

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 78-322  
 ) (Judge Smith)  
 WILLIAM H. WEBSTER, Director, )  
 Federal Bureau of Investigation, )  
 et al., )  
 )  
 Defendants. )

HAROLD WEISBERG, )  
 )  
 Plaintiff, ) Civil Action No. 78-420  
 ) (Judge Smith)  
 v. )  
 )  
 FEDERAL BUREAU OF INVESTIGATION, )  
 et al., )  
 )  
 Defendants. )

AFFIDAVIT OF JAMES H. LESAR

James H. Lesar hereby declares and attests as follows:

1. My name is James H. Lesar. I am a member of the District of Columbia bar and the bar of this Court. I practice law at 918 F Street, N.W., Suite 509, in Washington, D.C., and I previously served as attorney for plaintiff Harold Weisberg in these consolidated actions. This affidavit is being submitted in support of my argument that I should not be held liable for any award of attorneys' fees under Rule 37, Fed. R. Civ. P., in this case.

2. On February 4, 1983, this Court denied Mr. Weisberg's motion for a protective order and directed him to respond to

the Government's discovery requests within 20 days, i.e., by February 24, 1983. Those requests focused on Mr. Weisberg's contention that there had not been an adequate search for specific categories of records covered in his Freedom of Information Act ("FOIA") requests.

3. Upon receipt of this order, I made plans to confer with Mr. Weisberg at his home in Frederick, Maryland. The reason for making such a trip is that Mr. Weisberg's ill health prevents him from travelling to Washington, D.C. I scheduled trips for February 11 and then for February 14, both of which had to be cancelled because of bad weather. I was finally able to schedule our conference for February 21, 1983.

4. On February 21, 1983, I travelled to Mr. Weisberg's house, and we talked for 4-1/2 hours about the case. I went there with the hope that we would be able to answer the Government's requests in as much detail as was feasible about the inadequacy of the FBI's search for the requested categories of records.

5. At that meeting, we talked about the order compelling a response and what Mr. Weisberg's response would be. At various points in the conversation, Mr. Weisberg vehemently expressed his disagreement with the Court's decision denying him a protective order, and he stated his preference for not filing any answers, as a matter of principle. In his view, he had already provided all or almost all of the necessary data in his administrative appeal letters and his affidavits on file with the Court. In addition, he thought that discovery from the plaintiff was not appropriate in an FOIA case such

as this one. I indicated, and Mr. Weisberg understood, that sanctions could be imposed by the Court if he refused to answer, including dismissal of the case and an award of attorneys' fees. Indeed, the Government had already requested sanctions when filing its initial motion to compel on January 27, 1983, a request which this Court denied.

6. Despite Mr. Weisberg's considerable reluctance to proceed, I tried to persuade him to give me substantive replies to the Government's discovery requests. Specifically, I read each interrogatory to him, and he gave me oral answers to each one, which I wrote down on a legal pad. It was my intention, once I returned to my office, to use these notes in order to write up more extensive responses for Mr. Weisberg to review and revise, after which we would consult and prepare the final document.

7. I returned to my office the next day, February 22, 1983. At that time, I had only two days to file a response, and so I asked the Court for a two-week extension, until March 10, 1983, noting the weather-related delays and the fact that I had conferred with Mr. Weisberg the day before. I stated that I needed an extension in order "to complete a draft of the response to defendants' discovery by the end of this week and send it" to Mr. Weisberg. I added that two weeks would be necessary because of delays in using the mails and the fact that "a second draft may be necessary."

8. As I recall, after I had begun working on a substantive reply, I telephoned Mr. Weisberg to ask him about a

specific point. He told me that he had thought the matter over and that, as a matter of principle, he would not consent to filing any response that could be construed as complying with the discovery requests. I recall feeling in a bind, since I had always thought that such strategic decisions are to be made by the client, yet here, here was a possibility that sanctions could be imposed. Because I had always believed that it was better to file something rather than nothing, I decided to file specific objections to each discovery request on March 8, 1983, even though I did not want to go this route.

9. This Court held a hearing on April 8, 1983, on the Government's motion to compel and request for sanctions, at which time the Court asked me why I had asked for a two-week extension and then filed objections, rather than answers. As the transcript of that hearing indicates, I explained to the Court the conflict between me and my client as follows:

I requested a two-week extension of time because I needed to consult with Mr. Weisberg and to prepare an affidavit with him. I had consulted with him already. I felt that we would be submitting a draft response. That was my intention, to submit a draft response.

Now, as it ultimately turned out, we did not file any answers to interrogatories. Instead we objected to all of them. This gets into an area of some tension between myself and Mr. Weisberg over what tack we should take.

Ultimately Mr. Weisberg decided flatly that we should take the position that as a matter of principle, discovery is unwarranted -- discovery by the government is unwarranted in a case of this nature.

10. On April 13, 1983 the Court issued an order directing Mr. Weisberg to file responses within 30 days and allowing the Government to submit an application for attorneys' fees, which it did. That application sought fees solely from Mr. Weisberg, and on April 28, 1983 the Court entered an order directing him to pay fees.

11. During this period, I felt in an awkward and very vulnerable position. It was clear from my conversations with Mr. Weisberg that he was unyielding in his refusal to give answers, consistent with his position that discovery was improper in this case. Moreover, only Mr. Weisberg had the substantive knowledge necessary in order to answer the discovery requests fully, and, given his instruction to me not to file a substantive response, I did not feel I could file something myself. At the same time, I was concerned about the possibility of sanctions being imposed against me as well as my client if I filed an unresponsive document.

12. On May 12, 1983 I received a telephone call from Henry LaHaie, the Government's lawyer, seeking my consent to a brief extension for his filing some data from the FBI's New Orleans field office. I consented, and Mr. LaHaie then asked if I would be filing answers to the Government's discovery requests, which were due the next day. I explained that we would not be filing a response, in light of Mr. Weisberg's unequivocal position that discovery was not appropriate.

13. Feeling helpless to do anything because of my

client's position, and mindful of this Court's implicit criticism when I filed objections back in March, I decided to file nothing this time. The government promptly moved to dismiss the suit, which we opposed. At the Court's hearing on this motion, held on November 9, 1983, I repeated the situation to the Court: "Mr. Weisberg has taken an absolute position that discovery is not warranted on the search issue in a FOIA case and certainly in the circumstances presented here where there was no showing of need at all."

14. Prior to filing this affidavit with the Court, my attorney gave a copy to Mr. Weisberg's present counsel with a request that it be given to Mr. Weisberg, and I understand that Mr. Weisberg has reviewed this affidavit.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at Washington, D.C. this \_\_\_\_\_ day of May, 1985.

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James H. Lesar