## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 78-0249

CLARENCE M. KELLEY, <u>et</u> <u>al.</u>, Defendants

## MEMORANDUM OF POINTS AND AUTHORITIES

By order dated October 25, 1978, this Court granted a motion for a protective order which defendants' made to prevent plaintiff from taking the depositions of FBI Special Agents Horace P. Beckwith and Allan H. McCreight. Thereafter, by order dated February 15, 1979, this Court granted summary judgment on behalf of defendants.

Subsequently, however, plaintiff filed a motion for reconsideration supported by three affidavits and numerous exhibits. Plaintiff's affidavits and exhibits make it quite plain that defendants' have filed untruthful, obfuscatory and misleading affidavits with this Court. For example, with respect to purportedly classified matters, the April 17, 1979 affidavit of Special Agent Horace P. Beckwith stated in its Paragraph (3)(a) that:

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

The Beckwith affidavit thus gives the clear impression that certain "notations and short phrases" on the worksheets had already been classified in that form, as well as in the underlying "original documents." However, if the affidavit of Bradley Benson, is correct, this impression is entirely false, since Benson swears that the information on the worksheets was not classified until April 27, 1978, ten days <u>after</u> the date of the Beckwith affidavit. The April 28, 1978 affidavit of David M. Lattin asserts:

> (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 Sections (4)(A) and 28 C.F.R. 17.40, et seq.

The Lattin affidavit is deliberately worded so as to give the false impression that the information on the worksheets was properly classified in accordance with the procedures specified in E.O. 11652. But E.O. 11652 requires that classified material be classified <u>at the time of origination</u>! The Benson affidavit makes it clear, however, that classification did not result until months after origination of the worksheets!

It is apparent that each of the affidavits submitted by the defendants in this case was deliberated worded so as to conceal relevant information from plaintiff and the Court and to mislead the Court. The defendants' affidavits did have that effect. In its Opinion of February 15, 1979, this Court asserted that: "Here the FBI affidavits show that the documents are classified according to the proper procedural criteria and that they are correctly withheld under both Executive Orders 11652 and 12065." (Opinion, p. 2)

As a result of its reliance on the truthfulness and "good faith" of the FBI affidavits, this Court now finds itself in the embarrassing position of having suppressed innocous information already released--the initials "R.C.M.P.," standing for "Royal

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Canadian Mounted Police"--under the guise that the national security of the United States will be jeopardized if this information is released to Weisberg.

It is evident from this example, as well as from the additional information which is found in the attached affidavit of James H. Lesar and its attachments, that plaintiff must be allowed to test the accuracy and veracity of the affiants used by the defendants. Not to permit plaintiff to undertake discovery after these affiants have been shown to have submitted false and misleading information to the Court would be to irremediably tarnish the integrity and independence of the Court and to prohibit plaintiff from exercising his only means of countering the corrupt practices of the FBI.

Respectfully submitted,

LESAR FAMES H.

910 16th Street, N.W., #600 Washington, D.C. 20006 Phone: 223-5587

Attorney for Plaintiff

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

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Civil Action No. 78-0249

CLARENCE M. KELLEY, <u>et</u> <u>al.</u>, Defendants

## ORDER

Upon consideration of plaintiff's motion to vacate the Court's order of October 25, 1978, and to set a schedule for discovery, defendants' opposition thereto, and the entire record herein, it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 1979, hereby

ORDERED, that the Court's order of October 25, 1978 granting Defendants' motion for a protective order and barring plaintiff from taking the depositions of FBI Special Agents McCreight and Beckwith be, and hereby is, VACATED; and it is hereby

further ORDERED, that Plaintiff shall have \_\_\_\_\_ days within which to complete discovery in this case.

UNITED STATES DISTRICT COURT

#### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

Civil Action No. 78-0249

CLARENCE M. KELLEY, et al., Defendants

## AFFIDAVIT OF JAMES H. LESAR

I, James H. Lesar, first having been duly sworn, depose and say as follows:

1. I represent the plaintiff, Mr. Harold Weisberg, in the above-entitled cause of action.

2. Mr. Weisberg recently provided me with copies of some documents he has obtained as a result of a FOIA request for records pertaining to a former FBI informant, Mr. Oliver Patterson.

3. In this case the FBI has excised certain information pertaining to informants on the grounds that it is exempt from disclosure under Exemption 2, which provides an exception for "matters that are "related solely to the internal personnel rules and practices of an agency." However, Attachment A, a copy of a signed agreement between Patterson and the FBI, contains Mr. Patterson's express declaration that: "I understand that I am not a Federal employee and will not represent myself as such." It is apparent from this and other records which Mr. Weisberg has obtained on Mr. Patterson that the FBI is in fact using Exemption 2 to conceal information pertaining to persons who are <u>not</u> FBI employees. (See Attachments A-E) 4. In this case the FBI has invoked Exemption 7(D) allegedly to withhold the identity of confidential sources and the information supplied by them. The FBI considers state and local law enforcement agencies as "confidential sources" and somtimes withholds records which the FBI has obtained from them on the grounds that they are exempt under 7(D). For instance, in <u>Lesar v. Department</u> of Justice, Civil Action No. 77-0692, the government withheld records of the Atlanta and Memphis police departments <u>en masse</u> on the grounds that they are exempt under 7(D), even though some of these records had been made public previously by the FBI itself. This Court has accepted the government's position on this issue by declaring in its Opinion that 7(D) protects against the disclosure of any source, "whether it be an individual, an agency or a commercial or institutional source." (Opinion, p. 4)

5. The FBI is not uniform in its treatment of the records of state and local law enforcement agencies in its possession. Sometimes it does release these records without invoking Exemption 7(D). For example, the FBI has recently released two reports of the Columbia, Missouri Police Department which pertain to Mr. Patterson's arrest for public drunkenness. (See Attachment F)

6. Recent news accounts report that FBI Director William H. Webster has acknowledged in testimony before the House Judiciary Subcomittee on Civil and Constitutional Rights that FBI agents used to list "phony informants" such as "the bartender, the taxi driver and everyone who said it looks like rain outside." (See Attachment G) This testimony gives rise to the possibility that the FBI's claims under Exemption 7(C) and/or 7(D) in this case might be based on "phony informants."

JAMES H. LESAR

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## WASHINGTON, D.C.

NBr.

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Subscribed and sworn to before me this 21st day of March, 1979, by James H. Lesar.

NOTARY PUBLIC IN AND FOR THE DISTRICT OF COLUMBIA

My commission expires July 31, 1979

FD-340 (REV. 8-24-88) IA VO D 170 File No\_\_\_\_ Date Received 57 11/20 FIOD OLIVER BLOCK SAFAASO (NAME OF CONTRIBUTOR) 10350 (ADDRESS OF CONTRIBUTOR) BLACK STACK, MO. (CITY AND STATE) S.F. JACOSSA SA By -(NAME OF SPECIAL AGENT) Receipt given 🗌 Yes To Be Returned 🔲 Yes Gho G-No-Description 1- STATEMA-T OF COOPENAFEDN O.B. PATISA 50 Ċ. A. ATTACHM

I, Oliver Block Patterson, have voluntarily agreed to cooperate with the Federal Bureau of Investigation in a matter affecting the security of the United States. I consider it a patriotic duty to so cooperate and agree to maintain this relationship in strict confidence. I understand that I am not a Federal employee and will not represent myself as such. I further agree not to make any disclosure or exploit in any way information which I may obtain or any activity in which I may engage on behalf of the Federal Bureau of Investigation, both while I am actively associated with the Federal Bureau of Investigation and thereafter, unless authorized to do so by the Bureau.

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WITNESSED: = , SA, FBE, ST. LOUES MO. S/11,

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	Purpose and results of contact
	Informant advised that in a conversation with POSITIVE J. B. STONER, the attorney for JOEN RAY, STONER Indicated that he feels the U. S. Government has a very weak case against his client, JOHN RAY and that it is for this reason that the United States Attorney in St. Louis, Mo. had RAY indicted rather than go through the formality of a preliminary hearing.
	STONER also advised the informant that plans are to have RAY remain in jail rather than make bond because his trial will then be scheduled sooner. STONER also indicated that there was considerable time which passed after RAY's arrest before he was able to make a telephone call, and the defense may bring this to the attention of the court at the trial.
	Informant certified that he has furnished all information obtained Coverage
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Cover Sheet for Informant Report or Mater FD-306 (Rev. 9-30-69) ١ Date prepared 4/26/21 Received by Received from Iname or symbol number Date received (6)(2 SA STANGAY F. JACOBSRA 4/23/71 6)( Method of delivery (check appropriate blocks) recording device Charitles by laforts by telephone orally 🗌 by mail Fin person Date of Report If orally furnished and reduced to writing by Agent: 11/21 Data 4 added the string of the Date(a) of activity Dictated 4/11/21 Transcribed Authenticated by Informant \_ lirief description of activity or material 2 til home 11 ( 10 10 pp 1 CI ľ bXa) (h t-1 H 1000 Stall in all of the Flle Aluera unigitial 6 9 5 1 .: \* INDIVIDUALS DESIGNATED BY AN ASTERISK (\*) ONLY ATTENDED & MEETING AND DID NOT ACTIVELY PARTICLE VIOLENCE OR REVOLUTIONARY ACTIVITIES WERE NOT DISCUSSED. ÷ . . ... Information recorded on a card index by C (b)(2), (b)(7)(0) 70- 73 Remarks: 15-64 (NSR8) 105 ALL INFORMATION CONTAINED HEREIN IS UNCLAS .... 01119 Block Stamp (6/2) (6 C.A. 78-0249 TTACHMENT 0 SEASCHED . (pie) APR 2 0 1971 SALL LUUIS F61 -

April 11, 1971 St. Louis, Missouri

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## A-4 The Washington Star Monday, March 5, 1979

# FBI Spurns Hill Audit on Informants

#### By Robert Pear

FBI Director William H. Webster has rebuffed an attempt by Congress to investigate the FBI's confidential informant program.

informant program. His action is the latest example of a recurrent problem — executive branch agencies refusing to let the General Accounting Office examine their files.

Because of such disputes, some members of Congress now favor giving subpoena powers or a judicially enforceable right of access to GAO, an investigative arm of Congress.

The GAO wanted to ask such questions as: How valuable are the FBI's informants? How does the FBI know there is a real person corresponding to each informant's name listed in the files? How does the FBI control money paid to informants? How does the FBI know its informants don't instigate or participate in crimes? The GAO did not want to see the

The GAO did not want to see the names of informants, agreeing that the FBI could delete the names from any records turned over to GAO auditors.

BUT WEBSTER feared that the perception of outsiders having access to the information could be as damaging as actual disclosure of informants' identities.

"My considered opinion is that the FBI cannot allow any informant review or audit which would lend the impression of any type of access to the information in informant files." Webster wrote to Comptroller General Elmer B. Staats; head of the GAO.

"The FBI must protect this confidential relationship to maintain credibility with those persons whose assistance is vital to our investigative mission," the FBI director said.

Webster, appearing before a congressional committee last week, called the informant "the single most important investigative tool available to law enforcement."

Negotiations for a GAO audit of the controversial informant program are at an "impasse," Staats said. The audit was requested by the

The audit was requested by the-House Judiciary subcommittee on civil and constitutional rights, headed by Rep. Don Edwards, D-Calif.

ATTACHMENT G

AT ABOUT the same time, reports began to surface suggesting that FBI agents, under pressure from headquarters, had fabricated informants and pocketed cash payments earmarked for the nonexistent informants.

Webster acknowledged that FBI agents used to list "phony informants" such as "the bartender, the taxi driver and everyone who said it looks like rain outside." But he said, "We've applied a profes-

But he said, "We've applied a professional ax to that type of informant collection." As a result, the number of informants has dropped dramatically - from 11,000 in 1976 to about 2,800.

Webster said there are about 1,000 informants in organized crime, 1,300 in general crimes and 42 in domestic security cases, compared with several thousand in the last category a few years ago.

Edwards, a former FBI agent, complained that Webster's refusal to cooperate with the General Accounting Office was seriously hindering Congress.

The congressman said he was particularly disturbed by recent allegations that the FBI, when it was supposed to be giving GAO investigators a random selection of records for a previous audit, had actually manipulated the files, suppressing those "that would really create problems for the FBI."

Staats and other GAO officials maintain that "our statutory authority clearly provides for us to have access to FBI files and documents." Edwards agrees. But FBI and Justice Department officials dispute the GAO's claim in some cases.

A 1976 agreement signed by Staats and former FBI Director Clarence Kelley gave the GAO regular access to FBI files for the first time. However, there were many limitations.

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