UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff,	
v.	Civil Action No. 78-0249
CLARENCE M. KELLEY, et al., Defendants	

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

This is a Freedom of Information Act lawsuit which plaintiff instituted in order to compel disclosure of:

1. All worksheets related to the processing of records released to the public on December 7, 1977 and January 18, 1978 from the FBI's Central Headquarters' files on the assassination of President John F. Kennedy;

2. All other records related to the processing, review, and release of these records;

3. Any other records which indicated the content of FBI Headquarters records on the assassination of President Kennedy; and,

4. Any separate list or inventory of FBI records on President Kennedy's assassination not yet released. (Complaint, ¶¶6-7_

On April 12, 1978, the FBI released 2,581 pages of worksheets to plaintiff. The FBI maintains that "[t]hese worksheets represent the only documents available within the FBI which are responsive to plaintiff's request." (Beckwith Affidavit, ¶7) Defendants also assert that all excisions of information from these worksheets are proper under the exceptions to the Freedom of Information Act.

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For the reasons set forth below, plaintiff maintains that he has not been provided with all materials within the scope of his request and that defendants have not shown that they are entitled to the exemptions claimed for information excised from the worksheets. Accordingly, plaintiff opposes defendants' motion for summary judgment.

I. DEFENDANTS' HAVE NOT PROVIDED PLAINTIFF WITH ALL RECORDS RELATED TO THE PROCESSING, REVIEW, AND RELEASE OF THESE FBI CENTRAL HEADQUARTERS RECORDS ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY

As noted above, defendants claim that the only FBI documents within the scope of plaintiff's request are the worksheets themselves. This, however, cannot be true. For example, by letter dated January 9, 1978, former FBI Director Clarence M. Kelley stated with respect to the FBI's Central Headquarters records on the JFK assassination: "We anticipate that additional sets of documents will be produced and placed in other research facilities, such as the Library of Congress, in the near future." (See Attachment A) Three days later Mr. Quinlan J. Shea, Jr., Director, Office of Information and Privacy Appeals, Office of the Deputy Attorney General, wrote that in recognition of the historical importance of these records, "Director Kelley, . . . on his own initiative, made arrangements for the released materials to be made available at a number of different public locations . . .." (Attachment B)

These representations were repeated in court in Weisberg v. Bell, et al., Civil Action No. 77-2155, in an unsuccesful effort to deny Mr. Weisberg a total waiver of search fees and copying costs. Unless these representations were untrue, the FBI should have records relating to the decision to place these documents in other locations, such as the Library of Congress, as well as records

reflecting those locations actually selected, the conditions under which the recipients got them, and the arrangements for their actual transmittal.

It is also obvious that the decision to place a set of these documents in the FBI reading room did not spring full-blown from the head of Director Kelley. Such a decision would not be made without discussions and memoranda on whether this project should be undertaken, as well as the mechanics and costs of doing it. In fact, one such document is the November 17, 1977 memorandum from A.J. Decker, to Mr. McDermott, which is submitted herewith as Attachment C. On its face it shows distribution to six persons in the FBI, not counting McDermott and Decker themselves. Its second paragraph reads:

> DETAILS: As you are aware the FOIPA Branch anticipates making available for public inspection and copying the files pertaining to the assassination of former President John F. Kennedy. The approximately 600 sections which comprise this investigation include the files relating to Lee Harvey Oswald, Jack Ruby, the assassination investigation itself and a file relating to our dealings with the Warren Commission.

It is apparent from this that a number of FBI personnel were already involved in the decision to process these records as of the date of this memorandum and that earlier memoranda relevant to it must have been created. It is equally obvious that some kind of inventory must have been made in order for Mr. Decker to estimate the number of sections and pages involved in the releases contemplated. Yet plaintiff has not been given such memoranda or any inventory. Nothwithstanding this, the affidavit of FBI Agent Beckwith even goes so far as to deny that there are any records responsive to plaintiff's request other than the worksheets themselves.

Plaintiff has not been provided with copies of any guidelines or instructions to those who processed these records. Yet the historical importance of these records and the untutored nature of Operation Onslaught personnel who were brought to Washington, D.C. to process them would seem to require such guidelines and instructions.

The Decker memorandum gives an estimate as to the cost of processing these records. Undoubtedly there are other memoranda and documents which report on the costs actually incurred in processing these records and which give a breakdown of these costs according to various categories.

The Decker memorandum also inciates that approximately 60 Freedom of Information Act requests "of various scope" had been received by the FBI. These requests and the administrative records generated in response to them are clearly within the scope of plaintiff's request for "all other records related to the processing, review, and release" of the FBI's Central Headquarters files on the JFK assassination. Any lists of such requests would also be within the scope of plaintiff's request. The Setember 16, 1976 testimony of FBI Special Agent John E. Howard in Weisberg v. Department of Justice, Civil Action No. 75-1996, states that such a list was compiled. (See Attachment D) Yet plaintiff has not been provided with any list of these requests, the requests themselves, or the administrative records created in response to or during the processing of such requests.

Finally, it is plaintiff's understanding that the FBI's Central Headquarters files on the JFK assassination were processed at least three times before they were released to the public on December 7, 1977 and January 18, 1978. This means that there must have been earlier versions of these worksheets which were later

revised. Plaintiff, however, has been given only one set of worksheets.

In National Cable Television, Inc. v. F.C.C., 156 U.S.App.D.C. 91, 94, 479 F. 2d 183, 186 (1973), the United States Court of Appeals for the District of Columbia stated:

> Summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law. To prevail, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.

In this case, defendants have failed to show that each document within the requested class has been produced. Before summary judgment can be granted, defendants must demonstrate the adequacy of their search. Exxon Corporation v. F.T.C., 384 F. Supp. 755, 760 (D.D.C. 1974). But the affidavits which defendants have submitted in support of their mostion for summary judgment do not describe the nature of any search made or claim that a thorough search was made. Moreover, it is apparent that if a thorough search for all materials responsive to plaintiff's request had been conducted, plaintiff would have been provided with a great number of additional records which he has not so far obtained.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN OF SHOWING ENTITLEMENT TO EXEMPTION 1

Defendants claim that certain information has been excised from the worksheets provided plaintiff because it is exempt from disclosure under 5 U.S.C. §552(b)(1). Exemption 1 provides that the mandatory disclosure provisions of the Freedom of Information

Act to not apply to matters that are:

> (1)(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

In support of their claim that information which appeared on certain of the worksheets is exempt from disclosure under 5 U.S.C. §552(b)(1), defendants have submitted the affidavit of Special Agent David M. Lattin, which states:

> (9) The affiant has reviewed the worksheets and has determined that the proper classification has been assigned and that they have been appropriately marked in accordance with EO 11652 and Section 4(A), and 28 C.F.R. 17.40, et seq.

The initial problem with Agent Lattin's affidavit is that it nowhere indicates that he has reviewed the actual FBI records from which the purportedly classified information on the worksheets was extracted and determined that these underlying documents are currently properly classified according to both the procedural and substantive provisions of Executive Order 11652. Yet it is obvious that if the underlying documents are not properly classified in accordance with the terms of that Executive order, then there is no basis for the classification on the worksheets of information derived from those documents.

By letter dated July 7, 1978, Mr. Quinlan J. Shea, Jr., Director, Office of Information and Privacy Appeals, advised plaintiff that his office had affirmed the excisions made on the worksheets. However, Mr. Shea's letter makes it clear that the review conducted by his office extended only to a determination that the excisions on the worksheets "were in fact necessary to be compatible with the excisions from the actual records." (See Exhibit 11 to Weisberg Affidavit of July 10, 1978, hereafter referred to as "First Weisberg Affidavit")

Mr. Shea's letter further states:

> The classified materials have been referred to the Department Review Committee for determination whether they warrant continued classification under Executive Order 11652. You will be notified if the Committee's final decision results in the declassification of any information.

Thus, the validity of the (b)(1) exemption which defendants have claimed for certain information appearing on the worksheets hinges upon two things: 1) whether the underlying records are at present properly classified according to Executive order; and 2) whether the Department Review Committee affirms the classified status of the actual records; or, more specifically, whether it affirms the classified status of the items of information contained in the underlying records which appear on the worksheets.

In view of this, plaintiff contends that the Court should hold in abeyance any judgment on the Exemption 1 claim until: a) plaintiff can undertake a limited amount of discovery; and b) the Department Review Committee acts upon the documents which have been referred to it.

Discovery is particularly necessary because the FBI has a long history of classifying information which is in fact already publicly known. For example, the First Weisberg Affidavit states that after Weisberg had been provided with unclassified copies of certain FBI records, the FBI first classified the same documents, then declassified them and sent them to him in expurgated form. (First Weisberg Affidavit, ¶66)

Exhibits 12A and 12B to the First Weisberg Affidavit provide a second illlustration of this. As Weisberg states in that affidavit:

> Exhibit 12A is the "SECRET" FBI copy of an FBI memorandum with three paragraphs deleted. Exhibit 12B is the identical, never classified memo without these excisions. * * * All the content of the two excised

> paragraphs except for two sentences was published by the Warren Commission. These two sentences, the first two on page two, became public domain more than a year ago. The only content of those two sentences then not already within the public domain is the reference to FBI agents. The Commission published one of these photographs twice, as two different exhibits. The fact of the tape recording has been within the public domain for from three to five years. All that could have been new when the content of this memo was released by the Secret Service is the FBI's negative identification. This, of course, is contrary to all earlier official representations, beginning with those made to the Commission by the agencies involved. (First Weisberg Affidavit, ¶106. Emphasis in original)

Special Agent Lattin's affidavit is also deficient in its failure to state that the purportedly classified information is not already public information. Nor does Agent Lattin state that he consulted with those sufficiently familiar with the subject matter to be able to state whether the material excised on Exemption 1 grounds is already public knowledge or remains secret. Such an inquiry is imperative, particularly in a historically important case such as this where most of the underlying records are now nearly fifteen years old.

For these reasons, plaintiff must be allowed to undertake discovery to determine whether the underlying documents are properly classified, whether information already public is being withheld under the guise that its "disclosure" would harm the national security, and what exactly is included within the phrases "intelligence source" and "intelligence method" as used by the FBI. For, example, is a newspaper clipping considered an intelligence source? Is the CIA considered by the FBI to be an intelligence source that qualifies for Exemption 1 protection? Until such questions are answered, summary judgment in favor of defendants is inappropriate.

III. THE PUBLIC INTEREST REQUIRES THAT THE INFORMATION WITHHELD UNDER EXEMPTION 2 BE DISCLOSED

Defendants have invoked Exemption 2 with respect to informant file numbers and informant symbol numbers. According to the affidavit of FBI Special Agent Horace Beckwith, this was done "to protect the FBI Informant program and the FBI's administration of informants." (Beckwith Affidavit, ¶6(b))

Exemption 2 excludes from the Freedom of Information Act's mandatory disclosure requirements matters that are: "related solely to the internal personnel rules and practices of an agency." The United States Supreme Court construed this provision in Department of the Air Force v. Rose, 425 U.S. 352 (1976), where it held that "Exemption 2 is not applicable to matters subject to . . . a genuine and significant public interest." In so holding, the Court quoted Vaughn v. Rosen, 173 U.S.Appp.D.C. 187, 523 F. 2d 1136 (1975) to the effect that:

> ". . . the Senate Report indicates that the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest.
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> * * *
>
> "Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.' [Soucie v. David, 145 U.S.App.D.C. 144, 157, 448 F. 2d 1067, 1080 (1971)]" Department of the Air Force v. Rose, supra, at 375.

Defendants cite this decision and assert that "it is clear that the public's interest in knowning the names of FBI informants is neither significant nor genuine when compared to the FBI's need to keep this information confidential." (Emphasis added. Defendant's Motion for Summary Judgment, p. 7) This, however, misses the point. Disclosing the symbol informant number does not reveal

the names or identities of informants. In fact, one presumes that informants are given symbol numbers in order to protect against disclosure of their names and identities. The harm which defendants cite is, therefore, not a real one.

On the other hand, there is a genuine and significant public interest to be served by disclosure of informant symbol numbers in an historically important case. Disclosure of informant symbol numbers permits one who is a subject expert to evaluate the information which was provided by the informant more accurately and effectively than he otherwise could.

For example, it is obviously important to know whether the information contained in several FBI reports on the same subject comes from a single informant or was supplied by two or more informants. Such information provides a means of ascertaining whether an informant has made consistent or contradictory reports and whether the informant's account is supported by information supplied by other informants or is contradicted by them. In turn, this provides a means of evaluating the actions taken or not taken by the FBI in response to information supplied by an informant. Unless the symbol informant numbers are divulged, there is no means of evaluating such considerations.

Still other uses to which informant symbol numbers can be put in evaluating information are set forth in Exhibit 3 to the First Weisberg Affidavit. (Exhibit 3 is an excerpt from another affidavit by Mr. Weisberg which was filed in the case of Lesar v. Department of Justice, Civil Action No. 77-0692)

Because disclosure of informant symbol numbers will not disclose names and identities of FBI informants and therefore cannot harm the Government's interests in this respect, the public interest in disclosure outweighs any countervailing considerations and requires that these numbers not be excised.

IV. RECORDS IN THIS CASE WERE NOT COMPILED FOR LAW ENFORCEMENT PURPOSES: THEREFORE, EXEMPTION 7 DOES NOT APPLY

Defendants have invoked various provisions of Exemption 7 as justification for excising certain information from the worksheets. Exemption 7 applies only to "investigatory records compiled for law enforcement purposes." But when President Kennedy was assassinated, it was not a federal crime to murder the President. FBI Director J. Edgar Hoover testified to this before the Warren Commission. (See First Weisberg Affidavit, ¶¶39-42, and Hearings Before the President's Commission on the Assassination of President Kennedy, Volume V, page 98)

The FBI having had no law enforcement purpose in conducting its investigation into the circumstances surrounding President Kennedy's assassination, it cannot now invoke Exemption 7 for the records it compiled as a result of that investigation.

V. ASSUMING, ARGUENDO, THAT RECORDS WERE COMPILED FOR LAW ENFORCEMENT PURPOSES, DEFENDANTS HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING ENTITLEMENT TO PROTECTION UNDER THE CITED PROVISIONS OF EXEMPTION 7

A. Exemption 7(C)

Defendants seek to prevent the disclosure of information on the grounds that it is protected by Exemption 7(C), which provides an exemption for investigatory records compiled for law enforcement purposes to the extent that their production would "constitute an unwarranted invasion of personal privacy."

For decades the FBI violated the privacy of thousands upon thousands of persons without the slighest concern for the illegality of its actions. These days, however, it piously invokes a concern for personal privacy to bar disclosure of information in its files.

In certain cases the FBI's love of Exemption C knows no bounds. It is abundantly invoked where the names of FBI agents who participated in illegal acts--or the names of their victims--would otherwise be disclosed. It is also used as a means of harrassing a FOIA plaintiff the FBI does not like. For decades the FBI has carried out a vendetta against this plaintiff. It is not surprising, therefore, that it has used the exemptions to the Freedom of Information Act in such a ludicrous manner that it becomes apparent that harrassment, not compliance with the Freedom of Information Act, is the name of the game. For example, in one of Mr. Weisberg's lawsuits, Weisberg v. Department of Justice, Civil Action No. 75-1996, the FBI extended its love of privacy to information appearing in the newspapers. Thus, it deleted the name of the FBI's fingerprint expert, George Bonebrake, from an article in the Memphis Commercial Appeal. (See Exhibit 5 to First Weisberg Affidavit)

In this case the defendants have excised the names of the FBI agents who produced the worksheets. There is absolutely no basis whatsoever for doing this. In another of plaintiff's lawsuits, Weisberg v. Department of Justice, Civil Action No. 75-1996, the names of the FBI agents who produced the worksheets were not excised. This enabled plaintiff to single out one agent whose processing of documents was especially bad. This agent was subsequently removed. (See First Weisberg Affidavit, ¶¶44-46) Now the FBI is suddenly asserting that it would be an unwarranted invasion of privacy for the FBI to reveal the names of those who processed the underlying documents and recorded their actions on the worksheets.

This disclosure of the names of FBI agents is obviously not an unwarranted invasion of privacy, particularly in an historically

important case. This is shown by the fact that: 1) the FBI has previously released the names of FBI agents who prepared worksheets during the processing of FOIA requests, and 2) the FBI has on occasion even gone so far as to release lists of FBI agents which include their home addresses and phone numbers. (See Exhibits 2 and 3 to Second Weisberg Affidavit)

Furthermore, there is reason to believe that not only the excision of the names of FBI agents but also the other deletions made under this guise are inconsistent with the privacy standard which the FBI has applied in other instances. For example, the FBI has released material concerning the sexual fantasies and acts of Marina Oswald, as well as hospital records pertaining to her pregnancy. (See First Weisberg Affidavit, ¶¶13-14, and Exhibit 1 to First Weisberg Affidavit) It has also released vicious fabrications about plaintiff and his wife to the public even after plaintiff had provided proof of the falsity of these records. (See First Weisberg Affidavit, ¶15)

These are not just isolated examples. An even more detailed accounting of the FBI's inconsistencies--and improper motivations--in invoking Exemption 7(C) is given in the excerpt from another Weisberg affidavit which is reproduced as Exhibit 8 to the First Weisberg Affidavit.

Finally, the affidavits submitted in support of defendants' motion for summary judgment are deficient in that they fail to state that the information excised under the Exemption 7(C) claim is known not to have been publicly revealed. The FBI and other components of the Justice Department are notorious for withholding under exemptions 7(C) and 7(D) information which is already known to be in the public domain. This is graphically illustrated by a single three-page document with 30 excisions, 29 of which were easily filled in upon the basis of publicly available information.

(See Attachment 5)

It is plaintiff's position that information cannot be excised pursuant to this provision if it is already in the public domain. Furthermore, plaintiff contends that defendants must supply an affidavit by a government official would know stating that the information is not public before the government can carry its burden of showing entitlement to this exemption. This the government has not done.

The law requires that when Exemption 7(C) is claimed the public interest in disclosure must be weighed against privacy considerations. Deering Milliken, Inc. v. Irving, 548 F. 2d 1131, 1136, n. 7 (4th Cir. 1977). The District of Columbia has held that for each document, an agency must show why an invasion would occur and how serious it would be. In addition, the use to which the requester is expected to put the information must be weighed in making this determination. Rural Housing Alliance v. U.S. Dpet. of Agriculture, 498 F. 2d 73 (D.C. Cir. 1974); Retail Credit Co. v. FTC, 1976-1 CCH Trade Cas ¶60727 (D.D.C. 1976).

The defendant has not provided sufficiently detailed information about the excisions grounded on its 7(C) claim for the Court to determine whether disclosure would in fact result in an unwarranted invasion of privacy in specific instances. Nor is there any information in the affidavits submitted by the defendants which show that they weighed the personal privacy interest against the public interest. Yet the Attorney General's Memorandum on the 1974 Amendments itself asserts:

> When the facts indicate an invasion of privacy under clause (C), but there is substantial uncertainty whether such invasion is "unwarrranted," a balancing process may be in order, in which the agency would consider whether the individual's rights are outweighed by the public's interest in having the material

> available. (Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, p. 10)

The FBI has already taken the position that its investigation of President Kennedy's assassination is a case of great historical importance. In view of this, even without knowing the identities of those whose names have been withheld under 7(C), the balance would seem to be heavily in favor of public disclosure. Yet because the affidavits do not provide sufficient details on how this decision was arrived at, it may be necessary to undertake discovery on this issue.

B. Exemption 7(D)

Defendants have also invoked Exemption 7(D), which exempts from mandatory disclosure investigatory files compiled for law enforcement purposes to the extent that they:

> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

This provision places on defendants the burden of demonstrating that the withheld information is confidential and that there was an agency promise or implicit agreement to hold the matter in confidence. Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F. 2d 73 (D.C. Cir. 1974); Local 32 v. Irving, 91 LRRM 2513 (W.D. Wash. 1976). Defendants have not met this burden here. In fact, it is apparent that they cannot meet it. At the time the underlying records were compiled there was no such promise or agreement. This is evident from the fact that the Warren Commission itself published countless FBI records without any such excisions. There simply was no promise or agreement of confidentiality, implied or express.

Defendants have also claimed that Exemption 7(D) is applicable to information supplied by "confidential commercial or institutional sources." Plaintiff contends that this is an erroneous interpretation of Exemption 7(D). While it is clear that this provision does protect persons who provide information in confidence, it is extremely unlikely that Congress intended to use the term in a fashion which would expand its obvious meaning to include all law enforcement records provided by institutions, including state or local law enforcement agencies, to a federal agency.

The term "confidential source" is not defined in the Freedom of Information Act. However, the legislative history of the Act would seem to rule out the possibility that Congress intended it to create an institutional exemption such as the Department is claiming here. The Senate amendment to exemption 7 originally employed the term "informer" rather than "confidential source." In explaining the substitution of the latter phrase, the Joint Explanatory Statement of the Committee of the Conference stated:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. (Emphasis added) [Freedom of Information Act and Amendments of 1974 (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents, Committee on Governmental Operations, U.S. House of Representatives; Committee on the Judiciciary, U.S. Senate, p. 320]

This makes it clear that Congress intended to broaden the term "informer," a term which is exclusively restricted to persons, to include persons other than paid informers. It obviously did not contemplate that the term would be expanded beyond human sources to include entire agencies or "commercial institutions." Other portions of the legislative history carry this same implication.

For example, Senator Kennedy, a prime sponsor of this Amendment, stated:

> [W]e also provided that there be no requirement to reveal not only the identity of a confidential source, but also any information obtained from him in a criminal investigation. (Emphasis added) [Source Book, p. 459]

The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act also construes Exemption 7(D) this way. After quoting clause (D), the Attorney General states:

> The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatory record, civil or criminal. (Conf. Rept., p. 13) The term "confidential source" refers not only to paid informants but to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." Ibid. In most circumstances it would be proper to withhold the name, address, and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of law. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test for purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown. (Emphasis added) [Attorney General's Memorandum on 1974 Amendments, p. 10]

Thus, the legislative history seems firmly against the interpretation of 7(D) advocated by defendants, as does the Attorney General's own construction of its meaning. Plaintiff contends, therefore, that summary judgment in favor of defendants on this aspect of its 7(D) claim must be denied.

Plaintiff further notes that the objection he has made to defendants 7(C) claim--that it has not been shown that the information being withheld is not already public knowledge--applies equally to the 7(D) claim.

C. Exemption 7(E)

Defendant also invokes Exemption 7(E) for certain excisions it has made. This provides an exemption for records which would "disclose investigative techniques and procedures."

The legislative history shows that this exemption is not intended to apply to matters which are already publicly known. The Conference Report expressly addressed this point in commenting on this provision:

> The conferees wish to make clear that the scope of this exception against disclosure of "investigative techniques and procedures" should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques. [H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974)]

The Beckwith Affidavit states only that this exemption has been claimed "to protect investigative techniques." It does not state that these techniques are not known to the public. As the Second Weisberg Affidavit asserts, one of these techniques, pretext, has been known for thousands of years. (See Second Weisberg Affidavit, ¶4) Accordingly, defendants have not met their burden of proof with respect to this claim either and their motion for summary judgment must be denied.

Respectfully submitted,

James H. Lesar

JAMES H. LESAR
910 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this ~~31st~~ 1st day of ~~July,~~ August, 1978 mailed a copy of the foregoing Opposition to Defendants' Motion to Dismiss Or In The Alernative For Summary Judgment to Mr. Emory J. Bailey, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUBMIA

HAROLD WEISBERG, Plaintiff,	
v.	Civil Action No. 78-0249
CLARENCE M. KELLEY, et al., Defendants	

STATEMENT OF GENUINE ISSUES
PURSUANT TO LOCAL RULE 1-9(h)

Pursuant to Local Rule 1-9(h) plaintiff sets forth the genuine issues of material fact which he feels must be litigated. Incorporated herein by reference are the two affidavits of Harold Weisberg which are attached to plaintiff's Opposition to Defendants' Motion to Dismiss Or In The Alernative For Summary Judgment.

1. Whether defendants have produced all relevant records which are within the scope of plaintiff's request.

2. Whether the defendants have conducted a thorough search of all relevant files which might contain records within the scope of plaintiff's request.

3. Where information has been excised from worksheets on Exemption 1 grounds, are the records from which the withheld information was excised currently and properly classified pursuant to Executive Order?

4. Where information is withheld under any provision of Exemption 7, were the underlying records which contain this information compiled for a law enforcement purpose?

5. Whether the release of informant symbol numbers can or will result in the identification of informants.

6. Whether there is a public interest in the disclosure of informant symbol numbers.

7. Whether information has been excised under Exemptions 7(C), 7(D), and 7(E) which is already publicly known.

8. Whether information for which an exemption is claimed under 7(D) was provided as the result of an express promise or implied agreement of confidentiality.

9. Whether the public interest in the disclosure of the names of FBI agents outweighs any alleged claim of an unwarranted invasion of privacy.

10. Whether Exemption 7(C) has been applied selectively or consistently.

James H. Lesar

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Attorney for Plaintiff

ATTACHMENT A

Civil Action No. 78-0249

OFFICE OF THE DIRECTOR

UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

January 9, 1978

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

Dear Mr. Lesar:

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

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

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

James H. Lesar, Esq.

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

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

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

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

Sincerely yours,

Clarence M. Kelley
Director

ATTACHMENT B

Civil Action No. 78-0249

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

JAN 12 [illegible]

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

Dear Mr. Lesar:

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

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

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

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

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

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

Sincerely,

Benjamin R. Civiletti
Acting Deputy Attorney General

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

ATTACHMENT C

Civil Action 78-0249

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Mr. McDermott

DATE: 11/17/77

FROM : A. J. Decker, Jr.

SUBJECT: COST IN PROCESSING THE JFK ASSASSINATION FILE FOR RELEASE UNDER THE FOIPA

Assoc. Dir. ____
Dep. AD Adm. ____
Dep. AD Inv. ____
Asst. Dir.: ____
Adm. Serv. ____
Ext. Affairs ____
Fin. & Pers. ____
Gen. Inv. ____
Ident. ____
Inspection ____
Intell. ____
Laboratory ____
Legal Coun. ____
Plan. & Eval. ____
Rec. Mgmt. ____
Spec. Inv. ____
Training ____
Telephone Rm. ____
Director Sec'y ____

PURPOSE: Purpose of this memorandum is to give you a rough and conservative figure as to the direct costs involved in processing the JFK Assassination files.

DETAILS: As you are aware the FOIPA Branch anticipates making available for public inspection and copying the files pertaining to the assassination of former President John F. Kennedy. The approximately 600 sections which comprise this investigation include the files relating to Lee Harvey Oswald, Jack Ruby, the assassination investigation itself and a file relating to our dealings with the Warren Commission.

In attempting to capture the costs involved in processing this investigation we have taken into consideration the Grade range and salaries of personnel who have been involved in processing this information, including personnel benefits, as well as the per diem expended for those Onslaught Agents who worked full time in processing this material. In addition, inasmuch as some 80,000 pages are involved in this matter, we have also taken into account the duplication charges, including machine rental. Based upon the above we conservatively estimate the costs involved up to the present time to be $187,643.89.

V-36 DE-57 62-109060-7845

The above figure, of course, does not include the additional processing that will be necessary as a result of the approximately 60 requests of various scope which we have received to date as well as the additional costs that will accrue as a result of the undoubtedly overwhelming public interest which we anticipate once publicity is generated concerning this release. Obviously these latter factors will cause a substantial increase in the costs associated with public disclosure of this investigation.

1-19-78

1 - Mr. Boynton
1 - Mr. Long
Atten: Mr. Groover
1 - Mr. McCreight
1 - Mr. Tierney
2 - Mr. Bresson
(Attention: Mr. Beckwith)
AHM:law (7)

CONTINUED - OVER

A. J. Decker, Jr., to Mr. McDermott memo
re: Cost in Processing the JFK Assassination File

It is interesting to note that in the legislative history accompanying amendment of the FOIA in 1974, the Congress estimated that the additional costs for implementation of this legislation would consist of $50,000 for the first year and $100,000 per year for the next succeeding 5 years for the entire Executive Branch.

RECOMMENDATION: None, for information.

APPROVED:

Director	Adm. Serv.	Legal Coun.
Assoc. Dir.	Crim. Inv.	Plan. & Insp.
Asst. Dir.	Fin. & Pers.	Rec. Mgmt.
Asst. Dir.	Ident.	Spec. Inv.
Dep. Asst. Dir.	Intell.	Tech. Servs.
	Laboratory	Training
		Public Affs. Off.

ATTACHMENT D

Civil Action 78-0249

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 75-1996
U. S. DEPARTMENT OF JUSTICE,	:	
	:	
Defendant.	:	

Washington, D. C.

Thursday, September 16, 1976

The above-entitled cause came on for hearing before THE HONORABLE JUNE L. GREEN, United States District Judge, at 10:30 a.m.

APPEARANCES:

JAMES HIRAM LESAR, ESQUIRE

For the Plaintiff

JOHN R. DUGAN, ESQUIRE, AUSA

For the Defendant

AFTERNOON SESSION

(1:30 p.m.)

Whereupon

JOHN E. HOWARD

resumed the witness stand, having been previously duly sworn, and was further examined and testified as follows:

CROSS-EXAMINATION (Resumed)

THE COURT: May I inquire at this time if they haven't gotten to Mr. Weisberg's case at this time, or have they?

THE WITNESS: I don't think they have, Your Honor. I am not that familiar with that case.

MR. DUGAN: Mr. John Cunningham, who is in the courtroom, would be able to give some testimony.

THE COURT: All right.

MR. LESAR: Excuse me just one second, Your Honor.

BY MR. LESAR:

Q Before we adjourned, we were reading from an affidavit of yours and I am trying to locate it. Just a second.

Now, in this affidavit on the search for request on the JFK assassination, you indicate that Mr. Fensterwald's request for those documents is one of sixteen such requests for documents relating in general to the FBI investigation of the assassination of John F. Kennedy, two of which were received prior to plaintiff's.

Now do you know that there were sixteen requests, no more, no less?

A. At that time I knew exactly how many there were because I had a list of them.

Q. You had a list?

A. Yes.

Q. Do you still have that list?

A. No.

Q. You don't have it? How did you obtain that list?

A. By writing down the names of the requests as they came in and were assigned out to my team.

Q. On each FOI request pertaining to documents on the assassination of President Kennedy?

A. This is a specialized thing. There are so many requesters for the documents regarding the JFK assassination that a specialization is required. It is not just sixteen now. I believe it is up to 26.

Q. Now, the date of your affidavit is April 16, 1976. How many of those sixteen requests were by my client?

A. I don't know. I can't recall.

Q. You don't recall? Do you recall any by my client?

A. No, really, I just recall the requests more in the context of what they are for than who makes them. I don't recall who makes the request generally.

Q. But you did have a list?

A. Yes.

Q. Did my client's name appear on that list?

A. I assume so. He says he has a request for JFK material.

Q. Suppose I were to inform you that my client had filed more than sixteen requests pertaining to the JFK assassination files?

A. Are you informing me so?

Q. Yes.

A. I don't think you are right.

THE COURT: Before that date?

MR. LESAR: Yes.

THE WITNESS: Yes. If he has I am not aware of them.

BY MR. LESAR:

Q. It is my understanding that your unit specializes in processing those requests.

A. No, my team.

Q. Your team does.

A. That is correct.

Q. So that all such requests would have been routed to your team?

A. From the time I started I started to specialize with them.

Q. What was that time?

A. I believe it was about three or four months after I came to headquarters.

Q. Which was?

A. September 2 is when I got here, of '75.

ATTACHMENT E

Civil Action 78-0249

JAMES H. LESAR
ATTORNEY AT LAW
910 SIXTEENTH STREET, N. W. SUITE 600
WASHINGTON, D. C. 20006

TELEPHONE (202) 223-5587

October 17, 1977

FREEDOM OF INFORMATION APPEAL

Mr. Giffin Bell
U.S. Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Bell:

I write in reference to a Freedom of Information request by my client, Mr. Harold Weisberg, for copies of Department of Justice records which pertain to the assassination of Dr. Martin Luther King, Jr. Mr. Weisberg's request is the subject of a Freedom of Information lawsuit now nearly two years old. (Civil Action No. 75-1996)

By his letter of September 20, 1977, a copy of which is attached hereto, Mr. James P. Turner, Deputy Assistant Attorney General, Civil Rights Division, has advised me that as a result of my administrative appeal to the Deputy Attorney General on behalf of my client, Mr. Harold Weisberg, the Civil Rights Division was directed to make a supplemental release to me of all material previously withheld, "except for certain minor excisions," which "identifies individuals who appear within the King assassination files, even though they clearly had no connection with the murder, or sources who furnished information in confidence."

Mr. Turner further advised that seven documents which had been referred to the Civil Rights Division because they originated with it were also being released, again with "only minor excisions of names and other identifying data . . . pursuant to 5 U.S.C. §552(b)(7)(C) and (b)(7)(D)."

In accordance with Mr. Turner's advice that I may appeal the deletions from the records provided me by writing to you within thirty days, I hereby appeal.

I also enclose a copy of one of the records which the Civil Rights Division has released, a three-page memorandum dated August 26, 1971 from Monica Gallagher to "File." I have filled in the missing blanks in this document. The names deleted are all public domain, having been written about extensively, including, for

example, in Gerold Frank's An American Death and Wayne Chastain's articles in Computers and People Magazine, both of which are possessed by the Department of Justice.

What I have done with the Gallagher memorandum could easily be done with the twenty-five other documents which were released with Mr. Turner's September 20 letter.

If the "analysts" who review Departmental records for public release will not abide your Freedom of Information guidelines, cannot use common sense, and do not resort to indices of books on the subject of such records, then perhaps it would be more economical, not to mention quicker, if you simply installed a WATS line to Mr. Weisberg so they could check to see which of their deletions are already in the public domain.

I hope that all the records released on September 20th will be restored to their pristine state, and quickly, lest I be compelled to ask for a court hearing so that Mr. Weisberg can demonstrate that the withholdings are unjustifiable by filling in the missing blanks.

Finally, I call your attention to the complaint which Mr. Weisberg and I have made to other Department of Justice officials, which is that the skimpy release of records by the Civil Rights Division obviously comes nowhere near to being in compliance with Mr. Weisberg's Freedom of Information Act requests for records pertaining to Dr. King's assassination.

Sincerely yours,

James H. Lesar

James H. Lesar

cc: Mr. John R. Dugan, AUSA
Judge June Green
Mrs. Lynne Zusman
Mr. Bill Schaffer

UNITED STATES GOVERNMENT DEPARTMENT OF JUSTICE

Memorandum

TO : File

DATE: August 26, 197

MG:sbh

FROM : Monica Gallagher
Deputy Chief, Criminal Section
Civil Rights Division

DJ: 144-72-662

SUBJECT: Wayne Chastain, Jr.

On August 24, 1971, Mr. Queen and I met with Wayne Chastain, Jr., a reporter with the Memphis Press Scimitar, home address 810 Washington, Apartment 502, Memphis, Tennessee, telephone 901-525-6158; office telephone 526-2141. Mr. Chastain requested the meeting to furnish the following information, which he advised has mostly been previously furnished to the FBI in Memphis in 1969. At the conclusion of the interview I advised Mr. Chastain that we would carefully consider the information he furnished, together with other information available to us, and determine what if any further action would be appropriate.

A. Re Jack Youngblood aka Tony Brunetti. Youngblood, according to Chastain, is from the area of Alleene, Arkansas and has reputedly been engaged in illegal and/or questionable activities such as gunrunning. He is about 40 years old, has dark hair and eyes, and speaks some Spanish. He is a man of some wealth, drives a cadillac, and likes "high living." He was a college roommate of Walter Ratford, a Memphis attorney.

Chastain is persuaded that there is considerable evidence that Youngblood was in Memphis April 3-5, 1968, and present in "Jim's Grill" opposite the

Lorraine Motel on the afternoon of April 4 shortly before the assassination. If this is true, Chastain believes further investigation of Youngblood is warranted since there is no apparent logical explanation for his presence in that neighborhood at that time.

The evidence that Youngblood was there is as follows:

1. Lloyd Jowels (Giles?), owner of Jim's Grill, remembers (according to Chastain who interviewed him) that on the day of the assassination at about 4:30 p.m. a man entered Jim's Grill and ordered sausage and eggs. This was sufficiently unusual as to be noteworthy because at that hour of the day most people come to Jim's to drink and the cooking grill is closed down. Also, this man was not of the working class "type" that frequents Jim's Grill. During the time the man was in Jim's he went three times to the telephone but never made a call. He left about 5:00 p.m.

On later being interviewed by the police about the presence of any suspicious individuals, Jowels described the sausage-and eggs man and was allegedly told to call the police if he returned. In fact the man returned for breakfast the next day (4/5) carrying a suitcase. Jowels called the police who picked him up as he left the cafe. (He again had ordered sausage and eggs!). Jowels was never asked by the police to identify this man. However, he later heard that the man was released by the police a short time after he was picked up, although other individuals were being held as suspects in the King matter.

Chastain said he exhibited to Jowels a "mug shot" of Youngblood and that Jowels positively identified him as the sausage-and-eggs man.

2. A former waitress at Jim's Grill, identity unknown to Chastain but allegedly known to [redacted] also remembers the man and could identify a photograph of Youngblood as the individual involved.

3. Walter Buford once said that Youngblood called him from Memphis the day before the King slaying, but according to Chastain he now denies that he can fix the date accurately. In approximately May 1968 Buford told Chastain that the last time Youngblood had been in Memphis was "about the time of the King assassination." When the question of Youngblood as a possible suspect was raised, Buford said, "Jack" is more liberal on the racial issue than I am."

B. Re Bernavitas

A Memphis attorney named Russell X. Thompson told Chastain that he had been consulted by an individual who gave his name as Bernavitas, saying that was an alias. Bernavitas had allegedly been arrested in connection with the King slaying and released. He thought he would ultimately be charged and wanted Thompson to represent him. He took Thompson's telephone number and departed. Chastain exhibited to Thompson several photographs of Youngblood. With respect to the mug-shot, Thompson said that was not the man; however, with respect to a newsclip photograph, Thompson could not be sure. Thompson allegedly told Chastain that he inferred from Bernavitas' speech that he spoke Spanish in addition to English.