

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

RECEIVED

JUN - 4 1982

JAMES F. DAVEY, Clerk

HAROLD WEISBERG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 78-0322
	:	
WILLIAM H. WEBSTER, ET AL.,	:	
	:	
and	:	
	:	
FEDERAL BUREAU OF INVESTIGATION,	:	Civil Action No. 78-0420
ET AL.,	:	
	:	(Consolidated)
Defendants	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT

Preliminary Statement

This consolidated case involves two Freedom of Information Act requests for records of the FBI's Dallas and New Orleans Field Offices. Defendants' have moved for partial summary judgment with respect to the adequacy of their search for records responsive to these requests.

Plaintiff contends that defendants have not carried their burden of demonstrating that they have conducted a thorough, good-faith search for records responsive to the requests. Indeed, plaintiff contends that the evidence plainly shows that a search of the required scope and caliber has not been made.

Before arguing this point, plaintiff believes it will be helpful to provide some background information which places the search issue in proper perspective.

Background Information

A. FBI Policy of Refusing to Respond to Plaintiff's Requests

Since passage of the Freedom of Information Act in 1966, plaintiff has filed numerous requests for records pertaining to the assassinations of President John F. Kennedy and Dr. Martin Lu-

ther King, Jr. Most of these requests have been for records possessed by the Federal Bureau of Investigation ("the FBI"). Almost without exception, Weisberg has had to file suit to compel compliance with his requests. Indeed, under FBI Director J. Edgar Hoover, FBI personnel were directed not to acknowledge his requests. May 31, 1982, Weisberg Affidavit, ¶5. (Hereafter referred to as the "Weisberg Affidavit".)

The FBI's refusal to comply with Weisberg's requests became an issue in Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996, a suit for records pertaining to the assassination of Dr. Martin Luther King, Jr. At a three-day evidentiary hearing held in that case in September, 1976, Weisberg produced a list, not exhaustive, of twenty-five requests he had made which the Department of Justice and the FBI had ignored. (A copy of this list is found at Exhibit 1 to the Weisberg Affidavit)

#### B. Promises to Congress

In 1977 these facts were brought to the attention of the Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary of the United States Senate. The Subcommittee's Chairman stated that documents released to Mr. Weisberg "indicate an attitude regarding the act that is, at a minimum, very disturbing. The FBI memorandum indicates that requests from Mr. Weisberg under the Act were totally ignored." See Weisberg Affidavit, ¶65.

Mr. Quinlan J. Shea, Jr., then Director of the Office of Privacy and Information Appeals, told the Senate that he "will never be satisfied with the FBI's handling of [Weisberg's] FOIA requests," and Associate Attorney General William G. Schaffer testified that: "Mr. Weisberg does have reason to complain about the way he was treated in the past. We in the Civil Division are going to try to do something to straighten out all of these cases." See Weisberg Affidavit, ¶¶55-59.



Despite these assurances, the official Subcommittee Report noted that as of January, 1979, Weisberg told its staff that the Department of Justice and the FBI had not begun to comply with his specific requests for information on the assassinations of President Kennedy and Dr. King. See Attachment 1, Agency Implementation of the 1974 Amendments to the Freedom of Information Act, Report on Oversight Hearings by the Staff of the Subcommittee on Administrative Practices and Procedures, Committee of the Judiciary of the United States Senate, 95th Cong., 2d Sess., p. 71, n. 4 (Comm. Print) (1980).

C. The Shea Memorandum

Confirmation of plaintiff's claims that the FBI continues to resist complying with his requests is found in the March 27, 1980, memorandum from Mr. Quinlan J. Shea, Jr., then Director of the Office of Privacy and Information Appeals, to Mr. Robert L. Saloschin, then Director of the Office of Information Law and Policy.<sup>1/</sup> The Shea memorandum addresses the FBI's attempt to cut off the fee waiver for King and Kennedy assassination records which Mr. Shea granted to Mr. Weisberg in the aftermath of a court decision ordering that he be awarded such a waiver.<sup>2/</sup>

Portions of the memorandum concern the adequacy of the FBI's search for records requested by Mr. Weisberg, its lack of good faith, and its violation of promises made to the courts and

<sup>1/</sup> The text of Mr. Shea's memorandum was recently filed with the District Court in Allen v. Department of Justice, Civil Action No. 81-1206. Previously, in response to a Freedom of Information Act request by Mr. Weisberg, the FBI had authorized release of a copy of this memorandum with the text deleted in toto. Both versions are contained in Exhibit 2 to Mr. Weisberg's affidavit.

<sup>2/</sup> The FBI has in fact cut off Mr. Weisberg's fee waiver for all records requested by him which are not currently in litigation. As a result, he is being denied thousands of pages of records. Even where the records are in litigation, the FBI has on occasion used the fee waiver issue in attempt to deny him records. That happened in this case with respect to the records on George De Mohrenschildt, but the FBI was recently overruled on this by the appeals office.

to Congress. These portions bear quotation in extenso here:

Lastly, but very important, is the matter of the scope of the fee waiver granted to Mr. Weisberg. In my view (and as intended by me at the time it was granted), the waiver extends to all records about the King assassination, about the Bureau's investigation of the King assassination (not at all the same thing), about the "security investigation" on Dr. King, and about the Bureau's dealings with and attitudes towards its "friends" and its "critics" as they relate to the King case. The key point is that it extends to records by virtue of their subjects and contents, to the extent they can be located with reasonable effort -- and is not determined by where and how the Bureau has filed the records. Although the Bureau has departed from its initial position in both the King and Kennedy cases (that the only relevant records are those filed by the FBI in the main files on those cases and/or the very principal "players"), it has done so very reluctantly and to a very limited factual extent. I am personally convinced that there are numerous additional records that are factually, logically and historically relevant to the King and Kennedy cases which have not yet been located and processed -- largely because the Bureau has "declined" to search for them.

\* \* \*

. . . I know that what the Bureau wants the Committee to approve would contradict or be inconsistent with promises made to Mr. Weisberg by Bureau and Department representatives, and to representations made in court, and to testimony before the Aboureszk Subcommittee . . . .

See Weisberg Affidavit, Exh. 2.

#### D. The "Spectro" Suit

Nowhere is the FBI's refusal to conduct thorough, good-faith searches for materials sought by plaintiff more evident than in Mr. Weisberg's suit for spectrographic analyses and other scientific tests performed on items of evidence in the assassination of President Kennedy. This case has already been before the Court of Appeals on three occasions, once under the original Freedom of Information Act and twice under the Amended Act, and a fourth appeal is now pending. When suit under the Amended Act was filed on February 19, 1975, the date the new Act went into effect, the FBI



released some records and claimed it had made a complete response. When queried about other records, it claimed they did not exist, and the District Court dismissed the case. The Court of Appeals remanded and ordered Weisberg to take testimony from the FBI agents who had actually performed the tests regarding the existence or non-existence of the records sought. Weisberg v. Department of Justice, 177 U.S.App.D.C. 161, 543 F.2d 308 (1976).

On remand Weisberg established through the testimony of these FBI agents that additional records within the purview of his requests had been created. However, the FBI claimed that these records had been destroyed or discarded during "routine housecleaning," and the District Court granted summary judgment in favor of the FBI. Weisberg v. United States Dept. of Justice, 438 F. Supp. 492 (D.D.C. 1977). The FBI's claim of full disclosure notwithstanding, the Court of Appeals again reversed and remanded, this time to permit Weisberg to question the FBI agent who had performed the search for records. Weisberg v. United States Dept. of Justice, 200 U.S. App.D.C. 312, 627 F. 2d 265 (1980). Only after this second remand, and then only after on the day on which the FBI was deposed, did the FBI produce additional records which it had first claimed didn't exist, and then claimed had been destroyed.

It is against this background of unremitting recalcitrance and bad faith that the FBI's claims to have conducted a thorough search in this case must be viewed.

#### STATEMENT OF THE CASE

##### A. The Scope of Plaintiff's Requests

This Freedom of Information Act lawsuit arises out of plaintiff's requests for all records of the FBI's Dallas and New Orleans field offices pertaining to the assassination of President John F.

Kennedy, regardless of how those records are filed,

More specifically, plaintiff's December 25, 1977, request to the Dallas field office asked for:

- (1) "all records on or pertaining to the assassination of President John F. Kennedy";
- (2) "all records on or pertaining to persons or organizations who figured in the investigation into President Kennedy's murder that are not contained within the file(s) on that assassination, as well as those that are"; and
- (3) "all records on or pertaining to Lee Harvey Oswald regardless of date or connection with the investigation into President Kennedy's assassination." See Attachment 2.

Plaintiff's request to the New Orleans field office, also dated December 25, 1977, repeated these same requests and added one more:

- (4) "all records on or pertaining to Clay Shaw, David Ferrie and any other persons or organizations who figured in District Attorney Jim Garrison's investigation into President Kennedy's assassination." See Attachment 3.

#### B. The FBI's Response to Plaintiff's Requests

After Weisberg filed suit on these requests, the FBI began processing certain Dallas and New Orleans files. But rather than conducting a search for records responsive to plaintiff's requests, the FBI simply processed the same four main files that it had already processed at FBI Headquarters. Weisberg Affidavit, ¶302.

On April 10, 1979, plaintiff's counsel wrote the FBI and requested that he be advised of "all records not yet supplied to Mr. Weisberg which are within the scope of his requests" for the Dallas and New Orleans field office records. On May 10, 1979, the FBI responded that "we have now processed and released to Mr. Weisberg all records within the scope of his requests, with the exception



of the 3 x 5 index cards, referrals from the Headquarters files and a portion of the referrals from the Dallas and New Orleans Field Office files . . . ." See Attachment 4.

C. Further Searches Directed by Associate Attorney General

Notwithstanding the FBI's claim that it had located and processed all records responsive to plaintiff's requests except those specifically listed in its May 10, 1979, letter, Associate Attorney General John H. Shenefield subsequently ordered that further searches be made.

Mr. Shenefield's determination that the FBI's search had been inadequate was contained in his letter to plaintiff's counsel of December 16, 1980. With respect to the Dallas Field Office, Shenefield specifically directed that there be further searches of the following character:

(1) an "all-reference search on the assassination itself, on Lee Harvey and Marina Oswald, on Jack Ruby and on the Warren Commission;

(2) "all-reference searches on George De Mohrenschildt and former Special Agent James P. Hosty"; and

(3) a search to determine "whether there are any official or unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on 'critics' or 'criticism' of the F.B.I.'s assassination investigation."

With respect to the New Orleans Field Office, Shenefield directed:

(1) "a further search for a possible main file on David Ferrie";

(2) that New Orleans forward to Headquarters "for screening and possible processing those portions of another file which pertain to Ferrie, Jim Garrison and Jack Ruby"; and

(3) "a new search . . . for any existing official or unofficial administrative files which pertain to the Kennedy case." See Attachment 4, December 16, 1980 letter from Associate Attorney General John H. Shenefield to Mr. James H. Lesar.

D. Results of Further Searches

The results of these further searches are detailed in the April 24, 1982, Declaration of FBI Special Agent John N. Phillips which accompanies defendants' motion for partial summary judgment.

This reveals that numerous additional files containing pertinent records were located as a result of the new searches, even though the FBI had previously claimed that plaintiff had been provided all records within the scope of his request (except for some which had been identified and were being processed).

E. Plaintiff Contends Search Is Still Inadequate

Defendants have moved for partial summary judgment on the search issue. In so doing they have failed to state that their searches have located all records in the Dallas and New Orleans Field Office files responsive to his requests. For reasons set forth below, it is plain that the search is inadequate, and that summary judgment in their favor on this issue must be denied.

ARGUMENT

I. DISPUTED ISSUE OF MATERIAL FACT AS TO ADEQUACY OF SEARCH PRECLUDES PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

It is well-established that a motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); Adickes v. S.H. Kress & Co., 389 U.S. 144, 160, 90 S.Ct. 1598, 1609-1610, 26 L.Ed.2d 142, 155-156 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824, 827 (1975); Bloomgarden v. Coyer, 156 U.S.App.D.C. 109,



114-116, 479 F.2d 201, 206-208 (1973); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 281, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in the [movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden, supra, 156 U.S.App.D.C. at 113-114, 479 F.2d at 206-207. That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus, supra, note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

It is axiomatic that to prevail in a Freedom of Information Act lawsuit, "the defending agency must prove that each document that falls within the requested class either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." National Cable Television Association, Inc. v. F.C.C., 156 U.S.App.D.C. 91, 479 F.2d 183 (1973). In order to meet its burden of demonstrating that it has conducted a thorough, good-faith search, an agency must detail the scope of the search and the manner in which it was conducted. Weisberg v. United States Dept. of Justice, supra, 200 U.S.App.D.C. 312, 317, 627 F.2d 365, 372 (1980). Agency affidavits which "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized," are insufficient to support summary judgment on the search issue. Id., 200 U.S.App.D.C. at 318, 627 F.2d at 373. Furthermore, even if the agency affidavits are detailed and nonconclusory

and are submitted in good faith, "the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." Founding Church of Scientology, Etc. v. Nat. Sec. Agcy., 197 U.S.App.D.C. 305, 317, 610 F.2d 824, 836 (1979).

When these legal standards are applied to facts of record in this case, it is evident that there is a disputed issue of material fact as to the adequacy of the FBI's search, and that this precludes summary judgment in favor of defendants on this issue.

First, although defendants' Memorandum of Points and Authorities states that "[e]ssentially, [plaintiff's] requests sought access to all records pertaining to the assassination of President John F. Kennedy" in the Dallas and New Orleans files, the Declaration of FBI Special Agent John N. Phillips filed in support of their motion fails to state that all such records have in fact been located and processed. This omission alone dooms defendants' motion for partial summary judgment. No matter how many files defendants have located and processed, their motion for partial summary judgment on the search issue remains premature until they can categorically state that they have made a thorough search for all materials sought by the requests.

Second, defendants have failed to describe any search effort to locate certain kinds of records pertaining to the assassination of President Kennedy, such as "ticklers." See Weisberg Affidavit, ¶279.

Third, there is specific evidence of the existence of materials which have not been produced. For example, a Dallas record refers to "numerous photographs" which are "located in a secure metal cabinet." Weisberg Affidavit, ¶260, Exh. 13. In addition, other evidence shows that the Dallas Field Office maintained a



file copy of a photograph of each and every piece of evidence in the entire investigation. Weisberg Affidavit, ¶264, Exh. 15. The failure of the FBI to produce these records is evidence of the inadequacy of its search. Weisberg Affidavit, ¶262. The same may be said of the FBI's failure to produce other materials, such as films and tapes, including tapes on "critics" like Jim Garrison, and the Dallas police radio broadcasts. Weisberg Affidavit, ¶¶181-185.

Fourth, it is obvious that the FBI's search is in part inadequate because the Bureau has simply chosen to ignore those parts of plaintiff's requests which ask for: (1) "all records on or pertaining to persons or organizations who figured in the investigation into President Kennedy's murder . . ."; and (2) all records on or pertaining to Clay Shaw, David Ferrie and any other persons or organizations who figured in District Attorney Jim Garrison's investigation into President Kennedy's assassination." (Emphasis added)

There appear to be two legal theories which defendants might rely upon in an attempt to justify their refusal to identify and locate records pertinent to these portions of plaintiff's requests: (1) that these parts of the requests fail to "reasonably describe" the records sought; and (2) that privacy waivers are required of the persons who figured in the two investigations. For the reasons stated below, neither of these theories applies.

The Freedom of Information Act requires only that a request "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). The legislative history defines this as a description which "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." H.R. Rep. No. 93-876, 93rd. Cong., 2d Sess. (1974) at 6.

The FBI has not claimed that a professional employee with subject matter knowledge of the Kennedy assassination would be unable to identify persons and organizations who figured in the investigations conducted by the FBI and by Jim Garrison and locate the pertinent records without exerting an unreasonable amount of effort to do so. Given the intense and prolonged scrutiny of the FBI's investigation into the President's murder and the need for the FBI to respond to Congressional inquiries concerning those who figured in the investigation, it is obvious that the Bureau has the capacity to identify such persons and organizations and locate pertinent records without the expenditure of an unreasonable amount of effort. Indeed, with respect to "critics," plaintiff has provided a list, and with regard to persons who figured in the Garrison investigation, defendants already have lists and plaintiff provided copies of them to the Office of Privacy and Information Appeals. Weisberg Affidavit, ¶129.

In this regard, it must be pointed out that Justice Department regulations provide:

A request for all records falling within a reasonably specific category shall be regarded as conforming to the requirement that records be reasonably described if it enables the records requested to be identified by any process that is not unreasonably burdensome or disruptive of Department operations.

28 C.F.R. § 16.3(d)(1). Moreover, if it is determined that a request does not reasonably describe the records sought as specified in the above-quoted paragraph, then

. . . the response denying the request on that ground shall specify the reasons why the request failed to meet the requirements of paragraph (d)(1) of this section and shall extend to the requester an opportunity to confer with Department personnel in order to attempt to reformulate the request in a manner which will meet the needs of of the requester and the requirements of paragraph (d)(1) of this section.

28 C.F.R. §16.3(d)(2).



Defendants never notified plaintiff that any part of his requests fail to meet the specification that the request "reasonably describe" the records sought, nor have defendants ever extended to plaintiff the opportunity to "reformulate" his requests. Having failed to notify plaintiff of any defect in his requests, defendants should not be permitted to raise this objection at this late stage in the litigation. And, in any event, in view of the foregoing discussion it is apparent that the objection is baseless.

The second objection, the need to secure privacy waivers, would not apply to either dead persons (such as Dean Andrews, who figured prominently in the Garrison investigation), or to organizations (such as the "Truth or Consequences" group which funded Garrison's investigation or the Cuban exile organizations which Garrison focused on). In fact, because of the public role in which those who figured in the Kennedy assassination investigations have been cast, it would not generally seem to have any applicability at all for such persons, and certainly not for those of major importance.

In this regard it must be pointed out that although the FBI frequently insists it cannot search for records on a person without a privacy waiver from him, it has on occasion been overruled by the Department's Office of Privacy and Information Appeals. For example, when plaintiff's counsel requested records on William Bradford Huie and Gerold Frank, two writers who authored books on the assassination of Dr. Martin Luther King, Jr., the FBI's insistence that he obtain privacy waivers from them was overruled by the appeals office and the FBI did thereafter conduct a search and provide plaintiff's counsel with records on these two individuals. See June 3, 1982, Lesar Affidavit, ¶5.

The FBI also maintains, apparently with a straight face, that it is not required to search for files on particular "critics" be-

cause Associate Attorney General Shenefield only intended that it search for files indexed under the label "critics" or "criticism." This claim is preposterous, particularly in view of the testimony of FBI agents that the Bureau only indexes under names, not topics. See Lesar Affidavit, ¶¶1-2, Attachment 1; Weisberg Affidavit, ¶78. The speculation of Special Agent John N. Phillips that Shenefield placed these words in quotations to indicate a search only under these topics is entirely fanciful. It presumes either that Shenefield was ignorant of FBI indexing and filing practices, or that he cynically directed a search he knew would be futile.

Shenefield directed a search for records "on" critics. The FBI has avoided finding such records only by resorting to a transparent pretext: viz., construing his words in a strained and irrational manner. Indeed, the FBI has by this device managed not to locate records on the critics even after plaintiff provided defendants with appropriate file numbers. Weisberg Affidavit, ¶287.

The FBI's failure to search for files on the critics as directed by Shenefield established the absence of an adequate search and means that defendants' motion for partial summary judgment must be denied.

There are additional reasons why defendants' motion cannot stand scrutiny. For example, the Phillips Declaration fails to describe the nature of the search conducted as a result of Shenefield's directive that searches for "unofficial" files be conducted, nor does he recount who conducted any of the searches. It is, however, unnecessary to go into all the reasons why defendants' motion cannot pass muster. Enough has been said above to make it clear that defendants' cannot be awarded partial summary judgment on the search issue on the present record.



UNITED STATES DISTRICT COURT  
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Before arguing this point, plaintiff believes it will be helpful to provide some background information which places the search issue in proper perspective.

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ET AL.,	:	
	:	
Defendants	:	(Consolidated)

O R D E R

Upon consideration of defendants' motion for partial summary judgment regarding the adequacy of the search made for records responsive to plaintiff's Freedom of Information Act requests, plaintiff's opposition thereto, and the entire record herein, it is by the Court this \_\_\_\_ day of \_\_\_\_\_, 1982, here

ORDERED, that defendants' motion for partial summary judgment be, and the same hereby is, DENIED.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE



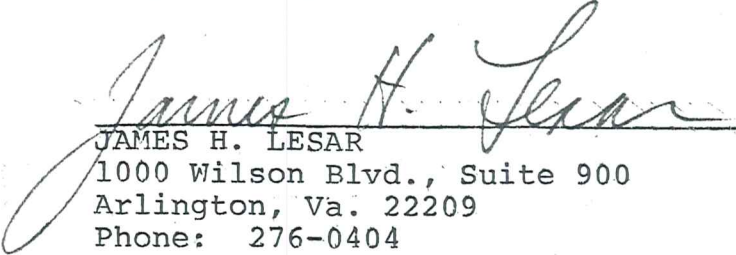
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PLAINTIFF'S STATEMENT OF GENUINE ISSUE  
OF MATERIAL FACT IN DISPUTE

Pursuant to Local Rule 1-9(h), plaintiff states that the following genuine issue of material fact is in dispute: whether the Federal Bureau of Investigation has conducted a thorough, good-faith search for records responsive to his requests.

Respectfully submitted,

  
\_\_\_\_\_  
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Attorney for Plaintiff

95TH CONGRESS }  
2d Session

[COMMITTEE PRINT]

AGENCY IMPLEMENTATION OF THE 1974  
AMENDMENTS TO THE FREEDOM OF  
INFORMATION ACT

REPORT ON  
OVERSIGHT HEARINGS

BY THE  
STAFF OF THE  
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE  
AND PROCEDURE

OF THE  
COMMITTEE ON THE JUDICIARY

OF THE  
UNITED STATES SENATE



MARCH 1980

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WASHINGTON : 1980



*Inadequate Records Management and Filing Practices.*—Improvement in agency records management practices and filing procedures can also help speed the response to FOIA requests and appeals. Although the FOIA regulations of the Central Intelligence Agency, for example, call for “the prompt and expeditious processing” of requests,<sup>94</sup> the CIA has informed the Subcommittee that it is unable to comply with the 10-and 20-day response times, in large part, because the agency has “no single centralized records system” or index to record its holdings.<sup>95</sup> Thus, it often takes the agency several days just to locate requested documents.<sup>96</sup> The CIA, or any other agency without a centralized records system, needs to reassess and improve its filing and records system in order to respond to requests for information more expeditiously.<sup>97</sup>

*Deliberate Dilatory Tactics.*—The most questionable and objectionable causes of delay are those that stem from improper agency attitudes, including outright hostility to the FOIA, access to public information or the individual requester.<sup>98</sup> Where such attitudes exist, agency personnel can easily use delay “as a deliberate stalling tactic.”<sup>99</sup> Hoping, for example, “that the passage of time will exhaust the requester’s interest in documents that the agency is reluctant to produce,”<sup>1</sup> an agency may improperly delay any reply for a substantial period of time, only eventually to reject a request “for a reason that should have been apparent at the time it was received.”<sup>2</sup> Or the agency may not deny a request outright but deem it “inadequate for lack of specificity” or sufficient identifying information, “with the result that final action on the unpopular request is delayed while the requester attempts to reformulate it with more particularity.”<sup>3</sup>

It is difficult to determine precisely the extent to which the agencies and departments are employing deliberate, dilatory tactics to frustrate FOIA requests and appeals. At least one such case, however, was brought to the attention of the Subcommittee, and there well may be more.<sup>4</sup>

<sup>94</sup> See 32 C.F.R. § 1900.1(d); Hearings, p. 535.

<sup>95</sup> Hearings, p. 86; 1977 CIA Annual Report, p. 2, subcommittee files.

<sup>96</sup> *Id.*

<sup>97</sup> See also pp. 125-133, *infra*, on other CIA records management practices.

<sup>98</sup> See pp. 52-56, *supra*.

<sup>99</sup> Giannella, p. 14, note 8, *supra*, p. 244.

<sup>1</sup> *Id.*

<sup>2</sup> *Id.*, citing Nader, “Freedom From Information: The Act and the Agencies,” 5 *Harv. Civ. R.-Civ. Lib. L. Rev.* 1, 8 (1970).

<sup>3</sup> *Id.*

<sup>4</sup> See Hearings, pp. 139-141, 174-175, 941-942. One witness brought to the subcommittee’s attention three internal FBI memoranda regarding an FOIA request submitted to the FBI in 1969 by Harold Weisberg. In the words of the witness, the memo, dated October 20, 1969, stated that Mr. Weisberg “...was a leading critic of the FBI’s Warren Commission Report and various government law enforcement agencies. Referring to the request submitted by Mr. Weisberg, which sought information on the King murder case for use in a forthcoming book, the FBI memo conclude (d) that “it was approved that this letter not be acknowledged.” Although it is now 8 years later, it is my understanding that despite Mr. Weisberg’s continuing efforts to obtain the requested information, it has never been received. In fact, Mr. Weisberg’s attorney informs me that there are approximately 25 of Mr. Weisberg’s FOIA requests which have never been answered, although some of this information has been generally released to the press. We hope the subcommittee will demand an explanation of these events from the FBI.” *Id.*, pp. 174-175. The Subcommittee attempted to obtain such an explanation from FBI and Justice Department witnesses. Acknowledging that Mr. Weisberg had “reason to complain about the way he was treated in the past,” the Department witness said the Civil Division was “going to try to straighten out” the matter. *Id.*, p. 140.

According to Mr. Weisberg, however, as of January 1979, neither the FBI nor the Department of Justice have begun to comply with his specific requests regarding both the King and Kennedy assassinations. In the King case, for example, Mr. Weisberg said the FBI “continues to make substitutes for my actual request,” and has “deliberately misinterpreted” his requests. He also claimed Allen H. McCreight, Chief, FOIA-Privacy Act Branch, FBI, continues not to respond to Weisberg’s FOIA correspondence. Telephone interview, Jan. 22, 1979.

JAMES H. LESAR  
ATTORNEY AT LAW  
910 SIXTEENTH STREET, N. W. SUITE 600  
WASHINGTON, D. C. 20006  
TELEPHONE (202) 223-5587

December 25, 1977

FREEDOM OF INFORMATION REQUEST

Special Agent in Charge  
Dallas Field Office  
Federal Bureau of Investigation  
1810 Commerce Street  
Dallas, Texas 75201

Dear Sir:

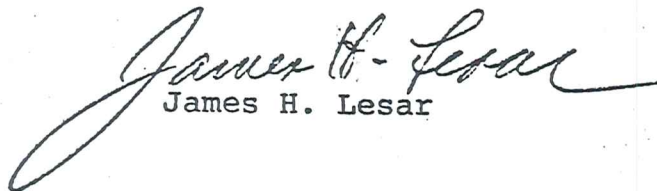
On behalf of a client, Mr. Harold Weisberg, I am requesting copies of all records on or pertaining to the assassination of President John F. Kennedy.

This request includes all records on or pertaining to persons and organizations who figured in the investigation into President Kennedy's murder that are not contained within the file(s) on that assassination, as well as those that are.

This request also includes all records on or pertaining to Lee Harvey Oswald, regardless of date or connection with the investigation into President Kennedy's assassination.

I would appreciate it if you could let me know the estimated volume of records involved in this request and when you expect to begin processing them in compliance with my client's request.

Sincerely yours,

  
James H. Lesar



Attachment 3

Civil Action Nos. 78-0322/0420

JAMES H. LESAR  
ATTORNEY AT LAW  
910 SIXTEENTH STREET, N. W. SUITE 600  
WASHINGTON, D. C. 20006  
TELEPHONE (202) 223-5587

December 25, 1977

FREEDOM OF INFORMATION REQUEST

Special Agent in Charge  
New Orleans Field Office  
Federal Bureau of Investigation  
701 Loyola Avenue  
New Orleans, Louisiana 70113

Dear Sir:

On behalf of a client, Mr. Harold Weisberg, I am requesting copies of all records on or pertaining to the assassination of President John F. Kennedy.

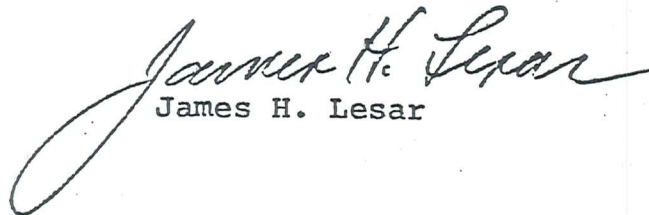
This request includes all records on or pertaining to persons and organizations who figured in the investigation into President Kennedy's murder that are not contained within the file(s) on that assassination, as well as those that are.

This request also includes all records on or pertaining to Lee Harvey Oswald, regardless of date or connection with the investigation into President Kennedy's assassination.

In addition, this request includes all records on or pertaining to Clay Shaw, David Ferrie and any other persons or organizations who figured in District Attorney Jim Garrison's investigation into President Kennedy's assassination.

I would appreciate it if you could let me know the estimated volume of records involved in this request and when you expect to begin processing them in compliance with my client's request.

Sincerely yours,

  
James H. Lesar



**U.S. Department of Justice**

**Office of the Associate Attorney General**

---

*Washington, D.C. 20530*

December 16, 1980

James H. Lesar, Esquire  
Suite 203  
2101 L Street, N. W.  
Washington, D. C. 20037

Dear Mr. Lesar:

This is in further response to the pending administrative appeals of your client, Mr. Harold Weisberg, from the actions of the Federal Bureau of Investigation on his requests for access to records of the Dallas and New Orleans Field Offices which pertain to the assassination of President John F. Kennedy.

As the result of extensive discussions between Bureau personnel and members of my staff, the F.B.I. has agreed to certain modifications of its initial actions on these requests. I have decided to affirm the Bureau's initial actions in part, to affirm the modified actions which will result from the discussions indicated, and to reverse the actions in one significant respect.

There was a relatively small amount of classified material which was actually processed by the F.B.I. pursuant to these two requests. Of the 113 pages and 142 individual paragraphs that were processed, the review on administrative appeal has resulted in the declassification of 29 entire pages and 36 additional paragraphs. As to the remaining classified material, the actions of the F.B.I. are affirmed. 5 U.S.C. 552(b)(1). This material has been referred to the Department Review Committee for consideration whether it warrants continued classification under Executive Order 12065. You will be notified of the results of this review.

Exemption 2 of the Act, 5 U.S.C. 552(b)(2), was used, either alone or in conjunction with 5 U.S.C. 552(b)(7)(D), to withhold source symbol numbers and informant file numbers. Such numbers are purely internal agency matters as to which the general public has no legitimate interest and the Bureau's use of this exemption for this purpose is affirmed. To the extent that exemption 3 of the Act, 5 U.S.C. 552(b)(3), was used, either alone or in conjunction with 5 U.S.C. 552(b)(7)(C), to withhold "rap sheets" and



the names of personnel of the Central Intelligence Agency, the actions of the F.B.I. are affirmed. 28 U.S.C. 534; 50 U.S.C. 403g. All uses of this exemption in conjunction with § 6103 of the Internal Revenue Code will be reconsidered. There is some question whether claims of exemption 6, 5 U.S.C. 552(b)(6), should not have been based instead upon exemption 7(C), 5 U.S.C. 552(b)(7)(C), given the investigatory nature of the file into which the records in question had been incorporated. On the other hand, the actual records are intrinsically exemption 6 material (medical records, etc.). In any event, the decision of the Bureau to withhold this information on personal privacy grounds is affirmed on the basis of both exemptions.

On a number of occasions, your client has questioned whether exemption 7 of the Act, 5 U.S.C. 552(b)(7), can properly be applied at all to records of the F.B.I. which pertain to the Kennedy assassination. In my judgment, these records of the Bureau do constitute investigatory records compiled for law enforcement purposes within the meaning of the Freedom of Information Act. Irons v. Bell, 596 F.2d 468 (1st. Cir. 1979). See also Weisberg v. Department of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

The two exemptions most frequently cited by the Bureau to deny access to material within the scope of your client's requests were 7(C) and 7(D), 5 U.S.C. 552(b)(7)(C) and (7)(D). These exemptions were, however, used to deny access to two very different kinds of material. First, they were used to withhold the names of persons, or purely descriptive information pertaining to them, or minimal information furnished by them, to the limited extent necessary to prevent the disclosure of their identities. All such usages of these exemptions, specifically including the denials of access to the names of F.B.I. Special Agents in the more recent portions of the processed files, are affirmed. Second, these exemptions were used to deny access to significant quantities of substantive information. On the basis of the results of my staff's review, I am not persuaded that all such usages of these exemptions were justified. Accordingly, I am at this time reversing the F.B.I.'s actions as to all such withholdings and remanding them for de novo reconsideration, which will be carried on in close coordination with my staff. Prior to undertaking the actual review of these records, Bureau personnel will familiarize themselves thoroughly with the Report of the Warren Commission, the relevant publications of the House Select Committee on Assassinations, and the various other official, readily-available, authoritative reference sources pertaining to the Kennedy assassination. This kind of substantive information in these files will be released unless the need for continued withholding is clearly established. In



exercising the discretion which is vested in this Department whether or not to release material which is exempt from mandatory disclosure under the Act, I have concluded that the importance to the American public of the Bureau's investigation of the Kennedy assassination is too great for me to apply any less rigorous standard. All denials of access which were effected on the basis of exemption 7(E), 5 U.S.C. 552(b)(7)(E), will also be reprocessed, but the Bureau's reliance on exemption 7(F), 5 U.S.C. 552(b)(7)(F), to withhold the names of agents of the Drug Enforcement Administration was correct and is affirmed.

There are certain other aspects of these appeals as to which it has been agreed that further action by the F.B.I. is appropriate. With respect to the Dallas Field Office, the Bureau will now conduct an all-reference search on the assassination itself, on Lee Harvey and Marina Oswald, on Jack Ruby and on the Warren Commission. All hitherto unprocessed records on these subjects, whether contained in main files or see references, will be carefully screened and those which pertain to the assassination in any way will be processed. In addition, as a matter of agency discretion, the Bureau will conduct all-reference searches on George De Mohrenshildt and former Special Agent James P. Hosty, and will also attempt to determine whether there are any official or unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on "critics" or "criticism" of the F.B.I.'s assassination investigation. Any records located as the result of these searches will also be carefully screened and, if appropriate, processed for possible release to your client. With respect to the New Orleans Field Office, the Bureau will undertake a further search for a possible main file on David Ferrie, and will forward to Headquarters for screening and possible processing those portions of another file which pertain to Ferrie, Jim Garrison and Jack Ruby. In addition, as a matter of agency discretion, the F.B.I. will conduct a new search in New Orleans for any existing official or unofficial administrative files which pertain to the Kennedy case. The action of the F.B.I. in not conducting a specific search for records pertaining to Gordon Novel is affirmed.

As you know, numerous records in Dallas and New Orleans files were referred to other agencies and components of the Department of Justice for their views, with the request that they be returned to the F.B.I. for action. As the result of efforts by Bureau personnel and members of my staff, virtually all of those records have now been returned with the exception of those



sent to the Central Intelligence Agency. The F.B.I. has agreed with my staff that all of the unclassified referred records should be reprocessed. Although appropriate weight will be given to the views of the other agencies and components, the Bureau, acting in conjunction with my staff, will consider these records for possible release in light of the same standards being applied to all of the other records within the scope of these requests. Particular attention will be given to claims that material is barred from release by § 6103 of the Internal Revenue Code. At this time, I am specifically finding that the denial of access on this basis to the requests for assistance in the Kennedy investigation which were sent from the F.B.I. to the Internal Revenue Service was improper.

Of the more than 100,000 pages of records to which access was in effect denied on a "previously processed" basis, it has been established that some 3,000 pages may not in fact have been processed as part of the Headquarters files. These pages have now been processed. With respect to all other documents in this category, the Bureau will entertain requests for specific items, subject to your client's willingness to pay for them at the rate of ten cents per page. When the substantive text of the second copy of a record is the same as that of a previously released record, it is my conclusion that there is insufficient presumptive benefit to the general public to warrant a fee waiver as to such materials. To the extent your client can show that any of these second copies have independent significance, I will consider granting a fee waiver as to them on a retroactive basis. My decision on this point is without prejudice to Mr. Weisberg's pending appeal from the termination of his general fee waiver for Kennedy records, but it is final as to previously processed documents, regardless of what may be the final decision on that other appeal.

Lastly, there are various films and tapes in these files which were not processed for possible release to Mr. Weisberg. The Bureau will now consult with him regarding these materials and will process any which are of interest to him. Only in the event that he requests additional copies of items which have already been furnished to him will he be charged.

-5-

Judicial review of my action on these appeals is available to your client in the United States District Court for the judicial district in which he resides or has his principal place of business, or in the the District of Columbia, or in the Northern District of Texas and the Eastern District of Louisiana, as to records in each of these districts.

Sincerely,

A handwritten signature in cursive script that reads "John H. Shenefield". The signature is written in dark ink and is positioned above the typed name.

John H. Shenefield  
Associate Attorney General

cc: Mr. Harold Weisberg



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 78-0322
	:	
WILLIAM H. WEBSTER, ET AL.,	:	
	:	
and	:	
	:	
FEDERAL BUREAU OF INVESTIGATION,	:	Civil Action No. 78-0420
ET AL.,	:	
	:	
Defendants	:	(Consolidated)

AFFIDAVIT OF JAMES H. LESAR

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

1. The April 15, 1982, Declaration of John N. Phillips filed in this case asserts:

By putting the words critics and criticism in quotes, it seems clear that the Associate Attorney General meant that those were the topics for which the FBI was to search. \*\*\* Not until the parties' private discussions during the last status call on March 25, 1982, did plaintiff's counsel ever suggest that the FBI should search for names of individuals. When asked to specify those individuals, plaintiff's counsel came up with only two: Harold Weisberg and Mark Lane.

2. Phillips' speculation that Associate Attorney General Shenefield intended for the FBI to search only under the words "critics" and "criticism" seems to me to be totally unfounded. First, Shenefield does not state that he is referring to files which captioned, labelled, or indexed under "critics" or "criticism," and if this was his intent, he could have said so. Nor are these words capitalized, as might have been done if he only desired a search under these titles.

Second, given the FBI's obvious reluctance to release information showing that it had compiled or disseminated information on

persons or organizations who had commented or or taken action concerning the investigation of President Kennedy's assassination, Shenefield may have placed these words in quotes to guard against the possibility that the FBI would seek to define these terms too narrowly and include in their search only the most prominent critics.

Thirdly, it must be remembered that Shenefield's letter was drafted by Mr. Quinlan J. Shea, Jr., then Director of the Office of Privacy and Information Appeals. Mr. Shea and his staff conducted the review which led to Mr. Shenefield's decision. In his many appeal letters, Weisberg complained repeatedly that records he had obtained indicated the existence of other pertinent records on the critics, but that no search for these records had been conducted. In other cases brought by Mr. Weisberg, FBI agents have testified that the FBI only indexes names, that it does not index topics. See, e.g., testimony of FBI Special Agent John Harting reproduced at Attachment 1. Thus, the only alternative to believing that Shea and Shenefield intended that the search include a check under the names of critics would be to conclude that they either (a) ignorant of the FBI's indexing practices, or (b) directing the FBI to conduct the search in a manner which they had reason to believe would be futile.

Finally, I note that Shenefield's letter direct a search for both "official and unofficial" files pertaining to the critics. This alone would seem to indicate that something more than a check of indices under "critic" and "criticism" is required, since it seems most unlikely that "unofficial" files would be indexed in the FBI's Central Records Index.

3. Contrary to Phillips' assertion that I never suggested that the FBI should search under the names of individuals until March 25, 1982, my notes on a conversation I had with defendants'



attorney Daniel Metcalfe on or about June 25, 1981, indicate that I raised this issue upon being informed by him, I believe for the first time, that the FBI was interpreting Shenefield's directive as being limited to a search for any subject matter files on the critics.

4. Phillips' assertion that when asked to specify the critics whose names should be searched I "came up with only two," is inaccurate and misleading. I was not asked to "specify" these individuals but to estimate the number of them Mr. Weisberg wanted searched. I gave a rough estimate of the number I thought he might be interested in and named three or four off the top of my head as examples. Had I been asked to list them, which I most certainly was not, I probably would have objected to being required to produce a definitive list then and there. Nevertheless, it would not have been at all difficult for me to have named thirty or more persons who would qualify as "critics" had I been asked to do so.

5. Phillips' April 15, 1982, Declaration also asserts that in order for the FBI even to ascertain whether files exist on individual critics, plaintiff must obtain a privacy waiver from these individuals. Although I am aware that the FBI frequently takes this position in responding to FOIA requests, the FBI has been overruled on this point in specific instances. For example, the FBI took this position with regard to the release to me of files on William Bradford Huie and Gerold Frank, two authors who wrote books on the assassination of Dr. Martin Luther King, Jr. But Mr. Shea, as Director of the Office of Privacy and Information Appeals, overruled the FBI on this point and the FBI did release files on these individuals to me without my having to provide privacy waivers for them.

5. Defendants' Response to Plaintiff's Settlement Proposal states that during the period between the December 10, 1981, status

call and the one held on March 10, 1982, I did not contact government counsel concerning any complaints of plaintiff. This is not accurate.

6. On February 21, 1982, I left on a brief trip to Puerto Rico. A few days prior to leaving I contacted defendants' counsel, Mr. Henry La Haie, and told him that I had not yet found time to review Mr. Weisberg's voluminous appeals in this case, but that I was planning to take many of them with me to Puerto Rico, and that I would be ready to meet with him concerning remaining issues in the case when I returned. During our conversation Mr. La Haie mentioned that defendants were considering filing a motion to adjudicate the exemption claims through a Vaughn sampling technique. Although he said he would be willing to discuss the case with me, he sounded cool to the idea, and I sensed that change of counsel had brought a change in the manner of handling the case.

7. I took approximately 500 pages of Mr. Weisberg's appeals with me to Puerto Rico. While I was there, I reviewed more than half of them.

8. On my return to Washington I was immediately confronted by a motion by defendants' to adjudicate the FBI's exemption claims by means of a Vaughn sampling technique. This made it apparent that there had been an abrupt change in the manner of handling this case from that which I and previous counsel for defendants, Mr. Daniel Metcalfe, had employed, and that attempts to resolve the issues between the parties through face-to-face discussion were no longer the order of the day.

  
JAMES H. LESAR



ARLINGTON COUNTY, VIRGINIA

Subscribed and sworn to before me this 3rd day of June, 1982.

*John Silvan*

NOTARY PUBLIC IN AND FOR  
THE STATE OF VIRGINIA

My commission expires

9/30/85

1 Do you know who was responsible for searching for  
2 the items on this request?

3 A It would be--we had it--when I was there, this  
4 request was being responded to on the team that I had.

5 Q It was being responded to.

6 All right.

7 Now, let us drop down to Item No. 2, is for "All  
8 receipts for any items of physical evidence."

9 Do you know what search was conducted for that  
10 item?

11 A I will tell you the major problem I always had, it  
12 may have been me, was with this request; I always had trouble  
13 figuring out what documents were in Bureau files that we  
14 could produce in response to this request. Because our  
15 indices are set up by name. That is the only way you can  
16 search for documents at FBI headquarters. With this request  
17 and one other request, I believe, and the numerous items of  
18 correspondence that we had, going back and forth, I always  
19 had trouble ascertaining what was the scope of this request;  
20 and we discussed it on numerous occasions and I--

21 Q When you say "we" discussed it--

22 A You and I and Harold and I and to me it was never  
23 clear until you and Lynne Zusman entered into what was at