9/7/82

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)

ERRATA

On September 2, 1982, the defendant sent the Court and opposing counsel its Reply to Plaintiff's Opposition to Defendant's Motion to Strike and to Have Its Statement of Material Facts Deemed Admitted. Subsequently, it came to the attention of defendant's counsel that the reply brief itself (as opposed to the two exhibits attached to the brief) contained several errors that should be corrected. Accordingly, the defendant is filing herewith corrected copies of its memorandum brief. The two exhibits attached to the original memorandum, however, remain unchanged.

Respectfully submitted,

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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

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 facts being deemed admitted. Zerilli v. Smith, 656 F.2d 705, 718 n.74 (D.C. Cir. 1981); 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. 81-1330, 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 directing 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 produces and maintains "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 resolved 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 (D.C. Cir. 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 on March 22, 1982 ("Defendant's Reply"). The decision on those appeals was rendered by former Associate Attorney General 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

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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 the 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 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.

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 Bureau'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 and Information 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 on any other organizations or persons whose names 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.

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 Associate Attorney General John Shenefield in his decision of December 16, 1980, to undertake a search on the topics of "critics" or "criticism" of

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.

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 processed 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 that material.[15/]

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.

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

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 was 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. Because the "67" 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

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 Proposal, 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 requests 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.

added

Plaintiff has put no significant probative evidence before the Court 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 25 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 Section B 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 must

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.

set forth significant probative evidence which establishes the existence of an issue of material fact. In so doing, the non-moving party's affidavits shall, 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 judgment (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, speculation 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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CERTIFICATE OF SERVICE

I hereby certify on this 3rd day of September, 1982, I have served the foregoing Errata and corrected copies of 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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