal Bureau of Investigation (FBI) for reply. You make request for waiver of fees for Mr. Weisberg for duplication of documents in the FBI Headquarters (FEHQ) file on the assassination of President John F. Kennedy.

For your information, more than 80,000 pages of raw FEHQ files concerning this investigation have been prepared for public release under the Freedom of Information Act (FOIA). Moreover, as you are aware, 40,001 pages of our JFK Assassination investigation materials are already in the public domain. A copy of the entire JFK Assassination release, including our first-segment release of December 7, 1977, and a second segment release scheduled for mid-January, 1978, will be maintained for public review in our Reading Room.

One set of these documents, the duplication of which requires many days of duplication machine time, in addition to the cost of paper, binders and other material, fills numerous file cabinets. Additionally, labor costs in the reproduction, review and assembly are substantial. The entire budgetary expenditure of the FBI, to date, in processing this single FOIA release of JFK Assassination investigation files, has exceeded \$180,000.

James H. Lesar, Esq.

While we fully understand the public interest in these documents, we have taken into consideration the extraordinary volume of JFK Assassination file material, their availability to the public, and the material and manpower required to reproduce them. We have therefore concluded that the public interest would be best served by assertion of the duplication fees set by regulation rather than by waiver of these fees, and that additional copies reproduced at government expense should be made available to the general public, rather than individual requesters for their personal use. We anticipate that additional sets of documents will be produced and placed in other research facilities, such as the Library of Congress, in the near future.

The JFK Assassination investigation file material is being made available to other requesters on the same terms as are now available to Mr. Weisberg. In cases where these requesters for the total JFK Assassination investigation files have sought waiver of duplication fees, we have denied their requests for waiver for the same considerations and as a matter of general policy.

These file materials are available for Mr. Weisberg's review during business hours at our Reading Room located at FBIHQ, 10th and Pennsylvania Avenue, N. W., Washington, D. C.

You may of course, appeal my decision in this matter. Any appeals should be directed to the Deputy Attorney General (Attention: Freedom of Information Appeals Unit), Washington, D. C. 20530, and should be clearly marked "Fee Waiver Appeal."

Sincerely yours,

Clarence H. Kelley
Director

Exhibit B



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

James H. Lesar, Esquire
Suite 500
910 Sixteenth Street, N. W.
Washington, D. C. 20006

JAN 12 1978

Dear Mr. Lesar:

On November 19, 1977, on behalf of your client, Mr. Harold Weisberg, you wrote to former Deputy Attorney General Flaherty requesting a waiver of all fees that might be assessed as a result of your client's request for access to records of F.B.I. Headquarters pertaining to the assassination of President John F. Kennedy. That request was forwarded to Director Kelley for initial consideration and response to you. I have now been informed that Director Kelley has decided not to waive reproduction charges (as in the case of records pertaining to the assassination of Dr. Martin Luther King, Jr., no search fees were assessed), and that he has communicated his decision to you.

The release to the public of the second portion of the Bureau's files on the Kennedy assassination is scheduled to occur on Wednesday, January 18. I am aware of the legal action you have filed on behalf of Mr. Weisberg, seeking, *inter alia*, to enjoin that release, or, in the alternative, to obtain a complete fee waiver on his behalf. Although no formal appeal from Director Kelley's denial of the fee waiver request has been received by me, it is my judgment that the circumstances of this particular case are now such that both simple fairness and the interests of justice would be served by my independent consideration of the fee waiver request.

There are certain obvious parallels between Mr. Weisberg's efforts to obtain access to the Kennedy assassination records and those pertaining to the King assassination. In each case we are concerned with records pertaining to an event of great historical importance and substantial interest on the part of the general public. It is in recognition of this that Director Kelley did not assess search fees in either case and, on his own initiative, made arrangements for the released materials to be made available

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at a number of different public locations, which I do not believe has been done with the King records. There are other similarities and distinctions between the two cases as well.

In acting on Mr. Weisberg's appeal from Director Kelley's refusal to grant any fee waiver as to the King records, I modified that decision and granted a partial waiver, in the amount of forty cents on the dollar. I was well aware of the fact that Mr. Weisberg has a commercial motive in seeking access to those records. In my view, this is ordinarily a more than sufficient reason to deny any fee waiver under the Freedom of Information Act. This statute is intended to ensure that the public is informed as to the workings of its Government, not that individuals can profit thereby. On the other hand, I felt that there was a sufficient counterbalancing public interest in that case to grant him the partial waiver. By examining your most recent complaint filed on behalf of Mr. Weisberg, I have become considerably more aware of just how blatantly commercial is the nature of what appears to be Mr. Weisberg's primary goal in seeking access to all of these records. By means of the content of the attachments to that complaint, however, as well as similar information from other sources, I am also somewhat more aware of the real, albeit limited, extent to which Mr. Weisberg does function in this area in support of the public interest.

On balance, I have concluded that the case for any fee waiver on behalf of Mr. Weisberg in the instant case is weaker than was true with the King records, but that the distinction does not warrant a difference in result. Accordingly, it is my decision that, to whatever extent Mr. Weisberg chooses to obtain copies of the Kennedy assassination records, he will be charged therefor at the rate of six cents per page, rather than ten cents.

Sincerely,

Benjamin R. Civiletti
Acting Deputy Attorney General

By:

Quinlan J. Shea, Jr., Director
Office of Privacy and Information Appeals