9/2/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action Nos. 78-322 and 78-420 (Consolidated)

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE AND TO HAVE ITS STATEMENT OF MATERIAL FACTS DEEMED ADMITTED

I. PRELIMINARY STATEMENT

On May 3, 1982, the defendant filed a motion for partial summary judgment on the question of the adequacy of its search with respect to plaintiff's FOIA requests for all records in the FBI's Dallas and New Orleans Field Offices pertaining to the assassination of President John F. Kennedy. On June 7, 1982, the plaintiff filed an opposition to that motion. In support of this opposition, plaintiff attached affidavits from himself and his attorney and a one sentence "statement of genune issue of material facts in dispute." Because the supporting papers of plaintiff failed to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, as well as Local Rule 1-9(h), the defendant moved, on June 17, 1982, to have the affidavits striken and to have its "statement of material facts not in dispute" deemed admitted.

On July 23, 1982, plaintiff responded to the defendant's motion to strike (hereinafter "Pl. Resp."). In that response, plaintiff acknowledged that "the first part of his affidavit" of May 31, 1982, did not address the search issues raised by defendant's motion for partial summary and thus he had "executed a new affidavit which focuses more exclusively on the search issue raised by defendant's motion for summary judgment." Pl. Resp. at 3. This new affidavit was filed concurrently with plaintiff's

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opposition to defendant's motion to strike. Subsequently on July 26, 1982, plaintiff filed an Amended Statement of Genuine Issues of Material Fact in Dispute which he claims moots defendant's motion to have its statement of material facts deemed admitted.

The purpose of this memorandum is to reply to the assertions made by plaintiff in his opposition to the motion to strike and to address the fourteen issues of material fact which he now contends are in dispute in this case.[1/]

II. ARGUMENT

A. Since Plaintiff Has Failed To Specify Which Of the Defendant's Twenty-nine Material Facts He Contends There Exists A Genuine Issue That Needs To Be Litigated, Those Facts Should Be Deemed Admitted.

As noted in defendant's Memorandum in Support of its Motion to Strike and to Have Its Statement of Material Facts Deemed Admitted, this Court has promulgated local requirements for summary judgment. Those requirements are set out in Local Rule 1-9(h) which provides, in pertinent part, as follows:

> With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be served and filed . . . a statement of the material facts as to which the moving party contends there is no genuine issue, and shall include therein references to the parts of the records relied on to support such statement. A party opposing such a motion shall serve and file, together with his opposing statement of points and authorities, a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, and shall include

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1/ The defendant will not attempt to reply to the discursive claims made by plaintiff in his new affidavit. Inasmuch as the fourteen issues in plaintiff's Amended Statement of Genuine Issues of Material Fact in Dispute are keyed to those claims, a reply to this latest affidavit would only be redundant of defendant's response to plaintiff's amended statement of genuine issues. Defendant's approach is buttressed by Local Rule 1-9(h) which provides that a party's "'statment of genuine issues' [shall set] forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated. . . ." Thus, all that is required to join the search issue in this case is a point by point response to the fourteen issues of material fact which plaintiff claims need to be litigated.

> therein references to the parts of the records relied on to support such statement. In determining a motion for summary judgment, the court may assume that the facts as claimed by the moving party in his statement of material facts are admitted to exist except as and to the extent that such facts are controverted in a statement filed in opposition to the motion.

(Emphasis added).

Consistent with these dictates, this Court has held that the failure to file a proper Rule 1-9(h) statement may be fatal to the position of the delinquent party. Piccolo v. Department of Justice, 90 F.R.D. 287, 288 n.3 (D.D.C. 1981); Gillot v. WHATA, 507 F. Supp. 454, 455 n.1 (D.D.C. 1981). If the delinquent party is the one opposing the motion, the rule itself provides that a court may assume that the facts as claimed by the moving party in his statment of material facts are admitted. In essence, a moving party's statement of material facts "operates as the equivalent of a request for admissions." Fleischhaker v. Adams, 26 FEP Cases 1451, 1452 (D.D.C. 1978). Consequently, a failure to specify the moving party's material facts which require a trial for resolution results in those facs being deemed admitted. Zerilli v. Smith, 656 F.2d 705, 718 n.74; Piccolo, supra, 90 F.R.D. at 288 n.3; Joseph v. Bond, 507 F. Supp. 453, 454 (D.D.C. 1981). See also United States v. Trans-World Bank, 382 F. Supp. 1100, 1102 (C.D. Cal. 1974).

In the instant case, the defendant supported its motion for partial summary judgment with a statement of 29 material facts as to which it contends there is no genuine issue. Each of those 29 material facts were, in turn, supported by references to the parts of the record relied on. In opposing the defendant's motion, the plaintiff failed at first to set forth the material facts as to which he contends there is a genuine issue. When this failure was pointed out in defendant's motion to strike, plaintiff responded by filing an amended statement of genuine issues which lists fourteen facts he contends are in dispute. All of those fourteen

points, however, raise issues not encompassed in defendant's Rule 1-9(h) statement. Indeed, plaintiff's amended statement of genuine issues does not attempt to controvert any of the 29 material facts as to which the defendant contends there is no genuine issue. Accordingly, under Local Rule 1-9(h) and the judicial decisions interpreting it, defendant's 29 material facts should be deemed admitted. See, e.g., Crooker v. BATF. 670 F.2d 1051, 1054 n.7 (D.C. Cir. 1981) (en banc).

B. The Fourteen Points Listed In Plaintiff's Amended Statement Of Genuine Issues Are Either Not In Dispute, Or Immaterial Or Unsupported By Significant Probative Evidence.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate if a moving party can show that "no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law." Perry v. Block, No. 80-1487, slip op. at 9 (D.C. Cir. July 30, 1982) (Exhibit B hereto); Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 836 (D.C. Cir. 1979). When a party has properly supported a summary judgment motion, the opposing party can not defeat the motion unless he comes forward with "significant probative evidence" demonstrating the existence of triable issues of material fact. Volyrakis v. M/V Isabelle, 668 F.2d 863, 865 (5th Cir. 1982); Merit Motors v. Chrysler Corp., 417 F. Supp. 263, 266 (D.D.C. 1976), aff'd 569 F.2d 666 (D.C. Cir. 1977). Under Local Rule 1-9(h) of this Court, the non-moving party's vehicle for coming forward with such evidence is "a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue" and referencing "the parts of the record relied on to support such statement." Should the non-moving party's statement raise issues of fact not encompassed in the movant's papers, the latter has an opportunity to show that those additional fact issues are either

not in dispute, immaterial or not genuine.[2] See Gardels v. CIA, 637 F.2d 770 (D.C. Cir. 1980). If the movant is successful in that regard, then he is entitled to summary judgment.

As noted earlier in this brief, plaintiff's Amended Statement of Genuine Issues of Material Fact in Dispute raises fourteen issues, all of which are not encompassed in defendant's Rule 1-9(h) statement. However, as is pointed out seriatim, these additional issues are either not in dispute, not material or not supported by significant probative evidence.

1. Whether the Dallas And New Orleans Field Offices maintain "ticklers."

The first issue of material fact which plaintiff contends is in dispute is whether the FBI maintains "tickler" copies of the documents that are generated in the Dallas and New Orleans Field Offices. This issue was initially raised by plaintiff in his opposition to defendant's motion for partial summary judgment. In responding to that opposition, the FBI, through Special Agent John N. Phillips, explained that "ticklers" -- as that term is used to refer to potentially retrievable records -- are photostatic or carbon copies of documents that are prepared for the information and temporary use of individuals who need to follow the progress of a certain matter. Special Agent Phillips also stated, however, that most FBI field offices, including the Dallas and New Orleans Offices, do not produce or maintain "tickler" copies of documents.[3]

To refute those statements by Mr. Phillips, plaintiff produced a document released to him from the Dallas files (i.e.,

2/ A fact issue is immaterial when it does not affect the outcome of the litigation, whereas it lacks genuineness when it is not established by significant probative evidence. Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). See also Merit Motors v. Chrysler Corp., supra, 417 F.Supp. at 266.

3/ See Fifth Declaration of John N. Phillips, ¶ 4, attached to Defendant's Reply to Plaintiff's Opposition to Motion for Partial Summary Judgment, filed July 2, 1982.

Exhibit 2 attached to Harold Weisberg's affidavit of July 21, 1982) ("Weisberg Affidavit") which bears the following notation: "Prepare a "six (6) months tickler for reopening." To plaintiff's mind, that notation demonstrates that the Dallas Field Office produces and maintains "tickler" copies of documents.

In paragraph 2(a) of his eighth declaration attached as Exhibit A to the instant reply, Special Agent Phillips succinctly explains that the context within which that notation appears indicates that the author of the memorandum was not requesting the production of a photostatic or carbon copy (i.e., a tickler copy) of the document. Rather, the agent was directly a rotor clerk to prepare a 3 x 5 index card reminding him to reopen a file in six months in order to verify the address of a subject and her family. This card would then have been placed in a chronologically arranged system of other such cards which contained similar types of reminders. As each time period elapsed, the noted action on a card would be taken and the card itself thrown away.

In light of that explanation, plaintiff's attempt to create a disputed issue on this point must fail. However, even if plaintiff were successful in demonstrating that the Dallas Office produce and maintain "tickler" copies of documents, such fact issue would be immaterial to the outcome of defendant's motion for partial summary judgment. See White v. Hearst Corp., 669 F.2d 14, 18 (1st Cir. 1982); Hahn v. Sargent, supra, 523 F.2d at 464. For the question to be reolved at this point in the litigation is "not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." Perry v. Block, supra, slip op. at 14. In resolving that question, it must be remembered that an agency "is not required to reorganize its filing system in response to each FOIA request;" instead it "is required only to make reasonable efforts to find responsive materials." Goland v. CIA, 607 F.2d 339, 370 (1978).

Here, the FBI undertook a multi-tiered search for the records requested by plaintiff. It located and processed over 100,000 pages of documents. To further expect the agency to search for carbon copies of those documents that were already processed in response to plaintiff's FOIA requests, is unreasonable. And that unreasonableness is heightened by the fact that a search for responsive "ticklers" (again assuming their existence) would be virtually impossible since their maintenance varies among the employees who use them.[4/]

In sum, plaintiff has not come forward with any significant probative evidence that demonstrates the existence of a triable issue of material fact with respect to "ticklers." His effort to defeat defendant's motion for partial summary judgment by way of this point must thus be rejected.

2. Whether the FBI searched for "ticklers."

There is no disputed issue whether the FBI searched for "tickler" copies of documents in the Dallas and New Orleans Field Offices. The defendant acknowledges that it did not undertake a search for these non-existent records.

3. Whether the FBI searched for "June files."

In paragraph 2(c) of his eighth declaration attached as Exhibit A to this memorandum, Special Agent John Phillips explains that "June files" are what the FBI sometimes calls the files that encompass the electronic surveilance conducted by the Bureau. Special Agent Phillips also notes that these files -- consistent with the FBI's filing system -- are indexed accordingly to who or what entity was under surveilance, and thus information in "June

4/ See Fifth Declaration of John N. Phillips, ¶ 4, attached to Defendant's Reply to Plaintiff's Opposition to the Motion for Partial Summary Judgment, filed on July 2, 1982; and Eighth Declaration of John N. Phillips, ¶ 2(b), attached to the instant reply.

files," like all other FBI files, is retrievable through a search of a field office's general indices.[5/] Lastly, Special Agent Phillips states that the FBI utilized its general indices in these cases to identify material which was responsive to plaintiff's FOIA requests, and that if any material was located in a "June file," the file was searched and the releasable material pertinent to plaintiff's requests was furnished to him.

Plaintiff has failed to put before the Court any evidence (much less any significant probative evidence) which would refute Special Agent Phillips' statements. Rather, he merely references paragraph 9 of his affidavit of July 21, 1982, which states as follows: "I note that in my March 4, 1979 appeal (Exhibit 3), I called attention to 'the existence of an undisclosed Dallas June file and noncompliance with regard to those records.'"[6/] Exhibit 3, however, offers no further evidence or enlightenment on this subject for the pertinent part of that exhibit simply states:

> In this connection I also call to your attention the existence of an undisclosed

5/ A detailed explanation of the FBI's filing system is set forth in paragraphs 3 and 4 of the Fourth Declaration of John N. Phillips, attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982.

6/ Throughout this litigation, plaintiff refers to his numerous "administrative appeals." Without doubt, plaintiff has, since the inception of this litigation, inundated the FBI and the Justice Department's Office of Privacy and Information Appeals (OPIA) with mounds of paper in which he complains about various aspects of the Bureau's processing of his FOIA requests. Exhibit 3 attached to Weisberg's Affidavit is typical of the discursive nature of these so called "appeals." Inasmuch as it was virtually impossible to decipher, much less respond to, all of plaintiff's "appeals," it was decided that those "appeals" would be subsumed into plaintiff's omnibus Dallas/New Orleans appeals which his counsel filed on June 5, 1979. See Exhibit A(1) attached to defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed March 22, 1982 ("Defendant's Reply"). The decision on those appeals was rendered by former Associate Attorney Gneral John Shenefield on December 16, 1980. See Exhibit A(3) attached to Defendant's Reply. When plaintiff continued to send complaints to OPIA about the FBI's processing of his requests, Mr. Quinlan Shea, OPIA's then director, unequivocally stated to plaintiff that his appeals had been ruled on and thus his recourse was "to the court in which [his] consolidated suits concerning these records are pending." See Exhibit A(4) attached to Defendant's Reply.

> Dallas "June" file and non-compliance with regard to those records. While I have additional identifying information I do not now provide it for reasons stated in an enclosed appeal.

In light of this dearth of evidence, plaintiff's claims about "the existence of an undisclosed Dallas 'June' file" must fail.

4. Whether the FBI's search encompassed records concerning the allegations of Mr. William Walter.

The FBI has now twice indicated that its search in these cases did locate records concerning the allegations of Mr. William Walter and that plaintiff was provided with those records which are not exempt under the FOIA.[7/] Since plaintiff offers absolutely no proof for the assertion in paragraph 10 of his affidavit of July 21, 1982, that nonexempt documents concerning Mr. Walter remain withheld, this alleged issue of fact -- similar to the one about "June files" -- must be reject for lack of genuineness. See Hahn v. Sargent, supra, 523 F.2d at 464.

5. Whether The FBI Searched For All Films And Tapes.

Special Agent John Phillips has stated several times in these cases that plaintiff has been furnished all releasable films and tapes in the Dallas and New Orleans Field offices which pertain to the Kennedy assassination.[8/] Plaintiff claims that there

7/ See Fourth Declaration of John N. Phillips, ¶ 18(e), attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982; and Eighth Declaration of John N. Phillips, ¶ 2(d), attached as Exhibit A to the instant reply.

8/ See Second Declaration of John N. Phillips, ¶ 5, attached to Defendant's Reply to Plaintiff's Opposition to Motion Concerning the Adudication of Certain Exemption Claims, filed on March 22, 1982; Third Declaration of John N. Phillips, ¶ 3(g), attached to Defendant's Response to Plaintiff's Settlement Proposals, filed on April 15, 1982; Fourth Declaration of John N. Phillips, ¶¶ 20 and 24, attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982; Fifth Declaration of John N. Phillips, ¶ 5, attached to Defendant's Reply to Plaintiff's Opposition, to the Motion for Partial Summary Judgment, filed on July 2, 1982; and Seventh Declaration of John N. Phillips, ¶ 3, attached to Defendant's Opposition to Plaintiff's Motion for Order Compelling Photographic Copies of All Movie Films and Still Photographs in the FBI's Dallas and New Orleans Field Offices, filed on August 19, 1982.

are additional films and tapes which have not been processed. Only recently, however, has plaintiff specified the materials that he believes have been wrongfully withheld: that is, the "Thomas Alyea film" and the tape of the recorded Dallas police radio broadcasts. In his eighth declaration attached as Exhibit A to this reply, Special Agent Phillips demonstrates that plaintiff's claims about these two matters are without foundation.

First, Mr. Phillips reiterates an earlier statement[9/] that some films and tapes pertaining to the JFK assasination were sent to FBIHQ during the investigation and thus are involved in the pending administrative appeal of plaintiff's separate FOIA request for FBIHQ material. One of those films was the "Thomas Alyea film." Accordingly, that film is not within the scope of plaintiff's FOIA requests in these cases.

Second, Mr. Phillips states that a tape of the recorded Dallas police radio broadcasts was made by an FBI official for use by the Warren Commission. A copy of that tape, however, was not maintained by the Bureau in its files on the assasination. Thus, there are no tapes of police radio broadcasts in either the Dallas or New Orleans Field Offices.

Given these statements by Special Agent Phillips and the lack of any credible evidence by plaintiff demonstrating otherwise, Mr. Weisberg's claims concerning additional tapes and films must be dismissed as yet another one of his red herrings.

6. Whether the FBI searched for all records on organizations and persons who figured in the Kennedy assasination investigation, including Clay Shaw, David Ferrie and Jim Garrison.

Special Agent Phillips has described in great detail the multi-tiered search that the FBI undertook to find records

9/ See Third Declaration of John N. Phillips, ¶ 3(g), attached to Defendant's Response to Plaintiff's Settlement Proposals, filed on April 15, 1982.

responsive to plaintiffs FOIA requests.[10] All documents that were located as a result of that search -- including records on organizations and persons who figured in the Bureau's investigation (as far as those records related to that investigation) -- were processed and, if nonexempt, were released to plaintiff. With respect to plaintiff's request for records on David Ferrie, Clay Shaw and Jim Garrison's investigation, Mr. Phillips has stated that the FBI could find no main files or material on those subjects other than what was merged into the main files on the Bureaus's investigation of the assassination. Those files, in turn, were included in the files that were processed in response to plaintiff's requests.[11]

Plaintiff does not attempt to refute these statements by Special Agent Phillips. Rather, he now comes up with a non-inclusive list of eleven organizations and persons whose names appeared in those Kennedy documents which pertained in some fashion to Mr. Garrison or his investigation, and claims that the FBI should have undertaken searches on these individuals and organizations. The defendant acknowledges that it did not undertake independent searches on the persons and organizations listed by plaintiff. It is the defendant's position that it was and is not legally required under the FOIA to do so. That position was well framed by Mr. Quinlan Shea, former director of the Justice Department's Office of Privacy aformation Appeals, when he stated to plaintiff's counsel that the FOIA does not contemplate "an open-ending process of search, locate, review

10/ See Fourth Declaration of John N. Phillips, attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982.

11/ See Fifth Declaration of John N. Phillips, ¶6, attached to Defendant's Reply to Plaintiff's Opposition to the Motion for Partial Summary Judgment, filed on July 2, 1982; Eighth Declaration of John N. Phillips, ¶2(f), attached to the instant reply.

and then search again based on what is contained in the reviewed records."12/

In sum, there is no factual dispute that the FBI's search in these cases did encompass records on the organizations and persons who figured in the Bureau's investigation of the JFK assassination, as well as records on Clay Shaw, David Ferrie and Jim Garrison's investigation. Nor is there any dispute that the FBI did not undertake new searches on the eleven persons or organizations listed by plaintiff or any other organizations or persons whose named appeared in the documents relating to Jim Garrison or his investigation. Instead, the dispute between the parties on this point is a legal one: that is, whether the FBI was required under the FOIA to conduct independent searches on any organizations or persons who appeared, based on the contents of the Kennedy records which were processed by the Bureau, to have been involved in Jim Garrison's investigation of the assassination.

7. Whether the FBI searched for files on "critics" or "criticism" of its assassination investigation

Similar to the previous point raised by plaintiff in his amended statement of genuine issues, there is no factual dispute about whether the FBI searched for files on "critics" or "criticism" of its investigation of the murder of President Kennedy. Rather, the dispute concerns whether the FBI should have searched for the names of 31 individuals first specified by plaintiff in his "settlement proposal" filed with the Court on April 5, 1982.

12/ Letter of June 16, 1980, from Quinlan J. Shea to James H. Lesar, attached as Exhibit A(2) to Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

As has been cogently explained by Special Agent John Phillips, it is the FBI's position that the agency agreed, pursuant to the discretion exercised by former Associtae Attorney General John Shenefield in his decision of December 16, 1980, to undertake a search on the topics of "critics" or "criticism" of its investigation.[13/] It did not commit itself to conduct searches on the names of individuals who at the time were unspecified. At no time did the Associate Attorney General or his staff in OPIA indicate otherwise. If indeed the Associate Attorney General wanted the FBI to search for records on specific individuals who were critical of the assassination investigation, it seems apparent that he would have listed their names the same way he, in that same decision of December 16, 1980, enumerated the names of several individuals on whom he agreed new searches would be conducted.[14/]

8. Whether the FBI searched for records referenced in Exhibit 4 attached to Weisberg's Affidavit.

The defendant assumes that plaintiff, by this issue, is attempting to dispute whether the FBI undertook a search for the "Raymond Comstock" documents. But again, there is no dispute. The FBI acknowledges that it did not conduct an independent search for those documents since they did not fall within plaintiff's requests. As noted above, it is the defendant's position that an agency is not required under the FOIA to make additional searches based on what is contained in the records located and process in response to a FOIA request. As noted as Special Agent Phillips, if plaintiff desires the alleged "Comstock" records, he can file a new FOIA request and pay the fees associated with the search for

13/ See Third Declaration of John N. Phillips, ¶ 3(f), attached to Defendant's Response to Plaintiff's Settlement Proposal, filed on April 15, 1982; Eight Declaration of John N. Phillips, ¶ 2(g), attached to this reply.

14/ See page 3 of Associate Attorney General Shenefield's decision of December 16, 1980, which is attached as Exhibit A(3) to Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

that material.[15/]

9. Whether the FBI searched for the record quoted in Exhibit 6 attached to Weisberg's Affidavit.

Although the defendant is not certain which record plaintiff is referring to, there is no disputed issue raised by this point. Inasmuch as none of the records referenced in Exhibit 6 of Weisberg's Affidavit fall within plaintiff's FOIA requests in these cases, the FBI did not undertake an independent search for those records.

10. Whether the FBI searched for records on Carlos Marcello.

Once again plaintiff raises an issue which is not in dispute. Since plaintiff's FOIA requests did not specify Carlos Marcello as someone on whom he wanted records, the FBI did not make an independent search for material on Mr. Marcello.

11. Whether the FBI searched for records on former Special Agent James P. Hosty.

Special Agent John N. Phillips has indicated before in these cases that, pursuant to Associate Attorney General Shenefield's decision of December 16, 1980, the FBI conducted indices searches in the Dallas Field Office to locate material on James P. Hosty.[16/] No main files on Mr. Hosty were located; however, there was a general personnel matters file (67-425) containing documents on Mr. Hosty pertaining to the JFK assassination that were processed and the releasable material furnished to plaintiff.

Special Agent Phillips has also noted that there is a "67" personnel file in FBIHQ on every FBI employee, including Mr. Hosty. Because67" FBIHQ file on Mr. Hosty was not within the scope of plaintiff's FOIA requests in these cases, it was not processed. At best, that file would be within the scope of

15/ See Eighth Declaration of John N. Phillips, ¶2(h), attached to the instant reply.

16/ See Second Declaration of John N. Phillips, ¶4, attached to Defendant's Reply to Plaintiff's Opposition to Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982; and Third Declaration of John N. Phillips, ¶3(c), attached to Defendant's Response to Plaintiff's Settlement Proposals, filed on April 5, 1982. See also Eighth Declaration of John N. Phillips, ¶2(k), attached to the instant reply brief.

plaintiff's separate FOIA request for FBIHQ documents, the administrative appeal of which is pending with the Justice Department Office of Information and Privacy.

There is nothing in plaintiff's submissions that disputes these statements by Special Agent Phillips. Indeed, even Mr. Weisberg admits in paragraph 35 of his affidavit of July 21, 1982, that the "Hosty records" he presently desires are contained in the FBIHQ files.

12. Whether the FBI searched for records on Mrs. Marguerite Oswald.

The FBI acknowledges that it did not conduct an independent search for records on Mrs. Marguerite Oswald, mother of Lee Harvey Oswald. Plaintiff's FOIA request in these cases did not specify her as someone on whom he wanted records. Nor did Associate Attorney General Shenefield direct the FBI, as a matter of agency discretion, to conduct a search for material pertaining to Mrs. Oswald. There is thus no disputed issue of fact concerning this point raised by plaintiff.

13. Whether the FBI has searched SAC confidential files and safes.

As noted by Special Agent Phillips in his attached eighth declaration, the FBI is unsure what plaintiff is referring to when he talks about SAC (i.e., Special Agent in Charge) confidential files. It can only be assumed that he is referring to materials on highly sensitive investigations and personnel matters which are maintained, for security purposes, in the SAC's office safes.[17/]

With respect to those safes, Mr. Phillips stated that the FBI's search in these cases included an inspection of the SAC safes in both the Dallas and New Orleans Field Offices. Any records that were located therein which pertained to the JFK assassination or which were responsive to the Associate Attorney General decision of December 16, 1980, were processed and, if nonexempt, were provided to plaintiff.

17/ See Eighth Declaration of John N. Phillips, ¶2(m), attached to this memorandum.

Plaintiff has put no significant probative evidence that supports his claim that the FBI failed to search for records in the SAC's safes. Accordingly, this alleged issue of fact must be dismissed for lack of genuineness. See Hahn v. Sargent, supra, 523 F.2d at 464.

14. Whether all records identified on "see" references have been provided by the FBI.

The FBI has indicated several times in these cases that all releasable information pertinent to plaintiff's FOIA requests was provided to him.[18/] This included records identified by way of "see" references. Furthermore, as Special Agent Phillips stated in paragraphs 21 and 24 of his fourth declaration, plaintiff was provided (by agreement of the FBI) with copies of all the indices search slips prepared by the Dallas and New Orleans Field Offices. Plaintiff thus has the capability for determining what files -- including those identified by way of "see" references -- were searched and processed by the FBI in these cases. Nothwithstanding that capability, plaintiff has not come forward with one shred of evidence which demonstrates that the FBI failed to process all the Kennedy assassination records identified by way of "see" references. Rather, he attempts, in typical fashion, to create a triable issue of material fact by resort to "gossamer threads of whimsy, speculation and conjecture." Manganaro v. Delaval, 309 F.2d 389, 393 (1st Cir. 1962). Such is clearly not sufficient under Rule 56. Accordingly, plaintiff's claims about the nonprocessing of "see" reference records must be dismissed as a non-genuine issue.

C. Plaintiff's Affidavits Opposing Defendant's Motion for Partial Summary Judgment, Including His Latest Affidavit, Do Not Meet the Requirements of Rule 56(e) And Thus Should be Striken.

As noted in the previous section of this memorandum, Rule 56 of the Federal Rules of Civil Procedure provides that a party who wishes to oppose a motion for summary judgment on factual grounds

18/ See, e.g., Fifth Declaration of John N. Phillips, ¶3, attached to Defendant's Reply to Plaintiff's Opposition to the Motion for Partial Summary Judgment, filed on July 2, 1982.

the existence of an issue of material fact. [illegible] non-moving party's affidavits must, under the dictates of Rule 56(e),

> be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Courts have applied those requirements strictly and thus have held that any affidavits submitted under this rule must only "contain evidentiary matter which, if the affiant were in court and testified on the witness stand, would be admissible as part of his testimony." American Security Co. v. Hamilton Glass, 254 F.2d 889, 893 (7th Cir. 1958). See also Union Insurance Society v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965); Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949).

In its previous memorandum filed in support of its motion to strike, the defendant argued that the two affidavits submitted by plaintiff in support of his opposition to the motion for partial summary (i.e., Affidavit of Harold Weisberg, dated May 31, 1982; and, Affidavit of James H. Lesar, dated June 3, 1982), failed to meet the requirements of Rule 56(e). Specifically, with respect to Mr. Lesar's affidavit, the defendant contended that the first four paragraphs amounted to argument of counsel and not admissible facts, whereas the last five paragraphs consisted of statements totally irrelevant to whether the FBI's search in these cases was adequate. Whereas, with respect to Mr. Weisberg's affidavit, the defendant demonstrated that it was a rambling 97 page, 364 paragraph recitation of hearsay, innuendo, speculation, conclusory language, and irrelevant and unsubstantiated statements. While the defendant did not attempt to list each and every inadmissible matter, it did point out numerous instances which were merely representative of the evidentiary deficiencies in that affidavit. Because of these shortcomings in plaintiff's affidavits, the defendant argued that the Court should adhere to its decision in Government of the Republic of China v. Compass Communications, 473 F.Supp. 1306 (D.D.C. 1979), and strike both documents.

In opposing the motion to strike, plaintiff does not take issue with any of the arguments advanced by the defendant with respect to Mr. Lesar's affidavit. Such silence can only be viewed as an acknowledgement that Mr. Lesar's affidavit indeed does not meet the requirements of Rule 56(e). Accordingly, that affidavit should be striken.

As to his own affidavit, plaintiff argues that the Court should strike only those parts which are inadmissible. He does not specify, however, those parts which he acknowledges as being inadmissible. Rather, he first appears to argue that under the Federal Rules of Evidence he, as a self-proclaimed expert on the Kennedy assassination, can state opinions based on hearsay and speculation. Having put forth this premise concerning opinions of experts, plaintiff then concedes that the first part of his affidavit did not address the defendant's motion for partial summary judgment. To cure this defect, plaintiff indicates that he has "executed a new affidavit which focuses more exclusively on the search issue." Pl. Resp. at 3.

Even assuming that plaintiff's arguments about expert opinion testimony are correct, which they are not,[19/] plaintiff's affidavits still do not meet the requirements of Rule 56(e). As plaintiff acknowledges, most of his first affidavit is completely irrelevant to the search issue. The parts that do address the adequacy of the search are replete with improper recitations of the intent or state of mind of other persons, see Maiorana v. McDonald, 596 F.2d 1072, 1080 (1st Cir. 1980), or are based on unsubstantiated conclusions. Even experts (and that is not to say plaintiff is one by any stretch of the imagination) must state the basis upon which they form their opinions. See, e.g., Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F.Supp. 1313, 1321-30 (E.D. Pa. 1980).

These same principles also undercut the viability of plaintiff's second affidavit for that document is likewise replete

19/ See, e.g., Merit Mortors Corp. v. Chrysler Corp., 569 F.2d 666, 672-73 (D.C. Cir. 1977); Ward v. Brown, 301 F.2d 445, 447 (10th Cir. 1962); Griffin v. Ensign, 234 F.2d 307, 315 (3rd Cir. 1956).

with inadmissible hearsay, conclusory language, specualtion and unsubstantiated statements. In sum, plaintiff's second affidavit, similar to his first one, is at odds with the requirements of Rule 56(e).

CONCLUSION

For the reasons set forth above and in defendant's previous memoranda, the defendant's motion for partial summary judgment, as well as its motions to strike and to have its statement of material facts deemed admitted, should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants.

Civil Action Nos. 78-322 and 78-420 (Consolidated)

/

EIGHTH DECLARATION OF JOHN N. PHILLIPS

I, John N. Phillips, make the following declaration:

1. I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Section, Records Management Division, FBI Headquarters (FBIHQ), Washington, D.C. As I have indicated in the seven previous declarations that were filed in these consolidated cases, I am familiar, due to the nature of my official duties, with the procedures followed in processing Freedom of Information Act (FOIA) requests received by the FBI, including plaintiff's requests for records on the assassination of President John F. Kennedy (JFK assassination) contained in the FBI's Dallas and New Orleans Field Offices.

2. Government counsel asked that I read Plaintiff's Amended Statement of Genuine Issues of Material Fact in Dispute. Having read that pleading, I make the following statements in response to the fourteen issues of fact which plaintiff claims are in dispute in these cases.

(a) Whether the Dallas and New Orleans Field Offices maintain "ticklers."

In paragraph 4 of my fifth declaration filed on July 2, 1982, in support of the Defendant's Reply to the Plaintiff's Opposition to the Motion for Partial Summary Judgment, I explained that "ticklers" -- as that term is used to refer to potentially retrievable records -- are photostatic or carbon copies of documents and that these copies are prepared for the information and temporary use of individuals who need to follow the progress

Exhibit A

of a certain matter. I also stated that not all FBI divisions maintain "ticklers" and that indeed most FBI field offices, including the Dallas and New Orleans Offices, do not produce or maintain these types of records.

In response to those statements, plaintiff produced a document (i.e., Exhibit 2 attached to Harold Weisberg's affidavit of July 21, 1982) ("Weisberg Affidavit"), which he claims demonstrates that the Dallas Field Office does produce and maintain ticklers. That document indicates that a file on Marina Nikolaevna Porter was being closed on March 6, 1978, but that the agent wanted to reopen the case in six months "for verification of the address of subject and family." To remind him of the reopening, the agent directed a rotor clerk, per a notation at the end of the memorandum, to prepare a "six (6) months tickler for reopening."

In this context, it is clear that the agent was not requesting the production of a photostatic or carbon copy (i.e., a "tickler" copy) of the memorandum in question. He was instead directing a clerk to prepare a 3 x 5 card indicating the action that was to be taken six months hence. This card, in turn, would have been placed in a chronologically arranged system of other such cards which contained similar types of reminders. As each time period elapsed, the noted action would be taken and the "tickler" card would be thrown away.

Exhibit 2 attached to Weisberg's Affidavit thus does not refute the statement in paragraph 4 of my fifth declaration that most FBI field offices, including the Dallas and New Orleans Offices, do not produce or maintain "tickler" copies of the documents that they generate. Rather, it merely demonstrates that FBI agents often utilize an informal card system to remind them of certain actions that should be taken in the future.

(b) Whether the FBI searched for "ticklers."

In paragraph 4 of my fifth declaration, I stated that, because the Dallas and New Orleans Field offices did not produce or maintain "tickler" copies of documents, the FBI did not undertake a search for such records. I also explained that even if those field offices had maintained "tickler" copies, it would have been virtually impossible to search for the ones responsive to plaintiff's FOIA requests inasmuch as their maintenance varies among the employees who use them. Moreover, I noted that it would have been a duplication of effort to search for "ticklers" (again assuming their existence) since they would have been merely carbon copies of documents that were already processed in response to plaintiff's requests.

(c) Whether the FBI searched "June files."

"June files" are what the FBI sometimes calls the files that encompasses the electronic surveillance conducted by a field office. These files, consistent with the FBI's filing system,*/ are index according to who or what organization or company was under surveillance. Information in the "June files," like all other FBI files, is thus retrievable through a search of a field office's general indices.

In the instant cases, the FBI utilized its general indices to identify material responsive to plaintiff's FOIA requests. If any of that material was located in a "June file," that file was searched and the releasable material pertinent to plaintiff's requests was furnished to him. However, not all of the "June files" in the Dallas and New Orleans Field Offices were searched for, as can be readily imagined, most of them have absolutely nothing to do with the JFK assassination.

*/ For a detailed explanation of the FBI's filing system, see paragraphs 3 and 4 of my fourth declaration attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982.

(d) Whether the FBI searched for records referenced in a Dallas memorandum dated October 23, 1975, attached as Exhibit 11 to Weisberg's Affidavit.

As I indicated in paragraph 18(e) of my fourth declaration attached to Defendant's Motion for Partial Summary, filed on May 3, 1982, the FBI's search in these cases did locate records concerning the allegations of Mr. William Walter. By letter dated May 15, 1981, plaintiff was provided with the records pertaining to Mr. Walter's allegations that had not been previously processed in the FBIHQ files.*/

(e) Whether the FBI searched for all films and tapes.

As I have stated several times in these cases,**/ plaintiff has been furnished all releasable films and tapes in the Dallas and New Orleans Field Offices which pertain to the JFK assassination. Furthermore, as I indicated in paragraph 3(g) of my third declaration, some tapes and films (this includes the "Thomas Alyea film") were sent to FBIHQ during the investigation and thus are involved in the pending administrative appeal of plaintiff's separate FOIA request for FBIHQ material. Lastly, there are no tapes of "the recorded police radio broadcasts" in either the Dallas or New Orleans Field Offices.***/

*/ Most of the records surrounding Mr. Walter's allegations were previously processed pursuant to a separate FOIA request by plaintiff. That processing of the FBIHQ Kennedy files was explained in paragraph 6 of my second declaration attached to Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

**/ See Second Declaration of John N. Phillips, ¶ 5, attached to Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982; Third Declaration of John N. Phillips, ¶ 3(g), attached to Defendant's Response to Plaintiff's Settlement Proposal, filed on April 15, 1982; Fourth Declaration of John N. Phillips, ¶¶ 20 and 24, attached to Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982; Fifth Declaration of John N. Phillips, ¶ 5, attached to Defendant's Reply to Plaintiff's Opposition to the Motion for Partial Summary Judgment, filed on July 2, 1982; and Seventh Declaration of John N. Phillips, ¶ 3, attached to Defendant's Opposition to Plaintiff's Motion for Order Compelling Photographic Copies of All Movie Films and Still Photographs in the FBI's Dallas and New Orleans Field Offices, filed on August 19, 1982.

***/ It should be noted that a tape of the recorded Dallas police radio broadcasts was made by an FBI official for use by the Warren Commission. However, a copy of that tape was not maintained by the Bureau in its files on the assassination.

(f) Whether the FBI searched for all records "pertaining to persons and organizations who figured in the investigation of President Kennedy's murder," as well as for New Orleans records "pertaining to Clay Shaw, David Ferrie and any other person or organization who figured in District Attorney Jim Garrison's investigation into President Kennedy's assassination."

As I spelled out in great detail in my fourth declaration and reiterated in paragraph 6 of my fifth declaration, all records on or pertaining to organizations or persons who figured in the FBI's investigation of the Kennedy assassination -- as far as those records related to that investigation -- were processed and, where appropriate, released to plaintiff. With respect to New Orleans records on David Ferrie, Clay Shaw or Jim Garrison's investigation, the FBI could find no main files or material on those subjects other than what was merged into the main files on the Bureau's investigation of the assassination. Those files, in turn, were processed and the nonexempt material was furnished to plaintiff.

As I indicated in my fifth declaration, the FBI was not involved in or connected with Mr. Garrison's investigation of the JFK assassination and thus maintained no main files on his investigation. Rather, as I explained above, any information or documents concerning Mr. Garrison's investigation was channelled into the New Orleans main files on the assassination. Notwithstanding this fact, plaintiff apparently believes that the FBI should have reviewed the documents in its Kennedy files which pertained to Mr. Garrison's investigation and then conducted new searches on the organizations and persons whose names appeared in those documents. According to plaintiff's counsel, those persons and organizations "include[d] but [are] are not limited to the following: the Free Cuba Committee, Double Check, Alpha 66, DRE, JURE, MNR, Sylvia Odio, Carlos Bringuier, Ronnie Caire, Dean Andrews, and Perry Russo."

The FBI acknowledges that it did not undertake new and independent searches on the organizations and persons whose names appeared in those Kennedy records which pertained in some

fashion to Jim Garrison or his investigation. The FBI believes that it was and is not required under the FOIA to do so. As Mr. Quinlan Shea, the former director of the Justice Department's Office of Privacy and Information and Appeals (OPIA), indicated to plaintiff's counsel, the FOIA does not contemplate "an open-ended, never-ending process of search, locate, review and then search again based on what is contained in the reviewed records."*/ This is precisely what plaintiff desires of the FBI in this case. If plaintiff wants a search conducted for records on the above detailed persons and organizations, he can file new FOIA requests with the agency and pay for any search and copying fees associated with the search for that material.

(g) Whether the FBI searched for files on "critics" or "criticism" of its assassination investigation.

In passing on plaintiff's administrative appeals in these cases, former Associate Attorney General John Shenefield decided that, "as a matter of agency discretion, the Bureau will conduct all-reference searches on George DeMohrenshildt and former Special Agent James P. Hosty, and will also attempt to determine whether there are any other official or unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on 'critics' or 'criticism' of the FBI's assassination investigation."**/ Per this directive, the FBI conducted a search for files on "critics" or "criticism" of its investigation. It did not attempt, however, to search for names of unspecified individuals. At no time did the Associate Attorney General or his staff in OPIA indicate to the FBI that it should search for records on any individuals, including those

*/ Letter of June 16, 1980, from Quinlan J. Shea to James H. Lesar, attached as Exhibit A(2) to Defendant's Reply to Plaintiff's Oppostion to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

**/ See page 3 of Associate Attorney General Shenefield's decision of December 16, 1980, which is attached as Exhibit A(3) to Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

listed by plaintiff in his Amended Statement of Genuine Issues of Material Fact in Dispute. Rather, by putting the words critics and criticism in quotes, it seems clear that former Associate Attorney General Shenefield meant that those were the topics for which the FBI was to search. This conclusion is buttressed by the fact that in the same paragraph of his decision Mr. Shenefield specifically listed the names of several individuals on whom he wanted new searches conducted. Thus, if the Associate Attorney General wanted the FBI to search for records on specific individuals who were critical of the assassination investigation, it seems apparent that he would have listed their names in his decision.

(h) Whether the FBI searched for records referenced in Exhibit 4 attached to Weisberg's Affidavit.

Apparently, by this question, plaintiff is asking whether the FBI searched for the documents which Raymond Comstock provided to Special Agent Regis L. Kennedy. The answer is no. Inasmuch as these documents per se do not fall within plaintiff's FOIA requests in these cases, the FBI did not conduct an independent search for the material. As explained in paragraph 2(f) above, the FBI does not believe that the FOIA requires an agency to make additional searches based on what is contained in the records located as a result of the search conducted in response to a FOIA request. If plaintiff desires the "Comstock" records, he can file a new FOIA request and pay the fees associated with the search for that material.

(i) Whether the FBI searched for the record quoted in Exhibit 6 attached to Weisberg's Affidavit.

Although it is uncertain which record in Exhibit 6 plaintifff is referring to, the FBI acknowledges that it did not conduct an independent search for any of the records referenced in Exhibit 6 of Weisberg's Affidavit. Again, the reason is that none of those records per se fall within plaintiff's FOIA requests in these cases.

(j) Whether the FBI searched for records on Carlos Marcello.

Inasmuch as plaintiff's FOIA requests did not specify Mr. Marcello as someone on whom he wanted records, the FBI did not conduct an independent search for material on Mr. Marcello.

(k) Whether the FBI searched for records on former Special Agent James P. Hosty.

As I have stated before in these cases,*/ indices searches were made in the Dallas Field Office to locate material on Special Agent Hosty. No main files on Mr. Hosty were located; however, there was a general personnel matters file (67-425) containing documents on Mr. Hosty relative to the JFK assassination which were processed and, if nonexempt, were released to plaintiff.

There is a "67" personnel file in FBIHQ on every FBI employee, including Mr. Hosty. Since the "67" FBIHQ file on Mr. Hosty was clearly not within the scope of the instant FOIA requests by plaintiff, it was not processed. At best, that file would be within the scope of plaintiff's separate FOIA request for FBIHQ documents, the administrative appeal of which is presently pending with the Justice Department's Office of Information and Privacy.**/

(l) Whether the FBI searched for records on Mrs. Marguerite Oswald.

The FBI acknowledges that it did not conduct an independent search for records on Mrs. Marguerite Oswald, mother of Lee Harvey Oswald. Plaintiff's FOIA request in these cases did not specify her as someone on whom he wanted records. Nor did Associate Attorney General Shenefield direct the FBI, as a matter of agency discretion, to conduct a search for material pertaining to Mrs. Oswald.

*/ See Second Declaration of John N. Phillips, ¶ 4, attached to Defendant's Reply to Plaintiff's Opposition to Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982; and Third Declaration of John N. Phillips, ¶ 3(c), attached to Defendant's Response to Plaintiff's Settlement Proposals, filed on April 15, 1982.

**/ Nothing in plaintiff's submissions contradict these facts. Instead, even plaintiff admits that the "Hosty records" he presently desires are contained in the FBIHQ files.

(m) Whether the FBI has searched SAC confidential files and safes.

The FBI is unsure what plaintiff is referring to when he talks about SAC (i.e., Special Agent in Charge) confidential files. Plaintiff may be referring to materials on highly sensitive investigations and personnel matters which are maintained in the offices of the SACs. Those materials are kept in safes for security purposes.

In the instant cases, the FBI did undertake a search of the SAC safes in both the Dallas and New Orleans Field Offices. Any records that were located therein which pertained to the JFK assassination or which were responsive to the Associate Attorney General decision of December 16, 1980, were processed and, if nonexempt, were provided to plaintiff.

(n) Whether all records identified on "see" references have been provided.

As I have stated before in these cases,*/ all releasable information pertinent to plaintiff's FOIA request has been provided to him. This includes records identified by way of "see" references. Furthermore, as I stated in paragraphs 21 and 24 of my fourth declaration, plaintiff was provided -- by agreement of the FBI -- with copies of all the indices search slips prepared by the Dallas and New Orleans Field Offices. Plaintiff thus has the capability for determining what files (including those identified by way of "see" references) were searched and processed by the FBI in these cases.

*/ See, e.g., Fifth Declaration of John N. Phillips, ¶ 3, attached to Defendant's Reply to Plaintiff's Opposition to the Motion for Partial Summary Judgment, filed on July 2, 1982.

3. In conclusion, I would like to note that the FBI's search in these cases was exhaustive. The agency not only undertook a systematic approach to locating records directly responsive to plaintiff's FOIA request, it also conducted, pursuant to the discretion exercised by former Associate Attorney General John Shenefield, a search for records on subjects which were, at best, remotely related to plaintiff's requests. As a result of the FBI multi-tiered search in these cases, nearly 12,000 documents and 53,000 index cards, together consisting of over 100,000 pages, were processed and the releasable information furnished to plaintiff.

I have read the foregoing statement consisting of 10 pages and fully understand its contents. In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 26 day of August, 1982.

John N. Phillips

JOHN N. PHILLIPS
Special Agent
Federal Bureau of Investigation
Washington, D.C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1330

CHARLES E. PERRY, APPELLANT

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 80-1487)

Argued April 19, 1982

Decided July 30, 1982

Sarah M. Vogel for appellant.

John H. E. Bayly, Jr., Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, and *Royce C. Lamberth*, *Kenneth M. Raisler*, and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellees. *Charles F. C. Ruff*, United States Attorney at the time the case was filed, also entered an appearance for appellees.

145-8-1349 USA:LS

Exhibit B

Before TAMM and GINSBURG, *Circuit Judges*, and EDMUND L. PALMIERI,* *United States Senior District Judge* for the Southern District of New York.

Opinion PER CURIAM.

PER CURIAM: This case comes to us on appeal of a district court decision that the federal appellees had, after some delay, released all documents responsive to appellant's Freedom of Information Act (FOIA) and Privacy Act requests for production. Appellant Charles E. Perry challenges Judge John Lewis Smith's summary disposition of the litigation in appellees' favor, arguing both that nonexempt, requested material remains undisclosed and that an action for damage lies under the Privacy Act as a result of the government's delayed and fitful responses to his document demands. Although it is manifest from the record that the government has been less than forthcoming in its dealings with Mr. Perry, we affirm the district court's rulings. The Privacy Act does not provide a claim for damages in the circumstances presented here, and the affidavits submitted by the government persuade us that all documents held by appellees and requested by Mr. Perry have now been released.

I.

Appellant Perry is a North Dakota farmer who received from the Farmers Home Administration (FmHA) loans totaling roughly $150,000 between 1976 and 1978. Deficiencies in appellant's repayment practices in 1978 prompted the government in the following year to initiate a foreclosure action against the collateral Perry pledged with the FmHA. Appellant has contested the foreclosure proceedings and has made allegations of government wrongdoing in connection with the loans he re-

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

ceived.[1] Indeed, even before the government filed the foreclosure action in North Dakota, Perry made in March of 1979 his initial request for the document he was subsequently to pursue for nearly two years. A little background will provide some flavor to this regrettable saga of carelessness and delay.

On March 15, 1979, Perry wrote to the National Director of the FmHA requesting (1) a complete copy of the working file assembled by FmHA officials and used by them to monitor the loans made him and (2) a copy of the investigative reports compiled in connection with those loans.[2] The FmHA claims, however, that it did not receive this letter until a copy of it was included with further correspondence sent by appellant to the Secretary of Agriculture on July 10, 1979.[3] On this July date, Perry wrote the Secretary and requested that the government provide the information sought in the earlier letter, a copy of which was appended.[4] The Secretary responded on July 30, 1979, acknowledging Perry's July 10 letter and stating that a formal response to the document request was in preparation.[5] By letter dated August 21, 1979, the Secretary apparently notified Perry that the records

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[1] Although appellant Perry's farm has now been sold pursuant to the foreclosure action, there remain pending against the government several counterclaims filed by Perry alleging misconduct by federal officials. Perry contends, for example, that the interest rate charged was usurious and that the government unlawfully accelerated the payment of the loans. *See* Brief for Appellant at xx-xxi. In a separate action Perry has also challenged the Farmers Home Administration (FmHA) foreclosure practices on constitutional grounds. *Id.* at xxi.

[2] Brief for Appellant at iii.

[3] Brief for Appellees at 2; Letter of April 22, 1980, from James E. Bryan, Jr., Freedom of Information Officer, FmHA, to A. James Barnes, Esq., Appendix (App.) at 20.

[4] Brief for Appellant at iii-iv.

[5] *Id.* at iv.

requested were in the possession of the United States Attorney for North Dakota and that inquiries should be directed to that official's office;[6] appellant denies, however, ever receiving this letter.[7]

This saga of allegedly crossed and lost correspondence involved as well a problem of roving files. The chief FmHA collection of files relating to and sought by appellant was held between January and May of 1979 by the Denver branch of the Office of General Counsel, Department of Agriculture. After mid-May of that year, these files were held by the United States Attorney in North Dakota, where they remained until after Perry filed the instant action.

In April of 1980, counsel for appellant again wrote the Secretary of Agriculture, demanding production under the FOIA and the Privacy Act of the information sought in the initial letter of March 1979.[8] The FmHA's FOIA Officer responded by advising appellant that the information he sought was held by the North Dakota United States Attorney and suggesting that Perry contact the office of the federal prosecutor there.[9] On May 9, 1980, counsel for appellant lodged with the Executive Office for United States Attorneys a formal request for the documents based on the FOIA and the Privacy Act.[10] In early

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[6] *See* Letter of August 21, 1979, from Bob Bergland, United States Secretary of Agriculture, to Charles E. Perry, App. at 21.

[7] Brief for Appellant at iv.

[8] Letter of April 8, 1980, from A. James Barnes, Esq., to Bob Bergland, United States Secretary of Agriculture, App. at 18-19.

[9] Letter of April 22, 1980, from James E. Bryan, Jr., Freedom of Information Officer, FmHA, to A. James Barnes, Esq., App. at 20.

[10] Letter of May 9, 1980, from A. James Barnes, Esq., to Director, Executive Office for United States Attorneys, United States Department of Justice, App. at 22-24.

July, the Acting Director of that office denied the request, citing the law enforcement investigatory files exemption to the FOIA, 5 U.S.C. § 552(b)(7)(A) (1976).[11] Although not necessary in light of the Justice Department delays, Perry subsequently exhausted available administrative remedies in seeking the documents.

On June 16, 1980, Perry filed the instant action seeking production of the requested agency records and damages for the wrongful withholding of the information. The Department of Agriculture and the FmHA responded in late July with a motion to dismiss or for summary judgment on the ground that the documents in question were in the possession and control of the North Dakota United States Attorney. In their affidavits supporting the motion, the federal defendants suggested to the court that the requested materials could be examined by appellant in Bismarck, North Dakota, during normal working hours; this sanguine suggestion was, however, inconsistent with the Justice Department letter of July 2, 1980, claiming the protection of the investigatory files exemption for the very same material.[12]

Appellant's difficulties in obtaining the requested material continued. In a statement filed in the district court on September 16, 1980, the federal defendants argued that the relief sought by Mr. Perry had "long [ago] been accorded him,"[13] apparently because a private investigator in the employ of Perry's counsel had viewed

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[11] Letter of 2 July 1980 from William P. Tyson, Acting Director, Executive Office for United States Attorneys, United States Department of Justice, to A. James Barnes, Esq., App. at 25.

[12] *See supra* note 11 and accompanying text.

[13] Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss or, Alternatively, for Summary Judgment, Perry v. Bergland, No. 80-1487 (D.D.C. Jan. 22, 1981), App. at 28.

the requested materials.[14] In mid-October, however, the Department of Justice finally released over 400 pages of documents for inspection and copying by appellant.[15]

On December 10, 1980, the district court held a hearing on the government motion, at which representatives of the involved agencies argued that the litigation was moot in light of the October record release. Appellant submitted an affidavit alleging that a number of relevant, nonexempt documents had been improperly withheld by appellees. Although expressing skepticism at Perry's allegations, the district judge ordered appellees to undertake a further search for the "missing" documents. The search proved fruitful for Perry as an additional 160 pages of materials were released on January 9, 1981;[16] appellees, acknowledging a "mistake," claimed unawareness of the additional material.[17] On January 12, 1981, still more documents were released; investigatory papers prepared by agents of the Department of Agriculture's Office of Inspector General and relating to Perry's federal indebtedness were then disclosed.

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[14] It appears that Mr. Perry's North Dakota counsel and a private investigator employed by that counsel did examine the files in question during 1980. *See* Brief for Appellees at 7; Brief for Appellant at xi. It is beyond peradventure, however, that a mere opportunity to inspect does not meet the disclosure responsibility imposed by the FOIA.

[15] Brief for Appellees at 7; Brief for Appellant at xii.

[16] *See* Brief for Appellees at 8. This additional material encompassed the North Dakota State FmHA file on Mr. Perry's account.

[17] *See* Brief for Appellees at 8. Appellees submit that the North Dakota State Office of the FmHA forwarded a duplicate copy of appellant's State file to the Washington FmHA office "without informing the National Office." *Id.* This "mistake," appellees contend, led to the belated disclosure of the nonexempt material. *Id.*; *see* Affidavit of Robert L. Nelson, Acting Freedom of Information Act Officer, FmHA, Perry v. Bergland, No. 80-1487 (D.D.C. Jan. 22, 1981) at 2, App. at 50.

The district judge conducted a second hearing on January 15, 1981. Appellees once again asserted that the Department of Agriculture possessed no other disclosable documents relating to appellant's request. Six days later, however, still more records were released.[18] Convinced that the federal defendants had at long last surrendered all of the requested documents, the district judge on January 22, 1981, granted the government's motion to dismiss or, in the alternative, for summary judgment. The trial judge also directed Perry's counsel to submit a request for reasonable attorneys' fees and costs. This appeal ensued.

II.

Appellant posits a variety of challenges to the government actions in this case, only two of which merit discussion here. We would simply note at this juncture that, however fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform. Although "[t]here may very well be circumstances in which prolonged delay in making information available or unacceptably onerous opportunities for viewing disclosed information require judicial intervention," *Lybarger v. Cardwell*, 577 F.2d 764, 767 (1st Cir. 1978), the case at bar does not mandate such court action. Under 5 U.S.C. § 552(a)(4)(B), a federal court is authorized only to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld . . . ." Thus, "[o]nce the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." *Crooker v. United States State Department*, 628 F.2d 9, 10 (D.C. Cir. 1980).

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[18] On January 21, 1981, appellees released to Perry copies of records of meetings conducted by local FmHA officials in North Dakota, at which appellant's situation was discussed. *See* Brief for Appellees at 10; Brief for Appellant at xviii-xix.

We are not authorized to make advisory findings of legal significance on the character of the agency conduct vis-a-vis any requester of information. In sum, if we are convinced that appellees have, however belatedly, released all nonexempt material, we have no further judicial function to perform under the FOIA.[19]

We turn now to the two arguments proffered by appellant that warrant limited discussion. First, arguing that relevant, nonexempt documents remain undisclosed, appellant contends that the affidavits submitted by appellees were insufficient to establish that the government search had been thorough and that all records had been released. Second, appellant contends that we should remand the case to the district court for a trial on his claim for damages under the Privacy Act.

A. *The Adequacy of the Affidavits*

Since the district judge considered matters outside the pleadings in disposing of the litigation, we properly treat this case as one in which a motion for summary judgment was granted. *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554

[19] We note that 5 U.S.C. § 552(a)(4)(F) (Supp. III 1979) directs the Merit Systems Protection Board's Special Counsel to initiate an investigation to determine whether disciplinary action is warranted in response to the improper withholding of nonexempt records under the FOIA by an agency officer or employee. Such an investigation is directed, however, only when the court in question (1) orders the production of the withheld records and (2) issues written findings suggesting that the "circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously . . . ." 5 U.S.C. § 552(a)(4)(F) (Supp. III 1979). While this process is arguably advisory in nature, the statutory language makes it clear that it is to be employed only when "the court orders the production of any agency records improperly withheld . . . ." *See* Lovell v. Alderete, 630 F.2d 428, 431 (5th Cir. 1980); Emery v. Laise, 421 F. Supp. 91, 92 (D.D.C. 1976). No such order was, of course, issued in this case.

(2d Cir. 1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 174 (D.C. Cir. 1976); 10 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2713 at 391-92 (1973 & 1982 Supp.). We test the propriety of the grant of such a motion by the well-known standards of Fed. R. Civ. P. 56. In a FOIA case, as in all others in the federal system, "'[s]ummary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that [movant] is entitled to judgment as a matter of law.'" *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979) (quoting *National Cable Television Association, Inc. v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

To meet this exacting standard in a FOIA suit, the "defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the [FOIA's] inspection requirements." *National Cable Television*, 479 F.2d at 186. The peculiarities inherent in FOIA litigation, with the responding agencies often in sole possession of requested records and with information searches conducted only by agency personnel, have led federal courts to rely on government affidavits to determine whether the statutory obligations of the FOIA have been met. Accordingly, "in adjudicating the adequacy of the agency's identification and retrieval efforts, the trial court may be warranted in relying upon agency affidavits, for these 'are equally trustworthy when they aver that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt.'" *Founding Church of Scientology*, 610 F.2d at 836 (quoting *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980)).

Reliance on affidavits to demonstrate agency compliance with the mandate of the FOIA does not, however, require courts to accept glib government assertions of complete

disclosure or retrieval. Rather, to ground a grant of summary judgment on the basis of agency protestations of compliance, the supporting affidavits "must be 'relatively detailed' and nonconclusory and must be submitted in good faith." *Goland*, 607 F.2d at 352 (footnote omitted) (quoting *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974)). Finally, as appellant argues, "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*, 610 F.2d at 836 (footnote omitted). Perry submits that the adequacy of the federal retrieval process is genuinely at issue in this case. Specifically, appellant challenges the adequacy of the searches carried out by agency officials in response to his FOIA requests and the sufficiency of the descriptions of those searches.

Although the offhand treatment appellees accorded Perry was by any measure unfortunate, we agree with the district court that summary judgment in the government's favor was appropriate. Appellees submitted for the consideration of the trial judge three affidavits of federal officials describing the searches for records that transpired, albeit belatedly, in response to Perry's requests. In *Weisberg v. Department of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980), and in *Founding Church of Scientology*, 610 F.2d at 836-37, we stated that affidavits setting forth the record procurement efforts of an agency should provide some detailing of the scope of the examination conducted. We do not believe, however, that the district judge's ruling in the case at bar violated either the spirit or the letter of the *Weisberg* and *Founding Church of Scientology* decisions.

Appellant's challenge to the adequacy of the government affidavits is, we believe, based on a misreading of these FOIA precedents. Neither *Weisberg* nor *Founding Church of Scientology* demands in every FOIA case that

the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records. Rather, in the absence of countervailing evidence or apparent inconsistency of proof, affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA. In considering a challenge to an agency's retrieval procedures, a reviewing court must thus determine whether the materials submitted by the agency satisfactorily demonstrate the apparent adequacy of the search conducted. Where the agency's responses raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory, summary judgment in the government's favor would usually be inappropriate. *See Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1094 (D.D.C. 1978), *aff'd*, 663 F.2d 120 (D.C. Cir. 1980).

Scrutiny of the agency affidavits submitted in the instant case convinces us that appellees' search for the requested records, though belated, was reasonably complete and thorough. Two of the three government affiants identified with reasonable specificity the system of records searched and the geographic location of those files.[30] The

[30] Affiant Robert L. Nelson, the Acting Freedom of Information Act Officer at the FmHA, stated that he had participated in and assisted in the supervision of the search for records pertaining to Mr. Perry and that "all levels of FmHA, including the County, State, and National levels," had been searched. Affidavit of Robert L. Nelson, Acting Freedom of Information Act Officer, Farmers Home Administration, Perry v. Bergland, No. 80-1487 (D.D.C. Jan. 22, 1981) at 2, App. at 50. Affiant Earl W. Judy, an agent with the Agriculture Department's Office of Inspector General (OIG), stated that he personally had searched OIG's Washington files for information relating to appellant's request and that he had directed that a comparable search be made of OIG's Kansas City office. Affidavit of Earl W. Judy, Special Agent, Office of Inspector General, United States Department of Agriculture, Perry v. Bergland, No. 80-1487 (D.D.C. Jan. 22, 1981) at 1-2, App. at 54-55.

third affiant, it is true, simply concluded that no records relating to appellant remained undisclosed; his position as North Dakota Director of the FmHA, however, lends credence to the conclusion that he was referring solely to the files held at his North Dakota office and that the search he supervised encompassed only those files.[21] To be sure, the descriptions of the searches could have been more detailed, and we urge agency affiants and counsel to provide as much specificity as possible to facilitate intelligent assessment of the submitted information. The arguable inadequacy of the search descriptions here is, however, no more than marginal and does not render the grant of summary judgment inappropriate.

We would note, moreover, that we do not view the above summary of governing principles as at all inconsistent with our rulings in either *Weisberg* or *Founding Church of Scientology*. Both of those cases involved rather special facts that tended to cast considerable doubt on the adequacy of the respective agencies' searches; the existence of this doubt in each case rendered summary disposition inappropriate. In *Weisberg*, the agency's own assertions supported an inference that specifically identified material, solicited by the requester, might have remained in the agency's possession. 627 F.2d at 368-70. The appellant in *Weisberg* also adduced specific evidence tending to show that the search conducted for the records had been inadequate. *Id.* at 368-69. Similarly, in *Founding Church of Scientology* there were "well-defined requests and positive indications of overlooked materials,"

[21] Affiant Frederick S. Gengler, the North Dakota State Director of the FmHA, simply stated that, as a result of the transfer of all FmHA documents to those prosecuting the foreclosure action, his office no longer held any nondisclosed records relating to Mr. Perry. Affidavit of Frederick S. Gengler, State Director for North Dakota, Farmers Home Administration, United States Department of Agriculture, Perry v. Bergland, No. 80-1487 (D.D.C. Jan. 22, 1981) at 1-2, App. at 52-53.

610 F.2d at 837, leading the court to conclude that "substantial doubts [existed] about the caliber of NSA's search endeavors." *Id.* at 834. Based on the conflicting evidence and nebulous records in *Weisberg* and *Founding Church of Scientology*, the court in each case ruled that a single, conclusory affidavit failed to negate any inference that requested information was irretrievable through the employment of reasonable search procedures.

Turning again to the case at bar, appellant's challenge of the district court's disposition of the retrieval question is based primarily on the cumulative effect of three alleged deficiencies in the government's behavior: appellant contends that the combined impact of (1) the vague descriptions of the searches conducted, (2) appellees' fitful responses to Perry's document requests, and (3) the fact that a belated release of materials rendered two of the government's affidavits "in error," [22] requires a remand for reconsideration of the adequacy of the government's search efforts. Neither the individual nor the cumulative effect of these alleged shortcomings requires reversal of the district court's decision, however.

We have noted above that the affidavits submitted by the government in this case, though perhaps somewhat summary, set forth with sufficient detail a reasonably thorough search for the requested information. *See supra* pp. 11-13. With regard to the second argument, it is clear that appellees' delayed reaction to appellant's document demands "evidences a lack of vigor, if not candor, in responding to [Perry's] FOIA requests." *Goland*, 607

[22] Brief for Appellant at 7. On January 21, 1981, appellees released copies of county FmHA records responsive to appellant's FOIA request. *See supra* note 18. This belated release contradicted earlier representations made by affiant Robert L. Nelson, *see supra* note 20, and by affiant Frederick S. Gengler, *see supra* note 21, to the effect that no additional materials responsive to appellant's request remained in appellees' possession.

F.2d 367, 370 (D.C. Cir. 1979) (opinion on rehearing). In the final analysis, however, appellant offers only the unsupported allegation that appellant's cumulative search efforts were insufficient as a matter of law to ground a ruling of summary judgment in the government's favor. Perry has presented no specific argument or evidence suggesting that solicited but undisclosed information remains in agency files. The issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate. *See id.* at 369. Given the dearth of evidence presented by appellant suggesting the inadequacy of the retrieval process, we are unable to say that the district judge was incorrect in relying on the agency affidavits in question, even given the delays in document provision.

Perhaps most troublesome in gauging the adequacy of the agency's search is the fact that additional documents were found and released after affidavits were executed by federal officials stating that no further records responsive to appellant's request remained in agency control.[23] As we have had occasion to note before, "the discovery of additional documents is more probative that the search was not thorough than if no other documents were found to exist." *Id.* at 370. After considering all of the surrounding circumstances, however, we are convinced that the district judge's disposition of the case was proper. Over 600 pages of materials were released to appellant over the course of four months in late 1980 and early 1981; only ten pages of records were released *after* the execution of the affidavits alleged by appellant to be false, and the circumstances surrounding this delay indicate neither artifice nor subterfuge but rather, at worse, administrative inefficiency. *See* Brief for Appellant at 7-8; Brief for Appellees at 14 n.8.[24] While we again recognize

[23] *See supra* note 22.

[24] Appellees suggest that the release, after the execution of the Nelson and Gengler affidavits, of the county FmHA

both the fitful nature of the government's release of records in this case and the probative impact of the discovery of additional documents, we find no error in the entry of summary judgment in appellees' favor.

In sum, after considerable study of the record, we are not convinced that sufficient "positive indications of overlooked materials" exist to warrant a remand of the case for a reconsideration of the substantive adequacy of the thoroughness of the search. *Founding Church of Scientology*, 610 F.2d at 837; *see generally Goland*, 607 F.2d at 367-72 (opinion on rehearing). Nor do we believe that the alleged deficiencies in the affidavit descriptions of that search require such a remand.

B. *The Claim for Damages Based on the Privacy Act*

Appellant claimed in the district court a right to "actual damages suffered as a result of the government's willful or intentional failure" to comply with the Privacy Act.[25] Although the contours of his claim are a bit difficult to discern, appellant apparently contends that the release by the agency appellees of inaccurate information regarding him, as well as the delayed surrender of that information, constituted violations of the Privacy Act giving rise to a claim for damages. As appellant notes, 5 U.S.C. §§ 552a(g)(1)(C) and (D) (1976) provide an individual with a cause of action against an agency that, *inter alia*, maintains inaccurate or incomplete records, the subsequent dissemination of which affects the individual adversely. But the United States is

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records "in no wise compromises the integrity or extent" of the document search, as these county records were "utterly non-responsive" to appellant's information request and were released "simply as a matter of courtesy." Brief for Appellees at 14 n.8. Even accepting appellant's characterization of these records, however, we see no need to upset the trial court's decision.

[25] *See* Brief for Appellant at 12-13.

liable for damages for violations of subsections (C) and (D) only when the agency "acted in a manner which was intentional or willful . . . ." 5 U.S.C. § 552a(g)(4) (1976). *See, e.g., Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980); *Zeller v. United States*, 467 F. Supp. 487, 503 (E.D.N.Y. 1979).

Appellant's Privacy Act claim must fail. As appellees note, no evidence submitted by Perry suggests that the actions of the government in this case, however disjointed or confused, were willful or deliberate in the sense demanded by the Privacy Act. There is no demonstration whatsoever of any alleged inaccuracies in the records assembled and disseminated by appellees. Nor does anything in the record demonstrate the existence of any "adverse effect" on appellant following as a result of the supposed Privacy Act violations, as required by both subsections (C) and (D) of section 552a(g)(1). Although in certain cases a claim for damages for delayed release of covered information might lie under the Privacy Act, the record before us reveals only that requested documents were disclosed in a delayed fashion through administrative oversight. The district judge thus properly dismissed appellant's claim for damages under the Privacy Act.

III.

Although we affirm in all respects Judge Smith's resolution of appellant's action, we add this postscript to express our disapproval of the government's behavior vis-a-vis Mr. Perry. By counsel's own admission, the FmHA and the Justice Department acted in a "disjointed," "dilatory," and "fitful" fashion in processing appellant's requests for documents that, under the FOIA and Privacy Act, he had the undisputed right to inspect.[26] The laudable aims of the FOIA will pass beyond reach if federal agencies can through carelessness and procrastination frustrate the efforts of private citizens to gain ac-

[26] Brief for Appellees at 11, 15.

cess to government files. The vigilance with which agencies process information requests should be all the greater where, as here, an individual requests information that bears on his relations with the given agency. We regret the necessity for the long pursuit by Perry and his counsel of the documents at issue in this litigation, and we admonish the appellee agencies that a delay of two years in the release of information to which the requester has a right of access is simply unacceptable as a matter of law, policy, and equity.[27]

Affirmed.

[27] The district judge invited counsel for appellant to submit a request for reasonable attorneys' fees and costs in connection with the release of the records relating to Mr. Perry. At oral argument counsel for appellant stated that no such fees or costs had yet been awarded. It would now be appropriate for appellant's counsel to renew the matter before the district court.

CERTIFICATE OF SERVICE

I hereby certify on this 2nd day of September, 1982, I have served the foregoing Defendant's Reply To Plaintiff's Opposition To Defendant's Motion To Strike And To Have Its Statement Of Material Facts Deemed Admitted, by first class mail to:

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Henry J. LaHaie

HENRY J. LaHAIE