4/7/83

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 REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER COMPELLING DISCOVERY

In his Opposition to Defendant's Motion for an Order Compelling Discovery, plaintiff makes several inaccurate representations which warrant replies by the defendant.

First, the objections to defendant's discovery requests which plaintiff filed on March 8, 1983, do more than "overlap to a considerable extent" with the arguments he advanced in support of his earlier motion for a protective order regarding those same discovery requests. Instead, plaintiff's objections completely parrot the arguments which the Court rejected when it denied his protective order motion on February 4, 1983, and ordered him to answer defendant's interrogatories and request for production of documents.

Second, plaintiff states that he construed the Court's Order of February 4, 1983, as a directive to "answer or object to each item of defendant's discovery" and that he complied with that directive when his counsel filed "particularized objections" to the discovery requests. Such claim, however, is belied by the fact that plaintiff's counsel sought a two week extension to

respond to defendant's discovery on the grounds that he needed additional time to draft the responses which had been devised during a multi-hour meeting with Mr. Weisberg, that Mr. Weisberg would then need to review the draft responses, and that "a second draft may be necessary" as a result of Mr. Weisberg's review. Yet, counsel never filed plaintiff's responses; he instead interposed blanket objections to defendant's discovery. The formulation of those objections clearly could have not required a multi-hour meeting with Mr. Weisberg, nor could there have been any necessity to send Mr. Weisberg a copy of the objections for his review -- especially since the objections, as noted above, merely restated the arguments that were advanced in support of plaintiff's motion for a protective order. Rather, it seems evident that, despite their lengthy meeting, plaintiff and his counsel were unable to come up with any credible information or documents that could substantiate his fourteen claims as to the alleged inadequacy of the FBI's search. Given this inability, counsel apparently decided to defy the Court's Order of February 4, 1983, by restating plaintiff's earlier arguments against the defendant's discovery. Not only should the Court refuse to countenance this renewed effort at stonewalling, it should also assess costs, including attorney's fees, against plaintiff and his counsel.

Third, plaintiff is incorrect that the defendant's "motion to compel fails to address the objections which plaintiff has interposed to [its discovery]." To the contrary, the defendant addressed those objections when it expressly incorporated by reference the arguments it had made in opposition to plaintiff's

motion for a protective order.*/ (As noted above, plaintiff's objections simply restated the grounds asserted in support of his protective order motion.) Since the Court had denied plaintiff's motion for a protective order, the defendant perceived no reason to re-address the grounds upon which that motion was premised when such reappeared as the basis for plaintiff's objections to defendant's discovery.

Lastly, plaintiff makes much ado about the fact that "he knows of no instance in which the government has sought discovery of an (sic) FOIA plaintiff except in the context of an attorneys fee award." In plaintiff's view, this can only mean that the defendant is attempting to shift the burden of proof in these cases. Contrary to this conjecture, the defendant did not

*/ For example, the defendant demonstrated in its opposition to plaintiff's motion for a protective order that it undertook discovery so as to enable it to address all the factual bases which supposedly support plaintiff's fourteen claims about the inadequacy of the FBI's search. In this regard, the defendant noted, by way of illustration, that the FBI has twice stated in this litigation that its search encompassed the "June" files in the Dallas and New Orleans Field Offices, but that plaintiff disputes those statements. The defendant thus argued that unless plaintiff is required to list the facts and documents upon which he bases such dispute, it will be unable to address adequately his assertion that the Bureau's search did not include "June" files. The defendant noted that the same can be said for plaintiff's contentions about the FBI's alleged failure to search for records on James P. Hosty, "see" references, etc.

The defendant also pointed out in its opposition to plaintiff's motion for a protective order that its discovery requests could not possibly be burdensome. All that is requested of plaintiff is that he provide the defendant with each and every fact and document upon which he grounds his fourteen disputed issues regarding the adequacy of the search. Such information reposes solely with plaintiff; indeed, it would be impossible for the defendant to speculate on what facts, or upon which of the more than 200,000 pages of records released in these cases, plaintiff relies to support his fourteen assertions.

undertake discovery to relieve itself of the burden of proving that the FBI's search was adequate. Nor does the defendant's discovery accomplish such. Instead, the FBI propounded discovery in this litigation only after the Court had ruled that defendant's motion for partial summary judgment did not succeed in establishing that there were no disputed issues of material fact with respect to the adequacy of the FBI search. Since plaintiff had listed fourteen points in his amended Rule 1-9(h) statement which he claims are the disputed factual issues concerning the adequacy of the search and since he had also alluded to certain information and documents in his possession*/ which supposedly substantiate those claims, defendant's sole recourse (especially given the guidance set forth in the Court's memorandum denying the motion for partial summary judgment) was to discover the bases for those fourteen points, including the information and documents to which plaintiff had alluded.

For example, the third point in plaintiff's amended Rule 1-9(h) statement disputes "whether the FBI has searched 'June' files." In support of that point, plaintiff cited paragraph 9 of his affidavit of July 21, 1982, which, in turn, states:

> I note that in my March 4, 1979 (administrative] appeal (Exhibit 3), I called attention to "the exitence of an undisclosed Dallas 'June' file and noncompliance with regard to those records."

*/ Again, it should be remembered that the defendant has released over 200,000 pages of documents to plaintiff as a result of his FOIA requests for information on the Kennedy assassination.

The "administrative appeal" attached to plaintiff's affidavit as Exhibit 3, however, offers no further evidence or enlightenment on this subject for the pertinent part of that exhibit merely states:

> In this connection I also call to your attention the existence of an undisclosed Dallas "June" file and noncompliance with regard to those records. While I have additional identifying information I do not now provide it for reasons stated in an enclosed appeal.

Since the defendant has no idea what other "appeal" plaintiff was referencing here, it is impossible even to respond to the reasons for plaintiff's non-disclosure of the so-called "additional identifying information." Whatever those reasons may be, defendant should be allowed to obtain such information from plaintiff through answers to its discovery requests so that it can have a meaningful opportunity to address the alleged dispute about "June" files. This can also be said for the other thirteen points enumerated by plaintiff as being in dispute. In short, defendant's discovery, similar to discovery in other types of cases, is merely designed to ascertain the facts and/or documents which form the core of plaintiff's claims. As such, it is consistent with the well established purpose of the Federal Rules on discovery, that is:

> to focus the fundamental issues between the parties and to enable the parties to learn what the facts are and where they may be found before trial, to the end that the parties may prepare their case in light of all the available facts.

United States v. A.B. Dick Co., 7 F.R.D. 442, 443 (N.D. Ohio 1947).

The fact that this may be the first FOIA case in which a government agency has sought discovery on the disputed issues surrounding the adequacy of its search does not by any means establish that the discovery is inappropriate.*/ Instead, the appropriateness of an agency's discovery in FOIA litigation should be analyzed, as is all other discovery, on a case by case basis. As demonstrated above and in defendant's previous papers, here that analysis dictates that defendant's discovery requests should be upheld; this is especially true when considered in light of the procedural history of these cases.**/

*/ The order allegedly entered in Cary Lacheen v. FDA, as summarized by plaintiff in his opposition to defendant's motion to compel does not compel a different conclusion. According to plaintiff's summation, the court in that case held that a plaintiff's "knowledge is irrelevant to the determination of whether records are releasable under FOIA" (emphasis added). Here, the issue is not whether the records are releasable, but whether the defendant's search was adequate. If plaintiff possesses information and documents which supposedly demonstrate that the search was not adequate, the defendant should be allowed to discover such information and documents.

**/ As was demonstrated in defendant's opposition to plaintiff's motion for a protective order, the procedural history of these cases has been one of the defendant attempting to get plaintiff to articulate all the bases for his complaints about the adequacy of the FBI's search, whereas plaintiff has attempted to avoid such an articulation, preferring instead to reveal his complaints in an ever-expanding piecemeal fashion. This tactic by plaintiff has kept his complaints fluid and obscure and, in turn, virtually irresolvable. Recently, the United States Court of Appeals for the District of Columbia criticized a similar tactic by Mr. Weisberg in his FOIA case concerning the spectrographic analyses in the FBI's Kennedy investigation. Weisberg v. U.S. Department of Justice, No. 82-1072, slip. op. at 17-22 (D.C. Cir. April 5, 1983) (Attached as Exhibit A hereto). See especially footnote 12 of that opinion.

CONCLUSION

For the reasons set forth above and in defendant's memoranda in support of its motion to compel and its opposition to plaintiff's motion for protective order, the defendant's Motion for an Order Compelling Discovery, filed on March 15, 1983, should be granted.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General
Civil Division

STANLEY S. HARRIS
United States Attorney

Barbara L. Gordon /phil
BARBARA L. GORDON

Henry J. LaHaie
HENRY J. LaHAIE

Attorneys, Civil Division
Room 3338
Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D. C. 20530
Telephone: (202) 633-4345

Attorneys for Defendant.