

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JUN 6 1983

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

HAROLD WEISBERG,
Plaintiff,

v.

WILLIAM H. WEBSTER, ET AL.,
Defendants

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Civil Action No. 78-0322

HAROLD WEISBERG,
Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,
ET AL.,
Defendants

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Civil Action No. 78-0420

PLAINTIFF'S MOTION FOR RECONSIDERATION

Comes now the plaintiff, Mr. Harold Weisberg, and moves the Court to reconsider and vacate its orders of April 13 and April 28, 1983; or, alternatively, to amend its order of April 13, 1983 to certify said order for purposes of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay its order of April 28, 1983 pending resolution of said appeal.

A Memorandum of Points and Authorities and proposed alternate orders are submitted herewith.

Respectfully submitted,


JAMES H. LESAR

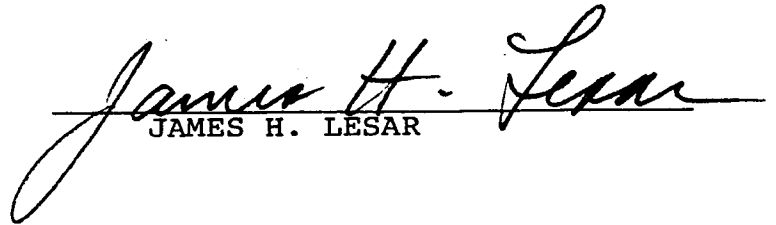
1000 Wilson Blvd., Suite 900
Arlington, Va. 22209
Phone: 276-0404

m

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 Motion for Reconsideration 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

By order filed April 13, 1983, this Court directed plaintiff to serve upon defendant and file with the Court responsive answers to defendant's interrogatories and request for production of documents. Subsequently, by order dated April 28, 1983, this Court directed plaintiff to pay the United States costs in the amount of \$684.50 within 60 days. Plaintiff has moved the Court to reconsider these orders and to vacate them; alternatively, plaintiff has moved the Court to amend its April 13 order so plaintiff can take an interlocutory appeal under 28 U.S.C. § 1292(b).

The Court's order compelling plaintiff to comply with defendants' discovery requests should be vacated because it creates an unwise and unwholesome precedent in Freedom of Information Act [FOIA] cases. The fierce resistance which federal agencies have mounted to disclosures mandated by FOIA is no secret, nor is the fact that entrenched judicial hostility to the Act has required Congress to repeatedly amend it to overturn court decisions enimical to the national disclosure policy which Congress wished to foster. The whole history of the Act shows that Congress has been keenly aware of the many ways in which powerful government agencies can thwart its purposes. This is the reason for many of the 1974 amendments to the Act--attorneys' fees, fee waivers, sanctions, etc. It is also the reason why Congress places the burden in FOIA cases on the Government.

This Court's decision to sanction the Government's discovery in these cases ignores the history of the Act and gives the Government a powerful tool which it can--and will--utilize to sabotage the FOIA. Congress enacted the attorneys' fees provision in 1974 because it recognized that few persons could afford the cost of litigating a FOIA case in the face of governmental resistance without such a provision. In FOIA requesters (and their counsel) are also to be faced with the cost of responding to unnecessary and burdensome discovery requests by government agencies, including the hazard of being held liable for the agency's attorneys' fees if they resist a discovery order, then instead of FOIA requesters being armed with means to compel agency adherence

to terms of the Act, the agencies will be armed with a potent weapon for discouraging all FOIA litigation not brought by wealthy corporations.

Not only has this Court reversed the burden of proof in FOIA cases, placing it upon the requester rather than upon the agency, but it also has ignored general principles of discovery.

"Discovery is an instrument of justice," as the court remarked in Harlem River Consum. Coop. v. Associated Dry Groc. of Harlem, 54 F.R.D. 551, 552 (S.D.N.Y. 1972), but it is one which has been much abused in recent years, generally by litigants trying to take advantage of their superior wealth, power or resources to wear down a less advantaged opponent. That is exactly the tactic being employed by defendants in these cases.

Where discovery is unduly burdensome, courts have refused to sanction it, particularly where it deals with material more easily obtainable by the proponent of the discovery. Cockrum v. Califano, 475 F. Supp. 1222, 1227 n. 1 (D.D.C. 1979). Here the discovery is unduly burdensome. Plaintiff is 70 years old and in ill health.^{1/} His monthly social security income is a mere \$335. May 5, 1983 Weisberg Affidavit, ¶3. Even in 1979,

^{1/} Plaintiff's previously submitted February 14, 1983 affidavit details at considerable length his serious health problems and the severe limitations they place upon him. His May 28, 1983 affidavit, filed concurrently herewith, states that he is now suffering from his third recent recurrence of bronchitis and pleurisy. May 28, 1983 Weisberg Affidavit, ¶2. His wife now has also contracted the same illness.

when his health was considerably better than it now is, it took him a full day of searching to establish the pertinency of a single Hosty record. He could not now begin to duplicate this without expending much, much more time. Id., ¶18-9.

Even without these considerations, there is no justification for defendants' discovery. Courts have frequently denied discovery requests where the proponent failed to establish a need for the information. See, e.g., White v. City of San Diego, 605 F.2d 455 (9th Cir. 1979). Defendants have utterly failed to present any evidence of a need for the massive discovery they seek, or for any discovery at all. There is no such need. Defendants themselves already have possession of the information and documents they claim they are seeking. Not only did the documents originate with the FBI, but plaintiff has repeatedly brought his complaints concerning the processing of his requests to the Office of Privacy and Information Appeals (now the Office of Information and Privacy). These appeals have provided detailed information regarding precise complaints, and they have been fully documented with records from the FBI's own files. See, e.g., Weisberg's May 5, 1983 affidavit regarding his 13-page appeal on Hosty with 26 documentary attachments. Id., ¶3, et seq. In addition, plaintiff has spelled out the evidence supporting his complaints about the adequacy of the FBI's search in a number of affidavits which have been filed in these cases. All that remains to resolve the search issue in this case is for defendants to comply with plaintiff's outstanding discovery. Once defendants have done that, then plaintiff will move

for a further search relying on such materials as he chooses to incorporate in that motion, including the discovery materials supplied by defendants. Unfortunately, however, unless this Court vacates its orders of April 13 and April 28, 1983, this simple, straightforward process will ineluctably be sidetracked and these cases embroiled in an unnecessary fight over defendants' undemonstrated need for discovery.

Even if this Court should determine not to vacate its April 13th order, it should still vacate its April 28th order directing plaintiff to pay defendants' the costs of having moved to compel production of the information they seek. As Professor Moore notes, in construing Rule 37's provision for payment of the costs of compelling discovery, "courts have focused on the 'genuine dispute' language of the Advisory Committee Note and have denied expenses where there was disagreement over difficult legal issues of relevance or privilege." Moore's Federal Practice, ¶37.02[10]. See, e.g., M. & W. Elec. Supply Co. v. Gatto Elec. Supply Co., 38 F.R.D. 393 (M.D.Pa. 1965) (no expenses where substantial questions of law involved); Keogh v. Pearson, 35 F.R.D. 20 (D.D.C. 1964) (no expenses imposed absent showing that refusal was "without substantial justification"); Harlem River Consum. Coop. v. Associated Groc. of Harlem, 54 F.R.D. 551, 554 (S.D.N.Y. 1972) (costs and expenses denied because issue raised was largely unprecedented and because plaintiff's opposition was not frivolous); Self v. American Home Assurance Company, 51 F.R.D. 222, 224 (N.D.Miss. 1970) (refusal to answer interrogatories was not without substantial justification

where application of the rule of law to the facts of the case was not without difficulty). Plaintiff's refusal to answer defendants' interrogatories was not without substantial justification. Whether an agency may take discovery of a plaintiff in an FOIA case on the adequacy of its search is an entirely novel issue. There are no prior decisions on this point, thus no guidance is provided by the case law.

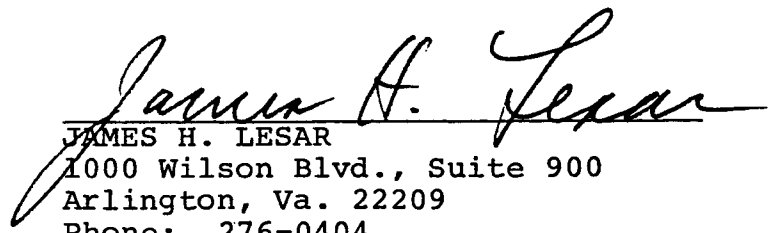
Should this Court decide not to vacate its April 13 and April 28 orders, then it should amend its April 13 order so that plaintiff may take an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). This statute requires the district court to certify that its order involves a controlling question of law, that there is a substantial ground for difference of opinion respecting its correctness, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The Court's April 13 order meets each of these requirements. The Court has determined that an agency may take discovery of a FOIA plaintiff on the adequacy of its search. The Court's legal determination on this point controls the future course of this litigation. There is a substantial ground for difference of opinion respecting the correctness of this Court's ruling because it can be persuasively argued that it reverses the burden which Congress placed on the agency when it enacted the FOIA. With much of the future course of this litigation affected by the Court's ruling, it is obvious that an immediate appeal may materially advance the ultimate termination of this litigation. It

would be far more efficacious to resolve this issue now, rather than to leave it dangling until the end of the case, which, so long as defendants' refuse to settle it on reasonable terms, may be years off. The FBI has stated, for example, that it will take a considerable amount of time for it to prepare even the limited Vaughn sampling index it has proposed. Waiting until the other issues in this case have been litigated before presenting this matter to the Court of Appeals does not make sense and will only delay the ultimate termination of this litigation.

Accordingly, this Court should amend its April 13th order to include the certificate required by 28 U.S.C. § 1292(b). Having done that, it would then be appropriate for this Court either to vacate its April 28th order requiring plaintiff to pay costs, or at least to stay that order until resolution of the interlocutory appeal by the Court of Appeals.

Respectfully submitted,


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

Attorney for Plaintiff

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 :

O R D E R

Upon consideration of plaintiff's motion for reconsideration of this Court's orders of April 13 and April 28, 1983, defendants' opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1983, hereby

ORDERED, that this Court's order of April 13, 1983, is amended to include the following additional finding:

Pursuant to 28 U.S.C. § 1292(b), this Court certifies that this order involves a controlling question of law, that there is a substantial ground for difference of opinion respecting its correctness, and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

And it is further ORDERED, that this Court's order of April 28, 1983 be, and hereby is, stayed pending resolution of

any interlocutory appeal taken by plaintiff pursuant to 28 U.S.C.
§ 1292(b).

UNITED STATES DISTRICT JUDGE

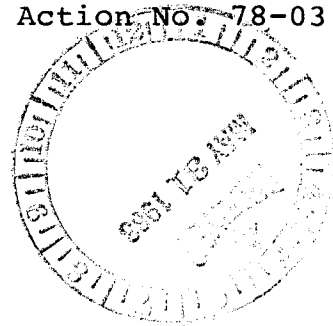
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,
Plaintiff,

v.

WILLIAM H. WEBSTER, ET AL.,
Defendants

Civil Action No. 78-03



HAROLD WEISBERG,
Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,
ET AL.,
Defendants

Civil Action No. 78-0420

(Consolidated)

PLAINTIFFS' MOTION FOR EXTENSIONS OF TIME WITHIN WHICH
TO OPPOSE DEFENDANTS' MOTIONS FOR A STAY OF PLAINTIFF'S
DISCOVERY AND FOR DISMISSAL OF THESE ACTIONS

Comes now the plaintiff, Mr. Harold Weisberg, and moves the Court for extensions of time, to and including June 6, 1983, within which to oppose defendants' motions for a stay of plaintiff's discovery and for dismissal of these actions. As grounds for his motion, plaintiff represents to the Court as follows:

1. Although the certificate of service recites that defendants' motion to dismiss these actions was mailed to plaintiff's counsel on May 18, 1983, he did not receive it until May 23, 1983. Because defendants' continue to deny plaintiff's request that copies of all motions and papers be mailed directly to Mr. Weisberg

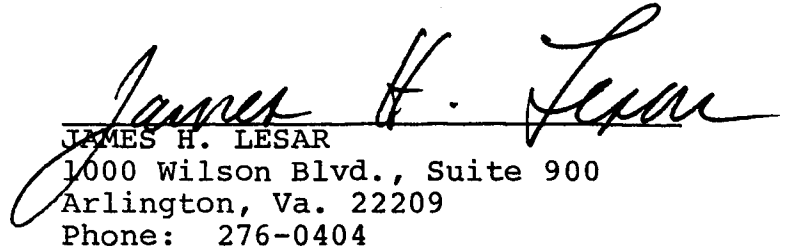
in order to enable him to respond more promptly, plaintiff's counsel immediately made a copy of the motion and mailed it to Mr. Weisberg. On Saturday, May 28, 1983, Mr. Weisberg advised his counsel that he has mailed an affidavit responding to this motion. His counsel has not yet received it.

2. Because of extensive work in other cases, notably a lengthy opposition to a motion for summary judgment in Hoch v. CIA, Civil Action No. 82-075, and a lengthy motion to compel in Prouty v. Amtrak, Civil Action No. 82-2277 (an age discrimination case), plaintiff's counsel was unable to make much progress on his research regarding defendants' motions until Sunday, May 29, 1983.

3. Plaintiff's counsel considers it necessary to research several questions which he has not previously had to deal with in any of his cases. These include the question of Rule 37 sanctions and the question of whether plaintiff should ask this Court to amend its order compelling discovery so as to certify an interlocutory appeal under 28 U.S.C. § 1292(b). Plaintiff's counsel's research on these matters is not yet complete. He believes that given his other time commitments this week, including court appearances, he will not be able to complete his research and draft his opposition to defendants' motions until June 3, 1983, at the earliest.

Accordingly, plaintiff requests that the Court extend his time for opposing both of defendants' motions to and including, June 6, 1983.

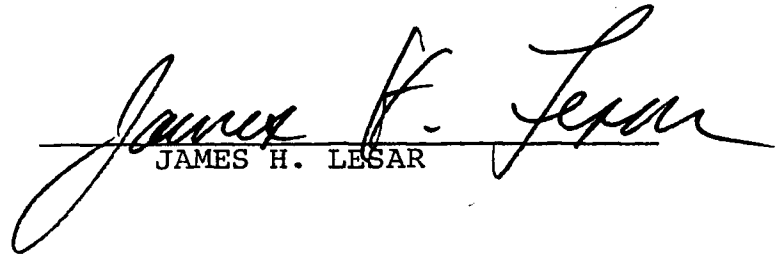
Respectfully submitted,


JAMES H. LESAR
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Arlington, Va. 22209
Phone: 276-0404

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of May, 1983, mailed a copy of the foregoing Plaintiff's Motion for Extensions of Time within which to Oppose Defendants' Motions for a Stay of Plaintiff's Discovery and Dismissal of These Actions to Mr. Henry LaHaie, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

O R D E R

Upon consideration of plaintiff's motion for extensions of time within which to oppose defendants' motions for a stay of plaintiff's discovery and for dismissal of these actions, and the entire record herein, it is by the Court this _____ day of _____, 1983, hereby

ORDERED, that plaintiff's time within which to respond to defendants' motions for a stay of plaintiff's discovery and for dismissal of these actions is extended to and including June 6, 1983.

UNITED STATES DISTRICT JUDGE