UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION TO DEFENDANTS'
MOTION FOR A PROTECTIVE ORDER

This is a Freedom of Information Act lawsuit in which plaintiff seeks 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)

It is apparent from the pleadings in this case, particularly plaintiff's opposition to defendants' motion for summary judgment, that there are material facts in dispute which preclude an award of summary judgment at the present time.

On August 16, 1978, plaintiff undertook to initiate discovery with respect to these issues by noticing the depositions of Mr. Allan H. McCreight and Mr. Horace P. Beckwith, employees of the

the Federal Bureau of Investigations. Mr. McCreight is presently Chief of the Freedom of Information/Privacy Acts Branch of the FBI's Records Management Division and had a personal involvement in the creation of some of the records sought by this lawsuit. Mr. Beckwith, reportedly a unindicted co-conspirator in some of the FBI's illegal activities, has been used as an affiant in this case.

The day before these depositions were to be taken plaintiff's counsel called defendants' attorney. Plaintiff's counsel was informed that Messrs. Beckwith and McCreight would not appear for the depositions scheduled for the next day and that the government was filing a motion to quash the depositions. Plaintiff's counsel immediately cancelled the depositions because his client, who lives at Frederick, Maryland and who for health reasons only travels to Washington, D.C. by bus, can ill-afford to spend either time or money on any wasted endeavors.

On October 4, 1978, plaintiff again noted the depositions of Messrs. Beckwith and McCreight. Defendants have once again moved for a protective order, asserting that depositions of their employees is not appropriate at this time because dispositive motions are presently before the Court. In addition, defendants assert, without any evidentiary support whatsoever, that taking depositions at this stage of the litigation "would indeed be burdensome and possibly a waste of resources."

Rule 30 of the Federal Rules of Civil Procedure provides:

> (a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including any party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant . . ..

Rule 30 is very clear: except under circumstances which do not now obtain in this case, depositions may be taken at any time without leave of court. As the court said in Grinnell Corp. v. Hackett, 70 F.R.D. 326, 333-334 (1976):

> . . . it should be noted that an order to vacate a notice of taking a deposition is generally regarded by the court as both unusual and unfavorable, and most requests of this kind are denied. Investment Properties International, Ltd. v. Ios, Ltd., 459 F. 2d 705, 508 (2d Cir. 1972); Wright and Miller, supra, § 2037 at 272-75. A showing that the liklihood of harassment is "more probable than not" is in my view insufficient without a concomitant showing that the information sought was "fully irrelevant and could have no possible bearing on the issues." Wright and Miller, supra, § 2037 at 275.

The cases cited by defendants are exceptions to the general rule. For example, the Allied Poulty case involved a question as to whether or not the court even had jurisdiction. Since the Court is obligated to determine whether or not it does have jurisdiction and a negative determination would make any discovery on the merits a wasted effort, the court felt this issue should be resolved first.

The jurisdiction of this court is not at issue in this case and discovery would help clarify the factual issues now in dispute. In addition, no showing has been made that the depositions will be burdensome or oppressive. Plaintiff doubts that the depositions will take more than two or three hours at most. In short, defendants are expending more time and energy opposing these depositions than it would take to proceed with them on schedule.

For these reasons, the motion for a protective order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 1978 mailed a copy of the foregoing Opposition to Defendants' Motion for a Protective Order to Mr. Emory J. Bailey, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

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O R D E R

Upon consideration of defendants' motion for a protective order, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1978

ORDERED, that Defendants' Motion for a Protective Order is hereby denied, and the depositions of Messrs. McCreight and Beckwith may be taken as scheduled.

_____
UNITED STATES DISTRICT COURT