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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, :
 :
 Plaintiff, :
 :
 vs. : Civil Action No. 78-C249
 :
 CLARENCE M. KELLEY, et al., :
 :
 Defendants. :
 :

Washington, D. C., January 10, 1979

BEFORE THE HONORABLE JOHN LEWIS SMITH, Jr., United
States District Court Judge, Motions.

APPEARANCES:

JAMES LESAR, Esq., on behalf of Plaintiff.

EMORY J. BAILEY, Esq., on behalf of Defendants.

18A

P R O C E E D I N G S

1 THE DEPUTY CLERK: Civil Action No. 78-249.

2 Weisberg versus Kelley.

3 Mr. Lesar and Mr. Bailey.

4 THE COURT: We have cross motions in this case,
5 is that correct?
6

7 MR. BAILEY: Yes, Your Honor.

8 MR. LESAR: Well, I think the primary issue is their
9 motion for summary judgment and our opposition to it.

10 There was an earlier summary judgment motion filed
11 but it was filed on a different factual -- in a different
12 factual context.

13 THE COURT: It is just the government's motion then?

14 MR. LESAR: Yes.

15 THE COURT: All right.

16 MR. BAILEY: I would agree with that, Your Honor.

17 Your Honor, I would like to reserve time for rebuttal.

18 THE COURT: How much time do you want total?

19 MR. BAILEY: I would like to reserve -- how much time
20 total?

21 About ten minutes -- I think I would take about 15
22 minutes for my initial presentation and an additional five
23 minutes for rebuttal.

24 THE COURT: As long as you make a complete opening,
25 that is agreeable.

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MR. BAILEY: Yes.

May it please the Court, we are before the Court this morning on basically the defendants motion to dismiss or in the alternative for summary judgment.

There was a motion on the part of the plaintiff for summary judgment at an earlier stage in the litigation which was not -- basically we think it was just a tactic on the part of the plaintiff and as a result was not meant indeed to seek summary judgment in this particular case due to circumstances surrounding the case at that particular time.

This case is an FOIA case. Plaintiff seeks from the F.B.I. basically information dealing with the assassination of President John Kennedy.

In his initial request to the Bureau, Plaintiff wrote a somewhat rambling letter and at the very end of that particular letter he indicated that he wanted certain information regarding the processing of some 98 -- at that time -- some 98,000 pages of documents regarding the assassination of President Kennedy.

At that particular time, because of the fact that plaintiff indicated that he was referring to work sheets, the F.B.I. tried to cooperate and surmised that he indeed wanted the work sheets that had been generated in the processing of these particular documents.

1 As a result thereof, the Bureau released to plaintiff
2 some 2500 pages of work sheets minus certain deletions.

3 I might add parenthetically that these work sheets
4 were released to plaintiff free of charge. There was no charge
5 for the reproduction.

6 Then the work sheets, the Bureau utilizing proper
7 exemptions under the Freedom of Information Act, excised
8 certain material pursuant to exemptions B-1, B-2 and B-7(c),
9 B-7(d) and exemption B-7(e).

10 Now, with regard to exemption B-1, I call Your Honor's
11 attention to the affidavit of Mr. Lattin, a special agent at
12 the Bureau, who is authorized to review documents according
13 to Executive Order 11652, and who indeed reviewed the work
14 sheets in accordance with that particular executive order
15 and found that the information therein should be withheld in
16 accordance with that particular executive order.

17 Certainly in plaintiff's opposition to defendants
18 summary judgment motion, plaintiff raises the red-herring that
19 Mr. Lattin did not indicate in his affidavit that he had review-
20 ed the actual document itself.

21 The defendant submits that that indeed is not necessary
22 in the particular case because the document -- because the work
23 sheet itself was independently reviewed by Mr. Lattin and the
24 information thereon was independently reviewed and determined,
25 in accordance with the executive order, that it was properly

1 classified.

2 Now, in this particular case we are talking, as
3 indicated in the affidavit of Mr. Lattin, we are talking
4 about information -- what we are talking about basically is
5 information which would -- which if released would do harm
6 to the national security because we are talking about the fact
7 that we have an intelligent source and I believe we are
8 talking in this particular case about cooperation between
9 the Bureau and foreign police agencies.

10 Certainly when you look at the legislative history
11 and indeed look at the applicable case law, that type of infor-
12 mation customarily -- not only customarily but as a matter
13 of law, it has been withheld and that holding has been sustained
14 by courts throughout the country.

15 Indeed, as was indicated in the opinion that I submitted
16 to this Court, notice of filing, an opinion of Lesar versus
17 the United States Department of Justice, Judge Gesell of this
18 Court, and you will note that it indeed contained certainly
19 many of the same issues that this particular case contains.

20 Judge Gesell consistently found for the government
21 and upheld the government's position throughout the case.

22 The Bureau also utilized exemption B-2. Now, this
23 exemption is taken in conjunction with B-7(d).

24 Now, in the B-2 situation, basically what was with-
25 held were the symbol numbers used by the Bureau to identify

1 confidential sources, confidential informants.

2 Indeed, in this particular case, the release of such
3 symbol numbers could possibly -- maybe I should say probably
4 lead to the identification of some F.B.I. informants.

5 It is certainly necessary that the Bureau be able to
6 maintain the integrity and the confidentiality of its
7 informant system.

8 To release that type of information to the public at
9 large would compromise the Bureau and some of its more vital
10 functions.

11 In the case of Lesar decided by Judge Gesell, which
12 I filed with this Court, Judge Gesell upheld the deletions
13 of the symbol numbers and found for the government in that
14 regard.

15 In regards to the exemption B-7(c), here we are deal-
16 ing with a situation where we have information that was
17 gathered by the Bureau in the course of its investigation and
18 in the course of law enforcement activities, and obviously
19 because they were investigating the assassination of a
20 President.

21 In this particular case, the Bureau deleted information
22 regarding third parties, the release of which would be an
23 unwarranted invasion of their privacy and in this particular
24 case I would like to point out to the Court that B-7(c) is some
25 what different than B-6.

1 B-6 uses the word clearly which, of course, gives
2 us a greater burden and that word clearly is deleted in B-7-(c).

3 Certainly information regarding third parties regard-
4 ing their sex life, psychological evaluations, would certainly
5 be an unwarranted invasion of their privacy and serve no
6 good by their release.

7 It was also used to withhold the names of certain
8 F.B.I. investigators. Again, this type of deletion has been
9 held -- upheld and was upheld in the case that I previously
10 cited in Lesar versus the United States Department of Justice.

11 I think that is good law. I urge this Court to
12 follow that opinion.

13 In the B-7(d) exemption, the Bureau withheld in-
14 formation of a confidential nature and also this was taken
15 not only because of a confidential nature but confidential
16 sources.

17 Again, this is consistent with the Congressional
18 intent, the legislative intent of Congress and it was also
19 consistent with the applicable case law.

20 It is very interesting to note, if I may address
21 myself, that plaintiff in his opposition to defendants' motion
22 relied almost extensively upon his client, Mr. Weisberg's
23 affidavit, and indeed we got to the point where it was almost
24 the law according to Mr. Weisberg.
25

1 He cited very little authority whatsoever for any
2 of the propositions.

3 To go on, exemption B-7(d) was also taken in con-
4 junction with the symbol numbers in regards to the informant
5 files.

6 Again, this is consistent with the applicable law
7 and consistent with the nature of the Act and consistent with
8 the intent of the Act.

9 B-7(e) was taken to protect investigative techniques.
10 This is important here because plaintiff makes much of the fact
11 that indeed there was no indication of whether this particular
12 technique was known generally to the public.

13 Defendants admit it is not and if it were so, then
14 it would have been released. If indeed the Bureau had made it
15 generally known to the public, and I think that is the point
16 and the Bureau is not responsible if someone is able to make
17 a lucky guess or base it on some information they acquired in
18 some form or another, and are able to put these things together
19 and to come up with that particular technique.

20 The Bureau did not make that technique public and
21 indeed, the Bureau still has the right and indeed the obligation
22 to refrain from making it public if indeed that is a vital
23 technique used by the Bureau in its investigations.

24 The defendant has set forth in two affidavits the
25 basis for the utilization of the exemption so provided by the

1 Act.

2 There is no indication and plaintiff does not raise
3 this, that there was in any way bad faith on the part of
4 defendant in regards to the affidavits before this Court.

5 I would like to impress upon the Court that the
6 defendant has been very cooperative in this case at adhering
7 to the dictates of the Act and indeed taking those exemptions
8 given by the Act for the purpose of protecting certain infor-
9 mation.

10 The defendant has released some 2500 pages of
11 work sheets to plaintiff at no cost to plaintiff. The defendant
12 has not tried to withhold information that was not necessary to
13 be withheld and could not be withheld pursuant to the Act.

14 It is the defendants position that dismissal or
15 summary judgment in this particular instance is appropriate.

16 Your Honor might note that I did not go into the issue
17 of whether Mr. Kelley and certain other individuals are proper
18 parties to this case.

19 The plaintiff did not address himself to that particular
20 issue and I think plaintiff concedes that indeed those in-
21 dividuals are not proper parties, Your Honor, and should not be
22 part of the case.

23 It is the defendants position that this case should be
24 dismissed or in the alternative defendant should be granted
25 summary judgment.

1 MR. LESAR: James Lesar for plaintiff, Mr. Harold
2 Weisberg.

3 A couple of preliminary comments before I proceed
4 with the argument.

5 In response to a couple of remarks just made, first,
6 we do not concede that Kelley and the other parties are not
7 proper parties. It seems self-evident that we didn't bother
8 to address that.

9 Secondly, with respect to the several repeated
10 references in Mr. Bailey's presentation to the fact that the
11 documents which have been made available were released without
12 charge to Mr. Weisberg, and I should like to inform the Court
13 that this is not because of the generosity of the F.B.I.

14 A decision was made by the Freedom of Information
15 Appeals Office of the Department of Justice that Mr. Weisberg
16 was to get all materials in the Department's files on the King
17 and Kennedy assassinations without charge.

18 That decision was made over F.B.I. opposition and
19 so to represent it as having come out of the good heart of
20 the F.B.I., is highly misleading.

21 The defendant has raised the question of bad faith.
22 I think that bad faith is evident in this case. It, of course,
23 has been evident in the handling of all of Mr. Weisberg's
24 requests for information pertaining to the King and Kennedy
25 assassinations over the past 15 years.

1 Over the past 15 years the F.B.I. has gone to
2 enormous lengths to obstruct to deny his requests to the King
3 and Kennedy assassination records on orders from the highest
4 level of the F.B.I., and apparently from Director Hoover him-
5 self and F.B.I. officials were even directed not to respond
6 to his requests for information.

7 His FOIA requests were filed under a file number
8 which designates subversive activities. Repeatedly, through-
9 out these cases, the F.B.I. has filed false affidavits stating
10 that records did not exist or could not be located when in fact
11 they did exist and ultimately were located.

12 The purpose of the F.B.I. is to delay and obstruct
13 Mr. Weisberg's access to information. They have done it in
14 this case and through a very simple tactic. They have
15 proclaimed and they have rewritten his request and rewritten it
16 to pertain only to one category of information, the work sheets
17 pertaining to the processing of J.F.K. assassination documents.

18 In fact, that request refers to other categories
19 of information.

20 Specifically I call the Court's attention to the
21 complaint which requests first the work sheets and secondly,
22 all other records relating to the processing, review and
23 release of these records.

24 Now, this morning only Mr. Weisberg has learned and
25 has advised me that he has just received five cartons containing,

1 he estimates, some 15,000 relevant pages which were delivered
2 to him, although they should have been delivered to him a year
3 ago, at the time of the release. No exemptions were claimed
4 for these documents.

5 They were documents relating to the F.B.I.'s
6 scientific testing.

7 THE COURT: Are those documents that are involved
8 in this complaint?

9 MR. LESAR: Yes, they are because of the way the
10 request is worded and they are involved also because -- the
11 withholding of those documents was in addition made possible
12 only by the fact that the F.B.I. ignored the other items on
13 the request. We would have known about the existence of these
14 documents many months ago if it had not been for the stone-
15 walling of this request and the refusal to admit that the
16 request is for items other than the work sheets.

17 In addition, Mr. Weisberg has also received records
18 again that he read on the bus coming down here this morning
19 and those documents were obtained by another requester, had
20 relevant materials which should have been provided in this
21 case and they referred to materials which should have been
22 provided in this case.

23 One example is that they disclosed that there was a
24 1972 review of all the relevant files at F.B.I. headquarters
25 on the J.F.K. assassination.

1 Now, that is just the second item of the request,
2 all other records relating to the processing, review and
3 release of these records.

4 So we know absolutely that they do have records
5 that are within the scope of the request and they have with-
6 held them.

7 The same files that he has just obtained make it clear
8 why they wished to withhold these. They wished to withhold
9 them because they concealed records that Mr. Weisberg has
10 requested and not obtained.

11 They conceal the fact that other requesters have not
12 been denied the access to records he has requested and while
13 he himself has not been able to obtain them.

14 They reveal the F.B.I.'s policy of resisting the
15 Department of Justice's Freedom of Information Act policy
16 and that the F.B.I. is so highly disturbed by the request for
17 information on the F.J.K. assassination that it has referred --
18 described FOIA requesters as "smear artists" and the like
19 even though no such description is remotely applicable to
20 those persons.

21 Now, there are without question issues of material
22 fact in dispute here. First, of course, and the most obvious
23 is the one that I have been addressing, the scope of the
24 information request itself.

25 It is quite plain that the F.B.I. has not responded
to the other items on his request.

1 We know of various types of documents which are
2 obviously within the scope of his request that they have not
3 provided us.

4 These examples are records of their plan to put
5 the J.F.K. assassination files in the Library of Congress and
6 elsewhere.

7 Their guidelines and procedures to be followed in the
8 processing of the J.F.K. assassination headquarter files, and
9 their memoranda on the cost of processing that data and it is
10 known that there are at least 60 other Freedom of Information
11 Act requests for Kennedy assassination records and those too
12 are within the scope of Mr. Weisberg's request.

13 None of them have been provided.

14 Secondly and obviously closely related to the issue of
15 material fact in dispute is whether or not a good faith search
16 was made and it is obvious that because of the way in which the
17 F.B.I. deliberately misconstrued the Freedom of Information Act
18 request that no search in fact was made at all.

19 With respect to the exemptions claim, the first,
20 of course, relates to Exemption 1.

21 The only affidavit which the government has set forth
22 in support of that exemption is the Lattin affidavit.

23 It does not meet the requirements that are now the
24 law.

25 As has been noted earlier this morning, the present

1 executive order is Executive Order 12065, which is found at
2 43 Fed. Register 28950 which became effective December 1, 1978.
3 That order requires even more stringent standards than
4 Executive Order 11652, which is the executive order which Mr.
5 Lattin executed --

6 THE COURT: Is that order to be applied retroactively
7 in your opinion?

8 MR. LESAR: Yes, it is quite clear from the reading
9 of the executive order that any time that a question arises
10 concerning the classification or declassification of documents
11 they are to be judged according to the classification standards
12 of the new executive order and there are some very important
13 differences between the classification standards of the new
14 executive order and the old executive order.

15 First of all, the threshold test as to classifiability
16 has been changed and whereas before it was whether or not the
17 unauthorized disclosure of the information reasonably could be
18 expected to cause damage to national security.

19 THE COURT: Has there been an official determination
20 of that?

21 MR. LESAR: I don't think there is any case law on it
22 because the Act -- the order just became effective about a
23 month ago but I think it is plain from the text of the executive
24 order itself.

1 The first point is that the executive order now re-
2 quires that it reasonably be expected -- that the unauthorized
3 release cause identifiable damage to national security.

4 There is no such statement in the Lattin affidavit.

5 Secondly, the new executive order requires a balancing
6 test and even if a record may be made to fall within the
7 criteria for classification, the need to protect the information
8 must be weighed against the public interest in the disclosure
9 of that information.

10 In fact, just the new philosophy of the new
11 executive order is that virtually all information -- all
12 classified information will be expected to be declassified with-
13 in six years after its origination.

14 We are talking about information here that is ten
15 years old already and there is no reason to believe that it can
16 meet the stringent test of the new executive order.

17 In addition, there is every reason to believe that
18 there -- it is quite obvious that there is a very important --
19 public interest in releasing all possible information about the
20 assassination of President Kennedy.

21 As the attorney for the defendant noted, we also
22 contend that the Lattin affidavit is deficient because it does
23 not indicate that any review was made of the classification
24 of the underlying documents.

25 Now, Mr. Weisberg appealed the determinations in this

1 case that the information deleted on the work sheets is proper-
2 ly deleted under Exemption 1 and that appeal I think is still
3 pending in the Department of Justice.

4 They have made no determination as to whether or
5 not either that information -- excuse me.

6 They have made -- Mr. Weisberg has appealed the
7 classification of the underlying documents and there has been
8 no decision made as-- upholding the classification of those
9 documents.

10 Obviously, if the underlying documents are not proper-
11 ly classified--or still do not warrant classification, then the
12 derivative information on the work sheets cannot be properly
13 classified either and so there first must be a determination
14 as to whether or not the underlying documents have been proper-
15 ly classified and still warrant classification under the new
16 executive order.

17 The affidavit of Mr. Weisberg on this -- one of his
18 affidavits states that he has reviewed some of the documents
19 and it is apparent to him that much of what has been withheld
20 as classified has in fact been the subject of wide spread
21 public attention.

22 So, therefore, there is no basis for requiring its
23 continued classification.

24 I should add that our experience in this regard has
25 been time and time again that the government agencies have

1 withheld information claiming it to be classified and then when
2 they get faced with a situation, and they will say so in affidavi
3 and mislead the court into believing that that is the case,
4 and we just had another recent experience where the C.I.A.
5 claimed that and then on the day their brief was due in the
6 Court of Appeals, they released the information. There never
7 was any basis for any claim that it would endanger national
8 security.

9 With respect to Exemption 2, we have information
10 on which -- have insufficient information upon which the
11 Court can properly make a determination as to whether or not
12 that exemption applies.

13 We don't know, for example, whether or not they apply
14 it to informant symbol numbers. We don't know whether or not
15 the informant symbol numbers are already public.

16 We have had many cases and many inferences in other
17 cases in which the F.B.I. has deleted informant symbol numbers
18 even though they have already been publicly released. .

19 Simply interrogatories would establish that fact and
20 we could have a fuller record on whether or not that is the case.

21 Another obvious factual question there is whether or
22 not the informant is dead. Quite obviously once the informant
23 is dead, the Exemption 2 cannot apply and even though this is
24 true, we have had instances where the F.B.I. has continued to
25 apply that exemption to documents that Mr. Weisberg has

1 requested even though the informant himself was dead.

2 With respect to Exemption 7, there is a threshold
3 question whether or not it can apply to these materials at all.

4 The simply fact is that in order for Exemption 7 to
5 apply, there must be a law enforcement purpose and at the time
6 President Kennedy was assassinated, the F.B.I. had no statutory
7 authority for investigating that crime. It was not a federal
8 crime. The investigation was not made pursuant to any law
9 enforcement purpose but pursuant to a request by the President
10 of the United States that he be informed of facts and that a
11 report be made to him about the facts.

12 More specifically, with respect to the claim for
13 Exemption 7(c), the use of this exemption is preposterous
14 in the manner in which the F.B.I. does it, and particularly
15 in this case.

16 We have put into the record, for example, one of the
17 things they have used it for is to delete the names of F.B.I.
18 agents. Well, the F.B.I. has a habit of releasing those names
19 to other persons and sometimes Mr. Weisberg, but when it wants
20 to delay him access, they delete the names of F.B.I. agents.
21 They have done it in this case, and yet we have put into the
22 record --

23 THE COURT: Isn't it conceivable that there is a
24 reason for deleting those names?

25 MR. LESAR: No, sir, no. There is no --

1 THE COURT: What evidence do you have of bad faith?

2 MR. LESAR: Well, I think we can -- we have listed
3 several things and one is the fact that they have --

4 THE COURT: Specifically with reference to your latest
5 statement that they deleted the names of the agents.

6 MR. LESAR: I think the evidence is that, for example,
7 we have put into the record cases where they have released
8 whole pages of names of F.B.I. agents with their telephone
9 numbers, their addresses, everything.

10 THE COURT: What possible motive would they have?

11 MR. LESAR: In withholding the names? Simply to
12 deprive Mr. Weisberg of information that would enable him to
13 prosecute his Freedom of Information cases more successfully.

14 You see, one of the things --

15 THE COURT: Mr. Weisberg has been quite successful,
16 has he not?

17 MR. LESAR: Well, if he has been, the nation owes --
18 him an enormous debt and we would not be where we are today
19 without his efforts either in the general sense of the Freedom of
20 Information law and specifically with respect to the status of
21 public knowledge about the assassination of President Kennedy.

22 But not withstanding that, it has come after 15 years
23 of effort in which every obstacle that is possible has been
24 thrown in his path and the need -- let me give you a specific
25 example.

1 They deleted even the names of people who processed
2 these work sheets. Now, they didn't do this in Civil Action
3 75-1996, which was his suit for King assassination documents.
4 They didn't do it there but they have done it here.

5 I suggest the only reason is, that they have done it
6 here, is that they have hit upon it as a tactic for stalling and
7 delaying and preventing his access to information.

8 Secondly, and I meant to inform the Court of this
9 earlier, but the government's case or a large part of the
10 government's case and I think really everything of the govern-
11 ment's case with respect to everything except Exemption 1,
12 which is addressed by Mr. Lattin, is addressed by F.B.I.
13 Agent Beckwith.

14 Now, F.B.I. Agent Beckwith is an unindicted co-
15 conspirator in F.B.I. illegal activities. He has recently been
16 fired.

17 Now, the Court couldn't possibly give any credence—
18 to the affidavit of a man in that position and that -- I think
19 the very use of that affidavit is another example of bad faith.

20 They have got an agent that is extremely vulnerable
21 and the agent has a history—in other cases we have his affidavit
22 pop up and we have found out that he has made false statements
23 in those affidavits and this is a matter of record and Mr.
24 Weisberg so states, without contradiction, in one of the
25 affidavits that he has filed in this case.

1 Your Honor, that is the agent that they have chosen
2 to rest their case on. I think it is an outrage and I think
3 the Court ought to be very upset that a Court would be asked to
4 render findings of factson the basis of an affidavit with that
5 kind of a history.

6 And so those are specific examples. Now, there are--
7 of course, the Exemption 7(c) requirement is, by the F.B.I.'s
8 own admission by the former Director of the F.B.I., Mr. Kelley,
9 in historical cases and this is a historical case, and the
10 interest of the public in knowing the names of the agents --
11 the public interest outweighs whatever privacy interest could
12 be attached to making public the name of an F.B.I. agent.

13 The fact is that after 15 years in which this case
14 has been in the papers repeatedly and in which hundreds of
15 thousands of pages of documents have been released, the names
16 are known. It is just that they decided as a tactic to keep
17 Mr. Weisberg from learning them.

18 The names can be very important to Mr. Weisberg
19 because of his subject expertise and he is able to -- when he
20 knows the names to better evaluate the information to determine
21 which agent is responsible for doing something or for failing
22 to do something and so there are important reasons in the public
23 interest why those names should not be deleted and usually
24 and in fact in historical cases, according to the word of the
25 F.B.I. director himself, that kind of information is not

1 deleted, but in this case it has been.

2 With respect to Exemption 7(d), that exempts in-
3 formation which would disclose the identity of a confidential
4 source and in the case of a record compiled by a criminal
5 law enforcement authority in the course of a criminal in-
6 vestigation or by an agency conducting a lawful national
7 intelligence investigation, confidential information furnished
8 only by the confidential source.

9 Now, you turn to the affidavit of Mr. Beckwith
10 at page 7 and you find that his affidavit does not state that.
11 It states instead that the material deleted is material that
12 would disclose the identity of the confidential source or--
13 and not and but or reveal confidential information furnished
14 only by the confidential source and then he adds a further
15 qualification, and not apparently known to the public.

16 Well, there is, of course, that -- that does not meet
17 the criteria of the statute and we don't know from his
18 affidavit and we can't know from his affidavit whether or not
19 the information which is public is being deleted under this
20 guise.

21 Again, discovery, I think, would -- discovery and
22 a Vaughn v. Rosen response would do much to clear this up and
23 it is again another factual question that is in dispute.

24 Finally, with respect to Exemption 7(e), which con-
25 cerns investigatory techniques, the criteria requires -- the

1 Freedom of Information Act makes quite clear that that applies
2 only to methods and techniques which are secret, which are not
3 generally known.

4 The fact is, as one of Mr. Weisberg's affidavits
5 specifically states, that it is quite clear that they have used
6 this exemption to conceal the use of pretext as an invest-
7 igatory technique.

8 Well, my goodness, everybody knows that pretext
9 is an investigatory technique and yet they are claiming the
10 exemption to conceal that sort of information, but again,
11 on the record—that is before the Court now, the Court cannot
12 sustain the government's claims.

13 The government has not met its burden of proof with
14 respect to any of the exemptions and in particular it is obvious
15 that it has flagrantly misinterpreted Mr. Weisberg's request
16 and there are many documents within the scope of that request
17 which have not been provided.

18 Thank you, Your Honor.

19 THE COURT: Mr. Bailey.

20 MR. BAILEY: It has been the history of Mr. Lesar in
21 arguing these FOIA cases to stray sometimes from the instant
22 matter or the matter that is present before the Court, and
23 attempts to argue every FOIA case that Mr. Lesar has ever filed
24 and indeed argue every FOIA request that Mr. Weisberg has
25

1 filed.

2 In this particular instance, Mr. Lesar makes much of
3 the fact that the Bureau flagrantly and intentionally mis-
4 interpreted Mr. Weisberg's request.

5 I would like to call to the attention of the Court
6 Mr. Weisberg's request. In reading Mr. Weisberg's request,
7 Mr. Weisberg's request consists of very disjointed, rambling
8 letter and at the end throws in this request that indeed it is
9 very vague and unclear and certainly within the Act itself,
10 there is ample authority that a request should have and should
11 meet certain criteria of specificity.

12 Certainly in this regard he mentioned work sheets
13 and talks about the processing and we must remember what he
14 is talking about in this initially. He is basically talking
15 about the 98,000 pages of documents that had originally been
16 released to him.

17 Certainly the Bureau is well within reason when it
18 interprets that request and when he mentioned the work sheets,
19 the purpose of that is to mean he is talking about work sheets.

20 Now, certainly there may be all kinds of documents.
21 I don't know but the point is that when you make a request, there
22 is a burden to make -- indicate what it is that you seek, and
23 certainly we must look at this request in light of the things
24 that have gone on before and his request in regards to the work
25 sheets dealt with at that time the 98,000 pages of documents

1 regarding the Kennedy assassination that had previously been
2 released to Mr. Weisberg, and incidentally, at a time when
3 Mr. Weisberg requested the work sheets, there was no appeal,
4 at least, at Justice regarding the actual documents themselves.

5 Mr. Lesar attempts to make much of the fact that
6 the underlying documents regarding documents of the 98,000 pages,
7 I suppose, and there was no indication that the underlying
8 documents had been classified.

9 Defendant submits that that indeed is not necessary.
10 The documents in question in this case are the work sheets and
11 if indeed the work sheets have been reviewed in accordance with
12 the executive order then in effect, that is the appropriate
13 way of determining whether indeed the decisions were properly
14 made.

15 Mr. Lesar makes much of the fact that the executive
16 order that was utilized, Executive Order 11652, at the time
17 the work sheets were reviewed by Mr. Lattin, no longer is
18 applicable today -- is no longer the applicable executive order.

19 The defendant submits that that would be applicable in
20 the executive order at that time and indeed the defendant cannot
21 be held to any burden of the executive order that went into
22 effect in December.

23 Certainly we cannot be held to -- accountable for
24 any law or rule that is not in effect.

25 Plaintiff submits that the executive order is to be

1 applied retroactively.

2 Defendant submits that plaintiff reads too much
3 into the order. He fails to understand the intent of the order.

4 The order is not to be applied retroactively as
5 plaintiff submits.

6 I think it is incumbent upon the defendant to make some
7 statement in regard to Special Agent Beckwith.

8 Plaintiff makes several statements regarding Mr.
9 Beckwith. I think plaintiff at this point is rather unfair
10 to Mr. Beckwith and I would think that plaintiff of all people,
11 plaintiff's counsel, would avoid some of the statements, Your
12 Honor, regarding Mr. Beckwith.

13 In regards to this case, it is noted that plaintiff
14 does not submit that Mr. Beckwith nor did he offer any proof
15 that Mr. Beckwith's affidavit was in any way false or mis-
16 leading.

17 Plaintiff relies basically upon some conclusionary
18 statements regarding other affidavits. I submit that this Court
19 is not and should not be concerned with statements regarding
20 other affidavits in other cases.

21 That is not before the Court and indeed the Court --
22 if the Court considered such statements, it would be unfair
23 not only to Mr. Beckwith but indeed unfair to the government
24 in this case.

25 Mr. Lesar seems content to rely upon the law according

1 to Mr. Weisberg.

2 I would submit that the Court will indeed rely on
3 the law according to the law, according to the way the law
4 is written.

5 Certainly in the case of the B-7(c) exemption, the
6 investigation that was carried on by the Bureau is indeed
7 an investigation conducted pursuant to law enforcement activities.

8 The mere fact that at the time President Kennedy was
9 assassinated, assassinated in Dallas, and as a result thereof,
10 he poses the fact that there was no law at that time explicitly
11 giving the Bureau jurisdiction in terms of the investigation.

12 I would submit that the common sense conclusion, the
13 obvious conclusion, is the fact that indeed the Bureau
14 conducted this investigation as a part of its law enforcement
15 activities, and indeed at the request of the highest official
16 in this country.

17 I submit that the Bureau's investigation was a law
18 enforcement activity and to say otherwise, is wrong, and certain-
19 ly not supported by any kind of common sense analysis of the
20 situation at the time.

21 It is always interesting to note and Mr. Lesar makes much
22 of the fact that this information has been released to others,
23 and that it is the -- that the Bureau is in some way harassing
24 Mr. Weisberg.

25 I would submit to this Court that Mr. Weisberg made quit

1 a few FOIA cases in various courts of the land and may have
2 been given "X" number of pages of documents by various agencies
3 of the Federal Government.

4 I would submit that Mr. Lesar exaggerates to some
5 extent. His client is not the center of wide spread conspiracy
6 to in some way keep him from obtaining certain documents.
7 Customarily I would avoid comment upon statements to that
8 effect because they are, obviously on the face of them, not worth
9 commenting on.

10 In this particular case I think it is time that some-
11 one made the comment that Mr. Weisberg is not as great as
12 Mr. Weisberg may think so -- may think Mr. Weisberg is or
13 Mr. Lesar thinks he is.

14 I would submit to this Court that any statements
15 regarding the bad faith of the Government, the bad faith of
16 the Bureau, should be taken in light of the fact or with a view
17 to the fact that Mr. Weisberg and Mr. Lesar failed to submit
18 any tangible proof of that and indeed relied basically upon
19 affidavits, conclusionary statements, innuendos, and total
20 untruths.

21 In conclusion, I submit that the government has
22 indeed -- the Bureau has indeed filled its obligation in
23 regards to the Freedom of Information Act, in regards to the
24 exemptions that have been taken, and indeed have acted in good
25 faith.

1 I call the Court's attention to the applicable
2 case law cited in the defendants' brief and indeed I would
3 again call the Court's attention to the case of Lesar versus
4 the United States Department of Justice.

5 I think a fair reading of the issues in this
6 particular case indicate that the so-called questions of fact
7 raised by plaintiff are not really questions of fact. There
8 are no questions of genuine fact in this case.

9 Indeed, the government has acted properly and as I
10 noted before, plaintiff fails to state or cite any case law
11 for some of his assertions.

12 In conclusion, the government requests, based upon
13 the brief and the record submitted before this Court, this
14 case be dismissed or in the alternative the government be
15 granted summary judgment.

16 Thank you, Your Honor.

17 THE COURT: Mr. Lesar.

18 MR. LESAR: Your Honor, just a couple of brief
19 things that I want to call to the Court's attention.

20 First, with respect to the question of whether or not
21 Mr. Weisberg's request was misinterpreted or was understand-
22 able, I would like to point out that under the Department of
23 Justice's own regulations, if they had any question about what
24 the request pertained to, if they had any question about whether
25 or not it reasonably described the records, and under 28 C.F.R.

1 16.3, they are then required to contact and I will read the
2 subsection "D" of that section and it states, "If it is
3 determined that a request does not reasonably describe the
4 records sought as specified in paragraph B-1 of this section,
5 the response denying the request on that ground shall specify
6 the reasons why the request failed to meet the requirements
7 of paragraph B-1 of this section and shall extend to the
8 requester an opportunity to confer with Department personnel
9 in order to attempt to reformulate the request in a manner
10 which will meet the needs of the requester and the requirements
11 of B-1 of this section."

12 No attempt at all was made to do that. Even after
13 the complaint was filed, no attempt was made to reformulate
14 the request with Mr. Weisberg's assistance.

15 That, I think, is a clear indication that this is
16 just a tactic that they hold up in order to stall compliance
17 with the request.

18 It is a perfectly readable and understandable request
19 and secondly, with respect to Executive Order 12065, and I note
20 that the government in this case has taken an inconsistent
21 position, I think, with the case of Allen versus C.I.A., which
22 was argued here earlier this morning in which they did apply
23 the order to a request retroactively.

24 In addition, I would like to just quote Section 3-302
25 of that executive order.

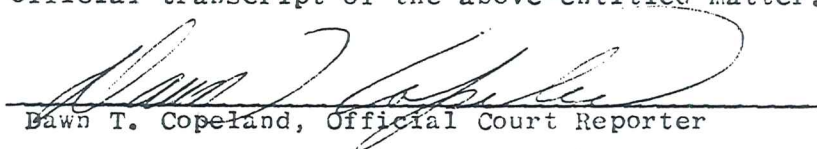
1 "When information is reviewed for declassification
2 pursuant to this Order, or the Freedom of Information Act, it
3 shall be declassified unless the declassification authority
4 established pursuant to Section 31 determines that the infor-
5 mation continues to meet the classification requirements
6 proscribed in Section 1-3 despite the passage of time."

7 That, I think makes clear the intent of the Act,
8 to apply its standards to -- to apply them retroactively.

9 Thank you, Your Honor.

10 THE COURT: Gentlemen, I will review the matter
11 further and advise counsel at a later date.

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16 This record is certified by the undersigned to be the
17 official transcript of the above-entitled matter.

18
19 
Dawn T. Copeland, Official Court Reporter