4/4/83

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 MOTIONS FOR ORDERS COMPELLING DEFENDANT TO PRODUCE DOCUMENTS AND TO ANSWER INTERROGATORIES

I. PRELIMINARY STATEMENT

The plaintiff has filed two motions which seek to compel production of the documents requested by item no. 1 of his request for production of documents and to compel answers to interrogatories nos. 1, 2, 10, 12(a), 17, 32 and 33 of his first set of interrogatories. Defendant opposes these motions because, as will be demonstrated below, either its original answers were responsive or its objections were well founded with respect to plaintiff's discovery requests.

II. ARGUMENT

A. Plaintiff's Request for Admission

Item No. 1 of plaintiff's Request for Admissions seeks "copies of the originals of all search slips" in these cases. Defendant objected to item no. 1 on the ground that plaintiff has already been provided with such copies. Plaintiff now requests an order compelling the defendant to produce those copies once more.

In support of his request, plaintiff states that although he "has been provided with copies of some search slips in this case,[1/] he has repeated (sic) stated his belief that the search slips are phonies, that they are no (sic) copies of the originals." Plaintiff premises that belief on the fact that the New Orleans search slips on David Ferrie do not reference certain file numbers[2/] and on the fact that the Dallas search slip on James Hosty is blank even though documents on Mr. Hosty were provided to plaintiff.

Since the defendant has already demonstrated in its opposition to plaintiff's motion to strike, filed on March 29, 1983, that Mr. Weisberg's claims about the New Orleans search slips on David Ferrie are false, it will decline to so demonstrate again.

Plaintiff's assertion about the Dallas search slip on James Hosty is also erroneous. As has been explained before in this litigation,[3/] the Dallas Field Office conducted, as a matter of agency discretion, an all reference search on Mr. Hosty pursuant to the decision by then Associate Attorney General John Shenefield on plaintiff's administrative appeals of these cases.

1/ Defendant does not know which of these consolidated cases plaintiff is referencing here. For purposes of this opposition, the defendant will assume that plaintiff wants the FBI again to produce copies of the search slips in both cases.

2/ This was also the basis for plaintiff's Motion to Strike All Sworn Statements by Special Agent John N. Phillips, filed on March 8, 1983.

3/ See Defendant's Motion for Partial Summary Judgment, filed on May 3, 1982.

That search did not locate any documents indexed in the Dallas indices; consequently, the search slip on Mr. Hosty does not contain any file references to him. However, because the Associate Attorney General also directed (again as a matter of agency discretion) that the FBI search for any pertinent documents in its administrative files, the Dallas Office manually looked through its general personnel matters file (i.e., 67-425) and located some documents on Mr. Hosty which pertained to his handling of the Kennedy assassination investigation. Those documents, in turn, were processed and the releasable material furnished to plaintiff. Thus, the fact that plaintiff was furnished material on Mr. Hosty even though the Dallas search slip contains no file references to him does not substantiate in any way plaintiff's claims that the search slips in these cases are not genuine. Rather, it merely demonstrates that the FBI does not index all the information or names (especially the names of special agents) in its files -- a point that the defendant established long ago in this litigation.[4/]

Given those explanations about the search slips on David Ferrie and James Hosty, it it clear that plaintiff's conjecture that they are not authentic is unfounded. Accordingly, there is no valid reason for requiring the defendant to provide plaintiff with duplicate copies of the search slips in these cases.

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

B. Plaintiff's Interrogatories Nos. 1, 2, 10, 12(a), 17, 32 and 33

Plaintiff first contends that, with respect to interrogatories nos. 1 and 2, the defendant ignored the definition of "tickler" incorporated by plaintiff at the outset of the interrogatories and relied instead on a more limited definition, thereby using semantics "to avoid an affirmative answer." Specifically, plaintiff claims that the defendant used the terms "photostatic or carbon copies" so as to exclude, sub silentio, any reference to whether the FBI has ticklers consisting of "xerox copies" -- the terms which Mr. Weisberg has used to describe those record. Such claim, however, is simply frivolous. Indeed, it is clear that the term "photostatic" was used to encompass copies of documents that were made by any type of photocopying machine, including those machines manufactured by the Xerox Corporation.[5/] Moreover, the answers to interrogatories nos. 1 and

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5/ Significantly, the distinction between "photostatic" and "xerox" copies has been explained to plaintiff once before in this litigation. See Defendant's Opposition to Plaintiff's Motion For Order Compelling Defendant to Provide Plaintiff with Photographic Copies Of all Movie Films and Still Photographs, filed on August 19, 1982.

6/ Interrogatory no. 10 inquired as follows:

> Were any "June" or "June Mail" files created which in any way relate to the investigation into assassination of President Kennedy conducted by New Orleans District Attorney Jim Garrison?

The defendant's response was:

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

(Emphasis added).

2 were intentionally worded to give the broadest possible scope both to plaintiff's definition of a "tickler" and to his inquiry whether the Dallas and New Orleans Field Offices "created 'tickler' files during the course of the investigation into the assassination of President John F. Kennedy" (emphasis added). Not only did the FBI answer with respect to "tickler" files but also with respect to "tickler" index cards.

Also frivolous is plaintiff's assertion that the answer to interrogatory no. 10 was not responsive because of defendant's comment that "the FBI was not involved in or connected in any manner with Jim Garrison's investigation of the JFK assassination."[6/] Significantly, however, the first word of that answer was "no." When the answer is thus viewed in its entirety, it is clear that the defendant was first stating that the Dallas and New Orleans Field Offices did not create any "June" or "June Mail" files which related in any way to Jim Garrison's investigation of the Kennedy assassination; and then, having answered the interrogatory's inquiry, the defendant simply reminded plaintiff once more that the FBI was not involved or connected with that investigation.

Plaintiff also complains that the defendant's answer to interrogatory no. 12(a) is unresponsive. Interrogatory 12 inquired whether the FBI conducted a search of several different places or files to determine if they contained any records on the Kennedy assassination. Subpart (a) of that interrogatory listed

"special file rooms." Defendant response to that subpart was: "Not applicable; see defendant's answer to interrogatory 11(a)." That answer, in turn, read as follows:[7/]

> 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 plaintiff's view, this response does not address whether the FBI conducted a search of the Dallas special file room. Simple logic and common sense dictate otherwise. Indeed, it is obvious from defendant's answer that when the FBI undertook its search in response to plaintiff's FOIA requests it could not have searched the special file room in Dallas since such was not in existence at the time. However, even if the Dallas special file room had been in existence at the time of plaintiff's FOIA requests, any Kennedy documents in that room would have been indexed to the office's special indices and thus would have been located as a result of the FBI's search of those indices.

Plaintiff's next complaint concerns defendant's response to interrogatory no. 17. That interrogatory first inquired whether "the FBI ever obtain[ed] tapes of the Dallas police radio broadcasts" (emphasis added). If the response to that initial inquiry was affirmative, the interrogatory sought additional information

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7/ Interrogatory 11(a) inquired whether the Dallas and New Orleans Field Offices contained special file rooms.

on those tapes. The defendant answered the interrogatory as follows:

> 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.

Plaintiff contends that defendant's answer is not responsive because it did not specifically state whether it ever "obtained" the tapes and because it "ignored the other parts of this interrogatory, including 12(e), (sic) which seeks information concerning any covering letter or memorandum which accompanied transmittal of the tapes to FBI Headquarters or the Warren Commission."[8/] It is evident from its answer that the defendant perceived ambiguity in plaintiff's use of the word "obtain." In order to clarify any ambiguity about the FBI's possession of the tapes, the defendant first stated that the FBI had never maintained a copy of the tapes but then noted that an FBI official had made a copy on behalf of, and for use by, the Warren Commission. Given this fact that the FBI itself never had the tapes, there was no need to respond to the follow-up parts of the interrogatory, all of which were premised upon an affirmative answer to the interrogatory's initial inquiry. However, since plaintiff thinks that a response should have been given to those follow-up inquires, the defendant will now state for plaintiff's

8/ Defendant assumes that plaintiff means "17(e)" and will respond accordingly.

benefit that, inasmuch as the FBI never had tapes of the Dallas police radio broadcasts, it did not transmit those tapes to FBI Headquarters or the Warren Commission; moreover, no covering letter or memorandum accompanied that nontransmittal.

The last complaint by plaintiff focuses on defendant's objections to interrogatories nos. 32 and 33. Defendant objected to both interrogatories because they seek information which falls outside the fourteen issues listed by plaintiff in his amended Rule 1-9(h) statement. Plaintiff claims that defendant's objections are ill-founded; he thus requests that the defendant be compelled to answer the interrogatories. Since the contentions advanced by plaintiff in support of this request are, for the most part, identical to those advanced by him in support of his "Motion for an Order Compelling Defendant to Answer the Request for Admission" and since the defendant has addressed those contentions in its opposition to the motion to compel, the defendant will not burden the record by repeating all of its arguments in that opposition. However, the following additional remarks should be noted about the contentions that plaintiff advances to support his efforts to compel discovery on matters which fall outside the fourteen issues listed in his "Amendmend Statement of Genuine Issues of Material Fact in Dispute."

First, the defendant has never contended that Rule 56 of the Federal Rules of Civil Procedure requires a party opposing a motion for summary judgment to come forward with all material facts which he contends are in dispute. Defendant has instead

demonstrated several times in this litigation[9/] that such a requirement is embodied in Local Rule 1-9(h). Indeed, the very reason why the defendant moved to strike plaintiff's first Rule 1-9(h) statement was because it failed to set out all the facts about the adequacy of the search which plaintiff supposedly disputes. Plaintiff responded to that motion to strike by submitting an amended "statement of genuine issues;" he also argued that such amendment rendered defendant's motion moot.[10/] In light of that response to defendant's motion to strike, plaintiff cannot now be heard to argue that he was never required to set forth all material facts which he contends are in dispute, or that the fourteen issues listed in his amended Rule 1-9(h) statement were "simply illustrations which evidenced the dispute as to the basic factual issue: viz., the adequacy of the FBI's search." Moreover, those arguments are contrary to the unequivocal dictates of Local Rule 1-9(h) and the judicial decision construing it. See, e.g., Gardels v. CIA, 637 F.2d 770 (D.C. Cir. 1980).

9/ See, e.g., Defendant's Memorandum of Points and Authorities in Support of its Motion to Strike and to Have its Statement of Material Facts Deemed Admitted, pp. 5-7, filed on June 17, 1982.

10/ Significantly, the introduction to plaintiff's amendment stated as follows:

> Pursuant to Local Rule 1-9(h), plaintiff states that the following material issues of fact are in dispute:

The plaintiff then listed fourteen facts and referenced the parts of the record relied on to support each fact.

Second, there is no basis for plaintiff's assertion that the defendant's position on discovery relieves it of the burden of proving that the search was adequate. Rather, the defendant merely wants to ascertain 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 disputed, the Court should preclude him from conducting a fishing expedition of discovery on matters which he has never claimed are in dispute. The Court should instead sustain defendant's objections to any discovery that seeks information outside the fourteen points listed in plaintiff's amended Rule 1-9(h) statement, including interrogatories nos. 32 and 33.

CONCLUSION

In light of the above arguments and explanations, it is clear that plaintiff's motions to compel are devoid of merit. The defendant therefore requests that the Court deny both of those motions.

Respectfully submitted,

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ORDER

Upon consideration of plaintiff's motions for orders compelling the defendant to answer interrogatories nos. 1, 2, 10, 12(a), 17, 32 and 33 of his first set of interrogatories and item no. 1 of his request for production of documents, defendant's opposition thereto, and the entire record herein, it is

ORDERED and ADJUDGED, that plaintiff's motions be, and the same are hereby, DENIED.

Dated this _____ day of April, 1983.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 4th day of April, 1983, I have served the foregoing Defendant's Opposition to Plaintiff's Motions for Orders Compelling Defendant to Produce Documents and to Answer Interrogatories, and a proposed Order, by first class mail, postage prepaid to:

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

Henry J. LaHaie

HENRY J. LaHAIE