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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

Washington, D. C.
January 16, 1978

The above-entitled cause came on for Hearing before
the HONORABLE GERHARD A. GESELL, United States District Judge,
at 11:00 a.m.

APPEARANCES:

JAMES H. LESAR, Esq.,
Counsel for Plaintiff

PAUL F. FIGLEY, Esq.,
DANIEL J. METCALFE, Esq.,
JOANN DOLAN, Esq.,
Department of Justice,
Counsel for Defendants

IDA Z. WATSON
Official Reporter
U. S. Court House
Washington, D. C.

COPY FOR:
MR. LESAR

P R O C E E D I N G S

1
2 THE COURT: Good morning.

3 THE CLERK: Civil Action No. 77-2155, Weisberg v.
4 Bell, et al. Mr. James H. Lesar for the Plaintiff.
5 Mr. Paul Figley, Mr. Daniel Metcalfe and Miss Joann Dolan
6 for the Defendants.

7 THE COURT: This matter comes to the Court because
8 the Court is motions judge this month. Judge Hart has the
9 flu and has been under the weather.

10 I would like to understand before we start precisely
11 what is before the Court. There has been a blizzard of papers
12 this morning.

13 As I understood it, it was an application for a
14 preliminary injunction. Apparently the issue has been broadened
15 somewhat by these recent filings. I wanted to determine
16 whether the parties are contemplating a hearing on both the
17 question of the timing of the release and the fee waiver
18 problem or what it is I am supposed to be deciding.

19 MR. LESAR: Your Honor, Jim Lesar, representing
20 Plaintiff Harold Weisberg.

21 THE COURT: Yes, Mr. Lesar.

22 MR. LESAR: I think that as a result of the fee
23 waiver determination which was made by Mr. Shea, who is the
24 Director of the Office of Information and Privacy Appeals,
25 Department of Justice, the first issue the Court has to decide

1 is whether or not that decision is arbitrary and capricious.
2 If it so holds, then Plaintiff will be entitled to obtain
3 the documents.

4 Once that issue is resolved, there is no justifica-
5 tion for withholding them from him any longer; that he is
6 entitled under the Freedom of Information Act to have those
7 documents as soon as that determination is made, and certainly
8 no later than the planned release of those documents to other
9 requesters. Some of the documents, of course --

10 THE COURT: Well, what I have been looking for is
11 what is the administrative record with respect to the fee
12 waiver problem?

13 MR. LESAR: The administrative record consists, first
14 of all, of a letter to me -- first, my request of November 19,
15 1977.

16 THE COURT: Right.

17 MR. LESAR: Secondly, Director Kelley's letter.

18 THE COURT: Turning you down.

19 MR. LESAR: Denying it in toto. And third, the
20 January 12 letter from Mr. Shea reducing it to a rate of
21 six cents a page.

22 THE COURT: Now, are both sides agreed that that is
23 the administrative record?

24 MR. FIGLEY: Your Honor, there is one addition.
25 A letter was sent today to Mr. Lesar correcting the deletion

1 that was made, typographical error, in the letter that was sent
2 out last week. This is in addition to Mr. Shea's letter.

3 Here is a copy of it. Here is a copy to you.

4 (Whereupon the document was submitted to the Court
5 and Plaintiff's counsel.)

6 MR. FIGLEY: With this addition, this does constitute
7 the entire administrative record.

8 THE COURT: All right. And that issue then is before
9 me as well as the initial matter that was raised.

10 MR. LESAR: The initial matter that was raised may
11 become necessary in my view only if you uphold Mr. Weisberg's
12 contention that he is entitled to a complete waiver of the
13 fees and then the Government seeks to appeal that ruling.
14 Then the initial matter may arise. Other than that, it seems
15 to me that a determination of the issue in Mr. Weisberg's
16 favor on the question of the fee waiver should end the imme-
17 diate controversy.

18 THE COURT: Do you agree with that?

19 MR. FIGLEY: No, sir.

20 THE COURT: I didn't think so.

21 MR. FIGLEY: Mr. Weisberg has brought the action
22 before the Court today on a motion for a preliminary injunction.
23 In his motion and in the draft order which he submitted, it
24 is clear that he seeks two things: One, an order from the
25 Court requiring Defendants to make a determination as to his

1 request for a fee waiver. That determination has been made
2 both in the initial and on the appellate level.

3 Secondly, he seeks an order barring the Government
4 from withholding records from him.

5 The Government is not withholding records from him.
6 They will be made available to him at the same time they are
7 made available to everyone else at the FBI reading room.
8 They are not being withheld under the Freedom of Information
9 Act.

10 Copies are not being provided to him for his personal
11 use free of charge. But that is not set forth in Plaintiff's
12 motion for preliminary injunction and is not properly before
13 the Court at this time.

14 MR. LESAR: Your Honor, I wish to object very
15 strenuously to the representations made.

16 In the first place, some of the documents at issue
17 have already been made available to other requesters. My
18 client is not being treated equally.

19 I received in the mail today an affidavit from
20 Mr. Paul Hoch, of Berkeley, California. I submitted that
21 affidavit earlier this morning. That affidavit states that
22 Mr. Hoch received three volumes of the files on Lee Harvey
23 Oswald, three volumes of the FBI's Lee Harvey Oswald's files.
24 I believe the date was September 22, 1977, considerably in
25 advance of the December 7 general release.

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The fact of the matter is that the --

THE COURT: That is the past release, though, isn't it?

MR. LESAR: Pardon?

THE COURT: That is the past release.

MR. LESAR: That is the past release.

THE COURT: Not the release scheduled for the 18th.

MR. LESAR: Yes, but the fact of the matter is that the -- I have had a very difficult time trying to review the totality of what I know about the FBI's operations in this area.

Shortly before, about fifteen minutes before this hearing began, I located an affidavit in a case involving Fensterwald v. the Department of Justice, in which Mr. Fensterwald sought certain records pertaining to the Kennedy assassination and to the Lee Harvey Oswald file.

This affidavit was executed in August of 1976. Let me check the exact date. August 21, 1976, a year and a half ago.

Paragraph 4 of that affidavit says:

"In our effort to locate records in possession of the FBI which would be responsive to Plaintiff's request, which consisted primarily of photographic materials and documents concerning the materials related

1 to our investigation of the assassination of
2 President John F. Kennedy, we conducted a
3 page-by-page review of the entire FBI file
4 concerning Lee Harvey Oswald. This file
5 consists of 237 volumes, each of which averages
6 150 to 200 pages. We additionally reviewed
7 those portions of the FBI file concerning the
8 Kennedy assassination, the FBI file concerning
9 Jack Ruby and the FBI's administrative record
10 pertaining to the President's Commission on
11 the Assassination of President Kennedy, more
12 commonly known as the Warren Commission, which
13 were referred to in the Oswald file and which
14 appeared most likely to contain the records
15 sought by the Plaintiff. Page-by-page review
16 had previously been conducted in response to
17 other FOIA requests and in fulfillment of other
18 statutory responsibilities."

19 This is a year and a half ago. They had already
20 conducted reviews and made attempts to comply with the requests
21 of other requesters.

22 They have steadily ignored my client's requests and
23 now they have contrived a situation in which they object to
24 providing him with the records at the same time as everybody
25 else.

1 If they do not provide him with copies of the
2 records, it amounts to a de facto denial of his right to
3 access to those records because he cannot afford to pay for
4 them. He is indigent and he is in ill health and they know
5 this. He cannot come to Washington, D. C. every day to re-
6 view those records. He has very serious medical problems.

7 In this last year, he expended more money in pur-
8 chasing Government records and making them public than he
9 earned in income. In spite of this, Mr. Shea's letter infers
10 that his motives are blatantly commercial. That, I suggest,
11 is itself sufficient indication that Mr. Shea's decision is
12 arbitrary and capricious and cannot be countenanced and must
13 be reversed.

14 If the Court has any further questions, I would be
15 happy to answer them.

16 THE COURT: I have been unable to determine from
17 the papers, Mr. Lesar, what your client's FOIA request was.
18 I don't think it is in the papers before me.

19 MR. LESAR: Yes. The complaint specifies some of
20 them. I think that for purposes of this, the most important
21 one is his request of October 27, 1975, for the entire FBI
22 headquarters files on Lee Harvey Oswald. That certainly
23 would comprise a very substantial portion of the records.

24 THE COURT: Of the group of documents to be released
25 on the 18th?

1 MR. LESAR: Yes, absolutely. In addition to that,
2 he has numerous requests going back over a period of a decade.

3 THE COURT: I realize that. I was trying to identify
4 the requests that really are most germane to the present
5 disclosure.

6 MR. LESAR: That is one that is germane. Let me
7 give you an example of another that is germane because it
8 also provides a very, I think, obvious refutation of the
9 Government's claims to fair treatment and equal access.

10 On December 6, 1977, one day before the first re-
11 lease of 40,001 pages, Mr. Weisberg made a request for the
12 FBI worksheets on these documents. The worksheets would
13 enable him and other requesters to pick and select the most
14 important documents. He still has had no response whatsoever
15 to that request.

16 THE COURT: Are you aware of whether or not news
17 media like, say, CBS or the New York Times or the St. Louis
18 Post Dispatch, or whatever, pay for these documents?

19 MR. LESAR: My understanding is that they did pay.
20 Yes, that is correct.

21 THE COURT: In other words, they pay the six-cent
22 rate?

23 MR. LESAR: I am not certain but I assumed that they
24 have been charged the ten-cent rate.

25 THE COURT: And would be with respect to this

1 January 18 disclosure?

2 MR. LESAR: I believe that is true but I can't
3 really say it from my own knowledge.

4 THE COURT: Right.

5 MR. LESAR: I would call the Court's attention in
6 that regard that there is some legislative history of the
7 Freedom of Information Act which indicates that Congress
8 clearly intended to make a distinction between indigents and
9 non-profit organizations and commercial interests or other
10 organizations that are sufficiently able to pay costs, that
11 it does not impede their right to access.

12 The issue here is that it is a de facto denial of
13 his right to access. Congress, in enacting the 1974 amendments
14 to the law, expressly sought to eliminate de facto denials
15 by legislating attorney fees and the reduction of copying
16 costs provisions.

17 THE COURT: What cost do you understand it is that
18 the FBI is recovering? That is a confusing matter to the Court,
19 looking at it.

20 One is just the cost of the reproduction of the
21 individual sheet of paper. The Government says in its papers
22 that it ran up a cost of \$138,000 -- I believe it says -- in,
23 I take it, making file searches of one kind or another.

24 MR. LESAR: I don't really think, Your Honor, that
25 file searches should have been that much of a problem.

1 THE COURT: I don't know whether it should or not.
2 But what cost is it that is supposed to be returned?

3 MR. LESAR: Well, I think, frankly, Judge Robinson's
4 decision in the Fitzgibbon case indicates that that is an
5 improper consideration.

6 THE COURT: What is an improper consideration?

7 MR. LESAR: That the cost in searching for documents
8 and compiling them -- I think it is the Fitzgibbon decision.

9 THE COURT: But surely it doesn't cost ten cent to
10 copy a sheet of paper.

11 MR. LESAR: Absolutely not, particularly not with
12 the super-Xerox copiers that they have.

13 THE COURT: And the volume.

14 MR. LESAR: And the volume is enormous. It costs
15 very little.

16 THE COURT: Has there ever been any justification
17 of the FBI's ten-cent charge that you have seen?

18 MR. LESAR: No, I have never seen any justification.
19 As a matter of fact, when I started to think about the FBI's
20 figures on the cost, when I read their letter reciting the
21 cost, my immediate reaction was, I wish I could get an inquiry
22 into how much of that is involved in unjustifiable deletions.

23 You know, I have had cases, including the King
24 assassination documents case, where they have provided us
25 with copies of newspaper clippings with deletions in them.

1 Now the taxpayers are paying for that.

2 THE COURT: But that is not part of the cost that
3 is supposed to be covered, is it? The cost that is supposed
4 to be covered is the reproduction cost, isn't it?

5 MR. LESAR: That would seem to me to be the only
6 proper part of the charge, yes, that is correct.

7 THE COURT: I mean in terms of the charge.

8 MR. LESAR: In terms of the charge that would be the
9 only proper part. So that we don't even know, given the
10 figures, how much above the actual cost the six-cent figure
11 is.

12 THE COURT: That is why I asked what the administra-
13 tive record showed.

14 MR. LESAR: The administrative record does not re-
15 flect anything on that.

16 THE COURT: Has nothing about costs in it?

17 MR. LESAR: Not in any figure that would give you
18 any rational basis for making a decision on. It is not there.
19 It is a lump-sum figure that is not broken down.

20 THE COURT: All right.

21 Let's hear what the United States has to say.

22 Mr. Weisberg, if you want to put your legs up, there
23 is no reason that you shouldn't.

24 MR. WEISBERG: I have them up, sir. Thank you.

25 MR. LESAR: He has them on the briefcase under the

1 table.

2 THE COURT: Then he is in good shape. I knew he
3 had a problem.

4 MR. FIGLEY: Your Honor, I would like to address the
5 points counsel has raised.

6 The Hoch affidavit, which he presented to us a few
7 minutes ago, does in fact deal with papers which were sought
8 from the FBI pertaining to the Kennedy assassination; and
9 he says that papers in the possession of the FBI were reviewed
10 in order to determine whether or not they were responsive to
11 the Plaintiff's, in that case, request.

12 This is a problem the FBI has gone through many
13 times. The Kennedy assassination and the papers in the posses-
14 sion of the FBI pertaining to it are matters of great public
15 interest, both in that they are of importance to us and in
16 the way the people think about it, and because --

17 THE COURT: The way people think about it?

18 MR. FIGLEY: The way people think about it.

19 THE COURT: They are important for what they contain.

20 MR. FIGLEY: They are important for what they con-
21 tain and they are important because --

22 THE COURT: You are being accused of putting them
23 out in a way to affect how people think about them.

24 MR. FIGLEY: I think that is an unfair accusation,
25 Your Honor.

1 Many of these papers have been examined for
2 purposes of responding to single Information Act requests.
3 The FBI has determined, because of the continuing nature of
4 these inquiries, that it makes more sense to go through the
5 entire files, pick out those portions which can be released,
6 which in this case are a great portion of the papers, and
7 make them available to the public en masse, rather than
8 waiting for particular requesters to write in and request
9 information on a particular subject.

10 This way people can go in, look at what the FBI
11 has done, what is available. If people seek to litigate dele-
12 tions, they can do so. But the whole mass is available to the
13 entire public.

14 Now the release to Mr. Hoch came to my attention this
15 morning when I received this affidavit, and confirmation of
16 the release from the FBI.

17 As set forth in the affidavit filed by Plaintiff,
18 Mr. Hoch requested information on Lee Harvey Oswald on
19 April 9, 1971. Counsel for Plaintiff just stated that
20 Mr. Weisberg requested the file on Lee Harvey Oswald on
21 October 27, 1975.

22 The delay in release to Mr. Hoch is not presently
23 before the Court; but the release was in response to his request
24 which predated Mr. Weisberg's by over three years.

25 The fact that the FBI has now collected all of the

1 records which can be made available to the public and put them
2 on display in the reading room, and later in other public
3 places, should not be held against the FBI as an attempt to
4 flood the public with records improperly, to mislead the
5 public as to what they contain.

6 The purpose of the Freedom of Information Act, in
7 a general sense, is to let the public decide for itself what
8 is important; and by making these records available, the
9 public can itself examine those records and determine whether
10 or not they say one thing or another.

11 We don't need someone, no matter how expert or
12 how scholarly, to interpret these records for the public.

13 Disclosure under the Information Act is disclosure
14 to the public. These records are not being withheld. They
15 are being made available to the public, including Mr. Weisberg.

16 Now Mr. Weisberg says that he has special circum-
17 stances because of his health and his location. It should be
18 noted that he does live in the Greater Washington area and
19 on occasion he can come to Washington.

20 We have received, in addition to his request for
21 fee waiver, three other requests that I am aware of. One
22 from a representative of the Associated Press. One from a
23 representative of the United Press; and one from a prisoner
24 in the Philadelphia prison system.

25 All of those requests have been denied at the initial

1 level. I don't believe any of those people have yet appealed
2 that initial denial. But it seems clear to me that if
3 Mr. Weisberg must be given copies of these records because
4 he cannot obtain access to them because he has only been given
5 a forty per cent waiver, that the prisoner in Philadelphia
6 has been denied access to them entirely because I doubt very
7 much if the Philadelphia prison system would allow him to come
8 to Washington to examine them.

9 We are not under an obligation to make records
10 available to each requester, particularly when we have amounts
11 of this kind and costs of this kind.

12 Mr. Weisberg can come in --

13 THE COURT: What is the cost of reproduction of one
14 of these documents?

15 MR. FIGLEY: Your Honor, I don't know.

16 THE COURT: I don't either.

17 MR. FIGLEY: I think that in addition to counting
18 the paper, you need to include the labor cost of having someone
19 standing there running the machine. In a reproduction of this
20 size, I think that the depreciation of the machine is something
21 that could be considerable.

22 We are talking about hundreds of thousands of pages
23 and I know the Xerox machine we have will not stand up to that
24 type of punishment or run off that number of pages with little
25 or no problem.

1 The regulations provide for a ten-cent per page
2 copy. Now there has been no challenge brought to them.
3 It is simply beyond my expertise and I think it is probably
4 beyond any consideration that was taken into account by anyone
5 in this case. I can't say that but certainly the record
6 does not indicate that they determined that the actual cost
7 per page is 7.3 cents or 8.9 cents.

8 I would also point out again that the preliminary
9 injunction seeks an order prohibiting Defendants from improperly
10 withholding records from Plaintiff.

11 I must reiterate that those records are not being
12 withheld from Plaintiff. They will be made available to him
13 as they are made available to everyone else.

14 He also seeks an order requiring final determination
15 of his fee waiver request. That has been rendered moot.

16 The issues before the Court on preliminary injunction
17 are no issues at all.

18 THE COURT: Well now, let me ask you a couple of
19 questions.

20 Why didn't you answer this man's letter when he asked
21 for a waiver? You didn't answer it until he brought a lawsuit.
22 You waited fifty days. Why?

23 MR. FIGLEY: I think the simplest answer, Your Honor,
24 is that he directed the request to the wrong party. He should
25 have requested it from the component which possesses the

1 records.

2 THE COURT: Who did he address it to?

3 MR. FIGLEY: He addressed the letter to Mr. Shea and --

4 THE COURT: The man who decided it.

5 MR. FIGLEY: The man who had appellate authority.

6 THE COURT: And it took fifty days for Mr. Shea to
7 get it down to Mr. Kelley? Fifty days? And then a lawsuit
8 to move it out of the inter-office transmission.

9 MR. FIGLEY: Your Honor, certainly it took a con-
10 siderable amount of time.

11 THE COURT: What is the explanation for that?

12 MR. FIGLEY: I think the explanation is that the
13 FBI has been working very hard to prepare these papers for
14 release and Mr. Weisberg has filed numerous requests, so
15 many in fact that perhaps it did not receive the same attention
16 that it would have if it was his first or perhaps his fifth
17 request.

18 Now I should point out --

19 THE COURT: Let me ask you another question.

20 What is the explanation for the fact that neither
21 Mr. Kelley nor Mr. Shea have dealt with this man's claim of
22 indigency which entitles him to free documents under the
23 regulation?

24 MR. FIGLEY: Your Honor, I don't believe the regula-
25 tions require the production of documents to indigents on a

1 free basis.

2 THE COURT: I think they do.

3 MR. FIGLEY: I believe they provide --

4 THE COURT: I believe the regulations provide that
5 that is one basis on which you can have them.

6 MR. FIGLEY: It can be considered.

7 THE COURT: Why didn't Mr. Shea consider his indi-
8 gency?

9 MR. FIGLEY: Your Honor, I think that to some extent
10 Mr. Shea relied upon the allegations in the complaint that --

11 THE COURT: In the complaint?

12 MR. FIGLEY: -- in the complaint that Mr. Weisberg
13 was a successful author and that Mr. Weisberg was seeking
14 these --

15 THE COURT: There are many successful authors in bread
16 lines.

17 MR. FIGLEY: Absolutely. But I think Mr. Shea
18 focused on the fact that Mr. Weisberg indicated that he was
19 seeking these documents for commercial profit.

20 THE COURT: The regulations, 16.9, Fees for Provision
21 of Records, has a specific reference to two exceptions:
22 Benefit primarily to the public, as opposed to the requester,
23 or -- not, and -- or unless the requester is an indigent
24 individual.

25 Now this man has made a claim of indigency. Neither

1 Mr. Kelley nor Mr. Shea paid any attention to it as far as I
2 read those letters.

3 What do you say about the adequacy of your record
4 on that basis?

5 MR. FIGLEY: First, Your Honor, I believe the record
6 is adequate. They have determined, first, in the FBI, as a
7 matter of general policy, that no waivers will be granted for
8 any of these materials.

9 THE COURT: They can't as an agency policy disregard
10 their own regulations, sir. They haven't got that fiat.
11 If they issue regulations under the statute, don't they have
12 to comply with them?

13 MR. FIGLEY: Yes, sir.

14 THE COURT: We are making progress now.
15 What is the explanation here?

16 MR. FIGLEY: The explanation for not granting an
17 entire waiver?

18 THE COURT: Or even referring to his indigent claim.

19 MR. FIGLEY: Well, first, I think that the record
20 is adequate, that they have considered appropriate factors in
21 making the determination, whether or not they mentioned each
22 of those factors.

23 Secondly --

24 THE COURT: How do I know that? Where do I find that?
25 In your brief you don't mention indigency.

1 MR. FIGLEY: No, Your Honor.

2 THE COURT: As a factor that was considered. And the
3 letters don't mention it.

4 MR. FIGLEY: I do not believe that the Court need
5 presume that the fact that indigency is not mentioned means
6 that it was not considered. If the Court --

7 THE COURT: Could I presume that it was?

8 MR. FIGLEY: I believe --

9 THE COURT: How can I presume it was?

10 MR. FIGLEY: I believe the Court can presume that these
11 matters are handled in an orderly and appropriate fashion.

12 THE COURT: They didn't answer the letter for fifty
13 days. That presumption was lost. The only thing they answered
14 was a lawsuit. They didn't answer the letter. So it wasn't
15 in an orderly way.

16 I don't want to press it but what do you say about
17 the indigency problem?

18 MR. FIGLEY: The regulations, particularly with the
19 FBI, are used most often with requests of individuals for
20 their own records; and as a matter of course, the Department
21 of Justice does not charge reproduction or search fees for
22 people who seek their own records.

23 Now in this case it is clear that Mr. Weisberg is
24 not seeking his own records. Some records pertaining to him
25 may be included in the materials. But clearly the request and

1 the scope of what is involved is something much broader.
2 If the FBI were required to waive search fees each time someone
3 requested records and could prove or claim that he was indi-
4 gent, then the FBI would be required to release such records
5 free of charge to people such as our prisoner in the
6 Philadelphia prison system. He claims to be indigent.

7 The records which he seeks are clearly of public
8 interest but it does not follow that they need be released
9 free of charge.

10 THE COURT: But the release has to also benefit the
11 general public, doesn't it? The release to your prisoner may
12 not benefit the general public. But you haven't any doubt
13 that the release to this Plaintiff will benefit the general
14 public, do you?

15 MR. FIGLEY: To some extent it will. At least that
16 is the determination made by Mr. Shea.

17 THE COURT: Because of his unique position.

18 MR. FIGLEY: Yes, sir.

19 THE COURT: So that brings you to the regulations,
20 doesn't it?

21 MR. FIGLEY: Yes, sir, and I believe that Mr. Shea's
22 letter does reflect that he was aware of the claim of indigency
23 because it relates that he had read the complaint. Certainly
24 the complaint raises the financial problems which Mr. Weisberg
25 claims to have.

1 So they were before him; and when he considered what
2 was in the complaint, he considered them as well.

3 THE COURT: I am not making rulings. You go ahead
4 with your argument.

5 Is there anything else you want to say about this?

6 MR. FIGLEY: I would point out, Your Honor, that
7 if the Court finds that the record does not adequately reflect
8 that the proper considerations were taken into account, that
9 the appropriate action would be to remand the case to the
10 agency for a determination of the proper factors.

11 THE COURT: Why?

12 MR. FIGLEY: Because the determination of whether
13 or not to waive fees has been delegated by Congress to the
14 discretion of the agency.

15 Now from the record, as the Court points out, it is
16 difficult to tell precisely whether or not this indigency
17 consideration was taken into account. If the Court determines
18 that the record is inadequate on that basis, it should be
19 remanded to the agency so that that point can be made clear.

20 If in fact it had been taken into account, for the
21 Court to order release free of charge would be effectively
22 to nullify a valid agency decision.

23 THE COURT: Even though the decision had been unrea-
24 sonably and arbitrarily withheld for forty days?

25 MR. FIGLEY: Your Honor, I am not at all clear that -

1 THE COURT: You see, if you made the decision as
2 your regulations contemplate, then the process you talk about
3 might have operated here within the time limits that you
4 set for releasing the documents. But you withheld it. In
5 fact, you would have withheld it permanently, I assume, unless
6 there had been a lawsuit. Now the lawsuit has been brought.
7 I have a case before me where the proceedings have not been
8 orderly at the administrative level, but where the requester
9 has been frustrated by the lack of response from the agency.

10 MR. FIGLEY: Well, Your Honor, the release is not
11 scheduled until Wednesday.

12 THE COURT: That is right.

13 MR. FIGLEY: If the Court finds that the record is
14 inadequate, I feel sure that we can provide a clarification
15 of the record by tomorrow afternoon.

16 I would also point out that it is clear that
17 Mr. Shea considered factors other than those considered by the
18 FBI or at least saw those factors differently because rather
19 than merely affirming the decision of the FBI to withhold
20 any fee waiver, Mr. Shea granted the forty per cent waiver,
21 as set forth in his letter.

22 He, obviously, has reached an independent judgment
23 and considered factors favorable to Mr. Weisberg.

24 THE COURT: All right, sir.

25 Do you have anything more you want to say, Mr. Lesar?

1 MR. LESAR: I have a couple of additional things
2 I would like to call to the Court's attention.

3 I always have a very difficult time keeping up
4 with Government explanations. The explanation for the delay
5 in Mr. Shea's letter in response to the fee waiver request
6 offered is not tenable for a number of reasons and it is also
7 not consistent with the past record in Mr. Weisberg's cases.

8 In November of 1976, I made a fee waiver request
9 with respect to the King assassination documents which were in
10 issue in Civil Action 75-1996. There was no response for a
11 long time. Eventually there was a denial from Director Kelley
12 an appeal; and no response.

13 Eventually the judge, Judge June Green, indicated
14 to the United States Attorney that a response ought to be
15 forthcoming.

16 The response that was forthcoming from Mr. Shea was
17 the following, dated May 26, 1977, some seven or eight months
18 after the initial request:

19 "Dear Mr. Lesar:

20 "This responds to your inquiry as to the
21 current status of your pending request for a
22 fee waiver in conjunction with the request of
23 your client, Mr. Weisberg, for access to materials
24 pertaining to the assassination of
25 Dr. Martin Luther King, Jr.

1 "The fee waiver request, together with
2 all other matters pertaining to your client's
3 pending appeal for access to the records,
4 themselves, will be determined when the final
5 action is taken on the appeal. Interim payments
6 by your client will in no way operate to prejudice
7 full and fair consideration of the request for
8 a fee waiver at that time."

9 Now this is in a case involving a potential 200,000
10 pages of documents and they are telling my client to pay at
11 ten cents a page, \$20,000, before they are going to make a
12 decision on the fee waiver request.

13 THE COURT: Do the regulations state to whom a fee
14 waiver request should be addressed?

15 MR. LESAR: I believe the regulations do state to
16 the Deputy Attorney General.

17 I have a fairly definite recollection in the case
18 of Department of Justice regulations, and FBI files are the
19 Department of Justice. It is part of the Department of
20 Justice, even though sometimes one wonders; and I believe that
21 is correct. I couldn't swear to it absolutely but I believe
22 it is correct.

23 There are other matters: One, my client, who has
24 an eye for detail, has pointed out that in the Department of
25 Justice the Xeroxing machines undoubtedly have a minimum

1 monthly cost payments and that they can run two copies a
2 second and that the cost of operating them is really very
3 little more than the cost of the paper, itself.

4 They have brought up the prisoner example. Of
5 course, that is not before the Court. We don't know what the
6 administrative record on that is. But the first problem --

7 THE COURT: But you are aware that your taxes would
8 substantially increase if every indigent person was automatical-
9 ly entitled to these copies free throughout the United States.

10 MR. LESAR: Yes, I agree.

11 One of the things that struck me when I read about
12 the plan of the Government to make copies available at various
13 unspecified locations, aside from the fact that the locations
14 may not be where the people are who really do the work that
15 informs the public, is that the cost of this may be very much
16 greater than the cost of having the Government Printing Office
17 print them up in volumes, as was done with the Warren Commission
18 Report and put them on sale at a cost that does make them
19 accessible to the public.

20 But aside from that, the decision that has already
21 been made by Mr. Shea in this case is that furnishing the
22 information to Mr. Weisberg does primarily benefit the public.
23 Now having made that decision, in order to effectuate the
24 purposes of the Act, it seems to me that you cannot effectuate
25

1 the purposes of the Act where it results in a de facto denial.
2 That necessarily means that it is arbitrary and capricious
3 because it doesn't accomplish the purpose of the determination.

4 I think it is particularly incongruous and, frankly,
5 unseemly in light of the fact that none of these documents
6 would have been made public except for Mr. Weisberg's efforts
7 over a long period of years at his own personal sacrifice.

8 We face this issue only because Mr. Weisberg raised
9 the issue, fought it all the way to the Supreme Court.
10 Congress overrode it; and now the Government is faced with
11 having to live with it.

12 That, of course, may be one of several hidden con-
13 siderations in the decision not to grant him a waiver or to
14 grant him a waiver in such a manner that it still results
15 in a de facto denial.

16 The record that has been put before the Court is re-
17 plete with, among other things, documents which indicate that
18 the FBI and the Department of Justice have at times obviously
19 pursued a vendetta against Mr. Weisberg; that they have been
20 infused with such personal bias that it seems unlikely that
21 they can consider his request in a manner which doesn't re-
22 sult in an arbitrary and capricious denial of it.

23 THE COURT: What that amounts to then is a statement
24 that you expect that he will receive free copies of everything
25 he asks for for the rest of his life. I didn't think that I

1 had that before me.

2 MR. LESAR: I don't think that that is before you.
3 What is before you is a specific request. The determination
4 has already been made that that specific request will -- the
5 public interest will be benefited thereby, if the information
6 is furnished him. I think that is undeniable.

7 Now the Government argues that the purpose of the
8 Freedom of Information Act is to enable the public to decide.
9 Let the people decide.

10 The point is, the people must hear all sides. That
11 has repeatedly been the decisions of our courts in First
12 Amendment cases. The people, in a subject as complex and
13 complicated and involving such enormous volumes of material
14 as this, are not going to hear both sides unless Mr. Weisberg
15 has access to the information and can communicate about it
16 freely.

17 Denial of this information is going to result in a
18 de facto denial.

19 THE COURT: That presents the arguments that were
20 originally scheduled before me on the preliminary injunction.

21 MR. LESAR: Yes.

22 THE COURT: In which you are contending that the
23 Government should not release this material until Mr. Weisberg
24 has a set in his possession.

25 MR. LESAR: Yes.

1 THE COURT: So what you are asking me to do, in
2 effect, is to enjoin the release of this data on the 18th,
3 aren't you?

4 MR. LESAR: No, I am not, because I think that the
5 fee waiver question is ripe for determination and I think
6 that clearly --

7 THE COURT: Even if it were determined today, it
8 doesn't follow that there would be copies available for
9 Mr. Weisberg by the 18th. Today is the 16th.

10 MR. LESAR: Well, we don't know. One of the things
11 we know is that certainly with regard to the first set of
12 40,001 pages, they had at least two copies, I believe, avail-
13 able in the FBI reading room. I rather suspect, in view of
14 the announced plan to put copies in various locations around
15 the country that they have other copies available.

16 THE COURT: I have no information about any of that.

17 MR. LESAR: I agree. I agree that the record is
18 certainly inadequate on relevant factors and that the absence
19 of relevant information in the decision is, itself, under the
20 law, grounds for holding that it is arbitrary and capricious.

21 I might add, I think I have cited in the opposition
22 that I filed this morning cases which hold that the law requires
23 that all of the relevant factors be on the record; and they
24 are not. They quite clearly are not.

25 Now that, of course, may distinguish Mr. Weisberg's

1 situation from the situation of other people who might raise
2 this question later and might result in a different determina-
3 tion.

4 THE COURT: Anything else you want to say?

5 MR. LESAR: I think not, except perhaps to inquire
6 what the Court intends to do.

7 THE COURT: I will tell you.

8 MR. LESAR: All right.

9 THE COURT: Is there something else you wanted to
10 say?

11 MR. FIGLEY: Yes, Your Honor, if I might.

12 THE COURT: Yes.

13 MR. FIGLEY: I think the Court raised a crucial
14 factor a moment ago when it pointed out that what we are
15 dealing with here is a preliminary injunction situation and
16 that we need to go on that basis in this hearing.

17 The Plaintiff alleges irreparable injury if he is
18 not to be provided the material here.

19 I would respectfully submit that that showing has
20 not been clearly made. If he were to receive these materials
21 a week later or a day later, it is difficult to perceive how
22 he will have been irreparably injured.

23 The two allegations set forth in the complaint are
24 that he will go down in people's esteem because he will no
25 longer be the expert who has read all publicly available

1 material. I doubt very much if Mr. Weisberg could read 40,000
2 pages of material overnight.

3 Secondly, he asserts that this will --

4 THE COURT: The press seems to be able to read them
5 and put them on the front page within a matter of almost
6 seconds of disclosure.

7 MR. FIGLEY: Well, Your Honor, they can read some
8 of them.

9 THE COURT: I wonder how they are able to do it.

10 MR. FIGLEY: I hate to speak for the press.

11 THE COURT: You know there will be big articles in
12 the papers the day of release and the day after won't there
13 be synthesizing and summarizing by able people who are ex-
14 perenced in reading documents hastily.

15 MR. FIGLEY: Yes, sir.

16 THE COURT: Yes. Sometimes upside down.

17 MR. FIGLEY: The second allegation is that if this
18 is not made available to him at this time, he will in some way
19 be harmed in his ability to commercially profit from these
20 papers.

21 He has no statutory right to commercially profit from
22 the papers. Nor, so far as I can tell, is there any common
23 law right to commercially profit from Government papers.

24 These are the things that he rests upon in arguing
25 that he will be substantially injured if the preliminary

1 injunction is not granted.

2 Now we hear from Plaintiff's counsel that the FBI
3 has proposed to make two copies of the papers available in-
4 the FBI reading room. Counsel implies that perhaps one of
5 these copies would better be given to Mr. Weisberg. I think
6 he goes too far. The public has a right to access to these
7 materials.

8 As Director Kelley pointed out in his letter denying
9 the requested fee waiver, the public interest might better
10 be served by making copies of these materials available at
11 other locations to the entire public rather than to one man
12 who claims to be an expert and hopes to commercially profit
13 from possession of the materials.

14 Counsel argues that the decision here was clearly
15 arbitrary and capricious because Mr. Shea granted a partial
16 waiver. To say that is to say that under no circumstances
17 could a partial waiver of reproduction fees be appropriate.

18 THE COURT: That is the way your regulations seem to
19 read.

20 MR. FIGLEY: Your Honor --

21 THE COURT: I just read the regulations. I don't
22 know anything about it. The regulations seem to talk that
23 way. Do they not?

24 MR. FIGLEY: The Government's reading is the opposite.

25 One last point that should be addressed is the

1 allegation that these papers are released only because of
2 Mr. Weisberg.

3 I think Plaintiff goes too far here as well. There
4 have been literally hundreds of requesters for these documents.
5 Certainly Mr. Weisberg --

6 THE COURT: What he is talking about is the fact that
7 Congress changed the statute because of Mr. Weisberg's activi-
8 ties in large part and freed these documents from what had
9 otherwise been a situation of permanent non-disclosure.

10 MR. FIGLEY: Yes, Your Honor, that is true of every
11 other Exemption 7 case before the Court. They are all a
12 result of Mr. Weisberg's efforts.

13 THE COURT: That is right. That is what he is talking
14 about.

15 MR. FIGLEY: Well, if that is the case, then certainly
16 he is more accurate than he is if he means to imply that none
17 of the Kennedy materials would have been made available if he
18 had not been as active as he has been.

19 In conclusion, I would again point out that the
20 relief sought in the preliminary injunction has been effectively
21 granted. That a final decision has been made; and because
22 these records have been determined to be subject to disclosure
23 under the Freedom of Information Act, they must be disclosed.

24 The question of fee waiver is not properly before
25 the Court on a preliminary injunction and should not be

1 addressed by this motions court.

2 THE COURT: This is the last time now, Mr. Lesar.
3 We are all done in this colloquy we have been having.

4 MR. LESAR: All right.

5 I would point out that there is consideration before
6 the Court on the question of cost to the Government.

7 I believe that the affidavit supplied this morning
8 from Mr. Paul Hoch points out that Mr. Weisberg's habit of
9 providing other people interested in the field with copies
10 of documents and answering their questions that they have
11 about the identity of documents and what documents are rele-
12 vant to certain questions, and so forth, all of these things
13 in fact save the Government lots of time and money and will
14 in the long run.

15 Mr. Weisberg has made arrangements and has, in fact,
16 already started depositing his documents in an archive in
17 the University of Wisconsin at Stevens Point, Wisconsin. That
18 is an institution which is much better designed to serve the
19 public interest than the FBI's proposal of locating other
20 copies of the records at unspecified locations which may or
21 may not have the trained personnel able to properly service
22 the public.

23 The University of Wisconsin will have that personnel.
24 It has the facilities to duplicate and to provide other informa-
25 tion in response to requests. In fact, the public interest

1 would be far better served by making the documents available
2 to Mr. Weisberg, who will then donate them to the University
3 of Wisconsin; and some of the burden would actually be taken
4 off the Government.

5 THE COURT: What do you say to the suggestion that
6 the question of the fee waiver isn't properly before me on a
7 preliminary injunction?

8 MR. LESAR: It seems to me the Government has made
9 it relevant. It is properly before you because unless the
10 documents are made available, then Mr. Weisberg and the public
11 interest are going to be irreparably damaged. There is no
12 doubt about it. He will not be able to exercise his First
13 Amendment right to contribute to public debate on this
14 subject. He will not be able to advise news media on the
15 contents and meaning and significance of these documents.
16 So there is irreparable damage.

17 I don't think, however, that it is necessary to issue
18 a preliminary injunction to resolve this situation, absent a
19 couple of factors.

20 THE COURT: But procedurally the waiver of fees in-
21 volves a review of administrative action. It has come on be-
22 fore me on this motion for preliminary injunction and has
23 been argued by the parties. I suppose that what I can do is
24 to consider it before me on the merits, treating the preliminary
25 as a prayer for final injunction. But I think there are two

1 separate matters, aren't there?

2 MR. LESAR: They may be two separate matters but
3 I suggest that a final injunction here is appropriate. If
4 the Court decides that Mr. Weisberg is entitled to a fee
5 waiver, then the only other question is whether or not the
6 Court can set a schedule for the delivery of documents to
7 Mr. Wesiberg; and the answer to that is clearly, yes.

8 The courts have in fact done so in numerous cases. In
9 the Hiss and the Rosenberg cases, for example, the courts have
10 set schedules for the delivery of documents.

11 So that once the fee waiver issue is determined, the
12 Court can set a schedule for the delivery of documents to
13 Mr. Weisberg.

14 It seems to me that under the law, including Open
15 America, that the delivery to Mr. Weisberg ought not to be
16 later than the delivery to the other persons involved.

17 THE COURT: All right, thank you, gentlemen.

18 I will give you my opinion orally from the bench
19 at one-forty-five.

20 (Whereupon at 12:05 p.m., the hearing was recessed
21 pursuant to reconvening at 1:45 p.m. of the same day.)
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AFTERNOON SESSION

(Whereupon the hearing reconvened at 1:45 p.m.)

THE COURT: In this case, Weisberg v. Griffin Bell, Civil Action No. 77-2155, Plaintiff seeks a preliminary injunction to enjoin the Department of Justice from going forward with its scheduled proposed release on Wednesday of this week of numerous documents relating to the assassination of President Kennedy.

The Department of Justice, responding to numerous overlapping Freedom of Information Act requests, has dealt with these requests on what it calls a project basis and is processing the requests as a group, leading to this broad disclosure of documents, which is the second such disclosure relating to the assassination.

Plaintiff initially sought the injunction resting substantially on the fact that he had some time ago sought a waiver of fee charges and the Department had not been responsive to his request.

It is Plaintiff's theory that as one early interested in the assassination and as having long ago sought access to these documents, he is entitled to priority or at least equal treatment and should receive the documents at least coincident with their disclosure in the manner the Court has previously described.

Responding to this complaint, the Department responded

1 promptly on the waiver of fee request to Plaintiff, which had
2 been long overdue, advising that the documents would be made
3 available to him at six cents, rather than ten cents a copy.

4 At this stage the Defendants continue to oppose the
5 preliminary injunction and seek a partial summary judgment,
6 at least with respect to the waiver of fee aspect of the case;
7 and an amended complaint has been filed.

8 The matter was argued and has been thoroughly briefed.
9 The Court has before it a number of affidavits, as well as the
10 briefs.

11 Taking first the question of whether the disclosure
12 on Wednesday, January 18, 1978, should be enjoined, the Court
13 will not enter such an injunction.

14 The reasons are simply these: The great public in-
15 terest in the disclosure of these documents seems to the Court
16 the preeminent consideration. In addition, the Court is not
17 satisfied that Plaintiff will be irreparably injured in any
18 fashion by disclosure.

19 The whole purpose of the Freedom of Information Act
20 is to bring about disclosures such as this; and it should go
21 forward as scheduled.

22 The suggestion that the decision of our Court of
23 Appeals in Open America is to contrary effect is rejected.
24 That opinion, which did not involve a situation comparable to
25 this, recognizes the desirability of the Government in matters

1 of broad public interest, such as this, to proceed on a
2 project basis; and there is no first-come-first-served rule,
3 established by Open America or any other decision, which should
4 be allowed to interfere under these circumstances.

5 The Court then turns to the question of Plaintiff's
6 request for complete waiver of fees with respect to these
7 particular documents.

8 The equities are very substantially and overwhelming-
9 ly in Plaintiff's favor. He has long sought such a waiver.
10 The Defendants delayed response to his request, perhaps pur-
11 posely, due apparently to past dealings with him.

12 The Defendants acknowledge that there will be benefits
13 to the general public and hence it is in the public interest
14 for Plaintiff to receive these documents under a partial
15 waiver.

16 The Plaintiff has made a unique contribution in this
17 area by his persistence through the courts and before the
18 Congress, without which there would be no disclosure, as the
19 Government recognizes.

20 I have before me the entire administrative record
21 relating to this waiver. It is apparent that no consideration
22 whatsoever was given to Plaintiff's claims based upon his
23 established poor health and indigency. Yet the rules and regu-
24 lations contemplate that these considerations should be given
25 weight.

1 Under all the circumstances, the Court is of the
2 view that the Defendants have forfeited any right to remand
3 with respect to this matter; that it is before the Court on a
4 proper record for determination; and that his prayer to re-
5 ceive this group of documents being released on January 18
6 without payment of any fee should be honored with reasonable
7 dispatch.

8 In making this ruling, I am prompted largely by the
9 special circumstances of this particular case. In no way
10 is the Court suggesting that any precedent is involved with
11 respect to any future problems that the Plaintiff may have
12 with this or any other agency of the Government.

13 The Court also wants to make clear that he feels
14 there are many matters raised in the papers, some of them
15 totally irrelevant, some of them marginally relevant, in which
16 Plaintiff has used sharp adjectives in his characterization of
17 governmental conduct.

18 The Court in no way is influenced by these and makes
19 no determination at all that such claims were appropriate in
20 this case or are supported by any proof.

21 I think, gentlemen, you ought to confer and prepare
22 a simple one-page order covering these two determinations, which
23 can be submitted to the Court later this afternoon. Thank you.

24 MR. LESAR: Thank you, Your Honor.

25 (Whereupon the hearing was concluded.)

CERTIFICATE OF COURT REPORTER

I, Ida Z. Watson, certify that I reported the proceedings in the above-entitled cause on January 16, 1978 and that the foregoing Pages 1 to 41, inclusive, constitute the official transcript.

Ida Z. Watson

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