Mr. Mark Lynch
122 Maryland Ave., NE
Washington, D.C. 20002

5/20/85

Dear Mark,

Thanks you very much for the forthrightness of your letter of the 16th which, despite Express Mail use, did not reach me until about 10:30 this a.m. If you get a copy of the receipt I believe you'll be entitled to a refund because by regular first-class mail it should have reached me not later than the 18th. I take it that your use of this means indicates a need for speed so I'll respond as rapidly as I can and will try to get something, perhaps not all, in tonight's mail by taking it into the post office. I may not able to respond in full before then because of things here. But I'll try.

First, there is no real disagreement between us. There is but one thing on which I would like you to consider a different interpretation than you give. It is of less immediacy so I'll get to it later.

The messing up of this case is much worse than you perceive. I indicated only part of it earlier when I told you that Jim had agreed that I'd prepare those affidavits and then he would draw them all together in something he'd file. He never did that, although I kept after him to, and that made me look very bad. But we did have prior agreement on that, other than to his agreement to my wordings.

I think there is something worse in his affidavit, rather not in it, and it is not really material whether it is his ideas or Hitchcock's. From Hitchcocks first draft, his effort to try his case on me, perhaps it is his, but Jim is no baby and he knows better. He omits all but one of my many objections, and I mean entirely, and any reference to what I wanted to do which is precisely what you say in the penultimate sentence on page one.

I'm sorry that the strange kind of life I necessarily lead intrudes at this point, but I'll return promptly, I hope with all I now have in mind still there. I have a neighbor of my age, who has other and serious physical limitations, who saw me using my riding mower yesterday and he knows (he's a retired vet) I shouldn't. So he has offered to resume doing what can be done without a pushmower if I ~~do~~ dog-sit for him when he and his wife take a trip. I'll have to stop and show him the potential pitfalls. (And even in spells of 10-15 minutes at a time I shouldn't really use the mower. I'm taking it up with the doctor Wednesday, but I've no help.)

It is physically impossible for me to represent myself because I cannot get there in time and I cannot stand at the podium. It would also be unwise before Smith and as I said, I'm not looking forward to any kind of martyrdom.

But before I stop, you are correct in believing that I do not want to put it all on Jim, even though he and Hitchcock try to do this with me. It is as with Shakespeare's sonnet, My Mistress' Eyes Are Nothing Like the Sun. I continue to have the deepest regard for him as a person and I'm aware of his, perhaps shortcomings is the wrong word. He has some psychological blocks, remains essentially the flower boy of the early 60s and simply cannot be an adversary in the adversary system.

When I resume I'll be going into what happened when he was up here. First, with the passing of time I may not recall all and may not fully recapture the spirit of it, and second, I did provide an affidavit on it, although my recollection of its details is not clear. He did not ask for it but I believe he filed it. ...

You are correct re shifting responsibility, page 2 graf 2, including with regard to my reluctance. First, I'll abide by your judgement and second, have I in effect waived this in filing the earlier affidavit. Possibly a third point, can I both ~~at one~~ claim privilege and then myself go into what really transpired, what he omits?

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Parenthetically, I've not heard from him in a while, I think not since I saw him briefly a week ago Wednesday, when I was in DC for my regular surgical checkup. He told me he was seeing Hitchcock but he did not tell me why.

With regard to your page 2, graf 1, I agree that "he took it upon himself to come up with answers to the interrogatories..." instead of following my wishes. I'll explain that, because even then he did not use what he insisted upon having, to which I reluctantly agreed. He did have what answers I'd have made if I'd agreed to make them which I didn't, a position from which I've never varied. For you to fully understand this, and I've mentioned it in affidavits, the government insisted upon excess. It did not ask for any reason to believe there were other relevant records or any documentation. It asked for "each and every" reason and document. From this I could not even think of swearing to what they demanded and if I provided less than "each and every" reason and document I would not have been in compliance and would have been swearing falsely.

His representation of my position with regard to appropriateness is inconsistent but is closer to actuality in the sentence that begins at the bottom of the first page of his draft affidavit. Yet as he quotes himself from the transcript, last graf, his page 4, he says that my position in this case is that discovery is not warranted in any FOIA case. It is true that as a layman, from my reading of the Act I do not believe that in placing the burden of proof on the government the Congress envisioned discovery against an FOIA requester, but I am not a lawyer, am not familiar with the rules and precedents, and my position is and was that in this case, for the reasons I gave him and believe I repeated in the affidavit, discovery is inappropriate.

He says, page 2, bottom of 5., that I said that I had "already provided all or almost all the necessary data..." My recollection is that in all instances I said and he wrote on his pad that I had provided all the information and documentation of which I was aware. There is, I think, a difference, and in this regard I do hope that you can find an appropriate way to refer to what is stated in my affidavit, that my copies fill not less than two file drawers. (I provided four full file drawers, one overstuffed entire file cabinet of JFK assassination investigation material and without doubt more than half is pertinent but I had to estimate because of their "previously processed" dodge. I think that this can also help him, but I'm sure it can help me to indicate the considerable extent of what I had already provided, acknowledgement of which by LaHaie himself I once called to your attention. And the same volume on the King assassination investigation. I have both in separate file cabinets separated from the other files. When one considers my health, age and financial circumstances, I think this represents a simply enormous and for me costly effort to be genuinely helpful to the defendant.)

So, my position was and is a) that under the circumstances in this case any such discovery was inappropriate; b) that to the degree possible I had already provided all the material of which I had any knowledge; c) that the discovery demanded was excessive, unnecessary and intended as harassment when I had already provided all I had and it had been ignored (this meaning not only the appeals but the affidavits, which almost entirely remain ignored);d) that it was beyond my physical capabilities, which I later explained in affidavits when he did nothing substantial if anything on this point; e) and on this I believe I said it but I'm now not 100% sure, it was physically and financially impossible for me to rexerox two file drawers of material which I could not in any event carry up from my basement to copy (and I'm sure that in the affidavits I gave details on this). I'm sure I wanted him to argue that the discovery was not necessaary, I'm pretty sure I wanted him to argue that when the enormous amount of information I had provided was ignored I had no reason to believe that refiling it would result in anything else and that it was not my responsibility to reorganize their files after I had provided the material.

Perhaps there were other points and if I think of any I'll add them.

We had discussed this by phone and he knew my position and his purpose, as I am sure I attested in his defense, was to talk me into some kind of pro forma compliance. As I indicate above, I both opposed and feared the potential consequences of this. However, without agreeing that I would sign it and saying that unless I changed my mind I wouldn't, I agreed for him to make notes of what I'd have said in his pro forma approach as he read each to me. Perhaps you and Hitchcock might want to look at them. I've never seen them. He sat at my left, in the chair my wife usually uses, and he wrote on his yellow pad. Hem may have abbreviated and omitted and may even have misunderstood, but I am pretty sure you'll see that I maintained that I had already done voluntarily all I could do under compulsion and that at my age, in my health and under my financial limitations I just could not do any more. I'm pretty sure that I also said that doing other than ~~xxxxx~~ rexeroxing what I had already provided and they had to comply with their actual demands could easily take the rest of the time I have on this earth. I have no index. I keep the records (as they have known all along) precisely as I receive them, and even if I had a perfect recall, which I do not, It would ~~be~~ an interminable job to retrieve and xerox "each and every" document in what was disclosed or I had already and how long would it have taken to reread and then search for what I'd referred to that might not have been attached? He knew and my affidavits state that I can stand only briefly, so I cannot stand at a file cabinet and search through thousands of pages of unindexed FBI records that are not even in actual chronological order. He knew, I reminded him and my affidavits also state that for years I've had no help and that I can carry only a small volume of records up the stairs to my office because I must have at least one hand on the handrail (sometimes both on both rails) and that some days I cannot safely use the stairs at all. Most days I can safely risk only a couple of trips, and he knew all of this and I wanted him to argue it.

I was outraged, I did regard the whole thing as indecent and I did ask him to appeal immediately, which is the course you refer to at the bottom of your first page. He didn't and we argued about this over a period of time at least by phone, perhaps in my letters which are too voluminous to search now, and I finally asked him pointedly, later, and he did. I recall quite clearly that as I had once before when he said that Smith might not permit the appeal I wanted to make on the issues stated above that I said then mandamus him. (He has little faith in mandamus, from when I wanted him to mandamus Green in the King case, despite my citation of Brown v. School Board and my belief that a failed mandamus might in the end be a success. It was some time before I could get him to ask Smith to permit the appeal.

So, it is not only what he pretends, that I questioned the appropriateness of discovery under FOIA, and he knows that very well, and it is not even his version, to the best of my recollection, that I admitted having material I had not provided albeit had provided most. And for your information, not for any use against him, I am pretty confident about how I felt. First, there were all the other things I'd wanted to do for which he'd not found time, what clearly would have been very important and would have obviated the situation in which I then was, and here he was ~~finding~~ finding time to try to talk me into what I opposed and saw as potentially dangerous to me. He did not explore my alternatives, if any, and was, in effect, acting as FBI counsel. He knew all I state above and hadn't even argued it. He had copies of my appeals and affidavits and correspondence with Shea and he didn't have to examine my file to be aware of the enormity of material I'd provided. He knew my medical, physical and financial limitations. Yet all he could think of was my making some kind of pro forma response, which I regarded as both wrong and dangerous, and ~~xxxxxxxx~~ that was his purpose in making those notes, to be able to draft it, ~~xxxx~~ knowing that I didn't want to and opposed it. The one thing I recall from the other side is that he admitted that burdensomeness is a proper basis for opposing discovery.

Frankly, I am troubled that he could bring himself to draft an affidavit omitting so much that I believe is relevant. While I am not sure, I believe I told him that it was past time for him to be able to stand on his feet and find voice over the outrage perpetrated, that he ought really sound off on the abusiveness of what they were up to in terms of what they knew about my health and limitations and what they were demanding and the lack of need for it. I'm not absolutely certain but I believe that I also wanted him to argue that they had not yet attested to the required searches; that in fact Dallas never made any except a couple much after claiming compliance and then because Shea asked for a couple of searches; that the New Orleans search slips ~~did not~~ were not search slips in response to my requests but that they nonetheless acknowledged the existence of pertinent records that were withheld; and that until they provided competent attestations to search any discovery was at the least premature. I'm sure I reminded him that Phillips had sworn that instead of making a Dallas search, as required, Bresson has at FBIHQ arbitrarily decided to limit me to the companion files of those disclosed in the FBIHQ general disclosures of 1977 and 1978. I was, as I think you know I can be, pretty pointed and pretty angry. I was angry and outraged at the government's dirty tricks and I was perhaps angry and I know disappointed and frustrated that my own lawyer was spneding all his time trying to talk me into what I opposed and none of it telling me how to accomplish what I wanted and apparently determined not to do anything about what I thought could and should be done in what amounts to my defense, to present my position. In fact, if I recall correctly, at the time he indicated to the court that I'd provide the demanded discovery he was well aware that I had no such intent and I'm pretty sure I'd told him that, hence his trip up.

But I'd still like to avoid doing to him what he and Hitchcock try to do to me. And I think the way to do it is to ignore his representation and simply give my own, which I'm pretty confident is already fairly well stated in the earlier affidavits. I can't avoid defending myself but I do not want to target him.

In his 6., he refers to my "considerable reluctance to proceed," but if this is limited, as he does not limit it, to the discovery, actually I refused, which is not the same as being reluctant, and in the other sense of proceeding, I was not at all reluctant, as indicated above, but wanted to take the initiative with both an appeal and a demand for a trial on the facts. (Which as I understand the Constitution is still mine as a matter of right.)

I do not know what he means by "substantive replies" when I'd have had to search to provide records and could not and when all I did was tell him in each case that I had already provided all of which I knew, which he could have said without me having to, in form, risk getting myself in trouble by swearing to what I could not swear to. ("Each and every," etc.) But he knew when he left that I did not intend to do what he asked and all I'd agreed to is think it over some more. I do not agree to the formulation of the last sentence in graf 6. And he had no basis for indicating in any way that, as he quotes himself in graf 7, that I was going to make "the response to the defendant's discovery." He should have said, if he wanted to proceed as he did, that I was at the least reluctant and he needed more time to try to convince me. But there never was any doubt that I was opposed to even pro forma compliance and didn't intend it as of the time he left here. And never later in any way indicated otherwise. (He indicates in 8. that I'd said I would think it over.) He refers to the strategic decision I'd made but alas he never really presented it to the court and to a degree I thereafter undertook to in an affidavit.

In graf 11 it was not by any means merely my refusal to give answers consistent with my position, which is never really stated. I also had to provide the documentation to which he never refers, and I simply couldn't. He then switches to "Fully" to refer to "the discovery requests," and there was never any question on this score. All he asked me to do is what I did with regard to each question when he read them and

after I'd made clear, as he knew in any event, that "full" compliance was a complete impossibility. Less than "fully" he already had my responses on his pad. I could argue, as I do not want to, that he also had the "substantive knowledge" because it is in the appeals and affidavits of which he had copies, including of affidavits he did not file.

In 12 he refers to a call from LaHaie. There was another call that is in the case record, in which, by pretext, LaHaie really called to tell him he'd ask that I be charged with contempt. While there may not have been any reason to include that in this affidavit, what I said is relevant to my position on the discovery and trial on the issues. I told him to tell LaHaie that I dared him, and I told Jim he would not dare because he didn't dare risk trial.

He says only that he felt helpless because of my position in 13, but I do not think he was helpless. He could have gone up on appeal promptly, as I'd asked, and he never did until later, when I insisted, ask Smith to make that ppssible. He could have argued all that I'd said in opposition, and proved it. I recall even suggesting that we arrange to wheel two full file drawers of the entire file cabinet into the courtroom. He did not have to leave it up to me to try to use the backdoor in my affidavit(s), he could have made out a real case of excessivenss, harassment, lack of need and impossibility. He did not by any means have no alternative but "to file nothing" then. And I believe that as a matter of law my position was correct. And my position for the court as distinguished from my layman's interpretation of the Act was not the "absolute position that discovery is not warranted on the search issue in an FOIA case," even when qualified with what he next says in 13, page 6. I think that if he didn't at that status call he should have argued strongly all the points I'd made to him and proffered proof. It is true that I always maintained that they'd not shown need.

Going back to his 5, while it is true that I could not go to see him, it is not true that my health was the only reason if it was any reason because he knew my position in advance. His real reason was to try to talk me into the pro forma compliance I refer to above and feared. I do not recall that what he concludes 4 with was relevant, that I was to provide" as much detail as was feasible about the inadequacy of the FBI's search for the requested categories of records." The sole question was of my compliance with their demands, as set forth in their discovery motions. I'll be surprised if on receipt of them I did not give him something in writing, including affidavits, probably.

It is now apparent to me that, as you say, page 2, graf 2, he is trying to shift all the responsibility on me, and that presents me with problems and perhaps limits my alternatives to what I'd prefer not to do, defend myself against him and Hitchcock as well as the government. Can you think of any alternative? I will not accept his responsibilities for him and it would not be in his interest if I were willing to. At the same time, I do not want to dump on him no matter how justified it is, and I think it is now more justified than you observed in what you've seen of the record. Maybe he and Hitchcock saw no alternative, in which event he should have spoken to me, and maybe Hitchcock talked him into it, which would not be material anyway.

As best a nonlawyer can be, I am certain that this situation is of his creation and that it would not exist, even after the discovery demands were filed, if he'd done as I wanted and asked.

Dismissal of the case never bothered me. I wanted that and offered it subject to the rights of others to see what was not searched for me, so that, as a sanction, gave me no trouble unless it was precedental, in which event I'd have been concerned again about the rights of others and of sanctions on people like you, a later development.

You correctly understand how I feel and perhaps this helps you further, but do you see any alternative or do you see how I can adequately defend myself while minimizing what I say about him?

My concern with his affidavit is not that it violates privilege but that it is not faithful. His problem, I guess, is that he cannot be and avoid sanctions and thus, without asking me, did ~~cross~~ cross that line.

I guess the short answer is that I'll do what you suggest after you think it over. I have no reluctance if you want to discuss this with Hitchcock, by which I mean what I've written. Use your own judgement. But if Jim could be ready to sign this I think it better not to include him. Privately, he may anticipate some problems with his wife over this, which may account for it in part.

No, my reaction is not to reiterate, as you think on page 2 of your letter, and I do understand that after remand the issues are as you state them. However, I do not believe that they are set in concrete and I do believe that it is possible to argue new evidence, as I've indicated, and ~~if~~ my does get to what I think is always relevant, despite the courts' ducking of it, deliberate lying as a secondary. The new evidence does prove what I stated and is germane, that they had and knew they had relevant records and were withholding them so a) they needed no discovery from me to locate them and b) no discovery from me would enable them to prove they had complied. I think this approach is more necessary for others than for me, but I do think it can be very helpful to me. It will not require many illustrations and they are, except for the new proof they've disclosed to Mark Allen, in the case record. (This backdoor is what I had in mind in asking you if you knew anyone in Baltimore who would file a small suit for a couple of these to dramatize what they are up to. For your information, many months ago I asked Jim about this, asking him if he could do it by my birthday, April 8, and that if he would and could be certain he would and could I'd write Huff so informing him. He hasn't yet, which is not atypical.) Do you really need more than the Dallas police broadcast recordings and the critics, the finding of the former confirmed to me in writing months ago (after Phillips' lying if not perjury) and the latter confirmed in the ticklers, which are a strong third point. No, the existence of the ticklers, which are not routinely destroyed.

Among the ancillary advantages of this, particularly for me and what these terrible people have been able to get away with in wrecking my reputation, is having a nice, succinct statement of it for any further appeal as well as (remotely possible) for the future and Congress. And, perhaps, the media. We do now have new evidence that their representation of the need for discovery, which the courts believed, was to their knowledge not true and that is what I swore at the time. This is not to reargue what the appeals court has ruled on but to argue new evidence that is relevant to all they alleged to all courts on their need for and purposes in discovery, the basis for the sanctions. I think also that the mere filing of it may give them pause and that rather than face it, crazy and powermad and vengeance-driven as they are, they may have second thoughts. It is akin to what the situation Gesell found himself in when he had to lambaste Axelrad and recused himself in that case. Axelrad deceived and misled him. I hope you can see it this way because I think it has great potential, particularly in overturning wrongful and evil and dangerous precedents - for others to suffer, including lawyers. And be very helpful to FOIA in general. And me, too.

I really do not have the option of being my own counsel, and for several reasons. One is the physical problem of getting there, which under some circumstances is not insurmountable. Like the time of the status call and a parking space at the courthouse. I could take a cab or maybe get a friend who isn't working. But then I'd not be able to conform with court procedures. I do not even have a suit that fits me and with the life I lead, I've no need for one, although I could get one. But I can't stand at the podium and there is no mike at the tables if he were to waive that. What

may be more important is that this is precedent and I cannot in good conscience risk harm to others, which would be inevitable if I goofed, and on the law and precedent this is certain because I'm ignorant of both. I also agree with you in what you say Smith would do. I'm sure that besides being a disgrace to the judiciary he by now hates me very much. (Which leads me to a side issue in the event you are able to pick up anything on it: I'm certain they have flashed some of the FBI's fabrications about me to these judges, as pretty clearly they did in Memphis and to that State AG, whose conduct cannot be explained in any other way. Still an aside, and private on Jim, going after the records on me has been my first priority since the Act was amended and he's not yet done a thing, despite frequent promises. This may help you understand him more. He also never went farthur on the fee waiver withdrawl although Shea dallyed and delayed for him to and despite the complete falsity of what Bill Cole prepared to justify it, which both Jim and Shea got in writing, and when Jim did nothing about it I even attached my affidavit to an affidavit in the King case, after which they backed off on charges in it for xeroxing.)

So, while I'm aware that this is my right and that it is proper for you to call it to my attention, for which also thanks, it isn't practical. This is not comparable with the situation before the appeals court. I've not considered it. Do you not recall my asking you what my rights would be after Smith, particularly in Maryland, and can I demand a trial, etc? (When you can, I'd still like to know those answers.)

May I respectfully disagree with your compliment, that my "greater experience has given" me "more wisdom." It is not wisdom because widdom is not the only fruit of experience.

There is much that we learn from experience (and mistakes) and often it is not possible to convey this to others, as I've learned.

Jim and Hitchcock have put me in a difficult position and frankly, I am not at all certain of what my position and course should be, one of the reasons I've undertaken to inform you fully. I'll probably do as you recommend. Moreover, this has become personal and that usually requires impersonal advice. I have a conflict not lost on me, between my own interest and my liking of Jim, which is based on what he is rather than what he isn't and this isn't diminished by what he is trying, although that is a disappointment. In this connection, I'm glad that you've seen what you've seen without my stating it. All I can recall telling you is that he ought not handle any deposition and if you wanted to know why I'd tell you in confidence. He is what he is and he isn't what he isn't and he is a good person. Despite the present.

May I in closing suggest to you that there is some flexibility in most situations if one looks for them and isn't completely rigid. I illustrate with experience, not wisdom. Well, says he laughing a bit, maybe a little cunning. When the FBI's release of its JFK HQ records in 12/77 was a monster media event, all the FBI's way, and it had another batch to disclose while ignoring all my many JFK requests, and when I was then additionally stonewalled, I did persuade Jim to file for a complete fee waiver and a TRO. He was aghast, Gesell, the strict one, would never give a TRO. I told him I didn't expect Gesell to but that it would help, including in the fee waiver. He was reluctant but he agreed, and for once he tried to put them on the defensive. They then had a six-lawyer "Get Weisberg" crew in Civil. All six plus SAs and other DJ lawyers were in the courtroom. Frankly, I'll be surprised if Gesell did not see clearly what I was up to. In any event, he was able to carry water on both shoulders: he denied the TRO but ordered my records with the fee waiver as rapidly as possible, and two days later I had 14 cartons of records, and he gave them hell at the same time. My point is, if I may appear to be avuncular with a 40 year old who is also a lawyer, as long as there is nothing absolutely wrong with a move it ought not be ignored entirely. (I'm arguing "new evidence" and not trying to blind-side you.) I made out a case for the TRO, and

asking for it was not wrong and it helped Gesell reach the decision I wanted. Much more, it greatly influenced Shea, and he not only gave me a complete fee waiver on everything, he ordered what the FBI agreed to and then ignored, that all JFK and King records disclosed to anyone be sent to me without charge.

I am thinking of a number of things this way in asking that you consider arguing and documenting "new evidence"--and how embarrassing the documentation can be to them now. It can have an impact on Smith, who may, as you indicated, be somewhat embarrassed by the position in which he is and give him a way around it. DJ and the appeals court also can be embarrassed. How can they hold that the government does not need contemporaneous time records to get costs and plaintiff's do? Moreover, the content of this new evidence, coming from a lawyer and not a person they dislike, can be of some impact on appeal. They are not preprejudiced against you as they are me.

I can give you other illustrations, from FOIA litigation, which is experience, and from other and sometimes difficult and painful experiences. I do not think that arguing new evidence is out of bounds or entails much work and I do believe that it can have impact, perhaps succeed, and that it also shifts the burden back to where it belongs and may also be helpful to Jim.

I do wish that Hitchcock had argued the Catch-22 involving Stanton, and I do not presume that you can presume to give him legal advice. But if it is not absolutely, 100% impossible now he ought argue that. And not only for Jim. For himself, for you and for other lawyers in the future. If he has not seen it, perhaps you can give him a copy of the copy I gave you?

In summary, it is probable that I'll do whatever you suggest. I'm trying to inform you as fully as I can and hope that it enables you to make a better judgement.

From the interruptions it is now not likely that I'll be able to mail this tonight but it will go out tomorrow.

Meanwhile, and this is separate from your law training and experience, please try to keep in mind what I've come to call intellectual judo, that your [redacted] opponent's greatest strength often can be used against him.

Thanks and best wishes,

Harold

P.S. Whether or not I can make the outgoing mail, of which Frederick has but one a day, I have a medical appointment Wednesday afternoon and probably won't be home until after 3:30. As usual, walking therapy first thing in the morning and until about 10:30 for me to be home.