

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CLERK U.S. DISTRICT COURT
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	:	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants' have moved to dismiss these cases with prejudice because plaintiff has not complied with this Court's April 13, 1983 order directing him to respond to defendants' discovery. And once again they also seek an award of attorneys' fees against plaintiff and his counsel for the effort they have expended.

Defendants' Rule 37(b) motion should be denied. First, although Rule 37 permits dismissal for failure to obey an order permitting discovery, "the sanction is obviously more severe than other available sanctions permitted by Rule 37 and is therefore appropriate only under limited circumstances." Laclede Gas Co. v.

G. W. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979). Or, as Professor Moore has stated:

In summary then, the Rogers case [Societe Internationale v. Rogers, 357 U.S. 197 (1958)] says that Rule 37(b) is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions, but that the court should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misconduct.

Moore's Federal Practice, ¶37.03[2].

If any sanction is appropriate here, it is not the severe sanction of dismissal. As one court has said, "[i]n any case, the severity of the sanctions should be tempered by a consideration of the equities of the situation...." Williams v. Krieger, 61 F.R.D. 142, 145 (S.D.N.Y. 1973). Here, the equities are overwhelmingly in plaintiff's favor.

It is well-known that the FBI does not take kindly to criticism, and that it pursues vendettas against its critics. Although the investigative work of this plaintiff was once publicly praised by former FBI Director J. Edgar Hoover,^{1/} the FBI has for many years sought to retaliate against him for his criticisms of its investigations into the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr. It has considered instigating lawsuits against him to "stop" his writing, it has carried out orders from Director Hoover that his FOIA requests not be answered, and it has bitterly resisted his FOIA lawsuits. Despite admissions by top Department of Justice FOIA personnel to a

^{1/} The FBI now claims it can find no record of Hoover's letter of praise.

Senate subcommittee in 1977 that Weisberg had been treated badly by the FBI in connection with his FOIA requests, the FBI's recalcitrance has continued: it has still not complied with requests which Weisberg made as long ago as 1969. Indeed, in these instant cases involving the Dallas and New Orleans field office files, the FBI has yet to conduct a search responsive to the actual requests. Instead of following normal FBI FOIA procedures in processing requests, in this case the FBI sought to substitute its version of his requests for the actual requests. See April 29, 1983 Weisberg Affidavit, ¶12-8.^{2/} In the case of the Dallas Field Office, no search is even claimed to have been made until October 15, 1980, nearly three years after the request was made and long after the FBI claimed to have complied with it. See May 28, 1983 Weisberg Affidavit, ¶10.

The FBI's resistance to releasing the records of its investigation into the assassination of President Kennedy is reflected in documents recently released to another requester. The FBI even attempted to limit access of the House Select Committee on Assassinations to its files. Indeed, the FBI found the Committee's request for the Dallas and New Orleans files objectionable and proposed as a compromise to limit the Committee to only a fraction of the Dallas

^{2/} Concurrent with the filing of this opposition to defendants' motion to dismiss, three affidavits by plaintiff are also being filed. These three affidavits, dated April 29, May 5 and May 28, 1983, are incorporated herein by reference. Plaintiff has advised his counsel that he is working on an additional affidavit to supplement his opposition to defendants' motion. This affidavit will be filed as soon as plaintiff's health permits. (Plaintiff has had a recurrence of bronchitis and pleurisy which he suffered earlier and his wife is also ill.)

Field Office files provided to Weisberg. See May 5, 1983 Weisberg Affidavit, ¶¶34-35 and Exhibit 14.

Plaintiff is regarded as the "premier authority" on the assassination of President Kennedy. The Assassination of John F. Kennedy: A Comprehensive Historical and Legal Bibliography, 1963-1979 (Greenwood Press: Westport, 1980), xxvi. Revelations stemming from his FOIA lawsuits helped create the climate of opinion which caused the House of Representatives to investigate the King and Kennedy assassinations. Id. at 59. The House probe resulted in an official congressional report concluding, contrary to the Warren Commission, that there probably was a conspiracy to assassinate President Kennedy. Although his own income is meager, plaintiff has nevertheless spent thousands of dollars of his own money over the past decade to compel release of Kennedy and King assassination records.

Dismissal is also inappropriate for other reasons. The discovery which defendants have sought to take is concerned only with the adequacy of the search issue. There remain, however, several other issues which are totally unaffected by any lack of discovery on this issue. For example, because defendants have refused to accept the reasonable settlement proposal made by plaintiff, they must justify their excisions and withholdings in these cases by means of a Vaughn index. In addition, the work sheets which have been provided plaintiff reveal extensive withholdings on the grounds that identified files were either irrelevant or had been

destroyed. The New Orleans field office has withheld records on Lee Harvey Oswald, David Ferrie and New Orleans District Attorney Jim Garrison as "irrelevant" even though plaintiff's request clearly demands all records on each of these individuals. The reductio ad absurdum of this claim is reached when the FBI withholds references on Garrison and Ferrie in the same pages of the same file, 94-448, as "irrelevant." See April 29, 1983 Weisberg Affidavit, ¶¶90-91.

The FBI makes numerous claims on the worksheets that records pertinent to Weisberg's request have been destroyed. This "destruction" should not have occurred in view of express orders that such records were not to be destroyed. See April 29, 1983 Weisberg Affidavit, ¶¶17-18, 79-84. However, even if these field office records were destroyed in violation of the FBI's own orders (as well as its practices and policies), the substantive information in them of value should still exist in other records, and these should be provided plaintiff.

Moreover, it must be pointed out that even with regard to the search issue, it would be inappropriate to restrict plaintiff from using such evidence as he obtains from defendants on discovery to support his contention that a further search is necessary. Similarly, the Court should not impose any sanction which would limit him from relying on such facts and documents as have been provided to defendants when he moves to require defendants to conduct a further search. This volume of evidence is considerable and already provides defendants with all the information they need to know to be

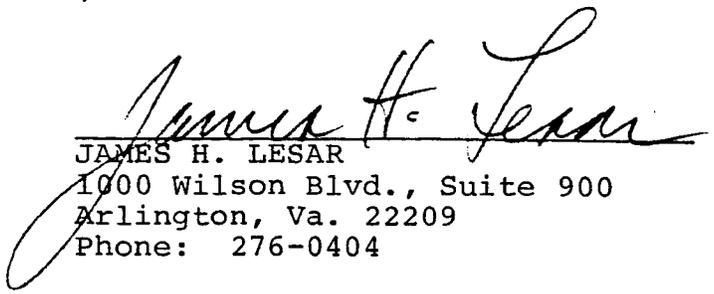
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able to rebut, if they can, plaintiff's contentions. For example, defendants' first interrogatory asks plaintiff to state each and every fact upon which he bases his contention that the Dallas and New Orleans Field Offices maintain "ticklers" and and indentify each and every document and/or other source upon which he relies to support said contention. Although it would be impossible for plaintiff to comply with the demands of this interrogatory, it should be pointed out that plaintiff's April 10, 1983 affidavit, already on file in this case, provides abundant evidence to support his earlier claims, also documented, that such ticklers do exist. The FBI has all the information in needs from plaintiff on this issue. What is required is not more information from plaintiff but for the FBI to drop its pretense that such files were not created and do not exist and get on with the business of searching for them. The same applies to the other search issues raised by plaintiff.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss should be denied. No sanctions should be applied to plaintiff. Or, if any sanction is found to be appropriate, it should be merely that plaintiff be restricted to such evidence he has presented to the Court as of the time he moves for a further search, plus such evidence as he uses in rebuttal of the defendants' opposition to such a motion.

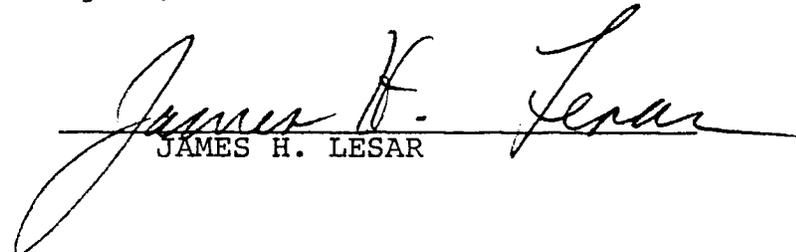
Respectfully submitted,


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 6th day of June, 1983, mailed a copy of the foregoing Plaintiff's Opposition to Defendants' Motion to Dismiss to Mr. Henry LaHaie, Civil Division, Room 3338, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR

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 :

O R D E R

Upon consideration of defendants' motion to dismiss these consolidated actions, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1983, hereby

ORDERED, that defendants' motion to dismiss is DENIED.

UNITED STATES DISTRICT JUDGE