

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 78-0249

CLARENCE M. KELLEY, et al.,

Defendants.

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATEMENT

Defendants hereby submit their opposition to plaintiff's motion for Summary Judgment. This opposition is supported by defendants' statement of points and authorities, the affidavit of Horace P. Beckwith, Special Agent of the Federal Bureau of Investigation, presently assigned as a supervisor in the Freedom of Information - Privacy Acts Branch, Records Management Division at FBI Headquarters, and the record in this case.

Plaintiff brought this action pursuant to the Freedom of Information Act (5 U.S.C. §552 - FOIA), seeking the disclosure of the worksheets produced during the processing of the Kennedy assassination documents. Plaintiff requested these documents by letter dated December 6, 1977, addressed to Allen H. McCreight, Chief, Freedom of Information/Privacy Acts Branch, Records Management Division. (This letter is attached hereto as Answer Exhibit 1)

Plaintiff was notified by letter dated February 21, 1978 (Attached hereto as Exhibit 2), that release of the worksheets was being discussed. Furthermore, by letter dated March 6, 1978 (attached hereto as Exhibit 3), plaintiff's request was acknowledged.

Plaintiff now seeks summary judgment alleging that there are no genuine issues of fact due to the fact that defendants have not claimed that the information sought is exempt from mandatory disclosure under 5 U.S.C. §552(b). Additionally, plaintiff alleges that the data sought is not exempt under the Freedom of Information Act.

On April 12, 1978, 2,581 pages were released to plaintiff pursuant to his request of December 6, 1977.

Defendants contend that portions of the material sought are exempt from mandatory disclosure under the Freedom of Information Act. The exemptions pursuant to which the material was withheld are set forth in the letter dated April 12, 1978, and the Affidavit of Horace P. Beckwith.

Plaintiff Is Not Entitled To
Summary Judgment As A Matter Of Law

To prevail on its motion for summary judgment, a party must demonstrate that there is an absence of any genuine issue of material fact, thus entitling it to judgment as a matter of law. Bloomgarden v. Coyer, 479 F.2d 201; 156 U.S. App. D.C. 109 (1973). Additionally, the party opposing summary judgment is entitled to all favorable inferences that may be reasonably drawn from the evidence in its attempt to prevent the granting of summary judgment. Semaan v. Mumford, 335 F.2d 704, 118 U.S. App. D.C. 282 (1964).

The summary judgment procedure is properly invoked when it eliminates useless litigation but not in those instances where a genuine issue of fact exists. Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 64 S. Ct. 724.

The plaintiff has failed to demonstrate that there is no genuine issue of fact. Plaintiff merely states that he made a request for documents and defendants have failed to assert that that material is exempted from disclosure. Plaintiff further asserts that the material is not exempted from mandatory disclosure.

On April 12, 1978, defendants released 2,581 pages of material, withholding only that material which is exempted from mandatory disclosure pursuant to the Freedom of Information Act. ^{1/} (The exemptions are set forth in the affidavit of Horace P. Beckwith). Therefore, the facts do not support plaintiff's motion for summary judgment, indeed the facts would appear to support defendants future motion for summary judgment.

The plaintiff's motion must be denied since plaintiff's conclusory statements viewed in light of the record fail to demonstrate the absence of a material issue of fact, entitling plaintiff to summary judgment. Bloomgarden v. Coyer, supra.

* * * * *

Defendants have recently processed and released (April 12, 1978) all of the documents identifiable with plaintiff's request. Thus, defendants will move for summary judgment within the next thirty (30) days. The thirty (30) days is necessary in order that defendants might be afforded an

1/ 5 U.S.C. §552(a)(6)(A)(i) empowers the agency to make initial determinations to withhold requested material in accordance with 5 U.S.C. §552(b).

opportunity to prepare proper affidavits. Additionally, the present workload of counsel's office is such that the motion cannot be prepared any earlier.

CONCLUSION

For the foregoing reasons plaintiff's motion for summary judgment should be denied.

Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General *12/7/72*

EARL J. SILBERT
United States Attorney


LYNNE K. ZUSMAN


EMORY J. BAILEY

Attorneys, Department of Justice
Washington, D. C. 20530
Tel: 202-739-4779

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff

v.

Civil Action Number
78-0249

CLARENCE M. KELLEY, et al.,

Defendants

AFFIDAVIT

I, Horace P. Beckwith, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned in a supervisory capacity to the Freedom of Information-Privacy Acts Branch, Records Management Division at FBI Headquarters. Pursuant to my official duties, I am familiar with the plaintiff's Freedom of Information Act (FOIA) request dated December 6, 1977, requesting records pertaining to the processing and release of records concerning the assassination of President John F. Kennedy (A true copy of this request is attached hereto as Exhibit A).

(2) In response to plaintiff's FOIA request of December 6, 1977, the FBI provided plaintiff, by letter dated April 12, 1978 (a true copy of which is attached hereto as Exhibit B), 2,581 pages of inventory worksheets utilized in the processing of files pertaining to the investigation of the assassination of President John F. Kennedy. Certain exemptions pursuant to the FOIA were utilized to withhold information from release and are as follows: Title 5, United States Code, Section 552 (b) (1), (b) (2), (b) (7) (C), (b) (7) (D) and (b) (7) (E).

(3) The following are explanations which details the use of the above Freedom of Information Act exemptions:

(a) Classified Matters

Title 5, United States Code, Section 552 (b) (1) exempts from disclosure information which is currently and properly classified pursuant to Executive Order 11652. This information contained in the inventory worksheets in the form of notations and short phrases is identical to information which is duly classified in the original documents. This information, if released, would identify foreign sources or sensitive procedures, thereby jeopardizing foreign policy and the national defense.

(b) Internal Agency Rules and Practices

Title 5, United States Code, Section 552, (b) (2) allows for deletion of material relating solely to the internal rules and practices of an agency. This exemption has been asserted solely to remove informant file numbers. These file numbers are withheld to protect the FBI informant program and the FBI's administration of its informants. This exemption was used in the worksheets in the manner it was used in the original documents.

(c) Unwarranted Invasion of Personal Privacy

Title 5, United States Code, Section 552, (b) (7) (C) which exempts information the disclosure of which would constitute an unwarranted invasion of personal privacy has been asserted to protect names, background data, and other identifying information of third parties that appear on the inventory worksheets and were withheld in the original documents. This subsection was also utilized to excise names of Special Agents responsible for producing the inventory worksheets during the processing of the original documents. To release these names could cause public exposure or harassment of Special Agents and their families, which is unwarranted and would inevitably affect their ability to perform their responsibilities.

(d) Confidential Source Material

Title 5, United States Code, Section 552, (b) (7) (D) allows for the deletion of material that would disclose

the identity of a confidential source or reveal confidential information furnished only by the confidential source and not apparently known to the public. The exemption was cited in the inventory worksheets corresponding to the same information as excised in the original documents. In addition, this exemption has been utilized to remove symbol numbers of informants. These symbol numbers are used to cover the actual identity of the informant in the document, but still enable the FBI to determine his identity.

(e) Sensitive Techniques and Procedures

Title 5, United States Code, Section 552 (b) (7) (E) exempts from disclosure information which would reveal investigative techniques and procedures, thereby impairing their future effectiveness. These techniques and procedures were deleted in the worksheets in those instances where they were deleted in the original document.

(4) The release of these inventory worksheets is pursuant to plaintiff's request for records relevant to the processing and release of the original records. These worksheets represent the only documents available within the FBI which are responsive to plaintiff's request.

(5) The records provided plaintiff by the FBI's April 12, 1978 letter were provided without charge.

Horace P. Beckwith
HORACE P. BECKWITH
Special Agent
Federal Bureau of Investigation
Washington, D. C.

Subscribed and sworn to before me this 17th day of April, 1978.

Mildred M. Foster
Notary Public

My Commission expires My Commission Expires September 14, 1981.

Mr. Allen W. McDreight, Chief FOIA/PA Branch
Records Management Division, FBI
Wash., D.C. 20535

Rt. 12, Frederick, Md., 21701
12/6/77

Dear Mr. McDreight,

Your letter of December 2, 1977 relating to the FBI's release of JFK assassination files came today. I regret that it requires further correspondence.

The first question I must raise, one I've raised more times than I can estimate, is why with all these reviews of JFK assassination records my many requests for precisely this public information remain without response. I have filed two dozen or more such FOIA requests. It is more than a year since your SA Howard testified in my C.A. 75-1996 that the FBI had by then had three reviews of this material. It is more than a year since I testified to these requests that are entirely without any compliance since. The FBI's counsel, AUSA and staff, were present at my testimony and at SA Howard's. Various FBI FOIA personnel were present. You obtained the transcript of this testimony. I have since the time of the testimony repeated prior appeals. But to date there is the same - total - silence from the FBI and from you who sign yourself as in charge of the FBI's FOIA work.

The Act requires the production of records, not their generation. However, my PA and FOIA requests that should have yielded these records years ago also are without your compliance. My appeals of this also without response. I therefore do not have all the records relevant to my FOIA and PA requests. I herewith repeat my requests under the Acts, intending by the repetition that you provide within the time limitations of the Acts all those records that relate to my requests. This means back to as I recall it 1968. I assume that this is your all-time record of non-compliance. Whether or not it is I want any and all such records of whatever source or nature, however generated and wherever filed or stored or described or classified by the FBI. I also solicit any explanation you would care to provide for this persisting non-compliance and the permeating disregard for the obligations imposed upon the Bureau and upon you personally by the Acts.

Aside from other and I believe obvious considerations it is a fact that some if not such or indeed all of what you are now making available should have been provided to me quite long ago. Not having complied with my requests and the Acts has, I believe, been hurtful to me and has constituted an interference with my right and ability to perform the work upon which I have for so long been engaged.

As you are aware long ago non-compliance with my requests was ordered and approved to the highest FBI levels, including the first Director. As you are also aware compliance is the present issue in my C.A. 75-1996 and because of the FBI's non-compliance I am at this very moment forced to forego other work and do the work of the FBI with regard to compliance in that case. With this non-compliance being total with regard to JFK assassination records and a major factor in the 1-96 case and for other reasons I believe the request in my second paragraph above constitutes justification under the Acts for expedited compliance and I do ask that of you. I want to be able to incorporate what you should provide in the memoranda I am being compelled to prepare for you and at your request in C.A. 75-1996.

By the time of the date of your letter of December 2, 1977, a letter I take it was sent to many and is a sort of form letter, your representations in it were untruthful. You had in fact made an exclusive release or more than 500 pages of these "forthcoming" records to Radio Station WLS and the AP at least. You thereafter and prior to the date of your letter made duplicates available to others in the press. Whatever the circumstances of these releases it is a fact and to my personal knowledge is a fact that within this release there are records I began to ask the FBI for going back to about 1968. But your first paragraph refers to your "forthcoming release" and your second begins, "The first segment of these materials will be made available beginning at 9:30 A.M. December 7, 1977, ..."

EXHIBIT A

Of course I am also troubled by your failure to notify me of your making these records available until the day prior to their availability. While I do not deceive you - I cannot use these records in your reading room - your unnecessary delay in this guaranteed that were it within my capabilities it would still be impossible for me because I have a medical appointment that precludes it.

Your fifth paragraph is also troubling. You say of these about 80,000 pages, "Materials to be released are copies from the raw investigative files of the FBI..." This is the same FBI that forced me to go all the way to the Supreme Court in a case in which I did not request "raw investigative files" by falsely representing that I had asked for such raw files and that the release of any of them at any time and under any circumstances would utterly destroy the FBI or render it forever impotent.

When you follow this with "as they were compiled chronologically in our central records system during the investigation," I am further troubled, in general and as it relates to my requests that remain without response. Most FBI records do not even reach your "central records system" at FBIHQ and there is no such limitation in any of my requests for JFK assassination records. This can mean, for example, that if I had all the 80,000 pages you are to release you might still not have complied with my requests.

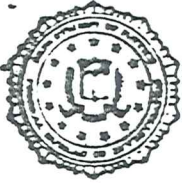
Your concluding paragraph states that "No index of our FBI materials is available to cross-reference these materials to the public record." This is a semantical representation. The public record is only part of the records that are involved. The raw materials are often incorporated in other records, like Letterhead Memoranda and other reports. From my personal experience in FBI cases I have learned that the FBI has a practice of noting on its field office raw materials what reports include that information. This should mean that through other than what you might describe as an index it is possible to correlate the raw materials with the other records into which parts are incorporated.

These records were processed under FOIA, I take it. This means that other records relevant to the processing were generated. These should include worksheets on which the records are listed and where exemptions are claimed the exemptions are noted. There are other records relevant to processing and review. I herewith ask for a copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they may be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the content of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released I ask for a copy of it also or if an inventory was made, a copy of the inventory.

Sincerely,



Harold Weisberg



UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

April 12, 1978

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

Dear Mr. Weisberg:

Enclosed are 2,581 pages of inventory worksheets utilized in the processing of files pertaining to the investigation into the Assassination of President John F. Kennedy. These pages are releasable under the provisions of the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. The deletions made in this material are based on one or more of the following subsections of Section 552:

- (b) (1) information which is currently and properly classified pursuant to Executive Order 11652 in the interest of the national defense or foreign policy;
- (b) (2) materials related solely to the internal rules and practices of the FBI;
- (b) (7) investigatory records compiled for law enforcement purposes, the disclosure of which would:
 - (C) constitute an unwarranted invasion of the personal privacy of another person;
 - (D) reveal the identity of an individual who has furnished information to the FBI under confidential circumstances or reveal information furnished only by such a person and not apparently known to the public or otherwise accessible to the FBI by overt means;



EXHIBIT B

Mr. Harold Weisberg

- (E) disclose investigative techniques and procedures, thereby impairing their future effectiveness.

Pursuant to the decision of the Deputy Attorney General, Office of Privacy and Information Appeals by letter dated March 31, 1978, to your attorney, James H. Lesar, no fee is being charged for the duplication of these documents.

You have 30 days from receipt of this letter to appeal to the Deputy Attorney General from any denial contained herein. Appeals should be directed in writing to the Deputy Attorney General (Attention: Office of Privacy and Information Appeals), Washington, D. C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

Sincerely yours,

Allen H. McCreight, Chief
Freedom of Information-
Privacy Acts Branch
Records Management Division

Enclosures (7)

Exhibit I

Mr. Allen E. McDreight, Chief of the
Records Management Division, FBI
Wash., D.C. 20535

Rt. 12, Frederick, Md., 21701
12/6/77

Dear Mr. McDreight,

Your letter of December 1, 1977, regarding the release of JFK assassination records came today. I regret that I cannot comply with your request.

The first question I must ask is how long a period of time I can estimate, in light of all these reviews of records, that you will require for precisely the public information records that you have requested. It is not clear from your letter that the FBI had by then had the records that you requested. It is more than a year since I identified to these requests the records that were in the files. The FBI's records, AUSA and staff, were present, and various FBI personnel were present. I have since the time of the testimony given by the FBI in the case - total - release from the FBI and from the records of the FBI's FOIA work.

The Act requires the production of records, not their generation. However, my FBI FOIA requests that should have been made records years ago also are without your compliance. My appeals of this non-compliance, I therefore do not have all the records relevant to my FOIA and my requests. I am with respect to requests under the Act, according to the repetition that you provide within the limitations of the Acts all records that relate to my request. I recall in 1968, I advised that this is your all-time record of non-compliance. I do not know if I want any and such records of what you have done, but I want any and wherever filed or kept or described or classified. I also hold you responsible for the explanation you would provide for this non-compliance and the preventing disregard for the obligations imposed upon the Bureau generally by the Acts.

Aside from other and I believe other considerations it is a fact that some if not all or indeed all of what you are now making available should have been provided to me quite long ago. Not having complied with my requests and the Acts has, I believe, been a hindrance to me and has constituted an interference with my right and ability to perform the work upon which I have for so long been engaged.

As you are aware long ago non-compliance with my requests was ordered and approved to the highest FBI levels, including the First Director. As you are also aware compliance is the present issue in my C.A. 75-1316 and because of the FBI's non-compliance I am at this moment forced to forego other work and do the work of the FBI with regard to compliance in that case. With this non-compliance being total with regard to JFK assassination records a major factor in the 1968 case and for other reasons I believe the request in my second paragraph above constitutes justification under the Act for expedited compliance. I do ask that of you. I want to be able to reiterate what you should provide in the records I am being compelled to request for records at your request in C.A. 75-1316.

By the time of the date of your letter of October 3, 1977, a letter I take it was sent to me and is a sort of formal letter, and the conditions in it were untruthful. You had not made an exclusive release of some 300 pages of these "forthcoming" records to the Station WINS and the AP at that time. After and prior to the date of your letter the duplicates available to others in the press. Under the circumstances of these records it is a fact and to my regret I believe it is a fact that within this release there are records I began to ask the FBI for and to which I am. But your first paragraph in your "forthcoming release" of records and in the first segment of those records will be made available beginning at 11:00 am. December 7, 1977, ..."

Exhibit
continued

Of course I am also troubled by your failure to notify me of your failing these records available until a day prior to their availability. While I do not disagree you - I cannot use these records in your reading room - your processing delay in this regard is guaranteed that most it within my capabilities it would still be impossible for me to find I have a medical appointment that preclude it.

Your fifth paragraph is also troubling. You say of them about 80,000 pages, "Materials to be released are copies from the non-investigative files of the FBI..." This is the same I that forced me to go all the way to the Supreme Court in a case in which I did not request "raw investigative files" by failing to state that I had asked for such raw files and that the release of any of them at any time and under any circumstances would utterly destroy the FBI or render it forever ineffectual.

When you follow this with "as they were compiled chronologically in our central records system during the investigation," I am further troubled, in general and as it relates to my own requests that records be put into a "central records system" at FBIHQ and there is no such limitation in any of my requests for JFK assassination records. This can mean, for example, that if I had all the 80,000 that you are to release you might still not have complied with my requests.

Your concluding paragraph states that "The index of our FBI materials is available to cross-reference these materials to the public record." This is a somewhat representation. The public record is only part of the materials that are involved. The raw materials are often incorporated in other records, like the reports of sources and all other reports. From my personal experience in FBIHQ cases I have learned that the FBI has a practice of noting on its field office raw materials what reports include that information. This should mean that through other than what you might describe as an index it is possible to correlate the raw materials with the other records into which they are incorporated.

These records were processed under FOIA, I take it. This means that other records relevant to the processing were processed as well. All include worksheets on which the records are listed and where they were processed and the descriptions are noted. There are other records relevant to processing and release. I herewith ask for a copy of any and all records relating to the processing and release of all these records, whatever the form or origin of such records might be and wherever they may be kept, as in the Office of Origin or other points as well as in Washington. If there are other records that indicate the content of these released records I am especially interested in them because they can be a guide to content. If there is a separate list of records not yet released I ask for a copy of it also or if an inventory was made, a copy of the inventory.

Sincerely,

Harold Weisberg



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

Exhibit #2

FEB 21 1978

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

Dear Mr. Weisberg:

This acknowledges receipt of your letter dated January 19, 1978, concerning the letter you received from Special Agent McCreight dated January 18, 1978, and the fact that you have received no determination on your request to the Federal Bureau of Investigation dated December 6, 1977, seeking access to the Bureau's worksheets on the Kennedy assassination records.

As you know, this Office ordinarily responds to appeals based on a lack of a component response to a request with a letter that merely expresses our inability to conduct initial record reviews, indicates that we will monitor the processing of the initial request, and advises the requester of his right to seek judicial relief. In this case, however, I intend to proceed somewhat differently and to maintain your appeal as to the December 6 request in an open status. It has been assigned Number 8-0242 and I intend to hold the file personally. Even prior to the receipt of your letter of January 19, I had been discussing with the Bureau the matter of the possible release of its worksheets; that was in a general sense -- not just the Kennedy case -- and resulted from my testimony before the Abourezk Subcommittee late last year. At that time, former Deputy Attorney General Flaherty and I assured the Subcommittee that we would give serious attention to the problem of giving requesters more information, at the initial stage, about the nature and quantity of records to which access is denied. I have given this problem considerable attention over the past several months, in discussions with personnel from the F.B.I. and other components of the Department as well. Pending resolution of the matter, I intend personally to hold appeals involving "explanatory" records.

With respect to the actual Kennedy assassination worksheets, it may possibly turn out not to be necessary for me to act formally. The Bureau is still considering whether to put

Exhibit 2
Continued

"clean" copies of the final version of these items into the reading room and otherwise to make them available to interested persons. A final decision should be made by the Bureau in the relatively near future. In the event the decision is negative, I will then treat your letter of January 19 as an appeal on the merits and we will adjudicate on a formal basis the issue of access to the worksheets.

With respect to the excisions from the released Kennedy records, it should be obvious that this Office would also prefer to address any possible issues in the context of specific exemptions and specific documents. This might permit an efficacious appeals procedure to operate -- there is no way my staff and I could do a line-by-line review of all excisions from all of these tens of thousands of pages. Accordingly, pending resolution of the worksheets issue, I will treat your letter of January 19 as a protective appeal encompassing any Kennedy assassination records as to which you ultimately decide to appeal.

As indicated above, I do not anticipate that the decision on access to the Kennedy worksheets will be overly delayed. Should there be any interim developments, I will keep you advised.

Because this response is not a grant of access to the worksheets, I remind you that you have the right to seek judicial relief in the United States District Court for the judicial district in which you reside or have a principal place of business, or in the District of Columbia, which is where the worksheets you seek are located.

Sincerely,

Benjamin R. Civiletti
Acting Deputy Attorney General

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

CC: James Lesar, Esquire

Exhibit #3

March 6, 1978

Mr. Harold Weisberg
Route 12
Frederick, Maryland 21701

Dear Mr. Weisberg:

Reference is made to your letter dated December 5, 1977, in which you sought access to the Federal Bureau of Investigation's (FBI) inventory worksheets on the Kennedy Assassination records pursuant to the Freedom of Information-Privacy Acts.

We have a large volume of requests similar to yours. In view of this, some delay in making a final response to your request may be anticipated. Please be assured that we are making every effort to process your request promptly. Your patience and understanding of this unavoidable delay will be appreciated.

Your request has been assigned number 62,054 which you are requested to utilize in any correspondence with this Bureau regarding your request.

Sincerely yours,

Allen H. Kewright, Chief
Freedom of Information-
Privacy Act Branch
Records Management Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 78-0249

CLARENCE M. KELLEY, et al.,

Defendants.

ORDER

Upon consideration of plaintiff's Motion For Summary Judgment, the papers filed in support thereof and in opposition thereto, and the entire record herein, it is by the Court on this ____ day of _____, 197 ,

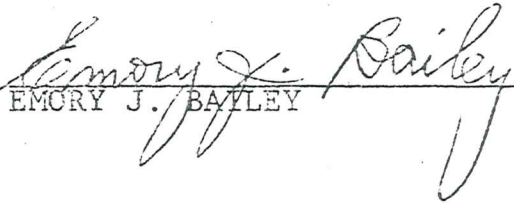
ORDERED that plaintiff's Motion For Summary Judgment should be and hereby is denied.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 1978, I served the foregoing Memorandum In Opposition To Plaintiff's Motion For Summary Judgment with attachments upon Plaintiff's counsel by causing a copy to be mailed first class, postage prepaid to:

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


EMORY J. BAILEY