2/15/83

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 OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER COMPELLING DEFENDANT TO ANSWER THE REQUEST FOR ADMISSION

I. PRELIMINARY STATEMENT

In December 1982, plaintiff propounded to the defendant forty interrogatories, a request for production of documents and a request for admission. On January 19, 1983, the defendant served its responses to those discovery requests; however, it objected to the request for admission on two grounds: (1) the request is irrelevant to the issue of whether the FBI's search in these cases was adequate; and (2) the request seeks information that falls outside the fourteen points listed in plaintiff's Amended Statement of Genuine Issues of Material Fact in Dispute, filed on July 26, 1982. Plaintiff now seeks to have the Court compel the defendant to answer that request. In support of the motion, plaintiff argues that the request is relevant to the search issue, that it does fall within the fourteen points listed in his amended "statement of genuine issues" and that, in any event, discovery on

the search issue should not be limited to those fourteen points. As will be demonstrated below, all of plaintiff's arguments are devoid of merit; accordingly, the Court should deny the motion to compel.

II. ARGUMENT

A. Plaintiff's Request For Admission Is Not Relevant To The Issue Of Whether The FBI's Search Was Adequate.

Under Rule 26(b) of the Federal Rules of Civil Procedure, a party may obtain discovery regarding any matter so long as it "is relevant to the subject matter involved in the pending action." If discovery is contested, the discovering party has the burden of demonstrating that the information sought is relevant to the issues involved in the case. See, e.g., Pierson v. United States, 428 F. Supp. 384, 390 (D. Del 1977).

Here, plaintiff's request for admission inquires as to whether the Central Intelligence Agency asked the FBI for information on any one of twenty six (26) individuals "at the time of New Orleans District Attorney Jim Garrison's investigation into the assassination of President John F. Kennedy." In his brief in support of the motion to compel, plaintiff summarily argues that this is relevant to the search issue because

> [i]f the CIA did request information from the FBI on these individuals, this is evidence both that they figured in Garrison's investigation and that the FBI knows they did. That being the case, they are clearly within plaintiff's requests and there must be a search for records pertaining to them.

Plaintiff's Memorandum of Points and Authorities at 2. What plaintiff fails to state however is why such a request by the CIA (assuming arguendo that the CIA did ask the FBI for such information) would establish that those named individuals figured in Mr. Garrison's investigation or why the request itself would have put the FBI on notice that those individuals had figured in the Garrison investigation. Although the FBI had no involvement in that investigation, it would appear from news media accounts that it spanned a four year period from late 1966 to late 1970.*/ The fact that during this four year period the CIA had requested information on one or more of the individuals specified by plaintiff hardly demonstrates that such individual(s) had figured in the investigation by Mr. Garrison. Indeed, if that were the case, one would be forced to conclude that the mere fact that the CIA had requested information from the FBI on any given individual during this time period would automatically mean that

*/ It should be noted at this point that all the FBI officials who were responsible for processing plaintiff's FOIA requests in these cases have no knowledge as to whether from late 1966 to late 1970 the CIA requested information from the FBI on any of the individuals named in plaintiff's request for admission. The only way that could be ascertained is to check to see if the FBI has files on any of those individuals and then to search those files (assuming there are some) to see if the CIA had requested information on the individuals. However, before the FBI could undertake these steps, plaintiff would have to comply with the requirements of the Privacy Act, 5 U.S.C. §552a, and submit notarized authorizations from the individuals specified in the request for admission, giving the Bureau permission to publicly disclose that it has files on them and that the CIA had requested information from the files. In addition, even if plaintiff did submit privacy waivers and the FBI did locate files on some or all of the individuals which contain a request for information from the CIA, the FBI would have to confer with the CIA to see if acknowledging the existence of such a request would be protected by a state secret privilege.

such individual had figured in Garrison's investigation. That clearly would be an illogical conclusion. In short, plaintiff has shown no nexus between the Garrison investigation and the fact that from late 1966 to late 1970 the CIA may have requested information from the FBI on one or more of the twenty six individuals specified by plaintiff in his request for admission.

Moreover, even if Mr. Garrison's investigation had invoked the CIA to make such a request, that does not establish that all FBI officials were then put on notice that those specified individuals had indeed figured in the investigation. This is especially true given the fact that (1) the Garrison investigation had apparently taken place at least eight to twelve years prior to plaintiff's FOIA requests in these cases and (2) the FBI officials who were responsible for processing plaintiff's FOIA requests have no independent knowledge of what information or records the CIA may have requested from the Bureau during that time period.

In sum, plaintiff has failed to demonstrate that his request for admission is relevant to the issue of whether the FBI's search in these cases was adequate. This conclusion is buttressed by the fact that the test for the adequacy of an agency's search is "not whether any further documents might conceivably exist," Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982), but rather whether the agency has made "reasonable efforts to satisfy [the FOIA request]." Founding Church of Scientology v. National Security Agency, 610 F.2d 824, 837 (D.C. Cir. 1979).

B. Plaintiff's Request For Admission Is Also Objectionable Because It Seeks Information On An Issue Not In Dispute.

In addition to being irrelevant to the search issue, plaintiff's request for admission seeks information that falls outside the fourteen points listed in plaintiff's amended Rule 1-9(h) statement. Defendant submits that any discovery on the search issue is limited to those fourteen points.

Plaintiff counters, first, that the request for admission is keyed to the sixth point in his amended "statement of genuine issues" and, second, that discovery, in any case, should not be restricted to the fourteen points that he had earlier listed as being all the disputed material facts in these cases. Both arguments are untenable.

First, contrary to plaintiff's assertions, it is readily apparent that the scope of the request for admission is much broader than the sixth point set out in his amended Rule 1-9(h) statement.

Second, plaintiff's argument that discovery should not be limited to the fourteen points listed in his amended "statement of genuine issues" is undercut by the language of Local Rule 1-9(h) and the cases construing it. As has been pointed out by the defendant in other briefs in this litigation, Rule 1-9(h) requires a party opposing a summary judgment motion to serve and file "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. . . ." (Emphasis added). In applying that rule, the courts of this Circuit have indicated that one of

the rule's purposes is to isolate all the facts that a party contends are in dispute so that the parties and the court can focus their attention only on those facts, should the court decide that summary judgement is not appropriate. See, e.g., Gardels v. CIA, 637 F.2d 770, 773 (D.C. Cir. 1980). Clearly, that focusing process includes any discovery that may be needed in anticipation of trial. If such were not the case, there would be no reason to require, as Rule 1-9(h) does, that a party set forth all materials facts which he contends need to be litigated.

As was demonstrated in its brief in opposition to plaintiff's motion for a protective order, the defendant has consistently endeavored to get plaintiff to articulate all the bases for his assertion that the FBI's search in these cases was inadequate. Plaintiff, on the other hand, has consistently tried to avoid such an articulation, thereby keeping his position obscure and thus unassailable. The latest example of this was when plaintiff opposed the defendant's motion for partial summary judgment by submitting a one sentence Rule 1-9(h) statement in which he contended that the only material fact in dispute was whether the FBI conducted a thorough, good faith search for records responsive to his FOIA requests. Per a motion to strike, the defendant made it clear to plaintiff that such was not sufficient under Rule 1-9(h) and that to avoid default on the summary judgment motion he had to come forward, once and for all, with an exhaustive list of his complaints about the FBI's search. Significantly, plaintiff responded to defendant's motion to strike by submitting an amended "statement of genuine issues" which he argued rendered the motion

moot. That amended statement, in turn, contained fourteen facts which plaintiff contended were both material and in dispute. And under Rule 1-9(h), the dictates of which had been specified in defendant's motion to strike, those fourteen points represented all the disputed material facts with respect to the search issue.

Notwithstanding those representations embodied in his amended "statement of genuine issues," plaintiff now wants this Court to hold that he is free to bring up at any time additional disputed issues of fact upon which he can conduct discovery. If the Court grants plaintiff's request, this litigation will continue ad infinitum.

In sum, the defendant is entitled to know all of plaintiff's complaints about the adequacy of the FBI's search so that it can have a meaningful opportunity to address those complaints. Since plaintiff has already been afforded the chance to amend his Rule 1-9(h) statement so as to detail all the facts about the search which he contends are in dispute, the Court should not countenance his attempt now to add new disputed facts by way of discovery. Instead, the Court should sustain defendant's objections to any discovery which seeks information outside the fourteen points set out in plaintiff's amended "statement of geniune issues," including the instant request for admission.

CONCLUSION

For the reasons set forth above, the defendant requests the Court to deny plaintiff's motion for an order compelling the defendant to answer his request for admission.

Respectfully submitted,

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ORDER

Upon consideration of plaintiff's motion for an order compelling the defendant to answer his request for admission, defendant's opposition thereto, and the entire record herein, it is hereby

ORDERED, that plaintiff's motion be, and the same is hereby, DENIED.

Dated this _____ day of February, 1983.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 1983, I have served the foregoing Defendant's Opposition to Plaintiff's Motion for An Order Compelling Defendant to Answer the Request for Admission, and a proposed Order, by first class mail, postage pre-paid to:

James H. Lesar, Esq.
Suite 900
1000 Wilson Boulevard
Arlington, Virginia 22209

Henry J. LaHaie

HENRY J. LaHAIE