

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,
Plaintiff,
v.
WILLIAM H. WEBSTER, ET AL.,
Defendants

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Civil Action No. 78-0322

RECEIVED

MAR 21 1978

JAMES F. DAVEY, Clerk

HAROLD WEISBERG,
Plaintiff,
v.
FEDERAL BUREAU OF INVESTIGATION,
ET AL.,
Defendants

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Civil Action No. 78-0420

PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Comes now the plaintiff, Mr. Harold Weisberg, and moves this Court for an order compelling defendants to answer interrogatories 1, 2, 10, 12(a), 17, 32, and 33.

A Memorandum of Points and Authorities and a proposed Order are submitted herewith.

Respectfully submitted,

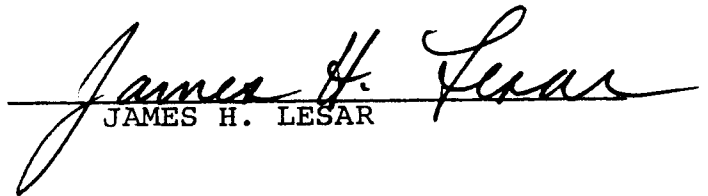


JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of March, 1983, mailed a copy of the foregoing Plaintiff's Motion to Compel Answers to Interrogatories to Mr. Henry LaHaie, Civil Division, Room 3338, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 78-0322
 :
 WILLIAM H. WEBSTER, ET AL., :
 :
 Defendants :

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

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff has moved to compel answers to seven interrogatories. These interrogatories and the responses given by defendants are set forth below.

Interrogatory 1: Did the FBI's Dallas Field Office create "tickler" files during the course of investigation into the assassination of President John F. Kennedy?

Answer: If plaintiff is asking whether the Dallas Field Office created files consisting of photostatic or carbon copies of the originals of investigative documents, the purpose of which was to enable a Special Agent or other employee to follow the progress of the Kennedy investigation including the need to take fur-

action, the answer is "no." Indeed, the creation of these types of files have never been standard operating procedure with the Dallas office.

If plaintiff is asking whether individual agents in the Dallas Field Office have utilized a system of chronologically arranged index cards which contain reminders to take certain action on specified dates with respect to any of the Field Office's investigations, the answer is "yes." Such a system, however, would not have been restricted to the Kennedy investigation nor has the office ever retained index cards the specified dates of which have lapsed.

Interrogatory 2: Did the FBI's New Orleans Field Office create "tickler" files during the course of the investigation into the assassination of President Kennedy?

Answer: Defendants' answer to this interrogatory is identical to their answer to Interrogatory 1.

Interrogatory 10: Were any "JUNE" or "JUNE MAIL" files created which in any way relate to the investigation into the assassination of President Kennedy conducted by New Orleans District Attorney Jim Garrison?

Answer: No, the FBI was not involved in or connected in any manner with Jim Garrison's investigation of the JFK assassination.

Interrogatory 12: Has the FBI conducted a search to determine whether there are any records in the Dallas and New Orleans

Field Offices related to the assassination of President Kennedy which repose in:

(a) special file rooms;

Answer to Interrogatory 12(a): Not applicable; see defendant's answer to interrogatory no. 11(a).

Interrogatory 17: Did the FBI ever obtain tapes of the Dallas police radio broadcasts? If so, please state:

(a) when and how the FBI obtained these tapes;

(b) when these tapes came into the possession of the Dallas field office;

(c) where these tapes are presently located;

(d) whether any search has been made to locate the tapes;

(e) whether a covering letter or memorandum accompanied transmittal of the tapes to FBI Headquarters or the Warren Commission, and if so, the date(s) of same.

Answer: The FBI has never maintained a copy of the tape of the recorded Dallas police radio broadcasts. However, as has been noted before in this litigation, a tape of those recorded broadcasts was made by an FBI official on behalf of, and for use by, the Warren Commission.

Interrogatory 32: Do the Dallas and New Orleans Field Offices maintain ELSUR indices? If so, please list all subjects

on which an ELSUR search was conducted in each field office and state when and by whom the search was made.

Answer: Defendant objects to this interrogatory because it seeks information which falls outside the fourteen issues listed by plaintiff in his Amended Statement of Genuine Issues of Material Fact in Dispute, filed on July 26, 1982. It is defendant's position that any discovery on the adequacy of the FBI's search in these cases is limited to the fourteen points enumerated by plaintiff, since, under the dictates of Local Rule 1-9(h), those points represent "all material facts as to which [plaintiff] contended there exists a genuine issue necessary to be litigated" (Emphasis added).

Interrogatory 33: Subsequent to the filing of Mr. Weisberg's affidavit alleging that he had been picked up on a wiretap in New Orleans, did the FBI make any investigation to determine if this was true?

Answer: Same as answer to Interrogatory 32.

ARGUMENT

In responding to interrogatories 1-2, defendants ignore the definition of "tickler" which is expressly incorporated in plaintiff's interrogatories and rely instead on their own limited definitions. This is unacceptable, particularly since the definitions are qualified in ways which suggest that defendants may be trying

to avoid an affirmative answer which would entail a further search by use of semantics. For example, defendants' limit the first part of their answer to files consisting of "photostatic or carbon copies." Mr. Weisberg has previously stated in an affidavit that the FBI's ticklers are xerox copies, not photostatic or carbon copies. In view of this, the FBI may be trying to avoid a forthright answer to the question. It should be required to answer these two interrogatories according to the definition of "tickler" supplied by plaintiff, and it should specifically be required to address them in terms of ticklers consisting of xerox copies.

Interrogatory 10 asks whether there were any "JUNE" or "JUNE MAIL" files created which in any way relate to the investigation into the assassination of President Kennedy conducted by New Orleans District Attorney Jim Garrison. The FBI's answer to this interrogatory is non-responsive. It asserts that the FBI was not involved in or connected in any manner with Garrison's investigation. But this does not answer the question which plaintiff asked. Plaintiff did not ask whether the FBI was involved in Garrison's investigation, but whether any "JUNE" or "JUNE MAIL" files were created which related to it. The FBI should be required to answer the questions asked.

Interrogatory 12(a) seeks to learn whether the FBI has conducted a search to determine whether there are any records in the Dallas and New Orleans Field Offices which repose in special file

rooms. Defendants assert that this interrogatory is "not applicable" and cite their answer to interrogatory 11(a). Their answer to that interrogatory, which asked "Do the Dallas and New Orleans Field Offices contain special file rooms?" is:

At the time of plaintiff's FOIA requests in these consolidated cases, neither field office contained special file rooms. The New Orleans office still does not contain such a room, whereas the Dallas office has, within the past few years, set up a special file room.

In light of defendants' answer to 11(a), interrogatory 12(a) may require no response as to the New Orleans Field Office, but it does require one with respect to the special file room in the Dallas Field Office. Plaintiff needs to know whether or not the Dallas Field Office's special file room has been searched for records responsive to this request. As defendants have not answered this part of the interrogatory, they should be compelled to do so.

Defendants' answer to Interrogatory 17 is non-responsive. Plaintiff asked if the FBI had obtained tapes of the Dallas Police radio broadcasts, not whether it had "maintained" any. In addition, defendants have entirely ignored other parts of this interrogatory, including 12(e), which seeks information concerning any covering letter or memorandum which accompanied transmittal of the tapes to FBI Headquarters or the Warren Commission. Defendants should be required to answer this interrogatory.

Interrogatories 32 and 33 seek information regarding ELSUR searches. Defendants have objected to both on the grounds that

they seek information which falls outside the fourteen issues of material fact which plaintiff listed as being in dispute in his Rule 1-9(h) statement which accompanied his opposition to defendants' motion for partial summary judgment.

There is no basis in law, logic or the local rules for the position taken by defendants. In the first place, defendants' motion for partial summary judgment dealt only with the adequacy of the FBI's search, and it is this issue, the sufficiency of the search, which is in reality the single material fact at issue. The many facts which plaintiff set forth in his Rule 1-9(h) statement are simply illustrations which evidence the dispute as to the basic factual issue: viz., the adequacy of the FBI's search.

There are many reasons why the position taken by defendants is wholly untenable. The party moving for summary judgment has the burden of establishing by a record that is adequate for decision of the legal question presented that there is no triable issue of material fact. Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). The papers of the moving party are to be carefully scrutinized, while those of the opposing party, if any, are treated with considerable indulgence. Semaan v. Mumford, 335 F. 2d 704 (D.C.Cir. 1964). If the moving party fails to should his burden his motion should be denied, even though the opposing party has presented no evidentiary materials in opposition, and has not

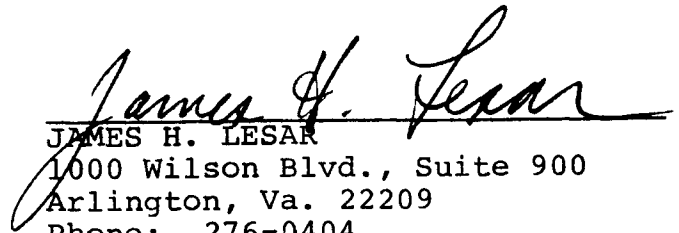
presented any Rule 46(f) affidavit. Adickes, supra; Bloomgarden v. Coyer, 479 F.2d 201 (D.C.Cir. 1973).

Thus, there is no requirement that the party opposing the motion set forth all evidence pertinent to a disputed factual issue; only that he set forth sufficient evidence to demonstrate that there is a factual issue in dispute. And if the moving party fails to should his burden, he doesn't even have to do that.

Moreover, in Freedom of Information Act cases, the Act puts the burden on the agency to show that it has conducted a proper search. What defendants propose would reverse that burden. Early in a case, and without having even made a bona fide search effort the agency could, as the FBI has done here, assert in a motion for summary judgment that it has performed the required search, then when its motion fails seek to put the requester under the enormous burden of demonstrating to the agency each and every fact showing that its search was insufficient. In addition to reversing the burden of proof which Congress provided in the Act, it would also provide agencies with a means of thwarting FOIA requests by resisting disclosure of all materials which the requester was unable to prove had not searched for.

The burden of proof cannot be switched to plaintiff. These interrogatories are proper and the Court should require defendants to answer them.

Respectfully submitted,



JAMES H. LESAR
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
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Attorney for Plaintiff

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O R D E R

Upon consideration of plaintiff's motion for an order compelling defendants to answer interrogatories, defendants' opposition thereto, and the entire record herein, it is by the Court this

_____ day of _____, 1983, hereby

ORDERED, that within _____ days of the date of this Order defendants shall serve upon plaintiff and file with the Court answers to interrogatories 1, 2, 10, 12(a), 17, 32 and 33.

UNITED STATES DISTRICT JUDGE