UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. GRIFFIN BELL, et al., Defendants	Civil Action No. 77-2155

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. BACKGROUND

This case arises under the Freedom of Information Act in the context of a request for a waiver of fees as provided by 5 U.S.C. §552(a)(4)(A). This waiver is essential if plaintiff is to obtain FBI records on the assassination of President Kennedy. On December 7, 1977, without having acted upon plaintiff's November 19, 1977 fee waiver request, the FBI made public 40,001 pages of JFK assassination records. Because plaintiff lives at Frederick, Maryland, is 64 years old, poor, and suffers from serious medical problems as the result of acute thrombo-phlebitis and arterial disease, the refusal to act upon his fee waiver request resulted in a de facto denial of his rights to these documents. Another 40,000 pages of these records is scheduled for release on January 18, 1978.[1] Unless a fee waiver is granted, he will again be de-

[1]Although plaintiff's attorney made several attempts to learn this release date, it was not until January 12, 1978 that government counsel advised him of the exact date. Plaintiff has since learned that at least one requestor was advised of the exact date by letter dated January 10, 1978.

nied access to FBI records and constrained from exercising his First Amendment rights.

That this case arises in emergency fashion is the result of a situation contrived by the government's failure to meet its obligations under the law to respond in timely fashion to plaintiff's fee waiver request and his motion for preliminary injunction.[2] These failures continue a pattern of unremitting abuses of plaintiff in the handling of his FOIA requests and lawsuits. They raise serious ethical questions about the conduct of government officials, including some government attorneys, and reflect upon the integrity of the judicial process.[3] In this case, as in others, these abuses victimize plaintiff and deny him his rights under the law. Because both plaintiff and his attorney have received scant income for many years they are, in part because of these very abuses, without the financial and other resources needed to effectively counter the unending stream of government abuses which they encounter and which place them under enormous economic and time pressures, not to mention physical and emotional stress.

---

[2]Plaintiff's November 19, 1977 fee waiver request was first responded to by Director Kelley's letter dated January 9, 1978, which was hand-delivered to the office of his attorney on the afternoon of January 11, 1978. Plaintiff's motion for preliminary injunction, hand-delivered to the office of the U.S. Attorney on December 19, 1977, was not responded to until January 12, 1978, when it was delivered to his attorney's home at 8:00 p.m.

[3]The examples are to numerous to recount all of them here, even if they could all be remembered. Some of the more salient are:

(1) In Weisberg v. Department of Justice, Civil Action No. 2301-70, Assistant United States Attorney Robert Werdig told District Judge John Sirica at the oral argument on the motion to dismiss on November 16, 1970, that the Attorney General of the United States had determined that it was "not in the national interest" to divulge the FBI's spectrographic reports on the assassination of President Kennedy which Weisberg sought. No such determination had been made by the Attorney General. This case may have been

These abuses, plus those which show that government officials have: (a) ordered that there be no response to Weisberg's information requests (Complaint Exhibit 4), (b) maliciously sought to deprive him of possible income once he obtained copies of public court records (Complaint Exhibit 5), and (c) conspired to transfer an admittedly non-exempt record from one agency to another to keep Weisberg from obtaining it (Complaint Exhibit 6), require that should this Court be compelled to considere exercising its equity jurisdiction, it can in good conscience only exercise it upon plaintiff's behalf. The government does not come into court with clean hands and it must not be allowed to take advantage of its own wrongdoing any longer.

---

dismissed as the result of this misrepresentation. The dismissal resulted in a three-year legal struggle all the way to the Supreme Court, which declined to review a decision of the Court of Appeals upholding the dismissal.

(2) When Congress amended the Freedom of Information Act's investigatory files exemption to specifically override the decision in Weisberg v. Department of Justice, 489 F. 2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416 U.S. 933 (1974), and in doing so said Weisberg had been right about Congress's intent to make certain investigatory files disclosable (See exchange between Senator Kennedy and Senator Hart, 120 Cong. Rec. S 9336 (daily ed., May 30, 1974), Weisberg again filed suit for the results of scientific tests in the Kennedy assassination. The government resisted plaintiff's attempt to discover the extence or non-existence of tests and records. Instead the government filed an affidavit by FBI Special Agent John W. Kilty stating that: "Neutron activation analysis and emission spectroscopy were used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and a curbstone." When Weisberg demanded the neutron activation analyses on these items of evidence, the same FBI Agent executed a second affidavit directly contradicting the first, swearing that: "further examination reveals emission spectroscopy only was used to determine the elemental composition of the borders and edges of holes in clothing and metallic smears present on a windshield and a curbstone.... NAA was not used in examining the clothing, windshield, or curbing." When plaintiff's counsel asserted that the FBI Agent was lying, the court lectured both counsel and his client not to accuse FBI Agents of lying. The Court then dismissed the case as "moot".

On Appeal, the Court of Appeals reversed, stating that plaintiff's inquiries were in the national interest. Weisberg v. Department of Justice, 543 F. 2d 308 (1976). Issuing its opinion

II. SYNOPSIS

Although plaintiff's original lawsuit for the FBI records on the assassination of President Kennedy was lost, Weisberg v. Department of Justice, 489 F. 2d 1195 (1973), cert. denied, 416 U.S. 993 (1974), the sweeping effect that that precedent had on access to investigatory files forced Congress to squarely confront the two primary legal issues it raised: 1) whether the Freedom of Information Act extended to FBI files; and 2) whether an agency had to show that certain specified kinds of harm would result from the

---

with unusual speed only a month after oral argument, the Court held that Weisberg's inquiries were in the national interest and instructed him to take testimony from the FBI agents who had conducted the actual tests on JFK assassination evidence. Weisberg v. Department of Justice, 543 F. 2d 308 (1976). In so doing the Court of Appeals took note of a false certificate which Assistant United States Attorney Michael Ryan had filed with the district court: "The Government's assertion to the District Court that the '[c]ase has been settled by fully producing all material sought by plaintiff's Freedom of Information Act request . . . that is, all laboratory data concerning the John F. Kennedy assassination investigation' was certainly unwarranted." Id. at 311.

Plaintiff's attorney never received a copy of the remand opinion in the mail. He first learned of the decision when the district judge's law clerk phoned him about it a week or ten days later.

On remand plaintiff again initiated discovery. Although the Court of Appeals had instructed that the case be expedited, the government again sought to delay it. According to an FBI memorandum, Assistant United States Attorney Michael Ryan did not notify the FBI of plaintiff's interrogatories until October 1, 1976 although the interrogatories had been served upon him on August 9, 1976. (Opposition Exhibit 1) On November 4, 1976, at the suggestion of the district court, plaintiff's counsel wrote FBI Director Clarence Kelley to request the addresses of former FBI agents which were needed in order to take their depositions. Although the district court had set January 15, 1977 as the cut-off date for plaintiff's discovery, this information was not provided until until nearly two months after it was requested, by letter from U.S. Attorney Earl Silbert dated December 27, 1976.

During the depositions former FBI agent John Gallagher, the agent who subjected items of Kennedy assassination evidence to neutron activation testing at the Oak Ridge National Labaratory, initially testified that he could not remember whether he took lead scrappings from the presidential limousine's windshield to Oak Ridge and subjected them to NAA testing. When confronted with

release of its records before such records would be held nondisclosable under Exemption 7. In enacting the 1974 Amendments, Congress expressly overrode the Court of Appeals decision in the first Weisberg case and upheld his position on these fundamental issues. Thus, in a very real sense no FBI records on the assassination of President Kennedy, or any other FBI investigatory files would now be being made public but for the fact that Weisberg, at enormous personal sacrifice, raised these basic issues and forced a long and bitter fight which ultimately established these fundamental principles. Although Weisberg's long fight in the public interest made Kennedy assassination files, Cointelpro records, and other investigatory files embarrassing to the FBI accessible to everyone, the Department of Justice now refuses to grant him a fee waiver on the patently false grounds that he wants these records for "blatantly commercial" reasons. In view of the long fight Weisberg has engaged in at his cost to establish the public's right to access to these records and the FBI's past abuses of him, this is an obscenity.

---

documentary proof that this evidentiary specimen had been subjected to NAA testing, Gallagher admitted it but claimed there had been no results because the sample was inadequate. He also could not remember whether there had been any report on the fact that the sample was inadequate. His deposition also developed evidence, previously denied, that bullet fragment Q3 had been tested by NAA, however no laboratory worksheet or report on this test was provided Weisberg. Other discovery by means of a request for production of documents established that the spectrographic plates on the piece of curbstone allegedly struck by bullet, a vital piece of evidence, are missing. When plaintiff noted the deposition of FBI Special Agent Kilty to determine the nature of the search for these records, the government moved to quash the subpoena issued for Agent Kilty. The district court quashed the subpoena before plaintiff's counsel had served with, or was even aware of, the motion to quash. Subsequently, without requiring any sworn testimony as to the nature of the search conducted for these records, the district court granted summary judgment for the government. As a result, the case is now on its way to the Court of Appeals for the fourth time in seven years.

(3) In Weisberg v. Department of Justice, Civil Action No. 75-1996, Weisberg's April 15, 1976 request for fairly limited cate-

The Department of Justice has determined that plaintiff is entitled to a reduction in the copying charge to a rate of six cents a page. To the extent that this is founded upon valid considerations rather than ulterior motive, it must be based upon a determination that it is in the public interest to furnish the information to plaintiff because doing so will primarily benefit the general public. However, because of plaintiff's age, health, and financial condition, among other factors, this will still result in a de facto denial of access. But in enacting the 1974 Amendments to the Freedom of Information Act, Congress was aware of the problem of a de facto denial of access to information in cases where expense might be an insurmountable obstacle to the requestor. To protect against de facto denials Congress expressly provided for attorney fees and waiver of copying charges in cases where such access is found to be in the public interest and vindicates public policies. A determination that furnishing information to a

---

gories of information was ignored for six and a half months until CBS News filed a similar but much more limited request. The CBS request forced a conference on it. According to a Civil Rights Division memorandum, a representative of the Justice Department's FOIA Appeals Unit expressed the "desire" of his boss, Mr. Quinlan Shea, "to avoid being 'blasted' (on the air) by CBS for being 'un cooperative'." (Opposition Exhibit 2)

Shortly after Weisberg filed suit, the FBI released documents to both Weisberg and CBS. The documents released revealed facts which establish that at the guilty plea hearing of James Earl Ray on March 10, 1969, State of Tennessee prosecutors misrepresented the results of the FBI's scientific testing and examination of King assassination evidence.

In releasing these records to Weisberg, the Deputy Attorney General rewrote his request to exclude much of what he had asked. Subsequently, when plaintiff's more extensive request of December 23, 1975 became part of the same suit, the FBI rewrote that request, too, this time enlarging it to include all FBI Central Headquarters records on its "MURKIN" investigation. This forced plaintiff to pay for thousands of records not within the scope of his requests in order to obtain those he had requested.

The FBI initially denied having any crime scene photographs of the King assassination and insisted that there had been no suspects in the murder other than James Earl Ray. Both representations proved untrue.

requestor can be considered as primarily benefiting the general public requires, if the intent of Congress is to be upheld, that the reduction in the amount of copying charges be sufficient to effectuate its purposes. In this case that can only be accomplished by a complete waiver of all fees. Where a determination is made that a reduction in copying charges is warranted because furnishing the information can be considered as primarily benefiting the general public, the decision to reduce charges is necessarily "arbitrary and capricious" where it does not accomplish its purpose but instead still results in a de facto denial of access to the requested information.

The Freedom of Information Act is an attempt by Congress to provide a mechanism which will effectuate informed public discussion of important issues. It is an attempt to make First Amendment rights a reality. When the FBI contrives to release enormous batches of records on a matter of serious public interest on specified dates, it necessarily creates an immediate and intense news

---

(4) In Weisberg v. Department of Justice and Department of State, Civil Action No. 718-70, plaintiff was forced to sue for copies of public court records filed in evidence at James Earl Ray's extradition hearing. When the Department of Justice finally conceded that it could not successfully defend against the suit, it made the records available to others in hopes of damaging Weisberg economically. The records obtained contained an affidavit by the only alleged eyewitness to the King murder which stated that he could not and did not identify Ray as the man he allegedly saw fleeing the rooming house after the shooting. They also contained an affidavit by FBI ballistics expert Robert Frazier which stated that "[b]ecause of distortion due to mutilation and insufficient marks of value," he could draw no conclusion as to whether the bullet removed from Dr. King was fired from the alleged murder weapon left on South Main Street. None of the American attorneys who represented Ray prior to and at his guilty plea obtained these records. At Ray's habeas corpus evidentiary hearing in October, 1973 Ray's ballistics expert testified that his examination of the "bullet" under a microscope indicated markings of such a nature that, in his opinion, proper test firing of the alleged murder weapon could definitely establish whether the bullet was fired from that weapon. The State of Tennessee presented no expert or other evidence contradicting his opinion.

interest in them. Without equal and contemporaneous access to the records being released, Weisberg cannot participate fully in the discussion and debate which will ensue immediately upon their disclosure. This violates his First Amendment rights.

III. THE DENIAL OF WEISBERG'S REQUEST FOR A COMPLETE WAIVER OF ALL COPYING COSTS WAS ARBITRARY AND CAPRICIOUS

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

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

The appropriate standard for review of agency action under the Administrative Procedure Act is found at 5 U.S.C. §706(A), which provides for reversal where agency action is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." In reviewing agency action pursuant to §706(2)(A) the court must decide whether the agency acted within the scope of its statutory authority, whether the agency complied with applicable

---

(5) In Weisberg v. General Services Administration, Civil Action No. 2052-73, Weisberg sought a Warren Commission executive session transcript purportedly classified pursuant to Executive order 10501. The government submitted two affidavits swearing that it was so classified, one by National Archivist Dr. James B. Rhoads, the other by Warren Commission General Counsel J. Lee Rankin. Despite those affidavits, the court held that the evidence did not show that the transcript had been properly classified. The court did uphold the government's claim that the transcript was protected from disclosure as an investigatory file compiled for law enforcement purposes, resting its ruling on the Court of Appeals' decision in Weisberg v. Department of Justice, 489 F. 2d 1195 (1973), which was then the law. Because the answers to interrogatories showed that the transcript had not been read by any law enforcement official until at least three years after the Warren Commission went out of existence, and arguably not then, Weisberg planned to appeal it notwithstanding the Weisberg precedent. Before he could appeal it, the government "declassified" the transcript, forgot about the exemption 7 claim,

procedural requirements, whether the decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 402, 415-16.

Under these criteria it is clear that the agency's failure to respond in timely fashion to his November 19, 1977 fee waiver request is itself sufficient grounds to support a finding that the agency acted arbitrarily and capriciously. The Freedom of Information Act requires agencies to respond to a request for information within ten days. Here the agency did not respond for 50 days, and then only after Weisberg brought suit.

Only a few Freedom of Information Act decisions deal with what constitutes arbitrary and capricious denial of a fee waiver request. The question was before Judge Aubrey Robinson in Alan L. Fitzgibbon v. Central Intelligence Agency, Civil Action No. 76-700. Judge Robinson held:

> Although 5 U.S.C. §552(a)(4)(A) gives the agency broad discretion in regard to regard to fee waivers, the agency's determination cannot be arbitrary and capricious. An agency's decision not to waive fees is arbitrary and capricious when there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public.
>
> Based upon the record developed in this case and upon the language employed by the agency in refusing a waiver of search fees, it is the opinion of this Court that the defendant may have applied an inappropriate standard in reaching its decision to deny fee waiver, and that at the very least the Defendants' decision is arbitrary and capricious. The implication evident from Defendant's fee waiver is that the agency feels an obligation to the public to collect fees

---

and gave the transcript to Weisberg. Once public its contents showed that there never had been any basis whatsoever for classifying it in the interests of national defense or foreign policy.

> for processing Freedom of Information Act requests. Any such perceived obligation is irrelevant to the purposes of §552(a)(4)(A).
>
> There has been no showing by the agency here that the Galindez affair was not newsworthy and of public interest at the time it first arose and there has been no showing by the agency that the Galindez affair does not continue to be of interest to the general public, in an historical sense at least. It is the judgment of this Court that furnishing information contained in CIA files regarding the abduction and murder of Jesus de Galindez can be considered as primarily benefitting the general public. (A copy of Judge Robinson's opinion is attached hereto)

Under these criteria, it is clear that Weisberg is entitled to a waiver of all fees. Not only is there nothing in Mr. Shea's determination "which indicates that furnishing the information cannot be considered as primarily benefiting the general public," but Shea's decision in effect concedes the point by granting a reduction in charges.

Director Kelley's letter denying Weisberg's fee waiver request cited the cost to the FBI of processing the records, a consideration which Judge Robinson held irrelevant to the purposes of §552(a)(4)(A). Mr. Shea's letter does not mention this factor, but inasmuch as he doesn't disavow Director Kelley's consideration of it, it must be presumed that it figured in his thinking, too.

Mr. Shea's letter states that in his view having a commercial motive in seeking access to records is "ordinarily a more than sufficient reason to deny any fee waiver under the Freedom of Information Act." This is clearly wrong. In the United States, at least, news organizations and journalists do have commercial motives as a rule, but the legislative history of the 1974 Amendments indicates that they are not to be considered "commercial interests" when considering an award of attorney fees. Freedom of

Information Source Book, p. 171. The cases in this circuit are quite clear that commercial motivation does not preclude recovery of attorney fees. Cuneo v. Rumsfeld, 553 F. 2d 1360 (D.C.Cir. 1977) Moreover, Mr. Shea's remark that Mr. Weisberg's primary goal is "blatantly commercial" is refuted by the evidence he purportedly considered in reaching his decision. For example, the affidavit of Howard Roffman, Law Clerk to Fifth Circuit Court of Appeals Judge Bryan Simpson states:

> 3. I am in a unique position to certify that Harold Weisberg's research into the assassinations of President John F. Kennedy and Dr. King have been for the direct benefit of the public and, more particularly, all interested, responsible researchers, historians and media representatives, and not for his personal financial gain. (Complaint Exhibit 2)

The grounds upon which an agency acted must be clearly disclosed and substantiated or recorded. Appalachian Power Co. v. Train, 545 F. 2d 1351 (C.A. 4, 1976) The Shea letter fails to show whether it considered such relevant factors as Weisberg's health, indigency, and age. It is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination. Concerned About Trident v. Schlesinger, 400 F. Supp. 454 (D.D.C. 1975).

The insulting tone of Mr. Shea's letter suggests a personal bias or animus against Mr. Weisberg which is also reflected in Mr. Shea's actions in other FOIA suits. For example, in a July 15, 1976 affidavit which he filed in Civil Action 75-1996, Mr. Shea expressed his opposition to Mr. Weisberg in such phrases as: "Even assuming that Mr. Weisberg is either an authority or expert on the King assassination, it is difficult for me to perceive how Mr. Lesar's speculation based on the alleged state of Mr. Weisberg's health should be entitled to any greater weight." And,

"The public is well aware that Mr. Weisberg holds and has expressed strong views on the question of the guilt of James Earl Ray; moreover his self-professed status as the investigator for Mr. Ray would appear to undermine any claim that his views are essential for the 'truth' about the assassination to come to light." Such personal hostility towards a requestor as is reflected in these comments inevitably indicates an incapacity to weigh relevant considerations and thus results in a decision that is arbitrary and capricious.

IV. FAILURE TO GRANT FEE WAIVER AND DELIVER RECORDS TO WEISBERG BY JANUARY 18, 1978 WILL DENY WEISBERG HIS FIRST AMENDMENT RIGHTS AND IS AGAINST THE PUBLIC INTEREST

> Only those at the inmost point saw things differently. To them, old Craw's article was a discreet masterpiece of disinformation; George Smiley at his best, they said. Clearly, the story had to come out, and all were agreed that censorship at any time was objectionable. Much better therefore to let it come out in the manner of our choosing. The right timing, the right amount, the right tone: a lifetime's experience, they agreed, in every brushstroke. But that was not a view which passed outside their set.
>
> --John Le Carre, The Honourable Schoolboy

The FBI has contrived to release its Headquarters records on the assassination of President John F. Kennedy in such a manner that vast quantities of records will be made public on the guise of thoroughness without any requestor, including Mr. Weisberg, having had an opportunity to challenge unjustifiable deletions and withholdings. The FBI has autocratically determined what will or won't be released, and it has had a very long time to do a very careful job of sifting and concealing. Moreover, the processing of the records was carried out under the direction of an FBI Agent deeply involved in the investigation of President Kennedy's

assassination himself, Agent Gemberling. The manner of release is thus clearly against the public interest and anathema to the meaning and purposes of the Freedom of Information Act. It is an effort in news management and explainable only as such.

To the extent that the public's interest can now be protected at all, it requires that knowledgeable authorities such as Weisberg have immediate access to the records being released.

In addition, the denial of access to these records by Weisberg at the time they are released to others will violate Weisberg's First Amendment rights. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court asserted:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. 269, 270.

If Weisberg's right to contribute to an "uninhibited, robust, and wide-open" debate is not to be denied, then he must have the records to be released on January 18, 1978 in hand no later than anyone else.

V. A FEW COMMENTS ON OPEN AMERICA

The defendants' motion to dismiss contains a considerable discussion of the decision in Open America v. Watergate Special Prosecution Force, 547 F. 2d 605 (D.C. Cir. 1976). What the discussion omits is that this decision was procured by fraud. The plaintiffs' in Open America did not challenge the FBI's affidavits about how it processes requests. As a result, the Court of Appeals had no choice but to accept the representations as true.

The FBI's two-tier approach to handling FOIA requests by splitting them into project (voluminous) and non-project (small) requests is not devised for administrative efficiency, as the Court of Appeals thought. Project requests almost inevitably involve matters that are highly sensitive or embarrassing to the FBI. Separating the two types enables the FBI to stonewall the more threatening requests, and it is an established fact that project requests lag months and even years behind non-project requests. The delay in processing them enables the FBI to carefully screen what materials it wants to release and to wear out requestors.

The Court of Appeals in Open America accepts as fact the FBI's representation that a project request is assigned to a project team headed by a supervisory agent, including five research analysts, and at least two special clerks. But this is not true. In Civil Action No. 75-1996 FBI Agents testified that only one "analyst" would be assigned to Weisberg's project request and initially only one was.

Moreover, the allegations of the complaint, many of which were sworn to during testimony taken during an evidentiary hearing in Civil Action 75-1996, provide specifics which show that the FBI can't possibly be following Open America insofar as Weisberg's requests are concerned.

VI. CONCLUSION

For years now outrage upon outrage has been heaped upon Weisberg by the government agencies handling his information requests and by some of the attorneys representing the government in court. It must be stopped. There is no question in this case but that he is entitled to a fee waiver and that the denial of it was arbitrary and capricious. There is no doubt but that his First Amendment rights will be denied if he does not receive FBI records

at the same time other requestors are scheduled to.

Accordingly, the motion to dismiss must be denied and the Court should enter an order: 1) granting Weisberg a complete waiver of copying charges for all FBI Headquarters records on the assassination of President Kennedy, and 2) compelling defendant Kelley to deliver these records to Weisberg no later than 8:00 a.m., January 18, 1978.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
910 16th Street, N.W., #600
Washington, D.C. 20006

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of January, 1978 hand-delivered a copy of the foregoing Opposition to ~~the night guard at the U.S. Department of Justice Building with instructions to hold it for~~ Mr. Dan Metcalf, attorney, Department of Justice.

James H. Lesar

JAMES H. LESAR

Attachment 1

77-2155

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALAN L. FITZGIBBON,

Plaintiff

v.

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

CIVIL ACTION 76-700

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's and Defendants' Cross-Motions for Summary Judgment. At issue is the decision by Defendant agency denying a waiver of the search fees involved in processing Plaintiff's Freedom of Information Act request, in which Plaintiff seeks the Central Intelligence Agency records relating to the abduction in 1956 and murder of Jesus de Galindez by agents of the Trujillo regime.

Although 5 U.S.C. §552(a)(4)(A) gives the agency broad discretion in regard to fee waivers, the agency's determination cannot be arbitrary and capricious. An agency's decision not to waive fees is arbitrary and capricious when there is nothing in the agency's refusal of fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefitting the general public.

Based upon the record developed in this case and upon the language employed by the agency in refusing a waiver of search fees, it is the opinion of this Court that the Defendant may have applied an inappropriate standard in reaching its decision to deny fee waiver, and that at the very least the Defendants' decision is arbitrary and capricious. The implication evident from Defendants' letter rejecting fee waiver is that the agency feels an obligation to the public to collect fees for processing Freedom of Information Act requests. Any such perceived obligation is irrelevant to the purposes of §552(a)(4)(A).

There has been no showing by the agency here that the Galindez affair was not newsworthy and of public interest at the time it first arose and there has been no showing by the agency that the Galindez affair does not continue to be of interest to the general public, in an historical sense at least. It is the judgment of this Court that furnishing information contained in CIA files regarding the abduction and murder of Jesus de Galindez can be considered as primarily benefitting the general public.

Accordingly, it is this 10th day of January, 1977,

ORDERED, that Defendants' Cross-Motions for Summary Judgment be and it is hereby DENIED; and it is

FURTHER ORDERED, that Plaintiffs' Motion for Summary Judgment be and it is hereby GRANTED and that Defendants shall waive all fees involved in processing Plaintiff's request under the Freedom of Information Act for all records in Defendants' possession relating to the Galindez case.

AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

Exhibit 1 Opposition 77-2155

Memorandum to Assistant Director
Records Management Division
Re: Harold Weisberg, v. United States Department of Justice, et al., (U.S.D.C., D. C.)
Civil Action No. 75-226

DETAILS: On 8/12/76, plaintiff served a copy of attached Request for Production of Documents by Defendant United States Department of Justice upon the AUSA handling this case, but the AUSA did not advise the FBI of this or furnish us a copy until 9/17/76. The request concerns records relating to laboratory examinations conducted with regard to the assassination of President Kennedy, as well as plaintiff's FOIA request for materials relating to these examinations. The FOIPA Section is being requested to locate all records which would be responsive to this request, so that a determination can be made as to which of these records should be turned over to plaintiff. Special Agent John Kilty of the Laboratory Division has already advised Special Agent Parle Thomas Blake of the Legal Counsel Division that the FBI possesses no records which would be responsive to paragraph 3 of the request, and has also advised that he will assist the FOIPA Section in making any determinations as to whether specific documents located would refer to the types of laboratory examinations which are within the scope of plaintiff's FOIA request. Special Agent Kilty will also answer the Laboratory-related questions in plaintiff's First Set of Interrogatories.

Special Agent Blake previously furnished a copy of this request to Special Agent Donald L. Smith of the FOIPA Section, and advised him that portions of the Request for Production are much more broad than plaintiff's original FOIA request, and in the opinion of Legal Counsel need not be complied with, even under the liberal rules of discovery, inasmuch as a plaintiff may not obtain through discovery that which he cannot obtain under his original FOIA request if it is not relevant to that FOIA request.

Memorandum to Assistant Director
Records Management Division
Re: Harold Weisberg, v. United States Department of Justice, et al., (U.S.D.C., D. C.)
Civil Action No. 75-226

At a status call on 10/1/76, the Court indicated that the Request for Production must be responded to by 10/15/76, and that also by that date plaintiff's First Set of Interrogatories, originally served upon defendants on 5/2/75, must be answered. After this case was remanded back to the District Court for further discovery, these Interrogatories were apparently re-served on the AUSA on 8/9/76, but we were not advised of this until 10/1/76.

Exhibit 2 Opposition 77-2155

EXHIBIT X

J. Stanley Pottinger
Assistant Attorney General

November 3, 1975

Stephen Horn
Attorney
Criminal Section

SH:vap
DJ 144-/2-663

Freedom of Information Requests:
Martin Luther King File -

On October 30, 1975, I attended a meeting at the Hoover Building for the purpose of discussing two FOIA requests received by the Department requesting certain FBI reports and evidentiary materials concerning the King investigation. Present were Volney Brown of the FOIA Appeals Unit headed by Quinlan Shea, and Tom Bresson and Tom Wiseman of the Bureau's FOIA Unit.

The subject requests are attached. One is from CBS, which, as you know, is preparing to air a documentary on the assassination on November 30, 1975; the other from Harold Weisberg, who is represented by James Lesar, Ray's attorney. Weisberg is acting in the capacity of Lesar's "investigator". Lesar has represented to Brown that, if need be, Ray himself will join in their FOIA request.

We have, of course, previously taken the position that the disclosure of King materials (the FBI scale model of the scene of the crime) would prejudice Ray's right to a fair trial, should he secure a new one, and this cannot be disclosed. I still strongly advocate this position.

If my reading of Brown was correct, the FOIA Unit may be viewing this from a slightly different perspective:

cc: Records
Chrono
Murphy
Allen
Horn

Brown expressed Shea's desire to avoid being "blasted" (on-the air) by CBS for being "uncooperative". While I took the approach that the FOIA Unit should formulate an appropriate legal argument against disclosure and seek court approval of what I believe to be a strong fact situation for non-disclosure, the thrust of Brown's comments was that the case law could support disclosure under these circumstances. However, he did state that he may in the final analysis, adopt our position.

There is some question as to whether some of the requested materials have already been made public, in one form or another, either at the extradition proceeding in England, the "mini-trial" wherein the state prosecutors made a proffer to satisfy the Court that there was a basis for the guilty plea, or the evidentiary hearing in U.S. District Court on Ray's petition for habeas corpus (the denial of which is on appeal to the Sixth Circuit). The FBI is making efforts to determine the answer to this question and is in contact with Tennessee authorities.

I told Brown that the fact that evidence may have been released in one form may not justify its release in another. In other words, from the perspective of prejudicial pre-trial publicity, I see a big difference between the affidavit of an FBI expert, already made public, and the disclosure of the actual raw data and photographs upon which he formulated his opinion. (Obviously, CBS and Weisberg see the difference too, why else go through the FOIA process to get material already a matter of public record?)

The possible legal theories for non-disclosure is not the present issue. What is important now is whether the

Department decides to contest disclosure in court, if at all legally practicable, or make disclosure in the immediate future. The Deputy Attorney General should have the views of this Division as well as that of the FOIA Unit.

I have drafted a memo for your signature if you are inclined to agree with my position.

Exhibit 3 Opposition 77-2155
Shea Affidavit 7-15-76

Neither Mr. Weisberg nor Mr. Lesar has requested expedited administrative consideration by this Department. Were such a request to be submitted, the decision would be made thereon by Deputy Attorney General Tyler. Because of the historical importance of these records, it would, in my judgment, take a particularly strong showing to persuade the Deputy Attorney General to deviate from our normal procedures in this case.

15. Even after reading Mr. Lesar's Second Affidavit, dated June 30, 1976, I personally have difficulty in seeing how a decision to grant such expedited processing could be supported on the basis of the available facts. I am fully aware of Mr. Weisberg's great interest in certain assassination cases. On the other hand, I am aware of no factual basis on which the Department could or should grant him preferential handling to the detriment of senior requesters. It may be of interest to note that the speculation by her attorney that Judith Campbell Exner was in danger of being killed to silence her was determined by Deputy Attorney General Tyler not to constitute an adequate basis for requiring expedited consideration and processing of her request by the FBI. Even assuming that Mr. Weisberg is either an authority or expert on the King assassination, it is difficult for me to perceive how Mr. Lesar's speculation based on the alleged state of Mr. Weisberg's health should be entitled to any greater weight.

16. Assuming for the moment that Deputy Attorney General Tyler would consider granting expedited treatment on the basis that Mr. Weisberg had unique insights into the records that could result in an evaluation that could not be

obtained from the numerous other persons interested in the case, Mr. Tyler would undoubtedly require a more solid evidentiary showing of objectivity and expertise than Mr. Weisberg has made heretofore. The public is well aware that Mr. Weisberg holds and has expressed strong views on the question of the guilt of James Earl Ray; moreover, his self-professed status as the investigator for Mr. Ray would appear to undermine any claim that his views are essential for the "truth" about the assassination to come to light. See Attachment C. In any event, to accept Mr. Weisberg as "the most knowledgeable authority" in the area, or to conclude that there would be some public detriment if we were to be deprived of his "expert evaluation" of any documents released, should require the sort of credentials ordinarily associated with judicial acceptance of individuals as experts. So far, the Department has not been provided with any factual basis to support Mr. Lesar's assertion that Mr. Weisberg has any professional expertise which is not present in other persons interested in the King assassination. Without such a showing, I would have difficulty recommending that the Deputy Attorney General decide that sufficient public benefit in expediting processing for Mr. Weisberg exists to justify overriding the interest of all prior requesters who are patiently waiting for records from the Department.

17. The matter representing the appeal of Harold Weisberg was the 1,359th received by the Unit. His appeal has not been processed because there are several hundred other matters which were received prior to his that have not yet been assigned to staff attorneys. The priority of Mr. Weisberg's appeal will be determined by the date of its

receipt and consideration of the appeal would normally begin when his number comes up in sequence. Because the Unit lacks the personnel resources to conduct the review of records that is necessary to make an initial determination on access to Justice Department records, however, we do not act until there has been a determination by each relevant component of the Department to deny the request in whole or in part. Therefore, processing of plaintiff's appeal will not commence until there has been an initial determination by the component or components to which the request was referred. If, upon reaching plaintiff's appeal, any component has completed its review of records in its possession, we will begin the appellate process as to those records. In my judgment, the Department should be afforded the opportunity to act on plaintiff's appeal, but should not assign or process it out of sequence and thereby confer a preference on plaintiff not accorded the hundreds of other appellants who are waiting their turn. I estimate that this appeal will be assigned to a staff attorney for processing in approximately 30 to 45 days. The time required to process the appeal cannot be estimated at this time, but will depend on the nature and volume of material which must be reviewed. The initial determination of each component of the Department which has denied access to records will be reviewed